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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THE HON. JAMES ALEXANDER MACDONALD.

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CHIEF JUSTICE:

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THE HON. WILLIAM ALFRED GALLIHER.
THE HON. ALBERT EDWARD McPHILLIPS.
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TABLE OF CASES REPORTED

IN THIS VOLUME.

A

PAGE

Aickin v. Baxter (J. H.) & Co. 217, 353
Alamo Gold Mines Ltd., Langer and, McTavish Brothers Ltd. v. 363
Albutt (W. J.) & Co. Ltd. v. Continental Guaranty Corporation of Canada Ltd., and Sheasgreen (E. W.) 537
Armstrong and Sutherland v. New Westminster Harbour Board 1
Attorney-General of British Columbia, Macdonald Murphy Lumber Co. Ltd. v. 473

B

B. v. B. and S., Intervener 184, 224
Bank of Toronto, Georgia Construction Co. Ltd. and v. Pacific Great Eastern Ry. Co. 469
Barlow v. Merchants Casualty Insurance Co. 427
Barrett *et al.,* Watson v. 478
Basant Sing and Jagat Singh v. Kehar Singh Gill 256
Baxter (J. H.), & Co., Aickin v. 217, 353
Bell, Rex v. 166
Blair v. The Canadian Fishing Co. Ltd. 80
Blakeman, Engblom and Erickson v. 456
Board of School Trustees of District of North Vancouver, Patterson v. 123
Bramall v. Bramall 184, 224
British Columbia Electric Ry. Co., Ltd., Calbick v. 17
British Columbia Electric Ry. Co. Ltd., Nowell *et al.* v. Yellow Cab Co., Ltd., and 238, 453
British Columbia Land and Investment Agency, Ltd., *In re* Land Registry Act and v. Waldron Apartments Ltd. 74
Bruin v. Bruin 298
Brunham, Whelan and, Third Parties: Turner v. Cantone 514
Burnaby, Corporation of District of, Watts v. 282
Burpee v. Burpee 201
Burrard Inlet Tunnel & Bridge Co., v. The S.S. "Eurana" 225

C

Cadeddu v. Mount Royal Assurance Co. 110
Calbick v. British Columbia Electric Ry. Co., Ltd. 17
Canada Morning News Co. Ltd. v. Thompson *et al.* 24
Canada Permanent Corporation v. Christensen *et al.* 258
Canadian Credit Men's Trust Association, Renneberg (Edward) & Sons Co. v.: *In re* Sechart Fisheries Ltd. 323
Canadian Fishing Co., Ltd., The, Blair v. 80
Canadian Pacific Ry. Co. v. The "Hampholm" 274
Canadian Robert Dollar Co. Ltd., Patterson v. 123

PAGE

Cantone, Turner v.: Whelan and Brunham, Third Parties 514
Chew Deb, Rex v. 403
Chin Chong, *alias* Jeanne, Rex v. 33
Chin Yow Hing, Rex v. 214
Christensen *et al.*, Canada Permanent Corporation v. 258
Chung Gee *et al.*, Pantages v. 401
Corporation of District of Burnaby, Watts v. 282
Cox, Rex v. 9
Continental Guaranty Corporation of Canada Ltd., and Sheasgreen (E. W.), Albutt (W. J.) & Co. Ltd. v. 537
Credit Service Exchange, Neary v. 223
Cuthbertson, Ltd., Leigh &, D'Orio v. 153

D

Dewar (J. A.) Co. Ltd., Winter v. 336
Dines, Paul and Paul v. 49
District of Burnaby, Corporation of, Watts v. 282
District of North Vancouver, Board of School Trustees of, Patterson v. 123
D'Orio v. Leigh & Cuthbertson Ltd. 153
Draper, The White Co. Ltd., Hanson Garage, MacPherson and, Reevie v. 345

E

Eccles v. Russell 161
Eden, Petersen and Oman, Turnbull v. 381
Engblom and Erickson v. Blakeman 456
Erickson, Engblom and v. Blakeman 456
"Eurana" (S.S.), The, Burrard Inlet Tunnel & Bridge Co. v. 225

F

Ferguson (Hugh), Deceased, *In re* Estate of 269
Fletcher, McGeer, McGeer & Wilson v. 437
Fletcher, McLelan v. 437

G

Garrett, Singer v. 160
Geiger, Hall v. 481
Georgia Construction Co. Ltd. and Bank of Toronto v. Pacific Great Eastern Ry. Co. 469
Granby Consolidated Mining, Smelting & Power Co. Ltd. v. West Kootenay Power and Light Co. Ltd. 89
Grant, Morrison v. 511
(Mary), Deceased, *In re* Estate of 511
Green v. Harry 433

H

Haddington Island Quarry Co. Ltd. *et al.*, Rudge *et al.* v. 502
Hall v. Geiger 481
Hammer v. Hammer and Luthmer 55
"Hampholm," The, Canadian Pacific Ry. Co. v. 274
Hanson Garage, MacPherson and Draper, The White Co. Ltd., Reevie v. 345
Harris v. Lindeborg *et al.* 262
Harry, Green v. 433
Henderson v. Henderson 441
et al., Rex v. 242
Hodges *et al.*, Royal Bank of Canada v. 203
Hodne, Nason v. 398
Hornby and Hornby v. Paterson 548
Howard v. Henderson 441

I

PAGE

Immigration Act and Toku Nishi *et al.*, *In re* 199

J

Jagat Singh, Basant Singh and v. Kehar Singh Gill 256
Jardine and Nanaimo Reduction Works Ltd., Mosdell *et al.* v. 487
Jarvis Electric Co., The, Trenwith Ltd. v. 328
Jeanne, *alias*, Rex v. Chin Chong 33
Johnson, Ross, Ltd. v. Victoria Mines, Ltd. 321

K

Kehar Singh Gill, Basant Singh and Jagat Singh v. 256
King, The v. The "Mary C. Fischer" 461

L

Land Registry Act and British Columbia Land and Investment Agency, Ltd., *In re* v. Waldron Apartments Ltd. 74
Langer and Alamo Gold Mines Ltd., McTavish Brothers Ltd. v. 363
Larsen, National Surety Co. v. 221
Leigh & Cuthbertson Ltd., D'Orio v. 153
Lerik v. Zaferis *et al.* 526
Lindeborg *et al.*, Harris v. 262
Luthmer v. Hammer and Luthmer 55

M

McCoy v. Trethewey *et al.* 295
McDonald v. Royal Bank of Canada 450
Macdonald Murphy Lumber Co. Ltd. v. Attorney-General of British Columbia 473

PAGE

McGeer, McGeer & Wilson v. Fletcher 437
McKelvie, Tedlock v. 446
McKercher v. Vancouver-Iowa Shingle Co. 252
McLelan v. Fletcher 437
McPherson, Rex v. 218
MacPherson and Draper, The White Co. Ltd., Hanson Garage, Reevie v. 345
McTavish Brothers Ltd. v. Langer and Alamo Gold Mines Ltd. 363
Malcolm v. Western Canada Magic Silver Black Fox and Fur Co., Ltd. 305
"Mary C. Fischer," The, The King v. 461
May and May v. Roberts *et al.* 182, 185
Merchants Casualty Insurance Co., Barlow v. 427
Midgley v. Midgley 482
Miller v. Wollaston 145
Morrison v. Grant 511
Mosdell *et al.* v. Jardine and Nanaimo Reduction Works Ltd. 487
Mount Royal Assurance Co., Cadeddu v. 110
Mullett v. United States Fidelity & Guaranty Co. 81

N

Nanaimo Reduction Works Ltd., Jardine and, Mosdell *et al.* v. 487
Nason v. Hodne 398
National Surety Co. v. Larsen 221
Neary v. Credit Service Exchange 223
Neilson *et al.* v. Richard *et al.* 220
New Westminster Harbour Board, Armstrong and Sutherland v. 1

PAGE

North Vancouver, Board of School Trustees of District of, Patterson v. 123
Notaries Act and J. A. Stewart, *In re* 467
Nowell *et al.* v. Yellow Cab Co., Ltd., and British Columbia Electric Ry. Co. Ltd. 238, 453, 494

O

Olsen (Fred) & Co. v. The "Princess Adelaide" 274
Oman, Eden, Petersen and, Turnbull v. 381

P

Pacific Berry Growers Ltd. v. The Western Packing Corporation Ltd. *et al.* 78
Pacific Great Eastern Ry. Co., Georgia Construction Co. Ltd. and Bank of Toronto v. 469
Pantages v. Chung Gee *et al.* 401
Paterson, Hornby and Hornby v. 548
Patterson v. Board of School Trustees of District of North Vancouver 123
Patterson v. Canadian Robert Dollar Co. Ltd. 123
Paul and Paul v. Dines 49
„ Wise, Ping Lee v. 64
Perry v. Woodward's Ltd. 404
Petersen and Oman, Eden, Turnbull v. 381
Ping Lee v. Paul Wise 64
"Princess Adelaide," The, Olsen (Fred) & Co. v. 274

R

Radinsky, Rex v. 317
Reevie v. The White Co. Ltd., Hanson Garage, MacPherson and Draper 345

PAGE

Renneberg (Edward) & Sons Co. v. Canadian Credit Men's Trust Association. *In re* Sechart Fisheries Ltd. 323
Richard *et al.*, Neilson *et al.* v. 220
Rex v. Bell 166
v. Chew Deb 403
v. Chin Chong, *alias* Jeanne 33
Rex v. Chin Yow Hing 214
v. Cox 9
v. Henderson *et al.* 242
v. McPherson 218
v. Radinsky 317
v. Rump 36
v. Somers 190
v. Wong Sack Joe 254
Roberts *et al.*, May and May v. 182, 185
Ross Johnson Ltd. v. Victoria Mines, Ltd. 321
Royal Bank of Canada v. Hodges *et al.* 203
Royal Bank of Canada, McDonald v. 450
Rudge *et al.* v. Haddington Island Quarry Co. Ltd. *et al.* 502
Rump, Rex v. 36
Russell, Eccles v. 161

S

S., Intervener, B. and, B. v. 184, 224
Scollard, Thompson v. 206, 241
Sechart Fisheries Ltd., *In re.* Edward Renneberg & Sons Co. v. Canadian Credit Men's Trust Association 323
Sheasgreen (E. W.), Continental Guaranty Corporation of Canada Ltd., and, Albutt (W. J.) & Co. Ltd. v. 537
Singer v. Garrett 160
Somers, Rex v. 190

PAGE

Stewart (J. A.). *In re* Notaries Act and 467

Sutherland, Armstrong and v. New Westminster Harbour Board 1

T

Tedlock v. McKelvie 446

Thompson v. Scollard 206, 241

——— *et al.*, Canada Morning News Co. Ltd. v. 24

Toku Nishi *et al.*, *In re* Immigration Act and 199

Trenwith Ltd. v. The Jarvis Electric Co. Ltd. 328

Trethewey *et al.*, McCoy v. 295

Turnbull v. Eden, Peterson and Oman 381

Turner v. Cantone: Whelan and Brunham, Third Parties 514

U

United States Fidelity & Guaranty Co., Mullett v. 81

V

Vancouver - Iowa Shingle Co. Ltd. *et al.* 252

Victoria Mines, Ltd., Ross Johnson Ltd. v. 321

W

Waldron Apartments Ltd., *In re* Land Registry Act and British Columbia Land and Investment Agency Ltd. v. 74

PAGE

Watson v. Barrett *et al.* 478

Watts v. Corporation of District of Burnaby 282

Western Canada Magic Silver Black Fox and Fur Co., Ltd., Malcolm v. 305

Western Packing Corporation Ltd., The, *et al.*, Pacific Berry Growers Ltd. v. 78

West Kootenay Power and Light Co. Ltd., Granby Consolidated Mining, Smelting & Power Co. Ltd. 89

Whelan and Brunham, Third Parties: Turner v. Cantone 514

White Co. Ltd., The, Hanson Garage, MacPherson and Draper, Reevie v. 345

Wilson, McGeer, McGeer & v. Fletcher 437

Winter v. Dewar (J. A.) Co. Ltd. 336

Wise, Paul, Ping Lee v. 64

Wollaston, Miller v. 145

Wong Sack Joe, Rex v. 254

Woodward's Ltd., Perry v. 404

Y

Yellow Cab Co., Ltd., and British Columbia Electric Ry. Co., Ltd., Nowell *et al.* v. 238, 453, 494

Z

Zaferis, *et al.*, Lerik v. 526

TABLE OF CASES CITED

A

Case	Year	Reference	PAGE
Abbott & Co. v. Wolsey	(1895)	2 Q.B. 97	347, 348, 350
Abouloff v. Oppenheimer	(1882)	10 Q.B.D. 295	187, 189
Abrath v. North Eastern Railway Co.	(1883) (1886)	11 Q.B.D. 440; 11 App. Cas. 247	406, 412, 413, 415, 416, 417, 418
Adams v. Angell	(1877)	5 Ch. D. 634	75, 77
Adamson v. Vachon	(1914)	6 W.W.R. 114	296
Admiralty Commissioners v. S.S. Volute	(1922)	1 A.C. 129	399
Albright v. Hydro-Electric Power Commissioners of Ontario	(1922)	92 L.J., P.C. 80	470
Alice, The	(1868)	L.R. 2 P.C. 245	291
Allardice v. Allardice	(1910) (1911)	29 N.Z.L.R. 959; A.C. 730	269, 270, 271, 273
American Securities Corporation Ltd. v. Woldson	(1928)	S.C.R. 432	68
Angell v. Duke	(1875)	L.R. 10 Q.B. 174	383
Angus v. Smith	(1829)	M. & M. 473	367
Aras, The	(1907)	P. 28	279
Archibald v. McLaren	(1892)	21 S.C.R. 588	406, 412, 415
Armand v. Carr	(1927)	S.C.R. 348	339, 340
Armstrong v. McCutchin	(1874)	15 N.B.R. 381	65
Arnison v. Smith	(1889)	37 W.R. 739	366
"Arranmore" (Steamship) v. Rudolph	(1906)	38 S.C.R. 176	278
Atkinson v. Abbott	(1855)	25 L.T. Jo. 314	164
Attorney-General v. Cory Bros. & Co. Kennard v. Cory Bros. & Co.	(1921)	1 A.C. 521	134
Attorney-General v. Terry	(1874)	9 Chy. App. 423	234, 237
v. Tod Heatley	(1897)	1 Ch. 560	134, 136
for British Columbia v. Canadian Pacific Ry. Co.	(1927)	A.C. 934; 96 L.J., P.C. 149; 3 W.W.R. 460	476
Attorney-General of British Columbia, The v. The "Pacific Foam"	(1928)	40 B.C. 100	230
Attorney-General of New South Wales v. Macpherson	(1870)	L.R. 3 P.C. 268	12
Austin v. Dowling	(1870)	L.R. 5 C.P. 534	410
Ayres v. The South Australian Banking Company	(1871)	40 L.J., P.C. 22	79

B

Case	Year	Reference	PAGE
Baker v. Kilpatrick	(1900)	7 B.C. 150	413
Banbury v. Bank of Montreal	(1918)	A.C. 626	451, 452
Bank of England v. Vagliano Brothers	(1891)	A.C. 107	193
Bank of New South Wales v. Owston	(1879)	4 App. Cas. 270	406, 423
v. Piper	(1897)	A.C. 383	411, 413
New Zealand v. Simpson	(1900)	A.C. 182	330
Banks, Deceased, *Re.* Weldon v. Banks	(1912)	56 Sol. Jo. 362	383
Barker v. Herbert	(1911)	2 K.B. 633	125, 134, 136
Barlow, *In re*	(1887)	35 W.R. 737	512, 513

Case	Year	Reference	PAGE
Barron v. Kelly	(1918)	56 S.C.R. 455	383
Beam v. Wade	(1885)	2 T.L.R. 157	164
Beaumont v. Senior	(1903)	1 K.B. 282	454
Belridge, The v. The Empress of Japan	(1917)	3 W.W.R. 961	276, 281
"Bernina," The	(1888)	13 App. Cas. 1	442
Bird v. Lake	(1863)	1 H. & M. 111	527
Blyth v. Fladgate	(1890) (1891)	60 L.J., Ch. 66; 1 Ch. 337	162, 164
Boericke v. Sinclair	(1928)	63 O.L.R. 237	492
Bog Lead Mining Co. v. Montague	(1861)	10 C.B. (N.S.) 481; 128 R.R. 797	348
Boston v. Boston	(1904)	1 K.B. 124	383
Bovet v. Walter	(1917)	62 Sol. Jo. 104	531
Boyer v. Moillet	(1921)	30 B.C. 216	50, 221, 442
Brackley v. Midland Railway	(1916)	85 L.J., K.B. 1596	134, 142, 144
Bradshaw v. Vaughton	(1860)	30 L.J., C.P. 93; 9 C.B. (N.S.) 103	191, 193, 195, 197
v. Waterlow & Sons Limited	(1915)	3 K.B. 527	406, 413
Brickles v. Snell	(1916)	2 A.C. 599; 86 L.J., P.C. 22; 30 D.L.R. 31	488, 490, 491
Britannia, The	(1905)	P. 98	279
British America Paint Co. v. Fogh	(1915)	22 B.C. 97	347, 349, 351
Columbia Electric Rway. Co. v. Dunphy	(1919)	59 S.C.R. 263	370
British Columbia Electric Railway Company, Limited v. Loach	(1916)	1 A.C. 719	50, 53, 57, 558
British Farmers Oil Cake Co., *Re* The	(1878)	47 L.J., Ch. 415	367
Brooks v. Bagshaw	(1904)	2 K.B. 798	196
v. B.C. Electric Ry. Co.	(1919)	27 B.C. 351	57
Brown v. Hawkes	(1891)	2 Q.B. 718, 727	407, 415, 416
v. Town of Edmonton	(1894)	23 S.C.R. 308	134, 144
v. Walsh	(1919)	45 O.L.R. 646	492, 493
Brunsden v. Humphrey	(1883) (1884)	11 Q.B.D. 712; 14 Q.B.D. 141	338, 344
Bryce v. C.P.R.	(1909)	15 B.C. 510	519
Bulley v. Bulley	(1878)	8 Ch. D. 479; 47 L.J., Ch. 841	147, 149, 150
Burkinshaw v. Nicolls	(1878)	3 App. Cas. 1004	367
Bush v. Canadian Pacific R.W. Co.	(1906)	14 O.L.R. 55	406
v. Fry	(1887)	15 Ont. 122	541
Butler *et al.* v. Rosenfeldt	(1879)	8 Pr. 175	207

C

Case	Year	Reference	PAGE
Calf and Sun Insurance Office, *In re*	(1920)	2 K.B. 366	82, 84, 87
Camosun Commercial Co. v. Garetson & Bloster	(1914)	20 B.C. 448	223
Campbell and Cowan & Co. v. Train	(1910)	47 Sc. L.R. 475	551
Canadian Company v. Grouse Creek Flume Co.	(1867)	1 M.M.C. 3	233
Canadian Northern Ry. Co. v. Robinson	(1910)	43 S.C.R. 387	92
Canadian Pacific Railway v. Roy	(1902)	A.C. 220	236
Cardiff Hall, The	(1918)	P. 56	232
Case, *Ex parte*	(1889)	28 N.B.R. 652	197
Cathay, The	(1899)	9 Asp. M.C. 35	279
Catlow v. Catlow	(1877)	2 C.P.D. 362	150

Case		Citation	PAGE
Cedar Rapids Manufacturing Co. v. Lacoste	(1914)	83 L.J., P.C. 162	7
Centre Star v. Rossland-Kootenay Mining Co.	(1905)	11 B.C. 231	541, 544
"Ceto," The	(1889)	14 App. Cas. 670; 62 L.T. 1; 6 Asp. M.C. 479	279, 280
Chan v. C.C. Motor Sales Ltd.	(1926)	36 B.C. 488	205
Chaplin v. Hicks	(1911)	2 K.B. 786	383
Charlton v. Charlton	(1883)	52 L.J., Ch. 971	147, 149
Charrington & Co., Limited v. Wooder	(1914)	A.C. 71	330
Cheater v. Carter	(1918)	1 K.B. 247	136
Cheshire v. Bailey	(1905)	1 K.B. 237	452
Ching v. Surrey County Council	(1910)	1 K.B. 736	128, 129
Citizens' Life Assurance Company v. Brown	(1904)	A.C. 423	406
City of Halifax v. Fairbanks' Estate	(1927)	3 W.W.R. 493; 97 L.J., P.C. 11	476
City of Halifax v. Tobin	(1914)	50 S.C.R. 404	288
St. John, The v. Donald	(1926)	S.C.R. 371	134
Clackamas (Ship) v. Cape d'Or (Schooner)	(1926)	S.C.R. 331	276, 279
Clara Camus, The	(1926)	17 Asp. M.C. 171	279, 281
Clark, *In re*	(1851)	1 De G. M. & G. 43	162
Clarke v. Corporation of Chilliwack	(1922)	31 B.C. 316	283
Clarkson v. Ryan	(1890)	17 S.C.R. 251	322
Clausen v. Canada Timber and Lands Ltd.	(1925)	35 B.C. 461	355
Clayton (John) Limited, *Re*	(1905)	92 L.T. 223	147
Cockrell's Estate, *In re*	(1911) (1912)	2 Ch. 318; 1 Ch. 23	150
Coffey v. Scane	(1895)	22 A.R. 269	212
Coghlan v. Cumberland	(1898)	67 L.J., Ch. 402	520, 560
Coley, *Ex parte*	(1851)	4 New Sess. Cas. 507	14
Collins v. General Service Transport Ltd.	(1926)	38 B.C. 512	442, 447
Colpitts v. Continental Life Insurance Co.	(1919)	47 N.B.R. 332	112
Combs v. The Hundred of Brackley	(1694)	Comb. 263; 90 E.R. 467	13
Cook v. Whellock	(1890)	24 Q.B.D. 658	26
Cooke v. Loxley	(1792)	5 Term Rep. 4	26
v. Midland Great Western Railway of Ireland	(1909)	A.C. 229	126
Cooke v. Vogeler (Charles A.) Co.	(1901)	A.C. 102	235
Cooper v. Walker	(1862)	2 B. & S. 770	142, 143
Corea v. Peiris	(1909)	A.C. 549	436
Cornish v. Searell	(1828)	8 B. & C. 471	32
Cory (William) & Son, Limited v. Harrison	(1906)	A.C. 274	528, 530, 533
Cossette v. Dun	(1890)	18 S.C.R. 222	289
Cotter v. National Union of Seamen	(1929)	2 Ch. 58	479
Cotton v. Wood	(1860)	8 C.B. (N.S.) 568	56
Coursier v. Madden	(1898)	6 B.C. 125	207
Cox v. English, Scottish and Australian Bank	(1905)	A.C. 168	411, 413, 416
Craig v. Hamre	(1925)	36 B.C. 1	417
Crane v. South Suburban Gas Company	(1916)	1 K.B. 33	287
Cullen, *In re*	(1859)	27 Beav. 51	162

Case	Year	Citation	Page
Curley v. Briggs	(1920)	53 D.L.R. 351	296
Curtis v. Peek	(1864)	13 W.R. 230	330, 332

D

Case	Year	Citation	Page
D. v. A. & Co.	(1900)	1 Ch. 484	485
Danby v. Beardsley	(1880)	43 L.T. 603	406
Dancer v. Hastings	(1826)	4 Bing. 2; 12 Moore, C.P. 34; 5 L.J., C.P. 3	26, 32
Darlaston Local Board v. London and North Western Railway Co.	(1894)	2 Q.B. 694	92, 96
Davies Footwear Co. Limited, *Re*	(1923)	53 O.L.R. 467; 4 C.B.R. 131	323
Davis v. Burton	(1883)	10 Q.B.D. 414	347
v. Morton	(1913)	2 K.B. 479; 82 L.J., K.B. 665	191, 192, 194
v. Von Alvensleben	(1914)	20 B.C. 74	160
Davy v. Lewis	(1859)	18 U.C.Q.B. 21	338
Dean and Chapter of St. John's Cathedral v. MacArthur	(1893)	9 Man. L.R. 391	75, 77
Delegal v. Highley	(1837)	3 Bing. (N.C.) 950	435
Denault v. Robida	(1894)	8 Can. C.C. 501	10
Dicker v. Angerstein	(1876)	3 Ch. D. 600	75
Dimock v. The Marine Assurance Company	(1849)	6 N.B.R. 398	27
Doe d. Canal Co. v. Bold	(1847)	11 Q.B. 127	27
Doe dem. Jackson v. Wilkinson	(1824)	3 B. & C. 413	26
Manton v. Austin	(1832)	9 Bing. 41	30
Prichett v. Mitchell	(1819)	1 Br. & B. 11	26
Dolby v. Iles	(1840)	11 A. & E. 335	27
Dominion Permanent Loan Co. v. Morgan	(1914)	50 S.C.R. 485; 7 W.W.R. 844	310
Dordogne, The	(1884)	10 P.D. 6	279
D'Orio v. Startup Candy Company		266 Pac. 1037	156, 157, 158, 159
Drew v. Guy	(1894)	3 Ch. 25	527
Driffill v. McFall	(1877)	41 U.C.Q.B. 313	541
Du Cros v. Lambourne	(1907)	1 K.B. 40	63
Dumergue v. Rumsey	(1863)	33 L.J., Ex. 88	338

E

Case	Year	Citation	Page
Eastern Steamship Co., Ltd. v. Canada Atlantic Transit Co.	(1928)	Ex. C.R. 129	279
Edmondson v. Moose Jaw School District	(1920)	3 W.W.R. 979	126
Edwards v. London and North Western Railway Co.	(1870)	L.R. 5 C.P. 445	406
Ellingsen v. Det Skandinaviske Compani	(1919)	2 K.B. 567	454
Elliott v. Crutchley	(1903)	2 K.B. 476	296
Emanuel v. Symon	(1908)	1 K.B. 302	202
Embree v. McKee	(1908)	14 B.C. 45	330

F

Case	Year	Citation	Page
Fanchaux v. Georgett	(1915)	9 W.W.R. 458	34
Farquharson v. Morgan	(1894)	1 Q.B. 552	10
Farrar v. Farrars Limited	(1888)	40 Ch. D. 395	509
Fero v. Hall	(1898)	6 B.C. 421	383
Fielding, *Ex parte*	(1861)	25 J.P. 759	196
Finch, *In re*. Finch v. Finch	(1883)	23 Ch. D. 267	296

Case	Year	Reference	PAGE
Fisher v. Prowse. Cooper v. Walker	(1862)	2 B. & S. 770	134, 142
Fleming v. Gooding	(1834)	10 Bing. 549	26
Forsyth v. The Imperial Accident and Guarantee Ins. Co. of Canada	(1925)	36 B.C. 253	205
Foss v. Harbottle	(1843)	2 Hare 461	478, 479, 480
Foster & Al., Executors v. The Essex Bank	(1821)	17 Mass. 478	452
Foxon v. Gascoigne	(1874)	9 Chy. App. 654	147, 148
Fraser v. B.C. Electric Ry. Co.	(1919)	26 B.C. 536	549
v. Fraserville (City)	(1917)	86 L.J., P.C. 91	3
River Mining Co. v. Gallagher	(1896)	5 B.C. 82	367

G

Case	Year	Reference	PAGE
Gadd v. Houghton	(1876)	1 Ex. D. 357	383
Gallagher v. Vennesland	(1917)	1 W.W.R. 860	34
Gareau, *In re*	(1922)	3 C.B.R. 76	323, 325
George and Goldsmiths and General Burglary Insurance Association, *In re*	(1899)	1 Q.B. 595	82, 84, 87
Gibbons v. Spalding	(1843)	11 M. & W. 173	207
Giblin v. McMullen	(1868)	L.R. 2 P.C. 317	451
Giles v. Walker	(1890)	24 Q.B.D. 656	134
Gingrass v. Desilets		Cassels's Dig. 116	289
Glannibanta	(1876)	1 P.D. 283	291
Glasgow and South-Western Railway Co. v. Boyd & Forrest	(1918)	S.C. (H.L.) 14	338, 342
Gophir Diamond Company v. Wood	(1902)	1 Ch. 950	527, 530
Goudy v. Mercer	(1924)	34 B.C. 103	399
Gould, *Ex parte. In re* Walker	(1884)	13 Q.B.D. 454	338
Gouldsworth v. Knights	(1843)	11 M. & W. 337	26
Graham v. Sandrinelli	(1846)	16 M. & W. 191	207
Granatstein v. Chechik	(1924)	4 D.L.R. 150	65
Grand Trunk Railway Company, The v. Anderson	(1898)	28 S.C.R. 541	399
Grant v. United Kingdom Switchback Railways Company	(1888)	40 Ch. D. 135	26
Gray, *Re*	(1869)	20 L.T. 730	164
Green v. Canadian Northern Ry. Co.	(1915)	19 Can. Ry. Cas. 171	3
, Swift & Co. v. Lawrence	(1912)	7 D.L.R. 589	297
Greenizen v. Twigg	(1921)	30 B.C. 225	382
Greer v. Young	(1883)	52 L.J., Ch. 915	150
Griffin, *In re; Ex parte* Board of Trade	(1890)	60 L.J., Q.B. 235	527
Griffiths v. School Board of Ystradyfodwg	(1890)	24 Q.B.D. 307	80
Grinham v. Willey	(1859)	28 L.J., Ex. 242	406

H

Case	Year	Reference	PAGE
Haack v. Martin	(1927)	S.C.R. 413	355
Hack v. London Provident Building Society	(1883)	23 Ch. D. 103	193
Hackney v. Knight	(1891)	7 T.L.R. 254	451
Halford v. Hardy	(1899)	81 L.T. 721	486
Hall v. Laver	(1842)	1 Hare 571	162
v. More	(1928)	39 B.C. 346	528
Hallack v. Cambridge University	(1841)	1 Q.B. 593	223
Hamilton v. Cousineau	(1892)	19 A.R. 203	406, 415
v. Magill	(1883)	12 L.R. Ir. 186	362
Hanley v. Hayes	(1924)	55 O.L.R. 361	442
Hanson v. Waller	(1900)	70 L.J., K.B. 231	406

Case	Year	Reference	PAGE
Hardy Lumber Company, The v. The Pickerel River Improvement Company	(1898)	29 S.C.R. 211	260
Hare & Chase of Toronto Ltd. v. Commercial Finance Corporation Ltd.	(1928)	62 O.L.R. 601	540, 544, 546
Harington v. Sendall	(1903)	1 Ch. 921	27
Harris v. Jays	(1599)	1 Cro. Eliz. 699	27
Hartopp v. Hartopp and Cowley (Earl)	(1902)	71 L.J., P. 78	184
Harvey v. O'Meara	(1839)	3 Jur. 629	207
Hasluck (Trustees of Benzon) v. Lehman	(1890)	6 T.L.R. 435	65
Heather Belle, The	(1892)	3 Ex. C.R. 40	279
Hemming v. Maddick	(1872)	7 Chy. App. 395	367
Henderson v. Hamilton	(1929)	1 D.L.R. 721	367
v. Henderson	(1843)	3 Hare 100	259, 338, 342, 343, 510
Hessey v. Quinn	(1909)	18 O.L.R. 487	26
Hicks v. Faulkner	(1882)	46 L.T. 127	410, 411, 436
Hill v. Saskatchewan	(1929)	1 W.W.R. 562	288
(Geo.) and Co. v. Hill	(1886)	55 L.T. 769	527
Hipgrave v. Case	(1885)	28 Ch. D. 356	382
Hitchcock v. Hunter	(1841)	5 Jur. 770	67
Hogg v. Garrett	(1849)	12 Ir. Eq. R. 559	406
Hontestroom (S.S.) v. Sagaporack (S.S.)	(1926) (1927)	95 L.J., P. 153; A.C. 37	86, 115, 290, 444, 535, 544
Hope v. Hope	(1857)	26 L.J., Ch. 417	222
Hopkins v. Hopkins	(1914)	P. 282; 84 L.J., P. 26	191, 192, 193, 194
Horne v. Gordon	(1909)	42 S.C.R. 240	534
Horton v. Mead	(1913)	1 K.B. 154	43
Hoystead v. Commissioner of Taxation	(1926)	A.C. 155	259, 338, 342
Huestis v. City of Toronto	(1926)	58 O.L.R. 648	133, 136
Hughes v. Northern Electric and Mfg. Co.	(1915)	50 S.C.R. 626	367
Humphrey v. Wilson	(1917)	25 B.C. 110	527
Humphreys, *In re*	(1898)	1 Q.B. 520	150
Humphries v. Cousins	(1877)	2 C.P.D. 239	136
Hurst v. Evans	(1916)	86 L.J., K.B. 305	82
Hutchison v. Leslie	(1927)	S.C. 95	551
Hyman v. Helm	(1883)	24 Ch. D. 531	186, 188

I

Case	Year	Reference	PAGE
Imperial Bank v. Barber	(1921)	20 O.W.N. 282; 1 C.B.R. 485	323
Indermaur v. Dames	(1866) (1867)	L.R. 1 C.P. 274; L.R. 2 C.P. 311	126
International Typesetting Machine Co. v. Foster	(1920)	60 S.C.R. 416	205
Irvine v. Midland-Great Western Railway (Ireland)	(1880)	6 L.R. Ir. 55	362

J

Case	Year	Reference	PAGE
Isaacs v. Keech	(1925)	2 K.B. 354	410
Jarrott v. Ackerley	(1915)	85 L.J., Ch. 135	27
Jenkins v. Great Central Railway	(1912)	1 K.B. 1	91, 95
"Jessie Mack," The v. The "Sea Lion"	(1919)	27 B.C. 444	232
John v. The Queen	(1888)	15 S.C.R. 384	42
Johnson v. Moore *et al.*	(1912)	1 W.W.R. 308	406
Johnston v. McMorran	(1927)	39 B.C. 24	399

Case	Year	Reference	PAGE
Johnston v. O'Reilly	(1906)	12 Can. C.C. 218	34
Jolly v. Arbuthnot	(1859)	4 De G. & J. 224; 28 L.J., Ch. 547	31, 32
Julia, The	(1860)	14 Moore, P.C. 210	290, 291

K

Case	Year	Reference	PAGE
Kaufman v. Gerson	(1904)	1 K.B. 591	222
Kavanagh v. McIlmoyle	(1901)	6 Can. C.C. 88	34
Keen v. Towler	(1924)	41 T.L.R. 86	454
Kempston v. Desgagnis	(1921)	1 W.W.R. 244	193
Kennedy v. Suydam	(1916)	36 O.L.R. 512	338
v. The "Surrey"	(1905)	11 B.C. 499	234
Kibble v. Gough	(1878)	38 L.T. 204	350
Kilmer v. B.C. Orchard Lands Co.	(1913)	A.C. 319; 82 L.J., P.C. 77; 10 D.L.R. 172	492
Kimpton v. McKay	(1895)	4 B.C. 196	207
King, The	(1911)	27 T.L.R. 524	279
v. Halifax Electric Tramway Co.	(1918) (1919)	40 D.L.R. 184; 52 D.L.R. 688	2
King v. Wilson	(1904)	11 B.C. 109	382
, The (McDonnell), v. Justices of Tyrone	(1912)	2 I.R. 44	191, 192, 194, 198
King, The v. Roland Stuart	(1926)	Ex. C.R. 91	2
(Walsh), v. Swifte	(1913)	2 I.R. 113	26
v. The Valiant	(1914)	19 B.C. 521	464
v. Woldingham, The Ship	(1925)	Ex. C.R. 85	232, 234
Kirby v. Cahill *et al.*	(1843)	6 U.C.Q.B. (o.s.) 510	541
"Knarwater," The	(1894)	6 R. 784	279, 280
Koursk, The	(1924)	P. 140; 93 L.J., P. 72	240

L

Case	Year	Reference	PAGE
Lacroix, *Re*	(1907)	12 Can. C.C. 297	10
Laing v. Paull & Williamsons	(1912)	S.C. 196	126, 140
Laitnen v. Tynjala	(1909)	14 B.C. 246	34
Lancashire Wagon Co. v. Fitzhugh	(1861)	6 H. & N. 502	541, 544
Leather Cloth Co. v. Lorsont	(1869)	L.R. 9 Eq. 345	533
Lee v. Lancashire and Yorkshire Railway Co.	(1871)	6 Chy. App. 527	429
Leicester Urban Sanitary Authority v. Holland	(1888)	57 L.J., M.C. 75	134
Lemmon v. Webb	(1894) (1895)	3 Ch. 1; A.C. 1	136
Levi v. Reed	(1881)	6 S.C.R. 482	289
Levy v. Levy	(1906)	12 B.C. 60	224
Lister v. Perryman	(1870)	L.R. 4 H.L. 521	406, 411, 413
Livingston, Deceased, *In re*	(1922)	31 B.C. 468	270
Loe v. Lardner	(1856)	4 W.R. 597	527
London and Provincial Marine Ins. Co. v. Davies	(1878)	47 L.J., Ch. 511	367
London Assurance v. Mansel	(1879)	48 L.J., Ch. 331	367
Lonsdale (The Earl of) v. Nelson	(1823)	2 B. & C. 302	136
Lord v. Kellett	(1833)	2 Myl. & K. 1	164
Lovell and Christmas Limited v. Wall	(1911)	104 L.T. 85	528, 533
Lowther v. Harris	(1927)	1 K.B. 393	541, 544

M

Case	Year	Reference	PAGE
Macandrew v. Tillard	(1908)	46 Sc. L.R. 111	551
Macaulay v. O'Brien	(1897)	5 B.C. 510	207

Case	Year	Citation	PAGE
McCabe Estate, *In re*	(1921)	3 W.W.R. 169	511, 513
McCarthy v. The King	(1921)	62 S.C.R. 40 2 W.W.R. 751	515, 523
M'Crombie v. Davies	(1805)	6 East 538	541
McDonald v. McDonald	(1903)	33 S.C.R. 145	296
Macdonald v. Tavistock Milling Co.	(1924)	27 O.W.N. 299	442
McDonald v. Weir	(1925)	34 B.C. 502	417
Macdonald (W. L.) & Co. v. Casein, Ltd.	(1918)	26 B.C. 204	383
MacDougall v. Gardiner	(1875)	1 Ch. D. 13	479
Macdougall v. Knight	(1890)	25 Q.B.D. 1	338
McHenry v. Lewis	(1882)	22 Ch. D. 397	186, 188
McGee v. Clark	(1927)	38 B.C. 156	383
MacGill & Grant v. Chin Yow You	(1914)	19 B.C. 241	162, 163, 164
M'Gowan v. Hamilton	(1903)	2 I.R. 311	454
McHugh v. Union Bank of Canada	(1913)	A.C. 299	289, 531
McIlwee v. Foley Bros.	(1919)	1 W.W.R. 403	355
Mackenzie v. Mackintosh	(1891)	64 L.T. 706	147
McLean Co. v. Newton	(1926)	3 W.W.R. 593 36 Man. L.R. 187 8 C.B.R. 61	322
M'Nair v. Glasgow Corporation	(1923)	S.C. 397	551, 552
McPhee v. Esquimalt and Nanaimo Rway. Co.	(1913)	49 S.C.R. 43	372
Maddison v. Donald H. Bain Ltd.	(1928)	39 B.C. 460	68
Mahomed v. Anchor Fire and Marine Insurance Co.	(1912) (1913)	17 B.C. 517 48 S.C.R. 546	82
Maille, *In re*	(1923)	4 C.B.R. 163	322
Major, *In re*	(1897)	5 B.C. 244	75
Mann v. Nunn	(1874)	43 L.J., C.P. 241	383
Manning v. Nickerson	(1927) (1928)	38 B.C. 535 2 W.W.R. 623 S.C.R. 91	406. 407, 410, 425
March v. Stimpson Computing Scale Co.	(1913)	11 D.L.R. 343	406
March Brothers & Wells v. Banton	(1911)	45 S.C.R. 338	490
Maritime Coal, Railway and Power Co., The v. Herdman	(1919)	59 S.C.R. 127	399
"Marpesia," The	(1872)	L.R. 4 P.C. 212	231
Marris v. Ingram	(1879)	49 L.J., Ch. 123	65
Martindale v. Lawson	(1838)	C.P. Cooper 83	164
Mathieson v. Dumbartonshire County Council	(1926)	S.C. 795	127, 141
Maxwell v. Keun	(1927)	44 T.L.R. 100	68
Mayfield v. Wadsley	(1824)	3 B. & C. 357	383
Meering v. Grahame-White Aviation Company Limited	(1919)	122 L.T. 44	410
Meter Cabs, Lim., *In re*	(1911)	81 L.J., Ch. 82	147
Miles v. New Zealand Alford Estate Co.	(1886)	32 Ch. D. 266	268
Milligan v. B.C. Electric Ry. Co.	(1923)	32 B.C. 161	447
Monroe v. Lord Kerry	(1710)	1 Bro. P.C. 67	26
Monrufet v. B.C. Electric Ry. Co.	(1913)	18 B.C. 91	50, 447, 551
Morgan, *Ex parte*. *In re* Simpson	(1876)	2 Ch. D. 72	367
Morris v. Carnarvon County Council	(1910)	1 K.B. 159 79 L.J., K.B. 670	129, 130
Morrow Screw and Nut Co. v. Hankin	(1918)	58 S.C.R. 74	330
Morton v. Woods	(1869)	38 L.J., Q.B. 81	29, 30
Morton's Ltd., *In re*	(1923)	3 C.B.R. 621	147
Moseley v. The Victoria Rubber Company	(1886)	55 L.T. 482	253

Case	Year	Reference	PAGE
Motherwell, *In re*	(1921)	1 C.B.R. 497	147
Moulis v. Owen	(1907)	76 L.J., K.B. 396	222
Munro, Brice & Co. v. War Risks Association	(1918)	2 K.B. 78	82
Murray v. Delta Copper Co., Ltd.	(1926)	S.C.R. 144	417, 418
Myall v. Quick	(1922)	1 W.W.R. 1	442

N

Case	Year	Reference	PAGE
Nanoose Wellington Collieries, Limited v. Adam Jack	(1926)	S.C.R. 495	535
National Trust Co. and Canadian Pacific Ry. Co., *In re*	(1913)	16 Can. Ry. Cas. 291	3
New Hamburg Manufacturing Co. v. Webb	(1911)	23 O.L.R. 44	338
Nicholl v. Allen	(1862)	1 B. & S. 916, 934	91, 100, 108
Nickerson v. Manning	(1928)	S.C.R. 91	407, 410
Noble v. Campbellford, Lake Ontario & Western Ry. Co.	(1916)	21 Can. Ry. Cas. 380	3
Noble v. Harrison	(1926)	2 K.B. 332; 95 L.J., K.B. 813	133, 134, 140
Nocton v. Ashburton (Lord)	(1914)	A.C. 932	310, 382, 534
Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Company	(1894)	A.C. 535	527, 532, 534
North British and Mercantile Insurance Company, The v. McLellan	(1892)	21 S.C.R. 288	205

O

Case	Year	Reference	PAGE
Oceanic, The	(1903)	88 L.T. 303	279
Olsen (Fred) & Co. v. The "Princess Adelaide." Canadian Pacific Ry. Co. v. The "Hampholm"	(1929)	41 B.C. 274	447, 449, 551
O'Neill v. Belfast County Council	(1912)	2 I.R. 310	178
Ontario Wind Engine and Pump Co. v. Lockie	(1904)	7 O.L.R. 385	541
Osborne v. Morgan	(1888)	13 App. Cas. 227	102
Outram v. Morewood	(1803)	3 East 346	338
Owen v. De Winton	(1894)	58 J.P. 833	134,142, 144
v. Ord	(1828)	3 Car. & P. 349	164

P

Case	Year	Reference	PAGE
Page v. Morgan	(1885)	54 L.J., Q.B. 434	350
Pallen v. The Iroquois	(1913)	18 B.C. 76	276
Palmer v. Elkins	(1728)	2 Raym. (Ld.) 1550	26
Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh	(1908)	24 T.L.R. 884	406
Parker v. Manning	(1798)	7 Term Rep. 537	26
Parlov v. Lozina and Raolovich	(1920)	47 O.L.R. 376	57
Parnell v. Dean	(1900)	31 Ont. 517	527
Paquin v. Beauclerk	(1906)	A.C. 148	372
Pasquier v. Neale	(1902)	2 K.B. 287	178
Patterson v. Victoria	(1897) (1899)	5 B.C. 628; A.C. 615	288
Paul v. Dines	(1929)	41 B.C. 49	559
Pelsall Coal and Iron Co. v. London and North-Western Ry. Co. (No. 3)	(1892)	8 Ry. & Can. Tr. Cas. 146	147, 151
Penny v. Wimbledon Urban Council	(1899)	2 Q.B. 72; 68 L.J., Q.B. 704	239, 496
Penruddock's Case	(1598)	3 Co. Rep. 205	136
Perrin v. Vancouver Drive Yourself Auto Livery	(1921)	30 B.C. 241	50, 221

		PAGE
Peruvian Guano Company v. Bockwoldt (1883)	23 Ch. D. 225	186
Peter Benoit, The (1915)	13 Asp. M.C. 203	281
Phillips v. Britannia Hygienic Laundry Co. (1923)	1 K.B. 539	134
Phillips and Scarth v. London Guarantee & Accident Co., Ltd. (1927)	2 W.W.R. 570	147
Phosphate Sewage Company v. Molleson (1879)	4 App. Cas. 801	510
Pickavance v. Pickavance (1900) (1901)	70 L.J., P. 14; P. 60	191, 192, 194
Pinkerton v. Easton (1873)	42 L.J., Ch. 878	150
Plimmer v. Plimmer	9 Gaz. L.R. 10	270
Pratt v. British Medical Association (1919)	1 K.B. 224	527
v. Patrick (1923)	93 L.J., K.B. 174	57
Prentice v. City of Sault Ste. Marie (1928)	S.C.R. 309	288
Pullman v. Hill & Co. (1891)	1 Q.B. 524	481
Pulsford v. Richards (1853)	17 Beav. 87	366
Puterbaugh v. Gold Medal Mfg. Co. (1904)	7 O.L.R. 582	481

Q

Quebec Bank v. Tozer (1899)	17 Que. S.C. 303	65
Liquor Commission v. Menard (1921)	36 Can. C.C. 385	192, 193, 195
Quebec Railway, Light, Heat and Power Company v. Vandry (1920)	A.C. 662	236
Queen, The v. Church Knowle (1837)	7 A. & E. 471	196
v. Hopkins (1896)	1 Q.B. 652	167
v. Moss (1896)	26 S.C.R. 322	237
v. Twiss (1869)	L.R. 4 Q.B. 407	223
Quillinan v. Stuart (1917)	38 O.L.R. 623	481

R

R. v. Austin (1724)	8 Mod. 309	12
v. Beale (1865)	L.R. 1 C.C. 10	43
v. Beauvais (1904)	7 Can. C.C. 494	255
v. Berdino (1924)	34 B.C. 142	178
v. Boak (1925) (1926)	36 B.C. 190; S.C.R. 525; S.C.R. 481	12, 179
v. Broad (1915)	A.C. 1110	524, 560
v. Button (1900)	69 L.J., Q.B. 901	43
v. Campbell (1912)	19 Can. C.C. 407	171, 181
v. Carlisle (1903)	7 Can. C.C. 470	250
v. Carmito (1919)	27 B.C. 225	243
v. Catherall (1731)	2 Str. 900; 93 E.R. 927	12, 14, 249
v. Cheeseman (1862)	L. & C. 145; 31 L.J., M.C. 89	41, 42
v. Cherry and Long (1924)	42 Can. C.C. 137	318, 319
v. Chew Deb (1913)	18 B.C. 23	192, 193, 195, 197
v. Chin Yow Hing (1929)	41 B.C. 214	247
v. Connolly (1867)	26 U.C.Q.B. 317	43
v. Cope (1921)	16 Cr. App. R. 77	44
v. Cox (1929)	41 B.C. 9; 1 W.W.R. 542	249, 250
v. Crawford (1913)	18 B.C. 20	10, 11, 15
v. Crocker (1922)	27 Cox, C.C. 325	43
v. Davidson (1871)	35 J.P., 500; 24 L.T. 22	10, 14
v. Deer (1919)	1 W.W.R. 410	34

Case	Year	Reference	PAGE
R. v. Delip Singh	(1918)	26 B.C. 390	37, 45
v. Duchess of Kingston	(1776)	20 St. Tri. 355	260
v. Dunning	(1887)	14 Ont. 52	10, 13, 248, 249, 250
v. Eagleton	(1855)	Dears. C.C. 515	42
v. Ed	(1926)	47 Can. C.C. 196	244
v. Fanning	(1865)	17 Ir. C.L.R. 289	41
v. Faulds	(1922)	31 B.C. 421	171
v. Finlay	(1924)	3 W.W.R. 427	37
v. Foster	(1903)	7 Can. C.C. 46 5 O.L.R. 624	250
v. Frejd	(1910)	18 Can. C.C. 110	251
v. Gainor	(1919)	1 W.W.R. 801	34
v. Geffler	(1923)	32 B.C. 423	157
v. Goodall	(1874)	38 J.P. 616 43 L.J., M.C. 119	14, 15
v. Goodman	(1872)	22 U.C.C.P. 338	41
v. Green	(1851)	20 L.J., M.C. 168	12, 13
v. Hensler	(1870)	11 Cox, C.C. 570	44
v. Hicks	(1925)	1 W.W.R. 1155	37
v. Hubin	(1927)	1 W.W.R. 705	47
v. Hughes	(1879)	4 Q.B.D. 614	245
v. Iaci	(1925)	35 B.C. 95 44 Can. C.C. 275 4 D.L.R. 474	244, 245
v. James	(1903)	6 O.L.R. 35	318
v. Judge of the City of London Court	(1892)	1 Q.B. 273	235
R. v. Lai Cow	(1921)	30 B.C. 277	34
v. Laitwood	(1910)	4 Cr. App. R. 248	44
v. Lemaire	(1929)	1 W.W.R. 321	318
v. Limerick; *Ex parte* Murphy	(1921)	69 D.L.R. 441 37 Can. C. C. 344	244
v. Lim Gim	(1928)	39 B.C. 457	47
v. Linneker	(1906)	2 K.B. 99	37, 43
v. Lomas	(1694)	Comb. 289 90 E.R. 483	13
v. Long	(1928)	23 Alta. L.R. 506 50 Can. C.C. 169	157
v. Louie Yee	(1929)	1 W.W.R. 882	255
v. McGregor	(1905)	11 B.C. 350	10
v. McLeod	(1901)	6 Can. C.C. 23	34
v. Meade	(1909)	1 K.B. 895	37
v. Menary	(1911)	18 O.W.R. 379	44
v. Montemurro	(1924)	2 W.W.R. 250	214, 215, 247
v. Mullen (No. 2)	(1905)	18 Can. C.C. 80	46
v. Nat Bell Liquors, Ld.	(1922)	2 A.C. 128	215, 242, 244, 246, 247
v. Nickerson: *Ex parte* Mitchell	(1909)	39 N.B.R. 316 16 Can. C.C. 316	197
R. v. Parker	(1870)	L.R. 1 C.C. 225	12
v. Petrie	(1890)	20 Ont. 317	10, 16
v. Pettibone	(1918)	2 W.W.R. 806	45
v. Pilon	(1920)	32 Can. C.C. 342	157
v. Punch	(1927)	20 Cr. App. R. 18	44
v. Ransford	(1874)	13 Cox, C.C. 9 31 L.T. 488	44, 45
v. Rash	(1923)	41 Can. C.C. 215	167, 171
v. Riepel	(1898)	2 Can. C.C. 225	46
v. Riley	(1916)	23 B.C. 192	318
v. Roberts	(1855)	Dears. C.C. 539	45
v. Robinson	(1915)	2 K.B. 342 84 L.J., K.B. 1149	37, 42, 44

Case	Year	Reference	PAGE
R. v. Robinson	(1851)	17 Q.B. 466	10, 14, 249
v. Roche	(1900)	4 Can. C.C. 64	10, 13
v. Rose	(1845)	3 D. & L. 359	13
v. Ryland	(1868)	11 Cox, C.C. 101	43
v. Salomons	(1786)	1 Term Rep. 249	249
v. Saunders	(1900)	3 Can. C.C. 495	318
v. Seddon	(1916)	85 L.J., K.B. 806 W.N. 63 80 J.P. 208	191, 192, 194
v. Sing Kee	(1901)	8 B.C. 20	10
v. Snyder	(1915)	34 O.L.R. 318 25 D.L.R. 1	37, 43
v. Stamper	(1841)	1 Q.B. 119 10 L.J., M.C. 73	193, 195
v. Stoke Bliss	(1844)	6 Q.B. 158	15
v. Stone (No. 1)	(1911)	17 Can. C.C. 249	167
v. Stonehouse and Pasquale	(1927)	39 B.C. 279	47
v. Sweet	(1807)	9 East 25	12
v. Swindall	(1846)	2 Car. & K. 230	59
v. Taylor	(1859)	1 F. & F. 511	41
v. Traynor	(1901)	4 Can. C.C. 410	10
v. Tyrell	(1893)	17 Cox, C.C. 716	37
v. Wah Sing Chow	(1927)	38 B.C. 491	37
v. White	(1910)	2 K.B. 124	43
v. Wilde and Jukes, *alias* West	(1914)	11 Cr. App. R. 34	37
v. Wright	(1906)	11 Can. C.C. 221	47
v. Zimmerman	(1925)	37 B.C. 277	37, 47
Railway Time Tables Publishing Company, *In re. Ex parte* Sandys	(1889)	42 Ch. D. 98	367
Rank (Joseph), Lim. v. Craig	(1918)	88 L.J., Ch. 45	406
Rayfield v. B.C. Electric Ry. Co.	(1910)	15 B.C. 361	370
Redfern v. Redfern	(1891)	P. 139	224
Reed v. Nutt	(1890)	24 Q.B.D. 669	193
v. Smith	(1914)	19 B.C. 139	123, 134, 135, 138, 143
Rennie v. Robinson	(1823)	1 Bing. 147	29
Renton v. Gallagher	(1910)	19 Man. L.R. 478 14 W.L.R. 60 47 S.C.R. 393	406, 407, 416, 418, 424
Rickards v. Lothian	(1913)	A.C. 263	22
River Wear Commissioners v. Adamson	(1877)	2 App. Cas. 743	60
Roberts v. Owen	(1890)	6 T.L.R. 172	184
Robertson v. Jackson	(1845)	2 C.B. (N.S.) 412	330
Robins v. National Trust Co.	(1927)	96 L.J., P.C. 84	50
Robinson, *Re*	(1924)	27 O.W.N. 138 5 C.B.R. 211	322
v. Canadian Pacific Railway Co.	(1892)	A.C. 481	193
Rochefoucauld v. Boustead	(1897)	1 Ch. 196	268
Roe v. Pierce	(1809)	2 Camp. 96	27
Rossillon v. Rossillon	(1880)	14 Ch. D. 351	202
Rossland Board of Trade v. Great Northern Ry. Co.	(1922)	28 Can. Ry. Cas. 24	92
Royal Bank v. McLennan	(1918)	25 B.C. 183	485
Royal British Bank v. Turquand	(1856)	6 El. & Bl. 327	79
Ruddy v. Toronto Eastern Ry. Co.	(1917)	21 Can. Ry. Cas. 377	3

S

Case	Year	Reference	PAGE
Salomon v. Salomon	(1897)	A.C. 22	509
Samson v. Aitchison	(1912)	A.C. 844	57, 60, 62
Saunders v. Topp	(1849)	4 Ex. 390	347, 350

Case	Year	Reference	PAGE
Saxby v. Fulton	(1909)	2 K.B. 208	222
Scarth v. Ontario Power and Flat Co.	(1894)	24 Ont. 446	338
Schofield v. Emerson-Brantingham Implement Co.	(1918)	3 W.W.R. 434	347, 351
Scholfield v. Lockwood	(1868)	38 L.J., Ch. 232	147
Schumack v. Lock	(1825)	3 L.J., C.P. (o.s.) 57	406
Schwan, The	(1892)	P. 419	232
Scott v. Fernie	(1904)	11 B.C. 91	418
v. Pilkington	(1862)	2 B. & S. 11	183, 186
Scottish North-Eastern Railway Company v. Stewart	(1859)	3 Macq. H. L. 382	92
Scribner v. Parcells	(1890)	20 Ont. 554	162
Seguin v. Boyle	(1922)	1 A.C. 462	102
Serrao v. Noel	(1885)	15 Q.B.D. 549	338
Shaw v. McKenzie	(1881)	6 S.C.R. 181	207
Shearer v. Canadian Collieries (Dunsmuir) Limited	(1914)	19 B.C. 277	371
Shrimpton v. Hertfordshire County Council	(1911)	27 T.L.R. 251 104 L.T. 145	125, 126, 129, 130, 137
Sinclair v. Ruddell	(1906)	16 Man. L.R. 53 3 W.L.R. 532	407, 410
Sir Robert Peel	(1880)	4 Asp. M.C. 321	291
Skeate v. Slaters	(1914)	30 T.L.R. 290	372
Smith, *In re*	(1919)	3 W.W.R. 745	511, 512, 513
v. Giddy	(1904)	2 K.B. 448	136
v. Hancock	(1894)	1 Ch. 209 2 Ch. 377	527, 529, 530, 533
v. Kay	(1859)	7 H.L. Cas. 750	366
v. St. Lawrence Tow Boat Company	(1873)	L.R. 5 P.C. 308	279
South American and Mexican Co., *In re; Ex parte* Bank of England	(1894)	63 L.J., Ch. 803	260
South Australian Co. v. Richardson	(1915)	20 C.L.R. 181	126, 129
South Eastern Railway Co., The v. Railway Commissioners	(1881)	6 Q.B.D. 586	97
Southwell v. Bowditch	(1876)	1 C.P.D. 374	383
Spark v. Osborne	(1908)	7 C.L.R. 51	134
Stanley Piano Co. v. Thomson	(1900)	32 Ont. 341	306
Steedman v. Drinkle	(1916)	1 A.C. 275 85 L.J., P.C. 79 25 D.L.R. 420	488, 490, 492
Steves v. South Vancouver	(1897)	6 B.C. 17	126
Stokes v. Stokes	(1911)	P. 195	194
Stone v. Marsh	(1827)	6 B. & C. 551	180
Stuart v. Diplock	(1889)	43 Ch. D. 343	528, 534
v. Moore	(1927)	39 B.C. 237	57
Sutherland v. Jones	(1922)	68 D.L.R. 498	491
Sweeney v. Coote	(1907)	A.C. 221	527, 533

T

Case	Year	Reference	PAGE
Talbot v. London Guarantee and Accident Company	(1897)	17 C.L.T. 216	112
Tanghe v. Morgan	(1905)	11 B.C. 455	407, 411, 412 417
Tarry v. Ashton	(1876)	1 Q.B.D. 314	137, 138, 141
Tarter, The v. The Charmer	(1907)	Mayers's Ad. Prac. 536	276
Thagard v. Edmiston	(1925)	35 Man. L.R. 319 3 W.W.R. 527	490
Thomas v. Canadian Pacific R.W. Co.	(1906)	14 O.L.R. 55	406

Case			PAGE
Thompson v. Bell	(1854)	10 Ex. 10	451
v. Mayor &c. of Brighton. Oliver v. Local Board of Horsham	(1894)	1 Q.B. 332	283
Thomson v. Birkley	(1882)	47 L.T. 700	184
Toothe v. Frederick	(1891)	14 Pr. 287	212
Toronto Hockey Club, Ltd. v. Arena Gardens of Toronto, Ltd.	(1926) (1926)	3 W.W.R. 26; 4 D.L.R. 1	531
Toronto Metal and Waste Co., *Re*	(1921)	51 O.L.R. 287; 21 O.W.N. 166; 2 C.B.R. 138	322
Townend v. Townend	(1905)	93 L.T. 680	484
Trawford v. B.C. Electric Ry. Co.	(1913) (1914)	18 B.C. 132; 49 S.C.R. 470	429
Trebeck v. Croudace	(1918)	1 K.B. 158	410
Trent v. Hunt	(1853)	9 Ex. 14	26
Trevillian v. Pine	(1707)	11 Mod. 112	26
Trudeau v. Pepin	(1904)	3 O.W.R. 779	26
Tunnicliffe v. Tedd	(1847) (1848)	17 L.J., M.C. 67; 5 C.B. 553	191, 192, 195
Turner, *In re*	(1907)	2 Ch. 126, 539	150

U

Case			PAGE
Union, The	(1928)	P. 175	279
Credit Bank v. Mersey Docks and Harbour Board	(1899)	2 Q.B. 205	541, 544
United Shoe Manufacturing Co. of Canada v. Brunet	(1909)	78 L.J., P.C. 101	362
U.S. Shipping Board v. Laird Line, Ld.	(1924)	A.C. 286	279, 280

V

Case			PAGE
Vadala v. Lawes	(1890)	25 Q.B.D. 310	187
Vallance v. Savage	(1831)	7 Bing. 595	26
Vectis, The	(1928)	45 T.L.R. 385	232
Verma x. Donahue	(1913)	18 B.C. 468	490
Victoria City v. Bishop of Vancouver Island	(1921)	2 A.C. 384	235
Victoria Corporation v. Patterson	(1899)	A.C. 615; 68 L.J., P.C. 128	418
Von Mackensen v. Corporation of Surrey	(1915)	21 B.C. 198	283

W

Case			PAGE
Walden v. Haney Garage, Ltd.	(1928)	39 B.C. 413	347, 348, 350
Walker v. B.C. Electric Ry. Co.	(1926)	36 B.C. 338	50, 399
v. Foster	(1923)	54 O.L.R. 214	296
Wallingford v. Fisher	(1927)	3 W.W.R. 740	183
Walt v. Barber	(1899)	6 B.C. 461	207
Walters v. W. H. Smith & Son, Limited	(1914)	1 K.B. 595; 83 L.J., K.B. 335	406, 407, 409, 410, 417
Walton v. Board of School Trustees of Vancouver	(1924)	34 B.C. 38	125, 126, 128, 135
Ward v. Clark	(1895)	4 B.C. 71	207
Wehrfritz v. Russell	(1902)	9 B.C. 50	207
Wells v. Abrahams	(1872)	L.R. 7 Q.B. 554	181
Wertheim v. Chicoutimi Pulp Co.	(1910)	80 L.J., P.C. 91	362
Western Canada Accident and Guarantee Insurance Company v. Parrott	(1921)	61 S.C.R. 595	112, 113, 121
White, *Ex parte. In re* Nevill	(1871)	6 Chy. App. 397	383

Case	Year	Citation	PAGE
White, *In re*	(1885)	17 L.R. Ir. 223	150
v. Nelles	(1885)	11 S.C.R. 587	26
Whiteley v. Delaney	(1914)	A.C. 132	75
Williams v. Banks	(1859)	1 F. & F. 557	412, 435
v. Letheren	(1919)	2 K.B. 262	196
v. Richards	(1895)	3 B.C. 510	207
Willis v. Snook	(1841)	8 M. & W. 147	207
Wilson v. The Northampton and Banbury Junction Railway Company	(1874)	43 L.J., Ch. 503	355
Wilson v. Wilson	(1820)	1 J. & W. 457	164
Winnipeg Electric Railway v. Winnipeg City	(1912)	81 L.J., P.C. 193	91, 101
Wood v. Benson	(1831)	2 C. & J. 94	383
v. Goodwin	(1884)	W.N. 17	241
Wright v. Castle	(1817)	3 Mer. 12 17 R.R. 3	163
Wyman, *Ex parte*	(1899)	34 N.B.R. 608 5 Can. C.C. 58	196, 197

Y

Case	Year	Citation	PAGE
Young (J. L.) Manufacturing Company, Limited. Young v. J. L. Young Manufacturing Company, Limited	(1900)	2 Ch. 753	207, 211
Young Sid, The	(1929)	45 T.L.R. 389	281

Z

Case	Year	Citation	PAGE
Zellinsky v. Rant	(1926)	37 B.C. 119	524

Reports of Cases

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

ARMSTRONG AND SUTHERLAND v. NEW WESTMINSTER HARBOUR BOARD.

COURT OF APPEAL

1929

Jan. 8.

ARMSTRONG v. NEW WESTMINSTER HARBOUR BOARD

Arbitration—Expropriation of land—Elevator site—Compensation—Principles governing—Can. Stats. 1913, Cap. 158, Sec. 12—R.S.C. 1927, Cap. 170, Sec. 232 (5).

On expropriation proceedings under section 12 of The New Westminster Harbour Commissioners Act, where the award discloses the fact that the arbitrator omitted to give any or manifestly inadequate compensation for a certain portion of the land appropriated, the Court of Appeal should correct the award under section 232 (5) of the Railway Act and increase it in such amount as the evidence justifies.

Statement

APPEAL by plaintiffs from the decision of MORRISON, J. of the 25th of May, 1928, affirming the award of HOWAY, Co. J. of the 24th of April, 1928, on an arbitration through expropriation proceedings taken by The New Westminster Harbour Commissioners under The New Westminster Harbour Commissioners Act to acquire 33.2 acres as an elevator site on the south shore of the Fraser River being a portion of sections 34 and 35,

COURT OF APPEAL

1929

Jan. 8.

ARMSTRONG v. NEW WESTMINSTER HARBOUR BOARD

Statement

block 5, North Range 3 West of the Coast Meridian, New Westminster District, and belonging to the estate of Joseph Charles Armstrong, deceased. The award was as follows:

"Under section 221, subsection (2) of the Railway Act which governs these proceedings, the value which I have to find is that at the time of the deposit of the plans of this elevator—15th February, 1928.

"In fixing that value, the principle is that the compensation must be based on the value to the owner as of the date of the deposit of the plan, and not the value when taken to the Harbour Commissioners (*King* v. *Halifax Electric Tramway Co.* (1918), 40 D.L.R. 184; (1919), 52 D.L.R. 688).

"In assessing such compensation, the sales of adjoining properties afford a safe *prima facie* basis of valuation; or, as it is expressed in another case, the market price of the lands in the vicinity is *prima facie* the basis of and not the value when taken to the Harbour Commissioners (*King* v. *Condon*, *ib.* 275).

"On behalf of the owners, I have here much evidence of opinion as to what, in the views of the individual witnesses the land being expropriated is worth at the present time—worth to the Harbour Commissioners for this elevator site. These opinions are of little assistance. It is not the value today that I am to find, but the value on the 15th of February last, before it was known that an elevator would be located in this vicinity—not the value to the Harbour Commissioners, but the value to the owner.

"Needless to say the filing of the plans and the assured advent of the elevator increased greatly the price at which properties in the vicinity were held; but the figure which an owner may demand for his property is only one of the factors to be considered in settling value. People often hold land at prices far beyond its market value.

"I must be governed by the rule above quoted. To my mind, the tangible thing is the amounts that people have been willing to pay for similar land in the vicinity in the past few years—land with the same, or approximately the same situation and benefits and possibilities. I assume that the seller of land has in his mind, as a justification of his price, the possibilities and contingencies of the situation and thus settles upon an amount which he is content to accept as the present sale value of future possibilities. Values depend, in my opinion, on the estimation of the ordinary man. An extraordinary man may see great possibilities of wealth, but until he can convince his fellow man of the reality of his vision, it remains a dream beyond the limits of practical life. As Maclean, J. says in *The King* v. *Roland Stuart* (1926), Ex. C.R. 91 at p. 97: 'The future advantage must however be calculable and calculated at the date of expropriation, and the proper compensation is the amount which a prudent man would then be willing to pay for it. The value to the owner consists in all the advantages which the land possesses present or future, but it is the present value alone of such advantages that must be determined.'

"Governing myself, then, by the evidence of sales in the vicinity, I am impressed by the amount mentioned by Mr. Spear, who purchased in May, 1925, 1,112 feet of water-front (an area of about three and a quarter acres)

for $14,000. That is one of the latest and the very highest purchase anywhere in the vicinity prior to February last. The figure works out at a rate of about $12.60 per foot of water frontage. Placing, then, the 1,850 feet of water frontage at $13 a foot equals $24,050. Add thereto ten per cent. for compulsory sale ($2,405)—total value $26,455.

"I therefore award that the price to be paid by the Harbour Commissioners for the property of the applicants is $26,455 together with interest at five per cent. from the 15th of February, 1928.

"The Harbour Commissioners will pay the costs of the arbitration."

The appeal was argued at Vancouver on the 9th and 13th of November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

W. J. Whiteside, K.C., for appellants: The Harbour Commissioners took an option on the property for $40,000. They paid $100 and went no further as the authorities in Ottawa said they would not pay this amount for the property. The award was $26,455 and we say this is too low. The arbitrator did not apply his mind to the evidence as he should have done. There is 1,850 feet of water-frontage with deep water on the strip taken. As to the principles upon which compensation should be awarded see *Green* v. *Canadian Northern Ry. Co.* (1915), 19 Can. Ry. Cas. 171; *In re National Trust Co. and Canadian Pacific Ry. Co.* (1913), 16 Can. Ry. Cas. 291 at p. 301.

David Whiteside, K.C., for respondent: The value of the property is arrived at by the various facts surrounding and unless there is very special reason for so doing the Court of Appeal will not interfere. Even if they think the award inadequate they should not disturb it: see *Ruddy* v. *Toronto Eastern Ry. Co.* (1917), 21 Can. Ry. Cas. 377; *Noble* v. *Campbellford, Lake Ontario & Western Ry. Co.* (1916), *ib.* 380.

W. J. Whiteside, in reply, referred to *Fraser* v. *Fraserville (City)* (1917), 86 L.J., P.C. 91, and MacMurchy & Denison's Railway Law of Canada, 3rd Ed., 310.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from an award of HOWAY, Co. J., sitting as an arbitrator under section 221 (2) of the Railway Act of Canada, R.S.C. 1927, Cap. 170, to ascer-

COURT OF APPEAL

1929

Jan. 8.

ARMSTRONG v. NEW WESTMINSTER HARBOUR BOARD

tain the value of land expropriated by the respondent, which award was affirmed by MORRISON, J.

MACDONALD, C.J.A.

The arbitrator is a County Court judge of long experience and was familiar with the locality in which the land is situate. The questions involved are questions of fact. It does not appear that the arbitrator was under any misapprehension concerning the factors involved in the arbitration or the principles by which he ought to be governed. He came to a firm conclusion which, in my opinion, is not an unreasonable one, and this conclusion was accepted as the correct one by the said learned judge. In these circumstances, and after fully considering the evidence in the case, I am satisfied that the arbitrator has not been shewn here to have been wrong in his conclusion but has come to the right conclusion, and the award should be upheld.

MARTIN, J.A.

MARTIN, J.A.: It is submitted by appellants that the award of the learned judge below (County Judge HOWAY) is clearly erroneous because the reasons His Honour gives disclose the fact that he omitted to give any, or manifestly inadequate, compensation for that portion of the land appropriated which lies behind the river-frontage strip, and in my opinion that submission has been established; therefore under section 232 of the Railway Act, Cap. 170, R.S.C. 1927 we "should [in the present circumstances] make the correct award" that His Honour should have made, and as there is evidence before us that justifies an increase of $3,300 in the award the appeal should be allowed and an additional "amount awarded" by this Court under subsection 5 to that extent.

GALLIHER, J.A.

GALLIHER, J.A.: The learned judge who acted as arbitrator was largely influenced in coming to his conclusion as to value; in fact it may be said that he practically based it upon the sale of a piece of water-front land in the vicinity, 1,112 feet long by 150 feet in depth, for the sum of $14,000, containing three and one-quarter acres. This works out at a foot frontage of $12.60. Assuming then that the learned judge is justified upon the evidence in accepting that as a guide, what is the result? A piece of water-frontage 150 feet deep is valued at $12.60 per

front foot, and while that might be a fair value for a piece of that depth and might be a fair value for the land in question based on a like depth, what becomes of what I might term, all the hinterland for which on that basis an added value of 40 cents a front foot is allowed? The hinterland area is almost 27 acres which at the additional sum allowed the difference between $13 and $12.60 per front foot would place the price per acre of the hinterland at, roughly, $27. Now, if a basis of $12.60 per front foot is applied as fair value for a strip 150 feet deep, it seems to me we should then value the remaining land taken; otherwise you might have a piece of land to be expropriated running back half a mile and yet you would only be remunerated at practically the same figure as land only 150 feet in depth.

GALLIHER, J.A.

Considering that this hinterland is part and parcel of the whole, including the water-frontage, and as such has a potential value to the owner beyond what would be its value for, say, farming land or grazing purposes, and by reason of its situation is and would be available in connection with industrial development, I think that is a feature we are entitled to take into consideration in estimating its value. It is true no evidence has been directed to its value on precisely that basis, but evidence was directed to its suitability for industrial purposes. On that basis I think $100 an acre is a fair figure to place on it, in addition to what has been allowed by the learned arbitrator, and to that extent the appeal is allowed.

McPhillips, J.A.: Upon the opening of this appeal counsel for the appellants applied to read further material. This is permissible with leave of the Court—section 232 (3) of the Railway Act (Cap. 170, R.S.C. 1927):

"3. The Court may, where, from any other evidence it deems proper to admit, it is clearly satisfied that injustice has been done, set aside the award or remit it to the arbitrator for reconsideration with such directions as it deems proper."

MCPHILLIPS, J.A.

The new evidence in my opinion was cogent evidence in support of the appellants' case. Leave was refused by the majority of the Court. With great respect to my learned brothers, I was of the opinion that leave should be granted. The same rules which govern in actions of law in my opinion, should not have

COURT OF APPEAL
1929
Jan. 8.

ARMSTRONG v. NEW WESTMINSTER HARBOUR BOARD

force in a matter such as this, an appeal from an award under the Railway Act, *i.e.,* technical rules should not control.

Now examining the evidence in this case as adduced at the arbitration, I am compelled to say in the language of the statute, with great respect to the learned arbitrator and the learned judge of the Supreme Court, to whom an appeal was taken, that I am "clearly satisfied that injustice has been done." The learned arbitrator, with respect, in my opinion, fell into a serious error in guiding himself by the Spear purchase in arriving at his valuation of the land in question. That was an area of merely three and a quarter acres being of shallow depth back from the river-frontage, whilst in the present case, allowing for the same depth as in the Spear case, there remain some 27 acres for which the learned arbitrator has allowed nothing. The following is an excerpt from the arbitrator's award:

"Governing myself, then, by the evidence of sales in the vicinity, I am impressed by the amount mentioned by Mr. Spear, who purchased in May, 1925, 1,112 feet of waterfront (an area of about three and a quarter acres) for $14,000. That is one of the latest and the very highest purchase anywhere in the vicinity prior to February last. The figure works out at a rate of about $12.60 per foot of water-frontage. Placing, then, the 1,850 feet of water-frontage at $13 a foot equals $24,050. Add thereto ten per cent. for compulsory sale ($2,405)—total value, $26,455."

MCPHILLIPS, J.A.

It is clear that the learned arbitrator overlooked the fact that in the present case there was a very large area of land as compared with the Spear case, namely, some 27 acres in excess of the area in the Spear case. Further, upon the evidence the land down stream (Fraser River) and west of the bridge is unquestionably much more valuable than land east of the bridge—that is above the bridge—the bridge itself constituting a serious obstacle and necessitating ships passing through a swing span. The ideal sites for elevators are those which are below the bridge with proper depth of water and landing facilities which the land in question undoubtedly has.

The valuation was undoubtedly arrived at erroneously, and is totally inadequate. It would seem to me that the learned arbitrator and the learned judge of the Supreme Court to whom an appeal was taken from the award, wholly failed to apply the governing rule as to valuation in failing to take into considera-

tion the true value of the land as an elevator site. At the time of the notice to treat, *viz.,* the 20th of February, 1928, it cannot be other than common ground that the land in the neighbourhood was known to be suitable for elevator sites and that was the purpose of the respondent, *i.e.,* acquirement of the land for an elevator site in area 33.2 acres.

Lord Dunedin in *Cedar Rapids Manufacturing Co.* v. *Lacoste* (1914), 83 L.J., P.C. 162 at pp. 166-7, laid down the principle upon which a valuation should be made. He said:

"For the present purpose it may be sufficient to state two brief propositions: First, the value to be paid for is the value to the owner as it existed at the date of the taking, not the value to the taker. Secondly, the value to the owner consists in all advantages which the land possesses present or future, but it is the present value alone of such advantages which fails to be determined. Where, therefore, the element of value over and above the bare value of the ground itself (commonly spoken of as the agricultural value) consists in adaptability for a certain undertaking (though adaptability, as pointed out by Lord Justice Fletcher Moulton in the case cited, is really rather an unfortunate expression), the value is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects which made the undertaking as a whole a realized possibility."

MCPHILLIPS, J.A.

The whole judgment is well summarized in the head-note:

"The law of Canada as regards the principles upon which compensation for land taken compulsorily is to be awarded is the same as the law of England; that is to say, the value to be paid for is the value to the owner as it exists at the date of taking, not the value to the taker; and this value consists in the present value of all such advantages as the land possesses, present or future.

"Where, therefore, there is a value above the bare agricultural value of the land, consisting in a possibility of use for a certain undertaking, the price is not to be calculated as a proportional part of the whole value of such undertaking, but is such price above the bare agricultural value as possible intending undertakers would give."

I cannot agree that the learned arbitrator did in his valuation give proper heed to these guiding principles.

The learned judge on appeal from the award gave the following reasons:

"I do not think the learned judge proceeded on a wrong principle herein. There does not appear to me to be the preponderance of evidence which would justify disturbing the award."

COURT OF APPEAL

1929

Jan. 8.

ARMSTRONG v. NEW WESTMINSTER HARBOUR BOARD

It is, therefore, with great respect, evident that the learned judge failed to note or appreciate the error into which the learned arbitrator fell, in not taking into consideration the true principles upon which the valuation should have been made and the failure to take into consideration that as to 27 acres of the land, nothing whatever was allowed. Therefore, in conformity with the statute law (section 232 (3) the Railway Act, Cap. 170, R.S.C. 1927) I am "clearly satisfied that injustice has been done." I would "set aside the award." The appeal in my opinion should be allowed.

MACDONALD, J.A.: This appeal gives me considerable difficulty. If there is evidence to justify the award we should not interfere, even if viewing it independently we might arrive at a different conclusion. If however, we find the reasoning of the learned arbitrator faulty or find that he did not consider all the elements which should enter into a proper valuation, including the potentialities of the property at the time of the taking, we may set it aside. The principle to follow is similar to any other appeal on a question of fact.

MACDONALD, J.A.

In his award the learned arbitrator says: [already set out in the judgment of MCPHILLIPS, J.A.].

Were it not for the first line in this paragraph, *viz.*, "Governing myself, then, by the evidence of sales," there would be little difficulty because reading it without that clause, I find, with respect, that the learned arbitrator did not logically follow the implications of the purchase by Spear in May, 1925. Does he mean by the first line that he considered other sales? If he did the evidence of Draper and others would justify the award. But I do not think it is open to that construction. He says in effect "Governing myself by sales, I am impressed with one in particular which may be taken as a guide for the conclusion I should arrive at."

For reasons pointed out by my brother GALLIHER, he should on that basis have awarded a larger amount. I would therefore allow the appeal and vary the award to the extent indicated in the judgment of my brothers MARTIN and GALLIHER.

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

Solicitor for appellants: *Martin & Sullivan.*

Solicitors for respondent: *McQuarrie, Whiteside & Duncan.*

COURT OF APPEAL

1929

Jan. 8.

REX v. COX

REX v. COX.

Motor-vehicles—Driving to the common danger—Conviction—Imposition of fine and costs—Certiorari—Conviction sustained but costs set aside—View of locus in quo by justice—At the request of accused's counsel and consent of Crown counsel—R.S.B.C. 1924, Cap. 177, Secs. 13 (1) and 29—B.C. Stats. 1925, Cap. 33, Sec. 10—R.S.B.C. 1924, Cap. 245, Secs. 36 (3), 38 and 101.

An accused was convicted before a justice of the peace of driving a motor-vehicle to the common danger contrary to section 13 (1) of the Motor-vehicle Act and was fined $10, and $2.50 costs. On application for *certiorari* the conviction imposing the fine was sustained but the part relating to costs was set aside.

Held, on appeal, affirming the decision of MACDONALD, J., that under sections 82 and 101 of the Summary Convictions Act the judge below had the power to strike out the order as to costs and the rest of the conviction was properly sustained.

At the request of the appellant, with the consent of the prosecutor and in the presence of the appellant and his counsel and of the prosecutor, the justice took a view of the *locus in quo* after the evidence was completed.

Held, that the Court will not accede to an application to set aside a conviction because of the alleged wrongful procedure brought about at the express request of the appellant.

Statement

APPEAL by accused from the decision of MACDONALD, J. of the 24th of September, 1928, quashing in part only, the conviction of the accused by R. C. Macdonald, Esquire, a justice of the peace for the District Municipality of Coquitlam on the 30th of July, 1928, for unlawfully operating a motor-vehicle on the Dewdney trunk road "to the common danger" in contravention of section 13 of the Motor-vehicle Act. After hearing the evidence the justice of the peace at the instance of counsel for the accused and with the consent of the Crown's counsel took a view of the *locus in quo*. He then convicted the accused and imposed a fine of $10, and $2.50 costs. The learned judge sustained the conviction imposing the fine but set aside that part of it relating to costs.

The appeal was argued at Vancouver on the 2nd of October, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1929

Jan. 8.

REX
v.
COX

Bray, for appellant: The justice of the peace had no jurisdiction whatever to take a view of the *locus in quo*: see *Rex* v. *Crawford* (1913), 18 B.C. 20; *Regina* v. *Petrie* (1890), 20 Ont. 317 at p. 324; *Re Sing Kee* (1901), 8 B.C. 20; *Farquharson* v. *Morgan* (1894), 1 Q.B. 552. Under sections 36 (3) and 38 of the Summary Convictions Act the evidence must be taken down in writing and on *certiorari* everything must be brought up but there were no depositions: see *Denault* v. *Robida* (1894), 8 Can. C.C. 501; *Rex* v. *McGregor* (1905), 11 B.C. 350; *Re Lacroix* (1907), 12 Can. C.C. 297; *Rex* v. *Traynor* (1901), 4 Can. C.C. 410. Next the justice of the peace made an adjudication of costs without jurisdiction and on appeal the learned judge should have quashed the conviction instead of striking out the costs and allowing the conviction to stand.

Argument

Cosgrove, for the Crown: The learned judge did not amend the conviction. There is no distinction between an order and a conviction, and he may strike out the costs and allow the conviction to stand: see *Reg.* v. *Davidson* (1871), 35 J.P. 500 at p. 501; *Regina* v. *Dunning* (1887), 14 Ont. 52 at p. 56. A view is allowed at common law when the parties consent to it.

Bray, in reply: The judgment of Armour, J. in *Regina* v. *Dunning* was overruled and see *Reg.* v. *Roche* (1900), 4 Can. C.C. 64. Convictions are not in the same category as orders: see Paley on Summary Convictions, 9th Ed., 459; *Regina* v. *Robinson* (1851), 17 Q.B. 466.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.: This is an appeal from an order refusing a writ of *certiorari*. The conviction was made under the Motor-vehicle Act, Cap. 177, R.S.B.C. 1924. The magistrate, in addition to the fine of $10, imposed upon the appellant, ordered him to pay $2.50 costs.

MACDONALD, C.J.A.

The learned trial judge appealed from sustained the conviction imposing the fine but set aside that part of it relating to costs.

The order as to costs is the only defect apparent on the face of the conviction. As it cannot be contended that the magistrate

proceeded to inquire into the complaint without jurisdiction, only defects apparent on its face can be considered on an application of this kind.

The learned judge invoking the power conferred upon him by section 101 of the Summary Convictions Act of this Province, and section 82 of the same Act, struck out the order as to costs. I think he had power to do so and that therefore the rest of the conviction was properly sustained.

MACDONALD, C.J.A.

This really disposes of the appeal, but I may refer shortly to the two other grounds mentioned in the notice of appeal, namely, that the magistrate had taken a view of the *locus* after the evidence had been completed, an act which it was claimed he had no power to do. It appears from an affidavit filed in the case that that view was taken at the request of the appellant and with the consent of the prosecutor, and in the presence of the appellant and his counsel and of the prosecutor. I cannot conceive of any Court acceding to an application to set aside a conviction because of the alleged wrongful procedure brought about at the express request of the appellant. The current of decisions, or, at all events *dicta,* are to the contrary. *Rex* v. *Crawford* (1913), 18 B.C. 20, and the cases therein referred to.

Another ground of appeal taken was that the magistrate had not taken the evidence in writing, as required by the Summary Convictions Act. There is no proof of this, either on the face of the conviction or in the material used on this appeal, or before the judge below. No doubt the authorities shew that it is obligatory upon the magistrate to take the depositions in writing, but if we could enquire into this question at all on *certiorari* proceedings, which I think we can not, the assumption is, in the absence of evidence to the contrary, that the magistrate acted properly and in accordance with his duty and not otherwise.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: Two only of the grounds advanced by the appellant require special notice. The first is an objection to the view of the *locus* taken by the convicting magistrate. This was done at the request of the appellant himself with the consent of the prosecution, and, as set out in the affidavit of the magistrate,

COURT OF APPEAL

1929

Jan. 8.

Rex v. Cox

it was held in the presence of the parties. It is, however, submitted that the view was to be taken only as to the existence of a certain ditch alongside the road, where the appellant drove his motor-car, but the magistrate exceeded this arrangement by viewing the whole locality, *i.e.,* the road itself as well as the ditch, as appears by the letter he took the unusual and undesirable course of writing to appellant's counsel after the view and informing him of his reason for convicting his client. This is such a fine distinction, *viz.,* that in looking at the ditch alongside the road the magistrate should not look at the road alongside the ditch, that it cannot be regarded, in my opinion, as one of substance. At the worst the taking of the view was an irregularity in the course of the trial brought about by the invitation of the appellant himself and therefore he has no just ground of complaint and that even a much stronger case of irregularity will be held to be waived appears from the decision of our National Supreme Court in *Rex* v. *Boak* (1926), S.C.R. 481, as to which see my explanatory observations in *Rex* v. *Boak* (1925), 36 B.C. 190.

MARTIN, J.A.

The second ground is that the learned judge appealed from erred in quashing the conviction in part only, *viz.,* "in so far as the same awards costs in the sum of $2.50 payable to the convicting magistrate himself." This is something quite distinct from amending the conviction and is a professed exercise of power to reject those bad parts of a conviction which are apparent on its face, quite apart from anything that might be ascertained from depositions, being an application of the maxim *"utile per inutile non vitiatur"*—*Reg.* v. *Parker* (1870), L.R. 1 C.C. 225, and *Attorney-General of New South Wales* v. *Macpherson* (1870), L.R. 3 P.C. 268. The due application of the maxim to orders of justices in, *e.g.,* bastardy proceedings is conceded, as it must be in view of repeated decisions cited in *Reg.* v. *Green* (1851), 20 L.J., M.C. 168 and *Rex* v. *Sweet* (1807), 9 East 25, and *Rex* v. *Austin* (1724), 8 Mod. 309; but it is submitted it does not extend to convictions by justices, and *Rex* v. *Catherall* (1731), 2 Str. 900; 93 E.R. 927 is mainly relied upon, but its effect has been misapprehended and it is not, when understood, at all similar to the case at Bar because what was

therein sought to be severed was something involved in the proof and trial of the charge itself in the incomplete particulars thereof "so as to enable him to defend himself on a second charge," and what was in truth sought to be done by the complaining turnpike trustees was "to amend the conviction" as the note to the report correctly states, which is essentially different from what was done here in the obviously improper penalty imposed, without jurisdiction, after conviction.

The point was considered by the Ontario Queen's Bench Division in *Regina* v. *Dunning* (1887), 14 Ont. 52, chiefly by Mr. Justice Armour, at pp. 56-58 where some principal cases up to that time were discussed and by Chief Justice Wilson (O'Connor, J. concurring) at p. 65. I am in accord with Mr. Justice Armour's reasons and conclusions and if those of Chief Justice Wilson are to be taken as opposed thereto (though it is far from clear that they are because much at least of his somewhat indefinite language supports Mr. Justice Armour) then I prefer to adopt the views of the former judge as being more in accord with the large number of authorities on the question I have examined in addition to those cited. It was suggested that in *Reg.* v. *Roche* (1900), 4 Can. C.C. 64, Chief Justice Armour, as he was then, had departed from this said view in *Regina* v. *Dunning,* but such is not the case because in *Reg.* v. *Roche* it was not possible to draw "clearly the line of demarcation" between good and bad as Erle, J. puts it in *Green's* case, *supra.* If the bad parts of bastardy orders may be quashed and the good left to stand, as is admittedly the case, I see no good reason why the same course should not be followed in ordinary convictions because so early as 1694 it was held by the King's Bench in *Combs* v. *The Hundred of Brackley* (1694), Comb. 263; 90 E.R. 467 that "in a case of bastardy part of an order may be reversed and part stand," and in the same Trinity Term the same Court said, *per* Chief Justice Holt, in *Rex* v. *Lomas, ib.* 289 (90 E.R. 483):

MARTIN, J.A.

"I see no necessity that it [the conviction] should be in Latin any more than an order for keeping a bastard-child (which is a conviction and) usually in English."

And in *Reg.* v. *Rose* (1845), 3 D. & L. 359, Patteson, J. could

COURT OF APPEAL

1929

Jan. 8.

REX v. COX

"not quite see how a bastardy order differs materially from a conviction."

The history of the distinction is traced in Paley on Summary Convictions, 9th Ed., 440 *et seq.*, but the distinction noted *supra,* in *Catherall's* case has escaped him. Two earlier cases also which he does not cite on this point support Mr. Justice Armour's view, *viz., Reg.* v. *Davidson* (1871), 24 L.T. 22; 35 J.P. 500, and *Reg.* v. *Goodall* (1874), 38 J.P. 616; 43 L.J., M.C. 119. Each of those cases was founded upon an ordinary conviction by justices and in each there was an appeal to Quarter Sessions followed by the subsequent quashing by the Queen's Bench of the order of the justices at Quarter Sessions as to costs, but allowing it to stand for the residue. In the former case Blackburn, J., p. 24, said:

"The justices at quarter sessions having therefore made an order in respect of part of which they had jurisdiction, and in another part not jurisdiction, we must quash that part of it over which they had not jurisdiction."

And Cockburn, C.J.:

MARTIN, J.A.

"What we must do in this case is to quash so much of the order of quarter sessions as applies to costs. It is clear that no costs could be given as against the convicting justices."

In the latter case Cockburn, C.J., said:

"We must make the rule absolute, with costs, to quash that part of the order of quarter sessions which makes the justices pay costs."

Such being the power exercised by what is in England in essentials an appellate Criminal Court exercising jurisdiction over proceedings having criminal origin and nature this Court has at least equal powers. I only add that long ago the Queen's Bench jurisdiction and practice in justices' orders in bastardy was by analogy held to extend to orders of Poor Law Commissioners—*Regina* v. *Robinson* (1851), 17 Q.B. 466, where Lord Campbell, C.J. in Trinity Term quoted with approval the decision of the same Court *per* Erle, J. in the preceding Hilary Term in *Ex parte Coley* (1851), 4 New Sess. Cas. 507, wherein, on a bastardy order that learned judge put the matter in language so clear and appropriate to the case at Bar that I cite it *in extenso*:

"The cases brought before me have established the doctrine, that this Court, in the exercise of its appellate jurisdiction over the orders of jus-

tices, will, if an order defective in part be removed here by *certiorari*, quash it only so far as it relates to the bad part, if that can be separated from the portion which is good. I am of opinion that the justices may abandon the void part of an order, if it appear on its face that it is severable from the residue. It seems to me to be a recognized principle of law, that an order good in part and bad in part, if capable of being divided, may be sustained *quoad* the good part; and I think it then follows that the valid part ought to be enforced without the useless expense of a *certiorari*. *Reg.* v. *Stoke Bliss* [(1844)], 6 Q.B. 158 was distinctly decided on the ground that the two parts could not be severed, the giving of costs to the respondents in that case being ancillary to the judgment confirming the order of removal, and the principle failing, the ancillary would fail with it. That was the distinction which the Court there pointed out. The two parts, they said, were so interwoven as not to be separable. In this case one part is good and one bad, but the line can be plainly drawn between them. The rule must be absolute to enforce the good part."

MARTIN, J.A.

When the present application for *certiorari* came before the learned judge below he had the same power to deal with "officious acts" of justices as the Queen's Bench in England, as to which Cockburn, C.J. said in *Reg.* v. *Goodall, supra* (43 L.J., M.C. at p. 120):

"Upon proper cause being shewn this Court may punish officiousness on the part of magistrates in the exercise of their summary jurisdiction, but there is no pretence for saying that the Quarter Sessions have any such power."

It follows that in my opinion the learned judge below made the proper order and so the appeal should be dismissed.

GALLIHER, J.A.: The appellant was convicted before a justice of the peace for an infraction of the Motor-vehicle Act—driving to the common danger—and was fined $10 and $2.50 costs.

The matter was brought up on *certiorari* before MACDONALD, J., who quashed so much of the conviction as imposed costs but refused to set aside the conviction *in toto*. Against that decision this appeal is taken.

GALLIHER, J.A.

It was a trial under the Summary Convictions Act, and Mr. *Bray*, counsel for the appellant, submits error in three respects:

1. The justice of the peace had no jurisdiction to take a view citing *Rex* v. *Crawford* (1913), 18 B.C. 20, a decision of this Court, and other cases. In *Rex* v. *Crawford* we held that a police magistrate in a summary trial of an indictable offence had no right during the trial to take a view without the consent of

COURT OF APPEAL

1929

Jan. 8.

REX v. COX

both the Crown and the accused, following *Rex* v. *Petrie* (1890), 20 Ont. 317. Here counsel for the accused suggested that a view be taken, the prosecution consenting, and all parties attending together when the view was taken. Upon such circumstances I think the view was proper.

2. The learned judge had no power to set aside the conviction in part as to the $2.50 costs wrongly imposed but should have set it aside *in toto*. I think this is covered by section 101 of the Summary Convictions Act, Cap. 245, R.S.B.C. 1924.

GALLIHER, J.A.

3. That the depositions were not taken down in writing by the justice as provided in the Summary Convictions Act, section 36, subsection (3). There is nothing on the face of the conviction or in any of the material brought up or used on *certiorari* to indicate that the provisions of that section were not carried out.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

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

Appeal dismissed.

Solicitor for appellant: *H. R. Bray.*

Solicitor for respondent: *M. Cosgrove.*

CALBICK v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

COURT OF APPEAL

1929

Jan. 8.

CALBICK v. BRITISH COLUMBIA ELECTRIC RY. CO.

Negligence—Operation of street-car—Starting car before passenger alights —Passenger thrown to pavement sustaining injuries—Evidence of conductor and motorman that a passenger pulled bell-cord—Credibility—Finding of trial judge—Damages.

When the plaintiff was about to alight from a street-car at about 5 o'clock in the afternoon, it suddenly started without warning, and she was thrown violently to the pavement sustaining injuries. The conductor and motorman swore that the bell-cord was pulled by some unauthorized person which caused the motorman to start the car prematurely. It was found by the trial judge that, owing to the crowded condition of the car and the hour of the day, the conductor and motorman were mistaken as to the incidents occurring on the occasion, and he gave judgment for the plaintiff.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN, J.A. dissenting, and would order a new trial), that the only excuse offered for the premature starting of the car was the alleged pulling of the bell-cord by some unauthorized person. The evidence on that defence was plainly disposed of by the judge against the defendant. The Court will not interfere with this finding of fact and the appeal should be dismissed.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 22nd of June, 1928, in an action for damages for injuries sustained through the negligent operation of a street-car while she was a passenger thereon. On the 10th of February, 1928, at about 5 o'clock in the afternoon the plaintiff boarded a street-car of the defendant Company at the corner of Hastings and Seymour Streets in Vancouver and on getting off the car at the corner of Robson and Thurlow Streets the car suddenly started without warning as she was descending the steps. She was struck by the open gates and thrown forward with force upon the paved surface of the street. She struck on the left side of her head. Her chest and body were severely injured and her nervous system received a severe shock. The defence was that while the plaintiff was alighting the car was started on a regulation signal given by some person unknown to the defendant or its

COURT OF APPEAL

1929

Jan. 8.

CALBICK v. BRITISH COLUMBIA ELECTRIC RY. CO.

servants. The conductor and motorman both gave evidence to this effect but the learned trial judge found that in view of the crowded condition of the car at that time the defendant's witnesses were mistaken as to the incidents occurring on the occasion which has given rise to this action. He found there was a breach of duty on the part of the Company's servants and gave judgment for the plaintiff for $267.50 special damages and $5,000 general damages.

The appeal was argued at Vancouver on the 14th and 15th of November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant.
Sullivan, for respondent.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.: The plaintiff claims that the defendant did not safely and securely carry her on the journey on which she was injured, but carried her so negligently and unskilfully that when she was in the act of descending from the car it was so suddenly and without warning put in motion that she was violently struck by the open gates of the car and injured.

MACDONALD, C.J.A.

The defendant sets up the defence that the bell-cord must have been pulled by some unauthorized person which caused the conductor to start the car prematurely thereby causing the plaintiff's injury.

The learned judge who tried the case without a jury found for the plaintiff but it was contended on this appeal that he misdirected himself with regard to the evidence. Evidence was given that if the bell-cord were pulled down perpendicularly once it could not ring the bell at the motorman's end twice and that at the conductor's end once. Now the evidence of the motorman was that the bell rang twice at his end while that of the conductor was that it rang once only at his end. It was contended on behalf of the plaintiff that that was not likely to occur, or was impossible of occurrence. The judge however disposed of the defence by saying:

"I am rather inclined to find that in the crowded condition in which the

car was at that particular hour and on that route, namely about five o'clock p.m., that the defendant's witnesses are mistaken as to the incidents occurring on the occasion which has given rise to this action."

Now the only incident occurring was the alleged pulling of the bell-cord by some unauthorized person and the alleged fact that it rang twice at one end and once at the other. That was the only excuse which the defendant offered for the premature starting of the car and consequent injury to the plaintiff. The evidence on that defence was plainly disposed of by the judge against the defendant. While, with deference, his reasons might have been more lucidly expressed, yet when analyzed there can be no doubt as to what he meant. The appeal should therefore be dismissed.

MACDONALD, C.J.A.

MARTIN, J.A.: This appeal should, with every respect to contrary views, be allowed in my opinion because the submission of appellant's counsel has been established that the learned judge below did not apply his mind to the "pinch of the case," as Lord Macnaghten used to say, and also considered an element of negligence which was admittedly excluded by the record, as the learned judge's reasons themselves disclose. Therefore the judgment cannot, in my opinion, be supported in law, yet as the real point is a nice one, but unhappily fell into confusion and misunderstanding below the justice of the case would best be met by a new trial which I would therefore, order.

MARTIN, J.A.

GALLIHER, J.A.: I do not feel that I would be justified in setting aside the judgment below.

The appeal should be dismissed.

GALLIHER, J.A.

MCPHILLIPS, J.A.: The appeal, in my opinion, cannot succeed.

The respondent, a lady of 74 years of age, was a passenger upon an electric street-car of the appellant in the City of Vancouver and at five o'clock in the evening the car being crowded, stops at the corner of Robson and Thurlow Streets, and the respondent being preceded by her son-in-law, is in the act of descending from the car when the accident takes place; that is, the car for some reason—it can only be said to be negligently—is started up almost before the first passenger is down although as

MCPHILLIPS, J.A.

COURT OF APPEAL

1929

Jan. 8.

CALBICK v. BRITISH COLUMBIA ELECTRIC RY. CO.

well as the respondent other passengers were about to alight at that corner and other passengers awaiting to board the car.

I do not think it is necessary to canvass the evidence in detail. I would, however, refer to the following statements in the evidence of Curtis E. Drinnen, a son-in-law of the respondent who was a passenger—by occupation a train man—therefore a man of some experience in transportation:

"THE COURT: Were you on the car at the time the accident happened?

"*Sullivan*: Yes, my lord. Where did the car stop? For us to alight?

"THE COURT: Speak up, if you don't mind. Were you on the car with your mother-in-law at the time? Yes, I was.

"THE COURT: Tell us about that.

"*Sullivan*: What happened when you reached the corner of Thurlow and Robson? We signalled to get off. I stepped down to the gates, with the baby in my arms, ready for the car to stop.

"Yes? And the gates opened. I stepped off; and as I was in the act of turning round, I heard some kind of noise. I turned round quick, just in time to see my mother-in-law being thrown to the street, with the car going ahead.

"How did you signal your wish to get off? I told the conductor I wanted the next corner.

"THE COURT: And the car stopped? Yes.

MCPHILLIPS, J.A.

"For the passengers to get off? You got off? Yes, first.

"And your mother-in-law followed? Yes, right at my heels.

"I have that, Mr. *Sullivan*. . . . .

"*Sullivan*: What was the condition of the traffic at this time? The street-car traffic? You mean as to the number of passengers on the car?

"Yes. Well, the car was crowded.

"Were you seated? No.

"Could you say how many—

"THE COURT: Well, 'crowded.' I know what that means, Mr. *Sullivan*.

"*Sullivan*: For what length of time was the car stopped before it started up again? Just time enough for me to step off. A few seconds, I could not say how long.

"And you were waiting at the gate. Did you hear any signal given, of the bells? Well, now, I could not say, definitely, whether there was a bell or not; but I was in the act of turning round, and I heard a noise, and turned round sharp, just in time to see the car started. Whether it was the bell, or the car starting, I could not say."

This witness was not cross-examined.

Then we have the evidence of the daughter, who was also a passenger:

"*Sullivan*: When you were alighting, who got off the car first? Mr. Drinnen, and the baby in his arms.

"Followed by whom? Mother; my five-year-old daughter and myself bringing up the rear.

"Were there other passengers behind you? I think so. The car was crowded, and we were interested in getting ourselves off safely.

"What happened then? When the car stopped, Mr. Drinnen was at the gates to step to the pavement with the baby in his arms; mother was ready to alight next, and before mother I would say got her second foot off the step, the car—the bell rang, the car went ahead like that, the conductor closed the gates. My little daughter came against the wall, this way.

"THE COURT: You did not get off? I never had a chance. The conductor quickly closed the gates after the car had gone ahead.

"*Sullivan*: You heard the bell? Yes; one bell I heard.

"One bell? Yes, sir.

"Do you know who rang the bell? Did you see the bell being rung? I did not see the bell, I heard the bell.

"THE COURT: I have that."

This witness was not cross-examined.

It is clear that upon this evidence alone that actionable negligence was established. It can reasonably be said that the learned judge had ample evidence to find negligence.

Turning to the pleadings we see that there was a denial of negligence and the only other defence set up was that,

"the car was started . . . on a regulation signal given by some person unknown to the defendant, its servants or agents, the act of such person being wholly unauthorized by the defendant, its servants or agents."

MCPHILLIPS, J.A.

There was no evidence led by the appellant to establish any such defence and the onus was upon the appellant to do this. It is clear that upon the evidence without more, a patent case of negligence was established; that is, what could be the excuse or what could be the defence for such a careless and reckless proceeding as this was, to stop the car to admit of passengers alighting and almost immediately starting up again with passengers in the course of proceeding to alight at the very moment? Now, this was a matter that the appellant had to clear up, but failed to do, in my opinion. The appellant as a carrier of passengers is in law called upon to carry them with reasonable safety and failing that is guilty of actionable wrong and liable in damages, and that is this case. It is true the carrier is not answerable or responsible in damages where the accident was not due to its default, as for instance, where caused by inevitable accident or the wrongful acts of third persons but that must be shewn with reasonable certainty. The learned trial judge had no evidence before him upon which he could find any such defence proved,

COURT OF APPEAL

1929

Jan. 8.

CALBICK v. BRITISH COLUMBIA ELECTRIC RY. Co.

MCPHILLIPS, J.A.

it never seemed to advance beyond suggestion. It was the same at this Bar, it is profitless to advance any such contention and have no evidence upon which any such defence could be based.

I might remark, as some reference was made to it upon the argument, that the motorman would not be entitled upon the facts of this case to start up as he did in this summary manner, even if he heard the usual bell signal, he knew passengers were about to get off the car and others about to board it, and with that knowledge he was under an obligation to advise himself as to whether or not all was clear and that the passengers had got down and those waiting had boarded the car. The carrier of passengers cannot excuse itself by saying the motorman got the regulation signal and the car was justifiably started up. The motorman must use his intelligence and not be at the mercy of some automatic or other signal especially if it be possible that the signal may have been given by a mischievous or malicious person, which is the suggestion here. The carrier must be held to be under the obligation to foresee such a happening and provide against it. That which is clear beyond question in this case is this: the motorman knowing the facts, that is, the need for some appreciable stop, would appear to have without enquiry whatever, no effort to satisfy himself of the regularity of the signal, recklessly and negligently started up the car, doing so the carrier must be held to be answerable in damages. Had it been reasonably established in the present case that the proximate cause of the accident—the bell signal to the motorman to go ahead—was the mischievous or malicious act of a third person, without any fault on the part of the carrier, then the judgment below would be in error (*Rickards* v. *Lothian* (1913), A.C. 263, Lord Moulton at pp. 278-9). That is not the present case, and it is well to remember here that even with a mischievous or malicious act perpetrated, that in itself cannot be a complete defence where the car is under the control of the servants of the carrier, those servants must exercise reasonable care and advise themselves and guard against any such mischievous or malicious happening, and not doing so would constitute fault on the part of the carrier and be no defence.

I would dismiss the appeal.

COURT OF APPEAL

1929

Jan. 8.

CALBICK v. BRITISH COLUMBIA ELECTRIC RY. CO.

MACDONALD, J.A.

MACDONALD, J.A.: Respondent was awarded $5,267.70 damages for injuries received while alighting from appellant's street-car. The practice is for the conductor to ring the bell at stopping points for the motorman to stop to permit passengers to disembark and others to board the car. When ready to start he pulls twice on a cord to give two rings to the motorman as a signal to proceed. While respondent was in the act of alighting the car started, throwing her to the pavement. The conductor declared that he did not give the starting signal, while the motorman on the other hand testified that he was given two rings and started the car in response thereto. The suggestion is—and it may be true—that an unauthorized person in the car, tampered with the cord. If this is true and two bells were rung appellant is not liable. If however the unauthorized party referred to so pulled the cord that only one ring resulted and the motorman upon hearing one ring instead of two started the car, or if the fact is that notwithstanding the evidence the jury thought no starting bell was rung at all, the appellant is liable. These are the only grounds upon which liability could be based. The appellant submits that the learned trial judge did not so find and that the judgment should be set aside. Reading all the evidence I am of opinion that he was at liberty to disbelieve the evidence of the motorman that two rings were given. Did he do so? It was urged that he did not. My own view is that where there is doubt we should, to avoid speculation, ascertain by enquiry the true facts from the learned trial judge. However, he says, after referring to defective system, a question which, with deference, does not arise:

"I am rather inclined to find that in the crowded condition in which the car was at that particular hour and on that route, *viz.*, about 5 p.m., that the defendant's witnesses are mistaken as to the incidents occurring on the occasion which has given rise to this action, and that the accident happened as claimed by the plaintiff. The duty a breach of which gives rise to a cause of action in negligence is to take due care under the circumstances. I find that there was a breach of this duty by the defendant."

What were "the incidents occurring"? The decisive incident was in respect to the starting signal. That is what he refers to. That view is fortified by the further statement—"that the accident happened as claimed by the plaintiff." I take it the

COURT OF APPEAL
1929
Jan. 8.
CALBICK v. BRITISH COLUMBIA ELECTRIC RY. CO.

plainiff (respondent) advanced to the Court below the same argument presented to us, *viz.*, that the motorman's evidence should be disbelieved notwithstanding his testimony that "I got two bells." When asked on cross-examination how he remembered it, he said "Well we never start up until we get two," an answer that does not suggest an independent recollection. I think we must take this as the plaintiff's claim to which the learned trial judge referred because there is no other point in the case. We have therefore a finding of fact and I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *Viggo Laursen.*
Solicitors for respondent: *Martin & Sullivan.*

COURT OF APPEAL
1929
Jan. 8.
CANADA MORNING NEWS CO. v. THOMPSON

CANADA MORNING NEWS COMPANY LIMITED v. THOMPSON *ET AL.*

Landlord and tenant—Unincorporated body, owner—Regulations—Officers duly elected—Distress warrant issued by officers—Distraint of goods and chattels—Validity.

The members of The Chinese National League of Canada (called the League) subscribed money for the purchase of a site and the erection of a building in Vancouver for its headquarters. As the League was unincorporated the conveyance of the property was taken in the name of a company with the same name that was incorporated under the Benevolent Societies Act with headquarters at Victoria. This company had nothing to do with the purchase of the property and was in no way connected with the League. After the erection of the building the president and secretary of the League (duly elected in accordance with its regulations) leased a portion of the premises in July, 1922, to the plaintiff Company. The plaintiff paid rents to the League for some time but falling in arrears the president and secretary of the League issued a distress warrant in April, 1927, and the defendants (bailiffs) distrained the goods, chattels and fixtures of the plaintiff. In an action for illegal distraint the plaintiff recovered $500 damages.

COURT OF APPEAL.

1929

Jan. 8.

CANADA MORNING NEWS CO. *v.* THOMPSON

Held, on appeal, reversing the decision of MURPHY, J., that the League being unincorporated is no bar to authorizing its officers to make a lease. It is in the nature of a social club with regulations under which the president and secretary were regularly elected, and through its officers had possession and entire management of the property. The lease and distress warrant were executed in accordance with the existing regulations of the League as landlord and there being a landlord his title cannot be questioned by the tenant who is estopped from enquiring into his *status*.

Statement

APPEAL by defendants from the decision of MURPHY, J. of the 28th of June, 1928 (reported 40 B.C. 230), in an action for illegal distraint. The Chinese Nationalist League of Canada, an unincorporated body having upwards of 40 branches in Canada is composed of some seven or eight thousand Chinamen who subscribed money to purchase lots in Vancouver and erect a building thereon to serve as the headquarters of the League. The conveyance of the property was taken in the name of The Chinese Nationalist League which was incorporated under the Benevolent Societies Act with headquarters at Victoria. This society was entirely distinct from the unincorporated body aforesaid but some of its members afterwards joined the unincorporated body. Since the 1st of July, 1922, the plaintiff, an incorporated body, has held a portion of the said premises under a lease at a rental of $75 per month and paid rentals to the headquarters of the unincorporated League until July, 1925, but afterwards the rent payable became in arrears and on the 26th of April, 1927, the arrears amounted to $1,494.30. The president and secretary of the unincorporated body then executed a distress warrant under which a seizure of the plaintiff's premises was made by the defendants, Thompson and Binnington. It was held on the trial that distress can only be justified when the relationship of landlord and tenant exists, that here the warrant was signed by the president and secretary of an unincorporated body unrecognized by law and consequently unable to enter into such a contract as a lease, that the property is in the name of an incorporated body in Victoria that has no connection with the unincorporated body whatever and the unincorporated body is not entitled to the reversion which is an essential requisite to the levying of a lawful distress.

COURT OF APPEAL

1929

Jan. 8.

CANADA MORNING NEWS CO. v. THOMPSON

The appeal was argued at Vancouver on the 13th and 14th of November, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Griffin, K.C. (*Brougham,* with him), for appellants: A tenant cannot dispute a landlord's title. The unincorporated body in Vancouver bought this property and constructed a building upon it, but not being incorporated the property was registered in the name of an incorporated body in Victoria that had the same name. In such a case there is presumed to be a resulting trust in favour of those who paid for the property: see Lewin on Trusts, 13th Ed., 178. The building was completed in 1921, and the officers of the unincorporated company leased a portion of the premises to the plaintiff. The Chinese constitution of the League never applied to Canada. We say the plaintiff is estopped from denying our title under which he holds possession: see *Monroe* v. *Lord Kerry* (1710), 1 Bro. P.C. 67; *Palmer* v. *Ekins* (1728), 2 Raym. (Ld.) 1550; *Cooke* v. *Loxley* (1792), 5 Term Rep. 4; *Doe dem. Prichitt* v. *Mitchell* (1819), 1 Br. & B. 11; *Doe dem. Jackson* v. *Wilkinson* (1824), 3 B. & C. 413; *Dancer* v. *Hastings* (1826), 4 Bing. 2; *Fleming* v. *Gooding* (1834), 10 Bing. 549; *Gouldsworth* v. *Knights* (1843), 11 M. & W. 337; *The King* (*Walsh*) v. *Swifte* (1913), 2 I.R. 113; *Parker* v. *Manning* (1798), 7 Term Rep. 537. An equitable owner may by leave of the legal owner distrain for rent: see *Trevillian* v. *Pine* (1707), 11 Mod. 112; *Vallance* v. *Savage* (1831), 7 Bing. 595; *Trent* v. *Hunt* (1853), 9 Ex. 14; *Cook* v. *Whellock* (1890), 24 Q.B.D. 658 at p. 661; *Hessey* v. *Quinn* (1909), 18 O.L.R. 487. A ratification before trial is sufficient: see *Grant* v. *United Kingdom Switchback Railways Company* (1888), 40 Ch. D. 135; *White* v. *Nelles* (1885), 11 S.C.R. 587. On seizure there was no interference with the business and we were there a month.

Locke, for respondent: An unincorporated club is not a legal entity and cannot be a party to a contract: see Halsbury's Laws of England, Vol. 4, p. 426, sec. 914; p. 406, sec. 862; p. 420, sec. 903. The warrant was made on behalf of the league and not the individuals: see *Trudeau* v. *Pepin* (1904), 3 O.W.R.

779; *Jarrott* v. *Ackerley* (1915), 85 L.J., Ch. 135; *Harington* v. *Sendall* (1903), 1 Ch. 921; Taylor on Evidence, 11th Ed., Vol. I., pp. 165 and 168; Bowstead on Agency, 7th Ed., 49; Chitty on Contracts, 17th Ed., 292.

Griffin, in reply, referred to *Dolby* v. *Iles* (1840), 11 A. & E. 335; Angel and Ames on Corporations, 10th Ed., 285-6; *Harris* v. *Jays* (1599), 1 Cro. Eliz. 699; *Roe* v. *Pierce* (1809), 2 Camp. 96; *Doe d. Canal Co.* v. *Bold* (1847), 11 Q.B. 127; *Dimock* v. *The Marine Assurance Company* (1849), 6 N.B.R. 398.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.: The action was brought for illegal distraint, and judgment was entered for the plaintiff for $500. From this the defendants appeal.

MACDONALD, C.J.A.

The dispute arose out of the affairs of the Chinese Nationalist League of Canada, an unincorporated body with upwards of 40 branches in different parts of Canada. This body, which I shall hereinafter call the League, embraces some seven or eight thousand Chinamen who subscribed money with which to purchase land in Vancouver and to erect a building thereon to serve as the headquarters of the League. They took a conveyance of the property in the name of a body known as The Chinese Nationalist League, theretofore incorporated under the Benevolent Societies Act, with headquarters at Victoria. This was a local body and many of its members afterwards became members of the unincorporated body, which had similar objects. Thereafter the business of the League was carried on in this building at Vancouver.

The respondent is an incorporated company publishing a Chinese newspaper, and occupies part of the said building, under a lease to which I shall presently refer. It admits that rent was owing to the League at the time of the distraint complained of. The alleged objection to pay these arrears of rent was that the officers of the League were not properly elected; it says that the election should have taken place under what it calls the "new Constitution," which has not been shewn to have any existence,

COURT OF APPEAL

1929

Jan. 8.

CANADA MORNING NEWS CO. v. THOMPSON

at least in Canada. The lease referred to was executed by the president and the secretary of the League. The respondent was then in possession of the premises, but thereafter paid rent to the League. The rent having fallen in arrear, the then president and secretary of the League, the successors of those who signed the lease, executed a distress warrant under which a seizure was made, which gave rise to this action.

It was contended by appellant that the lessor was in reality the incorporated body above mentioned and that although made without their authority yet it having been thereafter ratified, the ratification referred back to the inception of the lease and validated the tenancy and the proceedings taken for the collection of the rent, which were also ratified.

I think it is clear from the evidence that the lease was made by the League acting by its president and secretary, and that the learned trial judge was right in saying that the Victoria society had nothing to do with it. It is clear to my mind that it was intended to be the lease of the League not of the incorporated body at Victoria, and therefore was incapable of ratification by the latter.

MACDONALD, C.J.A.

This conclusion however, does not dispose of the case. There is another and alternative view. The League is of the character of a social club, having regulations under which the president and secretary hold their offices. The respondent's objection that the president and the secretary, who represented the members of the League, were not legally elected has not been sustained. It does not deny the legality of the regulations and does not assert any fault except that those regulations had been superseded by what it calls the "new Constitution."

There is no suggestion that the election had not taken place in strict accordance with the said regulations, and no evidence was offered to shew that these regulations had been superseded. Therefore both the lease and the distress warrant were executed in accordance with the existing regulations of the League.

The learned judge appears to have thought that because the League was unincorporated it could not authorize its officers to make a lease; that there was in reality no landlord, but in this I think he was in error. The League through its officers had

COURT OF APPEAL

1929

Jan. 8.

CANADA MORNING NEWS CO. v. THOMPSON

possession and enjoyment of the property and the entire management of the same. Once it is held therefore that there was a landlord, not a fiction, his title could not be questioned by the tenant, the tenant was estopped from enquiring into his *status*. This is well illustrated by the case of *Rennie* v. *Robinson* (1823), 1 Bing. 147.

The appeal should be allowed and the action dismissed with costs.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I have had the advantage of reading and considering the reasons for judgment of my brother the Chief Justice, with which I agree. I have little to add other than to refer to the salient facts when considering the principle of law which decides this appeal. The well-known principle of estoppel as between landlord and tenant was considered and elaborately dealt with by that eminent judge Chief Baron Kelly, in the Exchequer Chamber in *Morton* v. *Woods* (1869), 38 L.J., Q.B. 81, and I will later quote from the judgment reasoning which in my opinion, upon the facts of this case, is exceedingly apposite and meets the argument of the learned counsel for the respondent as advanced at this Bar, and the case there was one to recover damages for an alleged illegal distress, which is the present case.

The lease was made by the same party that made the distress, *i.e.,* The Chinese Nationalist League and the respondent attorned to the lessor and was in possession of the premises under the lease and was in arrears for rent, hence the distress took place; that the president and secretary of the League were not the same at the time of distress is not at all material, the evidence well substantiates they were the proper officers of the League at the time of the distress, exercising the duties of their office, the ostensible officers of the League carrying on its affairs and held out as such to the world.

The learned trial judge made a finding of fact upon this, *viz.*:

"I find, as a fact, that the distress warrant was signed and delivered by the defendants Low Yee Quan and Wai Hon on behalf of The Chinese

COURT OF APPEAL

1929

Jan. 8.

CANADA MORNING NEWS CO. v. THOMPSON

> Nationalist Society of Canada, whom they believed to be landlord. The plaintiffs in writing seem to have been under the same impression."

This is in accordance with the facts and remained the case throughout all the material time necessary to be considered in this case.

The League functioned through and by its duly-accredited officers and agents and the tenant cannot in law raise any effective exception to the *status* of the League and its accredited officers. It is a principle of general application that the tenant is estopped from disputing the title of his landlord and here, the League was admittedly the landlord, that is common ground, and possession of the premises was obtained from the League and possession was held and enjoyed under the League by the respondent as tenant from the League. Also, with great respect to the learned trial judge, no question of the reversion arises here; there has been no parting with title, the original landlord distrains upon the tenant holding under that original landlord and it is not open upon the facts of this case for the tenant to attack the title of the landlord.

MCPHILLIPS, J.A.

> "A tenant shall not contest his landlord's title; on the contrary, it is his duty to defend it. If he objects to such title, let him go out of possession":

Doe dem. Manton v. *Austin* (1832), 9 Bing. 41, *per* Tindal, C.J. at p. 45.

The present case is not one of it being established that at the time of the distress the landlord had no reversion in the premises.

I will now refer to the language of Chief Baron Kelly in *Morton* v. *Woods, supra,* which language, in my opinion, effectively meets all the arguments advanced at this Bar in support of the judgment under appeal, and is complete authority for the allowance of this appeal, even if the lease was ineffective in law, the tenancy would be one at will and the distress lawful. Kelly, C.B. said:

> "The question to be decided in this case is, whether the distress can be supported. It has been contended, on the part of the plaintiffs, that the defendants were not entitled by law to distrain, inasmuch as they were not seised of the legal estate, and the relation of landlord and tenant, out of which the right of distress must have arisen, was never created between the

parties; and that proposition is sought to be supported on two grounds, first, that it appears from the instrument itself that if there be any tenancy at all, it is a tenancy for ten years, a lease for ten years; and secondly, that the lease not being under seal, the mortgage-deed not being executed by the defendants, there is no such tenancy. It is said further, that the power of re-entry, which follows upon the attornment, does not convert the supposed or intended lease for ten years into a lease or tenancy at will, and, consequently, that there is, in effect, no tenancy and so no right of distress. Although these are objections of a highly technical nature, we are bound to give effect to them if they are sustained by law, and the more so, as they have been supported by a very learned argument, in which all the authorities, ancient and modern, bearing on the question have been fully brought before us, on the part of the learned counsel for the plaintiffs. And, first, as to the objection that, the defendants not having the legal estate in them, they could have no right of distress. It is perfectly clear that they had not the legal estate, but then that may be said of all lessors where there is a lease, or a tenancy by way of estoppel, who have no title at all. Here the defendants had an equitable estate; they certainly had no legal estate. As that, standing alone would have no effect, this being a lease or tenancy by way of estoppel, it becomes of primary importance in the present case, because it is contended that this being a tenancy by way of estoppel, and only available to the defendants by the law of estoppel, such law is inapplicable where the truth against which the estoppel is to operate appears on the face of the instrument itself. It may be taken that it appears on this mortgage of September, 1866, that the defendants were not seised of the legal estate, but that the legal estate was outstanding in the first mortgagee, Horn. Now, in support of this proposition, a number of cases have been cited, but when we look with attention to the facts of those cases, and to the *ratio decidendi* in one and all of them, we find that none are directly in point. They are cases either of actions upon covenant where, unless the covenantor can under the terms of the instrument enforce the covenant by action at law, it is clear no such action is maintainable; or where an action of ejectment having been brought on a clause of re-entry, it was perfectly clear that in order to maintain the action there must be the legal estate or title in the plaintiff, and it appeared on the face of the instrument and the evidence in the case, that the plaintiff in ejectment had not the legal estate, but that it was outstanding in another person, and the action was held not to be maintainable. But even if any of the *dicta* to be found in one or more of the numerous authorities referred to by Mr. Williams, were to lead to the conclusion that where the truth against which the estoppel is directed appears upon the face of the deed, no estoppel arises, that doctrine must be taken to have been overruled in the case of *Jolly* v. *Arbuthnot* [(1859)], 4 De G. & J. 224; S.C. 28 L.J., Ch. 547, and that by the Lord Chancellor sitting on appeal, by a Court of co-ordinate jurisdiction with that before which this case is now being decided. Even, therefore, if we were to find that which is binding on us by authority for the proposition contended for by the learned counsel, we should be bound to defer to the higher authority of the Lord Chancellor in *Jolly* v. *Arbuthnot*, which was an appeal from a decision of the Master of the Rolls,

MCPHILLIPS, J.A.

COURT OF APPEAL

1929

Jan. 8.

CANADA MORNING NEWS CO. *v.* THOMPSON

MCPHILLIPS, J.A.

and which is therefore binding even upon the Court of Exchequer Chamber. Now, when we look to that case we find that there was a mortgage, and an agreement between the parties, by way of attornment, or a sufficient clause in itself to constitute a tenancy, that the tenancy should subsist, not between the mortgagor and mortgagee, but between the mortgagor and a receiver, who is named in the instrument appointed by the Court of Chancery. It is perfectly manifest that the receiver having been so appointed, he had no interest whatever in the premises, either legal or equitable. It appears from the instrument itself that there was no legal estate in him; he claimed the power of distress by virtue of a tenancy of this nature, and in his character of receiver, and the absence in him of any interest whatever likewise appeared on the face of the deed. The Master of the Rolls certainly took a view of the case in accordance with that contended for here by the plaintiffs. That case was very elaborately argued, and Lord Chelmsford, as Lord Chancellor, reversed the decision of the Master of the Rolls, and there being there a tenancy by way of attornment, or by reason of a clause sufficient in itself to constitute as between the mortgagor and mortgagee a lease or tenancy at will, or for years, he held that though it appeared on the face of the same instrument which contained the clause creating the tenancy that it was a tenancy between the mortgagor and the receiver, and that the receiver had no interest legal or otherwise in the premises, that did not do away with the tenancy or right of distress, which arose by implication of law from the relation of landlord and tenant, thus created between the mortgagor and the receiver. And his Lordship, after stating that it was contended that the clause as to the receiver had no operation by estoppel, said, 'It appears to me that the circumstance of the truth of the case appearing upon the deed is a reason why the agreement of the parties, which it embodies, should be carried out, either by giving effect to their intention in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts, which they have authorized to be done.' Then his Lordship refers to the cases of *Cornish* v. *Searell* [(1828)], 8 B. & C. 471 and *Dancer* v. *Hastings* [(1826)], 12 Moore, C.P. 34; S.C. 5 L.J., C.P. 3, as supporting the conclusion at which he had arrived. There is a distinction between *Jolly* v. *Arbuthnot* and the case now before us; there the mortgagor and mortgagee, as well as the receiver, were parties to the transaction and to the creation of the tenancy to which the distress was incidental, while it appears in the present case that there was a first mortgagee, who is not a party to this transaction or to the instrument in question. That is relied on by Mr. Williams, but when we consider the causes of the law and the true reason of the law which led to the creation of the doctrine in question, it will appear manifestly that the creation of the tenancy and the arising of an estoppel out of a tenancy thus created, is the sole cause of the legal estate being superfluous and unnecessary, and that it is the relation of landlord and tenant, subsisting between the parties to the instrument, which creates the tenancy in question, and not the consent of any third party, not a party to the instrument. Therefore the two cases may be said to be identical. If we had any doubt, which we have not, on the question, we should feel ourselves bound to defer to this authority. Under these circumstances, although the

defendants have not the legal estate in the lands in question, although that fact appears by reference at least to the instrument now before us, we think that does not disentitle the defendants to the distress in question, and does not at all affect the relation of landlord and tenant, or the incidents of that relation created by and arising out of the terms of the instrument."

I cannot persuade myself, indeed, I am convinced to the contrary, that the judgment of the Court below should be supported, therefore, with great respect to the learned trial judge, my opinion is, that the appeal should be allowed.

MACDONALD, J.A.

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

Appeal allowed.

Solicitor for appellants: *W. F. Brougham.*
Solicitors for respondent: *J. A. Russell, Nicholson & Co.*

REX v. CHIN CHONG, *ALIAS* JEANNE.

Criminal law—Appeal from summary conviction—Notice of appeal given to wrong Court—Second notice of appeal to proper Court—Government Liquor Act—Affidavit of merits—Sworn before notary public—R.S.B.C. 1924, Cap. 245, Secs. 77, 78 and 99.

Where an appeal is taken under the Summary Convictions Act of British Columbia, and the notice of appeal is given to the wrong Court, this does not prevent the giving of a second notice of appeal to the proper Court within the time fixed by statute.

Where an appeal is taken from a conviction for keeping liquor for sale contrary to the Government Liquor Act, the affidavit of merits required by section 99 of that Act must be sworn before a "justice," a notary public will not do, even where the notary is also a justice of the peace though having taken the affidavit in his capacity as a notary public.

Statement

ACCUSED was convicted on November 17th, 1928, at Hazelton, B.C., for a second offence of keeping liquor for sale, contrary to the provisions of the Government Liquor Act, R.S.B.C. 1924, Cap. 146 and amendments. He appealed to the County Court of Prince Rupert at the sittings to be held in the City of

ROBERTSON, CO. J.

1929

Jan. 17.

REX v. CHIN CHONG

Statement

Prince Rupert. Later, but still within the time limited for appealing, he filed and served a second notice of appeal to the sittings to be held at Smithers, which was the nearest sittings.

The first notice of appeal was dismissed by His Honour Judge Young at Prince Rupert on the ground that there was no jurisdiction to hear the appeal in that Court. The second notice of appeal then came on for hearing at Smithers on January 17th, 1929, before His Honour Judge Robertson, acting for His Honour Judge Young. The affidavit of merits on this appeal, required by section 99 of the Government Liquor Act, had been sworn before Wm. Grant, a notary public residing at Hazelton, B.C.

Gonzales, for appellant.

Argument

L. S. McGill, for the Crown, took the preliminary objections (1) Having taken one appeal the appellant was not in a position to take a second one. This is contrary to the true interpretation of the provisions of the Summary Convictions Act, R.S.B.C. 1924, Cap. 245, in respect to appeals from summary convictions. Therefore this appeal, being the second one from the same conviction, cannot be heard. (2) The affidavit of merits is not sworn before a justice as required by section 99 of the Government Liquor Act, Cap. 146, R.S.B.C. 1924, but before a notary public. Therefore the appeal cannot be entered. [He cited *Rex* v. *Lai Cow* (1921), 30 B.C. 277; *Laitnen* v. *Tynjala* (1909), 14 B.C. 246; *Rex* v. *McLeod* (1901), 6 Can. C.C. 23; *Kavanagh* v. *McIlmoyle, ib.* 88; Crankshaw's Criminal Code, 5th Ed., notes at p. 902.]

Gonzales: The first notice of appeal being a nullity there was nothing to prevent giving a second notice of appeal to the proper Court, just as was done in this case. [He cited *Rex* v. *Deer* (1919), 1 W.W.R. 410; *Fanchaux* v. *Georgett* (1915), 9 W.W.R. 458; *Johnston* v. *O'Reilly* (1906), 12 Can. C.C. 218; *Rex* v. *Gainor* (1919), 1 W.W.R. 801; *Gallagher* v. *Vennesland* (1917), 1 W.W.R. 860; Tremeear's Criminal Code, 1919, notes at p. 1034.] On the second point, as to the affidavit of merits, the British Columbia Evidence Act gives authority to notaries public to take any affidavit for use in this and other

Courts. In any event, the notary public William Grant, who took the affidavit, is also a justice of the peace.

McGill, in reply: The Grant in question was a justice of the peace as well as a notary public, but in this instance he was acting as a notary public and not in his capacity as a justice of the peace. The provisions of section 99 of the Government Liquor Act are those which apply to this particular affidavit and the Evidence Act does not override them.

Judgment

ROBERTSON, Co. J.: I cannot sustain the first objection. The giving of notice of appeal to Prince Rupert was a nullity and the judge had no jurisdiction to deal with anything but the matter of costs. That being so, it is no bar to filing a second notice of appeal to the proper Court.

The affidavit of merits does not comply with section 99 of the Government Liquor Act which requires that it be sworn before a "justice." Mr. Grant, though admitted by counsel for the Crown to be a justice, took this affidavit as a notary public, as shewn by the affidavit itself. For this there is no authority. The evidence Act does not overrule the particular statutory provision applicable here.

In view of my decision on the foregoing, it is not necessary to deal with the other objections raised.

The appeal is dismissed with costs, and conviction confirmed. Costs to the Crown fixed at $60.

Appeal dismissed.

COURT OF APPEAL

1929

Feb. 1.

REX v. RUMP

REX v. RUMP.

Criminal law—Attempt to have carnal knowledge of girl under 14 years—What acts necessary to constitute an "attempt"—Evidence for jury—Sentence—Reduction of—Evidence of girl not being married to accused—Sufficiency of.

The accused was charged with unlawfully attempting to have carnal knowledge of a girl under the age of fourteen years. The evidence disclosed that the accused, who was a stranger to a girl of eleven years who lived with her parents and two sisters (fourteen and nine years respectively) in a house across the Thompson River from Kamloops, approached the house before the noon hour and from outside the fence spoke to the girl who was on the porch with her younger sister. After speaking about a doll the younger sister had he asked her if she liked candy. On her replying "yes" he said "I will have to buy you some." He then went across the bridge to the town. At about 4 o'clock in the afternoon the girl and her two sisters went to town on an errand for their mother when they met the accused who went into a store and bought candies which he gave them. He then asked the girl to "walk home to your place with me" to which she replied, "no, I have to go with my sisters." He then left them and they went home. The girl and her sister then went on the porch for their dolls when accused again came to the fence and said "I did not bring very many candies." He then gave them some candies and the smaller sister went away. The accused then beckoned to the girl and said "I will give you two bucks if you will come down to the bushes with me," to which the girl replied, "no, my mother would not allow me to." The girl then went to her mother to whom she told what had happened and the mother then went to the porch and told him to go away. He then used indecent language to the mother who told him she would call for the police. The evidence disclosed that during the afternoon the accused was in an intoxicated condition. The jury found the accused guilty and he was sentenced to two years' imprisonment and fifteen lashes.

Held, on appeal, affirming the decision of MCDONALD, J. but reducing the sentence (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the evidence disclosed a persistent intention by repeated overt acts by means of verbal and gestural invitation, by gifts and by promises of money to try to persuade the child to succumb to the carnal desires of the appellant, and the fact that she did not do so does not alter the legal consequences of his sustained endeavour to accomplish his object, but considering the circumstances the sentence should be reduced to one year's imprisonment only.

To the objection raised that there was no evidence to shew that the girl was not the wife of the accused:—

COURT OF APPEAL

1929

Feb. 1.

REX v. RUMP

Held, that proof of a fact of this kind need not be direct but may reasonably be inferred from all the evidence and here the fact that the child had never seen the appellant before that day was sufficient to support the ruling of the learned judge below.

Statement

APPEAL by accused from the decision of McDONALD, J. of the 9th of November, 1928, and the verdict of a jury on a charge of unlawfully attempting to have carnal knowledge of a girl under the age of fourteen years. The facts are set out fully in the reasons for judgment. Accused was sentenced to two years' imprisonment, and fifteen lashes.

The appeal was argued at Victoria on the 8th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Maclean, K.C., for appellant: This man spoke to the girl when on the opposite side of a fence from her, proposing that she go into the woods with him, and he made gestures to her but this is all that happened. He never touched her and was never near enough to do so. There was no "attempt" on his part whatever: see *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491; *Rex* v. *Linneker* (1906), 2 K.B. 99; *Rex* v. *Robinson* (1915), 2 K.B. 342; *Rex* v. *Snyder* (1915), 34 O.L.R. 318 at p. 326; *Reg.* v. *Tyrell* (1893), 17 Cox, C.C. 716. In any case the sentence is too severe. He was in a drunken state at the time: see *Rex* v. *Meade* (1909), 1 K.B. 895; *Rex* v. *Finlay* (1924), 3 W.W.R. 427; *Rex* v. *Hicks* (1925), 1 W.W.R. 1155; *Rex* v. *Wilde and Jukes alias West* (1914), 11 Cr. App. R. 34; *Rex* v. *Zimmerman* (1925), 37 B.C. 277. There is no evidence to shew the girl was not accused's wife.

Bullock-Webster, for the Crown: The girl says she never saw the accused before. This is sufficient to justify the inference that they were not married. That the evidence discloses an "attempt" to commit the offence charged see "Annotation" 25 D.L.R. 8; *Rex* v. *Delip Singh* (1918), 26 B.C. 390.

Maclean, replied.

Cur. adv. vult.

On the 1st of February, 1929, the judgment of the Court was delivered by

COURT OF APPEAL

1929

Feb. 1.

Rex v. Rump

Martin, J.A.: This is an appeal from the conviction of the appellant at the Kamloops Fall Assizes, 1928, *coram* Mr. Justice D. A. McDonald, upon the following indictment preferred under section 302 of the Criminal Code:

"The Jurors of our Lord the King present that at the East Bridge near Kamloops, in the County and Province aforesaid, on the twenty-ninth day of September, in the year of our Lord one thousand nine hundred and twenty-eight, Charlie Rump unlawfully did attempt to have carnal knowledge of Letty Price, a girl under the age of fourteen years, not being his wife, against the form of the statute in such case made and provided, and against the peace of our Lord the King his Crown and Dignity."

The learned judge sentenced the convict to two years' imprisonment and to be whipped, with fifteen lashes, as provided by said section, *viz.*:

"302. Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped."

The learned judge gave a certificate under section 1013 that the case was a fit one for appeal, and leave to appeal against the sentence was later granted under subsection (2) of that section.

Judgment

The facts are not in dispute, since the defence adduced no evidence, and in essentials are that the appellant, who was a stranger to the young girl, aged eleven years, and her family, before noon on the 29th of September, 1928, spoke to her and her younger sister, then on the front porch of their home, from outside the "wire" (fence) about the doll the younger sister had, and after asking her if she liked candy and getting an affirmative reply said "well, I will have to buy you some," and then went over to the town of Kamloops at the other (south) end of the Red Bridge across the Thompson River, the children's home being near the north end thereof, about 150-200 yards therefrom. Later in the afternoon, about four o'clock, Letty Price with her two sisters, aged nine and fourteen years respectively, went to Kamloops on an errand for their mother crossing the river by a boat and the appellant again spoke to her on the street and went into a store to buy some candy for them and gave it to them ("chocolate bars"), and thereafter he asked Letty to "walk home to your place with me," but she said "No, I have to go with my little sisters," upon which he went away and the children returned home, and a little later Letty and one of her

sisters went out on the porch to get their dolls when the appellant again and for the third time came and spoke to her as she thus describes:

"He says, 'I did not bring very many candies.' And he ate a few and gave us some. They were jelly beans, and then my other sister went away and I was getting the dolly ready and he went like this to me [beckoning to come to him] and I stepped back about two feet.

"THE COURT: Where was he then, outside the fence? Yes, outside the fence.

"And you were on the verandah? Yes.

"With your two little sisters? My little sister went away and then he—

"Do not worry now. You do not need to worry. You can think of it all right. He said, 'I will give you two bucks, two dollars, if you will come down the bushes with me.'

"Where was he then? Outside the fence.

"And you were on the verandah? Yes.

"Did he say two bucks or two dollars? He said two bucks first and then he said two dollars.

"*Macintyre*: Pardon me, I would like the stenographer to read the last two or three questions.

[Stenographer reads].

"*Fulton*: What did you say? I said, 'No, my mother would not allow me to,' and I walked back towards my mother and she asked me a question and I answered her.

Judgment

"Where was he? He was outside the fence.

"How far was your mother away? About sixteen feet, she was down on the back porch and we was on the front porch.

"She was on the back porch, was she? Yes, but she could see me.

"Could she see him? Yes."

The fence spoken of was only four feet from the front porch and when the mother saw from the back kitchen porch, the strange man just outside the fence at the gate speaking to her daughter and observed that on her coming to her she was "very much flushed," she at once acted as she thus describes:

"Well, I then walked out on to the verandah where he stood; just inside the fence; where he stood he was just outside the fence, and I walked up to the fence on the inside and told him to get down in the bushes where he belonged, and he just took about two steps between the fence and stood and put his head like that and he said, 'I was not talking to you.' I said, No, but you were talking to my little girl and trying to coax her down in the bushes and you had better get out of here and down in the bushes where you belong or I will call the police,' and he took about two more steps and turned and started using this abusive language.' "

The language is of so grossly indecent sexual nature as to be unprintable, and after hearing it, the mother continues:

COURT OF APPEAL

1929

Feb. 1.

REX v. RUMP

"I then turned and said, 'I am going to call the police' and I turned and went into the house to 'phone the police.

"Did he say anything more? Yes, after I had come from the 'phone.

"After you came from the 'phone? When I turned and started for the house he started on down to the bush in the direction of the railroad bridge and when I had come from the 'phone he was gone out of sight. . . ."

Judgment

A visiting friend, Mrs. Coucette, confirms in substance Mrs. Price's evidence and was so much frightened by the occurrence that she asked Mrs. Price to let two of her girls accompany her half way across the bridge on her way home, and they did so but before they had gone far from the home the same man came out of the bushes and followed after them shouting out vile language until near the bridge when an Indian on horseback came up and engaged him in conversation, whereupon Mrs. Price who was watching her daughters and friend from a window went to telephone the police again, but at that moment they arrived and arrested the appellant, at about a quarter to six, within 30 feet from Mrs. Price's house. The Indian testifies that he had seen this strange man "half running behind them and shouting at them" abusively, and as they seemed "kind of scared" he went to see what was the matter and upon coming up with the man (whom he had never seen before, though the Indian was born on the reservation hard by) he found he had a knife in his hand and talked to him till "I seen the ladies were going far enough ahead, so I rode away."

Upon the close of the Crown's case the defendant's counsel moved for the dismissal of the charge on the ground that the facts proved amounted in law to "only preparation for the commission of that offence" (section 72, Criminal Code) and not an "attempt to commit it," but the learned judge refused the motion and left the case to the jury on the facts after ruling that in law those facts if established would constitute an attempt and that it would be open to them to find the accused guilty if they believed beyond any reasonable doubt the testimony of the witnesses against him, and they returned a verdict of guilty as hereinbefore recited. Said section 72 is as follows:

"Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

"2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

This section, which is 64 in the original Criminal Code of 1892, is of much importance because it settled the law for Canada upon some aspects of the matter which were still, to some degree at least, doubtful in England, and the words "whether under the circumstances it was possible to commit such offence or not" are of particular consequence, and also the abolition, by original section 535, of the distinction between felony and misdemeanour. The state of the law in Canada shortly before the enactment of the Code is well set out by Mr. Justice Burbidge in his Digest of the Criminal Law of Canada, 1890, pp. 51-3, and earlier in 1888 by Mr. Justice Taschereau in his Criminal Statute Law of Canada, 2nd Ed., pp. 854-62 which excellent work has the additional benefit of many notes by C. S. Greaves, K.C. (see preface), the eminent counsel who prepared the Criminal Law Consolidation and Amendment Acts and then editor of "the latest and most authoritative text-book on Crimes" (Russell) as Mr. Justice, afterwards Lord O'Hagan describes him and his work in *Reg.* v. *Fanning* (1865), 17 Ir. C.L.R. 289, 305. The current edition of that work (8th, 1923) thus summarizes the law in England, Vol. I., p. 148:

Judgment

"The question in each case is whether the acts relied on constituting the attempt were done with intent to commit the complete offence, and as one or more of a series of acts or omissions directly forming some of the necessary steps towards completing that offence, but falling short of completion by the intervention of causes outside the volition of the accused, or because the offender of his own free will desisted from completion of his criminal purpose for some reason other than mere change of mind."

As to change of mind, as early as 1872 in Canada it had been unanimously decided by the Ontario Court of Common Pleas (Hagarty, C.J., Gwynne, and Galt, JJ.) in *Reg.* v. *Goodman,* 22 U.C.C.P. 338, that an attempt to commit arson had been established when a person had poured oil upon and put oiled sacks against a door and stooped down to apply a burning match to the oil but the match went out when within an inch or two of it whereupon the person made no further attempt and went away. The Court based its decision upon *Reg.* v. *Taylor* (1859), 1 F. & F. 511, and *Reg.* v. *Cheeseman* (1862), L. & C.

COURT OF APPEAL

1929

Feb. 1.

REX *v.* RUMP

145; 31 L.J., M.C. 89, Chief Justice Hagarty saying, pp. 339-40, *per curium*:

"The fact of Waters going away, or ceasing further action after the match went out (not by any act or will of his), seems to put the matter just as if he had been interrupted, or was seized by a peace officer at the moment.

"It seems to me the attempt was complete, as an attempt, at that moment, and no change of mind or intention, on prisoner's part, can alter its character.

"I see no objection to the charge. There was no doubt the combustible matter was so arranged that if the flame were communicated to it, the building would have caught fire, and the full crime of arson been complete. It would be a reproach to the law if such acts as were here proved do not constitute an overt act towards the commission of arson."

The oft-cited distinction well and succinctly drawn by Blackburn, J. in *Cheeseman's* case, *supra,* is as follows, L. & C. p. 145:

"There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime. Then, applying that principle to this case, it is clear that the transaction which would have ended in the crime of larceny had commenced here."

Judgment

And in the leading case of *Reg. v. Eagleton* (1855), Dears. C.C. 515, Baron Parke in delivering the unanimous judgment of the nine judges in a Crown Case Reserved said, p. 538:

"The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are."

This statement was accepted "as a safe guide" by the English Court of Criminal Appeal in *Rex* v. *Robinson* (1915), 2 K.B. 342, 348; 84 L.J., K.B. 1149, but as the Court observed, "the difficulty lies in the application of that principle to the facts of the particular case" which in *Robinson's* case were found to be (p. 349):

"in truth . . . preparation for the commission of a crime, not a step in the commission of it. It consisted in the preparation of evidence which might indirectly induce the underwriters to pay. . . . No communication of any kind of the false pretence was made to them [underwriters]."

Before our Criminal Code the Supreme Court of Canada in *John* v. *The Queen* (1888), 15 S.C.R. 384, 387, a rape case, adopted Mr. Justice Stephen's definition (Stephen's Dig. Cr. Law, 4 Ed., pp. 38 and 49) of attempt to commit a crime as

"an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

And the Ontario Court of Appeal also adopted it in the peculiar case of *Rex* v. *Snyder* (1915), 25 D.L.R. 1, 4 ("a sham, arranged by the military authorities," p. 8) following the English Court of Criminal Appeal in *Rex* v. *Linneker* (1906), 2 K.B. 99, 102, in which case it is to be also noted that Lord Alverstone, C.J. said:

"The question which we have to determine is whether there was in this case any evidence of such an attempt, for if there was any evidence the conviction must be affirmed."

In *Rex* v. *White* (1910), 2 K.B. 124, the same Court held, p. 130, that

"The completion or attempted completion of one of a series of acts intended by a man to result in killing is an attempt to murder even although this completed act would not, unless followed by the other acts, result in killing. It might be the beginning of the attempt, but would none the less be an attempt."

The case of *Reg.* v. *Button* (1900), 69 L.J., Q.B. 901, false pretences, illustrates what facts are not too remote to constitute attempts and *Horton* v. *Mead* (1913), 1 K.B. 154 shews the importance that may be attached to mere gestures in solicitation even though ineffective, and Mr. Justice Pickford concludes—p. 159:

Judgment

"Under this Act there was evidence upon which the magistrate and the quarter sessions could convict the appellant, and, that being so, it is no part of our duty to inquire whether or not the conviction was right."

It is to be remembered that children of the statutory age under section 302 and section 294 are not accomplices, *Rex* v. *Crocker* (1922), 27 Cox, C.C. 325, and that therefore corroboration is not essential, and their consent to the offence is immaterial and "altogether unimportant"—*Reg.* v. *Beale* (1865), L.R. 1 C.C. 10; *Reg.* v. *Ryland* (1868), 11 Cox, C.C. 101 and *Reg.* v. *Connolly* (1867), 26 U.C.Q.B. 317. In *Rex* v. *Crocker* the Court said, p. 326:

"If therefore, it is within the province of a jury to convict on the uncorroborated evidence of an accomplice. how much more so is it within their province to convict here? The jury had the opportunity of seeing and hearing the witnesses, and there are persons—especially young persons—who somehow are able to convey the fact that the story they tell is true, and here, in spite of the learned judge's warnings, the jury came to the conclu-

COURT OF APPEAL

1929

Feb. 1.

REX v. RUMP

sion the girl's story was true. The Court considers it would be a new departure if it allowed this appeal, as it cannot usurp the functions of the jury."

In another case of obtaining money by false pretences, *Reg.* v. *Hensler* (1870), 11 Cox, C.C. 570, by means of a begging letter, the Court of Criminal Appeal said (p. 573):

"This is an attempt by the prisoner to obtain money by false pretences which might have been so obtained. The money was not so obtained because the prosecutor remembered something which had been told him previously. In my opinion, as soon as ever the letter was put into the post the offence was committed."

And in the course of the hearing Blackburn, J. aptly said:

"You may attempt to steal from a man who is too strong to permit you."

In *Rex* v. *Menary* (1911), 18 O.W.R. 379, in upholding a conviction for an attempted indecent assault, Sir Chas. Moss, C.J.O. said, p. 380:

"As the learned judge instructed the jury in substance, an attempt is an effort to commit an unlawful act that is prevented or frustrated by some event which intervenes before accomplishment."

Judgment

The recent case of *Rex* v. *Punch* (1927), 20 Cr. App. R. 18, is only noteworthy because in principle it follows *Rex* v. *Robinson, supra,* but on the facts it failed because the accused had made no positive statement, as Avory, J. points out in delivering judgment. On the other hand, in *Rex* v. *Laitwood* (1910), 4 Cr. App. R. 248, an offence of the same nature, it was held that the case was "very near the line, but on the whole we think the conviction ought not to be disturbed," the Court being of opinion that the false representations the accused had made to obtain money "were not mere preparation, he must have made them to get the hundred pounds," and therefore the attempt was established.

An instructive case is *Reg.* v. *Ransford* (1874), 13 Cox, C.C. 9; 31 L.T. 488, in which it was held unanimously by five judges on a case reserved that an attempt to incite a boy at school to the commission of an unnatural offence was proved by sending a letter to him to effect that object though he did not read it but handed it over to the school authorities, and that decision was adopted by the Court of Criminal Appeal in *Rex* v. *Cope* (1921), 16 Cr. App. R. 77, a case of attempt to procure the commission of an unnatural offence, despite the fact that the

letters were couched in terms of apparent innocency; they were posted to the boy by the accused but had not reached him being intercepted by his mother and handed to the police. The Court, after considering and applying the decision in *Ransford's* case, said (pp. 82-3):

"We consider that in order to see whether the letters do contain such terms that Price would see in them an invitation to commit an act of gross indecency with the appellant the surrounding circumstances may and should be examined. See *R.* v. *Roberts*, Dears. C.C. 539; 1855. Price was a boy known to the appellant to have committed such an act with Riley. The appellant writes to Price reminding him of his meeting with Riley, sending Riley's good wishes, telling him not to be afraid to make himself known to the appellant, saying that the appellant is going to stay a week in Blackpool and is anxious to meet him. What would such a boy as Price was known to the appellant to be understand from such a letter? We think that there was enough to entitle the jury to find that Price would have read into it an invitation to repeat with the appellant the offence which he had committed with Riley, and therefore that the sending of the letters was an attempt to procure Price to commit the offence and that the conviction should stand."

These observations are in part, particularly applicable to the case at Bar.

Judgment

The Appellate Court of Alberta considered said section 72 in *Rex* v. *Pettibone* (1918), 2 W.W.R. 806, in a case of attempt to commit abortion by giving a woman drugs for that purpose, though they were in fact innocuous. The Court, *per* Stuart, J., said, p. 809:

"Now even if the doctor deceived the accused, and gave him innocuous material yet if the accused really tried, as I think the jury could reasonably infer that he did, to get a noxious material, believe that he had got it and tried to get the woman to take it in my view there was much more than mere preparation, there was a real attempt to commit the offence and the fact that owing to the doctor's deceit it was impossible for him to commit it would not make any difference as the section of the Code just quoted says."

Many other cases might be cited out of the great number that have been examined in an exhaustive consideration of the point, but it would not be profitable to do so, and we refer to our own decisions in *Rex* v. *Delip Singh* (1918), 26 B.C. 390, another case of attempted unnatural offence, only to note that we considered the charge so well established that we did not think it necessary to call upon counsel for the Crown.

It is to be remembered that, as was pointed out in *Reg.* v.

COURT OF APPEAL

1929

Feb. 1.

REX
v.
RUMP

Riepel (1898), 2 Can. C.C. 225, the intention of Parliament is to cast an "extra statutory protection" over young girls by legislation of this description, for the obvious reason that their tender years and inexperience render them peculiarly susceptible to become the prey of designing persons.

After an application of the principles above set out to the facts of this case hereinbefore recited, it is apparent to us, the more they are considered, that it is impossible to hold that the learned judge in law or the jury in fact erred in the view they took thereof. They disclose, in truth, a persistent intention by repeated overt acts by means of verbal and gestural invitation, by gifts, and by promises of money, to try to persuade the child to succumb to the carnal desires of the appellant, and the fact that she did not do so, either because of her moral rectitude or of the timely appearance of her mother, or both these causes, does not alter the legal consequences of his sustained endeavour up to the moment of frustration, to accomplish his object. It follows, therefore, that on the first and principal ground the appeal must fail.

Judgment

A second ground of appeal, taken here and below, is that there was no evidence to shew that the girl was not the wife of the appellant and therefore the attempt to have carnal knowledge of her was not proved to be "unlawful" as section 302 provides. The proof of a fact of this kind need not be direct but may reasonably be inferred from all the evidence and here the fact that the child had never seen the appellant before that day was sufficient in the circumstances to support the ruling of the learned judge below. The decision of the Ontario Court of Appeal in *Rex* v. *Mullen* (*No. 2*) (1905), 18 Can. C.C. 80 is to this effect, the Court, *per* Osler, J.A., saying, on the point of the prosecutrix being the wife of the accused (p. 82):

> "Then also, as appears from a memorandum of the learned trial judge attached to the indictment, the evidence shewed that the prosecutrix was a girl of 17, living at home with her mother and stepfather, and that she did not know Mullen by name, but recognized him as one of the persons who had assaulted her. The objection is evidently purely technical. Had the name of the prosecutrix and the prisoner been the same, it is possible that there might have been some difficulty, but, as it stands, I think the usual *prima facie* case was made out, which called upon the prisoner for an answer."

And *Rex* v. *Hubin* (1927), 1 W.W.R. 705, also confirms our opinion, and *cf.* also *Rex* v. *Wright* (1906), 11 Can. C.C. 221. Therefore upon this ground also the appeal fails.

There remains the appeal from the sentence, and it is sufficient to say that, after considering the circumstances in the light of our recent decisions in *Rex* v. *Zimmerman* (1925), 37 B.C. 277; *Rex* v. *Stonehouse and Pasquale* (1927), 39 B.C. 279, and *Rex* v. *Lim Gim* (1928), *ib.* 457, we are of opinion that the justice of the case will be met by reducing the term of imprisonment to one year without the whipping.

Judgment

McPhillips, J.A. (dissenting): In my opinion—and with very great respect for the contrary opinion, which is the judgment of the Court, being the opinion of the majority of the Court—the conviction should be quashed. The offence upon which the prisoner was convicted was attempt to carnally know a girl under fourteen (sections 302 and 72). The sections read as follow:

"302. Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped."

"72. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether under the circumstances it was possible to commit such offence or not.

"2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

McPhillips, J.A.

It is admitted law that an intention to commit a criminal offence is not of a punishable nature. Therefore, we proceed from that premise. It follows then that in effect to sustain this conviction there must be found an actual or an attempted carrying out of the criminal intention. That, I fail to find in the evidence, and whether it is or is not established by the evidence is a question of law in the language of the statute. "The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law." Being a question of law as I understand it, I am entitled to give a dissenting opinion, if I am of a contrary opinion to the majority of the Court, which is the case.

COURT OF APPEAL

1929

Feb. 1.

REX v. RUMP

MCPHILLIPS, J.A.

Many cases could be referred to upon this question but I have failed to find a case which would warrant coming to the conclusion that the conviction can be supported upon evidence such as we have here. The evidence discloses the giving of candy, the request to go to some secluded place presumptively, *i.e.*, the bush, but there was no proximity or nearness to the little girl which would at all indicate that there was any intention to carnally know the little girl. The little girl was actually at the time under the—we might say—physical guardianship of her mother. The prisoner was a considerable distance from the little girl, and a fence intervened. There was foul and obscene language made use of by the prisoner, but not to the little girl, to the mother. That the little girl was aware of the nearness of her mother to her at the time is demonstrated by her running at once to her mother. That which took place cannot be stigmatized as other than vile and reprehensible conduct consisting of the use of foul language but that is not this crime nor was the language directed to the little girl.

I cannot persuade myself that the crime charged and of which the prisoner was convicted, was established; the evidence in my opinion that the statute calls for is not present. It is doubtful indeed, if it can be called evidence leading to the conclusion that there was ever preparation for the commission of the offence. In any case, taking it in its strongest form, the evidence is, in the language of the statute, "too remote to constitute an attempt to commit," and the learned trial judge should have so held and withdrawn the case from the jury, that is, that the judgment of the trial Court should be set aside on the ground of a wrong decision of a question of law, and that there was a miscarriage of justice (section 1014 Criminal Code of Canada).

I would quash the conviction and direct a judgment and verdict of acquittal to be entered.

Appeal from conviction dismissed but sentence reduced.

PAUL AND PAUL v. DINES.

COURT OF APPEAL

1929

Jan. 9.

PAUL v. DINES

Negligence—Collision between automobiles—Right of way—Want of reasonable care approaching side street—Evidence—R.S.B.C. 1924, Cap. 177, Sec. 13; B.C. Stats. 1924, Cap. 33, Sec. 5; 1925, Cap. 33, Sec. 10.

On the 28th of June, 1928, at 6 o'clock in the morning the plaintiff, with four passengers, was proceeding south on the Island Highway towards Nanaimo and approaching a spot where Jenkins Road (coming from the west) entered the Highway. He was travelling at from 30 to 35 miles per hour and when about 90 feet from Jenkins Road he saw the defendant's truck coming on to the highway at a slow speed from Jenkins Road. The foliage was thick at this spot and the plaintiff could not see the truck until it was on the highway. As the defendant continued on, intending to turn north, the plaintiff proceeded with the intention of going past to the rear of the truck but his car skidded and crashed into it. In an action for damages, it was held that the defendant did not exercise due care in entering the highway and he was guilty of negligence.

Held, on appeal, reversing the decision of BARKER, Co. J. (MACDONALD, J.A. dissenting, and holding the defendant was guilty of contributory negligence), that the plaintiff in travelling at such a speed when approaching an intersection was guilty of negligence, that the evidence shewed the defendant took due care upon approaching the highway and the plaintiff was solely responsible for the collision.

Statement

APPEAL by defendant from the decision of BARKER, Co. J. of the 28th of September, 1928, in an action for damages for injuries sustained through a collision between the plaintiff W. A. B. Paul's car and that of the defendant's. On the morning of the 28th of June, 1928, the plaintiff was driving south on the Island Highway with his wife and three passengers from Courtenay to catch the seven o'clock boat at Nanaimo. Jenkins Road enters the Island Highway from the west at a point about 10 miles from Nanaimo. When the plaintiff was approaching Jenkins Road, about 90 feet away and travelling at a speed of from 30 to 35 miles an hour he saw the defendant emerging from Jenkins Road on to the highway with the intention of turning north. The foliage was very thick at this spot and a car could not be seen coming from Jenkins Road from where the plaintiff was until it was actually on the highway. On seeing

COURT OF APPEAL

1929

Jan. 9.

PAUL v. DINES

the defendant, the plaintiff proceeded thinking he could get past behind the defendant's car after he had crossed to the east side of the highway turning north, but the defendant stopped and in endeavouring to get behind him the plaintiff's car skidded and crashed into him. Mrs. Paul was injured and the car was considerably damaged.

The appeal was argued at Victoria on the 8th and 9th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

V. B. Harrison, for appellant: The accident was at 6 o'clock in the morning. The defendant in coming out of Jenkins Road had the right of way and it was the plaintiff's duty to drive his car so as to avoid a collision there. He admits he was going at a speed of from 30 to 35 miles an hour. He saw the defendant when 90 feet away and if he had had his car under control he could have stopped in that distance. Section 5 of the Motor-vehicle Act Amendment Act, 1924, sets out the duties of a driver and it was not complied with.

Cunliffe, for respondents: Jenkins Road was never treated as a highway. The section of the Motor-vehicle Act referred to was substituted by section 10 of chapter 33, B.C. Stats. 1925, but this Act was not passed for the purpose of affecting the civil liabilities of parties: see *Boyer* v. *Moillet* (1921), 30 B.C. 216 at p. 220; *Perrin* v. *Vancouver Drive Yourself Auto Livery, ib.* 241; *Walker* v. *B.C. Electric Ry. Co.* (1926), 36 B.C. 338. If section 13 (2) of the Motor-vehicle Act can be invoked by the defendant then the onus is on Paul to shew he was travelling in a careful and prudent manner: see *Robins* v. *National Trust Co.* (1927), 96 L.J., P.C. 84 at p. 86. That the defendant was negligent in the way he came out of Jenkins Road see *Monrufet* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 91.

Harrison, in reply, referred to *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed. The case is in a nutshell. First, the evidence is undisputed that the defendant was coming out of a side road on to the Island Highway; he apparently came out with care, since he was moving

slowly. He intended to turn to his left on the Highway; he apparently looked to the right, as he is obliged to do under the Motor-vehicle Act. Now the plaintiff saw the defendant coming out of that road when he was 90 or 100 feet away. Plaintiff was travelling on a straight and level road, in dry and good condition—in a condition which would enable him to stop within a reasonable distance. He did not put on his emergency brake, because he said he would have had to take one hand off his wheel. Now an emergency brake is what its name indicates, it is to be used in an emergency, and if it is to be of any use at all in an emergency it must be capable of being used by the driver, and I see no reason why the plaintiff should not have taken one hand off his wheel, and used his emergency brake. Instead of doing that he apparently thought he could get around defendant's car; he went on and got in the gravel, the result being that he skidded and struck the other car, and injured his own, and his wife. Now on these facts the learned judge has found that he was not guilty of any negligence. With great respect, I think he was in error in coming to that conclusion. I say nothing about his view of the *locus in quo* further than that he went more upon his own impressions created by that view than by the evidence which was before him. A view is to enable the judge to get a better understanding of the evidence given by witnesses, not to let in unsworn evidence.

MACDONALD, C.J.A.

Now was there any contributory negligence? It becomes of importance to consider that question. The defendant came out of the side road carefully. Some of the plaintiff's witnesses thought he had actually stopped about the middle of the road, and if that were so he must have come out very leisurely indeed. His own evidence shews that he could not have got out of the way. Now, that being so, how can it be said that the other man, who came along that road at a high rate of speed and saw him 90 or 100 feet away, can claim that the defendant was guilty of contributory negligence? I hold that the plaintiff was the sole cause of his own disaster.

MARTIN, J.A.: I agree that the appeal must be allowed under the circumstances, in view of the plaintiff's own admission as to his rate of speed as follows:

MARTIN, J.A.

COURT OF APPEAL

1929

Jan. 9.

PAUL v. DINES

"It is quite likely that I said I was going 35 miles.

"Not more than 35? I know I wasn't travelling more than 35 miles an hour."

Now I take that as practically an admission that he was going at the rate of 35 miles an hour. The learned judge has given a more favourable definition, so to speak, of this expression than I find myself enabled to give, so I proceed upon the assumption that plaintiff was going at a rate of 35 miles. The whole facts and circumstances depend upon this, if he was going, as he says, at that rate of speed, it is perfectly evident by his own evidence he had not his car under sufficient control to pull it up and check its speed in a reasonable distance. It is unthinkable, to my mind, that it can be said that a person can go at such a speed along the highways of this Province in a thickly wooded district such as this was and yet not be able to bring his car up within a distance that he admits himself is 90 feet. That, so far as I am concerned, in the facts of this particular case, fastens negligence upon him.

MARTIN, J.A.

Then as to contributory negligence, I accept what my learned brother the Chief Justice has said, that the explanation given by the defendant was sufficient to exonerate him from that charge. Therefore the appeal should be allowed.

GALLIHER, J.A.: I agree in the conclusion that there was negligence on the part of the plaintiff himself. And I was for a time, I may say, somewhat impressed with the idea that the defendant was negligent, until the evidence as it was pointed out to us by counsel for the defendant, Mr. *Harrison,* in the way he came on to the road, and kept going, as he says himself until he was struck. I do not think there was anything that he could have done that he did not do unless we are to hold that a man must absolutely stop when he comes to a corner like that. Having under the Highway Act the right to protection when he is coming in, from the right, unless we hold he has got to actually stop, as you are commanded to do when there are signs posted now, I do not see how we can find him guilty of negligence on his part.

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. I am of the same opinion as my learned brothers who

MCPHILLIPS, J.A.

have preceded me in giving judgment. I only wish to add that I think the case is an exemplification of negligence of a most flagrant sort. Here is a main highway known as the Island Highway, well known to residents on Vancouver Island. People must reasonably be held to know the existent conditions. There is no evidence here that this plaintiff was a stranger to the road. He lived in Comox; it is fair to assume that he was very familiar with the road. He surely could not think that there was no intersecting road. How would the communities along the road exist without getting access to the main highway? Then, under the Highway Act, the one coming in from the right has the right of way. And whilst that does not admit of one being negligent, and taking chances on coming out on to the main highway, yet one is entitled to assume that anyone coming up to an intersecting road will have his vehicle under reasonable control. Here, when he entered into the highway, it being wooded up to the point of intersection, he was confronted with a situation that I say, according to the evidence, was one of patent negligence. By going at the rate of 35 miles an hour, which I think it was, there was no chance for anyone coming out of this intersecting road; it was going at a pace in the extreme—to the common danger. As my brother MARTIN indicated during the argument, a child might come out; a child could not have seen over this broom; even a boy of some age would not be able to. And, surely, there must be some protection. The Legislature has very properly taken steps in the Highway Act to shew what the respective rights of the parties are. When there is one coming out from the right he has the right of way. That assuredly should carry some protection.

MCPHILLIPS, J.A.

Further, I think the case comes within the principles so well laid down, being an appeal from this Court and this Court's judgment was sustained, in *British Columbia Electric Railway Company Limited* v. *Loach* (1916), 1 A.C. 719. There it was the case of a street-car being insufficiently equipped with brakes, and being driven at excessive speed. I consider upon the facts of this case that the car was insufficiently equipped with brakes in view of the speed at which the car was being driven. If one proposes to drive his motor-car at 35 miles an hour along the highway he should have corresponding protection by way of

COURT OF APPEAL

1929

Jan. 9.

PAUL v. DINES

MCPHILLIPS, J.A.

brakes, both for himself and for the public. Now the brakes were applied, apparently, and they did not pull up the car within a distance of 90 feet. The brakes were only upon two wheels, not four-wheel brakes. Whilst it has been laid down by the Court from time to time that you cannot insist that a person should have the very latest machinery—which I suppose would apply to brakes upon a motor-car—yet when motor-cars are being made from year to year, the protection given should be the maximum. It seems to me that if a person will undertake the responsibility of driving his car at 35 miles an hour on a highway, with intersecting roads, that he cannot escape liability, without at least having on his car the latest brake equipment, and possibly not then. In this case if he had had a car with four-wheel brakes this accident would not have happened. He drove recklessly, in view of all the circumstances, when he drove at 35 miles an hour with only two-wheel brakes.

Upon all the facts and circumstances of this case it is plain to me that it was one of gross negligence, and it was an actionable wrong beyond a question of doubt, yet we find the plaintiff having the temerity to sue for damages and seek to fasten liability upon the defendant, and the Court below imposed damages. In my opinion the judgment of the Court below, with great respect to the learned judge, went wholly wrong, and the judgment below should be reversed. Further, I find no evidence which would entitle it being said that there was any contributory negligence upon the part of the defendant. As I said, at first, I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I think there was negligence on the part of the defendant in that he emerged from a narrow side road into the main artery of traffic without first properly looking as he was obliged to do, to see if there was any traffic on the main road to be avoided. He was half way across the road before he even saw the plaintiff's car. That shews that if he looked at all he did not look carefully. Had he seen the plaintiff's car between 90 and 100 feet away, travelling as he was at a slow rate of speed, in order to make the turn at the intersection, he should have stopped to allow the plaintiff's car to pass.

I think, however, the plaintiff was also guilty of negligence

inasmuch as at the speed he was travelling he did not bring his car under control, resorting to the emergency brake if necessary, in the distance traversed before the impact.

I would therefore divide the damages.

Appeal allowed, Macdonald, J.A. dissenting.

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

HAMMER v. HAMMER AND LUTHMER. LUTHMER v. HAMMER AND LUTHMER.

COURT OF APPEAL

1929

March 5.

HAMMER v. HAMMER AND LUTHMER.

LUTHMER v. HAMMER AND LUTHMER

Negligence—Driving automobile at excessive speed—Car swerves striking obstacle near pavement—Two gratuitous passengers—Both injured—Damages—Joint owners—One driving—Liability of both—B.C. Stats. 1924, Cap. 33, Sec. 5 (2).

The plaintiffs who were the respective mothers of the two defendants were invited by their daughters to accompany them on a motor trip through the Western States and Canada. The daughters were joint owners of the car and drove alternately on the trip. Shortly after passing Cloverdale on the way to Vancouver on the Pacific Highway in the early afternoon with the two girls in the front seat and the mothers behind and hurrying in order to get back to Bellingham that night, the right wheels of the car went off the pavement, then in turning onto the pavement the car went too far to the left and then swerved back too far to the right going off the pavement and striking a milk-stand. The two mothers were thrown out of the car and severely injured. The car stopped on the left side of the road about 70 feet beyond the milk-stand in a damaged condition. There was no eye witness of the accident, the only evidence being that of the two plaintiffs who testified as to excessive speed and that after the right wheels went off the pavement the car swerved suddenly to the left side of the road and then back to the right side where it struck the milk-stand. They also testified that the driver only had one hand on the driving wheel when the car swerved. There was the further evidence that the girl who was not driving at the time assisted the driver by applying the emergency brake when necessary. The mothers recovered judgment in an action for damages.

Held, on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting in part), that it was negligent driving that caused the car

COURT OF APPEAL

1929

March 5.

HAMMER v. HAMMER AND LUTHMER.

LUTHMER v. HAMMER AND LUTHMER

to leave the pavement, swerve to the left and then to the right again leaving the pavement and striking a milk-stand. Inferences may be drawn from admitted facts and this, coupled with the evidence referred to, establishes negligence.

Held, further, that as the defendants were co-owners, driving alternately with the understanding that the co-owner might assist the driver by applying the emergency brake when necessary, they were both liable.

Statement

APPEAL by defendants from the decision of MORRISON, J. of the 22nd of June, 1928, in two actions for damages for injuries sustained by the plaintiffs while passengers in the defendants' automobile. Miss Hammer and Miss Luthmer, the defendants, owned the car in question and they started from their home in the State of Iowa in the summer of 1927, with their mothers as passengers on a tour of the Western States and the southern part of Canada. The two girls drove the car alternately and on the morning of the 23rd of July they left Seattle for Vancouver. They were driving fast as they wanted to get back to Bellingham that evening and shortly after passing Cloverdale, when Miss Luthmer was driving, the right wheels got off the pavement. The driver turned to the left but went quickly over and off the pavement on the left side. Then she turned back and got over to the right side of the road again where she ran into a milk-stand which was on that side of the road. The crash threw the car over to the left side of the road about 70 feet beyond the milk-stand, the wheels and body of the car being badly smashed. The two plaintiffs who were sitting in the back seat were thrown out of the car and badly injured. The plaintiff Edith O. Hammer recovered $2,643.50, special damages and $3,000 general damages and the plaintiff Emma Luthmer recovered $2,297.85, special damages, and $2,500, general damages.

The appeal was argued at Victoria on the 14th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellants: The plaintiffs are the mothers of the two defendants, and the daughters were not seriously hurt. We submit that there is no evidence whatever. There was no eye-witness of the accident and the two old ladies knew nothing of what happened. *Res ipsa loquitur* does not apply to this case: see *Cotton* v. *Wood* (1860), 8 C.B. (N.S.) 568 at p.

COURT OF APPEAL

1929

March 5.

HAMMER v. HAMMER AND LUTHMER

LUTHMER v. HAMMER AND LUTHMER

570. If Miss Luthmer is liable then Miss Hammer is not liable. There are so many things that can make a car steer wrongly. It is not sufficient merely to prove a high rate of speed: see *Stuart* v. *Moore* (1927), 39 B.C. 237; *Brooks* v. *B.C. Electric Ry. Co.* (1919), 27 B.C. 351; Beven on Negligence, 4th Ed., p. 138; *Samson* v. *Aitchison* (1912), A.C. 844 at p. 850.

Argument

W. J. Whiteside, K.C., for resepondents: There is evidence explaining the action of car and driver before striking the milk-stand and brings them within section 5 (2) of the Motor-vehicle Act. The inference drawn by the trial judge from the evidence was that the driver was guilty of negligence, and this is a fair inference from the evidence. As to joint liability see *Pratt* v. *Patrick* (1923), 93 L.J., K.B. 174; *Parlov* v. *Lozina and Raolovich* (1920), 47 O.L.R. 376. They drove alternately and there was a partnership in driving.

Bull, in reply, referred to *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719 at p. 728.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.

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

MARTIN, J.A.

MARTIN, J.A.: Though the learned judge, with all respect, proceeded, as was rightly submitted by counsel, upon a serious misapprehension of the evidence when he found that "the car at several points had partially left the fairway" before the proximate difficulty suddenly arose which led to the collision with the permanent milk-stand, yet I feel compelled to join in the view that on other and proper grounds the judgment may be supported. This I do with reluctance because the case has a suspicious complexion and the refusal, *e.g.,* of both of the two respective daughters of the plaintiff mothers, who were in the driver's seat, to lift the veil by giving evidence though one at least of them was present at the trial, is significant.

As to their joint liability as co-owners, I have no doubt in the circumstances, because, apart from other matters, the daughter who was not at the wheel was nevertheless participating in the use of the emergency brake.

COURT OF APPEAL

1929

March 5.

HAMMER v. HAMMER AND LUTHMER.

LUTHMER v. HAMMER AND LUTHMER

GALLIHER, J.A.: In my opinion the appeal should be dismissed.

The only point that I wished reserved for consideration upon the argument was as to whether the defendant Hammer was rightly found liable, the defendant Luthmer being the one actually driving when the accident occurred. The two young ladies owned the car jointly and on the trip had been spelling each other in driving. If one of two joint owners is sitting in the front seat of their car the other joint owner driving, can it be said that the one not driving has divested himself or herself of all control of the car? I think not. If the driver is driving recklessly and to the danger of the occupants or damage to the joint property, surely the other joint owner in the interest of her own safety or in protection of the joint property has the right to interfere and in such an event has not abandoned control of the car, and moreover, there is evidence here that the one not driving at times assisted in driving by manipulating the emergency brake.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am of opinion that the appeal of the appellant Edith Hammer should succeed. I cannot agree that where a motor-car is being driven by one of the joint owners of the car, although the other joint owner be upon the same seat, that it necessarily or at all follows that both are to be held liable for the negligence. At the time of the accident Loraine Luthmer (one of the joint owners of the car) was driving the car and it would appear, at excessive speed. Being in the act of driving the car the position in law is the same as was well known in the law and still is the law, namely, if one of two owners be upon the horse the other owner may not pull him off, there is the right to absolute control and it would be dangerous indeed to admit of even a joint owner interfering with that absolute control; instead of preventing an accident interference might well precipitate an accident. I know of no case that would entitle me to hold that both of the joint owners are liable. In my opinion, the liability must be confined to the one who is in control and driving at the time of the accident. I am not prepared to say that there might not be a case where the other joint owner seated as she was in this case, might not be liable;

MCPHILLIPS, J.A.

that is, if she did some negligent act which was the proximate cause of the accident she would have been liable in such case, independent of ownership. There is no evidence that establishes that Edith Hammer did anything which precipitated the accident, or did any act whatever at the time of the accident that caused the accident. Let us consider what Edith Hammer could have done under the circumstances; so far as I can see, nothing. To have remonstrated at the speed of the car would have had no certain effect. It could have been ignored. In law she could do nothing. Should she have taken the wheel out of the hands of the driver and force the driver out of the seat, it is only necessary to visualize matters in this way, and see the futility of this and the grave danger. It results in this, that where the position is one of joint ownership, the mere fact of that relationship and the circumstance that one of the joint owners is seated in the car next to the other joint owner, who is driving the car, cannot impose any liability on the one who is not at the wheel. Accidents may take place at any moment and there may be negligence in the driver of the car at any moment. Is it at all reasonable to impose liability merely because of joint ownership? Joint ownership under these circumstances is meaningless, as the law does not admit of the joint owner interfering in any way with the other joint owner's control of the car; this is trite law and if there is to be any change we must look to the Legislature, the Court must not legislate. The only case that I have been able to find that gives any assistance in the consideration of this point is a criminal case and Pollock, C.B. pointed out that there is "a great distinction between civil and criminal proceedings." The case is *Regina* v. *Swindall* (1846), 2 Car. & K. 230, 232, and at p. 233, Pollock, C.B. further said:

> "Where two coaches, totally independent of each other, are proceeding in the ordinary way along a road, one after the other, and the driver of the first is guilty of negligence, the driver of the second, who had not the same means of pulling up, may not be responsible. But when two persons are driving together, encouraging each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion that in point of law the other shares the guilt."

There it was with respect to criminal liability and contributing to the death of a person, a very different situation to that

COURT OF APPEAL

1929

March 5.

HAMMER v. HAMMER AND LUTHMER.

LUTHMER v. HAMMER AND LUTHMER

of civil liability. Further, there is no evidence whatever in the present case that Edith Hammer was in any way a party to or encouraging Loraine Luthmer in driving at a dangerous speed. The case of *Samson* v. *Aitchison* (1912), A.C. 844, is not an authority helpful to the respondent at all as that case was one of owner, not joint ownership. Lord Atkinson in the *Samson* case at p. 849, said:

"The learned judge [speaking of the trial judge] in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage: [I need not quote it all, I content myself with only this] 'The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right to control.'"

MCPHILLIPS, J.A.

Now we have here a case where Edith Hammer had no right in law at all to intervene, in fact in law was inhibited from interfering in any way. The car being in the hands and possession of Loraine Luthmer and Loraine Luthmer at the wheel, there was no right in Edith Hammer whatever, to even remonstrate much less to forcibly take the wheel. How impossible and how dangerous to life it would have been!

I would refer to what Lord Blackburn said in *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743 at p. 767:

"And he does not establish this [referring to liability] against a person merely by shewing that he is owner of the carriage or ship [here it is a joint owner of the motor-car, not driving, but sitting beside the other joint owner] which did the mischief, for the owner incurs no liability merely because he is owner."

I would therefore allow the appeal of Edith Hammer, with costs here and below, but dismiss the other appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Two writs were issued; one by the respondent Edith Hammer and the other by respondent Emma Luthmer against appellants. The actions were consolidated. The two plaintiffs (respondents) stood in the relation of mother and daughter to the two defendants (appellants). Respondents were invited by their daughters to accompany them on a motor trip through the United States and Canada. The two daughters were joint owners of the car and drove alternately on the trip. Respondents were seriously injured on the Pacific Highway

near Cloverdale where the car left the road, ran into a milk-stand about two feet from the pavement, dashing forward about 60 feet, or as another witness put it from 70 to 80 feet beyond the milk-stand. At the time of the accident the appellant Lorraine Luthmer was driving the car her co-appellant being beside her in the front seat. It is in evidence that the one not driving for the time being would on occasions assist the driver by applying the emergency brake when necessary. Damages in the sum of $5,645.50 were awarded to respondent Edith Hammer and in the sum of $4,797.60 to respondent Emma Luthmer against both appellants.

MACDONALD, J.A.

The only evidence of negligence is furnished by the testimony of the two respondents and the inferences to be drawn from road marks found by other witnesses shewing the course of the car before and after hitting the milk-stand. The appellant Lorraine Luthmer who was driving the car at the time of the accident admitted that she was going about 50 miles an hour. Her co-appellant said that "they had been travelling at a fairly fast rate of speed when it happened." The admission of Lorraine Luthmer was made a few minutes after the accident. There was then considerable turmoil and unless she was astute to assist the respondents knowing that an insurance company would have to meet any liability, and in addition, dishonest, she would be inclined at that time to speak truthfully. Both respondents testified that before the accident they realized that "we were going fairly fast," and that shortly before the impact two wheels on the right side of the car were off the pavement. At this time the driver "had one hand on the steering wheel and her other arm and hand on the door beside her." She regained the road, swerved over to the left side of the pavement, then back to the right again running off the road and crashing into the milk stand. During these gyrations the respondent Edith Hammer thought the car would run into a ravine on the left side of the road and called out in alarm to her daughter. She admitted on discovery that she had no idea what caused the car to go off the pavement. The appellant Emma Luthmer noticed the car off the pavement on the right and speaks of it "swaying from the right to the left side of the road, and back to the right side again, and into the milk-stand." She too did

COURT OF APPEAL

1929

March 5.

HAMMER v. HAMMER AND LUTHMER.

LUTHMER v. HAMMER AND LUTHMER

MACDONALD, J.A.

not know what caused the car to leave the road. Another witness testified from the marks that the right-hand wheels of the car were off the pavement "from 35 to 40 feet before it hit the milk-stand." No evidence was called on behalf of the appellants.

On the foregoing facts the appellants submit that no evidence of negligence was adduced. I cannot agree. It is negligence to drive along a highway at 50 miles an hour, or even at a less rate of speed with one hand only on the steering wheel. A car travelling at high speed requires both hands on the wheel to safely keep it under control. It was negligent driving that caused the car to leave the pavement for about 40 feet, then sway without reducing the speed, to the other side and back to the right side again, leaving the pavement for the second time to crash into a milk-stand. The maxim *res ipsa loquitur* does not apply. But inferences may be drawn from admitted facts and occurrences and this, coupled with the oral evidence referred to, establishes negligence to a marked degree. It was suggested without any evidence to support it that the steering gear may have been defective. I do not think we need speculate on anything so improbable when we know from the course of the car that it evidently responded to the wheel. There is therefore affirmative proof of negligence. The care required of those who undertake the carriage of another gratuitously, *viz.*, reasonable care under all the circumstances, was not exercised. The standard of reasonableness will vary according to the facts of each case. Certainly it should not be lowered in this case where the respondents were asked to accompany the appellants (who were young girls) for their chaperonage and protection.

It was submitted, however, that granted the driver of the car was guilty of negligence the appellant Edith Hammer, a joint owner, who was not driving at the time and had, it is alleged, no control over the actual driver, is under no liability. The principles applicable may be derived from *Samson* v. *Aitchison* (1912), A.C. 844. There the owner of a motor-car riding in the front seat was held liable in damages to a passenger although another who was negligent was driving the car at the time. The owner had the right and the duty to exercise control over the driver. To quote from the judgment at p. 849:

"I think that where the owner of an equipage, whether a carriage and

horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver, 'Do this,' or 'Don't do that.' The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally: *Du Cros* v. *Lambourne* (1907), 1 K.B. 40. The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right of control."

And again at p. 850:

"And if the control of the car was not abandoned, then it is a matter of indifference whether Collins, while driving the car, be styled the agent or the servant of the appellant in performing that particular act, since it is the retention of the control which the appellant would have in either case that makes him responsible for the negligence which caused the injury."

MACDONALD, J.A.

In the case at Bar the facts are different, but I think the principle is applicable. Appellants were joint owners of the car. They drove it by arrangement alternately. There is a suggestion of mutual acquiescence in joint control by the evidence that the co-owner might assist the driver by applying the emergency brake if such assistance appeared necessary. Further if the one at the wheel drove so negligently that the common property of both might be endangered or damage caused to others the other has a right to interfere to protect the common interest. I think the moment the driver steps beyond limits of prudence and makes an unreasonable use of the common property the co-owner has the right and duty to intervene.

I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting in part.

Solicitors for appellants: *Walsh, Bull, Housser, Tupper & McKim.*

Solicitors for respondents: *Whiteside, Edmonds & Selkirk.*

COURT OF APPEAL

1929

Jan. 24.

PING LEE v. PAUL WISE

PING LEE v. PAUL WISE.

Arrest—Absconding debtor—Through ticket from Ontario to China—Arrested on British Columbia capias on way through—"Quit the Province"—Interpretation—R.S.B.C. 1924, Cap. 15, Secs. 3 and 15.

The defendant (of Chinese origin) being sent by his parents to Canada in 1912, for his education, attended various colleges finishing at McGill University, Montreal, in 1920. Shortly after he, with certain Chinamen, formed a syndicate for the purpose of purchasing a restaurant in Windsor, Ontario, for $9,000. The syndicate paid him the money to make the purchase but he only paid $7,000 on account of the purchase price and the vendor brought action for the balance due in 1922 and obtained judgment. In the summer of 1927 the defendant left Ontario obtaining transportation through to China. The vendor then brought action in British Columbia upon the Ontario judgment, obtained an order under section 3 of the Arrest and Imprisonment for Debt Act, and the defendant was arrested under a writ of *capias* in Victoria, B.C., in June, 1927. An application for the discharge of the prisoner under section 3 of said Act was dismissed on the 19th of November, 1928.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MARTIN, J.A. dissenting), that there was not reasonable evidence in the Court below that the defendant had means or the ability to satisfy the judgment or any part thereof and he should be discharged from custody.

Statement

APPEAL by defendant from the order of HUNTER, C.J.B.C. of the 19th of November, 1928, dismissing an application for an order discharging the defendant Paul Wise from custody he being held under a writ of *capias* issued from the Victoria Registry on the 7th of June, 1927. The defendant came to Canada in 1912, for the purpose of studying. He first went to Wesley College in Winnipeg, where he remained until 1914, when he went to the Agricultural College in Winnipeg where he remained for three years. He then attended McGill University in Montreal where he remained until 1920. He was provided with money by relatives while studying and at the same time earned moneys with odd jobs. The plaintiff alleged that in 1920 a partnership of which the defendant was one, paid over to the defendant $9,000 with which to purchase the Mandarin Cafe in Windsor, Ontario, from the plaintiff and when the sale was made he only paid $7,000. The plaintiff brought action in

COURT OF APPEAL
1929
Jan. 24.

PING LEE v. PAUL WISE

Statement

Ontario for the balance due and on the 13th of March, 1922, recovered judgment for $3,004.55. In the summer of 1927 the defendant came to Victoria, B.C., intending to sail for China and on the 6th of June, 1927, the plaintiff brought action against the defendant in Victoria to recover $3,787 for principal and interest due on the Ontario judgment. An order was then obtained to hold the defendant to bail under the Arrest and Imprisonment for Debt Act, and he was arrested on the 7th of June, 1927, and has been kept a prisoner in Victoria up to the present time.

The appeal was argued at Victoria on the 24th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Jackson, K.C., for appellant: The contract for the purchase of the Mandarin Cafe in Windsor was in his name and in 1922 the sum of $3,000 was still owing. He got his transportation through from Toronto to China. The words in the Act are "quit the Province," but he was not quitting the Province. The only judgment is the Ontario judgment. Action was started here only. *Capias* is no more than a proceeding by way of execution and execution cannot issue here unless there is a judgment here. It is illegal, and, secondly, it is discretionary and if discretionary this Court has in its discretion the right to discharge the defendant. That it is illegal see *Granatstein* v. *Chechik* (1924), 4 D.L.R. 150; *Armstrong* v. *McCutchin* (1874), 15 N.B.R. 381; *Quebec Bank* v. *Tozer* (1899), 17 Que. S.C. 303. That the giving of a *capias* order is purely discretionary see Annual Practice, 1929, p. 1473, marginal rule 1030; *Hasluck* (*Trustee of Benzon*) v. *Lehman* (1890), 6 T.L.R. 435; *Marris* v. *Ingram* (1879), 49 L.J., Ch. 123.

Maclean, K.C., for respondent: The question of whether this man was legally arrested or not is not before the Court. The question is whether he has assets and the learned Chief Justice below was satisfied on the evidence before him that he had assets, and having so found his decision should not be disturbed by this Court.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed, and the debtor discharged from custody.

COURT OF APPEAL
1929
Jan. 24.

PING LEE
v.
PAUL WISE

It is an extreme case in many respects. It shocks one's sense of justice, to find that a young man is kept in prison for debt for more than a year and a half, in spite of the evidence that he is quite unable to pay either the judgment debt or any part thereof. If we look at the evidence of witnesses who have made affidavits on behalf of the judgment creditor, we find that they describe him as a person with wealthy relatives in different parts of the world—in China, in Shanghai, and in the Philippines. His parents sent him out to this country to be educated; he was educated in our institutions of learning, including McGill University. Now one would expect, if there was any truth in the allegations of the creditor, his friends and relatives would not allow him to be kept in gaol in British Columbia for a year and a half without coming to his relief, and if there was any truth in the allegations that he has sufficient funds himself with which to pay the debt, he would not remain in gaol indefinitely. Looking at the probabilities of the case and viewing the evidence, one can hardly conceive of the state of affairs being as they are, unless the debtor be unable to pay.

MACDONALD, C.J.A.

In the first place, the prisoner has made an affidavit in which he has stated that he has no money. He tells of the sums of money he received while in temporary employment, used to supplement that supplied from his family. They are small in amount. He was cross-examined upon that affidavit, the judgment creditor taking the opportunity of testing his statements and of refuting them if he could, but without success.

Now, look at the evidence of the deponents for the judgment creditor, the plaintiff, Ping Lee. They do not meet the very gist of the case that he is putting forward here. The witness, Lee Nam Li, one of the syndicate who had agreed to purchase the restaurant in Windsor, the Cadillac Restaurant, stated on affidavit that the syndicate had entrusted the debtor with $9,000 with which to pay Ping Lee. Li says that Ping Lee did not receive more than $7,000—he is not certain of the amount, but he says about $7,000 is all that was paid to Ping Lee. Now one would expect Ping Lee to say that that was true. He was the person who was to receive the money, he was the person who received the $7,000, and he does not state "I did not get the

whole $9,000." It is for the balance of that money, that this action was brought.

I could refer to other evidence, shewing the unreliability of the creditor and his witnesses, but I do not think it is necessary. The Court is of opinion that the debtor should be released.

MARTIN, J.A.: I have the misfortune to differ from my learned brothers in what I consider is a matter of very considerable importance.

This is an application under section 15 of the Arrest and Imprisonment for Debt Act, Cap. 15, R.S.B.C. 1924, to obtain the discharge from custody of a debtor who has been arrested upon a *capias* in this Province, on a judgment recovered in Ontario, and afterwards recovered against him here. Section 15 of the statute declares that under such circumstances the debtor in custody may apply to any judge of the Court for his discharge, and the judge, "upon being satisfied that the debtor has no means or ability to satisfy the judgment or any part thereof" may order his discharge, save in certain excepted cases not presently material. The "satisfaction," be it noted, is that of the learned judge to whom the application is to be made; and the burden of proof of it obviously is upon the person who desires to be freed from the consequences of the judgment and the arrest on which he is in custody. I therefore have no hesitation in saying that the onus is upon this judgment debtor in custody to shew to the satisfaction of the judge his lack of "means or ability" before he is entitled to be discharged.

MARTIN, J.A.

Upon that application numerous affidavits were filed *pro* and *con.;* and we heard them enumerated and read, at least all the relevant portions. And to me it is abundantly clear that the matter was one that was especially in the discretion of the learned judge appealed from. That it is a matter of discretion appears from the judgment of the King's Bench in *Hitchcock* v. *Hunter* (1841), 5 Jur. 770; Lord Denman, C.J. delivering the judgment of the Court, in a case dealing with the statute from which ours is taken—1 & 2 Vict., Cap. 110, Sec. 3. We have therefore the unanimous judgment of the King's Bench upon language precisely the same in essentials as in our statute—

COURT OF APPEAL

1929

Jan. 24.

PING LEE *v.* PAUL WISE

MARTIN, J.A.

that it means the discretion of the judge. And we have repeatedly laid down in this Court that such discretion cannot be interfered with unless there were no materials before the judge to exercise it or that he proceeded upon a wrong principle. And I do not think it can seriously be suggested that there were no materials here, and if so then the learned judge cannot be upset in the exercise of his discretion unless it is apparent that he has proceeded upon a wrong principle, or there was something which was of so serious a nature as to amount to a "denial of justice," as was recently held by the English Court of Appeal in *Maxwell* v. *Keun* (1927), 44 T.L.R. 100, and this Court in *Maddison* v. *Donald H. Bain Ltd.* (1928), 39 B.C. 460, and the Supreme Court of Canada in *American Securities Corporation Ltd.* v. *Woldson* (1928), S.C.R. 432.

I shall only refer to three pages of the appeal book to shew how serious the conflict was before the learned judge. And fortunately we have something which was not based upon conflicting statements of the various Chinese who are interested in this matter; and I think the learned counsel for the respondent is quite justified in saying that the learned judge below must have given considerable weight to it—at least I should myself—*i.e.,* the affidavit of one of the practitioners of the Court in which he says, when this case was being tried before Mr. Justice D. A. McDONALD and the debtor's credibility is all important, as to the fact of his means or no means, that he (debtor) undertook to say that certain nine promissory notes that he was alleged to have made were forgeries, where as the learned judge found that they were not forgeries; and the deponent says:

"The learned trial judge found as a fact that the defendant did sign the said promissory notes and stated that he did not believe the defendant in respect of his denial of such signatures."

How a person could come before the learned judge below and expect full credence to be given to his statements after such a record as that I, with all respect, fail to comprehend. And we have a statement that is perfectly good evidence, of one of his former partners, Tong Del Hue, in the affidavit of Lee Hing, who gives the source of his information, that this debtor told him upon the eve of his departure from Toronto (in the course

of his journey out here) that he had in all something over $10,000 of his own money to take back with him to China.

I cannot, with all respect, draw the same inference that my brother the Chief Justice did as to paragraph 15 of the affidavit of the plaintiff herein. I think that the submission made to us by counsel for the respondent, that that could only carry an implication, carries the proper inference.

MARTIN, J.A.

I might go on and shew further other conflicts of testimony in this matter, but surely I have cited enough to shew that the learned Chief Justice below cannot be said to have been unreasonable in the view he took of it when he said on the materials before him that he had not been judicially "satisfied" of the truth of the statements of the prisoner, and therefore decided that he ought to remain in custody as a contumacious debtor.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I entirely agree with what has fallen from the lips of my brother the learned Chief Justice. But I would like to add this, that I do not look upon the matter as being one of discretion merely, such as a judge's orders under the Rules of the Supreme Court. Here the liberty of the subject is at stake. True, he is not a subject of His Majesty the King; but being in any part of our Empire entitled one to all the privileges that a subject of His Majesty has. Now therefore in effect it can be said that a subject of His Majesty the King has been in gaol for over a year and a half, and throughout that whole year and a half these parties who persist in keeping him in gaol have not been able to shew by any positive evidence that this defendant has means, for instance, in China, that he transmitted moneys to China, or has securities anywhere; that he has moneys in China or elsewhere. Is it at all reasonable that having money he, nevertheless, is pleased to lie in gaol here, occupying a cell, as if he were a criminal, in the police Court cells of this city? It is true he has a corridor next to the cell to walk up and down in—even a criminal has that. It does strike one that it is a most barbarous condition of things, that for the non-payment of debt this can go on in any portion of

COURT OF APPEAL

1929

Jan. 24.

PING LEE
v.
PAUL WISE

MCPHILLIPS, J.A.

the British Empire. Sometimes comments are made with regard to other countries—and China, that things are wrong in China. But if a British subject could be treated in the same way in China upon similar evidence, I would say that it could be said that it was a barbarous country in which that person was.

Now in principle, what did the English people long ago determine? They determined that no man should languish in gaol for debt. But the strange anomaly was that whilst giving that liberty with the right hand, with the left several provisoes were made whereby people do get in gaol for debt. But we have not got the provisoes in this Province that they have in England; nevertheless, men get in gaol here for debt. And it is a barbarous thing. It is against the principle that was enunciated long ago in the Mother Country, and it is against the genius of the British people that a man should lie in gaol for debt. It is well to bear in mind what the Legislature has declared in section 2 of the Arrest and Imprisonment for Debt Act, Cap. 15, R.S.B.C. 1924:

"2. Process of contempt for mere non-payment of any sum of money, or for mere non-payment of any costs payable under any judgment, decree, or order, is abolished; and no person shall be detained, arrested, or held to bail for non-payment of money except as in this Act is, or in any other Act of the Legislative Assembly may be provided."

Therefore we start with the premise that it is against the genius of our people that a man should be in gaol for debt, but the anomaly is that he can be in gaol for debt; he may be arrested for non-payment of debt if about to quit the Province owing the sum of $100 or over that sum; and the appellant was on that ground arrested, although he was actually at the time of arrest upon a continuous trip to China, as his education was concluded, having entered Canada as a student, and his right to remain in Canada was at an end.

In passing, let me say that I see upon the record here a collision between the National authority and the Provincial authority. Here is a man who came into this country, a young boy, for educational purposes. It is proved that he attended well-known educational institutions in Canada, and it is quite evident that he gained quite a considerable education. After that was through, his right to remain in Canada ceased. The Chinese Immigration Act says so. He, as a good foreigner

resident in Canada, and having been protected by the laws of Canada, and obeying the law of Canada, proceeds to get a ticket which takes him from the City of Toronto to China, in conformity with the Chinese Immigration Act, and when actually in transit the Provincial authority interposes its hand, and seizes him and takes him when in the course of a continuous passage to China.

It is a circumstance that ought to have been considered when the order for arrest was made, and it weighs with me because it is against the policy of Canada for him to further remain in this country.

We therefore see that the appellant was voluntarily proceeding to do what the National Parliament says he must do, that is return to China; and in the course of returning he is apprehended in this way.

MCPHILLIPS, J.A.

Now my learned brother MARTIN has laid great stress upon the power and right of the judge, and that his judgment should not be disturbed in the Court of Appeal in this particular case upon the evidence we have here. It is to be remembered that the members of the Legislature when enacting this legislation, said in effect, this is an extraordinary thing, that under certain circumstances a man should be arrested and imprisoned because of non-payment of a debt; so they said this, in section 16 of the Act:

"An appeal shall lie to the Court of Appeal from the decision of a judge discharging a debtor, or refusing to discharge him; and in case the appeal shall be from an order of discharge, the debtor shall remain in custody pending the appeal, unless the Court or judge shall otherwise order."

Now in the Legislature—and I had many years of experience—there would be objections raised to such drastic legislation, but the members would be told, there is a guarantee it shall not only be one judge that shall determine the question, but on appeal the whole Court of Appeal of British Columbia will determine the question, five judges, and with such a guarantee you can rely on it that justice will be done. I am very impatient when it is urged that because a judge of the Court below has held this or that, that we should with trepidation approach the subject. I do not think that that is our jurisprudence; that is not our judicature at all. We have seen the ultimate Court of Appeal in Canada reverse judgments upon

COURT OF APPEAL

1929

Jan. 24.

PING LEE
v.
PAUL WISE

MCPHILLIPS, J.A.

questions of fact, reversing the trial judge and reversing us. They do not hesitate to do so—in a proper case. Why should we with hesitancy approach this subject when, as I say, the liberty of the subject is at stake? To think that in these enlightened times a young man, after having found educational facilities in our country, in accordance with the comity of nations, he came here, was protected here, and was educated here, and then was proceeding home, but he is arrested on the way and has been lying in gaol here for over a year and a half. The respondent comes to Court with what class of evidence? Hearsay evidence, romance evidence—nothing to shew that the appellant has a dollar in China or elsewhere. He has sworn that he has no money and is without means of any nature or kind. Through the charity of counsel, his position is now being presented to this Court.

Now what had the learned judge below to do? He had to be satisfied that the debtor "has no means or ability to satisfy the judgment or any part or further part thereof" (section 15, Cap. 15, R.S.B.C. 1924). Now could the learned Chief Justice in the Court below reasonably—and I say this with all respect—say that this defendant has any means by which he may pay this debt? Where is it? What does it consist of? Real estate, shares, stocks, bonds, moneys? Nothing is shewn on the material whatever, and the appellant has pledged his oath that he has nothing, and all the circumstances prove that he has nothing, yet we are to be asked to confirm this order and leave this young man in gaol, as far as I can see, during the rest of his natural life. The balance of the probabilities is all with the appellant, there is no reason for the belief that the appellant has a dollar out of which he can discharge this debt. It is a matter where the liberty of the subject is at stake, it is not to be tried in the same way as a merchant's accounts are investigated. Parliament never intended that a man should be in gaol, notwithstanding that he has no money to pay the debt.

I do not consider, with great respect, that the learned Chief Justice had before him evidence—reasonable evidence—that the appellant had the means or the ability to satisfy the judgment or any part thereof.

It has not been proved that the appellant has a dollar, and in

COURT OF APPEAL

1929

Jan. 24.

PING LEE v. PAUL WISE

my opinion the learned Chief Justice should have discharged the appellant as having no means or ability to satisfy the judgment, "or any part or further part thereof," in conformity with the statute. The judgment of the Court below is not in my opinion founded upon reasonable evidence and should be reversed, and this Court should make the order the Court below should have made, and that is an order that the debtor, the appellant, should be discharged. I would allow the appeal.

MACDONALD, J.A.

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

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Jackson & Baugh-Allen.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

MCDONALD, J.

1929

Feb. 28.

IN RE LAND REGISTRY ACT AND BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LTD. v. WALDRON APARTMENTS LTD.

IN RE LAND REGISTRY ACT AND BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED v. WALDRON APARTMENTS LIMITED.

Mortgage—Quit claim by mortgagor to mortgagee—Quit claim registered by mortgagee but subject to his mortgage—Judgment against mortgagor registered after mortgage but before quit claim—No merger—Exercise of power of sale.

A mortgagee who takes a quit claim from the mortgagor, expressed to be in satisfaction of all claims against the mortgagor, but who registers the quit claim subject to his mortgage, does not thereby let in as a first charge a judgment registered against the mortgagor between the dates of the mortgage and the quit claim. The taking of the quit claim creates no merger of the mortgage unless the mortgagee so intends, and registration in the way mentioned negatives such intention. The mortgagee may exercise the power of sale in the mortgage, although the mortgagor is released from personal liability.

PETITION by a judgment holder, under section 232 of the Land Registry Act, by way of appeal from the registrar's ruling that a conveyance under power of sale in a mortgage had conferred a good title on the grantee freed from the judgment.

Statement

F. B. Pemberton, having acquired certain lands subject to a right to purchase in favour of Lou Gou and Wong Dick Jong, had conveyed to them in 1914 and taken from them a mortgage for the balance of the unpaid purchase-money. In 1916 the petitioner obtained a judgment against Wong Dick Jong which was registered and kept renewed. In 1918 the mortgagors being unable to pay the mortgage, the mortgagee, who knew nothing of the judgment, took from them a quit-claim deed which recited that it was given "in full satisfaction of all claims and demands upon" the mortgagors. The mortgagee did not sign the quit-claim deed. When application to register the quit-claim deed was made the judgment was discovered, and the mortgagee's agent then wrote upon the application form: "Reg'r subject to mortgage and judgment," which was done, the mortgage continuing on the register as a first charge.

In 1928 the mortgagee executed a conveyance under power

of sale in the mortgage to the respondents, who applied to register free of the judgment.

The petition was heard by McDONALD, J. at Victoria on the 22nd of February, 1929.

Prior, for petitioner: The quit-claim was taken in satisfaction, and the mortgage being satisfied, is gone, and the power of sale cannot be exercised: *Dicker* v. *Angerstein* (1876), 3 Ch. D. 600. The declaration filed, that the mortgagor has made default, is untrue: there can be no default if there is no liability. The mortgage being still on the register is immaterial, if the documents shew it is satisfied. There was a merger in law, and the merger not being shewn on the register does not alter the parties' positions.

Argument

Fowkes, for respondent: Because the mortgage debt cannot be sued for, it does not follow that the mortgage charge is gone. The declaration of default is correct: a mortgagor may make default even though he cannot be sued. By releasing one remedy against mortgagors, Pemberton did not release other remedies against third parties. When a charge and a fee vest in one person, there is no merger, unless that person so intends: *Adams* v. *Angell* (1877), 5 Ch. D. 634. There is nothing here to shew such intention, which was contrary to his interest. The method of registration shews his intention. Even if the recital shewed an intention to merge, which it did not, Pemberton not having signed it, could only be bound by it in equity, and the petitioner has no equity to avail itself of the point. It is a mere volunteer, trying to claim a priority for which it gave no consideration, and to which it has no moral claim whatever: see *Whiteley* v. *Delaney* (1914), A.C. 132. Even if the mortgage had been merged by mistake, we would still be entitled to relief: *Dean and Chapter of St. John's Cathedral* v. *MacArthur* (1893), 9 Man. L.R. 391. A power of sale can be exercised after a quit claim is taken from the mortgagor: *In re Major* (1897), 5 B.C. 244.

The District Registrar, in person: Even if the application had not shewn that the mortgage was not to merge, the Land Registry practice would be not to merge it without express instructions from the mortgagee: *In re Major* (1897), 5 B.C.

MCDONALD, J. 1929 Feb. 28.

IN RE LAND REGISTRY ACT AND BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LTD. v. WALDRON APARTMENTS LTD.

244. In regard to the mortgagee's charge and his remedies as unaffected, and putting myself in the position of the purchaser, I consider that Pemberton has conferred a good, safe-holding and marketable title.

28th February, 1929.

Judgment

MCDONALD, J.: The applicant, the B.C. Land and Investment Agency, Limited, petitions for a declaration that a certain deed of conveyance from one, F. B. Pemberton, to Waldron Apartments Limited ought not to be registered. Pemberton is the mortgagee of the property in question for $8,000, upon an indenture of mortgage dated 10th April, 1914, from Lou Gou and Wong Dick Jong. The said mortgage contains what is not an unusual power of sale, which power of sale is exercisable upon default by the mortgagors in payment of principal, interest or taxes.

On 23rd November, 1916, the petitioner obtained a judgment against Wong Dick Jong and one Chu Chow, and registered a certificate of same on 28th November, 1916. This judgment has been kept renewed to date.

On 14th September, 1918, Pemberton took a quit-claim deed from his mortgagors, which deed contained a recital that the mortgagee had agreed to accept a quit-claim deed to the lands in question in full satisfaction of all claims and demands of the mortgagee from the mortgagors under said mortgage. This conveyance was duly registered on 14th September, 1918, the application to register same containing these words: "Reg'r subject to mortgage and judgment."

On 1st October, 1928, Pemberton conveyed the lands to Waldron Apartments Limited by a conveyance which recited the mortgage and power of sale therein contained, and stated that such conveyance was made pursuant to such power of sale. Application has been made to register this latter conveyance and the petitioner prays that such registration should not be made.

The point in question appears to be whether or not Pemberton in accepting the quit-claim deed intended that his power of sale should thereby become extinguished, and as I understand counsel it is common ground that that question is to be decided

by ascertaining what was the intention of the parties when the quit-claim deed was executed. On the one hand we have the recital in the quit-claim deed that it was intended to extinguish the mortgage debt; on the other hand, we have the application to register the quit-claim deed which application clearly indicates no intention that there should be a merger, but an intention that the conveyance should be registered subject to the mortgage and to the judgment.

It is to be noted that the judgment was some two years subsequent to the mortgage, and the petitioner, in order to succeed, must have a finding that notwithstanding this fact nevertheless Pemberton intended to release his charge upon the lands in favour of the judgment creditor. The law upon the subject is clearly stated by Taylor, C.J., in *Dean and Chapter of St. John's Cathedral* v. *MacArthur* (1893), 9 Man. L.R. 391 at p. 395, where the learned Chief Justice cites one of the leading cases, *Adams* v. *Angell* (1877), 5 Ch. D. 634.

Under all the circumstances and upon the evidence before me, I am convinced that there was no intention to release the security upon the lands. The petition therefore must be dismissed, and as both parties in launching and opposing this application did so after full consideration, and with all the facts before them, I am unable to see any ground upon which I ought to refuse the costs to the successful party.

Petition dismissed.

MURPHY, J.

1929

Jan. 24.

PACIFIC BERRY GROWERS LTD. v. THE WESTERN PACKING CORPORATION LTD.

PACIFIC BERRY GROWERS LIMITED v. THE WESTERN PACKING CORPORATION LIMITED *ET AL.*

Companies—Amalgamation—Transfer of property and assets for shares in amalgamation—Absence of extraordinary resolution sanctioning purchase—R.S.B.C. 1924, Cap. 38, Sec. 15—Effect of section.

The plaintiff Company entered into an agreement for the purpose of effecting an amalgamation with various companies engaged in the business of purchasing, packing and selling fruits and vegetables and turned over its business and assets to the defendant Company which was formed to acquire the business and assets of the various companies, in consideration for which the plaintiff Company received certain shares in the defendant Company. In an action to set aside the sale and declare the plaintiff the owner of the property and assets which had been turned over to the defendant Company on the ground that the transaction was *ultra vires* and void as the sale and purchase were never submitted to or concurred in by the shareholders of the plaintiff Company and that said shareholders had not passed a resolution pursuant to section 15 of the Companies Act:—

Held, that the conveyances and other documents of transfer were validly executed and section 15 does not prevent property passing under a conveyance or instrument which under the ordinary circumstances of the law would pass it, nor does section 15 make the taking of shares by a company unlawful *per se*. There is not total failure of consideration as the shares given the plaintiff had value and any failure of consideration results not from absence of value in the shares but from want of capacity in the plaintiff Company to hold them. Under section 15, the question of capacity is wholly a matter for the plaintiff Company which could at any time clothe itself with the necessary capacity by complying with the provision of the section and the action should be dismissed.

Statement

ACTION to set aside a sale and declare the plaintiff the owner of certain property and assets which had been turned over to the defendant Company under an agreement for the purpose of amalgamating a number of companies engaged in the same business. The plaintiff Company was engaged in the business of purchasing, packing and selling fruits and vegetables and the defendant Company was formed to acquire the business and assets of various companies carrying on this business and in consideration of obtaining certain shares in the defendant Company the plaintiff Company turned over its business and assets. The plaintiff Company claimed the transaction was *ultra vires,*

illegal and void as the sale and purchase were never submitted to or concurred in by its shareholders and the shareholders had not passed an extraordinary resolution pursuant to section 15 of the Companies Act. Tried by MURPHY, J. at Vancouver on the 21st of January, 1929.

A. Alexander, for plaintiff.

Alfred Bull, and *Hossie,* for defendants.

24th January, 1929.

MURPHY, J.: It is clear on the undisputed facts of this case that plaintiff cannot succeed unless the transactions involved are nullities in law for they have been completely carried out and, in addition, any opening up would seriously affect the interests of numerous parties not before the Court. In my opinion it cannot be said that the conveyances and other documents of transfer herein are legally nullities. The memorandum of association of plaintiff Company clearly empowers their execution. It is not seriously argued but that, in so far as defendants are concerned, the doctrine of *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327 applies with regard to the validity of such execution. But it is said legal nullity results because of section 15 of the Companies Act, R.S.B.C. 1924, Cap. 38. I consider the decision in *Ayres* v. *The South Australian Banking Company* (1871), 40 L.J., P.C. 22 applicable to the case at Bar. Whatever the effect of said section 15 it does not prevent property passing either in goods or lands under a conveyance or instrument which under the ordinary circumstances of the law would pass it. Said section 15 does not make the taking of shares by a company with a constitution, such as that of plaintiff Company, unlawful or illegal *per se.* Nor can it be said that there is here a total failure of consideration. The shares issued to plaintiff Company unquestionably had value. Any failure of consideration would therefore result not from absence in value in the shares given but from want of capacity in plaintiff Company to hold such shares. As I read said section 15 this question of capacity was wholly a matter for plaintiff Company. It could at any time clothe itself with the necessary capacity by complying with the provisions of said section 15.

Judgment

The action is dismissed with costs.

Action dismissed.

CAYLEY, CO. J.

1929

Jan. 22.

BLAIR v. THE CANADIAN FISHING CO.

BLAIR v. THE CANADIAN FISHING COMPANY LIMITED.

Practice—Costs—Defence of tender—Payment into Court—County Court Order VI., rr. 5 and 10.

In an action to recover $283.06 the defendant paid into Court $100.43 under a defence of tender. The plaintiff only recovered $100.43 on the trial but it was found that the defence of tender was not sustained by the evidence.

Held, that Order VI., r. 10 of the County Court Rules applies, and the plaintiff is entitled to the costs of the action on the scale based on the amount recovered.

Statement

APPLICATION for disposition of the costs of the action. Heard by CAYLEY, Co. J. at Vancouver on the 29th of November, 1928.

J. A. McGeer, for plaintiff.
Hossie, for defendant.

22nd January, 1929.

Judgment

CAYLEY, Co. J.: The plaintiff sued the defendant for $283.06 but recovered only $100.43 which the defendant had paid into Court under a defence of tender. In my judgment, I stated that the defendant's defence of tender was not sustained by the evidence. Under these circumstances, who gets the costs? The defendant holds that Order VI., r. 5 governs. But if the plaintiff had accepted the amount paid in I hold that, under Order VI., r. 10, he could not have taken the money out of Court until after judgment and in effect that rule 5 does not apply to payment into Court on a defence of tender but that rule 10 alone applies. I think that *Griffiths* v. *School Board of Ystradyfodwg* (1890), 24 Q.B.D. 307 governs. The plaintiff will, therefore, have the costs of the action on the scale based on the amount he recovered.

Costs to plaintiff.

MULLETT v. UNITED STATES FIDELITY & GUARANTY CO.

COURT OF APPEAL

1929

March 5.

MULLETT v. UNITED STATES FIDELITY & GUARANTY Co.

Insurance—Burglary—Entry by tearing away fly-screen from window—"Actual force and violence"—"Visible marks made on premises at place of entry by tools"—Construction of—Burden of proof—Evidence.

The plaintiff, who was a sausage manufacturer, had his premises insured in the defendant Company against loss by burglary. The premises required a free passage of air and the plaintiff removed the glass from the upper sashes in three windows and covered the apertures with fly-screens. Prior to issuing the policy the Company's inspectors, on examining the premises, were shewn the screens and advised that a burglary had previously taken place by breaking through one of the screens. While the policy was in force burglars broke in and stole sausage casings valued at $412.75. On the morning following the burglary it was found that one of the fly-screens on a window had been torn away from its fastenings. The policy provided, *inter alia*, that the assured was indemnified against loss by burglary, etc., "occasioned by any person making felonious entry into the premises by actual force and violence when the premises are not open for business, of which force and violence there shall be visible marks made upon the premises at the place of such entry by tools," etc. The plaintiff recovered judgment on the policy for the loss sustained.

Held, on appeal, affirming the decision of RUGGLES, Co. J., that there was evidence to justify the finding of the Court below that there were "visible marks made upon the premises at the place of such entry by tools" within the policy of burglary insurance in question.

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 1st of November, 1928, in an action to recover $412.75 on a burglary-insurance policy, the plaintiff claiming that his premises on Pender Street in Vancouver where he manufactured sausages were forcibly entered during the night of the 9th and 10th of July, 1928, by parties unknown and sausage casings of the above value were stolen. The insurance policy contained the following clause:

Statement

"To indemnify the assured for all loss by burglary of merchandise, furniture and fixtures, from within the assured's premises as hereinafter defined, occasioned by any person or persons making felonious entry into the premises by actual force and violence when the premises are not open for business, of which force and violence there shall be visible marks made upon the premises at the place of such entry by tools, explosives, electricity or chemicals."

COURT OF APPEAL

1929

March 5.

MULLETT v. UNITED STATES FIDELITY & GUARANTY CO.

It was necessary to have ventilation through the premises where sausages were made and at the top of one of the windows the glass frame was taken out and it was covered with fly-screen. On the morning of the burglary it was found that a burglar had torn away the fly-screen, entered and unlocked a door from the inside, through which the sausage casings were taken away. The plaintiff recovered the value of the casings taken.

The appeal was argued at Victoria on the 10th and 11th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellant: The burglars simply tore aside the fly-screen. This was all the damage that was done to make an entry and the question is whether this is a burglary within the policy. We say (1) There was no force and violence; and (2) if there was force and violence there are no "marks by explosion, tools," etc.: see *In re George and Goldsmiths and General Burglary Insurance Association* (1899), 1 Q.B. 595. As to the meaning of "tool" see Murray's Dictionary, Vol. X., Part I., p. 136. The cases shew the insured must come within the four walls of the policy. As to the burden of proof see *Hurst* v. *Evans* (1916), 86 L.J., K.B. 305; *Munro, Brice & Co.* v. *War Risks Association* (1918), 2 K.B. 78 at p. 87.

Lennox, for respondent: There should be a liberal construction placed on the policy. The premises were examined by the Company's men before the insurance was taken: see *In re Calf and Sun Insurance Office* (1920), 2 K.B. 366. The premises required free passage of air and the top sashes of three windows had fly-screens. There had been a previous burglary in the same way and the Company's men had been told of this prior to taking the insurance. The onus is on the Company.

Bull, in reply, referred to *Mahomed* v. *Anchor Fire and Marine Insurance Co.* (1912), 17 B.C. 517, reversed by the Supreme Court of Canada (1913), 48 S.C.R. 546.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The policy was one which insured the

plaintiff against loss by burglary. The indemnity was against the entry of a burglar by "actual force and violence," of which force and violence "there shall be visible marks made upon the premises at the place of such entry by tools," etc. The visible mark upon the premises in question was the broken screen through which the burglar made his entry. That he did break the screen and enter through the aperture is not denied, but it was argued that there were no visible marks upon the premises made by a "tool." I think there were such visible marks. The clause does not imply that marks must be left which would identify the tool used. There must be marks from which the Court may properly infer that they were made by a tool of some kind. Now, the screen was intact before the entry and some instrument must have been used in the breaking of it. It was suggested that the burglar may have found a small hole in the screen through which he inserted his finger and then ripped the screen open in that way. The answer is that there was no hole in the screen which was of fine mesh. Whether the burglar broke the screen with a stick which was found outside the window or by any other instrument which would answer the purpose, it is not necessary to say. I draw the inference, as I think the trial judge did, that the screen was broken by a tool and the broken screen was the visible mark of the use of that tool.

MACDONALD, C.J.A.

I am not a little surprised that in a case of this sort, where no fraud was suggested, and where the officers of the defendant inspected the premises and had the screen pointed out to them before taking the risk, resistance to the plaintiff's claim should have been made. The said clause in the policy was inserted no doubt to cover cases in which entry was made, for example, through an open or unlocked door, or by means of a key leaving the manner of entry in doubt or entirely unexplained.

I would dismiss the appeal.

MARTIN, J.A.: Not without considerable doubt have I been able to reach the conclusion that I should not dissent from the view of my learned brothers that there is enough evidence to prevent our interfering with the finding of the learned judge below that there were "visible marks made upon the premises

MARTIN, J.A.

COURT OF APPEAL

1929

March 5.

MULLETT v. UNITED STATES FIDELITY & GUARANTY Co.

at the place of such entry by tools," within the policy of burglary insurance in question. The case is upon the line and undoubtedly the learned judge below drew the extreme inference from the finding of the stick with rusty marks upon it (which is as much a "tool" for the purpose of breaking the screen as an iron bar or cutting instrument would be) below the wire window screen where the entry was effected, which screen it was, however, open to him upon the evidence of several conflicting witnesses, to regard as intact, *i.e.*, without holes, though rusted, at the time of such entry. There is no dispute about the law governing the matter and the leading cases of *In re George and Goldsmiths and General Burglary Insurance Association* (1899), 1 Q.B. 595, and *In re Calf and Sun Insurance Office* (1920), 2 K.B. 366 do not conflict, here there was "actual force and violence" used within their meaning, and the actual use of a "tool" is a question of the inference that may reasonably be drawn from the facts in evidence in the peculiar circumstances of this case.

MARTIN, J.A.

GALLIHER, J.A.: This case depends upon the construction of clause 1 of the policy. It is distinguishable from *In re George and Goldsmiths and General Burglary Insurance Association* (1899), 1 Q.B. 595, in that there Lord Russell of Killowen, C.J., laid stress upon the fact that the parties had contracted as to the nature of the force and violence in the language thus set out:

"'Against loss or damage by burglary and housebreaking as hereinafter defined,' and the risk insured against was expressed to be loss of the property insured 'by theft following upon actual forcible and violent entry upon the premises wherein the same is herein stated to be situate.'"

GALLIHER, J.A.

And goes on to say (p. 601):

"Therefore it is not burglary and housebreaking as defined by the criminal law which is the subject-matter of the insurance, but burglary and housebreaking as the parties have defined them in their contract."

In the policy before us the words "as hereinafter defined" have reference to the premises and not to the burglary, but there is in the policy these words "of which force and violence there shall be visible marks made upon the premises at the place of such entry by tools, explosives, electricity or chemicals." We can here eliminate all of these latter words except "tools" and proceed to consider it upon that basis.

COURT OF APPEAL

1929

March 5.

MULLETT v. UNITED STATES FIDELITY & GUARANTY Co.

The burglar entered through a wire screen over the upper portion of one of the shop windows, the sash of this upper portion having been taken out by the owner for the circulation of air. From the evidence it would appear that the condition of this wire netting was such as to provide little protection against entry, still it can be said that some force and violence would be necessary to effect entrance.

I think also from the evidence that it must be taken to have been known by the agent of the defendant who made the inspection and recommended the risk that this was the protection they were insuring against and that they were shewn the manner in which a burglar had entered through a similar screen on another window in the shop on the night previous to the risk being written.

I think the appearance of the screen on the morning after the burglary with the large hole through it surrounded with jagged edges, was evidence on the premises that force and violence had been used, even although they were slight, but there still remain the words "marks of tools."

GALLIHER, J.A.

In Murray's Dictionary, Vol. X., Part I., at p. 136, under the heading "Tool," the only reference which I think can have any bearing is (2):

> "Anything used in the manner of a tool; a thing (concrete or abstract) with which some operation is performed; a means of effecting something; an instrument."

That would, I think, include a stick or stone used to smash in the wire netting.

Some evidence was directed as to a stick or piece of box being found outside the window with some rust upon it, and while this evidence is not perhaps as definite as could be wished, still, I could not say that there was no evidence before the learned trial judge upon which he could find or draw the inference that a stick had been used to break the screen.

I would dismiss the appeal.

MCPHILLIPS, J.A.: This appeal in my opinion cannot succeed. The reasons for judgment of the learned trial judge would appear to be conclusive in establishing liability under the policy. It is true that notwithstanding these reasons given at the close of the trial the learned judge reserved judgment.

MCPHILLIPS, J.A.

COURT OF APPEAL

1929

March 5.

MULLETT v. UNITED STATES FIDELITY & GUARANTY CO.

However, later, judgment was given and the plaintiff was held to be entitled to succeed, the cause of action in the opinion of the learned trial judge having been established to his satisfaction. I cannot persuade myself that the learned trial judge went wrong in his finding of facts nor do I consider that there has been any error in law. The policy sued upon was for burglary insurance. The material provision to be considered upon this appeal reads as follows: [already set out in statement].

MCPHILLIPS, J.A.

The facts amply prove a felonious entry by actual force and violence when the premises were not open for business, and visible marks were made upon the premises at the place of entry by tools. That which was used as a tool was a piece of wood. It bore signs of being used to break through the wire screen having rust marks thereon. The state of the wire screen bears ample evidence of the use of the piece of wood which was picked up from the ground below where the entry was made. It is sufficient within the meaning of the above-quoted provision to establish, as was well established, that the wire screen was, with force and violence by use of the piece of wood, forced and broken through, and visible marks are evidenced by the state of the wire screen which formed a part of the premises, just as much as a window frame or window glass would be a part of the premises. Therefore, all the requirements of the material provision of the policy were satisfied, to establish a burglary within the meaning of the policy and the indemnification sued for was rightly allowed to the plaintiff, being a liability upon the facts clearly within the meaning of the provision. The case is one that is wholly dependent upon the facts and no case has been made out which would warrant disturbance of the judgment (*S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37, at pp. 47-8).

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The respondent, a sausage manufacturer, sued appellant on an insurance policy indemnifying him for loss of merchandise by burglary. Appellant Company resists payment on the ground that the loss does not fall within the terms of the policy, relying upon the following clause therein: [already set out in statement].

It was not proven appellant submits that an entry was made "by actual force and violence," of which "there shall be visible marks made upon the premises . . . by tools," etc. The entry was made through a window covered by a screen, placed there, not for protection against invasion by burglars but to keep out flies and insects. The whole question turns upon the true construction of the contract and the natural meaning to be assigned to the words used by the parties thereto.

Whatever may be said as to inadequate protection of the premises by bars or otherwise to resist an entry, its condition was known to the appellant when the insurance was effected. It was inspected by its representative and found to be in the same condition as at the time the loss occurred. Appellant had the right to require the assured to make the premises reasonably secure but did not exercise that right. It was willing to issue the policy with the premises in the condition shewn at the time of the loss without requiring additional security against invasion and accepted a premium on that basis but refuses to pay for the loss.

MACDONALD, J.A.

Entry was effected by breaking through one of the screens on a window. It required, in my opinion, "force and violence" as contemplated by the clause referred to above to do so. These words have reference to

"the character of the act by which an entry is obtained rather than the actual amount of force used in making the entry":

In re Calf and Sun Insurance Office (1920), 2 K.B. 366 at p. 378. It was not as in *In re George and Goldsmiths and General Burglary Insurance Association* (1899), 1 Q.B. 595, where it was held that a somewhat similar condition was not complied with because entry was made through a door which was not locked or bolted. All that was required to gain admission was to turn the handle.

The main contention is that there was no evidence that a tool was used. The learned trial judge in his reasons said:

"A tool of some sort had to be used. I would not like to take my naked fist and hit that screen when it was tightly extended."

There was evidence that a small stick was found outside the premises bearing marks of rust on it as if used to pierce the rusty screen. It is often by inference from the appearance of

COURT OF APPEAL
1929
March 5.
MULLETT v. UNITED STATES FIDELITY & GUARANTY CO.

MACDONALD, J.A.

the damaged premises or parts thereof that the method of entry is established. "Chemicals" as mentioned in the condition might be used in some cases and yet shew no direct evidence—except by deduction—of the means employed. The trial judge thought a tool of some sort was used. We can take it that he so found. It was possible doubtless to make the opening by hand but most unlikely. It might be dangerous to use the bare hand on a rusty screen. That is not the natural way in which the aperture would likely be made. Undoubtedly the hand would be protected by using some instrument and as there is some evidence that a stick was in all probability used—the rust would not be on it if not brought into contact with rusted metal—and it is conceded that a stick would be a "tool," I see no reason for a trial judge refusing to make such a finding based upon inferential evidence. The learned trial judge who examined a part of the screen said: "I cannot put my finger through that," and "it does not seem to tear very readily." Obviously the hand was assisted by some object or tool. To hold otherwise is to suggest an improbability. The probabilities that either the bare hand or a tool was used are not equal. Facts may be affirmatively established by inference. If a man is killed and a hole found in his head it may be found as a fact that a revolver was used.

As to "visible marks made upon the premises," the aperture in the screen is quite sufficient to meet this requirement.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper & McKim.*

Solicitors for respondent: *Lennox & Fletcher.*

THE GRANBY CONSOLIDATED MINING SMELTING & POWER COMPANY LIMITED v. WEST KOOTENAY POWER AND LIGHT COMPANY LIMITED.

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &C. CO. *v.* WEST KOOTENAY POWER AND LIGHT CO.

Injunction—Interim—Application to continue—Electric power—Supply for mines—Conditional water licences—Use of power circumscribed—R.S.B.C. 1897, Cap. 190, Sec. 118; B.C. Stats. 1897, Caps. 45, 62, 63 and 67; B.C. Stats. 1899, Cap. 77.

The defendant Company, incorporated in 1897, was authorized to generate electric power and transmit same within a radius of 50 miles from the City of Rossland. At the same time the South Kootenay Water Power and Light Company Limited and the Okanagan Water Power Company were incorporated with like powers of generating and transmitting electric power, the first mentioned within an area of the same size adjoining the defendant Company's area to the east and the other within an area of like size adjoining further to the east. These two companies never constructed works, but the defendant Company constructed extensive works at Bonnington Falls on the Kootenay River and by separate agreements leased the whole of the undertakings of the other two companies, constructing extensive transmission lines in their respective areas. One transmission line supplied power to the plaintiff Company's mines situate within the area of the Okanagan Water Power Co. Upon the termination of the contract under which this power was supplied the defendant Company threatened to cease supplying power and the plaintiff Company then obtained an *interim* injunction restraining the defendant Company from cutting off the power it had hitherto supplied. An application to continue the injunction on the ground that the defendant Company was obliged to supply power to the plaintiff under section 118 of the Water Clauses Consolidation Act, 1897, was dismissed.

Held, on appeal, affirming the decision of MURPHY, J. (MARTIN and McPHILLIPS, JJ.A. dissenting), that neither the defendant Company nor the Okanagan Water Power Co. was entitled to claim the use of water for generating power under their respective Acts of incorporation but must have acquired it under the Water Clauses Consolidation Act. The Okanagan Water Power Co., the mines in question being within its area for the supply of power, never acquired licences under the Water Clauses Consolidation Act and was therefore under no obligation to supply power to the plaintiff's mines and having leased its entire franchise to the defendant, the defendant would be under no further obligation. The defendant Company only acquired licences for the use of water under the Water Clauses Consolidation Act, but its supply of power is confined to an area within 50 miles of Rossland. The defendant Company is not compelled to supply the plaintiff Company's mines with

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. Co. v. WEST KOOTENAY POWER AND LIGHT Co.

Statement

electric power under section 118 of the Water Clauses Consolidation Act.

APPEAL by plaintiff from the order of MURPHY, J. of the 17th of September, 1928 (reported, 40 B.C. 269), dismissing the plaintiff's application to continue an injunction to restrain defendant Company from cutting off the power it had hitherto supplied to plaintiff Company. The defendant Company was incorporated in 1897 by private Act and was authorized to generate and transmit electric power to that portion of West Kootenay within a radius of 50 miles from the City of Rossland. At the same time two other companies were incorporated by private Act having like powers, namely, the South Kootenay Water Power Company with the right to transmit power within an area of equal dimensions to that of the West Kootenay Power Company and lying to the east of the West Kootenay Power Company area, and the Okanagan Water Power Company with the right to transmit power within an area of equal dimensions to the east of that of the South Kootenay Power Company. The defendant Company constructed extensive works at Bonnington Falls but the two last-mentioned companies never constructed any works whatever. The defendant Company, shortly after its incorporation, 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. On the 5th of June, 1923, the Allenby Copper Company Limited having a mine on Copper Mountain and within the area of the Okanagan Company entered into an agreement with the Okanagan Company for the supply of power for five years for operating the said mine which was guaranteed by the defendant Company and the said mine was purchased by the plaintiff Company in December, 1926, said Company continuing to operate it under the said agreement of the 5th of June, 1923. Upon the termination of this agreement the plaintiff Company obtained an *interim* injunction restraining the defendant Company from cutting off the power it had hitherto supplied said mine, and on 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.

The appeal was argued at Vancouver on the 22nd and 23rd of October, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, J.J.A.

Mayers, K.C. (*Locke,* with him), for appellant: The question is whether the defendant Company has by statutory enactment to supply power to the plaintiff Company. The three private Acts incorporating the three Companies were passed at the same time in 1897, and later the West Kootenay Company acquired the other two. Part IV. of the Water Clauses Consolidation Act was incorporated in all the private Acts under section 118 of which, each is compelled to supply power in its own area. The contract under which power had been supplied expired on the 1st of September, 1928, but we say they must continue to supply under the statutory enactments. Part IV. of the Water Clauses Consolidation Act was repealed in 1909 but this does not affect the situation as the private Acts are still in force. It does not repeal a section incorporated in another Act: see *Jenkins* v. *Great Central Railway* (1912), 1 K.B. 1 at p. 8. The Okanagan Power Company is under an existing statutory obligation to supply us with power and the West Kootenay Company having acquired the Okanagan Company, it is under a statutory obligation to supply us with power. That it is obliged to assume the burdens as well as the benefits see *Nicholl* v. *Allen* (1862), 1 B. & S. 916. The water records were changed to licences but this does not take away any of their rights originally obtained: see *Winnipeg Electric Railway* v. *Winnipeg City* (1912), 81 L.J., P.C. 193 at p. 200.

Argument

A. H. MacNeill, K.C., for respondent: All the powers given the West Kootenay Company are optional. They can exercise them or not as they please. Their powers are set out in section 38 of the private Act (B.C. Stats. 1897, Cap. 63) and section 118 of the Water Clauses Consolidation Act was repealed in 1909, and under section 42 (1) of that Act there is an absolute prohibition from taking any steps under that Act. The agreement between The Allenby Company and the Okanagan Company was made in 1923, about 14 years after the Water Clauses

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &C. CO. v. WEST KOOTENAY POWER AND LIGHT CO.

Argument

Consolidation Act was repealed. As to the Company being compelled to exercise its powers there is no compulsory section in the statutes and there is no duty on the Company to continue to supply power: see *Rossland Board of Trade* v. *Great Northern Ry. Co.* (1922), 28 Can. Ry. Cas. 24; *Scottish North-Eastern Railway Company* v. *Stewart* (1859), 3 Macq. H.L. 382 at p. 414; *Darlaston Local Board* v. *London and North Western Railway Co.* (1894), 2 Q.B. 694.

Mayers, in reply: Part IV. of the Water Clauses Consolidation Act, 1897, is included in the private Act incorporating the Okanagan Company which is still in force. There is, therefore, the statutory obligation to supply power. The lease of the Okanagan Company has the same effect as a transfer. That the Company is bound to perform its duties see *Canadian Northern Ry. Co.* v. *Robinson* (1910), 43 S.C.R. 387.

Cur. adv. vult.

8th January, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appellant moved for an injunction to restrain the respondent from cutting off the supply of power to appellant's mines, which motion was denied by the learned judge. The ground upon which he refused this relief was, that by the water licences issued to the respondent the use of the water was in terms confined to the generation of power to be sold, exchanged or bartered within a radius of 50 miles from the city of Rossland, and that as the appellant is not using or demanding power within that area but entirely outside of it, respondent cannot be compelled to supply or to continue to supply it. The respondent has nevertheless voluntarily supplied for several years, the appellant with power generated by the use of water taken under said licences and now desires to discontinue doing so.

The appellant's counsel relies on section 118 of the Water Clauses Consolidation Act, 1897, Cap. 190, R.S.B.C. 1897. It is admitted that in all material respects the present water legislation has not changed the rights of the parties although it was indeed argued that by the repeal of the Act, section 118 is no longer in force. The answer to this is, that Part IV. of the Act

in which that section occurs, was by retrospective legislation passed in 1899 made part of respondent's special Act; it is therefore still in effect.

It does not appear to me to be pertinent to the question before us to enquire what powers the respondent enjoys under its Act of incorporation or under leases, if it be not entitled to claim the use of the water under them, which in my opinion, it is not, but must have acquired it under the Water Clauses Consolidation Act. The lessors did not build the line in question, it was built by the respondent. The lessors had acquired no licences to use water for the generation of power. They were therefore under no obligation to supply power to appellant. They are not parties to this action, and were incapable of giving what is demanded here.

MACDONALD, C.J.A.

The respondent being by its water licences restricted, as the learned judge has declared, and as I think it was, the question then comes to this: Can respondent be compelled to supply power to appellant irrespective of the limitations contained in the said licences? Mr. *Mayers* frankly stated that the question before us hinges on section 118; he said that was the "pivot" on which the case turns. As I understand it his argument goes this far: that the respondent having in fact extended its transmission line, rightly if one likes, to appellant's mines, it is legally bound to supply electrical power to appellant until enjoined by legal authority to desist. The Attorney-General or any person whose legal rights are infringed by reason of the illegal use of the power might stop that use, but Mr. *Mayers's* point appears to be that until that is done the respondent is bound by the provisions of section 118. In my opinion, that section does not entitle the Court to make an order compelling the illegal supply of power, nor enjoining the respondent from discontinuing such illegal supply.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: I would allow this appeal.

GALLIHER, J.A.

GALLIHER, J.A.: This is an appeal from MURPHY, J., refusing to continue an *interim* injunction obtained by the plaintiff Company restraining the cutting off of power then being supplied to them by the defendant Company.

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. Co. *v.* WEST KOOTENAY POWER AND LIGHT Co.

GALLIHER, J.A.

The learned judge held that the supplying of this power was an illegal act on the part of the defendant Company and refused to order it continued.

The contract under which the power was supplied has terminated but plaintiff relies on section 118 in Part IV. of the Water Clauses Consolidation Act, 1897, B.C. Stats. 1897, Cap. 45, and particularly on the words "The Company shall, from time to time, supply electricity and electric power to any premises lying within 50 yards of any main supply wire or cable, suitable for that purpose on being required by the owner or occupier of such premises," as making it obligatory on the defendant Company to supply power notwithstanding that the contract had terminated, in other words, it was under a statutory duty to supply power to the plaintiff.

The defendant Company was incorporated by an Act of the Legislature of British Columbia, being chapter 63, of the Statutes of 1897. It will be necessary to refer to two other companies incorporated at the same time, *viz.*, the South Kootenay Water Power Company, by Cap. 62 of 1897, and the Okanagan Water Power Company by Cap. 67 of 1897. By section 12 of each of these last-mentioned Acts it was declared that the companies should be in the position of a company incorporated in compliance with the provisions of Part IV. of the Water Clauses Consolidation Act of 1897 with the like rights, powers, privileges and priorities, and subject to the like conditions, and restrictions, and all the provisions of a power company of Part IV. This was not incorporated in the Act of the defendant Company but by an Act of the Legislature of 1899, Cap. 77, Sec. 2, although it is an Act entitled "An Act to Amend the Water Clauses Consolidation Act, 1897," declares in section 2 thereof that the West Kootenay Power and Light Company is entitled to have, exercise and enjoy all the rights, powers, privileges, etc., which it would be entitled to if it had been incorporated under Part IV. of the Act. The Water Clauses Consolidation Act, 1897, Cap. 190, R.S.B.C. 1897, was repealed by the Water Act, 1909, Cap. 48, and contains no such clause as 118.

It was argued that the 1909 Act did not affect the clauses

which had been incorporated into the private Acts, and with that contention I agree. See *Jenkins* v. *Great Central Railway* (1912), 1 K.B. 1 at p. 8. In my opinion then, we can approach this question, giving Mr. *Mayers,* appellant's counsel, all the benefit he can derive by reason of section 118.

Of the above three companies only one, the defendant Company, has developed power and recorded water rights and obtained licences. On 7th January, 1919, the South Kootenay Company leased their charter franchise, etc., to the defendant Company. On the same date the Okanagan Company leased its franchise, etc., to the South Kootenay Company, who in turn on same date, assigned same to the defendant Company, and the position remains so until the present time. The territory assigned to these respective companies in their charter adjoins each other, first the defendant Company, then adjoining it South Kootenay and adjoining South Kootenay, the Okanagan Company. It is within the territory of the Okanagan Company that the plaintiff's mines and concentrator, to which power is supplied, are situate.

GALLIHER, J.A.

On 5th June, 1923, the Okanagan Company entered into an agreement with the Allenby Copper Company for the supply of power to its mine and mill, and the plaintiff is the successor of the Allenby Company. The performance of this contract was guaranteed by the defendant Company who constructed the necessary pole lines through the territory of the South Kootenay and Okanagan Companies, and strung the necessary wires, established the necessary substations and transformers, and made the necessary connections for supplying power from its works at Bonnington Falls to the Allenby Company and to its successor, the plaintiff Company, and continued to do so until the expiration of the agreement. It then notified the plaintiff that it would shut off power except certain conditions were complied with, which were not acceptable to the plaintiff. Whether these conditions were right or reasonable or were not, does not really enter into our decision. It comes down to this: the plaintiff says defendant is under a statutory duty to supply power. The defendant denies this and says further "what we have been doing in the past is illegal, and the Courts will not force us to

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. CO. v. WEST KOOTENAY POWER AND LIGHT CO.

continue an illegal act." The learned judge, as I have said, based his judgment on the latter contention. I propose to deal first with the plaintiff's contention, that there is a statutory obligation to supply power and if that is decided against it, it does not become necessary to deal with the other.

Section 118 of the Water Clauses Consolidation Act, 1897, which I have already held applies to the defendant Company, is, in my opinion, the only one on which an argument could be based as to such obligation being created and the words in such section, which I have quoted above, are obligatory in their nature, but the question still is, obligatory to what extent, for how long and under what circumstances? And in determining this we have to consider the Acts as a whole and the charter of the defendant Company.

GALLIHER, J.A.

The defendant Company's Act here is enabling, and as I think the principle enunciated by the Court of Appeal in England in the case of *Darlaston Local Board* v. *London & North Western Railway Co.* (1894), 2 Q.B. 694, is applicable to the case at Bar. I cite at some length, certain passages from the reasons for judgment of A. L. Smith, L.J., and adopt them as my reasons herein. We read at pp. 709-10 and 711:

"It appears to me obvious if an Act is enabling, so as to impose no obligation to make, it imposes no obligation to maintain, though apart from the Act if a company desires to open and keep open its line and stations, and does so, for public traffic, it must whilst so doing maintain its line and stations. Apart, therefore, from the Railway and Canal Traffic Act of 1854, the defendants were under no obligation to keep open the old Darlaston Station in the year 1887. That Act, however, has undoubtedly imposed obligations upon railway companies which had not theretofore existed, and gave the Court of Common Pleas, now represented by the Railway Commissioners, jurisdiction to enforce them, and it becomes necessary to examine the Act to see what these obligations are.

"This Act, which is called an Act for the better regulation of the traffic on railways and canals, recites that it is expedient to make better provision for regulating the traffic on railways, which includes passengers and their luggage and goods, animals, and other things conveyed by a railway company, and it then enacts by s. 2, which is the material section in this case, that every railway shall (this is obligatory) according to its powers, firstly, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon its railway, and from every station of its railway used for the purposes of public traffic; . . . I can find nothing in this Act which either imposes an obligation upon a railway company to make the whole or any part of its line which it does not desire to make, or which

obliges a company to build any station which it does not desire to build, and I cannot doubt that this Act of 1854 does not impose either of these obligations upon a company under the obligation to afford all reasonable facilities for receiving and forwarding and delivering of traffic, and that this is the opinion of Lord Selborne and Lord Esher will be seen upon reading Lord Selborne's considered judgment at p. 592, and Lord Esher's at p. 600 in the case of *The South Eastern Railway Co.* v. *Railway Commissioners* [(1881)], 6 Q.B.D. 586. But it is said that even if so, where a company has made and uses for public traffic the whole or any part of its line, or has built and uses for such traffic any stations thereon, the Act of 1854 has by the words above mentioned imposed the obligation upon the company to maintain and use such line and stations so long as such maintenance and user is necessary for affording reasonable facilities, and that if the company does not do this it fails according to its powers to afford the reasonable facilities mentioned in the Act, and this is how it is put by the applicants. It is not denied on the part of the defendant company that so long as a railway company is working its line with its stations thereon for public traffic upon that line, and from and to those stations, the company is bound to afford the facilities mentioned in the Act; but they deny that there is to be found therein an obligation upon a railway company to continue to maintain and use either the whole or any part of its line, or the whole or any of its stations, in order to afford such facilities if it does not desire to do so. They do not deny jurisdiction in the commissioners to order the proper facilities to be given at the stations which are in public use, but they do deny their jurisdiction to order the company to keep all or any part of its line, or all or any of its stations, open for public traffic. . . .

"Now, what are the words which are said to have wrought this great change, and cast this onerous obligation upon the railway companies? They are these: 'Every railway company shall, according to its powers, afford all reasonable facilities for the receiving and forwarding and delivering of passengers, and their luggage and goods, animals, and other things conveyed by any railway company upon its railways, and from every station of or belonging to the railway used for the purposes of public traffic.' It will be seen that there is not a word in this section about the railway company maintaining or using its railway or stations in whole or in part, or rendering the facilities named for any defined or, indeed, for any period at all; the period for which a line is to be maintained and used is left precisely where it was before the Act of 1854 became law—the obligation imposed by the Act of 1854 is that 'the company shall according to its powers afford all reasonable facilities.' But for how long? The applicants contend that the company must do so for as long as these facilities are required by the public; but where is this to be found in the Act? There are no words to this effect; and, indeed, the words which are there are opposed to this contention—namely, the words, 'used for the purpose of public traffic.'"

And concludes at p. 714, as follows:

"For the reasons above, my opinion is that the Act of 1854 does not compel a railway company to go on maintaining and using its railways or

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. Co. v. WEST KOOTENAY POWER AND LIGHT Co.

stations either in whole or in part, even though by so doing it would afford reasonable facilities for public traffic, and that the defendant company was within its rights in closing its station as it did in 1887, and in ceasing to carry passengers over its branch line, and in subsequently pulling down the station."

In my view, therefore, there is no statutory obligation upon the defendant Company to continue to supply power to the plaintiff.

I am not to be taken as expressing dissent from the views of the learned judge below, not deeming it necessary to decide this in the view I take.

I would dismiss the appeal.

MCPHILLIPS, J.A.: This is an appeal from an order made by Mr. Justice MURPHY dissolving the injunction granted by the same learned judge on the 4th of September, 1928, restraining the defendant from interrupting, interfering with, discontinuing or diminishing the supply of electricity and electric power required by the plaintiff for the carrying on of the mining and other kindred operations of the plaintiff at Copper Mountain, B.C., and for the operation of a concentrator plant and other kindred operations of the plaintiff at Allenby, B.C.

MCPHILLIPS, J.A.

The West Kootenay Power and Light Company (hereinafter referred to as the West Kootenay Company) developed and for many years has operated a large hydro-electric plant. The undertaking has been of great public benefit and is in effect a great public utility corporation. The West Kootenay Company has gone on expanding and expanding operations until it would be a calamity and of incalculable damage to the public at large if this undertaking should be no longer continued in whole or in part. The West Kootenay Company has been in operation for long years and has supplied power in an ever expanding area from the first area to be served, *viz.*, 50 miles around the City of Rossland—this has meant the investment of millions of dollars—the mines throughout the Kootenay country are supplied with power and light, and the cities and municipalities are also supplied and this has gone on for years. The cessation of this supply as previously stated either in whole or in part, means paralysis in a large territory. Therefore it is necessary to

approach the question here to be considered with the greatest care.

In my opinion the learned judge rightly granted the injunction, which later he dissolved, it being my opinion that it was just and convenient that the injunction should be granted, that is, with great respect to the learned judge, he went wholly wrong in my opinion in dissolving the injunction. The West Kootenay Company throughout its years of operation acquired further statutory powers by way of lease from other incorporated companies having similar statutory powers to it, *viz.*, from the South Kootenay Water Power Company, and Okanagan Water Power Company, which greatly expanded the area of its operations. There is no question of the statutory right of the West Kootenay Company becoming the lessee of the corporate powers of the other companies, ample statutory authority exists and the leases are valid in every respect and in the result the West Kootenay Company rightly operates throughout the whole area of operation under express statutory power. No doubt when examining into this question many points arise which would suggest that there has been some departure from the strictness of some of the statutory requirements as to the area of utilization of the power generated. After careful consideration I have no hesitation in coming to the conclusion that the points pressed at this Bar, are all in their nature merely directory and do not militate against the legal right in the West Kootenay Power Company to exercise the powers now and heretofore exercised in the area in question. The plaintiff the Granby Consolidated Mining, Smelting and Power Company Limited (hereinafter referred to as the Granby Company) commenced an action by the issue of a writ against the West Kootenay Company endorsed as follows:

MCPHILLIPS, J.A.

"The plaintiff's claim is for

"(a) A judgment or declaration of this Honourable Court that the defendant is legally bound to supply and to continue to supply the plaintiff electricity and electric power as required by the plaintiff for carrying on of the mining and other kindred operations of the plaintiff at Copper Mountain in British Columbia and for the operation of the concentrator plant and other kindred operations of the plaintiff at Allenby, British Columbia.

"(b) In the alternative a judgment or direction of this Honourable Court that the plaintiff has required the defendant to supply and to continue to

COURT OF APPEAL.

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. Co. *v.* WEST KOOTENAY POWER AND LIGHT CO.

supply electricity and electric power as required by the plaintiff for the carrying on of the mining and other kindred operations of the plaintiff at Copper Mountain in British Columbia and for the operation of the Concentrator plant and other kindred operations of the plaintiff at Allenby, British Columbia, and that there is a statutory duty cast upon the defendant to supply such electricity and electric power.

"(c) And for an injunction to restrain the defendant from interrupting, interfering with, discontinuing or diminishing the supply of electricity and electric power required by the plaintiff for the carrying on of the mining and other kindred operations of the plaintiff at Copper Mountain in British Columbia and for the operation of the concentrator plant and other kindred operations of the plaintiff at Allenby, British Columbia.

"(d) And for a *mandamus* commanding the defendant to supply and to continue to supply electricity and electric power as required by the plaintiff for the carrying on of the mining and other kindred operations of the plaintiff at Copper Mountain in British Columbia and for the operations of the concentrator plant and other kindred operations of the plaintiff at Allenby, British Columbia."

As we have seen the injunction was granted but as we have also seen it has since been dissolved and hence this appeal.

MCPHILLIPS, J.A.

The organic statute dealing with the right to divert and use water in this Province for power and other purposes is the Water Act, Cap. 271, R.S.B.C. 1924, being statute law of the Province amended from time to time extending over more than a quarter of a century. The legislation is somewhat intricate but it must all be read bearing in mind the need for and absolute necessity for these great public utility corporations engaged in development works, the very life, health and industry of the people throughout large areas of the Province is only possible by their continued operation. In conjunction with the Water Act, the West Kootenay Company has special statutory powers as contained in its private Act of incorporation (Cap. 63, B.C. Stats. 1897) as well as the powers of the other companies above referred to the special powers where inconsistent with the general statute (Water Act) have of course paramount effect. It is clear that the West Kootenay Company must carry out all the statutory conditions imposed upon it as well as those imposed upon the companies under which it is lessee. This is very evident upon reading section 25, Cap. 63, 1897, the West Kootenay Act of incorporation. There is the correlative right (*Nicholl* v. *Allen* (1862), 1 B. & S. 916 at p. 936) as indicated by section 30, in the South Kootenay Water Power Company's Act of incorpora-

tion, Cap. 62, 1897. It is perfectly plain upon the examination of all the statutory and documentary evidence that the area of transmission of energy was to be such that it would extend throughout the whole area of West Kootenay. Here we have it advanced, strangely by the West Kootenay Company itself, through counsel, that it has not the power which it for long years has been exercising and mines and considerable cities, towns and communities have been built up relying upon its operations; in fact, its operations are vital to the maintenance of the mines and industries and the continuance of communities. It is perhaps an unparalleled contention in legal annals. The Crown is not a party to this action. No exception has been taken by the Crown to the exercise of its powers throughout the whole area of its operations, and notably the Crown itself has contracted with the West Kootenay Company for power in the now challenged area and orders in council in great number have been passed all indicating the approval of the Crown to the exercise of its powers as carried on for years and in this connection I would particularly refer to the language of Lord Shaw in *Winnipeg Electric Railway* v. *Winnipeg City* (1912), 81 L.J., P.C. 193 at p. 200, which can be aptly applied to this case:

MCPHILLIPS, J.A.

"This is the language of Mr. Justice Mathers, and the accuracy of his narrative was not denied, nor of what succeeds: 'The defendant company proceeded as required with the construction of these lines, and have expended a large sum of money in doing so, and in subsequently operating them. It is true that the resolution is directed to the Winnipeg Electric Street Railway Co., and not to the defendant Company. It does not seem to me that that makes any difference, because the plaintiff knew of the amalgamation of that company with the Power Co., and that at that time the power by which the street railway was being operated was that derived from Lac du Bonnet. Bylaw 543 provides that 5 per cent. of the gross earnings of the street railway shall be paid annually to the plaintiffs. These sums, aggregating about $100,000, have been paid by the defendant company to the plaintiffs since it has begun to use the Lac du Bonnet power, and this money has been accepted by the plaintiffs.'

"In their Lordships' opinion, the facts of this case give ample warrant for the conclusion which Mr. Justice Mathers reaches, in which conclusion their Lordships concur, that 'after these unequivocal acts recognizing the continued existence of the contract, entailing a large expenditure by the defendants, the city is too late now to have it declared that the defendants have forfeited their privileges in the streets.'

"Were it open to the city authorities to go back upon the permits issued by themselves and their predecessors, and to obtain a declaration that

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. Co. v. WEST KOOTENAY POWER AND LIGHT CO.

MCPHILLIPS, J.A.

these have all along been invalid, serious and far-reaching consequences might ensue—the traffic of the city might be dislocated or stopped and the municipal services provided from the supply would cease and the city itself plunged in darkness. Their Lordships think it right to add their opinion, however, that, important as the questions of the history and acting of parties are, the rights and interests of both of the city and the appellants are, upon the statutes and documents themselves, not on a basis so precarious and insecure."

It is unthinkable that the Crown would at this late date challenge the exercise of the powers of the West Kootenay Company especially when it would be so detrimental to the public interest. In this connection I would refer to the language of Lord Shaw in *Seguin* v. *Boyle* (1922), 1 A.C. 462 at pp. 476-7:

"It is manifest that in face of such correspondence a challenge by the Crown would be in bad faith and could not succeed, and their Lordships are not surprised to find that the Government of the Dominion takes up no such attitude and is in no way concerned with the challenge made by the respondent. It would be a curious circumstance if, the lessee having thus against the Crown an indefeasible right, his right could nevertheless be challenged by another party who was no party to the contract but a late arrival on the ground, and the only result of whose challenge would be, when given ultimate effect, to accomplish that dispossession of the appellant which even the Crown itself could not legally achieve. It is, moreover, very clear that no such result and no material step leading to it should be taken by a Court unless the contracting parties are convened before it; and in the present case a *mandamus* is asked and the case has proceeded to judgment granting it without either the lessee, the Canadian Klondyke Company, or the lessor, the Crown, having been made parties to these proceedings. It is in any view plain to the Board that no final judgment should have been reached without all parties having been called.

"This appears to follow, and very properly so, from the decision in *Osborne* v. *Morgan* [(1888)], 13 App. Cas. 227 already referred to; and another passage clearly elucidating the point, from the judgment read by Lord Watson, may be here given. It is as follows: 'But the appellants assert their right to terminate the leases, and to dispossess the lessees, not only without the aid, but against the wish of the Crown. They concede that no decree which they can obtain in this action could operate as *res judicata* between the lessees and the Crown; and it is obvious that their contention, if well founded, will be productive of very singular results. On that supposition, the lessees may have so conducted themselves that they cannot withdraw from their contract obligations; and the Crown may have so ratified the contract that it cannot disturb the possession of its lessees; yet any one or more persons holding a miner's right may avail themselves of an original flaw in the lease at any time during its currency. They may delay their challenge until the lessees have, on the faith of the lease, spent large sums of money in preparing the land for mining operations, and may then intervene and appropriate the whole benefit of such expenditure, with-

out the lessees being entitled either to repetition of the rents which they have paid, or to compensation for their beneficial outlay. That may be a necessary, but it can hardly be described as a just, consequence of the statutory privileges implied in a miner's right.'"

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &C. CO. v. WEST KOOTENAY POWER AND LIGHT CO.

That the West Kootenay Power Company is under statutory obligation to supply power, etc., to the Granby Company independent of contract is not capable of any possible serious contention, according to my opinion, when section 118 of the Water Clauses Consolidation Act, 1897 (which is the controlling Act), is read and it is the pivot section upon which the litigation must be determined. That section reads as follows:

"118. It shall be lawful for the power company to contract with any person, corporation or company for supplying with electricity or electric power any such person, corporation or company upon or in any roads, streets, ways, lanes, passages, tramways, railways, manufactories, shops, warehouses, public or private houses, buildings and places, and for such purposes may, from time to time, lay down, carry, fit up, connect and furnish any electric accumulator, storage battery, electric line, cable, wire, pipe, switch, connection, branch, burner, lamp, meter or other apparatus, for or in connection with any electric line, main, lead or cable, or to lay down any new electric line, main, lead or cable, which for such purposes may be required, and to let any such apparatus for hire or for such sum as may be agreed upon. 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: Provided, however, the power company, before supplying electricity and electric power, or making such connection, or as a condition to the power company continuing to supply the same, may require any customer to give reasonable security for the repayment to the power company of the costs of making such connection, and for the payment of the proper charges for electric supply and for rent of instruments: Provided, also, that all parties supplied with electric light by the power company may be required to place and use only such lamps as may be approved of by the power company."

MCPHILLIPS, J.A.

The premises of the Granby Company are within 50 yards of the main supply, wire or cable, of the West Kootenay Company. What answer can there be to this situation other than that the West Kootenay Company is under statutory obligation to carry out the statutory mandate? This legislation last referred to in effect gives statutory expansion of area to the Western Kootenay Company and renders it liable to and compelled to supply the power demanded by the Granby Company.

The injunction in this case was merely an interlocutory injunction and I do not understand that it has been agreed that

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. Co. v. WEST KOOTENAY POWER AND LIGHT Co.

MCPHILLIPS, J.A.

upon this appeal the merits of the action are to be determined. Therefore all that the appellant claims is an interlocutory injunction, *i.e.*, until the trial. In all cases of an interlocutory injunction it is in its nature provisional and does not conclude any of the rights of the parties. The Court does not profess to anticipate the determination of the right but merely indicates its opinion that there is a substantial question to be litigated (see Kerr on Injunctions, 6th Ed., p. 2). In view of all the facts and circumstances the relevant statutes and the course of dealing between the companies, this, in my opinion, is a proper case for an injunction and the appeal should be allowed and the injunction maintained until the trial, that is, the judgment of Mr. Justice Murphy dissolving the injunction should be reversed and the injunction should stand. I therefore would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The appellant sued for a declaration that respondent is bound to supply it with electricity and electric power and for an injunction restraining respondent from discontinuing such supply. The respondent delivered power for some time but now takes the ground that it never had any legal right to do so. An *interim* injunction was obtained but upon application for its continuance was dissolved. Appellant now seeks to have the injunction order restored. The sole question is whether or not respondent Company is under legal obligation to continue the supply of power. To determine it the relative obligations of three companies are involved, *viz.*, the respondent Company; the South Kootenay Water Power Company and The Okanagan Water Power Company, each brought into being by private Acts of the Legislature. The respondent Company obtained power to supply light, heat and power within a radius of 50 miles from the City of Rossland and to erect and maintain power houses, generating plant, etc., for transmitting power "to any part of the said area." It was also given power to enter into working engagements with, or to enter into a lease with other companies or to acquire the right to work the lines of any other company empowered to carry on similar undertakings. The South Kootenay Water Power Company was clothed with

authority to operate power houses, generate electricity or electric power and transmit same to a defined area and also to take, use and divert water from Kootenay River and Murphy Creek. It was also provided that for the purpose of carrying out its undertaking it should be in the position of a company incorporated in compliance with Part IV. of the Water Clauses Consolidation Act, 1897. The Okanagan Water Power Company was given similar power rights at certain points on the Okanagan River in Yale District to be exercised in an area contiguous to that of the South Kootenay Water Power Company; also to take and divert water from the Okanagan River in Yale District. Its Act of incorporation contained a similar section in reference to Part IV. of the Water Clauses Consolidation Act, 1897. This Act was repealed when the Water Act of 1909 was enacted saving and preserving any rights and privileges acquired thereunder. This repeal however did not affect the private Acts of the South Kootenay Water Power Company and the Okanagan Water Power Company. Each Company would have the same right to resort to Part IV. of the Water Clauses Consolidation Act of 1897 as if it had not been repealed. Where, as here, certain sections of a public Act are incorporated by reference in a private Act that part of the private Act is not repealed by the repeal of the public Act.

MACDONALD, J.A.

By an amending Act of 1899, B.C. Stats., Cap. 77, the respondent Company was invested with the same powers as if incorporated as a Water Company under Part IV. of the Water Clauses Consolidation Act, 1897.

Each Company was restricted in its operations to certain areas within which its powers might be exercised and privileges enjoyed. The appellant's plant for which power is required is in the area included in the field of the Okanagan Water Power Company.

On January 7th, 1919, the South Kootenay Water Company under authority conferred by section 30 of its private Act (Cap. 62, B.C. Stats. 1897) entered into an indenture by way of lease with the West Kootenay Power and Light Company acting under section 25 of its Act of Incorporation (Cap. 63, B.C. Stats. 1897) whereby the former leased to the latter its entire

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &c. CO. v. WEST KOOTENAY POWER AND LIGHT CO.

MACDONALD, J.A.

franchise charter undertaking and appurtenances to be worked, used and operated by the lessee, including pole lines, branch lines, substations and the right the lessor possessed to construct other power lines, works or undertakings of any kind together with building structures, camps, etc., thus divesting the lessor of everything except its reversionary rights. The lessee (this respondent) also received the right to use the franchise, charter and undertakings, etc., "in the manner and to the same extent" as before enjoyed by the lessor. The lease was for one year and thereafter from year to year until terminated by a 30 days' notice. It is still a subsisting lease. On January 7th, 1919, the Okanagan Water Power Company by authority of the same section in its private Act entered into a lease in practically the same terms with the South Kootenay Water Power Company as lessee and on the same date the said South Kootenay Water Power Company did grant and assign to the West Kootenay Power and Light Company (respondent) all that certain franchise, charter, undertaking and appurtenances of the Okanagan Company so leased as aforesaid together with the unexpired term of the lease and all benefits and advantages to be derived thereunder. The two companies therefore, *viz.*, Okanagan and South Kootenay, parted with their franchise rights to the respondent and since that time respondent Company acted in the full enjoyment of such accumulated powers and assumed to supply power under contract to the appellant outside of its own restricted area. The contract with appellant expired on the 1st of September of this year when respondent advised appellant that it would discontinue the supply unless appellant agreed to send its concentrates for treatment to a smelter at Trail in which respondent Company is interested. It does not necessarily follow that this stipulation was a harsh one in view of earlier history and surrounding circumstances. I express no opinion on this irrelevant point. The present action was then started to prevent this threatened discontinuance of power by which alone appellant could carry on its operations.

Part IV. of the Water Clauses Consolidation Act of 1897 provided that power companies might acquire and exercise the rights and privileges provided for in said Part IV. subject to

the conditions therein outlined in reference to the acquisition of water and water power. Section 118 in said Part IV. provides, *inter alia*:

"It shall be lawful for the power company to contract with any person, corporation or company for supplying with electricity or electric power any such person, corporation or company . . . [and] 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, . . . on being required by the owner or occupier of such premises."

This it is alleged imposes a legal obligation on respondent to supply power to the appellant as the latter's works are within 50 yards of the main supply wire but outside the original area of the respondent. It should be read in conjunction with section 13 of Cap. 62, B.C. Stats. 1897, and the same section in Cap. 67 of the same year together with the amendment of the Water Clauses Consolidation Act of 1899, Cap. 77, Sec. 2. Section 13 reads as follows:

"For the purpose of carrying out such undertaking the Company shall (except as is in this Act provided) be in the position of a company duly incorporated in compliance with the provisions of Part IV. of the Water Clauses Consolidation Act, 1897, and with the like rights, powers, privileges and priorities, and subject, except as aforesaid, to the like conditions and restrictions, and all the provisions relating to a power company of Part IV. of the said Act (except such as relate to the incorporation of the company, or as are herein excepted, altered or varied), and all the provisions of Part V. of the said Act shall apply to the Company."

The comparatively short point to determine is this: Must the respondent Company in view of the leases and assignments referred to and the transfer of the franchises, etc., of the Okanagan and South Kootenay Companies, bearing in mind the provisions of section 118 in Part IV. of the Water Clauses Consolidation Act, supply power to a point outside its own area but within the area of the Okanagan Company? The submission is that respondent Company having acquired said franchises took them subject to all the conditions and obligations imposed when the charter was granted to each company and is bound to carry out the alleged statutory obligation of the Okanagan Company to supply power to the appellant notwithstanding that by respondent's Act of incorporation it is prohibited from supplying power beyond an area 50 miles from the City of Rossland. As I read the statutes there are no apt words making it compulsory for any one of these companies upon acquiring the fran-

chise of another to exercise the powers of that other company. If these companies (while they were given the right to supply power) need not exercise their full rights—in the absence of course of a contract—it cannot be said that the respondent as assignee is bound to do what the assignor was not obliged to do. It was, I think, suggested that the respondent Company could sell power to the South Kootenay Company the latter receiving it at the boundary line between their respective areas (the three areas are contiguous) transferring it across its area and selling it to the Okanagan Company who could supply it to appellant Company. It would still be the power of respondent Company generated at Bonnington Falls that would be so conveyed outside of its own 50-mile area by indirect methods. If it could not do so directly neither can it do so by resorting to indirect methods. In any event, rights held need not always be exercised. The appellant seeks to apply a proposition of law which requires the holder of a franchise obtained from another to assume the burdens as well as the benefits performing the services which the divesting company would be obliged to perform had it not parted with its franchise property and undertakings. But the respondent Company cannot be compelled to assume a burden that never existed. The two companies, whose franchises it acquired were not compelled to supply power and did not commence to do so; they simply have the right if they chose to exercise it.

It was urged, however, that duties and rights are correlative —that if the right to supply power was granted the duty to exercise that right followed by necessary implication. But we must be satisfied that the right exists in respondent Company before any question of duty arises. We were referred to one authority in support of this view, *viz.*, *Nicholl* v. *Allen* (1862), 1 B. & S. 916, affirmed in the Exchequer Chamber, reported at p. 934 of the same volume. This case has not the elements we are concerned with, *viz.*, the acquirement by the respondent Company by assignment of what may be regarded as latent powers held by the assignors. The decision in *Nicholl* v. *Allen* rests on the construction of a statute, and a subsequent Act enlarging the powers of the first Act. The Act recited a pro-

posal to build a bridge across the river Thames and one Samuel Dickie was "authorized" at his own expense to build the bridge and to do all things necessary for maintaining it, and in consideration of this outlay "for building and maintaining" was permitted to collect tolls. It also enacted that if the bridge sustained damage making it dangerous or impracticable to use it, the owner might maintain a service by means of a ferry charging tolls therefor with the proviso that said ferry "shall not continue for any longer time than shall be necessary for repairing or rebuilding the said bridge." It was held that there was a duty imposed on the owner of the bridge to maintain it so long as he received the tolls given by the Acts. The proviso that the ferry should not be continued longer than necessary to repair the bridge shewed that it was a temporary service to be abandoned when repairs were completed. It is clear that from the Act itself the owner of the franchise could not go on indefinitely using the ferry. He could only do so for a reasonable time. While it is true—dependent on the facts in the particular case—that rights and duties are correlative the decision rests not on a legal principle but on "the clear intent of the Acts of Parliament," in other words, on the construction of the statute. The owner received the tolls from the ferry service; hence had to do the thing, *viz.*, repair the bridge, the disrepair of which alone entitled him to operate the ferry in the meantime. He bargained that if given the emoluments of an alternative service expressed to be of a temporary nature he would rebuild or repair the bridge. That was the intent of the Act. It bears no analogy to the facts in the case at Bar. If the respondent Company was authorized in case of a break-down to supply power within its own area temporarily by some substituted and less satisfactory method, and when that occurred insisted upon continuing the substituted service and refusing to repair, the analogy would be complete. That is not this case.

MACDONALD, J.A.

A further feature in the case bearing upon the restricted character of respondent's powers is found in the five conditional water licences held by respondent by means of which its power is developed. The history of these licences is correctly outlined by the learned trial judge, and need not be further referred to.

COURT OF APPEAL

1929

Jan. 8.

GRANBY CONSOLIDATED MINING, &C. CO. v. WEST KOOTENAY POWER AND LIGHT CO.

The area within which power to be generated by the use of the water rights granted is clearly restricted.

I would dismiss the appeal.

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

Solicitors for appellant: *Locke, Lane & Thomson.*
Solicitor for respondent: *R. C. Crowe.*

COURT OF APPEAL

1929

March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE CO.

CADEDDU v. MOUNT ROYAL ASSURANCE COMPANY.

Insurance, accident and guarantee — Conduct of insured — Conditions—Construction—Waiver—Estoppel—B.C. Stats. 1925, Cap. 20, Secs. 147, 154 and 158.

The respondent held a policy of insurance in the appellant Company to indemnify him against loss for any liability imposed by law for damages on account of bodily injuries suffered by any other person through an accident while such person was a passenger in his automobile. One D., a gratuitous passenger in the respondent's car received injuries while the respondent was driving his car. Immediately after the accident an insurance adjuster, acting for D., obtained from the respondent a statutory declaration detailing the facts leading up to the accident. D. brought an action for damages, and the appellant, in pursuance of a condition of the policy, assumed the defence. On the examination of the respondent for discovery, counsel for the appellant learned of the statutory declaration that the respondent had made, but the appellant continued the defence down to judgment awarding damages to D. The respondent brought this action to recover the amount paid by him to D. The appellant pleaded that by making the statutory declaration the respondent had practically admitted liability in breach of a condition in the policy thus relieving the appellant of liability. The respondent recovered judgment for the sums recovered in the former action.

Held, on appeal, affirming the decision of GREGORY, J., that irrespective of whether the respondent was guilty of a breach of a statutory condition in making the statutory declaration, once the breach came to the knowledge of the appellant, its solicitor by continuing to defend after knowledge, could only do so on the assumption that the policy

was valid and subsisting. It is a representation by acts that the appellant would assume any judgment obtained within the limits of the policy.

COURT OF APPEAL

1929

March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE CO.

APPEAL by defendant from the decision of GREGORY, J. of the 15th of November, 1928, in an action to recover $2,885.10 indemnity under an insurance policy for damages for breach of the said policy and for specific performance. In August, 1927, the plaintiff took out a policy of insurance in the defendant Company against loss from any liability imposed by law on the assured for damages on account of bodily injuries suffered while the said policy was in force by any other person or persons up to the sum of $10,000 for one accident while such person be a passenger in the plaintiff's automobile and the said automobile be operated in accordance with the terms and conditions of the policy. On the 3rd of December, 1927, and while the said policy was in force, as the plaintiff was driving his said automobile one J. E. Dickson who was a gratuitous passenger in his automobile was injured as a result of improper driving of the said automobile between the town of Newton and the City of New Westminster in British Columbia. The plaintiff immediately gave the defendant Company notice of the accident in accordance with the terms of the policy and on the 8th of March, 1928, said J. E. Dickson commenced action against the plaintiff for damages for injuries sustained in the accident. The defendant Company then, as provided in the policy, defended the action for the plaintiff. Judgment was recovered by the plaintiff in that action for $2,834.35. The main defence was that shortly after the accident an insurance adjuster, purporting to act on behalf of Dickson, induced the plaintiff to give the facts pertaining to the accident in a statutory declaration in the following form:

Statement

"I, Efisio Cadeddu, of Newton, in the Province of British Columbia, do solemnly declare that:

"1. An accident occurred on the Scott Road between Newton and New Westminster, in the Province of British Columbia, on the 3rd of December, 1927, at about 4.30 p.m. through the Star Roadster Licence No. 28,024 I was driving getting out of control.

"2. I was proceeding in a northerly direction on the Scott Road and immediately in front of me, going in the same direction, was a man on a bicycle and coming towards me was another car. The other car was just passing the man on the bicycle. I slightly misjudged the space between

COURT OF APPEAL

1929

March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE CO.

the man on the bicycle and the other car and found that if I did not make a sharp turn to my left the bicycle would have been struck. This action threw me to the extreme west side of the road and it was necessary to make a further quick turn to the right. This turn was made too acutely and on account of the momentum of my car it turned completely over and rolled in the ditch on the east side of the road."

Statement

and the defendant claims that by making this statutory declaration the plaintiff practically admitted liability although later evidence given in his examination for discovery disclosed a good defence to the Dickson action; further, that making the statutory declaration was contrary to his duty not to "assume liability" and to "co-operate with the insurer" in resisting the claim.

The appeal was argued at Victoria on the 11th and 14th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellant: At the time of the accident the plaintiff had three gratuitous passengers of whom Dickson was one, sitting in the back seat. Dickson recovered $2,500 and costs against the plaintiff. The plaintiff did not comply with the statutory conditions set out in section 154 of the Insurance Act. He failed to co-operate with the Company in defending the action brought by Dickson. The written statement he gave the other side was substantially an admission of negligence: see *Talbot* v. *London Guarantee and Accident Company* (1897), 17 C.L.T. 216; *Colpitts* v. *Continental Life Insurance Co.* (1919), 47 N.B.R. 332 at p. 334. Mr. *Housser* acted for the Insurance Company in that action but anything that he said or did cannot amount to waiver as section 14 of the statutory conditions is a complete answer to such a contention. Nothing was done to lull Cadeddu into thinking the Company agreed to pay: see *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R 595.

Miss Paterson, for respondent: If the Company intended to repudiate liability they should have had nothing to do with the Dickson action. They took the responsibility of defending that action and they cannot do that conditionally. What they did was very short of a repudiation of the policy. Even if the declaration made by Cadeddu is against us they cannot thereby

COURT OF APPEAL
1929
March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE CO.

get rid of their liability incurred through electing to defend the case. The case of *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595 at pp. 601 and 603 is in our favour. Under section 147 and 158 of the Insurance Act the judge may relieve from forfeiture.

Bull, in reply: There are sufficient facts to make the Court look with suspicion on Cadeddu's actions.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.: Apart from the estoppel urged by plaintiff's counsel, I think there was no proof that statutory condition No. 8 was broken by the plaintiff. The words of that condition relied upon by defendant as having been violated by the plaintiff are that the assured shall "co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action." The want of co-operation complained of was that the plaintiff, at the request of one Morton, acting on behalf of J. E. Dickson, the injured man, went to Morton's office, very naturally and I think, not improperly, or in bad faith, and there related the circumstances of the accident and at Morton's request, affirmed his statements by a statutory declaration. There is no suggestion, or at all events, no evidence, that this was done other than in the best of good faith on plaintiff's part. In relating the circumstances of the accident, subsequently, to defendant's counsel in the negligence action, there was a variance which it was alleged affected the result of the action. I think that condition 8 implies a request for co-operation. The co-operation is that which the insurer "deems necessary." Of course if plaintiff had acted in bad faith he ought not to have succeeded in this action, but when breach of the condition is relied upon, I think bad faith or assumption of the liability must be proved and it was not proved in this case. It cannot be said on the evidence that the plaintiff assumed the risk or failed in his duty to the defendant. The interview with Morton was immediately after the accident, was on the impulse of the moment, and without any notion that he was assisting his antagonist.

MACDONALD, C.J.A.

MARTIN, J.A.: I agree in the dismissal of the appeal but

MARTIN, J.A.

COURT OF APPEAL

1929

March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE CO.

only on the ground of election by the defendant Company after it became fully apprised of the true situation after the examination of Cadeddu upon discovery; the other questions I express no opinion upon.

GALLIHER, J.A.

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

I think the defendants ought to be taken to have notice of Cadeddu's statement when they received Morton's letter of 6th February, 1928. This statement was sworn to on January 25th, 1928, but in any event, their solicitor Mr. *Housser* had notice of it upon examination for discovery, yet his firm went on defending the action until judgment. It is true Mr. *Housser* informed Cadeddu that the declaration might hurt their chances of defending the Dickson action and that his company might repudiate liability to him. Nothing further was said and no notice from the company that they intended to repudiate liability until after trial and judgment in Dickson's favour. One rather admires Mr. *Housser's* attitude in not, as he puts it, throwing Cadeddu down, having undertaken the defence, but I am afraid his generous intentions coupled with his statement that the Company might not stand behind him, is not sufficient to relieve the Company as I read the authorities.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the facts disclose a complete cause of action under the policy of insurance sued upon. That which occurred was an event which came within the terms of the policy of insurance and the plaintiff in the action (here the respondent) was well entitled to succeed in the action, which he did, Mr. Justice GREGORY, the learned trial judge so holding. It was very strenuously contended by Mr. *Bull* in his very persuasive and able argument, that the plaintiff was disentitled to recover in the action because of his having committed a breach of statutory condition 8 in that he did not co-operate with the defendant (here the appellant), in respect of defence to the action the damages therein granted being the sought remedy in this action. Further, that there was the making known of certain facts that militated against the chances of the defendant successfully defending the other action. I cannot agree with this contention. Surely a person driving a motor-car and suffer-

ing an accident is at liberty to state the facts accounting for the happening. It cannot be that his mouth is closed because of the fact that he holds an insurance policy and that if he speaks no remedy can be had. It would be against public policy if it were the case. Granted that the statements should be true, they were, but not as complete as later explained. The defendant did not alter its position or suffer any damage by reason of what took place, as I read the evidence. And it is to be remarked that during the pendency of the other action the solicitor for the defendant became aware of the fact that the plaintiff had made the statutory declaration complained of, being a statement of the particulars of the accident. Nevertheless the solicitor for the defendant continued to carry on the defence to the action; there was notice in this way through the solicitor to the defendant in this action, and continuing the defence constitutes estoppel. The defendant elected to take the chances of defeating the claim in litigation against the plaintiff, which if unsuccessful would be a liability that would fall under the terms of the policy of insurance, upon the defendant. In any case the statements made by the plaintiff were true statements, and were as well brought to the notice of the defendant by a letter written to Mr. Shallcross, the adjuster for the defendant. I cannot take the view that the plaintiff was guilty of any collusion or breach of faith with the defendant in any respect. In any case the whole subject was eminently a matter for determination by the learned trial judge, and he has found in favour of the plaintiff. Upon the cases it would not be, in my opinion, proper in view of all the facts of the present case to take a different view to that voiced by the learned trial judge. I would refer to what Lord Sumner said in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8.

MCPHILLIPS, J.A.

I would dismiss the appeal.

MACDONALD, J.A.: This is an appeal from the judgment of Mr. Justice GREGORY awarding respondent the sum of $2,834.35 under a policy of insurance issued by the appellant Company under which respondent was insured against loss for any liability imposed by law for damages on account of bodily injuries suffered by any other person through an accident while

MACDONALD, J.A.

COURT OF APPEAL

1929

March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE Co.

MACDONALD, J.A.

such person was a passenger in respondent's motor-car. One, J. E. Dickson was riding with respondent in the latter's motor-car and received injuries through the negligent driving of respondent. He sued respondent and recovered damages in the sum of $2,500 and costs. The appellant Company as insurers acting on its rights under the policy defended this action through its own solicitors under circumstances later refered to. The respondent after judgment was obtained against him and upon the refusal of the appellant to pay it, brought this action against the appellant on the policy.

Payment is resisted on the ground of breach by respondent of the following statutory conditions forming part of the policy:

"8. (1) Upon the occurrence of an accident involving bodily injuries or death, or damage to property of others, the insured shall promptly give written notice thereof to the insurer, with the fullest information obtainable at the time. The insured shall give like notice, with full particulars of any claim made on account of such accident, and every writ, letter, document or advice received by the insured from or on behalf of any claimant shall be immediately forwarded to the insurer.

"(2) The insured shall not voluntarily assume any liability or settle any claim except at his own cost. The insured shall not interfere in any negotiations for settlement or in any legal proceedings, but, whenever requested by the insurer, shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal."

The alleged breach of the foregoing conditions by respondent is said to arise from the following facts. After the accident which formed the subject of the damage claim by Dickson, a letter was written by one C. E. Morton an insurance adjuster (who intervened somewhat gratuitously) to the respondent Cadeddu, in which he stated he was acting for Dickson, requesting respondent to come in to discuss the question of damages. The respondent promptly called on Morton and after detailing the facts gave to him a statutory declaration in the following form: [already set out in statement.]

It is alleged that by making this statutory declaration the respondent herein contrary to his duty not to "assume liability" and his further duty "to co-operate with the insurer" in resisting the claim went into the enemy's camp and practically admitted liability although the truth was, according to later

evidence given by him on his examination for discovery, that the true facts disclosed a good defence to Dickson's action. On this examination the appellant, through its solicitor, obtained knowledge of respondent's action in going to Morton and making the statutory declaration referred to. After seeing Morton and making the declaration he handed Morton's letter, inviting him to come in, to a representative of the appellant but did not mention the declaration. Morton, however, on the 6th of February, 1928, about two weeks after he received the declaration wrote to Shallcross & Co., adjuster for, and agent of the appellant, a letter giving a synopsis of it. This letter was sent in answer to a letter from Shallcross & Co., to Morton the previous day asking for a statement of the facts. Shallcross, however, testified that he never saw the statutory declaration until it was presented to him in the witness box in the present action although he was told of it after respondent's examination for discovery in the Dickson action. He admitted that his firm received the letter of 6th February. It was placed in the wrong file and he testified that he did not think he ever saw the letter —had no recollection of it—and was quite sure it was not shewn to appellant's solicitor or to the appellant.

MACDONALD, J.A.

On that state of facts the respondent in the present action, in addition to denying breach of the statutory conditions outlined, submitted that the appellant with full knowledge of the alleged breach obtained at all events on his examination for discovery in the Dickson action, continued (as the fact is) to defend that action and is now precluded from raising the defence that the policy was avoided by the alleged breach of conditions. The appellant on the other hand, relies on statutory condition 14, later referred to, setting out that a waiver of conditions must be in writing. The respondent in turn asks the Court should it be found that a breach occurred to apply the curative section 158 of the Insurance Act, Cap. 20, B.C. Stats. 1925, relating in part to automobile insurance and reading as follows:

"Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the Court deems it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on such terms as it may deem just."

COURT OF APPEAL
1929
March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE Co.

MACDONALD, J.A.

The learned trial judge while disposing of the case on other grounds stated that if it became necessary he would give effect to section 158.

First as to the alleged breach of the statutory conditions referred to. After respondent gave Morton the statutory declaration, he immediately went to the office of an agent of appellant and shewed him the letter he received from Morton but, as already stated, did not mention the statutory declaration. He said that he did not think it was of much importance. After knowledge of it was obtained on his examination for discovery the solicitor for appellant accompanied by Shallcross called upon respondent. He then told them that on or after passing a bicycle one of the front wheels of his car dropped into a hole in the road. He denied saying that this wrenched the steering wheel from his hand, but admitted he would "have had no trouble if he had not got into the hole" and that was "what caused the accident." He also told them that he did not think he was to blame for the accident, as he was not going more than 25 miles an hour. There is, of course, a marked difference between this statement and the facts outlined in the statutory declaration. No doubt on the trial of Dickson's action the trial judge laid stress on the admissions contained in the declaration although it is not clear that it was wholly the determining feature in the case. Appellant's solicitor asked respondent how he came to make the statutory declaration and was told that he did so because he got a letter from Morton and did not know that he should not have made it. When told that the statements in the declaration were not the same as the facts now given to the solicitor, he said "he did not understand it," although he stated in his examination for discovery that he did understand it. He did not realize it was something he should not do. The solicitor then told him that "it might make it very difficult for us to defend the trial," and that "the Company might refuse to back him," in other words, he was afraid the Insurance Company (appellant) would not make good the loss if Dickson succeeded in his action. He then went on discussing the evidence with him and interviewing another witness. He did not then, nor at any time thereafter, until the present action was launched repudiate liability on the part of the Insurance Company. When

asked why he continued to act for respondent in the Dickson action after knowledge of the alleged breach of conditions, he said he thought it was his duty "to play the game with the respondent." He did not think much weight would be placed on the declaration in view of the manner in which it was obtained; that respondent was tricked into making it and was not guilty of bad faith. After judgment was given in favour of Dickson against the respondent, appellant's solicitor wrote to respondent—in part, as follows:

"In view of the statutory declaration given by you, and the fact that the Company was greatly prejudiced in its defence by reason of such declaration, we are very much afraid that liability under the policy will be repudiated. We have laid all the facts before the local agent and he will either take action himself or submit the matter to head office. In any event you will be advised promptly as to what attitude the Company will take in the matter."

There was therefore no election by appellant before judgment repudiating liability.

MACDONALD, J.A.

On this state of facts is appellant liable to indemnify respondent under the policy referred to? The learned trial judge found that the statutory declaration was not given to Morton by respondent to prejudice any one and that there was no trickery; that is, I take it, no collusion (as there might be) with Dickson to assist him in obtaining judgment knowing that the appellant Insurance Company would be liable to pay the loss. The learned trial judge does not find that there was not a breach of the statutory conditions but rather that the Company having a right of election and being advised through Shallcross before the Dickson writ was issued of the material contents of the declaration and failing to repudiate liability cannot now do so. He evidently assumed that although Shallcross may not have seen the letter referred to nor passed it on to appellant or its solicitor, that knowledge of it must be imputed to the appellant Company. There must of course be knowledge before it is possible to elect. It is not necessary, however, to decide whether or not imputed knowledge is sufficient as I rest my decision upon the knowledge later obtained on the examination for discovery. It was urged that appellant's solicitor by continuing to act after knowledge was obtained in this way did not thereby elect to treat the policy as valid, because waiver is a question of intention and

COURT OF APPEAL

1929

March 5.

CADEDDU v. MOUNT ROYAL ASSURANCE CO.

MACDONALD, J.A.

he gave expression to a doubt as to the possible attitude of the appellant. His action however in continuing to represent the Insurance Company in the Dickson action against the respondent was a clear indication not of an intention to repudiate but of an election to proceed in the hope that notwithstanding the declaration he might successfully resist the claim. He could only continue to act on the footing that the appellant Company was vitally concerned.

I think there was a breach of the statutory conditions. Respondent should not have gone to see Morton and innocence or ignorance will not excuse him. He should have taken Morton's letter to the appellant Insurance Company direct. What is more decisive, he should not—as he did—by his declaration "voluntarily assume any liability." He did so by saying "I slightly misjudged the space," and "this turn was made too acutely," and by referring to his car "getting out of control." Notwithstanding the view of the learned trial judge it is difficult to conceive respondent making these admissions, contrary to the facts, if he had not been protected by insurance. He in effect co-operated with the representative of Dickson. I do not rest, however, on failure to co-operate because a careful reading of the conditions would seem to indicate that the insured was to co-operate only "whenever requested by the insurer." This would appear to be the true interpretation when one gives effect to the words "in all matters which the insurer deems necessary in the defence of any action." But I do think that instead of going direct to the insurer with Morton's letter, he stepped into the enemy's camp and voluntarily assumed liability. These statutory conditions were imposed for good reasons. Some people not particularly scrupulous would be inclined to aid the injured party in automobile accidents at the expense of the Insurance Company.

However, once the breach came to the knowledge of the appellant, it had to take a stand. The solicitor by continuing to defend after knowledge could only do so on the assumption that the policy was valid and subsisting. It was a representation by acts that the appellant would assume any judgment obtained within the limits of the policy. The solicitor's right to act at all only arose on the basis that the claim was within

the policy unless there was an additional retainer from the respondent to act for him also. Election may be by words or acts. The words were equivocal carrying a proviso but the action or conduct was unequivocal. If he had repudiated liability electing to stand on the breach of conditions the respondent would naturally reconsider his position. He might seek a settlement knowing that he was in jeopardy and succeed in doing so for a less amount than the judgment finally obtained, or at all events, save further costs. What took place was in effect an agreement by conduct with the acquiescence of the respondent that the appellant would assume liability. I do not of course criticize the solicitor. He was possibly in doubt as to whether or not there was a breach and did not like to leave respondent to his own resources and was further influenced by the fact that he might succeed in defending the action in any event. But we are dealing with legal implications.

I think the principles enunciated in *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. 595, are applicable. True the facts differ to some extent but the principles are the same. There was no question there that the insurance company knew of the breach, whereas here it might be the subject of argument. As in that case, so here, by reason of the action of appellant in continuing to defend the respondent changed his position to his detriment. If that is true there is no question that appellant is estopped from relying on the condition. There was evidence in the *Parrott* case as shewn in the judgment of Anglin, J. (now Chief Justice) and Mignault, J. that a settlement might or perhaps could have been made for one-half the amount recovered. It might also have occurred in the case at Bar. It did not take place because respondent was in effect assured notwithstanding the discussion that took place that he need not fall back on his own resources to defend or try to effect a compromise. As Anglin, J. stated at p. 603—"it so acted as to create the impression that it accepted responsibility." It is not that it "so stated" but "so acted." I think we are justified in finding prejudice. Possibly respondent would not have fared any better if appellant's solicitor withdrew from the case. But he had a right to change his course of action and seek a settlement avoiding further costs

COURT OF APPEAL

1929

March 5.

CADEDDU *v.* MOUNT ROYAL ASSURANCE CO.

MACDONALD, J.A.

and that would appear to be sufficient consideration to support an estoppel (see Anglin, J. at p. 603, *supra,* and the cases there referred to).

Nor is the situation altered by condition 14, on which the appellant relies, *viz.*:

"No condition or provision of this policy, either in whole or in part, shall be deemed to have been waived or altered by the insurer unless the waiver is clearly expressed in writing signed by the manager of the insurer or its chief agent for Canada or this Province."

Election, as stated, may be by words or acts. If appellant had said to respondent after knowledge of an admitted breach: "We elect to defend," it could not afterwards be heard to set up the breach and say that the election should have been expressed in writing signed by the manager or chief agent of the insurer. The acts of appellant were equivalent to such a statement. It is not solely a question of waiver. The election carried with it the affirmation of the policy and the obligation to pay notwithstanding any conditions therein.

It is not necessary to deal with the curative section 158 of chapter 20, B.C. Stats. 1925, except to say that if it is applicable I do not think the Courts should relieve against the breach of conditions which are highly salutary unless under special circumstances.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper & McKim.*

Solicitors for respondent: *Hamilton Read & Paterson.*

PATTERSON v. BOARD OF SCHOOL TRUSTEES OF THE DISTRICT OF NORTH VANCOUVER. PATTERSON v. CANADIAN ROBERT DOLLAR COMPANY LIMITED.

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

Negligence—Pupil leaving school—Struck by falling tree on highway just outside school grounds—Tree stood on opposite side of road—Dollar Company's property—Personal injuries—Duty of invitor—Tree leaning towards road and dead for many years—Liability of school board—Nuisance—Dedication of road—Liability of Canadian Robert Dollar Company—R.S.B.C. 1924, Cap. 226.

The plaintiff attended a municipal school in North Vancouver which adjoined the Dollarton Road. The school grounds were cleared up to the road allowance and a path led from the school grounds through the brush on the side of the road allowance to the cleared road in the centre. The Canadian Robert Dollar Company owned the property on the opposite side of the road, densely wooded. Early in the afternoon the plaintiff started for home and when nearly through the pathway on the road allowance he heard a tree cracking and he turned and ran back towards the school but just before reaching the school grounds he was struck by the branches of a tree which fell across the road from the Dollar property, the top of the tree reaching about ten feet into the school grounds. He was very badly injured and in an action for damages recovered judgment against the Board of School Trustees, but his action against the Robert Dollar Company was dismissed.

Held, on appeal, reversing the decision of MORRISON, J. as to the action against the Board of School Trustees (MCPHILLIPS, J.A. dissenting), that there is no duty imposed on a board of school trustees to protect pupils from injury on the highway after they have left the school premises.

Held, further, affirming the decision of MORRISON, J. as to the action against the Canadian Robert Dollar Company (MCPHILLIPS and MACDONALD, JJ.A. dissenting), that the occupier of land on which is standing a decayed forest tree, grown there naturally, is not responsible for damage done by its falling either on a neighbour's premises or on a highway adjoining.

Reed v. *Smith* (1914), 19 B.C. 139 followed.

Statement

APPEAL by defendant, the Board of School Trustees of the District of North Vancouver from the decision of MORRISON, J. of the 3rd of December, 1928, and by the plaintiff, from the dismissal of the action as against the Canadian Robert Dollar Company Limited. The plaintiff is an infant, eight years of

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

Statement

age, and sues by his father as next friend. The Board of School Trustees of the District of North Vancouver held lands and a school known as the Roche Point School on the west side of Dollarton Road, a public highway running through said municipal district. The lands on the opposite side of the road from the school are owned by the Canadian Robert Dollar Company and are thickly wooded. About one-third of the road allowance in the centre is a good macadamized road and used by the school children going to and from school but on each side of the clearing the road allowance is covered with thick brush. A path leads from the open part of the road through the brush at the side on to the school grounds. On the 8th of June, 1926, at about 2.30 in the afternoon, the plaintiff left the school to go home. As he was nearing the cleared part of the road through the pathway from the school grounds, he heard a tree on the opposite side of the road crack. He turned and ran back but just before reaching the school grounds he was struck by branches of the tree as it fell and was very badly injured. He was picked up about eight feet outside the school grounds. His thigh-bone was broken, his right foot crushed and his ankle injured. The tree in the Dollar property was standing about 30 feet in from the road allowance and was over 200 feet in height. It was very old, and had been in a decayed condition for many years and for some time had been leaning towards the road. It fell across the road in a slanting direction the top of the tree reaching about ten feet inside the school grounds.

Read, and Miss *Paterson,* for plaintiff.

Bourne, and *A. C. DesBrisay,* for the Canadian Robert Dollar Company Limited.

George A. Grant, for the Board of School Trustees of the District of North Vancouver.

3rd December, 1928.

MORRISON, J.

MORRISON, J.: As to the defendant the Canadian Robert Dollar Company there are several questions which arise, *viz.*: What have they done to their property which has put the public safety in peril? If the public safety was imperilled after the road which was dedicated had been opened to the public, are they under a duty to remove the peril which they did not create?

The acts of third parties placed the property of these defendants in such a position that a continuance of the tree in question in place became a nuisance endangering the public safety. Was there a duty on them to abate it? *Barker* v. *Herbert* (1911), 2 K.B. 633.

The gravamen of the submission here is the continuance of the alleged nuisance or danger which the defendant did not cause or create. It must be proved that it was continued by its permission or knowledge—*Barker* v. *Herbert, supra, per* Moulton, L.J. There is conflicting evidence on this point, that of the plaintiff not preponderating.

To deal with these points *seriatim* would be academic in view of the decision of the Appeal Court in *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38 which in this case I regret I view as binding upon one. The plaintiff fails as against this defendant.

MORRISON, J.

As regards the School Board defendants: A person who provides anything for the use of another is bound to provide a thing reasonably safe for the purpose for which it is intended: *Shrimpton* v. *Hertfordshire County Council* (1911), 27 T.L.R. 251.

I find that there was a breach of this duty on their part. There will be judgment against them for the amount of the special damages and the sum of $8,000 general damages with costs.

From this decision the defendant, the Board of School Trustees of the District of North Vancouver appealed in the first action, and the plaintiff appealed as to the dismissal of the action against the Canadian Robert Dollar Company Limited.

The appeal was argued at Victoria on the 21st of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Donaghy, K.C., for appellant Board of School Trustees: The tree was from 30 to 40 feet from the highway on the Robert Dollar property, and in a slanting direction from the school grounds. The boy was on the highway when struck by the tree, about 8 feet from the north-east corner of the school property.

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

Argument

The top of the tree reached about 10 feet inside the school grounds. Our submission is that the school trustees had no control whatever over this tree and cannot be held liable: see *Laing* v. *Paull & Williamsons* (1912), S.C. 196 at p. 203; *Edmondson* v. *Moose Jaw School District* (1920), 3 W.W.R. 979.

Reid, K.C., for respondent: The entrance or pathway through the brush to the school property is in the same category as the school property itself and it is the Board's duty to see that the path is safe for children going in and out: see *South Australian Co.* v. *Richardson* (1915), 20 C.L.R. 181 at p. 186; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 and on appeal (1867), L.R. 2 C.P. 311. At this point there was a greater duty on the School Board to see that it was safe for the pupils: see *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145; *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38; *Steves* v. *South Vancouver* (1897), 6 B.C. 17; *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff, an infant, had been dismissed from school for the day, had left the school premises, and was loitering on the highway close by, when an old and decayed forest tree which stood on the property of the Canadian Robert Dollar Company Limited, fell across the highway and injured the plaintiff while on the highway. The tree which stood about 30 feet back from the highway, being a tall one, some part of it fell on the school grounds, but there did no injury to anyone.

I have been unable to find any case and we have been referred to none, which would impose upon the School Board the duty of protecting the plaintiff from injury on the highway after he had left the school premises.

The appeal should therefore be allowed.

MARTIN, J.A.

MARTIN, J.A.: I agree in allowing the appeal in this case because, briefly, no apt authority has been cited to support the

judgment, which is based on the assumption that the defendant School Board is liable for damage done to its attending scholars while on the highway, and therefore beyond the boundaries of defendant's school premises, by decayed trees falling from the the land of persons who are entire strangers to the defendant. Whatever may be said about the liability of the owners of the highway (as to which *cf.*, *Mathieson* v. *Dumbartonshire County Council* (1926), S.C. 795) that of the defendant herein is not, in my opinion, established, and therefore the appeal should be allowed.

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

MCPHILLIPS, J.A.: The action was one for personal injuries and brought by the father on behalf of his son, his son being of the age of eight years. That which caused the injuries and resulted in crippling the boy for life, was the falling of a tree, 200 feet in height with a 19 foot lean towards the sole entrance to the Roche Point School, a public school in the district of North Vancouver. The tree was notoriously rotten and a peril to human life passing along the public road. Dangerous trees were not unknown to the Board of School Trustees, as the evidence shews the Board of School Trustees took up the question with the Municipal Corporation as early as 1923, this accident not taking place until 1926. It is clear that the Board of School Trustees had in mind the likely peril of the scholars attending school. This particular dead tree so noticeably rotten and of such great height was leaning directly towards the entrance to the school and as I have already stated the only entrance to the school grounds was from the highway. It is impossible upon the evidence to absolve the Board of School Trustees of knowledge of the conditions existing, and if they did not know of this particular tree that caused the very regrettable injuries that render this boy a cripple for life, it must be held that they ought to have known it. The boy was attending the school with an older brother and sister on the day of the accident. The boy pursuant to the Public Schools Act (section 159, Cap. 226, R.S.B.C. 1924) was obliged to attend the public school, *i.e.* Roche Point School. Upon the day of the accident

MORRISON, J. 1928 Dec. 3.

COURT OF APPEAL 1929 March 5.

PATTERSON v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

an examination was taking place and the little boys and girls were dismissed between 2.30 and 2.45 p.m.; the older children remaining. Donald Patterson, the injured boy started out from the school grounds by way of the sole exit, a pathway used by all the children and within five minutes of his leaving the school the tree fell upon him. It was attempted to be made out that the boy was loitering about. I do not so view the evidence. It is true he did not rush off and away home but was taking his time as he was really waiting for his brother and sister, who were still at school, a very customary and approved custom—that is a matter of general knowledge.

MCPHILLIPS, J.A.

Now the question is, has there been any breach of duty upon the part of the Board of School Trustees? In my opinion there was a breach of duty and it extended to the requirement that the school grounds and approaches thereto should be reasonably safe for the children who were under compulsion of law required to attend the school. This Court dealt with the subject recently in *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38. It cannot be that that duty does not extend to at least the way of entrance to the school grounds and in the present case the only entrance. Surely the school authorities were under a duty that the children should not be exposed to unnecessary danger in entering and departing from the school grounds. It was the case of an overhanging tree, a menace to any one upon the school grounds or upon the highway. As was proved the tree fell as it was leaning across the highway over the pathway forming the approach to the school and as well upon the school grounds. The boy was a compulsory attendant at the school and was in law an invitee and the Board of School Trustees, in my opinion, owed a duty to the boy that in entering the school grounds and departing therefrom that he would not be exposed to unnecessary danger, and it is reasonable that the Board of School Trustees should be responsible for the injuries sustained by the boy through breach of such duty. (*Ching* v. *Surrey County Council* (1910), 1 K.B. 736, 741, 743).

In my opinion there was a duty cast upon the Board of School Trustees to discover and remedy the dangerous condition of things existing, namely, this dangerous overhanging rotten tree which clearly overhung the highway and the school grounds and

more particularly the actual approach and sole approach to the school grounds over which the children were compelled to pass; that which took place demonstrated this (*Morris* v. *Carnarvon County Council* (1910), 79 L.J., K.B. 670). The evidence in this case entitles one to conclude that the approach to the school grounds was not reasonably safe for the use of the school children and it was at the invitation of the Board of School Trustees that this approach was used by Donald Patterson and there it was that the accident took place (*South Australian Co.* v. *Richardson* (1915), 20 C.L.R. 181, High Court of Australia). The Board of School Trustees had a duty cast upon them and they neglected that duty and that was keeping the school and grounds efficient and free from danger, which would extend to apprizing themselves of any dangerous condition of the school premises and grounds, and the way of ingress and egress thereto and therefrom, and where a person has been injured, as here, the person injured has the right to turn to the authority upon whom the duty to care is imposed and who has neglected that duty, and to bring his action against that authority (*Ching* v. *Surrey County Council, supra*). I confess that the case is one close to the line, and I would like to adopt the language of the Lord Chancellor in *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145 at p. 146:

MCPHILLIPS, J.A.

"I think that the House is very much indebted to all the learned counsel who have assisted us in this difficult case. I am anxious myself not to allow the sympathy which everyone must feel with the parents of this child, and with the child herself, to affect the opinion to which I come. I believe that I have arrived at a conclusion simply according to my view of the facts and of the law applicable to them without allowing any such feeling to affect me."

Here there may be doubt as to whether there was any breach of duty upon the part of the Board of School Trustees in respect to an accident met with off the school premises or grounds, but when we find the fact to be that the accident took place within ten feet of the lot line of the premises or school grounds and upon the sole passageway provided for the school children and the approved way of entrance to the school premises, I cannot persuade myself that the Board of School Trustees can say in law that there was no breach of duty upon their part in not providing a safe way of approach to and exit from the school

MORRISON, J. 1928 Dec. 3. COURT OF APPEAL 1929 March 5. PATTERSON v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

premises, the school children being under compulsion to attend the school and the Board of School Trustees in the carrying on of the school, in my opinion, owed a duty to the school children not to expose them in going to and proceeding from the school, to unnecessary danger, and the danger as established by the present case was an overhanging dead tree, a menace to life if it fell, which it did, upon the sole approach to the school which the Board of School Trustees failed to have removed. This, in my opinion, was a breach of duty for which there is legal liability. The boy injured was using this approach provided by the Board of School Trustees at their invitation. In the *Shrimpton* case, the Lord Chancellor said (p. 147):

> "There was no duty or obligation whatever on the county council to provide for the carriage of this child, but if they did agree to do so, and did provide a vehicle, then it is clear to my mind that their duty was also to provide a reasonably safe mode of conveyance."

MCPHILLIPS, J.A.

Here the school premises and the approach thereto where the accident took place should have been reasonably safe, which was not the case, and therein is to be found the breach of duty. In this connection I would also refer to the language of Mr. Justice Phillimore (later Lord Phillimore) in *Morris* v. *Carnarvon County Council* (1910), 1 K.B. 159 at p. 167:

> "But I am of opinion that there is a good cause of action in this case against the defendants wholly outside the statute, a liability which attaches to them not as an education authority, but as the owners of premises which are dangerous and upon which they have invited the plaintiff to come. There is a duty upon persons who invite others on to their premises to take every care that the premises are not in a dangerous condition. . . ."

Here the tree fell upon the school premises and also extended over the highway, and the pathway which constituted the approach to the school. Upon the latter way Donald Patterson was, only a few feet from the boundary of the school premises. The question is, was there a breach of duty in view of all the facts and circumstances? With some hesitancy I am of the opinion that the judgment of the learned trial judge should be affirmed. I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: An infant by his next friend sued the Canadian Robert Dollar Company Limited and the Board of School Trustees for the District of North Vancouver for damages for personal injuries. The child after being dismissed in

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

the early afternoon played in and about the school grounds waiting for an older brother who would be dismissed at a later hour. While standing about ten feet from the school grounds and on a highway running between the school and the property of defendant the Canadian Robert Dollar Company Limited, he was hit and seriously injured by a falling tree. It was a tall dead tree trunk on the Company's land, about 200 feet high and apparently 50 or 60 feet distant from the highway, and it fell across the roadway. Part of the top extended into the school grounds. The tree trunk had a decided list towards the school grounds—19 feet from the perpendicular—and when it fell, as it was bound to, could not do otherwise than fall in that direction.

The action was dismissed as against the Canadian Robert Dollar Company Limited, and judgment awarded against the Board of School Trustees for $9,866.35. The Board of School Trustees appeal against that judgment while the respondent resists the appeal and also appeals against the judgment exonerating the Canadian Robert Dollar Company.

MACDONALD, J.A.

I shall deal first with the judgment against the Board of School Trustees. By the Public Schools Act, Sec. 50, of Cap. 226, R.S.B.C. 1924, it is enacted that:

"The Board of School Trustees of each municipal school district shall have power, and it shall be the duty of the Board:—

"(*j*) To determine the sites of school-houses."

It was suggested the Board was negligent because it selected a site in recent years near this dead tree trunk when the trustees knew, or should have known, that it was bound to fall on the school grounds. The Municipal Council of the District of North Vancouver have authority under section 54, subsection (165), Cap. 129, R.S.B.C. 1924, to pass by-laws (and a "Dangerous Tree" by-law was passed) to compel the removal of trees, at the expense of the owner, which in the opinion of the Council might be dangerous to the public. On several occasions the Board of School Trustees requested the Municipal authorities to remove trees on the highway close to the school grounds. However the Municipality of the District of North Vancouver is not a party defendant and we need not agitate the question of possible liability on its part, or enquire if it was the duty of

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. BOARD OF SCHOOL TRUSTEES OF DISTRICT OF NORTH VANCOUVER

this public authority to keep the highway safe for passers-by. I may be permitted to express surprise and regret that action was not taken in some quarter as the tree was a decided menace to school children and others passing over the public highway. Fortunately no lives were lost but a boy is permanently crippled.

Upon what principle can liability be imposed on the Board of School Trustees? That body is charged with the duty of keeping the school premises safe. Further, if by its own act (for example, in cutting out a pathway over the rough ground between the travelled part of the highway and the school grounds—there was such a pathway here) it created anything in the nature of a trap, even outside the school yard, or permitted any structure to remain there likely to attract or injure children and damage resulted, no doubt liability would ensue. That is not this case. We were not directed to evidence shewing that the trustees cut out the pathway or put down a few planks as a culvert over a depression therein. We cannot assume that this was the act of the trustees. The injured boy was not under the control of the Board of School Trustees after dismissal when outside the school grounds. The only control retained over children by regulations under the Public Schools Act beyond the school grounds are disciplinary, *viz.*, while they are going to and returning from school.

MACDONALD, J.A.

Counsel for the plaintiff submitted that where, as here, there is a pathway to the school grounds from the travelled part of the road used by school children as a means of ingress and egress, it is in the same category as the school grounds itself and as the Board of Trustees knew (or should have known) that this menacing tree would fall across the pathway, it is liable to the plaintiff. I cannot agree. What did the Board omit to do? Obviously the only effective remedy was to have the tree cut down but we were not directed to any authority—nor is there any—to shew that like the Municipality it could take steps to bring this about. The only active negligence, if any, on the part of the Board of School Trustees was in selecting a site near this menacing tree trunk and in permitting the children to use a pathway in the way of an overhanging tree that was bound to fall. As we are not however dealing with ensuing consequences, had the boy been injured while in the

school grounds—as he might have been—I can see no difference in principle if the fact was that he was injured by a falling tree while on the way home a half a mile or more from the school grounds. The pathway was not part of the grounds. It was simply a footpath.

There was some inferential evidence that the Board knew, or should have known, of the danger. The minutes shew that in 1923

"attention was called to some dangerous trees surrounding Dollarton School, and the secretary was instructed to write to the district council asking that those on the road allowance be cut down."

They also asked the municipal council after this accident to cut down another dead spruce tree in the vicinity which might cause damage. Failure to request the Council to remove the tree that caused the damage cannot be regarded as negligence unless there was a duty to do so. In requesting the Council to cause other trees to be removed the trustees acted *ex abundanti cautela,* not in the performance of a legal duty. Exploring the situation therefore in all possible directions all that can be said is that the Board of School Trustees should have, if possible, induced either the District Municipality or the Canadian Robert Dollar Company Limited to remove the tree or failing that, should not have selected this particular area as a site for its school premises. This, however, is simply criticism; not evidence of breach of duty. The judgment against the Board of School Trustees must therefore be set aside.

MACDONALD, J.A.

Appeal allowed, McPhillips, J.A. dissenting.

PATTERSON v. CANADIAN ROBERT DOLLAR COMPANY LIMITED.

Miss *Paterson,* for appellant: We say this tree was a nuisance standing within about 30 feet of the road allowance over 200 feet high, leaning towards the road and it had been dead for 50 years. The danger was apparent and he owed a duty to persons passing his property on the road to see that they could pass safely: see *Noble* v. *Harrison* (1926), 2 K.B. 332 at p. 341; *Huestis* v. *City of Toronto* (1926), 58 O.L.R. 648. They should have known of the danger. There is evidence of the

Argument

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. CANADIAN ROBERT DOLLAR CO.

tree having been dead for 50 years and could be seen as in a lifeless condition: see *Phillips* v. *Britannia Hygienic Laundry Co.* (1923), 1 K.B. 539 at p. 553; *Barker* v. *Herbert* (1911), 2 K.B. 633; *Attorney-General* v. *Tod Heatley* (1897), 1 Ch. 560; *The City of St. John* v. *Donald* (1926), S.C.R. 371.

Argument

Bourne, for respondent: Where land is in a state of nature, and the owner has done nothing to change it, he cannot be liable for the falling of a tree: see *Reed* v. *Smith* (1914), 19 B.C. 139; *Giles* v. *Walker* (1890), 24 Q.B.D. 656; *Noble* v. *Harrison* (1926), 95 L.J., K.B. 813; *Sparke* v. *Osborne* (1908), 7 C.L.R. 51. When the road was dedicated the public took it subject to any danger from trees on adjoining property: *Fisher* v. *Prowse* (1862), 2 B. & S. 770; *Brackley* v. *Midland Railway* (1916), 85 L.J., K.B. 1596 at p. 1605; *Owen* v. *De Winton* (1894), 58 J.P. 833 at p. 834. There is no evidence that he was on the road allowance when hit. He may have been on the school grounds: see *Attorney-General* v. *Cory Bros. & Co. Kennard* v. *Cory Bros. & Co.* (1921), 1 A.C. 521 at p. 530.

Miss *Paterson,* in reply: He must shew the danger existed at the time of dedication. On the onus of proof see *Leicester Urban Sanitary Authority* v. *Holland* (1888), 57 L.J., M.C. 75 and *Brown* v. *Town of Edmonton* (1894), 23 S.C.R. 308.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from the dismissal of an action brought against the respondent.

In my opinion, the appeal is concluded against the appellant by our decision in *Reed* v. *Smith* (1914), 19 B.C. 139, in which we held that the occupier of land on which was standing a decayed forest tree which had grown there naturally, was not responsible for damage done by its falling on a neighbour's premises.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal is, in my opinion, determined in favour of the respondent by the principle enunciated in our unanimous decision in *Reed* v. *Smith* (1914), 19 B.C. 139, and no sufficient reason in law has, to my mind, been advanced upon

which we can hold, on the facts before us, that the owner of trees of this natural and primeval state and description and not overhanging his boundary, has a greater liability to persons upon the adjoining highway than to those upon adjoining lands.

I only add that the learned judge below expresses his regret that our decision in *Walton* v. *Board of School Trustees of Vancouver* (1924), 34 B.C. 38, is binding upon him in giving the judgment he did, but counsel for both parties agree, correctly, that our said decision does not touch the point raised for adjudication herein.

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

The case is, I think, within the decision of this Court in *Reed* v. *Smith* (1914), 19 B.C. 139.

MCPHILLIPS, J.A.: This appeal gives occasion to consider and determine the liability of any person in respect of a happening upon a highway, *i.e.*, the falling upon a highway of a dead tree, 200 feet in height, with a lean of 19 feet outwards towards the highway. In falling it fell as would be expected in the direction in which it was leaning and it extended across the whole highway and into the school grounds of the Roche Point School, at the point of entrance thereto. Donald Patterson a boy of but eight years of age was upon the highway at the time upon the pathway, being the passage-way from the highway to the school grounds, and was within a few feet of the lot line of the school premises, and the tree in falling crushed him to the ground rendering him a cripple for life. The respondent was at the time of the accident the owner of the land upon which this dead tree stood and upon the evidence must be held to have had knowledge of the tree, and its dangerous condition. In my opinion the decision of this Court in *Reed* v. *Smith* (1914), 19 B.C. 139, is in no way embarrassing or any prevention from coming to a decision upon this appeal that there is liability upon the respondent. I may say that the case differs from the present case in two particular respects: (a) It was not the case of an overhanging tree. In my judgment at p. 145, I said: "This is not the case of an overhanging tree . . ." (b) The tree here overhung the highway and also overhung a portion of the Roche

MCPHILLIPS, J.A.

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. CANADIAN ROBERT DOLLAR CO.

MCPHILLIPS, J.A.

Point School grounds and the pathway, *i.e.*, the entrance way to the school that Donald Patterson was attending, and when Donald Patterson was returning from school the accident happened, which is the subject-matter of this appeal.

There is authority that it is an actionable nuisance if a tree growing on one's land overhangs a neighbour's land: see Best, J. in *The Earl of Lonsdale* v. *Nelson* (1823), 2 B. & C. 302, 311; *Smith* v. *Giddy* (1904), 2 K.B. 448; *Lemmon* v. *Webb* (1895), A.C. 1; Lindley, L.J. (1894), 3 Ch. 1 at pp. 11-12.

Now as to the question of liability for this accident and as to whether the respondent can rightly be visited with damages owing to the falling of this dead tree. In my opinion it is a clear case of liability, the nuisance here, the dangerous dead tree, overhanging the highway was the actual cause of the injuries that Donald Patterson sustained. That there is liability in such a case as the present one is well portrayed upon a careful reading of *Barker* v. *Herbert* (1911), 2 K.B. 633, although in that case the defendant was held not liable as it was in respect of a nuisance created by the action of trespassers. In the *Barker* case, Fletcher Moulton, L.J. (afterwards Lord Moulton), said at p. 644:

"The duty is to guard against accidents to persons using the highway, and, in order to prevent the existence of a nuisance, the protection afforded must be sufficient as regards children as well as adults."

Further on he said:

"The case here was not one in which an accident arose from a person being exposed to danger, while using the highway, by reason of the existence . . . of that which was a nuisance."

Here we have the case of Donald Patterson, injured owing to his being exposed to danger by the existence of the nuisance—the dead tree 200 feet in height with a 19-foot lean which fell upon him. (*Cheater* v. *Cater* (1918), 1 K.B. 247, Bankes, L.J., at p. 254; *Humphries* v. *Cousins* (1877), 2 C.P.D. 239; *Penruddock's Case* (1598), 3 Co. Rep. 205; *Attorney-General* v. *Tod Heatley* (1897), 1 Ch. 560.)

In the Court of Appeal of Ontario a case was under consideration which is exceedingly apt, when considering the present case. There we find Latchford, C.J. saying in *Huestis* v. *City of Toronto* (1926), 58 O.L.R. 648 at p. 649:

"It was also found that the tree had long been in a decaying condition,

easily discoverable, yet negligently not observed by the city's servants and workmen."

Liability was held to attach on two grounds—non-repair of the street and the maintenance on the city's property of a large tree so decayed as to be liable to fall. In that case it was a tree planted in a city highway which fell upon a motor-car damaging it and injuring the person driving it. The Court of Appeal in Ontario went upon the principle that there was liability at common law in allowing a thing potentially dangerous to the public and actually causing damage to the plaintiff in that action to remain on its property (*Tarry* v. *Ashton* (1876), 1 Q.B.D. 314) and that is really the present case and the one this Court has to determine. I am clearly of the opinion upon the facts and circumstances present in this case that the respondent is liable for the damages resultant from the fall of what was unquestionably a tree devoid of life with no hold in the ground; further, of great height, 200 feet, out of the perpendicular by 19 feet. The facts shew that the tree could have been nothing but notorious and a potential danger, the miracle is that it had not fallen before and have caused even greater damage with loss of life. Here it has fallen short of that, but a young and promising lad has been rendered a cripple for life.

MCPHILLIPS, J.A.

I cannot but remark that I am pleased that I have at least persuaded myself upon a careful consideration of this case that the respondent is liable as and for an actionable nuisance which has occasioned actual injuries and must be answerable for the damages sustained. I would refer to and adopt for myself in this case what the Lord Chancellor said in *Shrimpton* v. *Hertfordshire County Council* (1911), 104 L.T. 145 at p. 146:

"I think that the House is very much indebted to all the learned counsel who have assisted us in this difficult case. I am anxious myself not to allow the sympathy which everyone must feel with the parents of this child, and with the child herself, to affect the opinion to which I come. I believe that I have arrived at a conclusion simply according to my view of the facts and of the law applicable to them without allowing any such feeling to affect me."

Upon the point of the road being dedicated to the public and that therefore the public took the road subject to the existent nuisance, I cannot follow the argument nor do I find cases that would cover the present case, and would be surprised if I had,

MORRISON, J. 1928 Dec. 3.

COURT OF APPEAL 1929 March 5.

PATTERSON v. CANADIAN ROBERT DOLLAR CO.

as the facts and circumstances here all rebut any such condition of things.

I would, therefore, allow the appeal.

MACDONALD, J.A.: It is sought to fix liability on the defendant the Canadian Robert Dollar Company Limited. It is suggested that the tree in its condition constituted a public nuisance and the Company should have known it. It failed to abate the nuisance. Apparently the learned trial judge regarded it as a nuisance endangering the public safety. The tree was the result of natural growth in the soil and so far as an adjoining owner is concerned we are bound by the decision of this Court in *Reed* v. *Smith* (1914), 19 B.C. 139. That decision should be read as strictly applicable to the facts of the case. No direct knowledge that the tree was likely to fall was brought home to this defendant. It is only urged it should have known it.*

MACDONALD, J.A.

From the proximity of the tree to the highway and its list in that direction logically it may be regarded as a tree overhanging the public highway, in the same way as if it abutted on the highway. The consequences of a fall would be the same in either case. That being so is it possible to apply the decision in *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314? There the defendant was the lessee and occupier of a house from the entrance of which a heavy lamp projected over the foot pavement. The lamp fell on, and injured the plaintiff. Some time before the defendant employed a gas fitter to repair it. At the time it fell a man employed by the defendant was blowing the water out of the gas pipes of the lamp and while doing so the ladder on which he was standing slipped and as he clutched the lamp to save himself the shaking caused it to fall upon the plaintiff. The fastening attaching the lamp to the lamp-iron was found to be in a decayed condition. The jury found the lamp was out of repair through general decay but not to the knowledge of the defendant and that if it had been in good repair the slipping of the ladder would not have caused it to fall. The plaintiff was held entitled to a verdict on the ground of breach of duty—not that the lamp in its condition constituted a nuisance. To quote Blackburn, J. at p. 319:

"So also the occupier would be bound to know that things like this lamp will ultimately get out of order, and, as occupier, there would be a duty

cast upon him from time to time to investigate the state of the lamp. If he did investigate, and there were a latent defect which he could not discover, I doubt whether he would be liable; but if he discovers the defect and does not cure it, or if he did not discover what he ought on investigation to have discovered, then I think he would clearly be answerable for the consequences."

MACDONALD, J.A.

If the Canadian Robert Dollar Company left, say, a loading crane on its premises near the highway permitting it to fall into disrepair and so situated that a part of it would, if it gave way fall on the highway, one passing along the highway and injured thereby could maintain an action even if the defendant had no actual knowledge of its condition. Do different principles apply when the inanimate object is the dead trunk of a tree? It ceased many years before to receive sustenance from the soil. If there is any distinction it would seem to be an arbitrary one. Why should a dead tree receiving little or no support from the soil—no adequate support at all when it fell in the natural course of things—be viewed differently to a logging crane which might also for greater security be embedded to some extent in the soil? It might as well be a telegraph pole planted a few feet in the ground and in course of time developing a dangerous list. Should different principles be applied because one object was placed there by the hand of man, the other by nature? The fault was not in placing the pole in the ground nor in planting the tree. The fault was in permitting both to remain when a source of obvious danger. The law is concerned not with conduct originally proper but with allowing evil consequences to ensue to the damage of others. The Court should not hesitate to apply established principles to new cases arising as they do in ever varying form, so long as there is no departure from established principles. Is it too much in modern days, with ever increasing traffic on the highways, to hold that the owners and occupiers of timber land abutting thereon must remove dead trees which if not removed are bound to fall across it? Should not failure to do so be regarded as a breach of duty, or must it be left to other authorities, *viz.*, the municipality or the Attorney-General to take means to compel the owner to remove such trees? Can it be said that the duty on the part of the owner arises, if at all, only when others call it to his attention? To fail to hold the owner responsible is to place

MORRISON, J. 1928 Dec. 3. COURT OF APPEAL 1929 March 5. PATTERSON v. CANADIAN ROBERT DOLLAR CO.

little value on public safety and more value on the question of expense and inconvenience to the owner. It was suggested that it would be too onerous to require owners of large timber areas to do so. A similar argument was advanced in *Laing* v. *Paull & Williamsons* (1912), S.C. 196, where the duty to repair metal discs in a street pavement covering an opening into a cellar was considered. The Lord Justice Clerk, at p. 201, said:

"One of the most extraordinary reasons for this non-inspection was given by one of the defenders' witnesses, who said that inspection was impracticable because the number of these plates in Aberdeen was so great—some 300. The reasoning is curious. If one such plate, if neglected, may cause danger, it should be inspected to avert danger, but if there are 300 such possible causes of danger it cannot be expected that they can be inspected! One would have thought that the more numerous the points where danger might arise the more imperative is it that care should be taken."

In *Noble* v. *Harrison* (1926), 2 K.B. 332, the branch of a tree growing on defendant's land overhung the highway at a height of 30 feet from the ground. In fine weather it broke and fell upon the plaintiff's motor-coach causing damage. The defendant did not know it was dangerous as the defect was latent. It was held that the mere fact that it overhung the highway did not create a nuisance as it did not obstruct free passage over it and although as it turned out it was dangerous the defendant was not liable because he did not create it nor had he actual or imputed knowledge of the existence of the danger. It was not of course as here, a dead branch obviously dangerous and bound to fall, offering a more menacing obstruction to free and safe passage on the highway. Rowlatt, J., at p. 338, said:

MACDONALD, J.A.

"The result of that and the other cases cited to us is that a person is liable for a nuisance constituted by the state of his property: (1.) if he causes it; (2.) if by the neglect of some duty he allowed it to arise; and (3.) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it."

It may be urged that the case at Bar falls within the third principle mentioned. Again on the same page his Lordship states:

" . . . and it is only when accident or decay interferes that human intervention is required. I see no ground for holding that the owner is to become an insurer of nature, or that default is to be imputed to him until it appears or would appear upon proper inspection, that nature can no longer be relied upon."

It is, I think, sound in principle to say that if a person

causes work to be done on his premises necessarily attended with risk, the person causing it to be done has the duty to see that precautions are taken to prevent damage. Nor can he escape the responsibility of seeing that such duty is performed because the work was done by another. Here the tree in its then condition was the remote result of the operations of nature. It in fact ceased to be a growing tree or a tree at all many years ago —it turned into a dead trunk—and partook the character of a structure on the premises. It was not necessarily attended with risk before decay but if the owner would be liable if he put a dangerous structure there he should be liable if he permitted a dangerous structure to remain. It is on account of dangerous structures being permitted to remain that damage ensues not on account of how they got there in the first place whether by nature or by the hand of man. Sometimes a dangerous structure is placed on the owner's land by another, *e.g.*, a contractor. If the contractor builds thereon a room for explosives not properly protected, the owner must see that it is removed or properly protected. If this dead trunk is regarded, as it should be, as a structure no matter how or by what agency it was placed there, whether by the owner or a contractor or by an act of God, it cannot be permitted by the owner to remain there with impunity when it falls into a condition necessarily attended with risk. It was potentially dangerous to the public. True, this defendant may not have seen it and may not have appreciated the risk. Neither did the defendant know of the danger in *Tarry* v. *Ashton, supra.* In *Mathieson* v. *Dumbartonshire County Council* (1926), S.C. 795, where under somewhat similar circumstances it was sought to make the road authorities liable, an observation (*dicta*) of the Lord President (Clyde) may be referred to:

MACDONALD, J.A.

"No doubt road authorities are responsible to the public for maintaining a road in a condition of safety for public use, but they have no responsibility for the condition of property adjoining the road—that is the affair of the owners of such property."

A further argument was submitted on behalf of this defendant, *viz.*, that when this highway was dedicated the public took it subject to any danger that existed by reason of the dead tree trunk standing nearby. The highway was created on the subdivision of lots in that area apparently in 1917. The conten-

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. CANADIAN ROBERT DOLLAR CO.

MACDONALD, J.A.

tion, among others, is that as there was no liability to adjoining owners before the highway was dedicated (*Reed* v. *Smith, supra*), there cannot be liability to the public when the owner parts with a portion of it for road purposes.

However, the main contention on this point was based upon the decisions in *Fisher* v. *Prowse*. *Cooper* v. *Walker* (1862), 2 B. & S. 770; *Brackley* v. *Midland Railway* (1916), 85 L.J., K.B. 1596, and *Owen* v. *De Winton* (1894), 58 J.P. 833. As to the facts in the case at Bar the evidence on the point is scanty. A subdivision plan of an area including defendant's lands was filed shewing the highway in question in this action. The plan has endorsed thereon a certificate of the registrar of titles certifying that it was deposited by John G. Farmer on behalf of the District of North Vancouver on the 31st of January, 1917. This together with an endorsement of the approval of the plan by the Council of said District is taken as proof that the highway so provided for in the subdivision was accepted by the municipality. Such an acceptance is necessary to bring it within the principles of the cases cited. These authorities held that as the Municipality might either accept or reject, it must if it accepts take the road subject to the risk of the existing state of things and it is said this dead tree trunk was one of the risks. The road was dedicated eight or nine years before the accident and one would expect evidence to shew that before that time the tree was in the dangerous condition existing at the time of the fall. There is no such evidence in the book. By section 111 of the Land Registry Act (chapter 127, R.S.B.C. 1924), the deposit of the subdivision plan shewing roads is deemed to be a dedication thereof by the owner to the public. However, as I view it the authorities quoted do not assist the defendant. In *Fisher* v. *Prowse,* where the defendant occupied a house adjoining the street with a cellar underneath, the mouth of which opened into the footway of the street by a trap-door, the plaintiff walking along the footway stumbled over the flap which closed the trap-door. It was held he could not recover damages because from the evidence the jury ought to find that the cellar flap existed as long as the street (in fact it existed as far back as living memory went) and that therefore the dedication to the public of the roadway was with the cellar

flap on it. As pointed out it was not in the case at Bar shewn that the tree trunk existed as a dead trunk as long as the highway. That was left to inference. Had the flap been put down for the first time after the highway was dedicated it would have been a nuisance and those who maintained it would be liable for damages. "On the other hand," to quote Blackburn, J., at p. 777:

"We must take it to have appeared that the flap continued in its original condition, and that the defendant had not altered it or suffered it to get out of repair, so as to increase the danger and obstruction beyond what always must have existed since it was there."

MACDONALD, J.A.

In the case at Bar the defendant "suffered" the trunk to remain in a condition differing from its original state. I do not think it can be said that the dedication of this highway was with this dead tree trunk on or near it. It was too remote from the highway and did not offer an obstruction thereto in the sense considered in these cases. It was not within the express or implied contemplation of the parties to give or take the road subject to this menace. In *Cooper* v. *Walker* certain stone steps encroaching on the street caused the mischief. The street was taken by the public subject to the long-existing rights of the occupiers of houses adjoining it to have steps standing in the highway leading to the outer doors. It would be otherwise if the steps were placed there after dedication and could be regarded as a nuisance. It is clear too from the judgment that if an obstruction existing before dedication was in its inception unlawful other results would follow. If, therefore, this dead tree trunk was unlawfully suffered to remain after decay as a menace before dedication, could it by the magic of dedication become lawful? I am not overlooking *Reed* v. *Smith, supra,* which would appear to decide that, aside from the question of a highway, there would be no liability if the trunk fell on adjoining land, or I take it if it fell on the owner's land causing damage to another. I think I am entitled, however, to confine that decision to the exact point determined without following inferences which may not be justified. The question of possible breach of duty towards the users of a highway were not in issue in that case. In *Cooper* v. *Walker,* it is stated that "the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the

MORRISON, J.

1928

Dec. 3.

COURT OF APPEAL

1929

March 5.

PATTERSON v. CANADIAN ROBERT DOLLAR CO.

MACDONALD, J.A.

public accept the use under such circumstances" (p. 779). That is understandable where existing obstructions on the way are in question. Not so here. The dead trunk was 50 or 60 feet away. The principle of all these decisions is that where the owner grants a highway under given conditions well understood by the grantor and grantee the former should not be required to make further concessions or alter the existing state of things to his own disadvantage. It is a question of the application of this principle to the facts and it would be carrying it too far to apply it to the facts of this case. As pointed out in the two cases considered, flap doors opening on to vaults and cellars are found in large numbers, also footways on country roads and steps leading to houses built up to the street line. They were so numerous that I think the principle of "contemplation of the parties" was or might be invoked. The considerations I have outlined are equally applicable to the decisions in *Brackley* v. *Midland Railway* and *Owen* v. *De Winton, supra.*

There is a decision of the Supreme Court of Canada (*Brown* v. *Town of Edmonton* (1894), 23 S.C.R. 308—the report is too brief to be of much assistance) by which it would appear that where the obstruction interfering with the use of the highway was a log house the Court held "that the right of the public to the free and unobstructed use of a street could not be taken away by the existence of an obstruction when the street was dedicated."

I would allow the appeal as against the defendant.

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

Solicitors for plaintiff: *Hamilton Read & Paterson.*

Solicitors for defendant Board of School Trustees: *Grant & McDougall.*

Solicitors for defendant Canadian Robert Dollar Company: *Bourne & DesBrisay.*

MILLER v. WOLLASTON.

COURT OF APPEAL

1929

March 5.

MILLER v. WOLLASTON

Solicitor—Costs—Charge on property recovered or preserved—Bankruptcy —Preference—R.S.C. 1927, Cap. 11—R.S.B.C. 1924, Cap. 136, Sec. 104.

The applicant, a solicitor, under instructions, defended five actions for the Victoria Mines, Limited: (1) To recover $5,000 commission owing by the Company; (2) to recover $1,400 for professional services as a mining engineer; (3) a mechanic's lien action for work done in the mines, $702.50 claimed; (4) to recover $1,000 and interest on a promissory note; and (5) to recover $46.45 for goods sold. The amount recovered in each case was substantially less than the amount claimed. The solicitor's bills of costs, when delivered, were passed and accepted at a meeting of the directors and shortly after the Company went into bankruptcy. The solicitor filed his claim with the trustee in bankruptcy for $1,722.60, claiming $225 thereof as an ordinary creditor and $1,497.60 as a secured creditor. The trustee rejected the latter claim on the ground that it was not a preference claim and that the bills should be taxed by the registrar before being filed. On an application for directions to a judge in bankruptcy it was held: (1) That the accounts should be taxed; (2) that the solicitor had a charge or lien upon and a right to payment out of the property of the company under section 104 of the Legal Professions Act; (3) that the solicitor's claim did not constitute a preference under the Bankruptcy Act.

Held, on appeal, reversing the decision of MORRISON, J. in part, that all the cases defended by the solicitor, with the exception of the mechanic's lien action, were personal actions and not actions *in rem* and they do not come within the words "property recovered or preserved" in section 104 of the Legal Professions Act, but in the mechanic's lien action the property upon which the lien attached was relieved to the extent of $52.50 and for that amount (or so much thereof as shall be taxed) the solicitor is entitled to rank as a preferred creditor.

Statement

APPEAL by applicant from the order of MORRISON, J. of the 1st of November, 1928, on a motion before him as a judge in bankruptcy for an order that the decision of Percy Wollaston, trustee in Bankruptcy of the Victoria Mines, Limited, refusing to accept his claim for $1,497.60 as a preferred claim against said company be rescinded or modified and for directions in respect to the following:

"(a) Whether the accounts of the said *Thomas Munroe Miller* should be taxed by the registrar.

"(b) Whether section 104 of the Legal Professions Act gives the said *Thomas Munroe Miller* a charge or lien upon and against and a right to payment out of the property of the company.

COURT OF APPEAL

1929

March 5.

MILLER
v.
WOLLASTON

"(c) Does the claim of the said *Thomas Munroe Miller* constitute a preference under the Bankruptcy Act, chapter 11, Revised Statutes of Canada, 1927?"

The applicant, a solicitor, was employed by the Victoria Mines, Limited, to defend the following causes:

"(a) *Wollaston (trustee for Ross, Johnson, Ltd.)* v. *Victoria Mines, Limited, N.P.L.* A Supreme Court action, wherein the sum of five thousand ($5,000) dollars was claimed as commission alleged to be owing by the company to Ross, Johnson, Limited. Commission was allowed the plaintiff in the said action in the sum of $373.50.

"(b) *Gaul* v. *Victoria Mines, Limited, N.P.L.* A Supreme Court action commenced in Vancouver, claiming the sum of fourteen hundred ($1,400) dollars against the company for professional services as a mining engineer. After many negotiations, settlement resulted in acceptance by Gaul of $350 in full settlement.

"(c) *Herman* v. *Victoria Mines, Limited, N.P.L.* This is a mechanic's lien action for work done at the mines, in which $702.50 costs were claimed. The action was defended and settlement was finally arranged on the basis of $650.

"(d) *Haynes* v. *Victoria Mines, Limited, N.P.L.* This was a claim against the company for $1,000 and interest on a promissory note, upon action brought in the Supreme Court.

"(e) *Diggon* v. *Victoria Mines, Limited, N.P.L.* This was an action for $46.45, goods sold, and was defended."

Statement

At a meeting of the directors of the Victoria Mines, Limited, held prior to bankruptcy, the applicant's accounts amounting to $1,722.60 were passed and accepted. On the company going into bankruptcy the applicant filed his claim for $1,722.60 claiming $225 as an ordinary creditor and $1,497.60 as a secured creditor. The latter claim was rejected by the trustee on the grounds that it was not a secured claim and that the accounts should be taxed before being filed with the trustee. The particulars of the secured claims are as follow:

"(a) *Wollaston* v. *The Company.* Account rendered $955.30. The claim was for $5,000. The amount allowed on trial was $373.50, preserving to the company the sum of $4,626.50 and proportionate costs.

"(b) *Gaul* v. *The Company.* Account rendered $312.10. Account rendered for additional disbursements $103.40. The amount claimed in the writ was $1,400, the amount of the settlement was $350, the sum of $1,050 and costs being preserved to the company.

"(c) *Herman* v. *Victoria Mines, Ltd., N.P.L.* Account rendered $97.85. This is a mechanic's lien for $702.50 and costs, settlement was finally arranged at $650 and the company was saved $52.50 (about $100 costs) and the claims valued at $7,500, were preserved to the company.

"(d) *Haynes* v. *Victoria Mines, Ltd. N.P.L.* Account rendered $18.45. Judgment was avoided and costs of at least $75 saved the company.

"(e) *Diggon* v. *Victoria Mines, Ltd. N.P.L.* Account rendered $10.60 and further costs saved the company."

COURT OF APPEAL

1929

March 5.

MILLER v. WOLLASTON

The solicitor claims that property has been preserved to the company in each case to a greater amount than the costs and he is entitled to preference. The learned judge answered the first two questions in the affirmative and the third in the negative.

The appeal was argued at Victoria on the 23rd of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

O'Halloran, for appellant: The learned judge below held that we had a lien but he says we did not have a preference. Our submission is that having a lien we have a preference. On preserving the estate we have a preference to that extent: see *Phillips and Scarth* v. *London Guarantee & Accident Co., Ltd.* (1927), 2 W.W.R. 570; *In re Meter Cabs, Lim.* (1911), 81 L.J., Ch. 82; *Scholfield* v. *Lockwood* (1868), 38 L.J., Ch. 232; *Bulley* v. *Bulley* (1878), 47 L.J., Ch. 841. That the lien should attach to the general assets of the company see *Pelsall Coal and Iron Co.* v. *London and North-Western Ry. Co. (No. 3)* (1892), 8 Ry. & Can. Tr. Cas. 146; *Re John Clayton Limited* (1905), 92 L.T. 223; *Foxon* v. *Gascoigne* (1874), 9 Chy. App. 654; *Charlton* v. *Charlton* (1883), 52 L.J., Ch. 971.

F. C. Elliott, for respondent: He is not entitled to preference under the Act: see *In re Morton's Ltd.* (1923), 3 C.B.R. 621; *In re Motherwell* (1921), 1 C.B.R. 497. As to particular property on which there may be a lien see Halsbury's Laws of England, Vol. 26, p. 840, sec. 1342; *Mackenzie* v. *Mackintosh* (1891), 64 L.T. 706.

O'Halloran, replied.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur in the judgment of Mr. Justice GALLIHER.

MARTIN, J.A.

MARTIN, J.A.: This appeal depends upon the construction to be placed upon section 104 of the Legal Professions Act, Cap. 136, R.S.B.C. 1924, as follows:

"In every case in which a solicitor is employed to prosecute or defend

COURT OF APPEAL

1929

March 5.

MILLER
v.
WOLLASTON

MARTIN, J.A.

any cause or matter in any Court of justice, the solicitor shall be deemed to have a charge upon and against and a right to payment out of the property which is recovered or preserved therein through his services for the proper costs, charges, and expenses of or in reference to the cause or matter (including counsel fees, whether the solicitor also acted as counsel or not); and it shall be lawful for the Court before whom the cause or matter has been heard or is pending, or any Judge of that Court, to make such orders for the taxation of and for the raising and payment of the costs, charges, and expenses out of the property as to the Court or judge may appear just and proper; and all acts done and conveyances made to defeat, or which operate or tend to defeat, such charge or right shall, unless made to a *bona fide* purchaser for value without notice, be deemed to be absolutely void and of no effect as against such charge or right: Provided that no proceeding for the purpose of realizing or enforcing any charge or right arising under this section shall be had or taken until after application has been made to a Court or judge for directions as to the realization thereof."

The intention of the Legislature is clearly to give the solicitor a charge upon, and a right to payment "out or the property which is recovered or preserved through his services," *i.e.*, a charge in respect of a particular class of his client's property and not his property in general. It is, as the cases shew, often far from easy to give due application to the expression "recovered or preserved" in widely different circumstances, but in ordinary matters of business it is obvious, to me at least, that even the most literal construction possible could not extend to them, because if it did then the statute must be construed as though it had a general application which is clearly not the case. To me it conveys the idea of salvage of some piece of property which is capable of special treatment as appears by the expression:

"And it shall be lawful . . . to make such orders for the taxation of and for the raising and payment of the costs, charges, and expenses out of the property as to the Court or judge may appear just and proper."

This view is supported by, *e.g.*, the observations of Lords Justices Mellish and James in *Foxon* v. *Gascoigne* (1874), 9 Chy. App. 654, 661-2:

"A charge can only be made upon the property itself which is recovered or preserved, and it cannot be made if the suit relates only to some incident to the property. You cannot, as it appears to me, because some benefit has been acquired to the property, on that account make a charge upon the whole property. It seems to me impossible to make a charge upon an easement. . . . . If the plaintiff succeeds, his property may be benefited by having a right of way attached to it, and if the defendant succeeds, the defendant's property may be benefited by its being established that it is not

subject to any such right of way over it. Still it appears to me that it cannot be properly said that the property is either recovered or preserved, because, in my opinion, 'preserved' means preserved from the claim of property which is made by the other side."

And Jessel, M.R. said, p. 657:

"Now, what does that expression 'actual recovery or preservation' mean? Generally, I apprehend, it means that where the plaintiff claims property, and establishes a right to the ownership of the property in some shape or other, there the property has been recovered; that where a defendant's right to the ownership of property is disputed, and that right has been vindicated by the proceedings, there the property has been preserved. There is another case in which property may be preserved at the instance of a plaintiff, that is, where it is not properly taken care of but liable to destruction or attack by third persons. Then I can understand that a process which may not be called recovery may be preservation. But all the cases, as I understand them, shew, in accordance with what seems to me to be the good sense of the thing, and the plain meaning of the Act of Parliament, that recovery and preservation are correlative terms, and that they both relate to the ownership of the property."

The corresponding English Act, section 28 of the Attorneys and Solicitors Act, 1860, Cap. 127, is, in present essentials, the same as our section 104, except that our charge is absolute and not discretionary.

MARTIN, J.A.

The principle of salvage as the key to construction is stressed by Vice-Chancellor Bacon in *Bulley* v. *Bulley* (1878), 8 Ch. D. 479; 47 L.J., Ch. 841, and relied upon by North, J. in *Charlton* v. *Charlton* (1883), 52 L.J., Ch. 971, where several cases are considered and the scope of the section further defined. The Vice-Chancellor said, pp. 484-5:

"I do not know any more liberal or more just way of construing it than by considering what the words of the statute are, and bearing in mind what the policy of the law is. The law of salvage is well enough known, depending upon plain principles, not the subject of any particular statute (except the Shipping Acts), nor depending upon any statutory enactment. . . . The law is, if you save a sinking ship, you shall be paid what is just out of the value of that ship. That I take to be the principle of the Solicitors Act referred to, for the words are distinct and clear, and carry into effect plainly that principle. . . . The words of the statute appear to me to be beyond doubt, and the only question I have to ask myself is, what is the property that has been preserved? It is quite indifferent who was the owner of it; if the property has been preserved, the solicitor is entitled, according to the words of the statute, to a charge upon it for his costs."

And at p. 487, he says:

"The solicitor can exercise his right—whether it is the partial or the entire property is indifferent—the right which a salvor would have to be indemnified for his costs in saving the ship."

COURT OF APPEAL

1929

March 5.

MILLER
v.
WOLLASTON

The appeal from the Vice-Chancellor was declared by Jessel, M.R. to be "entirely unfounded." In *Greer* v. *Young* (1883), 52 L.J., Ch. 915 the Court of Appeal again substantially approved Vice-Chancellor Bacon's views, Brett, M.R. saying, p. 918:

"I take the view of the theory of the Act which was enunciated by Vice-Chancellor Bacon in the cases cited of *Bulley* v. *Bulley* [(1878)], 47 L.J., Ch. 841; 8 Ch. D. 479, 488. I do not accept the idea of salvage as being an accurate analogy in all respects; but I agree that the fundamental theory of the section is the idea that what has been recovered by the action of the solicitor is to be treated as if it were salvage—I do not say marine salvage—and to be paid for on the theory that a salvage service has been rendered."

Bowen, L.J. said, p. 921:

"It is a salvage section. The solicitor employed lawfully in an action is a salvor who has recovered or preserved something in the hour of danger by his work and labour, and he is entitled to a reward; into whatever hands the property may fall, it is charged with the salvage."

MARTIN, J.A.

The cases also of *In re Humphreys* (1898), 1 Q.B. 520 (confining the statute to civil proceedings); *In re Turner* (1907), 2 Ch. 126, 539; *In re Cockrell's Estate* (1911), 2 Ch. 318; (1912), 1 Ch. 23; *Catlow* v. *Catlow* (1877), 2 C.P.D. 362; *In re White* (1885), 17 L.R. Ir. 223; and *Pinkerton* v. *Easton* (1873), 42 L.J., Ch. 878, merit perusal in this connexion, and many others to similar effect that I have consulted with the result that after applying the principles they lay down I am unable upon the agreed statement of facts in the appeal book (by which we are restricted) to discover any sound ground for interfering with the view taken by the learned judge below on the five proceedings in question except on the third one, *i.e.*, the case of the action of *Herman* v. *Victoria Mines, Ltd.*, to establish a mechanic's lien against the company's mineral claims, that proceeding does, I think, come within the salvage principle above recited of property "preserved" and therefore the statutory charge attaches to those claims. The four other cases are all in one similar group and simply come, as I view them, within the general class of ordinary business transactions at large, being claims for goods bought and sold, for money due on a promissory note, for services of a mining engineer, and for a commission, which, in the absence of any facts before us to change their obvious complexion, do not apparently present any element of salvage in the proper sense of that word.

I would therefore allow the appeal to the extent above indicated, the appellant to have the general costs of the appeal and proceedings below on the issue on which he is successful.

GALLIHER, J.A.: With the exception of (c) *Herman* v. *Victoria Mines, Ltd.*, a mechanic's lien action, I do not think that any of the other claims for which plaintiff is asking to be considered a secured or preferred creditor under the Bankruptcy Act, can be so treated. In the first place, I am of the opinion that the plaintiff (solicitor) does not come within section 104 of the Legal Professions Act of British Columbia. The claims (a), (b), (d) and (e) in the statement of facts are for costs due the solicitor in defending actions brought by different parties for amounts claimed to be due them by the company, for certain services, for goods sold, and upon a promissory note. These are all personal actions and not actions *in rem* and do not as I view it, come within the words "property recovered or preserved" in section 104. Neither do they come within *Pelsall Coal and Iron Co.* v. *London and North-Western Ry. Co.* (*No. 3*) (1892), 8 Ry. & Can. Tr. Cas. 146.

GALLIHER, J.A.

In that case the London and North-Western had been given a lien upon the wagons of the coal company with power to sell for payment of arrears of haulage due the railway company, and in an action brought by the coal company against the railway company for over-charges for haulage, a settlement was arrived at by which the railway company's bill was reduced by a very considerable amount and the lien on the wagons of the coal company relieved to that extent and subsequently on the coal company going into liquidation the wagons came into the hands of the liquidator with the lien thereon lessened, thereby enhancing the value of the assets to that extent.

Wills, J. held the solicitor entitled to a lien under the circumstances, saying that:

"The services of the solicitors in such a case, . . . are in the nature of salvage, and do not depend upon contract."

Nor are any of the other cases cited to us and which I have read, an authority in the facts of this case.

The mechanic's lien action is different for there the property upon which the lien attached was relieved to the extent of

COURT OF APPEAL

1929

March 5.

MILLER v. WOLLASTON

$52.50, and for that amount or so much thereof as shall be taxed in that proceeding, I would hold the solicitor is entitled to rank as a preferred creditor.

The learned judge below refused the applicant's motion *in toto,* and to the extent mentioned above I would allow the appeal.

Mr. *O'Halloran* withdrew his objection to the solicitor's bill of costs being taxed so there is really taxation by consent and I would so order.

MARTIN, J.A.

As to the amount when taxed, with the exception of the amount above referred to, the solicitor should rank as an ordinary creditor.

The appellant having succeeded in part he is entitled to the general costs of the appeal proceedings and below, on the issue on which he is successful.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: I concur for the reasons given by Mr. Justice GALLIHER.

Appeal allowed in part.

Solicitors for appellant: *O'Halloran & Harvey.*
Solicitors for respondent: *Courtney & Elliott.*

D'ORIO v. LEIGH & CUTHBERTSON LIMITED.

ELLIS, CO. J.

1928

Dec. 13.

COURT OF APPEAL

1929

March 5.

D'ORIO v. LEIGH & CUTHBERTSON LTD.

Criminal law—Gaming—Gambling machine—What constitutes—Game of skill—Criminal Code, Secs. 226 and 236, Subsecs. (b), (d) and (e).

The plaintiff, an expert checker player, who designed and patented the Advertoshare Problem Checker Board, sold a number of boards to the defendants. The board has on its upper right cover the face of a checker board, the checker squares being numbered consecutively. On the left upper corner are ten names (Venus, Curve, Blind, etc., each representing a checker problem) with the numbers of the squares following the names of the problems in each case on which the black and white checkers are to be placed to constitute the problem. Across the bottom of the board are 1,000 punch holes covered with seals. Each punch-hole contains the name of one of the problems. A certain sum is paid by a customer for each punch and upon drawing a name, and solving the problem it represents, he receives a prize. The defendant refused to pay for the boards on the ground that they were devices for playing at a game of chance or a mixed game of chance and skill and their use would be a violation of sections 226 and 236 of the Criminal Code. In an action to recover the cost of the boards it was held that the problems to be played were games of skill only and the use of the boards did not constitute a violation of the Criminal Code.

Held, on appeal, affirming the decision of ELLIS, Co. J., that the only element of chance alleged was involved in selecting the game to be played which was done by the player punching a board, but the result of the draw did not affect the character of the game as all the problems were capable of solution by the player provided he had sufficient skill.

Statement

APPEAL by defendant from the decision of ELLIS, Co. J. of the 19th of December, 1928, in an action to recover $114.38, the purchase price of 39 Advertoshare Problem Checker Boards. The board was designed and patented in the United States and Canada by Julius D'Orio, a nationally known checker player and author of a treatise on the game. The board is an advertising medium when used and is contemplated to stimulate and increase sales of goods. The merchant who has them arranges to award prizes for correct solutions of the checker problems which accompany the board and are selected by the customer. The board has on its right upper corner the face of a checker board with the checker squares numbered and in the opposite

ELLIS, CO. J.
1928
Dec. 13.

COURT OF APPEAL
1929
March 5.

D'ORIO v. LEIGH & CUTHBERTSON LTD.

upper corner are ten names (Venus, Curve, Blind, etc., each representing a checker problem, being an ending of a game) with the numbers shewing the position of the checkers in each problem, according to the numbers on the squares in the opposite corner. Across the bottom of the board are 1,000 punch-holes (more or less the size of the boards varying) covered with seals within each of which is the name of one of the ten problems that are equally divided in the holes. A customer pays so much per punch and if he solves the problem he draws, he receives a prize. The defence was raised that the board was used for gaming purposes, for playing at a game of chance or playing at a mixed game of chance and skill contrary to the provisions of sections 226 and 236 of the Criminal Code.

Maitland, K.C., for plaintiff.
Hunter, for defendant.

19th December, 1928.

ELLIS, CO. J.: The plaintiff is the patentee both in Canada and the United States of a device known as Advertoshare Problem Checker-Board, the Canadian patent being No. 275,886. The plaintiff sold and delivered to the defendant, a manufacturer of chocolates in the City of Vancouver, 39 of these boards which were to be used by the defendant in the City of Vancouver. The cost of the checker-boards amounted to $114.36 which the defendant refused to pay after delivery on the ground, as alleged in the defence, that they were devices to be used for gaming purposes contrary to the Criminal Code, *viz.*, sections 226 and 236. The parts of those sections material to this action are:

ELLIS, CO. J.

"226. A common gaming house is

"(a) a house, room or place kept by any person for gain, to which persons resort to for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or

"(b) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill . . ."

"236. Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars who—

"(d) disposes of any goods, wares or merchandise by any game or mode of chance or mixed chance and skill in which the contestant or competitor pays money or other valuable consideration; or

"(e) induces any person to stake or hazard any money or other valuable

property or thing on the result of any dice game, shell game, punch board, coin table or on the operation of any wheel of fortune."

Defendant Company, after ordering the checker-boards had honest misgivings as to the legality of operating them, obtained the opinion of their lawyers on this point, were advised their operations would be in contravention of the Criminal Code and consequently wrote the plaintiff refusing to carry out their contract.

The contention of the plaintiff is that the checker-board is an advertising medium and would introduce and stimulate the sale of the defendant's chocolates and that the game played on the checker-board is one of skill and does not violate the criminal law. Action was then brought to determine the validity of the contract.

There is no dispute of facts between the parties and the only question to determine is whether the transaction is illegal in which case the considerations fail. The device sold is in form a regular standard checker-board, the squares of which are numbered. On the board ten problems, any of which the player or customer is to solve or play, are named. After each name is the colour of the checkers, *i.e.,* black and white and after the color are the numbers upon which the checkers are to be played. There are also a number of holes on the board covered with a thin seal in which hole there is a small slip of paper containing the name of one of the problems, referred to above, the customer or player is to play or solve. There are no blanks in any of the holes and the player is therefore bound to draw the name of one of the problems designated on the board. The customer pays 10 cents, punctures the seal over one of the holes, withdraws the piece of paper, ascertains the name of the problem he is to play and then proceeds to attempt to solve the problem and win the game. He places the checkers upon the checker-board and, in beginning to play, moves a black coloured checker first and is to play the black checkers to win. If he wins he gets a prize. Every problem is capable of solution by the exercise of skill in applying the principles of the game of checkers. It is alleged by the plaintiff, and the only evidence given bears this contention out, that the problems are real problems, that the customer or

ELLIS, CO. J.
1928
Dec. 13.
COURT OF APPEAL
1929
March 5.
D'ORIO v. LEIGH & CUTHBERTSON LTD.

player plays both the black and white checkers and that the black shall win by the exercise of skill.

The only element of chance, as disclosed by the evidence, is in punching the holes in the first place to obtain the name of the problem to be played. It does not appear that there is any material benefit to the customer or player in drawing one problem rather than another as the same prizes are offered for all problems played. Once it is settled which problem is to be played it is alleged skill or science is required to obtain the desired end. It is apparent that the method of determining the problem to be played is adopted for the purpose of preventing an expert customer or player from voluntarily choosing a problem to play in which he is or has become proficient and that the method adopted in choosing by chance the problem to be played is for the purpose of eliminating this possibility. After the problem to be played is determined by the method above stated it appears that skill, if it is not entirely necessary to win the game, predominates and the element of chance, if not negligible, is a no greater factor than it is in any game of skill such as bridge. Is then the device a violation of the Criminal Code? Is it a game of chance or of skill or a game of mixed chance and skill? I cannot conclude that the element of chance which clearly exists in deciding which problem shall be played has any real connection with the problem itself as and when played. The evidence discloses that skill must be used in working out the problem. The device cannot be such a game as is contemplated in the Criminal Code.

ELLIS, CO. J.

Counsel for the defence contends that the device is nothing more or less than a punch-board, that in the hands of an expert checker-player skill might solve the problem but in the hands of a non-expert player it is simply chance. The only case cited as actually bearing on the device was *D'Orio* v. *Startup Candy Company,* 266 Pac. 1037. This case was decided by the Supreme Court of Utah, and holds that the device is not a violation of its laws relating to the game of chance which are very similar to the sections of our Criminal Code.

The deduction to be drawn from the evidence as given at the trial is that any of the problems or games can be won providing

the player has sufficient skill of the game of checkers to move his checkers skilfully. It must, therefore, be such a game of skill as was not contemplated by the framers of the Criminal Code.

The case of *Rex* v. *Geffler* (1923), 32 B.C. 423 was cited by counsel for the plaintiff. That case is a judgment of this Court and the learned trial judge held that there was no evidence to warrant him in finding that the element of chance was present in the shooting of the revolver at the mark when in the hands of an expert. It was substantially target shooting which is not "a mixed game of chance and skill." I must, therefore, hold that the evidence in this case discloses that the problem to be played was one of skill and not a violation of the Criminal Code.

ELLIS, CO. J.

There will be judgment for the plaintiff for $114.36 and costs.

From this decision the defendant appealed. The appeal was argued at Victoria on the 10th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Hunter, for appellant: Our submission is that this board is a gambling device and contrary to the Code, and being gambling material they cannot recover. We rely on section 236 (*d*) of the Criminal Code. The device is also in contravention of section 236 (*e*). As to subsection (*b*) of the same section of the Code see *Rex* v. *Long* (1928), 23 Alta. L.R. 506; 50 Can. C.C. 169; *Rex* v. *Pilon* (1920), 32 Can. C.C. 342.

Argument

Maitland, K.C., for respondent: The player must have skill in checkers. There are ten problems varying very little as far as difficulty in solving them is concerned. The only element of chance is in selecting the game to be played by punching the board, but this amounts to nothing as all the problems require substantially an equal amount of skill to solve them. It is entirely a question of skill: see *Rex* v. *Geffler* (1923), 32 B.C. 423. There is a case in the State of Utah, the plaintiff here being the plaintiff in that case—*D'Orio* v. *Startup Candy Company,* 266 Pac. 1037. The facts are precisely similar to this

ELLIS, CO. J.

1928

Dec. 13.

COURT OF APPEAL

1929

March 5.

D'ORIO v. LEIGH & CUTHBERTSON LTD.

case and it was unanimously held by the Supreme Court of that State (composed of five judges) that it was a game of skill. The reasons given apply under our statute.

Hunter, replied.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The game in question was the well-known game of checkers. The only element of chance alleged was that involved in selecting the game to be played, which was done by the player or customer punching a board, the result of which would fix the game to be played. There were a number of games in the frame, all of them were capable of solution by the player provided he had sufficient skill. It therefore mattered not to the character of the game what the result of the draw was.

I agree with the learned County Court judge in the result. The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed for the reasons given by the learned judge below.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. I think the learned judge below was right in his conclusions and his reasons therefor.

The game is one of skill or one in which skill largely predominates, and into which the element of chance entering is negligible. The Supreme Court of the State of Utah recently dealt with the matter in the case of *D'Orio* v. *Startup Candy Company*, 266 Pac. 1037 in an action where the defence set up was illegal consideration in view of the statutes of that State governing games of chance or gift enterprise. The Court, composed of Thurman, C.J., Cherry, Straup, Hansen and Gideon, JJ.A. was unanimous in holding that it was a game of skill and the reasons given are, in my opinion, applicable under our statute.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the learned trial judge arrived at the proper conclusion. The evidence does not disclose that the article—the price of which was sued for in the action—

ELLIS, CO. J. 1928 Dec. 13. COURT OF APPEAL 1929 March 5. D'ORIO v. LEIGH & CUTHBERTSON LTD.

is one to be used in a game of chance or mixed game of chance and skill, contravening section 226 of the Criminal Code (R.S.C. 1927, Cap. 36). It follows that the defence to the action—that there could be no recovery because the consideration for the agreement of purchase was in its nature illegal and that the Court would not enforce the agreement of purchase—wholly fails.

I may say that I am in entire accord with the judgment of Chief Justice Thurman of the Supreme Court of the State of Utah in the case of *D'Orio* v. *Startup Candy Company*, 266 Pac. 1037, a decision in which four of the learned Chief Justice's colleagues concurred, *viz.*, Cherry, Hansen, Straup and Gideon, JJ.A., that case being in all respects similar to the present case.

MCPHILLIPS, J.A.

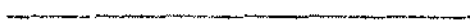
I adopt the learned Chief Justice's reasons for judgment and apply them to the facts of this case under appeal in this Court, being *in pari materia*. I would therefore dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the reasons of the learned trial judge and the conclusions he reached, and would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Hunter & Owen.*
Solicitors for respondent: *Maitland & Maitland.*



MCDONALD, J.
(In Chambers)

1929

May 2.

SINGER
v.
GARRETT

SINGER v. GARRETT.

Practice—Agreement for sale of land—Foreclosure—Period of redemption.

In an action for foreclosure under an agreement of sale there is no hard and fast rule as to the time to be given the purchaser in which to make good his default, but each individual case must be dealt with on its own merits, having regard particularly to the question of whether or not the vendor is secured, and whether there is any probability of the purchaser being able to pay.

Statement

MOTION for an order *nisi* in an action to foreclose an agreement of sale. Heard by McDONALD, J. in Chambers at Vancouver on the 23rd of April, 1929.

Dickie, for the motion.
J. A. McGeer, contra.

2nd May, 1929.

Judgment

McDONALD, J.: Motion for order *nisi* (in an action to foreclose an agreement of sale). Approximately one-half the purchase price has been paid. It is contended that the practice was laid down by my brother W. A. MACDONALD in *Davis* v. *Von Alvensleben* (1914), 20 B.C. 74 to the effect that in all such cases the purchaser should be given three months in which to make good his default. I have examined the judgment referred to and have consulted with all my brother judges who are available and they all agree that it was not intended by the said judgment to make any hard and fast rule to apply to all cases but that each individual case must be dealt with on its own merits having regard particularly to the question of whether or not the vendor is secured and whether there is any probability of the purchaser being able to pay.

Having these principles in mind, I fix the time in this case at six months. Costs will be in the cause.

Order accordingly.

ECCLES v. RUSSELL.

COURT OF APPEAL

1929

March 5.

ECCLES v. RUSSELL

Costs—Solicitor and client—Client in employ of police—Client arrested—Undertaking by police department to pay costs if client innocent—Bill of costs submitted to police and paid—Liability of client to further costs—Evidence.

The plaintiff, who was a member of the Narcotic Squad of the Royal Canadian Mounted Police, was arrested in August, 1923, with others of the Force and charged with an infraction of The Opium and Narcotic Drug Act. On the advice of his superior officer, who stated that if he cleared himself to the satisfaction of his superior officers the police department would pay his costs, he consulted the defendant and retained his services as counsel. The defendant appeared as counsel for the plaintiff on the above charge, and subsequently on a charge of perjury, also before a Royal Commission. The plaintiff cleared himself to the satisfaction of his superior officers and on the defendant submitting his bills to the police department at Ottawa they were taxed and paid. During the proceedings the plaintiff advanced the defendant $450 for disbursements and on the perjury charge he paid the defendant $2,000 to be deposited as bail, but the bail was otherwise provided and the defendant paid back $1,000, but retained the other $1,000, the defendant claiming that the costs paid by the police department did not cover all his costs. In an action for the return of the $1,450 it was held that the plaintiff's account should be accepted in preference to that of the defendant who failed to take the precaution of having a written retainer.

Held, on appeal, affirming the decision of GREGORY, J., that the defendant submitted his bill of costs against the plaintiff to the department of justice, the plaintiff having been in the Government employ, and the proper inference from the whole evidence is that his bill was paid on the assumption that it was his whole bill against the plaintiff and that its payment entirely relieved the plaintiff from any responsibility for the costs of the proceedings therein set out.

Statement

APPEAL by defendant from the decision of GREGORY, J. of the 11th of October, 1928 (reported, 40 B.C. 396), in an action for the return of $1,450 advanced by the plaintiff on account of costs. In August, 1923, the plaintiff, with other members of the Narcotic Squad of the Royal Canadian Mounted Police Force, was arrested and charged with an infraction of The Opium and Narcotic Drug Act. The plaintiff, acting on the advice of his superior officer, consulted the defendant and retained his services as counsel on the understanding that if the

COURT OF APPEAL

1929

March 5.

ECCLES v. RUSSELL

plaintiff cleared himself of the charges against him to the satisfaction of his superior officers, the police department would pay the defendant for such services as he might render the plaintiff but if the plaintiff was unable to clear himself he would have to pay the defendant for his services. During the proceedings the plaintiff advanced the defendant $450 of his own for disbursements and he made a further payment to the defendant of $2,000 to be deposited as bail. Of this sum the defendant paid back $1,000 but retained the other $1,000. The plaintiff cleared himself to the satisfaction of his superior officers and the police department paid the defendant the full amount of his bill for services rendered. The defendant claimed that the costs paid by the department did not cover all the services rendered by himself to the plaintiff and he was entitled to retain the amount claimed to cover the additional costs.

Statement

The appeal was argued at Victoria on the 25th of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Mayers, for appellant: There was a charge of perjury against the plaintiff and *Russell* says the department's undertaking to pay his costs did not include the perjury charge. The learned judge in deciding the case relied on *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241, but in that case there is a denial of authority and it does not apply as authority to act is admitted here: see *Scribner* v. *Parcells* (1890), 20 Ont. 554 at p. 558.

Argument

J. A. MacInnes, for respondent: There was no written retainer and there is a flat contradiction between *Russell* and Eccles. The $2,000 paid for bail was never used for that purpose and cannot be retained for costs: see *In re Cullen* (1859), 27 Beav. 51. The bills shew all these services were rendered for the three men: see *Hall* v. *Laver* (1842), 1 Hare 571 and *In re Clark* (1851), 1 De G. M. & G. 43.

Mayers, in reply, referred to *Blyth* v. *Fladgate* (1890), 60 L.J., Ch. 66.

Cur. adv. vult.

5th March, 1929.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The learned trial judge appears to have

thought that he was bound by our decision in *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241, and while I think that case does not go as far as he thought, yet I am driven to the conclusion that he rightly dismissed the action, for the reason that the defendant submitted his bill of costs against the plaintiff to the department of justice at Ottawa, for payment, the plaintiff having been in the employ of the Government, and I infer from the whole evidence that his bill was paid on the assumption that it was his whole bill against the plaintiff, and that its payment entirely relieved the plaintiff from any responsibility for the costs of the proceedings therein set out.

MACDONALD, C.J.A.

The appeal should be dismissed.

MARTIN, J.A.: This appeal comes before us in what is, to me, at least, an unsatisfactory state because the learned judge below has, with respect, as submitted by counsel misconceived and misapplied our decision on a solicitor's retainer in *MacGill & Grant* v. *Chin Yow You* (1914), 19 B.C. 241, and disposed of the case on that mistaken basis. The learned judge said in his reasons:

"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."

MARTIN, J.A.

Our decision, like all others, must be considered in the light of the facts that it was founded on, and the only and simple question in it was, did the defendant retain the solicitors to defend a friend of his who had been charged with a criminal offence? and the whole matter depended on the mere conflicting statements of the defendant and a member of the solicitors' firm, without further evidence verbal or documentary. The case at Bar is very different from such a case and there is much to be considered beyond bare denials on clear-cut issues. Moreover, I have grave doubt about the application of the rule to retainers to defend, as distinguished from retainers to bring actions, because Lord Chancellor Eldon said in *Wright* v. *Castle* (1817), 3 Mer. 12-13; 17 R.R. 3 at p. 4:

"It is also settled that, if the plaintiff denies, and the solicitor asserts, authority to have been given, and there is nothing but assertion against assertion, the Court will say that the solicitor ought to have secured him-

COURT OF APPEAL

1929

March 5.

ECCLES v. RUSSELL

self by having an authority in writing, and that, not having done so, he must abide the consequences of his neglect. There must be a special authority to institute, although a general authority is sufficient to enable the solicitor to defend a suit. In this case the plaintiff has positively sworn that he gave no authority whatever to file the bill, and this is met by only a general assertion of his being authorized, on the part of the solicitor."

MARTIN, J.A.

This point was not raised in *MacGill's* case, nor was the *Wright* case cited to us, but I draw attention to the point now by way of precaution and for further consideration if necessary. It is not really necessary to consider it herein because we have considered this case in all its circumstances and aspects, and after having done so my learned brothers have so strong an opinion as to its disposition that I do not feel free enough from doubt to oppose it, but nevertheless I feel it is unfortunate that the matter was not properly dealt with below when the conflict of evidence, with the witnesses before the Court, could have been decided on its true appraisement. I have examined many cases on the point, in addition to those cited in *MacGill's* case, the most relevant of which are *Wilson* v. *Wilson* (1820), 1 J. & W. 457; *Owen* v. *Ord* (1828), 3 Car. & P. 349; *Martindale* v. *Lawson* (1838), C.P. Cooper 83; *Lord* v. *Kellett* (1833), 2 Myl. & K. 1 at p. 2; *Atkinson* v. *Abbott* (1855), 25 L.T. Jo. 314; *Bean* v. *Wade* (1885), 2 T.L.R. 157; *Blyth* v. *Fladgate* (1891), 1 Ch. 337, 355, 359; and *Re Gray* (1869), 20 L.T. 730, in which last it is to be noted that Lord Romilly said, p. 732:

"The extent of a retainer is not unfrequently discussed in taxation, but the fact of a bill being filed in the absence of any retainer, I do not remember to have met with before."

This supports the appellant's counsel in that respect.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the learned trial judge's judgment should not be disturbed. The whole case resolves itself into a question of fact and the essential fact has been by the learned judge found in favour of the plaintiff, and that is the Dominion Government having paid the costs of the plaintiff, the plaintiff was and is entitled to a refund of the moneys received by the defendant from the plaintiff and retained by the defendant in respect of the self-same matter.

In short terms the agreement was that the Dominion Government paying the costs the plaintiff was put to there cannot be any other costs for which the plaintiff can be held liable to pay the defendant. The condition upon which the retainer was made was wholly satisfied when the Dominion Government assumed and paid these costs, the defendant rendering his bill in due course to the Dominion Government which was settled and allowed at a certain figure and later on upon reconsideration by the Government allowed at a figure in substantial increase of the sum at first allowed, and in passing it may well be said that the costs were finally allowed upon a very liberal basis. The case is one in which, in the interests of justice, it would be highly inequitable to impose any liability upon the plaintiff and certainly the defendant failed to establish his right to withhold the money sued for and which the learned trial judge gave judgment. I would dismiss the appeal.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitors for appellant: *J. A. Russell, Nicholson & Company.*
Solicitor for respondent: *G. L. MacInnes.*

COURT OF APPEAL

1929

March 5.

REX v. BELL

REX v. BELL.

Criminal law—Bankruptcy—Removal and disposal of goods to defraud creditors—"Creditors," meaning of—Evidence—Criminal Code, Sec. 417 (a) (ii.).

B., who carried on a grocery business in two stores in Vancouver, incorporated in 1925 a company known as "Bell's Grocery and Meat Market Limited," he taking 500 shares in consideration of transferring the business in the two stores to the company, and his two daughters buying 350, the returns to the registrar of joint-stock companies disclosing this transaction. B. continued in control as manager of the business. In August, 1928, not meeting its obligations, the creditors, after holding a meeting, took over the business and upon investigation laid a charge against B. of unlawfully with intent to defraud his creditors, concealing and disposing of certain moneys and cheques amounting to between $4,000 and $5,000 contrary to section 417 (*a*) (ii.) of the Criminal Code. He was convicted.

Held, on appeal, reversing the decision of Magistrate Shaw (MARTIN and GALLIHER, JJ.A. dissenting), that the Crown was obliged to prove that the creditors who were alleged to have been defrauded were B.'s creditors but the evidence disclosed that the persons who claimed to have been defrauded were not B.'s creditors but those of a joint-stock company, *i.e.*, "Bell's Grocery and Meat Market Limited" of which B. was an officer and manager and there is therefore no warrant for the prosecution.

The question of whose creditors had been defrauded, namely, those of B.'s or of "Bell's Grocery and Meat Market Limited" was the crucial point in the case and the onus of proving this was on the Crown. The Crown therefore had no right to call a witness in rebuttal of the defendant's evidence on this point.

Statement

APPEAL by accused from his conviction by H. C. Shaw, Esquire, police magistrate, Vancouver, on the 14th of November, 1928, on a charge of unlawfully, with intent to defraud his creditors, to whom he was indebted in a certain sum of money, did remove, conceal or dispose of certain of his property to wit: a certain sum of money and certain cheques payable to him amounting in the aggregate to between $4,000 and $5,000 contrary to section 417 (*a*) (ii.) of the Criminal Code. The accused carried on business in two stores on Commercial Drive in Vancouver for some years in the trade name of "Royal Grocery and Meat Market." In December, 1925, he caused a

joint-stock company to be incorporated under the name of "Bell's Grocery and Meat Market Limited," he being allotted 500 shares in consideration of transferring his former business to the Company, and his two daughters purchasing 350 shares, returns filed with the registrar of joint-stock companies disclosing this transaction; further, the signs fixed to the said premises being the company's signs. In August, 1928, when some of the creditors were unable to collect their accounts they had a meeting when it was disclosed that Bell had about $5,000 in a private account of his own that had been taken from moneys received in the stores, and from which he refused to pay any of the creditors. The accused was convicted and sentenced to one year's imprisonment.

Statement

The appeal was argued at Victoria on the 22nd of January, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. M. Whiteside, for appellant: The business was carried on in two stores under the name of "Bell's Grocery and Meat Market Limited." It was a company, Bell owning a large portion of the shares and the business being under his supervision. When first pressed by creditors, Bell's bookkeeper was away and he carried the proceeds from sales around in his automobile pending the bookkeeper's return. He refused to pay any bills until the bookkeeper returned and the creditors then had a meeting when he offered to pay them $1,500. He had certain moneys in a bank which he claimed were his own. If there was any fraudulent act at all, and we say there was not, then the people defrauded were not his creditors but the creditors of the company: see *Rex* v. *Stone (No. 1)* (1911), 17 Can. C.C. 249.

Argument

W. M. McKay, for the Crown: This was entirely Bell's business. The company was simply a company on paper and did not function as a company at all. The fraudulent act of taking the money from the business and hiding it from his creditors was Bell's act, and these men were his creditors.

Whiteside, in reply, referred to *The Queen* v. *Hopkins* (1896), 1 Q.B. 652 and *Rex* v. *Rash* (1923), 41 Can. C.C. 215.

Cur. adv. vult.

COURT OF APPEAL

1929

March 5.

REX v. BELL

On the 5th of March, 1929, the judgment of the Court was delivered by

MACDONALD, C.J.A.: The appellant was convicted in the police Court and sentenced to one year's imprisonment on the charge of concealing and disposing of property with intent to defraud creditors.

Their misconception of their public duty by Mr. Brown and Mr. Halliwell, is shewn by the following taken from the evidence of the latter:

"Finally after the creditors had been taking the matter up several times and suggested he should be prosecuted, I got Mr. Bell up to the office and told him we would have to prosecute him unless he made some arrangement with the creditors or dug up this money. 'Well,' he said, 'I have not got the money. You can go ahead and prosecute.' So I suggested he have Mr. *Whiteside*, his solicitor at that time, come over—no, Mr. *White*, I think it was. He 'phoned up Mr. *Whiteside* and Mr. *Whiteside* was not in, and Mr. *White* came over; and Mr. *Keill*, of *Russell, Hancox & Anderson*, and we talked the situation over, and he would not dig up the money, and we brought him to the police Court and laid the information; and just at the foot of the stairs down here Mr. Bell admitted he had been telling me a lie about where the money had gone to and he told me a woman had the money and he could not get it back.

Judgment

"Was that in the presence of any person he told you that? In the presence of Mr. Brown, of Kelly, Douglas & Company. Well I told him if it was a question of blackmail, anything like that, we could probably put it in the solicitor's hands and get the money back, he said, no, he would sooner go to gaol for ten years rather than tell me the name of the woman.

"And he told you this here? Yes, I told him 'We did not want to lay the information, we wanted our money, that is all there is to it. If you refuse to come through with any information as to where the money was or who got the money you will have to take the consequences.' Mr. Bell finally came up to the police Court office and was arrested."

The conduct of the appellant may not have been excusable, but if the defence made in the police Court were a good one, he was not guilty of the crime of which he has been convicted. The defence was that the persons who claimed to have been defrauded were not his creditors, but those of a joint-stock company, "Bell's Grocery and Meat Market Limited" of which the appellant was an officer and manager. If this were true there was no warrant for the prosecution. Whatever other offence, if any, the appellant may have been guilty of he was not guilty of the one charged. The Crown was obliged to prove that the creditors who are alleged to have been defrauded were his credi-

tors. The appeal involves only questions of fact or mixed questions of law and fact.

The appellant had, up to December, 1925, carried on business in the trade name of "The Royal Grocery and Meat Market." In that year he caused the said joint-stock company to be incorporated. In consideration of the transfer of his former business and assets he was allotted 500 shares in the company. His daughters purchased for cash 350 shares. Returns afterwards made to and filed with the registrar of joint-stock companies disclose this transaction, but if this were not strictly proved as claimed, since certified copies only were put in, the evidence of Hazel Christian Bell, one of the shareholders, proves the substance of what is contained in said returns. The sign affixed to the premises was said to be the company's sign, and although this was not strictly proved, it was not disputed. The sales slips used by the company, a sample of which is in the appeal book, are in the name of the company. Actions in the Small Debts Court as late as last year and only shortly before this trouble arose, were brought in the name of the "limited" company. The cheques relied upon by the prosecution were generally signed Bell's Grocery & Meat Market, without the word "Limited," but one to the Burns Company contained the word "Limited"; another to one Gordon was signed "Bell's Grocery & Meat Market, William C. Bell, vice-president." Most of the other cheques were signed "Bell's Grocery & Meat Market," and underneath "William C. Bell," implying as I think it does, that the business was not his own.

Judgment

It is apparent to us that the appellant regarded the word "Limited" as superfluous, a very common assumption amongst laymen. The absence of the word "Limited" proves nothing; its presence would not prove that the company was a joint-stock company, nor would its absence prove the contrary. The only evidence which could help the Crown's case is the power of attorney which the appellant executed in favour of Halliwell to enable the latter to wind up the business. This was drawn by Halliwell and there is no evidence that it was read over to the appellant. In fact all the evidence indicates that he being badgered by creditors did what he was asked to do in this respect without question. This power of attorney describes appellant

COURT OF APPEAL

1929

March 5.

REX v. BELL

as trading under the name of "Bell's Grocery & Meat Market"; it is however, signed like the cheques—"Bell's Grocery & Meat Market, William C. Bell." In addition to this evidence, Halliwell was asked on cross-examination, whether the business was Bell's or that of the joint-stock company. He said he knew nothing about it except that Bell had told him that it was his business. The defence called a witness, Ward, who had been present at the time of the last-mentioned statement. This witness said:

"Mr. Halliwell asked him, he said, 'Is this business in your own name or under Bell's Limited?' And Mr. Bell said 'Well, it is under Bell's Limited, but you can close me out under which one you like if you are going to close me out.' Mr. Halliwell said then 'It looks like we will have to close you out under W. C. Bell's because some of your accounts are in that name such as Burns and Swifts.' "

Judgment

The Crown was permitted, against strong objection to call in rebuttal Forster, who was present on that occasion. The claim to do that was not founded upon any exception to the general rule, which requires the prosecution to exhaust their material evidence in their opening. Now, the fact of whose business it was, whether Bell's Grocery and Meat Market Limited or Bell's own, and whose creditors had been defrauded, whether Bell's or those of Bell's Grocery and Meat Market Limited, was a crucial question in the case the onus of proving which was upon the Crown. The Crown therefore strictly had no right to call a witness in rebuttal of Ward's evidence though the magistrate had a discretion which we think was not judicially exercised.

Now while we think that the evidence in the circumstances was not such as could be safely acted upon to found a conviction we wish to say in addition that it is apparent to us that the criminal proceedings were manifestly not taken in vindication of public justice but wholly because of appellant's refusal to comply with the demand to "dig up the money or take the consequences." The prosecution was, therefore, an abuse of the process of the magistrate's Court which we cannot countenance. We think that the Criminal Courts are not to be held *in terrorum* over alleged debtors.

The appeal is allowed and the conviction quashed.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from the following conviction by His Worship the Police Magistrate of Vancouver:

"BE IT REMEMBERED that on the 14th day of November in the year of our Lord one thousand nine hundred and twenty eight at the said City of Vancouver, William Cosgrove Bell being charged before me, the undersigned H. C. Shaw, Esquire, Police Magistrate in and for the City of Vancouver, and consenting to my trying the charge summarily is convicted before me for that he, the said William Cosgrove Bell at the said City of Vancouver between the 2nd and 23rd days of August, 1928, inclusive unlawfully with intent to defraud his creditors to whom he was lawfully indebted in a certain sum of money, did remove, conceal or dispose of certain of his property to wit: A certain sum of money and certain cheques payable to him amounting in the aggregate to between $4,000 and $5,000 contrary to the form of statute in such case made and provided."

Section 417 of the Criminal Code declares that:

"Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,—(*a*) with intent to defraud his creditors, or any of them . . . removes, conceals or disposes of any of his property."

Several questions of law and fact arise out of this appeal, some of them raised by appellant's counsel upon the argument before us and some raised thereafter by one of my learned brothers.

MARTIN, J.A.

As to those argued at the hearing, the first is that there is no evidence to support the charge, which is a question of law now as it was before the passing of the Criminal Code Amendment Act, 1923, Cap. 41. Compare, *e.g.*, *Rex* v. *Campbell* (1912), 19 Can. C.C. 407; *Rex* v. *Faulds* (1922), 31 B.C. 421, and *Rex* v. *Rash* (1923), 41 Can. C.C. 215; and this makes it necessary to examine the evidence to ascertain what inference can be drawn from the facts in dispute which in essentials are few because it is proved beyond controversy, if not actually admitted, that the accused did fraudulently "remove" from the business he was managing and "conceal" various sums of money amounting to over $4,000 and the only question really in dispute, as a perusal of the whole appeal book shews (which perusal is necessary to fully understand the matter), is as to whether the said "removed or concealed" money was the personal property of the accused or that of a company called "Bell's Grocery and Meat Market Limited" which was incorporated on 21st September, 1925, nearly three years before the fraudulent acts in question, committed in August, 1928, and which company the appellant alleges he was the manager of and in that capacity only dealt with said moneys; he had previously

COURT OF APPEAL

1929

March 5.

REX v. BELL

MARTIN, J.A.

been carrying on the same business for several years by himself alone.

It appears by the uncontradicted evidence that the business, which unquestionably was under the complete and unfettered control of the accused during the time material to the charge, got into financial difficulties and he admitted to the witness Halliwell on 20th August last that it had become bankrupt. Several of his creditors had endeavoured to get payment of their accounts, aggregating about $14,000, during August but without success, though several of them testify that he admitted to them he had received money from the current sales of the business which he had not deposited to its credit and refused to apply on his indebtedness though he shewed the witness Slade packages in his motor-car which he said contained in cash the missing store takings. The way he treated his creditors, whose goods he was disposing of, is illustrated by Slade's evidence:

"On Monday [20th August] I happened to get him on the 'phone at his house, and he told me at that time, he was trying to give me another stall, and I said, 'Now there is going to be something done on this account today, and I am going to take some action if I don't get a payment today.' 'Well,' he said, 'I just had your cheque made out for you, and I am just going to tear it up. You won't get a darn thing, and you will do whatever you like.' I said 'Alright if that is the way you feel about it, I will just have to govern myself accordingly.' And that was the last I saw of Mr. Bell or spoke to Mr. Bell till I met him in Mr. Halliwell's office a few days after [*i.e.*, 22nd August]."

And his similar attitude to Kelly Douglas & Co., creditors for over $6,000, on 21st August, is deposed to by their accountant, McWilliams:

"I said 'Mr. Bell, it has come to my attention that you have $5,000, or approximately $5,000 in a bank account.' 'Yes,' he says, 'I have, but no creditor is going to get that, because that is my money and doesn't belong to the business. You can take the business but you won't get that money.' 'Well' I said, 'that is a very strange statement for you to make, Mr. Bell. I am sorry that is your attitude, but if that is your attitude I think you will have some explanation to make to your creditors because,' I said, 'three months ago you signed a statement shewing a surplus in that business of over $23,000,' and I said 'it seems rather strange that you should adopt that attitude now. ' 'Well,' he said, 'if that is the way that you take it' he says, 'you can do what you please, and the creditors can do what they please, but,' he said, 'they are not going to get that money'; and he walked out of my office."

This evidence is confirmed by that of W. H. Brown, the salesman for Kelly Douglas Co., who says that Bell told him

he had $5,000 cash "but would pay nobody till he saw what they were doing with him" and he proceeds:

"I followed Mr. Bell outside [McWilliams's office] and tried to reason with him, and tried to get him to go back into the office and go into the thing further, and not have all this trouble. I said 'it is probably the first time you have been threatened with a writ and you are probably making a mountain out of a molehill, and I would like you to come down,' and he said 'No, I won't come back. They can do what they like with me.' That is the conversation I had with Mr. Bell."

On the 22nd a meeting of four or five of the principal creditors (A. P. Slade Co., Kelly Douglas Co., P. Burns & Co., Creamery Co. and perhaps another) was held at the office of said Halliwell, accountant of the Canadian Credit Men's Trust Association Ltd., which Bell attended and he said he had some money and offered to pay $1,500, which would be about 40 cents on the dollar to certain creditors but excluding the principal creditor, Kelly Douglas Co., whose account Bell wanted to wait, to which McWilliams objected and deposes:

MARTIN, J.A.

"I said I didn't think that was fair being the chief creditor; and he said he hadn't enough money to go round. And I said to Bell, 'Don't you think you could take this money you have in the bank and pay it proportionately among your creditors? If you would do that everything would be alright. It would only take four or five thousand dollars to satisfy every creditor you have got, and you could go on like in the business.' I said, 'You paid us in the month of July twenty-five hundred' and I said 'if you give us a payment of fifteen hundred dollars that will satisfy us, we will give you credit.' No, he would not do anything of that. The creditors could take his business, but he was going to take that money."

Halliwell on behalf of the principal creditors endeavoured to arrange an extension for Bell and had a meeting with him in his office and afterwards in the evening of the 21st went to Bell's store with the following result, after Bell shewed him a savings bank book and made a statement about it:

"He admitted he had this $4,500. He admitted that to you? Yes, he told me. I said 'Is that in your own name?' and he said, 'No'; and I says, 'Well, whose name is it in?' 'Oh' he says 'it is in a fictitious name,' he said, 'you cannot get it, none of the creditors are going to get that money.'

"Yes, well just go on. Then I tried to persuade him, if he could pay up the money I could place the position of affairs before the creditors and probably arrange an extension for him to pay those things up, and get an extension to pay his liabilities. No, he said he was not going to pay anything. I told him then the only thing to do was to get the creditors together and talk the situation over and see if we cannot arrive at a suitable arrangement; and I arranged to meet the creditors next Wednesday afternoon August 22nd at two o'clock. I called four or five of the prin-

COURT OF APPEAL

1929

March 5.

REX v. BELL

cipal creditors to come to talk the situation over. I was chairman of the meeting. Mr. Bell was there; and Mr. Bell told the creditors that he could not carry on any more; and then I asked him as regards what became of the money; he told us that he had lost five hundred dollars on the races, twelve hundred dollars in cash he had hid in the store and it was hid in a corner where there happened to be a little fire from an electric motor, and he claimed twelve hundred dollars was burned up; and he also paid $600 on a personal loan that he owed. I told him, 'well there is more money than that, that only accounts for a little more than $2,000.' 'Well,' he said, 'I have lost the rest' he said, 'I don't know where it has gone.' We tried to persuade Mr. Bell at that meeting to make some arrangement to settle the creditors' claims. Finally he made an offer; he would pay $1,500 cash dividing it up amongst the creditors provided Kelly Douglas would give him an extension on their account. The creditors were not prepared at that time to consider that proposition till they knew the exact situation, till they knew what his stock, fixtures and everything was. At that time I might mention, the meeting the night before with Mr. Bell, I asked Mr. Bell what his stock was. 'Oh,' he says, 'eight or nine thousand dollars.' Well, I went over the stock very carefully and I estimated his stock at about $4,000, and it happened the stock just turned out to be about $4,000 when we afterwards did take stock. As the result of that meeting Mr. Bell was requested to turn his business over to the Canadian Credit Men's Association for investigation to see how his affairs stood. I put two or three men in to take stock and got a statement there, and they prepared a statement of his affairs. Here is a copy."

MARTIN, J.A.

This statement and another one shewed liabilities $14,690.90, assets $10,966.86, and cash unaccounted for $4,397.96. Ward confirms Halliwell's statement that the question of the real ownership of the business was raised by Halliwell in Bell's store the evening before the meeting of 22nd August of certain creditors with Bell and that vital question pointedly brought up for action thereupon, as Halliwell thus describes:

"I didn't think we had anything to do with a limited company, because Mr. Bell was particularly requested at the meeting of the creditors to state whether or not the business was his own personally or belonged to a limited company.

"Who asked him that? I did.

"And he said that the business was his own? He said there was no question about it, the business was his own. At one time he started turning it over, and then he dropped the idea.

"Well what prompted you to ask that question? Because [in] the trade reports we got there was mention made of it that at one time he formed a limited company.

"Didn't your trade reports say this business was then a limited company? No."

And at p. 49:

"After the meeting of creditors was brought it was left to Mr. Bell to

consult me and to state as to whether or not he was going to make an assignment or turn the business over on power of attorney; and he asked permission to go up and see this solicitor Mr. *McKay* at that time, to consult with regard to whether or not he should make an assignment or give us his power of attorney. I went along with him to Mr. *McKay* and explained the situation and left them together. About fifteen minutes after Mr. Bell came in and stated he was willing to give his power of attorney. I drafted up the form and Mr. Bell signed it.

"Then you did not go any further at that time into the question of the company? No."

The disastrous consequences to the creditor and Halliwell of there being any mistake about the question of ownership of the business and property they were going to wind up and dispose of under the power of attorney from Bell and the proper precautions they took to avoid them were brought out by accused's counsel on Halliwell's cross-examination:

"So that if the property did in fact belong to the company you have dealt with it without authority, isn't that true? If it belongs to the company we are trespassing and disposing of their goods without proper authority.

"And you are not prepared to say whether it did belong to the company or not? Merely took Mr. Bell's word that it was his own personal goods.

"His word, giving that word would not affect a transfer from the company to himself, would it? Well we always considered he was the owner of the business and we asked him right there at the meeting whether or not he was the owner.

MARTIN, J.A.

"If it were a private company and he owned most of the stock that would be a natural thing to say that he owned the business, would it not? No.

"Doesn't a man often refer, isn't it an ordinary custom to refer to his business, when it is in fact incorporated and he owns only the shares? Well, I don't know. Not in this particular case. We particularly asked him as to whether or not the business was his personally or belonged to the company."

That Bell did make these crucial statements is not only not denied by him but actually admitted by his counsel at the trial, *viz.*:

"*Whiteside*: There is no question that Bell stated to those creditors that it was his own business. I suppose that is true."

This admission was made under section 978 of the Code which provides that

"Any accused person on his trial for any indictable offence, or his counsel or solicitor, may admit any fact alleged against the accused so as to dispense with proof thereof."

These representations by Bell were followed up by the execution and delivery of the said power of attorney which was not at all a document hastily forced upon him by his creditors,

but on the contrary was executed after he had consulted his solicitor upon the situation after it had been explained to them both by Halliwell as above cited. That power of attorney is given by "William Cosgrove Bell trading as Bell's Grocery" and signed in that way and it irrevocably authorized and empowered at large the Canadian Credit Men's Trust Association Ltd. to take possession and sell and dispose of the business in question, *i.e.*, carried on "at 1654 x 2150 Commercial Drive," or continue the same as to the attorney "may seem reasonable or expedient," etc., etc., and

"to distribute all moneys received from any source whatsoever among our creditors in accordance with the terms of section 8 of the Bulk Sales Act of British Columbia."

That "Act to regulate the Purchase, Sale, and Transfer of Goods in Bulk" is now Cap. 28, R.S.B.C. 1924.

MARTIN, J.A.

Upon the evidence it is beyond dispute that this was the best course to adopt in the interests of all concerned and having regard to the state in which the business had fallen the results obtained by said Trust Association were better than could have been reasonably expected; the stock of No. 2 store actually realizing 100 cents on the dollar. After it had become apparent that the realization of the assets would result in a heavy loss to the creditors Halliwell urged Bell to make a settlement as he thus describes:

"After we took charge I saw Mr. Bell sometime and tried to persuade him to make a proposition to settle with the creditors; and he said he didn't have the money, it was burnt up and paid for personal debts. Finally after the creditors had been taking the matter up several times and suggested he should be prosecuted, I got Mr. Bell up to the office and told him we would have to prosecute him unless he made some arrangement with the creditors or dug up this money. 'Well,' he said, 'I haven't got the money. You go ahead and prosecute.' So I suggested he have Mr. *Whiteside*, his solicitor at that time, come over—No, Mr. *White* I think it was. He 'phoned up Mr. *Whiteside* and Mr. *Whiteside* wasn't in, and Mr. *White* came over; and Mr. *Keill*, of *Russell, Hancox & Anderson*, and we talked the situation over, and he would not dig up the money, and we brought him down to the police Court and laid the information; and just at the foot of the stairs down here Mr. Bell admitted he had been telling me a lie about where the money had gone to and he told me that a woman had the money and he could not get it back.

"Was that in the presence of any person he told you that? In the presence of Mr. Brown of Kelly Douglas & Company. Well, I told him if it was a question of blackmail, anything like that, we could probably put it in the solicitor's hands and get the money back. He said no, he would

sooner go to gaol for ten years, rather than tell me the name of the woman.

"And he told you this here? Yes, I told him 'we didn't want to lay the information, we want our money, that is all there is to it. If you refuse to come through with any information as to where the money was or who got the money, he would have to take the consequences.' Mr. Bell finally came up to the police Court office and was arrested [on 29th August]."

The statement about giving the money to a woman is confirmed by Brown who "overheard" it at the police station.

It is not disputed that a company was formed by Bell and members of his family three years before, but the submission of the Crown is that whatever was originally done and planned the company as such had not in fact carried out its object and had ceased to function and "gone out of business" as Halliwell describes it; in other words, become defunct *de facto* and had surrendered itself into the hands and absolute control of its former owner Bell who had become again the sole master and owner thereof by reason of such tacit reversion, and Bell himself told his creditors at said meeting that this is what had happened saying "he started turning it over and then he dropped the idea." In criminal cases of this kind the Court will look to the substance and not to the shadow of the transaction and will determine its true nature not as it might be made to appear upon paper but as it was actually carried on upon the premises. All the evidence, in my opinion, of that carrying on, *e.g.*, the significant absence of any salary being paid to Bell appearing in the incomplete and untrustworthy books, and only two salary cheques produced; the varying way in which the firm name was used in bank and sales and other transactions; the secret bank accounts; the *ex facie* suspicious alleged cash contributions of his two daughters for shares; the absence of any corporate books of the company or record of appointment of officials and no returns since December, 1925—all these and more that could be mentioned go to support strongly the finding of the learned police magistrate "that it does not seem to me a genuine transaction." The accused's counsel indeed said to the magistrate after his motion to dismiss the charge was refused and he was required to "explain the situation":

MARTIN, J.A.

"*Whiteside*: The fact is that the business is apparently the business of the company. We are not able to say whether it is or not."

It was incumbent upon the debtor Bell at said meeting, upon

COURT OF APPEAL

1929

March 5.

REX v. BELL

every principle of business honesty and fair dealing, to tell the creditors the truth about the crucial fact of the ownership of the business then under the gravest consideration for appropriate action and disposition and it would, to my mind, be wrong to presume that he did not speak the truth when he admittedly told them it was his personal property and they acted upon that assurance and necessarily assumed heavy responsibilities, and he should not now be regarded as not being the owner he said he was seeing that he did not even venture to pledge his oath in support of that belated contention so incredible in the circumstances.

Upon the whole case there is in law abundant evidence, in my opinion, to support the charge and the conviction of the learned police magistrate and I may say with Lord Justice Cherry in *O'Neill* v. *Belfast County Council* (1912), 2 I.R. 310, 316, that I should have to be "coerced by authority to hold he was wrong" in his view of the matter because upon the evidence before him that was the only verdict that could reasonably have been reached.

MARTIN, J.A.

Then as to the motion for leave to appeal upon the "question of fact alone" under section 1013 Criminal Code. All that is necessary to say upon this point is that it must follow from my views already expressed that this is not "a fit case for appeal" upon such a ground and therefore leave should be refused. In *Rex* v. *Berdino* (1924), 34 B.C. 142, 146, we affirmed a conviction by the deputy police magistrate of Vancouver because "it was impossible to say there was no evidence to support the view the magistrate took," following *Pasquier* v. *Neale* (1902), 2 K.B. 287 (*per* Lord Alverstone, C.J., and Darling and Channell, JJ.) wherein at p. 289 the Court said (in addition to the preceding citation which we also adopted):

"It is impossible for us to say that a magistrate is not at liberty to draw inferences of fact unless they can be conclusively proved to be true inferences."

This leaves for a consideration the said two grounds raised by one of my learned brothers since the argument and upon which we have not had, regrettably I think, with respect, the benefit of counsel's views though one of the grounds is of wide public importance.

COURT OF APPEAL

1929

March 5.

REX v. BELL

MARTIN, J.A.

The first is that the evidence of Forster, on behalf of the Crown, was wrongly admitted upon rebuttal to support the evidence of Halliwell concerning the accused's statement at the meeting that he was the owner of the business. It is conceded that this is a matter for the discretion of the judge, and the cases shew that such discretion will not be interfered with, except, perhaps, in extreme cases—Roscoe's Criminal Evidence, 15th Ed., 108; and Archbold's Criminal Pleading, 27th Ed., 212. In the present case it is suggested that the discretion was not judicially exercised, but in what respect it was non-judicial I am, with deference, unable to comprehend, and none is stated.

Furthermore, the accused's counsel, after objecting to Forster being called took advantage of the opportunity to cross-examine him to support his own case in that respect, and in such circumstances there was a clear waiver of the objection to the witness being called in rebuttal, and it is impossible to say that "any substantial wrong or miscarriage of justice actually occurred" in this particular, as must be held before we can give weight to such an objection—*Rex* v. *Boak* (1925), S.C.R. 525. But above all there was the formal admission of that very fact in dispute, pursuant to the section of the Code already cited, and that was an end of the matter and is doubtless the reason why the appellant's counsel did not raise any such ground of appeal. That every opportunity was given by the magistrate and Crown counsel to the accused to bring out his defence fully is shewn by the fact that seven days later, after the evidence was all in and the magistrate had reserved the case for argument and decision, he nevertheless at the request of the accused's counsel allowed him to call another witness on the same point of ownership which unusual course the Crown counsel had been "kind enough to consent to," as Mr. *Whiteside* informed the Court.

The second ground taken by my brothers is that the prosecution was an abuse of the process of the magistrate's Court in that it was not taken in vindication of public justice but to compel the debtor to pay his creditors or take the consequences. This is such a very serious aspect of the matter involving an offence against the administration of justice, that I think, with every respect, it should not have been adjudicated upon without hearing counsel on behalf of those implicated because there no

COURT OF APPEAL

1929

March 5.

REX v. BELL

suggestion of any abuse or improper conduct was made before the magistrate or at this Bar. But as the matter has been dealt with in this way, I feel constrained to dissent, with every respect, from said view of it and disposition of the appeal upon that ground. It is to be noted that the language used (quoted *supra*), which is the sole support of the alleged abuse of process, is that of Halliwell alone, and there is no evidence whatever from which it could be inferred that any one of the numerous creditors authorized him to make use of it or had any knowledge of it, and at the interview in Halliwell's office at which the language was used only Bell and two of his legal advisers were present. It is further to be noted that Brown was not present at that meeting and only later "overheard" at the police station, after the information was laid, that part of Bell's conversation with Halliwell which related to Bell's giving money to a woman, as already cited, *supra.*

MARTIN, J.A.

In such circumstances I fail to see how the laying of the charge can be held from any point of view to be a legal ground for frustrating the due process of the criminal law which is passed for the protection of the public at large, and that essential object should not be frustrated because of the hasty and unauthorized expressions of a person who is not even a creditor of the accused. The truth of the matter is that the creditors had acted with great forbearance (as the citations hereinbefore given abundantly shew) and only with great reluctance put the criminal law in motion after repeated efforts to persuade the debtor to act honestly and reasonably had been insolently spurned to a degree which might well provoke and excuse the use of strong and plain language as the result of just indignation created by the extremely reprehensible conduct of a defiant debtor.

No authority has been cited to support the dismissal of the present grave charge upon this ground, but on the contrary so to do would, in my opinion, with respect, bring about a failure of criminal justice because, as was said over a century ago by the King's Bench in *Stone* v. *Marsh* (1827), 6 B. & C. 551, 564-5, *per* Lord Tenterden, C.J.:

"Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony without suit."

And in *Wells* v. *Abrahams* (1872), L.R. 7 Q.B. 554, Lush, J. said, at p. 563, that

". . . It is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement."

How can this fundamental "requirement" of public justice be "satisfied" if the present charge, under a statute passed specially to enforce the principles of common honesty in business, be dismissed from our criminal Courts as an abuse thereof?

MARTIN, J.A.

Wherefore, upon all grounds, I would dismiss this appeal, and consequently, in the view I take of it, I am not called upon to consider the effect of section 1016 (2) of the Code which gives this Court power to substitute a verdict of guilty for another offence in certain circumstances, as to which, if it were necessary to consider it, I should like further argument on the proper action to be taken seeing that an interlaced crime of the same kind has clearly, upon the evidence before us, been committed, and as was said by the Court of Criminal Appeal in Quebec, in *Rex* v. *Campbell, supra,* "the defence is absolutely technical and subtle."

Appeal allowed.

COURT OF APPEAL

1929

March 8.

MAY v. ROBERTS

MAY AND MAY v. ROBERTS *ET AL.*

Practice—Interlocutory order—Application to extend time for giving notice of appeal—Foreign attorneys—Instructions as to time for appeal mislaid.

On the dismissal of an application in Vancouver to stay proceedings in an action pending the determination of an appeal in a similar action between the same parties in Portland, Oregon, the solicitors in Vancouver who were instructed by the defendants' attorneys in Portland, advised an appeal. The Portland attorneys in reply asked how much time they had in which to appeal. They received a letter in answer that notice of appeal must be served within fifteen days from the date of judgment. Four days after the expiration of the time for appeal the Vancouver solicitors received instructions to appeal. On being advised that the time for appeal had expired and that an application to extend the time for giving notice of appeal must be supported by an explanation for the delay, the Portland attorneys replied that a partner in its firm who had sole charge of the case moved suddenly from Portland and had neglected to leave the Vancouver solicitors' letter giving information as to time for appeal in the file of the case, the letter not being found until they were informed that the time for appeal had expired, they being under the impression they could give notice any time before the opening of the Court of Appeal a few days later.

Held, that in the circumstances the time should be extended for giving notice of appeal.

Statement

MOTION to extend the time for giving notice of appeal from an order of HUNTER, C.J.B.C. of the 11th of February, 1929, dismissing an application of the defendants, Roberts and Seward to stay proceedings in this action until the determination of an appeal in the State of Oregon from a judgment pronounced there in favour of the plaintiffs against the defendant Roberts, this action having been brought for the same and further relief as was granted to the plaintiffs by the Oregon judgment and in this action the plaintiffs are relying on the Oregon judgment from which the appeal is now pending, and pending said appeal, proceedings on the Oregon judgment are now stayed. The firm of Messrs. *Craig & Company* in Vancouver received instructions from Messrs. Cake, Cake & Liljqvist, attorneys of Portland, Oregon, who are attorneys for the defendants Roberts and Seward to make the application for stay of proceedings in this action until the determination of the Oregon appeal, and upon the dismissal thereof *Craig &*

Company immediately wrote Messrs. Cake, Cake & Liljqvist advising them of the order made and expressing the opinion that an appeal should be taken. On the 15th of February following, Messrs. *Craig & Company* received a letter from Messrs. Cake & Company asking how much time they had for giving notice of appeal and saying they advised their clients that an appeal should be taken and on instructions from them would further advise. To this letter Messrs. *Craig & Company* replied on the 15th of February stating that notice of appeal must be given within fifteen days from the judgment, *i.e.,* on or before the 26th of February. Messrs. *Craig & Company* heard nothing further until the 1st of March when they received the following telegram from Messrs. Cake & Co.: "Forwarded today cheque for appeal as per your letter of the eleventh ultimo." To this Messrs. *Craig & Company* immediately replied that the 26th of February was the last day for giving notice of appeal and asked whether they wished to apply for extension of time and if they did to give full explanation why they did not give instructions to appeal within the time as shewn in their letter of the 15th of February. A telegram arrived from Messrs. Cake & Company on the 2nd of March explaining that a partner Liljqvist had sole charge of the case. He moved from Portland suddenly and Messrs. *Craig & Company's* letter of the 15th of February was not in the file of the case but was found after receiving Messrs. *Craig & Company's* telegram of the 1st of March and not having seen said letter the other members of the firm were under the impression that they could give notice of appeal on or before the first day of the sitting of the Court of Appeal, *i.e.,* the 5th of March following.

Statement

The motion was heard at Vancouver on the 8th of March, 1929, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for the motion: We were only four days late: see *Wallingford* v. *Fisher* (1927), 3 W.W.R. 740; *Scott* v. *Pilkington* (1862), 2 B. & S. 11.

J. A. MacInnes, contra.

Argument

Per curiam: There will be an order extending the time for giving notice of appeal.

Motion granted.

Judgment

MURPHY, J.
(In Chambers)

1929
March 13.

B.
v.
B.

B. v. B. AND S., Intervener.

Divorce—Practice—Particulars of adultery—Intervener not bound by order made at instance of respondent—Divorce rules 27 and 41.

On the application of the intervener in a divorce action for further and better particulars giving the time and places where the alleged adultery was committed, as her reputation is at stake, she is entitled to press for the fullest particulars and is not bound by any order previously made at the instance of the respondent.

Statement

MOTION by the intervener for further and better particulars of paragraph 8 of the petition for divorce giving the time and places where the alleged adultery was committed. On a previous motion made by the respondent on the 22nd of February, 1929, Hunter, C.J.B.C. ordered further and better particulars of said paragraph by the giving of the place or places in the City of Vancouver or in the vicinity thereof where the respondent is alleged to have committed adultery with the intervener on each of the dates specified in said paragraph but refused to make any order as to the time and particular place where each alleged wrongful act was committed. Preliminary objection was taken that under rules 27 and 41 of the Divorce rules the application should have been made in Chambers and that no material was filed denying on oath the intervener's knowledge of the circumstances of which she required particulars. Heard by Murphy, J. at Vancouver on the 13th of March, 1929.

Argument

J. W. deB. Farris, K.C., for the motion.

J. E. Bird, contra, on the preliminary objection, referred to *Thomson* v. *Birkley* (1882), 47 L.T. 700 and *Roberts* v. *Owen* (1890), 6 T.L.R. 172.

Farris, referred to *Hartopp* v. *Hartopp and Cowley* (*Earl*) (1902), 71 L.J., P. 78.

Judgment

Murphy, J.: The preliminary objection is overruled, the intervener is not bound by any order made on the application of the respondent. There might be collusion between the

respondent and the petitioner and as her reputation is at stake in the matter she is entitled to press for the fullest particulars. The cases cited by Mr. *Bird* are not applicable to divorce cases which are not subject to the same rules and do not apply here. Particulars will be ordered pursuant to the demand of the intervener.

Motion allowed.

MAY AND MAY v. ROBERTS *ET AL.* (No. 2).

Practice—Foreign judgment on which appeal is taken—Action in British Columbia on same subject-matter—Stay of proceedings pending appeal—Discretion.

The defendants obtained judgment in an action in the State of Oregon and then sued upon that judgment and obtained judgment in British Columbia where certain mining properties in dispute are situate. Later the plaintiffs brought action in the State of Oregon to set aside the judgment obtained there on the ground that it was obtained through fraud practised on the Court and obtained judgment in their favour. The defendants appealed from this judgment to the Supreme Court of Oregon and proceedings in the Court below were stayed pending the disposition of the appeal. The plaintiffs also brought action in British Columbia to set aside the judgment obtained here that was based on the original Oregon judgment on the ground of fraud and the defendants then applied for a stay of proceedings in the action pending the result of the appeal in the State of Oregon. The application was refused.

Held, on appeal, reversing the order of HUNTER, C.J.B.C. (MACDONALD, C.J.B.C. and MACDONALD, J.A. dissenting), that there should be a stay of the action here until the Supreme Court of Oregon has decided whether or not a fraud was practised on their Circuit Court in order to obtain the judgment which is attacked.

Statement

APPEAL by defendants from the order of HUNTER, C.J.B.C. of the 11th of February, 1929, dismissing an application to stay proceedings in this action until the determination of the appeal of the defendant Roberts from a judgment pronounced in the Supreme Court of Oregon on the 26th of April, 1928. The properties in dispute are a group of mining claims near

COURT OF APPEAL

1929

May 6.

MAY v. ROBERTS

Statement

Kaslo, British Columbia. In April, 1920, defendants obtained a judgment in the Circuit Court of the State of Oregon against the plaintiffs and then, suing on that judgment, they obtained judgment in the Supreme Court of British Columbia. In March, 1928, the plaintiffs brought action in the Circuit Court of the State of Oregon to set aside the judgment obtained in April, 1920, on the ground that said judgment was obtained by reason of fraud practised upon the Court and judgment was given in the plaintiffs' favour. This action was then brought here for the same and further relief as asked for in the Oregon action and the plaintiffs are relying on the Oregon judgment in support of this action. On application in the State of Washington proceedings on the judgment there were stayed pending the disposition of the appeal.

The appeal was argued at Vancouver on the 28th of March, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Craig, K.C., for appellants: They are asking for the same relief here as in Oregon and for further relief. Proceedings are stayed in Oregon pending the appeal there. Their action here is founded on the Oregon judgment and it should be finally disposed of there before it is tried here: see *Scott* v. *Pilkington* (1862), 2 B. & S. 11.

J. A. MacInnes, for respondents: The action in British Columbia is between different parties from the Oregon action and the remedies sought here are different. On the principle governing stay in such cases see *McHenry* v. *Lewis* (1882), 22 Ch. D. 397. When the remedies are different, the parties are different, and the cause of action different, a stay will not be granted: see *Peruvian Guano Company* v. *Bockwoldt* (1883), 23 Ch. D. 225; *Hyman* v. *Helm* (1883), 24 Ch. D. 531. Our right of action existed independently of the Oregon judgment: see Piggott on Foreign Judgments, 3rd Ed., Pt. I., p. 78. *Scott* v. *Pilkington* (1862), 2 B. & S. 11 only applies to execution but this is a stay of action. This is a matter that was in the discretion of the Court below and should not be disturbed on appeal except on strong grounds.

Craig, in reply, referred to *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295 and *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310.

Cur. adv. vult.

6th May, 1929.

MACDONALD, C.J.B.C.: The appellant recovered certain judgments in the Courts of the State of Oregon, upon which he subsequently obtained judgments here. The respondents thereafter brought an action in Oregon to set aside said judgments on the ground that they had been obtained by fraud. They succeeded in that action and then brought this action to set aside the judgments obtained here.

The appellant appealed from the Oregon judgment to the Supreme Court of that State, which appeal is now pending and may not be reached, as appears by the appellants' affidavit, for nine months or a year at least, owing to a congestion of appeals in that Court.

As this action now stands, there is no rule of international law in the way of its prosecution. *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295. Moreover, property and rights in this Province are involved. In fact the dispute is concerning mining property here, title to which is now in some confusion owing to the setting aside of the original Oregon judgments, and taxes are accruing which must be taken care of either by the appellants or the respondents in order to preserve the rights of the parties. A stay therefore for a long and indefinite period may be very prejudicial to the respondents.

MACDONALD, C.J.B.C.

The jurisdiction of our Courts to entertain the action was not questioned by counsel for the appellants, and they suggest that if the respondents will amend their statement of claim by deleting reference to the Oregon litigation the appellants will not press the motion for a stay. If the pleadings are wrong there is a way of putting them right; we cannot do that on this motion. The appellants' counsel did not argue that the reversal of the judgment now in appeal in Oregon will deprive our Courts of their jurisdiction to entertain the action. I am not therefore called upon to consider that question at this stage. They put their application on the ground of saving of time and expense in the trial here.

COURT OF APPEAL
1929
May 6.

MAY v. ROBERTS

MACDONALD, C.J.B.C.

Our Courts are disinclined to stay an action here because litigation on the same subject is pending in a foreign country: *McHenry* v. *Lewis* (1882), 22 Ch. D. 397; *Hyman* v. *Helm* (1883), 24 Ch. D. 531. We may do it on special grounds but it is not within the rule of comity.

There is another reason for refusing the order asked for in this appeal. The judge of first instance, who is clothed with a wide discretion refused to grant the stay and unless we are satisfied that he was clearly wrong, we ought not to interfere.

I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A. would allow the appeal for the reasons given by GALLIHER, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: This is an appeal from an order of the late Chief Justice HUNTER, refusing a stay of proceedings in an action brought in the Supreme Court of British Columbia. The facts in sequence are as follow: The defendants obtained a judgment in the Circuit Court of the State of Oregon for Multnomah County. They then sued upon that judgment and obtained judgment in the Supreme Court of British Columbia, where the properties in question (mineral claims) are situate. Subsequently the plaintiffs brought an action in the said Circuit Court to set aside the judgment obtained in that Court on the ground that such judgment was obtained by reason of fraud practised upon the Court and obtained a judgment in their favour. From this judgment the defendants have appealed to the Supreme Court of the State of Oregon, and proceedings have been by that Court stayed in the Court below until determination of the appeal. The plaintiffs have also brought action in the Supreme Court of British Columbia to set aside the judgment in that Court based on the original Oregon Court judgment upon the same ground of fraud. The defendants applied to have proceedings in the Supreme Court of British Columbia stayed until the appeal in the Supreme Court of the State of Oregon has been determined. This was refused, hence this appeal.

The issue of fraud as alleged was not and could not have been before the Circuit Court of Oregon in the first instance, and no such issue of fraud was raised in the Supreme Court of British

Columbia in the action upon the Oregon Circuit Court judgment. Had it been so raised in the British Columbia Court the case of *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295 (and other cases therein referred to) is authority for the proposition that the British Columbia Court could have determined the question of whether fraud had been practised upon the Court. As I have pointed out, it was not and could not have been an issue determined by the Oregon Circuit Court in the first instance. Now, the Supreme Court of the State of Oregon is called upon to finally determine that issue in the State of Oregon. While we may have jurisdiction to proceed independently of the Oregon Courts, it does seem to me that we should stay our hands until the Supreme Court of Oregon decides whether or not a fraud was practised on their Circuit Court in order to obtain the judgment which is attacked, otherwise, the position might be this: Supposing that the Supreme Court of Oregon should restore the original judgment in the Circuit Court and declare that no fraud had been practised on that Court, and in the meantime the matter were allowed to proceed in the British Columbia Court, and a decision was there reached that a fraud on the Court had been perpetrated, we would have the British Columbia Court saying, a fraud was perpetrated on your Court notwithstanding you say it was not. This, to say the least, would not be desirable, and since the matter is now before the Supreme Court of Oregon for determination, whatever the attitude of this Court might be if the matter later comes before it, my view would be that we should stay proceedings until the Supreme Court of Oregon has given its decision.

GALLIHER, J.A.

I would allow the appeal and grant the stay asked for.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would allow the appeal for the reasons given by GALLIHER, J.A.

MACDONALD, J.A.

MACDONALD, J.A. would dismiss the appeal for the reasons given by MACDONALD, C.J.B.C.

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

Solicitors for appellants: *J. F. Downs.*

Solicitors for respondents: *MacInnes & Arnold.*

MURPHY, J.

1929

Feb. 18.

COURT OF APPEAL

April 11.

REX v. SOMERS

REX v. SOMERS.

Criminal law—Writ of prohibition—Charge of sale of intoxicating liquor—Withdrawal of summons—Effect of—Issue of subsequent summons—Jurisdiction—Autrefois acquit.

An information was laid against the defendant for unlawfully selling intoxicating liquor. On the hearing before the police magistrate Crown counsel obtained unconditional leave from the magistrate to withdraw the information before the accused had been called upon to plead thereto. On the same day a second information was laid in the same terms as the first one, except that added thereto was an allegation of a prior conviction. Objection to the magistrate's jurisdiction to hear the charge on the ground of *autrefois acquit* being overruled, the accused applied for a writ of prohibition which was refused.

Held, on appeal, affirming the decision of MURPHY, J., that the principle to be gathered from the cases is that unless it can be said on the facts that there has been an adjudication and acquittal on the merits, the permission of the Court to withdraw a charge is not equivalent to a dismissal which can be pleaded in bar of subsequent proceedings. There was no determination of this matter on the first summons and the magistrate had jurisdiction to hear and determine the second summons.

Statement

APPEAL by defendant from the order of MURPHY, J. of the 18th of February, 1929, dismissing a motion for an order *nisi* prohibiting the police magistrate at New Westminster from taking any further proceedings on the hearing of a complaint against the accused. On the 9th of January, 1929, an information and complaint was laid against the accused for selling intoxicating liquor, and pursuant to summons served on accused he attended before the police magistrate at New Westminster on the 15th of January following. There was an adjournment until the 17th of January when the parties appeared and before the accused entered a plea, counsel for the prosecution applied to unconditionally withdraw the information and the application was granted. On the same day the same complainant laid another complaint containing the charge in identical terms with the first information and complaint, but included an allegation that the accused had been convicted for selling intoxicating liquor, which had not been included in the first information. This complaint was adjourned to the 24th of January when the

hearing of the second complaint was proceeded with and counsel for the accused raised on his behalf the plea of *autrefois acquit*. There was a further adjournment until the 1st of February when the magistrate overruled this plea. Counsel for accused then obtained an adjournment for the purpose of applying for a writ of prohibition.

A. M. Johnson, K.C., for the Crown.
Adam Smith Johnston, for the accused.

18th February, 1929.

MURPHY, J.: Applicant relies first on *Pickavance* v. *Pickavance* (1900), 70 L.J., P. 14 in support of his position. That decision was considered in *Hopkins* v. *Hopkins* (1914), 84 L.J., P. 26 in which it was held that what was said in the *Pickavance* case as to a previous hearing (which discussion was *obiter* as pointed out in *Rex* v. *Seddon* (1916), 85 L.J., K.B. 806) applies only to separation order proceedings. In the *Hopkins* case Sir Samuel Evans quotes with approval what was said in *The King (McDonnell)* v. *Justices of Tyrone* (1912), 2 I.R. 48 as to extending the doctrine of the *Pickavance* case to criminal cases in general. In the *Justices of Tyrone* cases it is stated, *inter alia* (p. 49):

"If, however, we apply the principle laid down in that decision to the withdrawal of any summons for a criminal offence, we would impose a fetter upon the administration by Justices of the criminal law, which derives no support either from statute or from analogy to the common law; and to do so would, in my opinion, be opposed to the long line of authorities which define and limit the application of the common law pleas of '*autrefois convict*' and '*autrefois acquit*.' "

Approval of this language is again given by Lord Reading in the *Seddon* case and see *Davis* v. *Morton* (1913), 82 L.J., K.B. 665.

The next case relied upon is *Bradshaw* v. *Vaughton* (1860), 30 L.J., C.P. 93 which the judgment shews to be founded on *Tunnicliffe* v. *Tedd* (1847), 17 L.J., M.C. 67. Both of these are assault cases and turn not on the question of *autrefois acquit* but on the effect of the granting of a certificate of dismissal by magistrates as being a bar to subsequent civil proceedings. In the *Tunnicliffe* case a plea of not guilty had been entered before the magistrates but apparently not in the *Bradshaw* case. In

MURPHY, J. 1929 Feb. 18. COURT OF APPEAL April 11. REX v. SOMERS

both cases the magistrates formally dismissed the charges. No dismissal took place in the case at Bar. The magistrate merely allowed the first information to be withdrawn before plea.

The last case relied upon is *Quebec Liquor Commission* v. *Menard* (1921), 36 Can. C.C. 385. This was not a case of simple withdrawal like the one at Bar. The withdrawal resulted from an arrangement between both parties each paying their own costs. The judge therefore held that the case at the first hearing "was decided practically on its own merits."

The last case quoted in support of the application is *Rex* v. *Chew Deb* (1913), 18 B.C. 23. This is clearly distinguishable. The prosecution had closed its case and then on discovering it had failed to prove an element of the charge applied to have the charge withdrawn with a view to laying a new information so as to retry the case. Nothing of that sort occurred in the case under consideration.

MURPHY, J.

In *Rex* v. *Seddon, supra,* a bastardy case, the Court refused to extend what was said in the *Pickavance* case to such proceedings.

I think the language used in the *Justices of Tyrone* case and twice approved by eminent English judges, as to extending the *Pickavance dicta* to ordinary criminal proceedings is applicable here.

The application is refused.

From this decision the accused appealed. The appeal was argued at Vancouver on the 5th of March, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Adam Smith Johnston, for appellant: The plea of *autrefois acquit* applies to this case as the second information is precisely the same as the first: see Halsbury's Laws of England, Vol. 19, p. 595, sec. 1242; *Pickavance* v. *Pickavance* (1901), P. 60; *Tunnicliffe* v. *Tedd* (1848), 5 C.B. 553; *Hopkins* v. *Hopkins* (1914), P. 282. If there is no irregularity in the first proceedings and the complaint is withdrawn then the plea of *autrefois acquit* applies: see *Davis* v. *Morton* (1913), 2 K.B. 479; *The King* (*McDonnell*) v. *Justices of Tyrone* (1912), 2 I.R. 44 at p. 48; *Rex* v. *Seddon* (1916), W.N. 63; Paley on Sum-

mary Convictions, 9th Ed., 226; *Quebec Liquor Commission* v. *Menard* (1921), 36 Can. C.C. 385. In the case at Bar no consent was given: see *Reg.* v. *Stamper* (1841), 1 Q.B. 119. A plea is not necessary to bring the matter before the Court. The Summary Convictions Act is a code in itself and must be strictly followed: see *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103; *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107; *Robinson* v. *Canadian Pacific Railway Co.* (1892), A.C. 481; *Bradshaw* v. *Vaughton* (1860), 30 L.J., C.P. 93; 9 C.B. (N.S.) 103. This case was decided on *Reed* v. *Nutt* (1890), 24 Q.B.D. 669, but that case is distinguishable: see also *Kempston* v. *Desgagnis* (1921), 1 W.W.R. 244; *Rex* v. *Chew Deb* (1913), 18 B.C. 23 at p. 24.

Argument

Johnson, K.C., for respondent: This was a second offence, but the first information did not refer to the old offence. The information was withdrawn before he had pleaded. There can be no jeopardy until he pleads: see *Hopkins* v. *Hopkins* (1914), P. 282. An appearance is not equivalent to a plea.

Johnston, replied.

Cur. adv. vult.

On the 11th of April, 1929, the judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal from an order of Mr. Justice MURPHY refusing an application to prohibit the police magistrate of the City of New Westminster from proceeding with the hearing of an information, dated 17th January, 1929, against the appellant, Fred Somers, for unlawfully selling intoxicating liquor on 27th December, 1928, contrary to the Government Liquor Act, and the information further alleged that the said Somers had been previously convicted on the 25th of November, 1922, for selling intoxicating liquor on 6th October, 1922, contrary to the statute then in force and had been sentenced to six months' imprisonment for that offence.

Judgment

A prior information for the present offence had been laid against the applicant on the 9th of January last with the exception that it did not contain the said allegation of the prior conviction, and when that information came before the said police

MURPHY, J. 1929 Feb. 18. COURT OF APPEAL April 11. REX v. SOMERS

magistrate for hearing on the said 17th of January the Crown counsel obtained unconditional leave from the magistrate to withdraw it before the accused had been called upon to plead thereto. Thereafter on the same 17th of January the present information was laid and, after an adjournment at the request of accused's counsel, the magistrate on the 24th of January proceeded to hear the same, but objection was taken by accused, before plea, to his jurisdiction to hear the same, on the ground of *autrefois acquit* by the withdrawal of the first information (which it is submitted was equivalent to a dismissal of the charge) which objection after argument the magistrate overruled, but at the request of the accused's counsel adjourned the proceedings to give him an opportunity to apply for prohibition, which he did with the result above stated.

Judgment

We have the benefit of the reasons upon which the learned judge refused the application and are of opinion that in the circumstances he reached the right conclusion which was founded, in principle, upon the leading case of *The King (McDonnell)* v. *Justices of Tyrone* (1912), 2 I.R. 44, decided by the Irish King's Bench Division composed of that very eminent judge Lord Chief Baron Palles, and Gibson and Boyd, JJ., in which case that Court placed a limitation, which has been often followed, upon the scope of the decision of the English Probate Division in *Pickavance* v. *Pickavance* (1901), P. 60 as being applicable only, at most, to cases of separation between husband and wife, which proceedings are "in their essence civil not penal" (53) and not applicable "to the administration of criminal laws by Justices" (p. 48); the effect of the "withdrawal" of an ordinary criminal information "only indicates that the case is struck out without hearing or adjudication. 'Withdrawal' cannot be an acquittal; it is not an adjudication at all."

The learned judge below has cited some of the cases in which this decision has been followed, *viz., Hopkins* v. *Hopkins* (1914), 84 L.J., P. 26 (by the English Probate Division); *Davis* v. *Morton* (1913), 2 K.B. 479; and *Rex* v. *Seddon* (1916), 85 L.J., K.B. 806; 80 J.P. 208 (a bastardy summons); and it is to be noted that in *Stokes* v. *Stokes* (1911), P. 195, the Probate Division (Evans, President, and Deane, J.) give the precise reason for the decision in *Pickavance* v. *Pick-*

avance, viz., that the first summons was withdrawn "with the consent of the parties and amounted to a withdrawal of the complaint." The decision in *Quebec Liquor Commission* v. *Menard* (1921), 36 Can. C.C. 385 is really based on the same principle, and *Rex* v. *Chew Deb* (1913), 18 B.C. 23, founded on *Bradshaw* v. *Vaughton* (1860), 30 L.J., C.P. 93 (in which the magistrates dismissed the charge upon default of the complainant to attend and support it) and *Tunnicliffe* v. *Tedd* (1847), 17 L.J., M.C. 67, is clearly distinguishable, whatever may otherwise be said about it, for the reasons given by Mr. Justice MURPHY.

In *Reg.* v. *Stamper* (1841), 1 Q.B. 119; 10 L.J., M.C. 73, strongly pressed upon us by appellant's counsel the prosecutors likewise did not appear to support their complaint in a bastardy case and so (under the special provisions of section 73 of 4 & 5 Wm. IV., c. 76) the sessions only made an order against them for the costs of the putative father who did appear to "resist such application." It is to be noted that neither in this case nor in *Bradshaw's* case nor in *Tunnicliffe* v. *Tedd* (1847), 17 L.J., M.C. 67; 5 C.B. 553, did the magistrates give leave to withdraw the information or complaint, and the point there under consideration was what was the effect when the informant voluntarily withdrew from (*i.e.,* abandoned) the further prosecution of the charge he had laid. The point is neatly put in *Tunnicliffe's* case in Cresswell, J.'s judgment, *viz.*:

Judgment

"It appears to me that there was a hearing in this case. As soon as the defendant appeared and pleaded to the summons, there was an issue joined. The plaintiff was asked what he had to say, and said that he had no evidence to offer. Having heard that, the Justices heard the case."

The failure to observe this obvious distinction between a "withdrawal," conditional or unconditional, by leave of the Court and the situation created by the breakdown of the charge when the prosecutor abandons it by "withdrawing" at any stage from its further prosecution, accounts for the misapprehension of the language used in the *Stamper, Bradshaw* and *Tunnicliffe* cases, particularly in regard to the observations of Erle, C.J. in *Bradshaw's* case, which are quoted and misapplied in *Rex* v. *Chew Deb, supra,* and the fact that a certificate of dismissal had been given after what was held to be equivalent to a hearing on the merits, overlooked. Long ago, indeed, it was so decided as

MURPHY, J. 1929 Feb. 18. COURT OF APPEAL April 11. REX v. SOMERS

appears from the judgment of the Queen's Bench in *The Queen* v. *Church Knowle* (1837), 7 A. & E. 471, wherein it was said by Coleridge, J. p. 479:

"Quashing an order for want of form is different from quashing it merely because the merits are not gone into. If the order is discharged because the respondents do not choose to enter into their case, that is a quashing on the merits. We decide this case, therefore, on the general ground which has been long established."

In *Brooks* v. *Bagshaw* (1904), 2 K.B. 798 the King's Bench Division (Lord Alverstone, C.J., Kennedy and Phillimore, JJ.) held in a prosecution under the Sale of Food & Drugs Act that a second summons could be issued on the same information though the first had not been proceeded with upon its return but was "simply allowed to drop" because of a defect in the time for service, the Court saying, pp. 801-2:

Judgment

"Ever since the decision in *Ex parte Fielding* [(1861)], 25 J.P. 759 it has been held that on a valid information two or more summonses in succession can be issued unless and until there has been a determination of the matter on its merits. In *Ex parte Fielding* [(1861)], 25 J.P. 759 Cockburn, C.J. pointed out that, 'The justices entertained the application in due time, and therefore issued a summons. That summons, however, from some cause or other, was not served, and dropped. Why should the same justice not issue another summons, or a series of summonses, if necessary, on the same information?' I think, therefore, that, as the information in the present case was laid within the proper time, the issue of the second summons was in the circumstances perfectly valid, and the justices ought not to have refused to entertain the case."

This decision was followed and applied in *Williams* v. *Letheren* (1919), 2 K.B. 262, Bray, J. saying, p. 268:

"That case seems to me to be a clear authority for saying that where, as in the present case, there has been no determination of the matter on the first summons, the justices have jurisdiction to issue a second summons on the same information."

Lawrence and Shearman, JJ. agreed, the latter saying, p. 270:

"I agree. I think nevertheless that we should not encourage a practice of having two summonses upon the same information in the paper for hearing before the justices upon the same day. It would have been better that the justices should have determined that the first and irregular summons should be withdrawn and that another regular summons should be taken out in its place. The fact that that was not done did not, however, interfere with the jurisdiction of the justices to hear and determine the second summons."

The Full Court of New Brunswick in *Ex parte Wyman* (1899), 34 N.B.R. 608; 5 Can. C.C. 58, held (*per* Tuck, C.J.,

Hanington and Van Wart, JJ.) that a magistrate may allow the prosecutor to withdraw a charge under the Canada Temperance Act after the evidence of one witness has been taken, and after refusing a certificate of dismissal he may proceed to hear a charge substantially the same upon a second information. The fourth member of the Court, Landry, J. dissented but his dissent was based under the misapprehension of Erle, C.J.'s remarks in the *Bradshaw* case already noted in *Rex* v. *Chew Deb*. The Court in reaching its decision considered the effect of section 858 (now 726) of the Criminal Code but decided that it did not prevent the magistrate from taking the course he did. It is likewise apparent that section 720 does not affect his right so to act because the direction therein "to hear and determine the complaint or information" is substantially a declaration of the law as it existed before the Code, and to allow a "withdrawal" of a charge in a proper case is not inconsistent with that direction: section 726 is complementary to 720 and contains the same direction to "determine," and they should be read together, and with 722 also, which provides for the issuance of a certificate of dismissal in a proper case; sections essentially the same as these are to be found in our Summary Convictions Act, R.S.B.C. 1924, Cap. 245.

Judgment

The same Full Court in *Rex* v. *Nickerson*: *Ex parte Mitchell* (1909), 39 N.B.R. 316; 16 Can. C.C. 316; pronounced unanimously another decision, also on the Canada Temperance Act, to the same effect. It is to be noted that the Court dealt with the matter upon the real facts thereof and disregarded certain statements in a so-called certificate of dismissal which were contrary to the real action taken by the magistrate; the judgment, after reciting the facts, concludes:

"For the magistrate under these circumstances to have given a certificate of dismissal would simply be for him to certify to an untruth. It was contended, however, that in effect and in law a withdrawal and a dismissal were one and the same thing. That is contrary to *Ex parte Case* [(1889)], 28 N.B.R. 652, when Tuck, J. in delivering the judgment of the Court says, 'there is no authority for saying that a withdrawal *per se* is equivalent to a dismissal. A withdrawal entitles the defendant to a dismissal if he appears and asks for it on that ground. No case goes further than that.' See also *Ex parte Wyman* [(1899)], 34 N.B.R. 608.

"This certificate does not profess to be a certificate of dismissal. It states precisely and accurately what was done and it was for that purpose

MURPHY, J. 1929 Feb. 18. COURT OF APPEAL April 11. REX v. SOMERS

that it was given. It is immaterial whether the magistrate had jurisdiction or not, for if he had he never exercised it in dismissing the information."

The appellant herein also did not at the time of the withdrawal of the first charge ask for a certificate of dismissal, though it is not apparent, in view of the other authorities cited above, how that could have affected the matter if the magistrate saw fit to allow a withdrawal in the particular circumstances of the case. The expression of such a view (which overlooks the distinction between "withdrawal" equivalent to abandonment and adjudication and "withdrawal" by permission contemplating another prosecution) was moreover *obiter* as being unnecessary for the decision upon the facts. Since then the correct view of the matter has been laid down in the *Tyrone* case, *supra,* in which Chief Baron Palles said (p. 48):

"In my opinion the permission given by the Justices to withdraw the first complaint did not amount to an acquittal. The order involved no more than the consent of the Justices that the question of the guilt or innocence of the defendant in the summons should be withdrawn from their cognizance, that is, that they should not adjudicate upon it. There was, therefore, an absence of adjudication; whilst, to amount to an acquittal, it was necessary that there should be an adjudication on the merits. The withdrawal had not, in my opinion, any greater effect than that which a *nolle prosequi* has in proceedings by indictment, and that undoubtedly, would not be an answer to a subsequent indictment for the same offence."

Judgment

In granting such permission a magistrate would doubtless have to be guided by what was in the best interests of public justice, and it is beyond question that in the case before us his action was of that nature because it was in furtherance of the intention of the Legislature to secure due observance of the statute by the imposition of more severe penalties for repeated offences in selling liquor.

The main principle to be gathered from all the many cases, not always consistent or exact, and based in varying circumstances, that we have considered is that, unless it can be said on the facts of the particular case that there has been an adjudication and acquittal upon the merits, the permission of the Court to withdraw a charge is not equivalent to a dismissal which can be pleaded in bar of subsequent proceedings.

The appeal, therefore, should be dismissed, but we think it desirable, *ex abundanti cautela,* to say that it is questionable if this is a case for prohibition because it does not appear from the

incomplete material before us that the magistrate refused to hear the evidence in the usual way in support of the plea of *autrefois acquit,* and there is moreover an appeal from him in case of error in fact or law to the County Court which appeal is in all respects a trial *de novo* wherein complete justice can be done; but as no objection of this kind was taken here or below, and the essential facts are all admitted, we think it best on this special occasion to entertain and refuse the application upon the merits but without establishing a precedent for such a course in future.

Appeal dismissed.

Solicitor for appellant: *Adam Smith Johnston.*
Solicitor for respondent: *A. M. Johnson.*

IN RE IMMIGRATION ACT AND TOKU NISHI *ET AL.*

MURPHY, J. (In Chambers) 1928 Aug. 24. IN RE IMMIGRATION ACT AND TOKU NISHI

Habeas corpus—Japanese obtains certificate of naturalization—Subsequent attempt of wife and children to enter Canada—No passport from Japan —Entry refused—Section 3 (t) of Immigration Act subject to other disqualification—R.S.C. 1927, Cap. 93, Sec. 3 (i) and (t).

M., an immigrant from Japan in 1914, subsequently obtained a certificate of naturalization as a Canadian citizen. In 1928 his wife and two children on arriving at Victoria from Japan were refused entry on the ground that they had not in their possession a valid passport issued in and by the Government of the country of which they were citizens as required by order in council pursuant to section 3 (*i*) of the Immigration Act. On *habeas corpus* proceedings the applicants claimed that notwithstanding their not having a passport, they were entitled to admission into Canada by virtue of section 3 (*t*) of the Immigration Act.

Held, that said section 3 (*t*) is restricted to the question of illiteracy of relatives of an admitted immigrant and when otherwise disqualified such persons are prohibited from entering Canada.

Statement

APPLICATION for a writ of *habeas corpus.* One Masakichi Nichi had been landed in Canada as an immigrant from Japan in 1914. He subsequently obtained a certificate of naturaliza-

MURPHY, J. (In Chambers) 1928 Aug. 24.

IN RE IMMIGRATION ACT AND TOKU NISHI

tion as a Canadian citizen. His wife Toku Nishi and her two children arrived from Japan at the Port of Victoria in April, 1928. The immigration officer in due course investigated the circumstances and adjudged the three applicants unqualified for admission into Canada, and subsequently, pursuant to the Immigration Act, a Board of Inquiry was convened, and determined that the applicants came within the class of prohibited immigrants and not entitled to be landed in Canada in that they had not in their possession a valid passport issued in and by the Government of the country of which they were subjects or citizens. Notwithstanding the fact that a proper passport is required of immigrants under order in council pursuant to section 3 (*i*) of the Immigration Act and that they held none, the applicants claimed a right to be admitted into Canada by virtue of section 3, subsection (*t*) of the Immigration Act, which section reads as follows:

Statement

"(*t*) On and after the first day of July, one thousand nine hundred and nineteen, in addition to the foregoing 'prohibited classes,' the following persons shall also be prohibited from entering or landing in Canada:—Persons over fifteen years of age, physically capable of reading who cannot read the English or the French language or some other language or dialect: Provided that any admissible person, or any person heretofore or hereafter legally admitted, or any citizen of Canada, may bring in or send for his father or grandfather, over fifty-five years of age, his wife, his mother, his grandmother or his unmarried or widowed daughter, if otherwise admissible, whether such relative can read or not, and such relative shall be permitted to enter."

Heard by MURPHY, J. in Chambers at Victoria on the 24th of August, 1928.

O'Halloran, for applicants.
Jackson, K.C., for the Crown.

Judgment

MURPHY, J.: The provisions of section 3, subsection (*t*) of the Immigration Act are restricted to the question of illiteracy of relatives of an admitted immigrant, and when such persons are otherwise disqualified, they are prohibited from landing in Canada.

Application dismissed.

BURPEE v. BURPEE.

McDONALD, J.

1929

March 11.

BURPEE
v.
BURPEE

Husband and wife—Foreign decree for divorce—Alimony—Final judgment for—Action on foreign judgment.

A husband's action in the State of Washington for a divorce being unopposed, a decree was granted not on account of any misconduct of the wife but rather that of the husband. The grounds, however, would not justify a decree of divorce in British Columbia. As ancillary to the decree, judgment was entered for the wife for $35 per month alimony for maintenance of wife and infant child. Later the child died and final judgment was then entered for the wife for $5,000. In an action brought by the wife in British Columbia upon the judgment:—

Held, that a divorce granted in a foreign jurisdiction is valid here provided the husband was domiciled within the jurisdiction of the Court granting the decree. The merits are all with the plaintiff and the defendant having brought his action in the Washington Court and having chosen his forum is bound by the decision of that Court, and the plaintiff is entitled to judgment.

Statement

ACTION to recover judgment upon a judgment delivered in the State of Washington for $5,000 alimony. Tried by McDONALD, J. in Vancouver on the 7th of March, 1929.

E. A. Burnett, for plaintiff.
Symes, for defendant.

11th March, 1929.

Judgment

McDONALD, J.: In 1913 the defendant sued his wife, the plaintiff, for a divorce in the Courts of the State of Washington. The petition was unopposed and the decree was granted, not, it may be interjected, upon account of any misconduct of the present plaintiff but rather upon that of the present defendant. The grounds upon which the divorce was granted were not such as would justify a divorce in British Columbia. As ancillary to the decree of divorce a judgment was entered against the present defendant for $35 per month alimony. This was intended for the maintenance of the present plaintiff and her then infant child. Later this child died and, on the 7th of December, 1928, a final judgment was entered in favour of the present plaintiff against the present defendant for $5,000.

MCDONALD, J.

1929

March 11.

BURPEE v. BURPEE

Upon the evidence of Mr. Baldrey, an Attorney-at-Law residing at Bellingham, Wash., I am clearly of the opinion that this is a final and valid judgment and not subject to modification. Upon this judgment the plaintiff now sues in British Columbia. At the trial I disposed of all the defences raised except the question of whether or not the judgment can be enforced in British Columbia by reason of the fact that it is against public policy to enforce such a judgment in this Province where no ground for divorce is recognized except adultery. I have examined the authorities cited by counsel especially *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351 and *Emanuel* v. *Symon* (1908), 1 K.B. 302 and the cases cited therein. I am unable to find in any of these cases any reason why the present judgment should not be enforced in our Courts. It is not against the policy of our Courts to grant a divorce nor to grant a judgment for alimony for a divorce granted in a foreign jurisdiction for any reason recognized as sufficient within that jurisdiction is valid here provided the husband was domiciled within the jurisdiction of the Court granting the decree. The merits are all with the present plaintiff and, in addition to the matters mentioned above, I cannot see any answer to the contention of the plaintiff's counsel that the present defendant having brought his action in the Washington Court and having chosen his forum is now bound by the decision of that Court.

Judgment

There will accordingly be judgment for the plaintiff.

Judgment for plaintiff.

ROYAL BANK OF CANADA v. HODGES *ET AL.*

MCDONALD, J.

1929

April 10, 24.

ROYAL BANK OF CANADA v. HODGES

Banks and banking—Loans—Security—Purchaser of right to cut timber——Whether "owner" within Bank Act—Vendor's reservation of title—Effect of—Conditional Sales Act—R.S.B.C. 1924, Cap. 44, Sec. 9 (2)—R.S.C. 1927, Cap. 12, Sec. 88.

Under an agreement of sale, the Exchange National Bank of Olean and the Olean Trust Company sold to the Blue River Pole & Tie Company Limited a number of timber licences with all trees and timber standing, lying and being thereon, the purchase price being paid by instalments at so much per foot as the cut lumber and poles were shipped. The agreement contained the following term: "It is understood and agreed that the property and title in the said timber licences and lots and all timber cut therefrom shall remain in the vendors until the same are fully paid for by the purchaser." The Blue River Company then applied for and obtained a line of credit from the plaintiff Bank and gave security therefor under section 88 of the Bank Act. Said Company proceeded to cut and ship poles but later became bankrupt at which time it was in arrears in payments to the vendors for poles shipped in a sum exceeding $6,000, and there was owing on advances by the Bank a sum exceeding $18,000. By order of the Court the trustee in bankruptcy sold and disposed of the poles lying on the property and after paying the expenses of the trustee in getting out the poles, the Government taxes and royalties, the claims of wage-earners holding valid liens and 2 cents per lineal foot of stumpage on all poles shipped by the trustee, he paid a balance of $9,500 into Court. On a special case as to whether the Bank has a valid security under section 88 of the Bank Act, and entitled to payment of its account in priority to the vendor's claim to a lien and to payment of their claim on poles shipped prior to the bankruptcy:—

Held, that only an "owner" can give security under section 88 of the Bank Act and as the Blue River Company was not an "owner" within the meaning of said section, the assignments made to the Bank under said section are invalid.

Statement

ACTION for a declaration that a certain assignment of the 19th of April, 1928, made by the Blue River Pole & Tie Company Limited to the plaintiff Bank of certain products of the forest claimed to be owned and in the possession of said Company, described as poles, ties, logs and lumber on certain limits on the North Thompson River, and purporting to be made under and pursuant to the Bank Act, is a good and valid security in the hands of the plaintiff for the sum of $18,066, said sum hav-

ing been advanced by the said Bank to the Blue River Pole & Tie Company. The facts are set out in the head-note and reasons for judgment. Tried by McDONALD, J. at Vancouver on the 28th of March and the 2nd of April, 1929.

Alfred Bull, for plaintiff.
Macrae, for defendants.

10th April, 1929.

Judgment

McDONALD, J.: The defendants, Exchange National Bank of Olean and Olean Trust Company, sold to Blue River Pole & Tie Company Limited certain timber licences in British Columbia. Under the agreement the purchase price was payable by instalments as the cut lumber and poles were shipped, with a proviso fixing minimum annual payments. The agreement contained the following term:

"It is understood and agreed that the property and title in the said timber licences and lots and all timber cut therefrom shall remain in the vendors until the same are fully paid for by the purchaser."

Almost immediately after entering into this agreement Blue River Pole & Tie Company Limited applied to the plaintiff for a revolving line of credit and gave security to the Bank under section 88 of the Bank Act. The Blue River Company Limited later became bankrupt and the defendant Hodges is its authorized trustee. The defendant Hodges under an order of the Court sold and disposed of sufficient poles from the property to pay all the costs and expenses incurred in such operation and the trustee is now in possession of approximately $9,500. This issue is to decide whether the plaintiff is entitled to the said moneys or whether the defendant is entitled to the balance owing to it by the Blue River Company of $6,099.90. Many interesting questions are involved and all parties acted in good faith. The plaintiff Bank had no notice of any claim of the defendants nor did it make any enquiries as to the nature of the title of the Blue River Company. The case was fully and carefully argued by counsel and many interesting points were discussed but I have concluded that the plaintiff cannot succeed, upon the short ground that the Blue River Company was not an "owner" within the meaning of section 88 of the Bank Act. Only an "owner" can give security under that section and if the Blue

River Company was not an owner its security falls to the ground and the issue must be decided accordingly.

Action dismissed.

24th April, 1929.

McDONALD, J.: After handing down my reasons for judgment in this matter I was asked by counsel for the plaintiff to grant a rehearing particularly upon the question of whether or not the Blue River Company should be held to be "owners" within the meaning of the Bank Act. This rehearing has taken place and I have examined the cases cited by Mr. *Bull* upon this question, *viz.*: *Forsyth* v. *The Imperial Accident and Guarantee Ins. Co. of Canada* (1925), 36 B.C. 253; *Chan* v. *C.C. Motor Sales Ltd.* (1926), *ib.* 488 (affirmed in the Supreme Court of Canada) and *International Typesetting Machine Co.* v. *Foster* (1920), 60 S.C.R. 416. As I read those cases they are to be considered in respect of the facts therein involved. In each case the Conditional Sales Act applied and in the *Forsyth* case and in *The North British and Mercantile Insurance Company* v. *McLellan* (1892), 21 S.C.R. 288, therein cited, the decision was that in insurance cases the position between the purchaser and the vendor was that of owner and mortgagee. The decision in the *Chan* case may go a little further but even in that case the Conditional Sales Act applied and I understand the decision to be simply that the mortgagee was required, as is usual in such cases, to account to the mortgagor for the proceeds of the sale.

Judgment

In my opinion the Conditional Sales Act does not apply in the present case for the reason that "possession" in the sense in which the word is used in section 3 of that Act was never given. This was a sale of licences to cut a large tract of timber. The purchaser bought the right to cut. There was no assignment of the licences nor did any possession pass, but what the purchaser acquired was that so long as it was not in default it had the right to cut and ship. I agree further with Mr. *Macrae* (and this is almost a corollary to what has preceded) that section 89 of the Bank Act does not apply. It is not a vendor's lien which is here claimed because such lien applies only after the landlord has parted with possession to the purchaser.

MCDONALD, J.

1929

April 10, 24.

ROYAL BANK OF CANADA v. HODGES

In the result, I adhere to the opinion previously expressed. I might say, however, as a result of Mr. *Bull's* having brought to my attention my previous statement, that the Bank made no enquiries as to the nature of the title of the Blue River Company, there is no evidence on this point one way or the other in the stated case. I simply drew that conclusion from a remark which Mr. *Bull* made on the previous argument.

Action dismissed.

MACDONALD, J. (In Chambers)

1929

April 10.

THOMPSON v. SCOLLARD

THOMPSON v. SCOLLARD.

Arrest — Ca. re.—Affidavit in support — Application to disclose — R.S.B.C. 1924, Cap. 15, Secs. 3 and 7—1 & 2 Vict. (Imperial), Cap. 110.

On an application for discharge from custody under section 7 of the Arrest and Imprisonment for Debt Act, if the Court is satisfied that the defendant had no intention of quitting the Province at the time the writ of *capias* was issued, he should be discharged.

Statement

SUMMONS to discharge defendant from custody held on *capias* issued pursuant to order of the Court on plaintiff's affidavit, after proving a debt on a foreign judgment for $19,406.93. The following paragraphs of the affidavit deal with the question of "quit the Province":

"5. That I have been informed by John Cameron a police officer on the Vancouver City Police Force that the defendant will quit the Province of British Columbia as soon as he is able to do so.

"6. That I have good, reasonable, and probable cause for believing the defendant is about to quit the Province of British Columbia and that he will do so unless he be forthwith apprehended."

The following objections were taken to the writ, order for *capias* and affidavit:

"1. That the writ of *capias* does not comply with the statute: (a) It is entitled in an action; (b) the signature of the plaintiff's solicitor was not on the writ of *capias* before issue from the registrar's office.

"2. That the plaintiff's affidavit filed herein does not state: (a) That the deponent 'verily believes' the information set out in said paragraph 5; (b) probable cause for plaintiff's belief that defendant is about to quit the

country; (c) any material upon which the Court could draw an inference except hearsay evidence without stating why same should be believed; (d) any fact upon which an inference could be drawn or judgment based; (e) any reasonable or probable cause for the statement in said paragraph 6, as foundation for the Court to act or exercise jurisdiction.

"3. That the defendant does not and did not at any time since he came to reside in the Province and never has had any intention of leaving the Province and the affidavit in support of the application is untrue."

The application was heard by MACDONALD, J. in Chambers at Vancouver on the 10th of April, 1929.

Argument

Stuart Henderson (*Manzer,* with him), for the application: The form set out in R.S.B.C. 1924, Cap. 15, does not give a style of cause, nor was the writ signed by the plaintiff's solicitor before issue, as required by marginal rules 5 and 19. The affidavit of the plaintiff does not comply with marginal rule 523: see Annual Practice, 1929, pp. 540-1 and Yearly Practice, 1929, pp. 568 and 585; *In re J. L. Young Manufacturing Company, Limited. Young* v. *J. L. Young Manufacturing Company, Limited* (1900), 2 Ch. 753. The question of probable cause in section 3 of the Act is for the judge on facts stated, not of opinion of the plaintiff on oath: see *Willis* v. *Snook* (1841), 8 M. & W. 147; *Gibbons* v. *Spalding* (1843), 11 M. & W. 173; *Graham* v. *Sandrinelli* (1846), 16 M. & W. 191 all based on the exact wording of our Act and the English Act (1 & 2 Vict., Cap. 110, Sec. 3). *Harvey* v. *O'Meara* (1839), 3 Jur. 629, states it must not be on suspicion but on facts stated: see also form in Chitty's King's Bench Forms, 15th Ed., pp. 947-8 and cases there cited: see also *Walt* v. *Barber* (1899), 6 B.C. 461; *Williams* v. *Richards* (1895), 3 B.C. 510; *Kimpton* v. *McKay* (1895), 4 B.C. 196; *Wehrfritz* v. *Russell* (1902), 9 B.C. 50; *Ward* v. *Clark* (1895), 4 B.C. 71; *Coursier* v. *Madden* (1898), 6 B.C. 125; *Shaw* v. *McKenzie* (1881), 6 S.C.R. 181 at p. 191.

G. B. Duncan (*A. deB. McPhillips,* with him), *contra*: Reversing paragraphs 5 and 6 of the affidavit there is a substantial compliance with marginal rule 523. The present application is not an appeal from the order of *capias* and until appealed from the order is binding: see *Butler et al.* v. *Rosenfeldt* (1879), 8 Pr. 175; *Macaulay* v. *O'Brien* (1897), 5 B.C. 510.

MACDONALD, J. (In Chambers)

1929

April 10.

THOMPSON v. SCOLLARD

Judgment

MACDONALD, J.: In this action, the defendant was arrested under the provisions of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1824, Cap. 15. He did not avail himself of the provisions of section 5 of that Act, as to giving a bail bond to the sheriff, and now seeks to utilize, for the purpose of discharge from custody, section 7 of that Act. Shortly stated, this section provides that it shall be lawful for any person arrested upon a writ of *capias* to apply, at any time after arrest, to a judge of the Court in which the action has been commenced by summons, calling upon the plaintiff to shew cause why the person so arrested should not be discharged out of custody. And then the section adds:

"And it shall be lawful for such judge to make such order upon such summons as to the judge may seem fit."

Provision is then made for an appeal by either party dissatisfied with the order that might be made by the judge.

This legislation is similar to 1 & 2 Vict. (Imp.), Cap. 110, and in a number of cases it was decided that a defendant, utilizing for a like purpose the corresponding section in the English Act, may contend that the provisions of the Act, providing for the order for the writ of *capias* had not been complied with, or the defendant so under arrest may apply to the Court upon affidavit to meet the statements contained in the material upon which the order for the issuance of such writ had been obtained.

It appears that the plaintiff, in obtaining the order for the issuance of the writ of *capias*, endeavoured to comply with section 3 of the Act. This shortly stated is as follows: That a plaintiff in an action brought for the recovery of a debt or money demand or damages may, by an affidavit of himself or some other person shew to the satisfaction of a judge of the Court that he has a cause of action against the defendant to the amount of over $100, or has sustained damages to that amount; and then the section adds that such party must shew to the satisfaction of the judge "that there is probable cause for believing that the defendant . . . is . . . about to quit the Province unless he . . . be forthwith apprehended."

This section requires, apparently, two essentials in order to bring it into operation. First, a debt or claim for damages as outlined in the section and then proof to be afforded to the

MACDONALD, J. (In Chambers)

1929 April 10.

THOMPSON v. SCOLLARD

judge as to the intention of the defendant to quit the Province almost immediately. Without those two essentials, the judge is not required to grant his order authorizing the issuance of the writ of *capias*. It is quite evident from the material that the plaintiff is seeking to recover the amount of a judgment which he obtained in the neighbouring State of Washington against the defendant. He seeks such recovery in this Province and has taken steps for that purpose and, incidentally, has obtained the writ of *capias,* now the subject of consideration. It is contrary to the policy of our Courts to arrest a foreigner upon a debt contracted in a foreign country, arising from transactions between two foreigners. If the defendant was simply temporarily in this Province, then I think that the Court should not assist the plaintiff in the recovery of his debt or allow the arrest to continue, but I find, on the contrary, that the defendant has been resident for some considerable time in this Province and has a more or less fixed place of abode at Cobble Hill on Vancouver Island, so that the objection to which I have referred does not apply. There are numerous cases along this line, particularly in the Province of Ontario, to which reference might be made.

Judgment

Finding, then, that the defendant was thus subject to a process of this nature in this Province, the question is whether his contention, that there are defects in the material upon which the order has been obtained should prevail, and, secondly, whether even aside from any defective material, he has shewn to the Court such evidence as would warrant the application under the provisions of section 7 of the Act with respect to his discharge. First, as to the writ of *capias* under which the defendant is being held in custody, objection has been made that it is not in the form provided by the Act. There were some objections to the form of the *capias,* but those seem to be of no importance. Also, objection was made as to the style of cause being inserted in the writ of *capias*. This may be treated as surplusage. But there was a point raised as to the writ not stating by whom it was issued. In that respect it does not follow the form provided in the schedule of the Act. The form provides at the end thereof as follows: It shall state that "this writ was issued by *E. F.*, of , solicitor

MACDONALD, J. (In Chambers)

1929

April 10.

THOMPSON v. SCOLLARD

for the plaintiff within named." There is no such statement on the face of the *capias,* but looking at the back of it, the endorsement on the back, I find a reference made as to the person by whom the writ was issued. I take it, from the affidavit and from the argument of counsel, that this endorsement on the writ of *capias* was simply to comply with the provisions of section 13 of the Act, which states that the sheriff must not execute the writ of *capias* until there shall be delivered to him or his deputy by the solicitor the writ of *capias* endorsed in the manner therein named, with the name and place of abode of such solicitor. The conclusion to be drawn is that, apparently, you should follow the form contained in the schedule, as you would on an ordinary writ of summons and then, in addition, you have to place the endorsement on the back of the writ of *capias.* Now, while that may be an objection, I do not think it is sufficient in weight to affect this application. I am only referring to it, so as to dispose of what may be termed preliminary objections.

Judgment

I come, then, to consider the more important objection; that is, as to whether the affidavit is sufficient on both points, *viz.,* as to the question of the debt referred to therein and as to the question of intention on the part of the defendant to quit the Province. As to the debt, I consider, if you read together paragraphs 2, 3 and 4, of the affidavit of the plaintiff upon which the order was obtained, that it is sufficient to fully cover the ground. Then as to the material upon which the order was made with respect to quitting the Province, in the 6th paragraph the plaintiff says:

"That I have good, reasonable and probable cause for believing the defendant is about to quit the Province of British Columbia and that he will do so unless he be forthwith apprehended."

It has been held that this statement is not sufficient to come within the intention of the Act, the intention being, that facts shall be submitted to the judge granting the order, upon which he can determine whether section 3 shall come into operation or not. It is quite evident that the party seeking this remedy should not be himself, the person to decide whether a provision of this nature in an Act should be operative or not. It is quite clear, I repeat, that the judge should determine that question.

Then it is contended that even assuming that paragraph 6

is not of itself sufficient to enable the section to be operative, that it should be read in conjunction with paragraph 5 and thus become effective. The evidence, so terming it, upon which the plaintiff sought to obtain this order as to the defendant quitting the Province is not of a direct nature, but what may be called hearsay evidence. Now, affidavits for use in our Courts under marginal rule 523,—

"Shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted."

The plaintiff must necessarily invoke the last portion of this rule to which I have referred.

Reading those two paragraphs transposed, it is submitted that this rule may be applied. In other words the plaintiff says he has good and probable cause for believing that the defendant is about to quit the Province and that the Court should look at the previous paragraph to determine what his grounds are for such belief. The difficulty of that contention being accepted is, that he does not state that he believes that this ground is worthy of credence, nor does he even state that it is the ground upon which he bases his belief as to the probable cause. His counsel seeks to impress the Court with the probability that the statement referred to in paragraph 5 is the one that operated on the mind of the deponent when he made the affidavit, and particularly paragraph 5 of the affidavit.

Judgment

Upon an affidavit of this kind I do not think a conclusion should be reached by guesswork. I think it has been expressed by one of the decisions; there is to be no "intendment." You must clearly state not only the facts, but where you have grounds you should connect those grounds with that belief. The judge has to be "shewn to his satisfaction." In that connection I need only refer to the oft-quoted case of *In re J. L. Young Manufacturing Company, Limited* (1900), 2 Ch. 753, where the Court of Appeal held:

"An affidavit of information and belief, not stating the source of the information or belief, is irregular, and therefore inadmissible as evidence, whether on an interlocutory or a final application."

Lord Alverstone, C.J., in giving his judgment, states:

"In my opinion so-called evidence on 'information and belief' ought not to be looked at at all, not only unless the Court can ascertain the source

MACDONALD, J. (In Chambers)

1929 April 10.

THOMPSON v. SCOLLARD

of the information and belief, but also unless the deponent's statement is corroborated by some one who speaks from his own knowledge."

The Court has to guess in this case, as to the ground of belief and if that course were pursued then, at the best, it was a mere piece of gossip, if I may so term it, on the part of Cameron, communicated to the plaintiff, and this is irrespective of the denial, which has since been made by Cameron, as to having made a statement to the alleged effect. Lord Alverstone, C.J., says:

"If such affidavits are made in future, it is as well that it should be understood that they are worthless and ought not to be received as evidence in any shape whatever."

Lord Justice Rigby followed along the same lines. So I think this is an important feature of the application.

Judgment

I now consider a matter which may be termed as more directly connected with the merits of the case. I am quite satisfied upon an application made by the defendant under section 7 of the Act, he may file affidavits contradicting the statements contained in the affidavits filed by the plaintiff in obtaining the order for the writ of *capias*. In *Toothe* v. *Frederick* (1891), 14 Pr. 287, Boyd, C. discusses the difference between the law relating to arrest under the Imperial statute and that in force in England from which our statute is taken. It is true that the judgment in that case, according to the notation in the reports, has apparently been overruled in effect in *Coffey* v. *Scane* (1895), 22 A.R. 269, but this was doubtless not material with respect to the history of the legislation nor in particular as to the summing up of the position of a debtor under the Imperial Act. Chancellor Boyd says that two things must concur before the statute operates—the quitting of Ontario, and an intent thereby to defraud creditors. The latter does not require to be considered in this Province. He then comes to a conclusion upon the first; that as to quitting Ontario and gives the decision of the Court as follows upon that point (p. 289):

"I am satisfied with the result arrived at on the affidavits here, that the defendant had no intention to flee the country at the time of his arrest. He meets and explains what is relied upon in the first affidavits upon which the County judge acted."

Now, as far as the relief by the defendant being granted and discharged from custody, while there is a difference in the statute to which I have referred, still upon this point the law

seems the same in British Columbia as in Ontario. There is the right, as I previously mentioned, to the defendant, of shewing by way of substantive application that he was not intending to quit the Province. The material upon which the plaintiff sought to satisfy the judge making the order was of the nature to which I have referred. It appears that even if I were to accept the statement made by Cameron, as being sufficient and forming the ground upon which the plaintiff based his affidavit of belief as to the defendant quitting the Province, still that Cameron has now denied making such statement, and his denial is corroborated by another detective, to some extent, at any rate. The defendant very flatly denies any intention of quitting the Province. On probing into the matter, it would appear that the ground on which Cameron got the impression that the defendant might quit the Province was that certain coupons, payment for which would not mature until the coming August, had been detached from the bonds to which they belonged, and thus it would appear, according to the idea of some of the parties interested in the arrest on the criminal charge, that the defendant might be intending to leave the Province. If such a fact had been communicated to the judge granting the order, as to the real ground in this connection, I do not know what effect it might have had upon his mind, but, as far as I am concerned, I feel quite satisfied that no such reasonable deduction could be drawn, simply from the severance of the coupons from the bonds to which they belonged. Outside of this fact there does not appear to have been any evidence or facts upon which a reasonable conclusion could be drawn that the defendant would leave his place of residence where he has been for some time and go to some other country, outside the Province of British Columbia. If he went to the neighbouring State of Washington, he would only be proceeding then to the State in which the judgment sought to be recovered was obtained against him. Without further comment upon this portion of the application, I feel quite satisfied that the defendant had no present intention of quitting the Province at the time the writ of *capias* was issued, and for that reason he should now be discharged from custody. His discharge is ordered accordingly.

Judgment

MACDONALD, J. (In Chambers)

1929

April 10.

THOMPSON v. SCOLLARD

As to the costs, I follow the course pursued in similar cases in Ontario and make the costs, costs in the cause. Order accordingly.

Application allowed.

MACDONALD, J. (In Chambers)

1929

April 9.

REX v. CHIN YOW HING

REX v. CHIN YOW HING.

Criminal law—Habeas corpus—Conviction—Jurisdiction of magistrate—Right of applicant to shew lack of—Evidence supporting conviction—Inability of judge to consider sufficiency of.

On application for *habeas corpus* with *certiorari* in aid evidence may be submitted by affidavit to shew that the convicting magistrate lacked jurisdiction but the judge before whom the application is made cannot pass upon whether there was sufficient or any evidence to support the conviction.

Statement

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid, the applicant having been convicted of an offence under The Opium and Narcotic Drug Act. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Vancouver on the 9th of April, 1929.

Nicholson, for the accused.

Wood, K.C., and *W. M. McKay,* for the Crown.

Judgment

MACDONALD, J.: Upon this application for a writ of *habeas corpus* it is contended by the applicant, that there was a want of jurisdiction, on the part of the magistrate, in convicting such applicant for an offence under The Opium and Narcotic Drug Act.

I am, in support of this contention, referred to my judgment in *Rex* v. *Montemurro* (1924), 2 W.W.R. 250, in which it was held that an affidavit may be utilized for the purpose of shewing want of jurisdiction. I adhere to that decision, and, in my opinion, an applicant for *habeas corpus* may shew want of jurisdiction in the convicting magistrate, if such state of facts

exists. The ground of the lack of jurisdiction is, as I understand it, that the applicant was tried for more than one offence at the same time. It was held, in the *Montemurro* case, that such a course destroyed the jurisdiction of the magistrate. If that event had occurred in this case, the same result would have ensued.

I find, however, on the admitted facts, that the magistrate simply tried one case, referred to in the information, as being the distribution of drugs between the 6th and 9th of January, 1929. If I were now to consider the evidence upon which the conviction was based, I would be pursuing a course which was referred to by Lord Sumner in the much cited case of *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128, *vide* pp. 142-3, where he criticized the judges in the Alberta Court, as having practically reheard the case. In other words, were I to canvass the situation and consider the evidence, I would be really treating the matter as one of appeal, and not as a resort to *habeas corpus* proceedings with *certiorari* in aid thereof.

Judgment

I think I can well quote the words to which I have just referred in the *Nat Bell* judgment, as they seem properly referable to the application now being considered, as follows:

"It appears to their Lordships that, whether consciously or not, these learned judges were in fact rehearing the whole case by way of appeal on the evidence contained in the depositions, a thing which neither under the Liquor Act nor under the general law of *certiorari* was it competent to them to do."

I hold, following this case, that I have no right to consider whether there was sufficient evidence or proper evidence upon which a magistrate might convict the applicant. Along these lines, another portion of the judgment, at p. 151, is appropriate:

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous."

Now, in this judgment, their Lordships, in the Privy Council, went so far as to hold, that even without evidence at all, if the jurisdiction of the magistrate to act, is conceded, that his judgment could not be interfered with, upon *certiorari* proceedings.

MACDONALD, J. (In Chambers)

1929

April 9.

REX v. CHIN YOW HING

Judgment

Here, as I understand it, the only argument is that the evidence may have pertained to two other informations, then undisposed of, against the same accused. Such judgment states that:

"A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not."

This portion of the judgment is supplemented later on. I conclude by reading other appropriate and applicable portions of the judgment (pp. 140-41):

"It will be convenient to state at the outset that none of the ordinary grounds for *certiorari*, such as informality disclosed on the face of the proceedings . . . are to be found in the present case. The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so. There is no suggestion that he was biased or interested, or that any fraud was practised upon him. His conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the inquiry. No conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete."

I hold that this conviction on its face is sufficient and complete. It supports the warrant of commitment upon which the applicant is being held. No proof has been afforded *dehors* the conviction, by which it is invalidated, and has thus affected the imprisonment of the applicant.

The application is dismissed.

Application dismissed.

AICKIN v. J. H. BAXTER & CO.

COURT OF APPEAL

1929

March 14.

AICKIN v. J. H. BAXTER & Co.

Practice—Application to abridge time for hearing appeal—Section 24 of Court of Appeal Act—Costs of application costs in the cause—R.S.B.C. 1924, Cap. 52, Sec. 24.

Where an order is made abridging the time for hearing an appeal on an application that is justified on the merits and within the statute, the costs of the application should be costs in the cause (MARTIN and MCPHILLIPS, JJ.A. dissenting).

Statement

APPLICATION to the Court of Appeal for leave to abridge the time for hearing the appeal. The application was heard at Vancouver on the 14th of March, 1929, by MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for the application.
Walkem, contra.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: At first impression I thought the costs should be made payable in any event, but, on further consideration, I think Mr. *MacInnes* is right. He is not asking for an indulgence; what he is really asking is something that the procedure of the Court provides for. He has a right to come here on grounds that an injustice would be done unless the time is abridged. We have power to grant it. It is very much like an application for the adjournment of a trial on the ground of the illness of a witness. That would not be penalized by costs payable either forthwith or in any event. The costs would go as costs in the cause. It seems to me the same principle applies here.

MARTIN, J.A.

MARTIN, J.A.: In my opinion, it is not a case for departing from the ordinary rule. I have never heard it suggested, until this morning, where a person comes and asks for an indulgence from the Court, thereby occasioning extra expense, he should not pay. I think the section is 24 of the Court of Appeal Act and it says this Court may either enlarge or abridge the time upon such terms as it thinks right in the interests of justice as

COURT OF APPEAL

1929

March 14.

AICKIN v. J. H. BAXTER & Co.

the case may require. That rule is applied just the same in regard to extension as it is to abridgment and why a person should obtain something in his favour over and above that which the statute gives him and, nevertheless, do so at the expense of the other parties, is something which, with all respect, I am unable to follow. I think this is not a case for departing from the ordinary rule.

GALLIHER, J.A.

GALLIHER, J.A.: I would make the costs costs in the cause. Where an enlargement of time is asked for there is some default. It does not strike me that applies in the same way to an application to abridge.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same view as my brother MARTIN.

MACDONALD, J.A.

MACDONALD, J.A.: The applicant is not in default. He makes an application justified on the merits and within the statute. I think therefore the costs should be in the cause.

Application granted, Martin and McPhillips, JJ.A. dissenting.

MURPHY, J. (In Chambers)

1929

March 15.

REX v. MCPHERSON

REX v. McPHERSON.

Criminal law—Fisheries—Fishery regulation No. 21—"Keeping purse-seine open," etc.—Conviction—Offence not properly described—Power to amend—Exercise of—Costs.

Section 21 of the fishery regulations makes it an offence for a purse-seine to be kept open for any time after being cast in the manner known as an "open set." The alleged offence set out in the conviction is that the accused "did fish for salmon with a purse-seine in the manner known as an 'open set.'"

Held, that the offence created by said section 21 is not properly described in the conviction and the conviction should be quashed.

Held, further, that on proceedings such as these, the rule, in civil matters, that costs must follow the event unless good cause be shewn, should be followed.

MURPHY, J. (In Chambers)

1929

March 15.

REX v. McPHERSON

APPEAL from a conviction for an infraction of section 21 of the fishery regulations. Argued before MURPHY, J. in Chambers at Vancouver on the 12th of March, 1929.

Cochrane, and *Hossie*, for the accused.
J. B. Roberts, for the Crown.

15th March, 1929.

MURPHY, J.: In my opinion the offence created by section 21 of the fishery regulations is not properly described in the conviction. The regulation makes it an offence for a purse-seine to be kept open for any time after being cast in the manner known as an "open set." The alleged offence set out in the conviction is that the accused "did fish for salmon with a purse-seine in the manner known as an 'open set.'" An essential ingredient of the offence under section 21 is the keeping open of a purse-seine for any time after being cast. It may be that the words "in the manner known as an 'open set'" may convey this idea to the initiated but it would not do so to a Court without expert evidence of what the expression means.

Judgment

Further the regulation is not directed against fishing for salmon in particular but is aimed at keeping a purse-seine open for any time after being cast. I think I have power to amend but unless the evidence discloses proof that the regulation has been contravened such power should not be exercised. Giving full credence to what the witnesses for the prosecution say I do not find such proof. This evidence merely shews that more than 15 minutes elapsed after the casting of the purse-seine before it was closed. No such time limit is fixed by the regulations. If it is desired to fix one they must be amended. Some official has apparently fixed 15 minutes as the maximum time to be allowed between the casting of a purse-seine and its closing. There is nothing in the regulation to which I have been referred conferring such power on any official. There are obvious objections to fixing such a time limit and making it applicable to all conditions without limitation but that is a matter for the proper authorities to consider. I feel bound to decline to amend the conviction.

The same remarks apply to the other cases at Bar. One

MURPHY, J. (In Chambers)

1929 March 15.

REX v. MCPHERSON

defendant, it is true, pleaded guilty but, in view of the course taken in adducing evidence against the others, I think he probably pleaded guilty to allowing more than 15 minutes to elapse between casting and closing his purse-seine. In any event I think it would be inequitable under the circumstances to exercise the power of amendment against him and not against the others.

Judgment

The four convictions are quashed. As to costs the rule in this Court governing civil matters is that costs must follow the event unless good cause be shewn to the contrary and there would seem to be no reason to depart from that rule on proceedings such as these. The convictions are therefore quashed with costs.

Convictions quashed.

NEILSON *ET AL.* v. RICHARD *ET AL.*

MURPHY, J.

1929 March 18.

NEILSON v. RICHARD

Motor-vehicles—Violation of Motor-vehicle Act—Negligence of driver—Responsibility of owner—R.S.B.C. 1924, Cap. 177, Sec. 35.

Section 35 of the Motor-vehicle Act does not impose civil liability on an owner in excess of that which attaches at common law.

Boyer v. *Moillet* (1921), 30 B.C. 216, and *Perrin* v. *Vancouver Drive Yourself Auto Livery*, *ib.* 241 followed.

Statement

ACTION for damages resulting from driving an automobile in a manner forbidden by the Motor-vehicle Act. Section 35 of the said Act is as follows:

"The owner of a motor-vehicle shall be held responsible for any violation of this Act, or of the regulations, by any person entrusted with the possession of such motor-vehicle, but where the motor-vehicle is in the possession of a person under a contract by which he may become the owner of the motor-vehicle upon full compliance with the terms of the contract, and in whose name alone the licence is issued, nothing in this section shall impose any liability on any other person as owner of the motor-vehicle."

Tried by MURPHY, J. at Vancouver on the 25th of February, 1929.

Swencisky, for plaintiffs.
Hossie, and *Ghent Davis,* for defendants.

MURPHY, J.
1929
March 18.
NEILSON v. RICHARD

18th March, 1929.

MURPHY, J.: The Court of Appeal has twice construed the section of the Motor-vehicle Act against the view that it imposes civil liability on an owner in excess of that which attaches at common law. *Boyer* v. *Moillet* (1921), 30 B.C. 216, *Perrin* v. *Vancouver Drive Yourself Auto Livery, ib.* 241. It is true the section has been amended since but not in a way to affect the applicability of said decisions to the case at Bar. In both cases the Court had before it decisions giving effect to the contrary view by Ontario and Alberta Courts based on statutes of those Provinces but the Appeal Court pointed out that the B.C. statute differed from those on which said decisions were given. It would be entirely improper for this Court to refuse to follow the judgments of the Court of Appeal merely because the Supreme Court of Canada has ruled that the Ontario Courts were right in their construction of the Ontario statute.

Judgment

There was, in my opinion, no evidence that the husband was on the occasion when the accident occurred acting as the wife's agent or on her behalf. The action against Mae Richard is dismissed with costs.

Action dismissed.

NATIONAL SURETY COMPANY v. LARSEN.

MCDONALD, J.
1929
April 10.

Conflict of laws—Bail in foreign country—Contract of indemnity in British Columbia—Legality—Mortgage to indemnify obligor—Enforcement.

NATIONAL SURETY CO. v. LARSEN

The plaintiff Company entered into a bail bond in the State of Washington to secure the attendance of the defendant's husband at his trial in that State, and the defendant executed a mortgage in British Columbia on lands situate in British Columbia to secure the plaintiff from loss under the bond. The husband did not appear at the trial and the bail was estreated. In an action on the mortgage:—

Held, that as the giving of this security offends against our ideas of natural justice and right dealing, the contract is not enforceable in British Columbia.

MCDONALD, J.

1929

April 10.

NATIONAL SURETY CO. *v.* LARSEN

ACTION to enforce payment of a mortgage. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 25th of March, 1929.

Wismer, for plaintiff.
Adam Smith Johnston, for defendant.

10th April, 1929.

MCDONALD, J.: The defendant executed in British Columbia a mortgage on lands situate in this Province, to secure the plaintiff against loss under a certain bail bond into which it had entered to secure the attendance of the defendant's husband at his trial in the State of Washington. The husband did not appear and the bail was estreated. Plaintiff now seeks to recover on its mortgage. The arrangement above referred to is of course illegal if made in Canada for the reason that it is deemed here to constitute an interference with the due administration of justice and therefore against public policy. In the State of Washington the arrangement is neither considered illegal nor against public policy. All the arrangements and negotiations leading up to the giving of the mortgage except its actual execution took place in the State of Washington.

Judgment

Under these circumstances is the mortgage enforeable? The question is a very difficult one and counsel have not been able to find any case identical in its facts. This is not a "foreign contract" in the usual sense, though the consideration moved in Washington and only the formal act of completion took place in British Columbia. Nor can it be called strictly a British Columbia contract which must be construed and enforced (or not enforced) according to the law of this Province. However, inasmuch as the giving of this security offends against our ideas of natural justice and right dealing, I feel obliged to hold that the contract is not enforceable in our Courts. See *Saxby* v. *Fulton* (1909), 2 K.B. 208; *Hope* v. *Hope* (1857), 26 L.J., Ch. 417; *Moulis* v. *Owen* (1907), 76 L.J., K.B. 396 and *Kaufman* v. *Gerson* (1904), 1 K.B. 591.

The action is, therefore, dismissed.

Action dismissed.

NEARY v. CREDIT SERVICE EXCHANGE.

MURPHY, J. (In Chambers)

1929

March 19.

NEARY v. CREDIT SERVICE EXCHANGE

Practice—Prohibition—Action for account in County Court—Jurisdiction.

In an action in the County Court where the plaint asks for an account, the case is not *ex facie* beyond the jurisdiction of the County Court as that Court has jurisdiction in such actions up to $1,000. An application for a writ of prohibition will therefore be refused especially where it appears that the plaintiff has filed a waiver of any claim over $1,000.

Statement

APPLICATION for a writ of prohibition. Heard by MURPHY, J. in Chambers at Vancouver on the 14th of March, 1929.

C. L. McAlpine, for plaintiff.
Hogg, for defendant.

19th March, 1929.

Judgment

MURPHY, J.: The plaint herein asks for an account. The case is not therefore *ex facie* beyond the jurisdiction of the County Court since that Court has jurisdiction in actions of account up to $1,000. This application is accordingly premature as this Court ought not to assume that the inferior Court will go beyond its competency and jurisdiction and, therefore, ought not to intervene at the present stage of the proceedings, the more so since counsel informed the Court that plaintiff has now filed a waiver of any claim in excess of $1,000. *Hallack* v. *Cambridge University* (1841), 1 Q.B. 593; *The Queen* v. *Twiss* (1869), L.R. 4 Q.B. 407. The case of *Camosun Commercial Co.* v. *Garetson & Bloster* (1914), 20 B.C. 448 is clearly distinguishable. There the plaint failed to shew on its face any jurisdiction whatever in the Court to which the writ of prohibition was directed.

The application is dismissed with costs.

Application dismissed.

MURPHY, J. (In Chambers)

1929

March 21.

BRAMMALL v. BRAMMALL

BRAMMALL v. BRAMMALL. (No. 2).

Divorce—Petition for—Discovery—Interrogatories—Material only as tending to establish adultery—Inadmissible.

The Court will not order interrogatories in a petition for divorce where they can be material only in so far as they may tend to establish adultery.

Redfern v. *Redfern* (1891), P. 139 and *Levy* v. *Levy* (1906), 12 B.C. 60 applied.

Statement

APPLICATION by petitioner for leave to deliver interrogatories to be answered by the respondent and intervener. The petition filed in the cause alleged that the respondent had committed adultery with the intervener on the 7th, 9th, 11th, 14th and 18th of March, 1928. The interrogatories sought to be delivered as to March 7th, 1928, were as follow:

"(a) Were you in the company of the intervener between the hours of 7.00 and 11.30 p.m. on the 7th of March?

"(b) Where were you during this period?

"(c) Were you alone with the intervener any time during this period?

"(d) If you were alone during this period when was it?"

Exactly similar interrogatories were sought to be delivered with respect to each of the other dates above mentioned, except with a slight difference as to time. In addition exactly similar interrogatories were sought to be delivered as to the 21st of March, 1928, this being the first occasion on which this date appears in any of the pleadings in the action. Heard by MURPHY, J. in Chambers at Vancouver on the 18th of March, 1929.

J. E. Bird, for the petitioner.

Remnant, for respondent.

J. W. deB. Farris, K.C., for co-respondent.

21st March, 1929.

Judgment

MURPHY, J.: In view of the decision in *Redfern* v. *Redfern* (1891), P. 139 followed in *Levy* v. *Levy* (1906), 12 B.C. 60 it would seem that the Court should not order interrogatories in divorce proceedings which can only be material so far as they may tend to establish the issue of adultery. I have carefully considered the proposed interrogatories. In my opinion they all fall within the prescribed category whether it is proposed to administer them to the respondent or to the co-respondent.

The applicaton is dismissed.

Application dismissed.

MARTIN, LO. J.A.

1929

April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. v. THE S.S. "EURANA"

THE BURRARD INLET TUNNEL & BRIDGE COMPANY v. THE S.S. "EURANA."

Admiralty law—Shipping—Damage to bridge by vessel—Tidal currents—Inevitable accident—Counterclaim—Authority to erect bridge—Construction—Interference with navigation—Can. Stats. 1910, Cap. 74, Secs. 8, 9, 14 and 16—R.S.C. 1927, Cap. 170.

The defendant steamship with a full cargo of lumber in attempting to pass through the bascule span of the bridge across the Second Narrows of Burrard Inlet, outward bound, when the tide was at the last of the slack water or slightly on the ebb, collided with the east side of the bridge. In an action for the resulting damage to the bridge:—

Held, that the accident was caused by a very strong incoming sub-surface current setting north-easterly across the bridge and not visible on the surface which continued to indicate slack water. This undercurrent at a distance of 500-600 feet from the bridge suddenly and unexpectedly greatly increased in strength and took control of the ship causing her to sheer suddenly from the proper course she had been on and was still holding at a proper speed and which in ordinary circumstances would have taken her safely through the bascule span, so that the allegations of negligence against her are not sustained by the evidence either with respect to the time of making the attempt or of the manner in which that attempt was carried out. Further no fault is to be found in the measures taken by the ship to extricate herself, though ineffectually, from the imminent danger in which she suddenly found herself and which she had no reason to anticipate. The collision could not possibly have been prevented by the exercise of ordinary care, caution and "maritime skill" on the part of the ship and the case becomes one of "inevitable accident."

The defendant ship counterclaimed for damages to her caused by the collision based upon the allegation that the plaintiff wrongfully and illegally erected the bridge and maintains it as a public nuisance as being an obstruction which impedes the free and convenient navigation of the Second Narrows by ships having lawful occasion to navigate said waters and which obstruction was the cause of the damage to the ship while endeavouring to proceed through without colliding with it.

Held, that all statutory conditions were fulfilled which are necessary to support the validity of the various orders of the Board that the plaintiff relies upon, and that it has in fact and without negligence constructed the bridge at the site and in accordance with the plans and specifications duly authorized originally and later by alterations in certain particulars validly approved, and no liability attaches to the plaintiff for the consequences of the proper construction, operation and maintenance of its undertaking under its Act of Parliament.

Statement

ACTION to recover $7,887, damages to the bridge across the

MARTIN, LO. J.A.

1929

April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. v. THE S.S. "EURANA"

Second Narrows of Burrard Inlet on the 10th of March, 1927, by the steamship "Eurana" owing to the alleged negligent navigation thereof in colliding with the east side of the bridge while attempting to go through its bascule span with a full cargo of lumber and counterclaim by the defendant ship for $77,064 for damages caused by the collision based upon the wrongful and illegal erection thereof. The facts are fully set out in the reasons for judgment. Tried by MARTIN, Lo. J.A. at Vancouver on the 26th to 28th of September, 1st October, 28th to 30th November and 3rd to 7th December, 1928, and 15th to 18th of April, 1929.

Burns, K.C., and *Walkem*, for plaintiff.
Griffin, K.C., for defendant.

20th April, 1929.

Judgment

MARTIN, Lo.J.A.: This is an action by the plaintiff Company (incorporated by Can. Stat. 1910, Cap. 74) against the S.S. "Eurana" (length 399.7 feet, beam 56.21, gross tonnage 5,688, regtd. 3,516, draught as then loaded 25 ft. aft, 23.5 for'd, single screw, h.p. 2,500, Nels Svane, master) to recover $7,887 damages done to its bridge across the Second Narrows of Burrard Inlet on the 10th of March, 1927, shortly after 6 p.m. by said ship, owing to the alleged negligent navigation thereof, in colliding with the east side of the bridge while attempting to go through its 150-foot bascule span with a full cargo of 4,200,000 feet of lumber when the tide, a fairly big one, was apparently at the last of the water slack, outward bound from Barnet. Several charges of faulty navigation are set up but those substantially relied upon are that the ship did not set and keep a course true for the centre of the span opening, and that she made the attempt to go through it at a wrong stage of the tide, *i.e.*, on the ebb, instead of at slack or slight flood, and failed to observe the unfavourable set of the same, and delayed in taking the proper manœuvres.

The defendant ship disputes the title of the plaintiff to the bridge and the land it is built upon and its right to construct and maintain the same, and alternatively alleges that the plaintiff has not obtained the approval of the Governor-General in Council under the Navigable Waters' Protection Act for its

undertaking, and that in consequence the bridge is an unlawful obstruction to navigation; and also that even if the statutory power to build a bridge which impedes navigation has been duly conferred yet the plaintiff—

"negligently and wrongfully constructed a badly designed bridge which impedes and interferes with the navigation of said Second Narrows to a greater extent than is necessary for the proper exercise of the plaintiff's said statutory powers and the defendant says that the collision between the S.S. 'Eurana' and the said bridge was occasioned by the fact that said bridge was badly designed and constructed and impedes and interferes with the navigation of said Second Narrows to a greater extent than is necessary to enable the plaintiff to exercise its said statutory powers and that therefore the plaintiff is not entitled to recover damages in respect of said collision."

The defendant ship also, on the facts of the collision, denies any bad navigation and alleges alternatively, par. 14, that it was caused by

"circumstances of wind and current over which those in control of the 'Eurana' had no control and which they could not anticipate or guard against and the collision was an inevitable accident for which the defendant is not responsible."

Judgment

And it further alleges that at the time in question the tide turned and began to flood earlier than the hour fixed by the tide table and the northerly set of the tide was of abnormal force, and that the span opening is not in the middle of the channel, and is too narrow, and that the unnecessary number of short spans and a rock fill on the south shore create strong and varying currents which make navigation unusually difficult even at the most favourable times.

The defendant ship further sets up a counterclaim against the Company for $77,064 as and for damages to her caused by the said collision based upon the allegation that the plaintiff wrongfully and illegally erected the said bridge and maintains it as a public nuisance as being an "obstruction" which "impedes the free and convenient navigation of the said Second Narrows by ships having lawful occasion to navigate said waters," and which "obstruction" was the cause of the damage to the ship while she was "endeavouring to proceed past or through [it] without colliding with it."

To this the plaintiff replies that the bridge has been duly constructed in accordance with powers conferred by the said statute and the Railway Act and certain recited orders of the

MARTIN, LO. J.A.

1929

April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. v. THE S.S. "EURANA"

Governor in Council and the Board of Railway Commissioners, and, in general, joins issue with the other said allegations of undue interference with navigation and nuisance by obstruction and wrongful or negligent construction in any respect, and denies that the same were the cause of the collision, and that it was due to abnormal conditions which could not have been anticipated and guarded against.

Upon these issues forty-two witnesses were called and a vast amount of evidence taken upon all aspects of the claim and counterclaim, much of which evidence is applicable to both distinct causes of action though not all of it, and it would be easy to confuse the issues were not their distinct nature kept in mind because the relevant facts are largely interwoven.

Judgment

Taking up, then, the plaintiff's claim first, and assuming in its favour all questions of title and that the bridge has been only constructed in accordance with statutory powers and plans authorized by the proper authority, it is nevertheless necessary to consider the effect of this authorized obstruction upon the navigation of the channel when an action is brought against a vessel for damaging the bridge in passing through it. In other words, if the effect of its construction is to make navigation even at proper times more difficult than theretofore it would not be reasonable to expect that mariners so using the channel could avoid injury to themselves or to the bridge as easily as they could if the channel had been left in a state of nature, even though they use all the skill and caution that should be required of a prudent and skilful navigator. It must follow that the more difficult the passage is made the more must accidents be expected, just as the easier it is the fewer should there be. Obviously it would not be reasonable to expect the same results in such very different circumstances, because though the standard of the mariner's navigation is always the same, yet as his task is rendered more difficult the more must it be expected that reasonable human effort and precaution cannot always guard against accident when the margin of safety is substantially reduced in what at the best of times is, now at least, a channel which presents increased difficulties in navigation for larger deep-sea vessels, over 300 feet in length, to navigate.

It is not necessary, on this branch of the case, to consider to

the fullest extent what the effect of the construction of the bridge has been upon such navigation by ships of the class now in question, but it is sufficient to say that in three respects the natural difficulty has been substantially increased thereby, *viz.*, in contracting the space in which it is necessary for such ships to line up in passing through the bascule span outwards and in manœuvring after passing through inwards; in adding to the naturally very uncertain conditions of tidal currents in the immediate vicinity of the bridge; and in increasing the force of the current through it at said span in particular. Though a great mass of evidence was given upon these main points it would be practically impossible to review it adequately in these reasons, and the subject is further complicated by the important unquestioned fact that the extensive operations which for a long time have been carried on (and are still in progress) in deepening, widening and straightening the outlet channel at the First Narrows have had an appreciable effect upon the currents at the Second Narrows, which indeed is obvious from the mere inspection of the charts of Burrard Inlet, because the contracted run-in of a great volume of water to the lower basin (between the bridge and Brockton Point) through the Second Narrows must inevitably be affected by the facilities of run-off to sea through the First Narrows, and *vice versa* with incoming tides which bring the water back through the First and Second Narrows to the much larger upper basin above the bridge. But upon the extent of the undoubted substantial effect of these First Narrows operations upon conditions at the Second there is no evidence of any weight, which is not indeed to be wondered at, because to obtain any reliable information upon the point a series of long and doubtless very expensive observations, and also researches into prior conditions, would have to be undertaken, which the parties hereto have not attempted and could not reasonably be expected to do so. Nevertheless the absence of exact information upon substantial changes in navigation which are not due to the bridge at all (and yet which will continue to increase as the First Narrows channel continues to be widened) renders it impossible to determine satisfactorily the extent of the degree to which the bridge alone has added to the natural difficulty of navigation, and it is not necessary on the

Judgment

MARTIN, LO. J.A.

1929
April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. v. THE S.S. "EURANA"

Judgment

present point to say more than that the bridge has, apart from the said First Narrows operations, increased in the said three ways the said natural difficulty to a substantial extent, though undefinable upon the insufficient evidence before me. At the same time, however, the increase is not as great as many witnesses deposed to and it is very probable that one of the reasons why there was so much conflict between apparently credible witnesses (as I am pleased to say most of them appeared to be) as to the difference between former and present conditions at the Second Narrows is that they failed to appreciate the far-reaching effect of the First Narrows operations upon present conditions of tide and current at the Second and merely regarded the latter in the light of what they see now at that spot.

It is further alleged that the difficulty of navigating larger vessels through the bridge has been increased by the fact that the bascule span is not placed at right angles to the centre of the main current, and that it is appreciably to the south thereof. That such is the case to some, and an appreciable, extent there is little if any doubt because the presence of a shoal on the south shore of the channel extending eastward from the bridge for about 700 feet to a protuberance called The Knuckle tends to cramp such vessels in their passage inwards and outwards. It is not, in strictness, for this Court to suggest a remedy for this condition but in a case of this exceptionally wide public importance I cannot shut my eyes to the fact that the evidence suggests that it would be well for the proper authority to cause careful observation and investigation of the shoal to be made to ascertain if it would not be possible to reduce, materially at least, the obstruction it causes, by dredging operations, as in the First Narrows.

These questions of the proper construction of bridges and their proper position as regards the current are always difficult and there have been several of them before this Court, the last being *The Attorney-General of British Columbia* v. *The "Pacific Foam"* (1928), 40 B.C. 100, but they all depend upon the particular and always varying circumstances of each case. The present one, in view of its exceptional importance and difficulty, has caused me long and anxious reflection, with the result that, bearing in mind the conditions the defendant ship was

confronted with in attempting to pass through the span at the time in question, I can only reach the conclusion that the said allegations of negligence against her are not sustained by the evidence, either with respect to the time of making the attempt or of the manner in which that attempt was carried out, despite the able manner in which Mr. *Burns* presented his argument to the contrary. The accident was, I can only conclude from the evidence, caused by a very strong incoming sub-surface current setting north-easterly across the bridge and not visible on the surface, which continued to indicate slack water, and which undercurrent at a distance of 500-600 feet from the bridge suddenly and unexpectedly greatly increased in strength and took control of the ship causing her to sheer suddenly from the proper course she had been on and was still holding at a proper speed, and which in ordinary circumstances would have taken her safely through the bascule span. No fault is to be found in the measures taken by the ship to extricate herself, though ineffectually, from the imminent danger in which she suddenly found herself and which she had no reason to anticipate. It is true that those in charge of her expected, and were in fact prepared to meet ordinary changes in the undercurrent there (caused largely by the fact that the change of the tide at the bascule span is very quick, almost instantaneous at times, and slack water usually is only for a few minutes) but not one at all approaching the abnormal strength encountered on this occasion, which her pilot, Wingate, describes as "tremendously stronger" than he had ever experienced there, and his evidence is confirmed in essentials by that of the Master, Svane, and also largely by Captain Harrison, of the "Pacific Foam" and Captain Payne of the "Farquhar," and W. Tamburino, independent eye-witnesses.

Judgment

Being then of opinion that this collision "could not possibly have been prevented by the exercise of ordinary care, caution and maritime skill" on the part of the ship, the case becomes one of "inevitable accident" as so defined by the Privy Council in *The "Marpesia"* (1872), L.R. 4 P.C. 212, wherein it is also said (p. 220):

"Here we have to satisfy ourselves that something was done or omitted to be done, which a person exercising ordinary care, caution and maritime

MARTIN, LO. J.A.

1929

April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. *v.* THE S.S. "EURANA"

skill, in the circumstances, either would not have done or would not have left undone, as the case may be."

This definition was also adopted by the English Court of Appeal in *The Schwan* (1892), P. 419; and lately applied by this Court in its New Brunswick District in the similar case of *The King* v. *The Ship Woldingham* (1925), Ex. C.R. 85, to include a sudden "yaw" in passing through a narrow bridge; and *cf.*, also Marsden's Collisions at Sea, 8th Ed., 18, and Beven on Negligence, 4th Ed., Vol. 2, p. 1291.

It is to be noted that in certain aspects there is also a similarity between this case and the very recent one of *The Vectis* (1928), 45 T.L.R. 385, wherein a collision—"bumping"—took place between two barges in a narrow creek owing to "a sudden swell of the incoming tide," as Lord Merivale describes it. A new trial was ordered in the circumstances, but speaking of the expectation of "bumps" in narrow places Mr. Justice Hill said, p. 387:

"Apart from knowledge of the dangerous position of the anchor, I can see no reason for saying that there is negligence in not preventing a harmless bump between barges. Such bumps are frequent in the ordinary working of barges, and in this narrow creek were probably incidental to the ordinary use of the creek. They involve neither *damnum* nor *injuria.*"

Judgment

Seeing that the case is one of inevitable accident the plaintiff's claim must be dismissed, and formerly it was the practice to make no order as to costs in such circumstances, but the present practice as laid down by the judgment of this Court in *"The Jessie Mack"* v. *The "Sea Lion"* (1919), 27 B.C. 444, is that costs should follow the event in the absence of special circumstances requiring a departure from that rule: to the cases there cited I add *The Cardiff Hall* (1918), P. 56, and as the defence of inevitable accident was pleaded herein and there are no special circumstances which would justify a departure from said general rule the disposition of the costs will be in accordance therewith.

Then as to the counterclaim of the ship against the bridge. This depends largely on different considerations because if the bridge has been duly built in accordance with the permission given by the proper authority the fact that it does actually obstruct navigation more or less imposes no liability upon it for damage to vessels caused by the increased difficulty in navigating

the natural narrow channel, which it has restricted and impeded substantially as already indicated; it is beyond reasonable doubt that if the bridge had not been there on the day in question the ship would not have suffered any damage. The right, therefore, of the plaintiff company to build and maintain the bridge in its present state and position is what is really in question on this branch of the case.

It is first objected that the plaintiff has no title to the lands upon which the bridge is built and therefore cannot maintain this action and that its National Crown grant (dated 9th May, 1924) of the lands "as part of a public harbour" is invalid in that no order in council authorizing it has been put in evidence though the grant recites "that it is made under and by virtue of the statutes in that behalf and pursuant to authority duly granted by our Governor in Council." This objection, in my opinion, is not one of weight in the case of a grant made under the great seal of Canada, even assuming that an order in council is necessary, because, in brief, a recital in such an instrument of the greatest solemnity and duly recorded, *i.e.*, enrolled (on 31st May, 1924) is sufficient to establish a *prima facie* case of the existence of such an order if necessary, or at least to bring into operation the maxim *omnia præsumuntur rite esse acta,* nor on long-established and well-known principles, has a stranger any *status* to rely upon the effect of the non-performance of any conditions which might, *e.g.*, result in a forfeiture to the Crown —*Canadian Company* v. *Grouse Creek Flume Co.* (1867), 1 M.M.C. 3, and cases noted at p. 8.

Judgment

Then as to the application of the Navigable Waters' Protection Act, Cap. 115, R.S.C. 1906, and amendment, Cap. 33 of 1918, now Cap. 140, R.S.C. 1927; it is in my opinion excluded by the 3rd section thereof in and for the present circumstances and purposes, not being "rebuilding or repairing," as will later appear.

The plaintiff Company by its said Act of incorporation (Cap. 74 of 1910) is authorized by sections 8 and 9 thereof not only to build a bridge but also to operate (and does in fact operate) "one or more lines of railway" across said bridge and into adjacent territory as part of its undertaking as a connecting line with certain of the other railways specified in section 14,

MARTIN, J.A.
1929
April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. v. THE S.S. "EURANA"

and by section 2 that whole undertaking is "declared to be a work for the general advantage of Canada" and section 16 declares that "the Railway Act shall apply to the Company and its undertaking." The effect of these provisions is to read into the Act of incorporation, which is a public Act (Interpretation Act, R.S.C. 1927, Cap. 1, s. 13) all apt provisions of the Railway Act and the two Acts must be read as one so as to carry out the intention of Parliament to legislate for the "public good" ("advantage of Canada") and, as the said Interpretation Act, Sec. 15, declares, it—

"shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act . . . . according to its true intent, meaning and spirit."

Approached in this light no real difficulty is to be experienced from the words much relied upon by the ship in section 8, that said undertaking may be constructed, operated and maintained "from some convenient points on the south shore in or near the City of Vancouver to points on the opposite shore of Burrard Inlet so as not to interfere with navigation." That the general location of the bridge is at the most "convenient points" of the Second Narrows is not disputed; in fact it is unquestionably at the best points, and except in its immediate neighbourhood the construction of a bridge across them (the Narrows) would not in reason be contemplated, and even where it is located the evidence is clear that for many reasons its construction presented several problems of exceptional difficulty to overcome. It would be impossible in the present stage of human effort to build a bridge there which would not in some substantial degree interfere with navigation within the decisions which are conveniently collected in a leading case in this Court, *Kennedy* v. *The "Surrey"* (1905), 11 B.C. 499, to which may be added *Attorney-General* v. *Terry* (1874), 9 Chy. App. 423, and *The King* v. *The Ship Woldingham, supra.*

Judgment

To escape the literal consequences of those decisions and to allow unimpeded navigation for the whole of the space at all stages of this tide it would, as one example only, be necessary to have a span of at least one thousand feet without supporting piers and that fact alone shews that Parliament, which must be assumed to be informed upon the subject of the public harbour

with which it was dealing, could never have contemplated anything of the kind, and to hold that Parliament intended to grant a charter which ostensibly conferred powers to be exercised to the "general advantage of Canada" and yet at the same time rendered them incapable of execution is a conclusion which a Court of justice should be intractably driven to before accepting because it would "lead to a manifest absurdity." The Privy Council in *Victoria City* v. *Bishop of Vancouver Island* (1921), 2 A.C. 384, thus laid down the principles which should govern the construction of the Act in question:

"There is another principle in the construction of statutes especially applicable to this section. It is thus stated by Lord Esher in *Reg.* v. *Judge of the City of London Court* (1892), 1 Q.B. 273, 290: 'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity. In my opinion, the rule has always been this:—if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity, and the other does not, the Court will conclude that the Legislature did not intend to lead to an absurdity, and will adopt the other interpretation.' And Lord Halsbury in *Cooke* v. *Charles A. Vogeler Co.* (1901), A.C. 102, 107 said: 'But a Court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the Legislature has said.' Which necessarily means that for this latter purpose it is legitimate to take into consideration the reasonableness or unreasonableness of any provision of a statute. Again a section of a statute should, if possible, be construed so that there may be no repugnancy or inconsistency between its different portions or members."

Judgment

Applying both these most appropriate principles to the present case, Parliament, in my opinion, intended that the said two Acts must be read together and practically applied in such a way as to arrive at the only possible reasonable result in the circumstances, *viz.*, that the words "not to interfere with navigation" mean not more than is necessary to carry out the undertaking in the manner authorized by the special tribunal created by Parliament in the incorporated Railway Act to determine that very question, *i.e.*, the Board of Railway Commissioners for Canada. And it must not be overlooked that, since the granting of the charter and the construction of the bridge thereunder, the National Government itself has materially increased the difficulty of navigation at this bridge by its large operations at the First Narrows already noted.

MARTIN, LO.J.A.

1929

April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. v. THE S.S. "EURANA"

In The Railway Act, 1919 (Cap. 68 of 1919) itself there is a much more pronounced "repugnancy or inconsistency" than in the plaintiff's Act (section 8) because the group of sections, 245-48, entitled "Respecting Navigable Waters," begins by a general prohibition in section 245 against "any obstruction in . . . . the free navigation" of such waters but nevertheless proceeds immediately and necessarily to provide for inevitable obstruction by bridges and "other structures" to be constructed (under sections 247-8) as to the said "Board may seem expedient for the proper protection of navigation" by proper openings in spans and due provision for draws and swings where necessary. What is the "proper protection of navigation" in the particular circumstances is for the Board to decide before granting an order in accordance with the specified procedure, for construction, and subsection (5) of 248 finally provides that:

"Upon the completion of any such work the company shall, before using or operating the same, apply to the Board for an order authorizing such use or operation, and if the Board is satisfied that its orders and directions have been carried out, and that such work may be used or operated without danger to the public, and that the provisions of this section have been complied with, the Board may grant such order."

Judgment

This brings the case to a question of fact as to whether the plaintiff has procured the necessary orders from the Board under said sections, as to which a long contest arose but no useful purpose would be served by here considering it in detail. It is sufficient to say, therefore, that in my opinion all statutory conditions were fulfilled which are necessary to support the validity of the various orders of the Board that the plaintiff relies upon, and that it has in fact and without negligence constructed the bridge at the site and in accordance with the plans and specifications duly authorized originally and later by alterations in certain particulars validly approved. Such being the case no liability attaches to the plaintiff for the consequences of the proper "construction, operation and maintenance" of its undertaking under its Act of Parliament—*Canadian Pacific Railway* v. *Roy* (1902), A.C. 220; and *Quebec Railway, Light, Heat and Power Company* v. *Vandry* (1920), A.C. 662 at p. 681.

The final point requiring particular consideration is that the bridge is in fact not constructed in accordance with the said statutory authorization but has substantially departed therefrom

in a way that has materially increased the difficulty of navigation even beyond the degree of obstruction that the said authorization permitted, and on this question a large amount of evidence was given but with the result that such allegation has not been established in proof. The only feature of it that created any doubt in my mind was in regard to the rock fill on the south shore, the extent of which was not as clearly defined as I should wish by either party, doubtless owing to its nature and the unavoidable obliteration of the original contour of the land and tidal marks at that point. But I have no doubt that even if it could be clearly proved that the said fill is greater in extent than authorized nevertheless that excess in size is "an encroachment of so trifling a nature that this Court would not interfere" as was said by Lord Chancellor Cairns in *Attorney-General* v. *Terry, supra*, p. 431. That case has been unanimously adopted by our National Supreme Court in *The Queen* v. *Moss* (1896), 26 S.C.R. 322 at p. 332 as "settling the law," and it approves the judgment below of Jessel, M.R. The Court said, *per* Chief Justice Strong:

Judgment

> "Even if the bridge now in question was of very great public benefit, whilst the prejudice it caused to the public as an obstruction to navigation was of the slightest possible degree, it nevertheless would have been an illegal structure amounting to a public nuisance, which, as such, the Crown might cause to be removed unless for other reasons it was not to be treated as a nuisance."

In the case at Bar there is no evidence to justify a finding that any "prejudice" has been occasioned to the navigation of the bridge by the excess in size (if such there be) of the rock fill beyond what was lawfully authorized as aforesaid.

In conclusion the following illustration given by the Master of the Rolls (in the course of his valuable remarks upon the way obstructions in public harbours should be regarded in the light of changing conditions) in *Terry's* case may appropriately be cited as some indication of how the difficult situation at the Narrows was doubtless viewed by the Board of Railway Commissioners in their attempt to deal with conflicting public interests in a practical way which would best secure the greatest benefit to the public as a whole:

> "Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river, and, of course,

MARTIN, LO. J.A. 1929 April 20.

THE BURRARD INLET TUNNEL & BRIDGE CO. v. THE S.S. "EURANA"

according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the waterway, and to some extent, perhaps to a more or less material extent, obstruct the navigation. But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury, if injury it be, to the navigation, that on the whole a Court of justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case also it would be a public benefit that would counterbalance the public injury."

It follows that upon the whole of this branch of the case the counterclaim must be dismissed and with costs in accordance with the general rule.

Judgment

I feel that I should not leave this case of exceptional importance and difficulty without adding a few words in appreciation of the highly creditable manner in which it was handled by the counsel concerned therein: their work has been of great assistance to the Court.

Action and counterclaim dismissed.

MURPHY, J. 1929 Feb. 15.

NOWELL v. BRITISH COLUMBIA ELECTRIC RY. CO.

NOWELL v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED *ET AL.*

Negligence—Two defendants sued on separate torts in one action—Payment made by one in settlement of action as against them—Reduction of damages against other by amount paid in damages—Costs.

Where two defendants are sued for damages resulting from separate acts of negligence by each of them, and one of them pays a certain sum in settlement of the action as against him, the damages assessed in the action in favour of the plaintiff as against the other defendant must be reduced by the amount paid in settlement by his co-defendant less solicitor and client costs.

Statement

ACTION for damages for negligence. On the 21st of November, 1928, the plaintiffs were driving in a taxicab of the Yellow Cab Company Limited on Broadway East in the City of Vancouver, when the driver of the taxicab came to a stop on the

street-car tracks and getting out left the taxicab there. There was a thick fog at the time and while the driver was away a street-car going westerly on Broadway ran into the taxicab and all the occupants of the taxicab were injured. Tried by MURPHY, J. at Vancouver on the 5th of February, 1929.

Griffin, K.C., and *Fleishman,* for plaintiffs.
Craig, K.C., and *Tysoe,* for the Yellow Cab Company.
Sloan, for B.C. Electric Ry. Co.

15th February, 1929.

MURPHY, J.: I am of opinion that the pleadings sufficiently raise the grounds of negligence which I found proven against the Yellow Cab Company Limited. In any event my findings are based on the story of the accident given by the taxi driver himself plus the uncontested facts of the places in the cab occupied by plaintiffs and of the locked door next to Nowell, Sr.

I assess the damages as follows: H. Nowell, Sr., $20; H. Nowell, Jr., $20; Mrs. Nowell, $50; Freda Nowell, $500, this last sum to include special as well as general damages.

As to the argument that the special damages incurred by Freda Nowell should be assessed to the father because she is a minor a sufficient answer is that these damages were claimed for her in the pleadings whilst no claim for them was made on behalf of the father.

Judgment

As to the point that one of defendants, the B.C. Electric Ry. Co., has paid plaintiffs $600 in settlement of this action and that therefore the defendant the Yellow Cab Company Limited can now claim that the damages against it must be reduced by whatever part of said $600 was paid in satisfaction of damages. I think this is a sound position. Plaintiff in a negligence action such as this, as everyday Court procedure proves, must shew liability for negligence on defendant's part and must further prove the damage suffered. If it be shewn that these very damages have been wholly or in part satisfied by a co-defendant then I think credit *pro tanto* for such payment must be given. The case of *Penny* v. *Wimbledon Urban Council* (1899), 2 Q.B. 72; 68 L.J., Q.B. 704 as I read it so decides. Smith, L.J. in his judgment expressly states "though the respondent could not recover the amount twice over, that does not preclude

MURPHY, J.

1929

Feb. 15.

NOWELL v. BRITISH COLUMBIA ELECTRIC RY. CO.

Judgment

her from recovering nominal damages and her costs of suit." The attempt to distinguish that case on the ground that it was a case of joint tort whilst the one at Bar is one of independent torts fails I think when the case is read carefully. This will appear more clearly if the report in the Law Journal, which is fuller in some respects than that in the Law Reports, is read. Vaughan Williams is quoted in the Law Journal Report as saying that the joint tort cases have no application "for there never was any satisfaction of this cause of action against the council by the mere payment into Court by the contractor." Indeed if the joint tort doctrine had been applicable I cannot see how the appeal could have been dismissed as it was. *The Koursk* (1924), P. 140; 93 L.J., P. 72 does not conflict with this view since no attempt was there being made to collect damages already paid. It is true that in the concluding paragraph of the judgment of Sargent, L.J. there is a somewhat cryptic remark, as I read it, which if interpreted in one sense seems to support the contention of counsel for plaintiffs. This remark is however clearly *obiter* and I confess I am not clear as to what it is directed. In any event, as stated, the *Penny* case seems to me decisive for if plaintiffs' argument addressed to me here is correct then since it was held that the joint tort doctrine did not apply Penny should have recovered over again the £50 she had already received.

This being my view there should be if necessary a further hearing to determine what part of the $600 paid by the B.C. Electric Ry. Co. was paid as damages and what part as costs. If it was paid as a lump sum in payment of debt and costs then I think plaintiffs' costs against the B.C. Electric Ry. Co. should be taxed on solicitor and client basis and the amount so ascertained deducted from $600 the balance to be credited on the damages awarded against the Yellow Cab Co. and judgment entered for the balance thus ascertained against the Yellow Cab Co. As to costs Freda Nowell is to have her costs on the appropriate scale of the Supreme Court tariff. No certificate as to costs is granted in the case of the other three plaintiffs.

Judgment for plaintiffs.

THOMPSON v. SCOLLARD. (No. 2).

MCDONALD, J. (In Chambers)

1929

April 26.

THOMPSON v. SCOLLARD

Practice—Action on foreign judgment—Counterclaim for malicious prosecution—Right to file—Marginal rule 279.

In an action on a foreign judgment the defendant, after filing his defence, filed a counterclaim in which he claimed damages for malicious prosecution.

A motion to strike out the counterclaim on the grounds that (a) it ought not to have been filed without leave and (b) that it cannot be conveniently tried with the claim, was dismissed.

MOTION to strike out counterclaim. Heard by McDONALD, J. in Chambers at Vancouver on the 26th of April, 1929.

A. DeB. McPhillips, for the motion.
Alfred Bull, contra.

McDONALD, J.: Motion by plaintiff to strike out a counterclaim for damages for malicious prosecution. The action is brought upon a foreign judgment. The defendant filed his defence and within eight days thereafter filed a counterclaim in which he claimed damages for malicious prosecution. The motion is based upon two grounds, *viz.*: That the counterclaim ought not to have been filed without leave and that in any event the counterclaim cannot be conveniently tried with the claim.

Judgment

I have examined the cases cited by counsel and have reached the conclusion that the application must be dismissed.

The counterclaim was filed pursuant to Order XXIV., r. 2 and while my first impression was that the rule did not cover the case I am obliged to follow the decision in *Wood* v. *Goodwin* (1884), W.N. 17 which decision has stood without question for many years and is strengthened by the opinion of the learned author, G. S. Holmested, K.C., in his work on the Judicature Act, 5th Ed., at p. 609. The defendant, therefore, was within his rights in filing his counterclaim.

As to the question of convenience, I am satisfied upon consideration of all the facts in this case, that there will be no added inconvenience in trying the counterclaim at the same time as the claim. Costs will be to the defendant in any event.

Motion dismissed.

MACDONALD, J. (In Chambers)

1929 April 29.

REX v. HENDERSON

REX v. HENDERSON *ET AL.*

Criminal law—Excise Act—Infraction—Habeas corpus—Certiorari—Legality of arrest—Effect on jurisdiction—Informant—Authority to act—Extrinsic evidence as to jurisdiction—Severance of conviction—R.S.C. 1927, Cap. 60.

On an information for an offence against the Excise Act, the informant is described as a customs and excise officer on behalf of His Majesty the King.

Held, sufficient to shew that he belonged to the class of persons by whom such an information may be laid and gives the magistrate the right to proceed thereunder.

If a summary trial is proceeded with under the Excise Act by a stipendiary magistrate who had jurisdiction territorially and otherwise to try a case of this kind, it is immaterial whether the proceedings prior to the trial were legal or not.

On *habeas corpus* proceedings with *certiorari* in aid with respect to a conviction and imprisonment under the Excise Act, proof of the informant's authorization to lay the information is immaterial but the case of *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128, does not deprive an applicant from proving *dehors* the record that the magistrate has no jurisdiction to convict him.

The imposition of a fine less than that prescribed by the statute is no ground for holding the conviction invalid.

Where a conviction is valid with respect to the term of imprisonment imposed, but a provision therein as to costs is beyond the jurisdiction of the magistrate, the portion which provides for imprisonment nevertheless remains good.

Statement

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid for the discharge of the accused who were convicted of having in their possession without a licence under the Excise Act, a still suitable for the manufacture of spirits and without giving due notice thereof as required by said Act. Heard by MACDONALD, J. in Chambers at Vancouver on the 29th of April, 1929.

Stuart Henderson, for the accused.
Wood, K.C., for the Crown.

Judgment

MACDONALD, J.: The applicants herein seek, by *habeas corpus* proceedings, to obtain their discharge from imprisonment. While

there are separate applications, they were argued together and may be decided in like manner. The same relief was sought by these parties and refused by the late respected Chief Justice. Whether he subsequently consented to consider a second application is not material, as the Crown has agreed to my hearing the applications. I will endeavour to consider and determine them as if they had come before me in the first instance, and in any event not as savouring of an appeal.

There are a number of grounds taken by the applicants in support of their claim to be discharged—they were convicted of having, at Pocahontas Bay, in the County of Vancouver, unlawfully in their possession without a licence under the Excise Act, a still suitable for the manufacture of spirits, and without having given due notice thereof as required by the Excise Act. The punishments differed in some respects and I will refer to this later on. While it is admitted that the offence, of which these parties were so found guilty, is triable summarily, following the decision in *Rex* v. *Carmito* (1919), 27 B.C. 225, it is contended that there was a lack of jurisdiction in the magistrate to convict, and that his conviction and warrant of commitment, therefore, were invalid.

Judgment

In the first place, it is submitted that offences under the Excise Act can only be instituted and prosecuted by a distinct class of persons referred to in the Act, and that it was not stated on the face of the record, nor proved by evidence, that Norman DeGraves, the party who laid the informations in question, belonged to such class. On this ground it is contended that there was no jurisdiction in the convicting magistrate. The informations laid by the said DeGraves describe him as a customs and excise officer, and then the words are added "on behalf of His Majesty the King." It is quite apparent that it was intended by the wording of these informations to shew that DeGraves was not acting in a personal capacity, but for the Government and in the name of the King. This description seems to me quite sufficient, and it is not customary for a party, according to my view, in laying an information, to afford evidence therein as to his authority for such proceeding. There is even authority in the Criminal Code with respect to an indictable offence for anyone to make a complaint or lay an information based simply

MACDONALD, J. (In Chambers)

1929 April 29.

REX v. HENDERSON

Judgment

upon "reasonable or probable grounds." Here this provision is not invoked, and the informant swears positively to the commission of the offence. I consider the information valid on its face and thus giving the magistrate the right to proceed thereunder. It is, however, contended that proof should have been afforded as to DeGraves being authorized to act in the matter, otherwise the jurisdiction of the magistrate became ousted. In other words, that even if the magistrate were justified in proceeding with a trial, still, unless proof of the authority of the informant was adduced during the trial, then the magistrate would have no right to convict. In support of this contention, I am referred to the case of *Rex* v. *Ed* (1926), 47 Can. C.C. 196; also the case of *Rex* v. *Limerick; Ex parte Murphy* (1921), 69 D.L.R. 441; 37 Can. C.C. 344. These cases lend support to the contention which is made where it is a question as to sufficiency of the proof afforded to support the commission of the alleged offence as well as the authority of the party who laid the information. In this connection I particularly refer to the portion of the judgment in the former case, reading as follows:

"As stated by the magistrate it was not alleged in the information or shewn in the evidence before him that Goodwin was authorized by the Finance Department or any other department of the Government to lay the information or otherwise to enforce the provisions of the Income War Tax Act."

This case, however, was not, as here, an application to be discharged through *habeas corpus* proceedings, but was to obtain the opinion of the Court upon a case stated submitted by the police magistrate of the City of Moncton. This case was decided after *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128, now commonly known as the *Nat Bell* case, but such decision of the Appeal Division of the Supreme Court of New Brunswick does not, as might appear at first blush, conflict with the binding authority of the *Nat Bell* case. It is, however, inconsistent with the decisions of our Courts, particularly the case of *Rex* v. *Iaci* (1925), 35 B.C. 95; 44 Can. C.C. 275; 4 D.L.R. 474. If the effect of the judgment of *Rex* v. *Ed* were as contended for, then the decision in *Rex* v. *Iaci* would not have the effect that it appears to me it has, so far as these applications are concerned, with respect to the informations. In such latter case

reference was made to *Regina* v. *Hughes* (1879), 4 Q.B.D. 614. There,

"The prisoner was arrested on an illegal warrant, taken before justices and charged with an offence which they had no jurisdiction to hear. No objection was made by the prisoner, probably because, as suggested in the judgment of Hawkins, J. at p. 625, he was not aware of the illegality of his arrest. The trial proceeded and the conviction and other proceedings were afterwards brought up on *certiorari*. The Court consisted of ten judges, who held (Kelly, C.B. dissenting) that the justices had jurisdiction, notwithstanding the irregular manner in which the accused was brought before them. They held that an information and warrant were not conditions precedent to jurisdiction, but were procedure and that in a case such as that was, the right of the prisoner was to demand an adjournment giving time to prepare his defence."

Then in the case of *Rex* v. *Iaci*, Chief Justice MACDONALD adds, after referring to *Regina* v. *Hughes,* in the manner I have indicated, as follows:

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

Judgment

There are further references, all on the same lines. Here these three applicants made no objection to the trial proceeding summarily or as to the sufficiency of the information upon which they were being held under arrest; in fact, my recollection is that during the argument before me, counsel for the applicants admitted that his clients had been properly arrested, so I can aptly quote the concluding portion of the judgment of Chief Justice MACDONALD in the *Iaci* case as applicable to the situation here present. It is as follows:

"The conclusion I would draw, with great respect, is that the judges in *Reg.* v. *Hughes* decided the case on the broader ground, *viz.*, that the jurisdiction existed in the justices and that the warrant being directory and not a condition precedent, it was immaterial whether objection was taken or not. If a warrant were a condition precedent, I could understand why an objection to its absence would prevent the jurisdiction of the magistrate from coming into existence, but we have seen above that it is not a condition precedent, therefore, the objection in any view of it could not affect the jurisdiction of the magistrate."

Under these circumstances I have no hesitation in holding that the applicants were, so far as the question of information

MACDONALD, J. (In Chambers)

1929 April 29.

Rex v. Henderson

Judgment

is concerned, properly placed on trial before the magistrate and that he had a right to proceed with the trial. Then, if that be the case, did anything occur to prevent the magistrate from properly convicting these applicants? It is not suggested that anything he did himself would have such an effect; the only submission that can be made is that there was no proof afforded that the party who laid the information was authorized to do so under the Excise Act. This is an objection in addition to the one to which I have already referred, that he was not properly described as having authority to lay the information. If this necessity exists, then to determine the question as to such proof, it would necessitate a perusal of the depositions. This course I should not pursue upon these applications unless I were utilizing sections 1120 and 1124 of the Criminal Code. I am not so doing and it is immaterial in my opinion, in the light of the judgment in the *Nat Bell* case whether such proof is afforded or not. In this connection I refer to portions of the judgment in the *Nat Bell* case at p. 151:

"It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence on which to convict is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous."

Then again:

"A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not."

I have already referred to the arrest of these parties having been legal in the first instance, though such a reference is not really material on the point I am now considering. Then, holding as I do, that if a summary trial be proceeded with under the Excise Act by a stipendiary magistrate who had jurisdiction territorially and otherwise to try a case of this kind, it is now immaterial whether the proceedings prior to the trial were legal or not. In my opinion, these parties were properly placed on trial, without objection. In passing, I might say that I do not think the consent of the accused was necessary to enable the magistrate to try the cases.

There has been no appeal nor any case stated submitted for the opinion of the Court on any point. I feel satisfied that upon these applications, the sufficiency of the evidence supporting the conviction is not a subject for consideration. In so holding, I am following the course pursued repeatedly, based upon the effect of the *Nat Bell* case. However, the result of that case, while very far-reaching in some ways, does not deprive these applicants of the right to seek their discharge by proving a want of jurisdiction *dehors* the record. I so held in the case of *Rex* v. *Montemurro* (1924), 2 W.W.R. 250, and recently followed that decision in *Rex* v. *Chin Yow Hing* [(1929), *ante*, p. 214]. Then has evidence been supplied outside the record shewing a want of jurisdiction? It is contended that the material filed shews a trial and conviction by a stipendiary magistrate who should not have acted, and whose jurisdiction to try these cases was barred by the provisions of the Excise Act. In support of this contention, I am referred to section 129 of the Excise Act, reading as follows:

"If any prosecution in respect of an offence against any provision of this Act is brought before a judge of a County Court, or before a police or stipendiary magistrate, or before any two justices of the peace, no other justice of the peace shall sit or take part therein; Provided, however, that in any city or district in which there are more than one judge of a County Court, or more than one police or stipendiary magistrate, such prosecution may be tried before any one of such judges or police or stipendiary magistrates."

Judgment

Stress was laid upon the word "brought" in the beginning of the section; notwithstanding *dictum* to the contrary, it is contended that the bringing of such a prosecution, included the trial. I so understood the argument presented on behalf of the applicants. However, to my mind, there is no difficulty whatever in properly applying this legislation in a reasonable way. In this connection, I may add that legislation should be so construed, as, if possible, to give effect to the intendment of the legislative body. I think in the first place, that the word "brought" means "initiate" and so where a prosecution is initiated under the Act before certain tribunals, then there is a restriction placed upon the trial of such prosecution, and the only restriction is that "no other justice of the peace shall sit or take part therein." It is not necessary to discuss the reason for that restriction, but in order to remove any difficulty of

MACDONALD, J. (In Chambers)

1929

April 29.

REX v. HENDERSON

another magistrate trying a case where the information may be laid before a different magistrate, as distinguished from a justice of the peace, the balance of the section contains such provision, so I do not think this objection is tenable. There is no want of jurisdiction shewn outside the record.

Then do the convictions and warrants of commitment shew invalidity on their face? No fault is found with the terms of imprisonment imposed, but it is submitted that as to the costs they are improperly dealt with; and as to the fine of one of the parties that it is below the minimum prescribed by the Act; further that the imprisonment in default of payment of such fine has a like defect. There is an arguable objection in these respects, to both the convictions and the warrants of commitment. It is contended that I should find that there is such an invalidity in this conviction and in these warrants as would render them void and so entitle these applicants to their discharge from imprisonment. In view of later decisions, I am not disposed to give the weight to these objections to which they might be otherwise entitled.

Judgment

As to one of the applicants; his counsel is contending that though found guilty and not appealing from his conviction he should escape punishment because the magistrate took a lenient view of his conduct and imposed a lighter fine than the statute prescribed. I think if such a result followed it would be a travesty of justice.

Then can a conviction like an order be severable; and can the fine be separated from the imprisonment? It would appear to be a reasonable course to pursue as the trial does not, up to the conclusion of the evidence, relate to the punishment. The question for adjudication is the guilt or otherwise of an accused person. The punishment to be imposed stands by itself. Numerous authorities have been cited in support of the contention that, as far as severance is concerned, there is a distinction between a conviction and the order. There is no doubt that there are numerous authorities which would support such contention, but I propose to follow the later ones and not those of long ago. In *Regina* v. *Dunning* (1887), 14 Ont. 52, Armour, J. discussed this question, with a view to determining whether a provision in the conviction which was beyond the jurisdiction of the convict-

ing magistrate, with respect to imprisonment in default of distress, would invalidate the conviction altogether, and made reference to Paley on Convictions and the case of *Rex* v. *Catherall* (1731), 2 Str. 900, and *Rex* v. *Salomons* (1786), 1 Term Rep. 2489; and then adds (p. 58):

"In the conviction in question there is a perfectly good adjudication of guilt, and a perfectly good adjudication of punishment, and a perfectly good award for enforcing this punishment, but a bad award of imprisonment for enforcing the punishment—the payment of the penalty in default of distress. I see no good reason why this award of imprisonment, which is merely subsidiary to enforcing payment of the penalty, and is quite severable from the rest of the conviction, should not be quashed without otherwise interfering with the conviction. It would be a reproach to the law if it could not be, especially in view of the legislation that has taken place in support of convictions. See 33 Vic., ch. 27, sec. 2 (D); 49 Vic., ch. 49 (D). It is clear that an order may be good in part and bad for the residue, and that this bad part may be quashed without at all interfering with the good part."

And then reference is made to the case of *Regina* v. *Robinson* (1851), 17 Q.B. 466:

"And there is no reason worthy of the name to be found in the books why there should be any distinction, in this respect, between an order and a conviction."

Judgment

This judgment was referred to in *Rex* v. *Cox* (1929), [41 B.C. 9]; 1 W.W.R. 542. In that case, there was an appeal from an order I made, refusing a writ of *certiorari* and sustaining the conviction, but setting aside that part of it relating to costs. MARTIN, J.A., at p. 545, in discussing *Regina* v. *Dunning, supra,* approves of the judgment of Armour, J., to which I have referred. The learned judge then discussed the distinction between a conviction and order, and referred to Paley on Convictions. He pointed out that the author of that commenable work had overlooked the distinction, to which he makes reference with respect to the *Catherall* case. A number of cases were referred to, which were not cited in Paley on Convictions, tending to shew lack of distinction between a conviction and order, so far as the question of severance is concerned. So even if there may be some strength in the contention that portions of these convictions are beyond the jurisdiction of the magistrate, still that portion which provides for imprisonment remains good. Then if this be the case, these applicants are properly being held under such provision of the conviction, and it is premature

MACDONALD, J. (In Chambers)

1929 April 29.

REX v. HENDERSON

Judgment

for them to complain that some portions of such conviction or warrants of commitment may be invalid. These applicants are in the same position that the prisoner was placed, in the case of *Rex* v. *Carlisle* (1903), 7 Can. C.C. 470. A portion of the head-note covers the point being discussed, and reads as follows:

"A commitment by a tribunal of inferior jurisdiction may be severable, and where imprisonment is ordered for a term and a further term in default of payment of a fine and costs, the prisoner is not entitled to his release on *habeas corpus* during the first term because of the costs not being ascertained in the commitment, but leave will be reserved to him to re-apply at the expiration of the first term."

Moss, C.J., in giving the judgment of the majority of the Court, at pp. 480-1 said as follows:

"The prisoner is in custody under an order for his imprisonment for one year. In addition to this he is ordered to pay a penalty of $400 and costs within thirty days, and in default to be imprisoned for three months unless sooner paid. But in an order such as this is, the part relating to payment of the costs is readily separable from the other part, and the order stands good as regards the imprisonment for one year. As remarked by Street, J., in *Rex* v. *Foster* (1903), 7 Can. C.C. 46; 5 O.L.R. 624, 628, there is no reason why the sentence of imprisonment should not stand good, even if the adjudication of the fine were objectionable. At the expiration of that period, the question of the prisoner's further detention will arise, and it may then prove difficult for the Crown to shew any warrant for it."

My remarks as to the objections taken to the conviction of one of the applicants and the warrant of commitment thereunder do not equally apply to all of them, but there is a clause to which objection might be taken in the three warrants of commitment as to the question of the costs. However, applying *Regina* v *Dunning, supra*, as approved of, in *Rex* v. *Cox, supra*, as to severance of punishment even in a conviction, and referring to the case just cited of *Rex* v. *Carlisle*, in my opinion the applicants cannot succeed in their applications.

I think it not out of place for me to state that in any event, if I had not so decided, and had considered the defects to which I have alluded were fatal, in so far as affecting the validity of the conviction and warrants of commitment, I would have asked counsel to present argument, as to whether section 1120 of the Code should not be applied. I would have requested arguments as to its applicability either after commitment, according to a number of Canadian decisions, or to the same effect, in accordance with the views of Meredith, J.A., the dissenting judge, in

Rex v. *Frejd* (1910), 18 Can. C.C. 110 at p. 120. The learned judge, so dissenting, held that the wording of section 1120 of the Code was such as to render it inapplicable after commitment or to authorize the course being pursued by the majority of the Court. In giving his judgment, however, in effect, the same result followed, as if the section in question had been so utilized. He said:

> "It is, in no sense, the purpose of any writ of *habeas corpus* to thwart the due administration of justice, and so, in many cases, even under the common law, one who is unduly restrained of his liberty, in one respect, and entitled to his discharge from such detention, may nevertheless be further detained, and dealt with, so that justice may be done regarding him."

Judgment

This is to the same effect as the note in Crankshaw at p. 1205, dealing with section 1120, reading as follows:

> "The object of this section is to permit the correction of errors in procedure in order to prevent a denial of justice."

However, I am not utilizing that section, but decide these applications along the lines indicated.

The applications are refused.

Applications refused.

MCDONALD, J. (In Chambers)

1929

May 1.

McKERCHER v. VANCOUVER-IOWA SHINGLE CO.

McKERCHER v. VANCOUVER-IOWA SHINGLE COMPANY LTD. *ET AL.*

Practice — Patents—Action for infringement — Discovery — Inspection of documents—Correspondence between plaintiff and his patent attorney—Privilege.

In an action for infringement of letters patent held by the plaintiff in Canada the defendant moved for an order for inspection of certain correspondence which passed between the plaintiff and his patent attorney in the United States in respect of applications of the plaintiff pending before the United States Patent Office.

Held, that the general rule that patent agents are not considered as professional legal advisers and communications with them are not privileged, does not apply, and the plaintiff is not required to disclose details relating to applications not before the Court, that are pending at Washington.

Statement

APPLICATION for an order for inspection of certain correspondence between the plaintiff and his patent attorney in the United States with respect to certain applications pending at Washington. Heard by McDONALD, J. in Chambers at Vancouver on the 30th of April, 1929.

A. C. DesBrisay, for the application.
Pattullo, K.C., contra.

1st May, 1929.

Judgment

McDONALD, J.: In this action brought in respect of the alleged infringement of certain letters patent held by the plaintiff in the Dominion of Canada the defendant moves for an order for inspection of certain correspondence which passed between the plaintiff and his patent attorney. The correspondence is disclosed in the plaintiff's affidavit on discovery of documents but the plaintiff claims that the documents are privileged. I have had great difficulty in arriving at a decision as to the order which ought to be made. Generally speaking, the law seems to be clear, as stated in Terrell on Patents, 7th Ed., 384, that patent agents when performing their ordinary work, such as preparing specifications, are not considered as professional legal advisers and communications with them are not privileged.

This statement of the law is based upon a decision of Chitty, J. in *Moseley* v. *The Victoria Rubber Company* (1886), 55 L.T. 482. In that case the plaintiff was held bound to disclose the specifications and patterns which had been prepared by his patent agent in respect of his application for the very patent in respect of which he was claiming there had been an infringement in England. In the present case the defendants seek inspection of correspondence which passed between the plaintiff and his patent attorney in the United States in respect of certain applications of the plaintiff which are now pending before the United States Patent Office. I accept the statement of counsel that these patents have not been granted, that certain amendments have been required and that negotiations are in process for the satisfaction of such requirements. In this respect the case differs entirely from the *Moseley* case. If the correspondence now in question were in respect of the plaintiff's application for the patents in respect of which he now claims an infringement the order would go as a matter of course, but it seems to me the decision does not cover this case and that it might lead to a very grave injustice if the plaintiff were required to disclose the details relating to his application at Washington while such application is pending. Admittedly, even if this correspondence were produced the defendants could not use it in evidence at the trial. The defendants claimed, however, that production and inspection of these documents would be of great value by way of giving them a clue which might be followed up with a view to obtaining evidence to prove their allegation of prior publication in the United States. Discovery of this nature I think savours too much of a fishing expedition and ought not to be allowed.

Judgment

As the matter admits of considerable doubt costs will be in the cause.

Application dismissed.

MORRISON, C.J.S.C. (In Chambers)

1929

May 6.

REX v. WONG SACK JOE

REX v. WONG SACK JOE.

Criminal law—Charge of having opium in his possession—Convicted of minor offence—Jurisdiction—Mandamus—R.S.C. 1927, Cap. 144, Secs. 4 (d) and 10.

An accused was charged with having opium in his possession contrary to section 4 (*d*) of The Opium and Narcotic Drug Act. On the trial before a County Court judge under Part XVIII., of the Criminal Code the offence was proved, but he was convicted of the minor offence of smoking opium under section 10 of said Act. On an application for a prerogative writ of *mandamus* directed to the County Court judge commanding him to proceed with and conclude the trial of the accused on the charge laid:—

Held, that if a charge under section 4 (*d*) of said Act be proved the Court should convict under that section and not reduce or substitute an offence under other sections of the Act. The conviction as entered is a nullity. *Mandamus* should issue to compel completion of the unfinished trial with an order for the rearrest of the accused.

APPLICATION for a writ of *mandamus,* heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 6th of May, 1929. Wong Sack Joe was committed for trial for having opium in his possession, and he elected for speedy trial before BARKER, Co. J. at Nanaimo, under Part XVIII. of the Criminal Code.

Statement

The officers of the Royal Canadian Mounted Police had raided an opium-smoking joint in the City of Cumberland, and found opium smoking in progress. While the officers were in charge of the joint, other officers stationed outside observed the accused peering into the door of the building, and on their approach he attempted to escape but was overtaken and on his person was found a jar of opium containing the equivalent of several hundred smokes. It was stated in evidence for the defence that one of the opium-pipes found in the joint belonged to the accused. On the trial, counsel for the accused pressed for a reduction of the charge from that of having opium in his possession under section 4, subsection (*d*) of The Opium and Narcotic Drug Act to one of smoking under section 11 of said Act. The Crown declined to accede to this, and insisted upon the trial proceeding on the charge of having opium in possession as laid.

At the conclusion of the trial counsel for the accused again renewed his plea for a reduction of the charge and the learned judge found the accused guilty of the offence of "having in his possession opium as part of his appliance for use in smoking opium contrary to section 10 of The Opium and Narcotic Drug Act," and fined the accused $50. The accused paid the fine and was released.

Argument

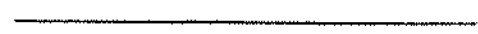
Jackson, K.C., for the application: A prerogative writ of *mandamus* should issue directing the County Court judge to proceed with and conclude the trial. The learned judge found that the accused had opium in his possession which was tantamount to finding him guilty of the charge laid. He had no jurisdiction to hear and determine a charge under section 10 of the Act and the conviction as entered is a nullity: see *Rex* v. *Beauvais* (1904), 7 Can. C.C. 494; *Rex* v. *Louie Yee* (1929), 1 W.W.R. 882.

Nicholson, contra.

Judgment

MORRISON, C.J.S.C.: The conviction as entered is a nullity, and therefore the trial of the accused had not been completed. There will be an order for the issue of a writ of *mandamus* to the County judge requiring him to proceed with the trial of the accused, and further that the accused be forthwith apprehended and held in custody to appear on the said trial and submit to the jurisdiction of the judge in the premises. This order will be a sufficient warrant and authority to all police officers for the arrest of the accused and his detention in gaol pending conclusion of the trial.

Application granted.



FISHER, J.

1929

May 9.

BASANT SINGH v. KEHAR SINGH GILL

BASANT SINGH AND JAGAT SINGH v. KEHAR SINGH GILL.

Sale of land—Written agreement as to—Proviso for mortgage for balance of purchase price—Mortgage must be registrable—Specific performance.

One of the terms of a written agreement for the sale of an interest in a farm was that the purchaser should give the vendor a mortgage for $2,000 upon the property for the balance of the purchase price. The vendor transferred the property to the purchaser but the purchaser refused to deliver a registrable mortgage to the vendor. In an action for specific performance:—

Held, that the word "mortgage" in the agreement means a registrable mortgage that would give the vendor a first charge upon the property free from encumbrances.

Statement

ACTION for specific performance of an agreement for the sale of land. Tried by FISHER, J. at Vancouver on the 2nd of May, 1929.

A. B. Macdonald, K.C., and *R. M. Macdonald*, for plaintiffs.
J. Edward Bird, for defendant.

9th May, 1929.

Judgment

FISHER, J.: In this matter I find that by agreement in writing, dated the 25th of October, 1928, the plaintiffs agreed to sell and the defendant agreed to purchase the plaintiffs' interest in the Cloverdale farm, being the property described in the statement of claim, for $2,000 upon the terms set out in said agreement one of them being that the defendant would give a mortgage of $2,000 (with 4 per cent. interest) upon the said property.

I also find that the plaintiffs transferred to the defendant all their interest in the said property but the defendant has neglected or refused to deliver to the plaintiffs a registrable mortgage and instead thereof tendered a document executed by defendant covering the said property and containing, *inter alia*, the words: "The mortgagees covenant with the mortgagor that they will not register this mortgage nor make any application therefor," which document was refused by the plaintiffs. At

the time said agreement was made and also when said document was tendered by the defendant it could not be registered as the certificate of title covering said property had been deposited by the defendant with another party, Miss M. J. Bird, for money owed her by defendant.

After consideration of the evidence and section 34 of the Land Registry Act my opinion is that the word "mortgage" used in said agreement means a registrable mortgage that would give the plaintiffs a first charge upon the said property free and clear and I so find. The defendant, therefore, in my opinion, has neglected or refused to deliver to the plaintiffs such a mortgage as they are entitled to. There will, therefore, be judgment declaring that the said agreement is a binding contract between the plaintiffs and defendant and that the plaintiffs are entitled to have it specifically performed by the delivery to them by the defendant of a duly-executed mortgage for $2,000 and interest as aforesaid covering said property and capable of being registered as a first charge and in default of his so doing there will be judgment for plaintiffs against the defendant for $2,000 and interest.

Judgment

Costs to plaintiffs.

Judgment for plaintiffs.

MURPHY, J.

1929

May 11.

CANADA PERMANENT CORPORATION v. CHRISTENSEN

CANADA PERMANENT CORPORATION v. CHRISTENSEN *ET AL.*

Mortgage—Foreclosure—Defence of adverse possession raised—Consent judgment in previous action between the same parties on same issues—Res judicata.

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 matters which might have been brought forward as part of the subject in contest but which were not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case.

The plaintiff and defendant P. had been parties to a prior action in which the main issue was the ownership of the land covered by the mortgage and in which a consent judgment was given dismissing the action as against the present plaintiff (who was a defendant in that action) and declaring that the title to the land was subject to the mortgage now sought to be foreclosed, and vesting the land in P. subject to said mortgage. P. now raises the defence of adverse possession, a point which had not been raised in the former action.

Held, that the defence is not open to P. on the principle of *res judicata* or at least on the principle that a judgment is conclusive proof between the parties of the matters actually decided, and a consent judgment should be regarded as a judgment after a hearing on the merits.

Statement

ACTION for foreclosure of a mortgage. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 8th of May, 1929.

Alfred Bull, and *Ray,* for plaintiff.
I. A. Shaw, for defendants.

11th May, 1929.

Judgment

MURPHY, J.: Action for foreclosure. The execution of the mortgage and default thereunder are proven and I think *prima facie* proof was advanced that the money secured was actually paid over. At any rate this point is covered by what is said hereafter. Various defences are raised all of which are, I consider, met by the plea of *res judicata* or, if this view is incorrect, by the principle that a judgment when the parties and the issues

are the same is conclusive evidence regarding said issues. There has been a previous action between the same parties now before the Court the only differences being that Mrs. Parkin in the first case was plaintiff whilst now she is one of the defendants, whilst the present plaintiff was then a defendant. The first case is hereinafter referred to as the *Parkin* case.

I think the issue in the case at Bar was one of the issues decided in the *Parkin* case. The main issue in the *Parkin* case was the ownership of the land covered by the mortgage, foreclosure of which is now being sought. This issue necessarily involved consideration of the title as shewn by one of the reliefs prayed for in the *Parkin* case, *viz.*:

"A declaration that the plaintiff (Parkin) is entitled to the fee simple, possession and enjoyment of the said lands and premises and to be entitled to be registered as the owner thereof free from incumbrances."

The title being involved the mortgage given by Christensen to plaintiff became an issue that had to be decided as part of the main issue. The validity of this mortgage was in fact attacked in the statement of claim filed in the *Parkin* case. The defence filed in said case by the present plaintiff is practically identical with the reply filed on its behalf in the present action. But it is said the attack on the mortgage in the *Parkin* case was confined to allegations of fraud and forgery and no attack was then made based on the defences now raised and particularly on the defence of adverse possession. But there is clear authority that this position is untenable—*Hoystead* v. *Commissioner of Taxation* (1926), A.C. 155 at p. 170:

Judgment

"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."

MURPHY, J.

1929

May 11.

CANADA PERMANENT CORPORATION v. CHRISTENSEN

Judgment

If adverse possession had been alleged and proved in the *Parkin* case the Court could not have dismissed that action against the present plaintiff.

I fail to see any special circumstances that would take the case at Bar out of the operation of this rule. It is urged that the judgment in the *Parkin* case being a consent judgment may be such a circumstance. But again there is clear authority that a judgment by consent is to be regarded as a judgment after a hearing on the merits—*The Hardy Lumber Company* v. *The Pickerel River Improvement Company* (1898), 29 S.C.R. 211; *In re South American and Mexican Co.; Ex parte Bank of England* (1894), 63 L.J., Ch. 803.

It is also urged that in the *Parkin* case the present defendant, Mrs. Parkin, did not understand the effect of what her counsel did when in her presence in open Court at the hearing he consented to dismissal of that case as against the present plaintiff. To this there are, I think, two answers, one in fact and one in law. In fact as Mrs. Parkin and her husband admit, the question of what was to be done in the *Parkin* case, with regard to the present plaintiff, was left by Mrs. Parkin in the hands of her then counsel. He was given authority without qualification to act as his judgment dictated. But as a matter of law I do not think this question is open to consideration on the record in the present action. There is a judgment in the *Parkin* case given by a Court of competent jurisdiction which stands unchallenged either by appeal or by any allegations against its validity in the present proceedings. I am, therefore, confronted with an unimpeached judgment. So long as that is the case I must give it full effect without enquiry. But if I am wrong in the view, that the plea of *res judicata* disposes of the defences raised, then I think they cannot be considered because of the principle that a judgment is conclusive proof between parties of the matters actually decided. *Rex* v. *Duchess of Kingston* (1776), 20 St. Tri. 355, 588.

The judgment in the *Parkin* case not only embodies a dismissal against the present plaintiff but it declares the state of the title to the land covered in question herein. It contains a specific declaration that plaintiff's title is subject to the mort-

gage now sought to be foreclosed and vests the property in defendant, Mrs. Parkin, subject to said mortgage. The term "mortgage" has a clear meaning in law and it is beyond controversy as daily evidenced in the Courts that one of the legal rights appertaining to a mortgage is that it can be foreclosed in case of default. If now I were to give effect to the defence of adverse possession, or to any other defence raised herein, I would be deciding that what a Court has already decided to be a mortgage in litigation between the same parties in reference to the identical document is not a mortgage at all since it cannot be foreclosed. Indeed it would be a mere useless scrap of paper and not a pledge of property that the money secured thereby would be repaid under penalty of its loss if such payment was not made.

Judgment

The usual order *nisi* is granted and the receiver, whose name was suggested in argument, is appointed on the usual undertaking being given by plaintiff.

Order nisi granted.

MORRISON, C.J.S.C.

1929

May 16.

HARRIS v. LINDEBORG

HARRIS v. LINDEBORG *ET AL.*

Mines and mining—Group of claims—Oral agreement between owner and two miners—Two miners to do assessment work and manage claims generally—Consideration, two-thirds of claims—Claims relocated and Crown granted and eventually sold—Action by original owner for his share of purchase price under original agreement—Statute of Frauds—Laches.

H. acquired three mineral claims in the Stewart mining division known as the "Jumbo Group" in 1904 and kept them in good standing until the 9th of August, 1909. In May, 1908, he went to Queen Charlotte Island to work mineral claims he owned there, where he met two old friends S. and P. with whom he entered into a verbal agreement whereby S. and P. were to do the assessment work and record same on the "Jumbo Group" and manage same including "handling," selling, optioning and Crown granting for which they were to receive two-thirds of all money and profits derived from the claims, H. to receive a one-third share of all moneys received from said claims and all other claims grouped therewith. S. and P. proceeded to the "ground" in question and on the way met the two L. brothers with whom they agreed to share their interest in the claims. On reaching the claims they decided to let H.'s locations expire and the ground was relocated including adjoining ground. Ten claims were located and called the "Big Missouri" group. The valuable portion of the group was within the original locations. An option was given on the group in December, 1909, and from the money received $100 was sent to H. and in 1910 other small sums were sent to him. Another option was given on the claims in 1914, of which H. was not notified and in 1916 the claims were Crown granted. In 1917 the claims were again sold under an option upon which $12,000 was paid but the option ran out and nothing further was done until 1925, when the group was sold for $275,000. In the meantime S. and P. and one of the L. brothers had died and the final sale was made by the remaining L. brother and the representatives of the three deceased partners. H. then brought action for $100,000 being a one-third share of moneys received from the sale of the "Big Missouri" group.

Held, that as the agreement as pleaded was entered into between H., S. and P. and the L. brothers acquired their interest on the footing of the agreement and identified themselves with it, the plaintiff is therefore entitled to judgment for the amount claimed. Having regard to the evidence and writings supplementing the oral agreement the Statute of Frauds does not apply nor does the defence of laches avail.

Statement

ACTION to recover a one-third share of all moneys received by the defendants as trustees for the plaintiff from all options

and sales of the "Big Missouri" group of mineral claims in the Stewart Mining Division. The facts are set out fully in the head-note and reasons for judgment. Tried by MORRISON, C.J.S.C. at Victoria on the 13th and 14th of May, 1929.

Maclean, K.C., and *Sinnott*, for plaintiff.
R. M. Macdonald, and *Bullock-Webster*, for defendants.

16th May, 1929.

Judgment

MORRISON, C.J.S.C.: The plaintiff was what may appropriately be termed a real old pioneer in what has since become one of the most well-known mining areas of America, *viz.*, the Portland Canal country.

On or about the 25th of July, 1904, he being then, and at all times material to the narration, a free miner, discovered, located and recorded mining claims situated on the Salmon River in the Stewart Mining Division of the Province of British Columbia about twelve miles from the head of Portland Canal, known and described as the "Jumbo Group," consisting of three mineral claims. He kept these claims in good standing by complying with the requirements of the Mineral Act until the 9th of August, 1909. He was not, in a literal sense, an educated man. In his itinerary, after locating, staking and working in one place he would move on. So that in May, 1908, he was in Queen Charlotte Island which lies a considerable distance out in the Pacific Ocean and in the offing from the entrance to Portland Canal, developing some claims there. There happened along at that time two young prospectors, Hiram Stevenson and James Proudfoot, who were more or less at a loose end. They were all known to each other and were friends. Queen Charlotte Island was then more remote in the terms of transportation facilities than even today—sparsely settled except for the Indian population. In their intercourse there the plaintiff learned that they had no "stake" of their own and disclosing the fact that he had certain claims in the Portland Canal country entered into an oral agreement with them whereby the said Proudfoot and Stevenson were to do whatever work was necessary and keep up all assessments and record the same on all the ground within the boundary of said group and to manage, group, and look after

MORRISON, C.J.S.C.

1929

May 16.

HARRIS v. LINDEBORG

Judgment

said claims as well as the "handling," selling, optioning and Crown granting for which they and their associates, if any, were to receive two-thirds of all the money and profits derived therefrom, and the plaintiff was to receive a one-third share of all moneys received in respect to the said claims and all other claims grouped therewith by selling or otherwise.

Pursuant to and under said agreement Proudfoot and Stevenson proceeded to the "ground" in question. They met after reaching the mainland two men Andrew Lindeborg and Daniel Lindeborg and after disclosing their agreement with the plaintiff, all four entered into the possession of the said group of Jumbo mineral claims. Whilst there and with the knowledge acquired on the ground they considered it as a matter of policy advisable to allow the Harris's stakings to lapse at midnight on the 8th of August, 1909, and on the 9th of August, 1909, had the said Stevenson and the said Daniel Lindeborg relocate the said Jumbo group of mining ground and claims as the "Big Missouri" and "Kansas" mining claims and recorded them and the requisite supplemental ground on the 10th of August, 1909, in the Mining Recorder's office at Stewart, B.C., in the names of said Stevenson and Daniel Lindeborg, the above-named defendants, which said group of mining claims was thereafter known under the name of the "Big Missouri" group. The name "Missouri" was adopted because the plaintiff was a native of that State.

On or before the 9th of August, 1909, Proudfoot, Stevenson, Daniel Lindeborg, and Andrew Lindeborg, entered into an agreement with each other to group and consolidate with the said Kansas and Big Missouri mineral claims certain other adjoining mineral claims owned by them and known as Tip Top, Rambler, Buena Vista, Province, Jain, Golden Crown, Winner and Dauntless and called the same the "Big Missouri Group" for the purpose of selling the same in block in accordance with the original agreement.

The principal value of the group of mineral claims designated as the Big Missouri group consisted in the values and showings of minerals and precious metals upon the grounds and within the boundaries of "Jumbo" group of claims; and on or about

the 8th of December, 1909, the defendant Daniel Lindeborg and Proudfoot, Stevenson and Andrew Lindeborg, gave an option on the Big Missouri group of claims to one John Edgcomb which option was subsequently assigned by John Edgcomb to one Donald D. Mann and in respect of which certain sums of money, the amount of which the plaintiff does not know, were received by the defendant Daniel Lindeborg and Proudfoot, Stevenson and Andrew Lindeborg, out of which they paid to the plaintiff the sum of $100. The plaintiff during all this time was on Queen Charlotte Island but kept up communication with his partners in Portland Canal as often as the lack of facilities for easy communication admitted. With the exception of the Lindeborgs, who were natives of Sweden, they were illiterate men.

On or about the 12th of September, 1910, and after that date, the defendants paid to the plaintiff further various small sums of moneys due to the plaintiff pursuant to the said agreement made in June, 1908.

Sometime after this Proudfoot died in the Province of British Columbia and the defendant Duncan C. Barbrick was granted administration of his estate.

Judgment

On or about 10th August, 1914, the defendants Daniel Lindeborg, Duncan C. Barbrick, as administrator, Andrew Lindeborg and Stevenson granted an option of the Big Missouri mineral claims to E. C. Howard, B. C. Thane and L. P. Shackleford without the knowledge of the plaintiff.

On or about the 25th of October, 1916, a Crown grant of the Big Missouri mineral claims being lot 3217, Cassiar District, was issued to the defendants Daniel Lindeborg and Stevenson and on or about the same date Crown grants were issued to the defendants in respect of the other mineral claims referred to herein and known as Tip Top, Rambler, Buena Vista, Province, Jain, Golden Crown, Winner and Dauntless.

On or about the 3rd of August, 1917, the defendant Daniel Lindeborg executed an option to one M. F. Hendrickson of the Big Missouri group of claims at a purchase price of $165,000 and on or about the 25th of October, 1918, M. F. Hendrickson assigned the option to Sir Donald Mann and in respect of the

MORRISON, C.J.S.C.

1929

May 16.

HARRIS v. LINDEBORG

said option the said Daniel Lindeborg received the sum of $12,000 without the knowledge of and without having paid any part thereof to the plaintiff. In the meantime war was declared and Stevenson having enlisted was killed in action in France and his sister, the defendant Laura McEwan, was appointed the administratrix of his estate. Andrew Lindeborg also died and administration of his estate was granted to his brother the defendant Daniel Lindeborg. During the period of the war conditions became abnormal and mining activities were at a low ebb. The plaintiff retained his confidence in Stevenson and Proudfoot during these times and, as could be expected of *bona fide* honourable prospectors, was confident that they neither had done nor would have done anything prejudicial to him or his interests. The agreement upon which the plaintiff relied and which the Lindeborgs had adopted, and with which they identified themselves, had not been reduced in the first instance to writing.

Judgment

In or about the month of July, 1925, the defendant Daniel Lindeborg in his own behalf and as administrator for his brother Andrew Lindeborg and the defendant Duncan C. Barbrick as administrator of the estate of James Proudfoot and Laura McEwan as administratrix of the estate of Hiram Stevenson executed an option on the Big Missouri mineral claims to the Standard Mines Company, a corporation organized under the laws of the State of Washington, and having its principal office at the City of Tacoma in the State of Washington, for the sum of $275,000, which option was assigned by the Standard Mines Company to the Big Missouri Company, a corporation organized under the laws of the State of Washington and having its principal office at Tacoma. This option was further assigned by the Big Missouri Mining Company to the Buená Vista Mining Company, Limited, a company incorporated under the laws of the Province of British Columbia and having its registered office at the City of Vancouver, and the sum of $275,000 was paid thereon to the defendants.

It is alleged that pursuant to these options and assignments the defendants have received various sums of money amounting to some $300,000, and that the plaintiff only received from the

defendants to date a very small portion. That the defendants although asked by the plaintiff to give an accounting and to pay over to the plaintiff the undivided one-third share of the said moneys received by the defendants in respect of the Big Missouri group of mineral claims pursuant to the said agreement made in June, 1908, have refused to do so.

The plaintiff now claims as against the defendants:

1. Judgment for the sum of $100,000 being one-third share of moneys received from the sale of the Big Missouri claims; 2. An account of all sums of money received by the defendants and paid to the defendants as trustees for the plaintiff from all options and sales of said Big Missouri group of claims; 3. Payment of the amount found due to the plaintiff pursuant to said agreement.

Judgment

Mr. Harris, the plaintiff, is now an old man. He is essentially a man of the remote woods, a typical old pioneer prospector with very little, if any, idea of business. At the time of making his agreement with his two friends, Stevenson and Proudfoot they had no writing material with which to reduce the terms to writing. Had they had such I doubt if they could have in writing expressed what they meant intelligibly. Even the subsequent agreements between the Lindeborgs and Stevenson and Proudfoot were not in writing. It simply was not done at that period in those remote regions. The incidents of these transactions on the part of Harris, Stevenson and Proudfoot are an exemplification of the simplicity of the true pioneer prospector who in consequence was on occasion victimized by designing, dishonest partners. The plaintiff was supported at the trial by a number of independent miners and particularly by a Mr. Tonkin who was on the ground and had paid a deposit on one of the options. His evidence goes a long way to support the existence of the agreement in question and who, had he been asked, might have thrown more light on the activities of the defendant Lindeborg. It is a matter of comment that this defendant although in Court and hearing the evidence did not vouchsafe either his denial or his explanation of the evidence for the plaintiff. I was not impressed favourably by the witness Hoveland, a fellow countryman of the Lindeborgs, the only witness called on behalf of the defendants.

MORRISON, C.J.S.C.

1929

May 16.

HARRIS v. LINDEBORG

Judgment

I find that the agreement as pleaded was entered into between the plaintiff and Stevenson and Proudfoot; that the Lindeborgs were brought into the agreement or that they intruded themselves on the footing of the agreement and identified themselves with it and were fully aware all along of such agreement; that Daniel Lindeborg took advantage of what he doubtless deemed a safe situation with the intention of depriving the plaintiff of his just rights. I take it from the submission on behalf of the defendants that they rely mainly on the Statute of Frauds. Having regard to the evidence and the writings supplementing the oral agreement I do not think the Statute of Frauds applies. The only effect of the Statute of Frauds is to prevent the active prosecution of claims in the Law Courts which are not supported by written evidence at the trial—Bowen, L.J. in *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266 at p. 296. I think there was such written evidence. Nor will the defence of laches avail—*Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196.

There will be judgment for the plaintiff in terms of the statement of claim.

Judgment for plaintiff.

IN RE ESTATE OF HUGH FERGUSON, DECEASED.

MACDONALD, J. (In Chambers)

1929

May 21.

IN RE ESTATE OF HUGH FERGUSON, DECEASED

Testator's Family Maintenance Act—Will—Husband and wife—Application for relief by widow—Duty of Court—R.S.B.C. 1924, Cap. 256.

On an application by a widow for relief under the Testator's Family Maintenance Act, it is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband owes towards his wife, and if it be found that the testator has been guilty of a breach of such moral duty, it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it.

A husband conveyed his house to his wife shortly before he died and by will left her all his household effects and directed his trustees to invest $75,000 and pay her the net income therefrom. She also received $2,000 from insurance upon her husband's life. She had one son (step-son of deceased) attending a university. On an application for relief under the above mentioned Act it was held that although the estate was large enough to make a further allowance to the petitioner, in the circumstances adequate provision was made by the testator for the proper maintenance and support of his wife.

Allardice v. *Allardice* (1911), A.C. 730, applied.

Statement

APPLICATION by a widow for relief under the Testator's Family Maintenance Act. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Victoria on the 7th of May, 1929.

Mayers, K.C., for the application.
H. J. Davis, for the estate.

21st May, 1929.

Judgment

MACDONALD, J.: Adelia Ferguson, widow of the late Hugh Ferguson, seeks under the provisions of the Testator's Family Maintenance Act, Cap. 256, R.S.B.C. 1924, to modify the terms of his will and obtain an order for a further amount to be paid to her, out of his estate. The will bears date the 23rd of June, 1928, and the testator died on the 17th of October, 1928.

This statute is an invasion of the right of an owner of property to dispose of it, as he sees fit. It is, however, in com-

MACDONALD, J. (In Chambers)

1929 May 21.

IN RE ESTATE OF HUGH FERGUSON, DECEASED

Judgment

mon with other enactments, remedial in its nature and should receive "such a fair, large and liberal construction and interpretation, as will best insure the attainment of the objects of the Act . . . according to its true intent, meaning and spirit." The section of the Act, which gives authority to the Court, to make further provision for maintenance, out of the estate of a testator, is as follows:

"3. Notwithstanding the provisions of any law or statute to the contrary, if any person (hereinafter called the 'testator') dies leaving a will and without making therein, in the opinion of the judge before whom the application is made, adequate provision for the proper maintenance and support of the testator's wife, husband or children, the Court may, in its discretion, on the application by or on behalf of the wife, or of the husband, or of a child or children, order that such provision as the Court thinks adequate, just, and equitable in the circumstances shall be made out of the estate of the testator for the wife, husband, or children."

I have then to form an "opinion" as to whether the testator has, "under the circumstances" made such adequate provision. Is the petitioner—giving a "liberal" construction to the legislation—entitled to relief?

This Act, with its intention, was discussed somewhat at length, in the case of *In re Livingston, Deceased* (1922), 31 B.C. 468. Reference was there made to the fact that our statute is similar to one, which has been in force for a considerable period in New Zealand, and the leading case in that Dominion, of *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959, was referred to; and particularly as to some instructive principles which should be adopted by the Court in applying such legislation. It was also pointed out in that case that the intention of the Act was not to interfere with the will of the testator to the extent of apportioning his estate but that

"the first inquiry in every case must be, what is the need of maintenance and support, and the second, what property has the testator left?"

These essentials were amplified by Cooper, J., at p. 974, mentioning his judgment in *Plimmer* v. *Plimmer,* 9 Gaz. L.R. 10, and citing a portion as follows:

"The principle upon which the Court should exercise its discretion in the case of a widow claiming against the estate of her husband under the corresponding provisions in the Testator's Family Maintenance Act, 1906, I said: 'What is an adequate provision for the wife of a testator is a question which depends—1, upon the station in life of the parties; 2, upon the age, health, and general circumstance of the wife; 3, upon the means possessed by the testator at the time of his death; and 4, upon any prop-

erty or means which the wife possesses in her own right. What would be an adequate provision for the wife of an artisan or a labouring man who died possessed of a comparatively small estate would be inadequate for the wife of a prosperous tradesman or a wealthy merchant or professional man. What would be an adequate provision for the wife of a man who died possessed of an estate of £20,000 would be inadequate for the wife of a millionaire. So that what might be considered sufficient for a woman in the prime of life, or robust health, and capable in mind and body, might be insufficient for a woman of advanced years or in ill-health.' These observations, in my opinion, state a reasonable rule applicable for the claims of the widow of a testator. I think that the widow of a testator may stand in a different position to a widower or children of a testator."

The case of *Allardice* v. *Allardice, supra,* was appealed from the Court of Appeal to the Privy Council—(1911), A.C. 730. At p. 732, reference is made to Stout, C.J. having said in the Supreme Court of New Zealand, that many cases had been decided under the Acts, before their consolidation and that the rules laid down in those cases might be summarized as follows (pp. 732-3):

"(1.) 'That the Act is something more than a statute to extend the provisions in the Destitute Persons Act.'

"(2.) 'That the Act is not a statute to empower the Court to make a new will for the testator.'

Judgment

"(3.) 'That the Act allows the Court to alter a testator's disposition of his property only so far as it is necessary to provide for the proper maintenance and support of "wife, husband, or children" where adequate provision has not been made for their proper maintenance and support by the will of the testator.'

"(4.) 'That in the case of a widow, at all events, if not in the case of a widower, the Court will make more ample provision than in the case of children, if the children are physically and mentally able to maintain and support themselves.' "

" ' "Support," 'it has been held, said the learned Chief Justice, 'at all events in the case of a widow, does not mean merely having a supply of food and clothing. It means . . . such kind of maintenance as the widow during the life of her husband has been accustomed to. The matter that should be considered, both as to the widow and children, is how she or they have been maintained in the past. . . . The whole circumstances have to be considered. Even in many cases when the Court comes to a decision that the will is most unjust from a moral point of view, that is not enough to make the Court alter the testator's disposition of his property.' "

With the assistance afforded by such authorities in dealing with the Act in question, does the material filed, coupled with the oral evidence, warrant my utilizing the Act and making further allowance to the widow? Her petition shews that the estimated amount required for the up-keep of her house and

MACDONALD, J. (In Chambers)

1929 May 21.

In re Estate of Hugh Ferguson, Deceased

Judgment

living expenses, is $289.95. This amount, however, does not include doctor or dentist bills, or clothing of any sort, nor the up-keep of the motor-car. It appears that the house in which the petitioner lives was conveyed to her by gift of her husband about a year before he died, so that she has a home, free of rent. Then the estimated monthly expenses are capable of criticism, especially as to the man employed, doing out-of-doors work, during the year and the up-keep of the motor-car. Her step-son, James D. Ferguson, is on friendly terms with her and has made her pecuniary gifts since his father's death, and has also aided her own son, who is approaching 24 years of age, and taking a medical course at McGill University. The will of Hugh Ferguson appears to have been carefully drawn and was executed a few months before his death. He had already provided his wife with a home as mentioned. He bequeathed her all the household furniture, silver, linen, pictures and personal effects in their house, and no objection has been made to the motor-car being included in such bequest. He then, to provide an income, directed the trustees to invest in any investments, that might be authorized by law, in the Province of Saskatchewan, the sum of $75,000, and to pay the net income thereof to his wife. This provision in the will has been carried out by the trustees of the will and she is in receipt at the present time of $358 per month. She also received $2,000 from insurance upon her husband's life. There was a large estate left by the deceased, but even with respect to his own son he was careful, in only giving him a cash payment of $10,000 and an annual allowance of $3,000 a year until he attained the age of 32. It was submitted and it is a fact, that the estate is large enough to make a further allowance to the petitioner from the annual income of the estate, but this position only becomes important when I have decided that the present allowance is not "adequate, just and equitable in the circumstances." In my opinion the petitioner is now in as good, if not a better position, as far as finances, support and maintenance are concerned, than she was, in the lifetime of her husband. I need not discuss this feature at any length. She was cross-examined on her affidavit and particularly as to her grounds, under such circumstances, for seeking a further allowance. She candidly admitted that the desire to assist her son in his medical

education was the principal, if not the sole incentive, in making the application. It was contended that she had a moral obligation to carry out the wishes of the testator with respect to such medical education, as it was alleged that he had initiated this course being pursued. Assuming that this contention is based on facts, then followed to its logical conclusion, the effect would be that William Winter, the step-son of the deceased, through his mother, would be enabled to invoke the provisions of the Act in question. Such a contention, to my mind, is not tenable under the legislation. Further, it should not in any event be overlooked, that the testator sought to implement his wishes in this respect, as to the medical education of his step-son, by a bequest of $5,000 for that purpose. This amount the executors are entitled to pay over in due course.

Judgment

There are other circumstances which might be discussed, but it will suffice for me to bear in mind that I should not attempt in any way to make a new will or speculate, as to how the estate might have been better divided, I am required simply to discharge my "duty," in carrying out the intention of the Act. It was referred to by the Court of Appeal in New Zealand, in *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 959 at pp. 972-3 as follows:

> "It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be. If the Court finds that the testator has been plainly guilty of a breach of such moral duty, then it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. In the discharge of that duty the Court should never lose sight of the fact that at best it can but very imperfectly place itself in the position of the testator, or appreciate the motives which have swayed him in the disposition of his property, or the justification which he may really have for what appears to be an unjust will."

Upon the facts here present, I cannot find that the testator has been guilty of such breach of duty. In my opinion under the circumstances, adequate provision was made by the testator for the proper maintenance and support of his wife.

Although I have come to this conclusion, I think I am justified in directing that the costs of all parties should be payable out of the estate.

Application dismissed.

MARTIN, LO.J.A.

1929

May 22.

FRED OLSEN & CO. v. THE "PRINCESS ADELAIDE" AND CANADIAN PACIFIC RAILWAY COMPANY v. THE "HAMPHOLM."

FRED OLSEN & CO. v. THE "PRINCESS ADELAIDE."

CANADIAN PACIFIC RY. CO. v. THE "HAMPHOLM"

Shipping—Collision — Fog — Excessive speed—Unequal apportionment of damages—Costs—Collision regulations—Article 16.

The steamship "Princess Adelaide" after leaving Vancouver at 11 a.m. cleared the First Narrows in calm weather, but in a dense fog, and proceeded at a speed of about twelve knots on a course S.W. ¾S. When about three miles off the Narrows the master stopped his engines on hearing fog whistles, one from a tug to port and another from a ship to starboard (which turned out to be the "Hampholm") and almost immediately he saw the "Hampholm" emerging from the fog about 300 feet away on his starboard bow. He tried to clear her by putting his helm hard astarboard with full speed ahead but was too late, the "Hampholm" cutting into the "Adelaide" a little forward of amidships. The "Hampholm" inward bound to the Narrows passed half a mile from Point Atkinson at about 4 knots and owing to the fog decided not to attempt to enter the Narrows but to proceed "slow ahead" and "stop" alternately to the usual anchorage in the southerly part of English Bay. While so proceeding (her speed being reduced to from 2 to 3 knots) she heard the signal of another vessel (which turned out to be the "Adelaide") about 5-6 points on her port bow. She stopped her engines and blew her whistle. On the third alternate whistle the "Adelaide" appeared from the fog heading across her bow. The "Hampholm" then reversed her engines full speed and turned her helm hard aport. The "Hampholm" still had way on her of one and one-half knots when the "Adelaide" was sighted and the collision took place about half a minute after the vessels came in sight of one another.

Held, that the "Adelaide" had committed a gross breach of article 16 of the Collision Regulations without any extenuating circumstances but that the master of the "Hampholm" knew they were crossing the main stream of traffic through the Narrows in going southerly to anchorage which required the exercise of much caution, and on hearing the second whistle of the "Adelaide" should have realized that as it shewed no indication of broadening, the danger was imminently increasing and if he had then given the order to reverse the engines the "Adelaide" would have swung clear or at the worst a scraping only would have resulted. As the former deliberately violated the regulations in a gross degree and the latter erred in her manner of endeavouring to carry them out the liability for "degrees of the fault" should be apportioned as two-thirds on the part of the "Princess Adelaide" and one-third on that of the "Hampholm."

Held, further, that as there is "unfettered discretion" over costs in cases

of unequal apportionment, two-thirds of the costs in both actions should be awarded the "Hampholm" and one-third to the "Princess Adelaide."

[Reversed by Exchequer Court of Canada].

MARTIN, LO. J.A.

1929

May 22.

FRED OLSEN & Co. v. THE "PRINCESS ADELAIDE."

CANADIAN PACIFIC RY. Co. v. THE "HAMPHOLM"

ACTION by the owners of the Norwegian freighter S.S. "Hampholm" for damages sustained in a collision with the steamship "Princess Adelaide" in Burrard Inlet on the 19th of December, 1928, and cross-action by the Canadian Pacific Railway (owners of the "Princess Adelaide") against the S.S. "Hampholm" for damages arising out of said collision. The facts are set out in the reasons for judgment. Tried by MARTIN, Lo. J.A. at Vancouver on the 15th to the 18th of April, 1929.

Griffin, K.C., for plaintiffs.
McMullen, for defendant.

22nd May, 1929.

MARTIN, Lo. J.A.: This is an action by the owners of the Norwegian freighter S.S. "Hampholm" (length 395, beam 52, gross tonnage 4,480, regst'd 2,615, Anton Markusson, master) against the high-powered passenger S.S. "Princess Adelaide" (Hunter, master) for damages caused by a collision between those vessels in Burrard Inlet (English Bay) about three miles S.W. of the entrance to the First Narrows (Prospect Bluff) on the 19th of December, 1928, at about 11.14 a.m. There is also a cross-action by the "Princess Adelaide" against the "Hampholm" for damages arising out of the said collision and by consent both actions are tried together.

Judgment

At the time of collision the weather was calm but with a dense fog and the tide at the last of the flood. According to the admission of the "Princess Adelaide's" master she was running through the fog after she left the Narrows at a speed of twelve knots on a course which her master says was S.W. ¾ S. as he marked it on the Admiralty Chart, Ex. 1, and he also says, and there is no sound reason to doubt that statement, that he did not change that course till the collision became imminent. He had stopped his engine about half a minute before the collision upon hearing the fog whistles from a tug to port and then again from a ship to starboard that turned out to be the "Hampholm" which he first saw emerging from the fog at a distance of about

MARTIN, LO. J.A.

1929

May 22.

FRED OLSEN & CO. v. THE "PRINCESS ADELAIDE."

CANADIAN PACIFIC RY. CO. v. THE "HAMPHOLM"

Judgment

300 feet between 2 and 3 points on his starboard bow, and tried to clear her by putting his helm hard astarboard with full speed ahead, but it was too late to avoid the collision, the stem of the "Hampholm" cutting into the "Adelaide" on her starboard side, a little forward of amidships, as shewn by the position of the models on Ex. 4, which is admitted by both parties to be substantially correct. At the moment of impact the "Adelaide" was still swinging with a speed of at about 11 knots at least, to avoid the "Hampholm," which still had, I am satisfied, upon the conflicting evidence on the point, a slight amount of way on her when she sighted the "Adelaide" but not exceeding 1½ knots: her preliminary act admits she had "steerage way only."

At the conclusion of the evidence, but not before, counsel for the "Princess Adelaide" admitted that she had committed (as was obvious from the start) a breach of article 16 of the Collision Regulations which has frequently been considered and expounded in this Court, *e.g.*, in *Pallen* v. *The Iroquois* (1913), 18 B.C. 76, and *The Tartar* v. *The Charmer* (1907), Mayers's Ad. Prac. 536; and *The Belridge* v. *The Empress of Japan* (1917), 3 W.W.R. 961; it was indeed, in all respects what is called a "gross breach" (p. 539) of said article without any extenuating circumstances; and *cf. Ship Clackamas* v. *Schooner Cape d'Or* (1926), S.C.R. 331, 336.

It is submitted, however, that the "Hampholm" was also to a substantial degree in default in that she did not sooner reverse her engines so as to come to a standstill, and that under the circumstances of no wind, sea, current, or channel, there was nothing to prevent her from so doing in safety, and that if she had done so the collision would have been avoided or its results minimized to an inappreciable degree. This submission is based on the assumption that the "Hampholm" became in ample time fully aware of the unascertained and dangerous position of the "Adelaide," within article 16 but neglected "to navigate with caution until danger of collision [was] over." By article 16,—

"Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The "Hampholm," inward bound, to the Narrows, at 10.05 had passed and seen Point Atkinson, half a mile off, on a course E. by N. at a speed of about 4 knots but shortly afterwards in view of the density of the fog had decided not to attempt to enter the Narrows but to proceed cautiously, by "slow ahead" and "stop" alternately, to the usual anchorage in the southerly part of English Bay, which was in general the proper action to take in the circumstances, and to do so she altered her course at 10.25 to E.N.E. and continued on it at a decreasing alternate speed down to about 3 and 2 knots and finally owing to the signals of other vessels, again changed her course, at 10.50 to E.S.E. giving the proper signals and taking soundings.

While on that course, and at least as early as 11.12, she heard the signal of another vessel (which turned out to be the "Adelaide") about 5-6 points on the port bow, upon which she stopped her engines and blew her whistle to which the "Adelaide" replied, and after another exchange of whistles, and when the "Adelaide" was whistling for the third time (if not the fourth, as the "Hampholm's" master gives it) she almost immediately emerged from the fog, at a distance of about 3-500 feet, and apparently heading almost directly for the "Hampholm," or at least across her bow, upon which the "Hampholm" reversed her engines full speed and put her helm hard aport but too late to avert the impact, as already noted. The master of the "Hampholm" says he was struck by the "Adelaide" less than "half a minute" after sighting her.

Judgment

The real point pressed is that on the "Hampholm's" own statement of facts she knew at least two minutes before the collision that she was in a position of danger from an "unascertained" out-going ship continuing to approach on the same S.W. course (5-6 points on her port bow) without broadening, and such being the case it is submitted that the requirements of "navigating with caution" under said article 16, and taking "any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case" under article 29, were not observed by merely stopping her engines but that she should have promptly taken her way off entirely, as aforesaid.

According to the master of the "Hampholm" when his ship

MARTIN, LO.J.A.

1929
May 22.

FRED OLSEN & CO. v. THE "PRINCESS ADELAIDE."

CANADIAN PACIFIC RY. CO. v. THE "HAMPHOLM"

Judgment

was on her final course, immediately preceding the collision, she was going so slowly that he could have brought her to a standstill within 30 feet, but he gives no satisfactory, if any, explanation why he did not, after hearing the "Adelaide's" second whistle at least, which indicated her continued approach in the same direction, of "risk," then reverse his engine and take her way off as he had done shortly before in safely working past another vessel, to port, also coming out from the Narrows, which he could not see. Both the pilot and the master admit they knew they were crossing the main stream of traffic through the Narrows in going to the said southerly anchorage and expected to meet vessels, and hence the situation was obviously one requiring the exercise of much caution as is always the case when a ship is on the final approach to the narrow entrance of a great seaport such as the one in question.

Article 16 not only requires a ship's engines to be stopped when the "circumstances admit" of it (as they did unquestionably here) but after that is done the article goes on to require her to "then navigate with caution until danger of collision is over," and that such navigation includes the prompt reversal of her engines to take her way off to a standstill, or get her way on astern, as may be necessary, is beyond question, and such manœuvres come with the "precautions" prescribed in general for the "ordinary practice of seamen," etc., in said article 29, which expression is defined by section 894 of the Canada Shipping Act, Cap. 186, R.S.C. 1927, and "means and includes the ordinary practice of skilful and careful persons engaged in navigating the waters of Canada." And it was decided by our National Supreme Court that "all these regulations must be read together as one Code"—*Steamship "Arranmore"* v. *Rudolph* (1906), 38 S.C.R. 176, 185.

The cases are too numerous to cite, both under the present articles and the former ones, 13 and 18 (which contain no essential difference in their practical requirements of good seamanship) in which it has been held that the question of whether approaching vessels in a fog should not merely stop their engines but also their way, or reverse their engines, is something to be decided under the circumstances of each case, but without going back unnecessarily far the following decisions

may, *e.g.*, be usefully referred to: *Smith* v. *St. Lawrence Tow-Boat Company* (1873), L.R. 5 P.C. 308; *The "Ceto"* (1889), 14 App. Cas. 670 (H.L.); *The Dordogne* (1884), 10 P.D. 6 (C.A.); *The Heather Belle* (1892), 3 Ex. C.R. 40; *"The Knarwater"* (1894), 6 R. 784 (C.A.); *The Cathay* (1899), 9 Asp. M.C. 35; *The Oceanic* (1903), 88 L.T. 303 (H.L.); *The Britannia* (1905), P. 98; *The Aras* (1907), P. 28 ("practically stopped in the water," p. 33); *The King* (1911), 27 T.L.R. 524 (excluding also the application of article 19 in fog); *U.S. Shipping Board* v. *Laird Line, Ld.* (1924), A.C. 286 (H.L.); *The Clara Camus* (1926), 17 Asp. M.C. 171 (H.L.); and *The Union* (1928), P. 175, in which last Bateson, J. said (p. 177):

"In my view the meaning of the rule is that the engines must be stopped and the way run off the ship. Perhaps then you may go on again if you have heard nothing else but the one whistle from the other ship, although, if nothing more has been heard at all, I doubt very much if you are justified in going on until you do, or can be reasonably sure that there is no risk. At any rate, the proper course is to bring the ship as nearly as possible to a standstill before going on."

Judgment

The *Clackamas* case, *supra,* has also valuable observations on the point, and it was very recently considered in *Eastern Steamship Co., Ltd.* v. *Canada Atlantic Transit Co.* (1928), Ex. C.R. 129, 132, a case in this Court from its Toronto district.

It would not be profitable to discuss these decisions but it should be noted that the leading one of the House of Lords in *The Ceto, supra,* is usefully considered and explained by the Court of Appeal in *The Knarwater, supra,* in applying the rule laid down by *The "Ceto"* and the importance of the "indication" as to the "broadening" of the whistles of the approaching vessel is unanimously emphasized. Lord Esher, M.R. said, p. 788:

"If the second whistle was not broader on the bow, all that it indicated to him was that the vessels were coming nearer to each other, which made it more necessary that he should stop his vessel. It is only if he proves that the whistle was in fact broader that he will be enabled to erect his case at all. Did he prove that it broadened? . . . There is no evidence that it did broaden, that the course of the other vessel was such as to make it broaden. . . . He has failed to prove to any of us that the second whistle was broader than the first. If he has failed to prove that then the foundation of his justification or excuse is gone. That he 'thought so' is not enough."

And Lord Justice Davey said, pp. 790-1:

"The rule which we have to apply to such a case as the present has been

MARTIN, LO.J.A.

1929

May 22.

FRED OLSEN & Co. v. THE "PRINCESS ADELAIDE."

CANADIAN PACIFIC RY. CO. v. THE "HAMPHOLM"

Judgment

laid down for us in the judgment, in *The Ceto* (1889), 14 App. Cas. 670; 62 L.T. 1; 6 Asp. M.C. 479, in the House of Lords. Lord Herschell says that 'when a steamship is approaching another vessel in a dense fog she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another.'"

After examining the evidence for the "indications" he proceeds (pp. 791-2):

"It appears to me that we cannot act on the captain's suggestion, even though it is confirmed by his mate, that he thought the second whistle was a little broader. I think there must be some foundation for that, because of the impression which it left in the captain's mind, and if the evidence shews that it did present that appearance to the captain's mind, and still there was no foundation in fact for thinking that the second whistle was a little broader, we can only come to the conclusion that the statement made by the captain is incredible, or else that he was a negligent observer. There being, in fact, no indications which could justify a man in the impression that there was no danger of collision between the two vessels, we must hold that it was the captain's duty to have stopped, and, if necessary, to have reversed his engines. Indeed, on that point we are not left in much doubt, because the captain, in cross-examination, said that if he was mistaken in thinking that the second whistle was not broader he would have stopped his engines at that second whistle. I think, therefore, that the burden of proof, being on *The Knarwater*, she has not satisfied it, and we must hold that she, as well as the other vessel, was to blame for the collision."

And Lord Justice Lopes to the same effect.

Applying all the foregoing to the facts of this case, I can only reach the conclusion, after giving much thought to the matter (because it "involves considerations of general importance" as Lord Watson said in *The "Ceto"*) that the "Hampholm" did not "navigate with caution" after, at least, she heard the second whistle of the "Adelaide" and thereupon should have realized that as it shewed no indication of broadening the danger was imminently increasing. The person in charge of the "Hampholm" was not placed in the "agony of collision" so that he had not even that inevitably short interval for "his mind to grasp the situation and to express itself in an order" (as was said in the *U.S. Shipping Board* case, *supra*, 290, in a space of three seconds) but he had at least one half a minute to give that proper order to reverse the engines which his mind should have been on the alert for, if necessary, after hearing the first whistle, and had that order been given there is no doubt that either the "Adelaide" would have swung clear or at the worst a scraping only would have resulted with little if not trifling damage. Such

MARTIN, LO.J.A.

1929

May 22.

FRED OLSEN & Co. v. THE "PRINCESS ADELAIDE." CANADIAN PACIFIC RY. Co. v. THE "HAMPHOLM"

being the case it becomes necessary to apportion the liability for the damage "in proportion to the degree in which each vessel was in fault," as the Maritime Conventions Act declares, Cap. 126, R.S.C. 1927, Sec. 2.

This is usually far from an easy matter to do satisfactorily, and Lord Shaw, in the *Clara Camus, supra,* recently referred to it thus (p. 173):

> "There may be a danger in these cases of error in refinement and ultra analyses in what is at best a highly difficult exercise, *viz.*, the quantification of cause by the quantification of blame. It is clear, to my mind, that a mere enumeration of errors or faults goes no distance to satisfy the case, and forms no safe prescription of any rule of quantification. For many errors or mistakes in minor incidents or in minor particulars (although none of them could have been ruled out of the category of causes contributory to the result) may be completely outweighed in casual significance by a single broad and grave delinquency. One error of the latter kind may have done more to bring about the result than ten of the former."

Judgment

And I refer also to the cases on the point cited and applied by me in this Court in *The Belridge* v. *The Empress of Japan, supra,* particularly the observations of Lord Sumner in *The Peter Benoit* (1915), 13 Asp. M.C. 203 (H.L.) and dealing with the present case in their light and "having regard to all [its] circumstances" as the Act directs, I apportion the liability for "degrees of the fault" as two-thirds on the part of the "Princess Adelaide" and one-third on that of the "Hampholm"; there is a great distinction between the conduct of the two vessels, the former deliberately violated the regulations in a gross degree and the latter erred in her manner of endeavouring to carry them out.

As to the costs in these cases of unequal apportionment, it has just been held in *The Young Sid* (1929), 45 T.L.R. 389 (C.A.) that I have an "unfettered discretion" over them, and in the exercise of it I award two-thirds of them in both actions to the "Hampholm" and one-third to the "Princess Adelaide." There will be the usual reference to the registrar with merchants to assess the damage.

Order accordingly.

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

WATTS v. THE CORPORATION OF THE DISTRICT OF BURNABY.

Damages — Negligence — Municipal corporation—Highway—Misfeasance—Nuisance—Personal injuries—Whether damages excessive.

In constructing a sewer along the south side of Kingsway the defendant Municipality erected a barricade of planks against which the earth taken from the excavation was piled up. The barricade was near the inside edge of the sidewalk and left a space of about two and one-half feet between the barricade and private properties for the use of pedestrians. From the wet condition of the earth so piled up and from occasional rain the clay seeped through the cracks on to the narrow pathway resulting in its surface becoming very slippery. The plaintiff coming from a store behind the barricade on to this pathway, slipped and fell, breaking certain bones in her ankle. In an action for damages it was held that the defendant had created and continued a nuisance which was the sole cause of the accident.

Held, on appeal, affirming the decision of MORRISON, J. (MACDONALD, J.A. would reduce the damages), that the defendant was guilty of misfeasance and that the damages awarded should be affirmed.

Per MCPHILLIPS, J.A.: That the judgment could be affirmed on the grounds both of nuisance and of negligence, although under the circumstances the imposition of liability on the ground of nuisance was to be favoured.

MACDONALD, J.A.: That in failing to take proper precautions to provide a safe footway and to keep it safe when the sidewalk was appropriated to other uses, the defendant created a nuisance.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 22nd of January, 1929, in an action for damages for negligence. Prior to March, 1928, the defendant Corporation entered into a contract for the construction of a sewer along the south side of Kingsway west from MacKay Avenue. A wooden barricade was erected along the sidewalk as a receptacle for the earth that was taken out of the excavation for the sewer and a space of about two and one-half feet was left between the barricade and fences for pedestrians. On the morning of the 20th of March, 1928, the plaintiff went to what is known as McKay's bakery about 100 feet west of MacKay Avenue on the south side of Kingsway to make some purchases. There was a platform in front of the store. Plaintiff came out on the platform, turned

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

easterly and walked in a slanting direction across the platform and at its easterly end stepped off into the narrow pathway between the barricade and the platform. She started easterly along the narrow path and after taking a few steps slipped and fell. She crawled back to the platform when it was found that she had broken certain bones in her ankle. She was in the hospital for some time. While in the hospital she developed phlebitis which was due to the fracture. She said the ground was very slippery in the narrow passage where she fell owing to mud and water dripping out of the barricade that had been filled with earth. Rain had fallen during the day. The plaintiff recovered $3,500 general damages and $516.50 special damages.

Statement

The appeal was argued at Vancouver on the 15th and 20th of March, 1929, before MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellant: This is not a case of misfeasance but one of non-feasance. Every reasonable care was taken in putting up a barricade to protect pedestrians, and the dampness on the narrow passage in question was due to the rain. On the question of non-feasance see *Clarke* v. *Corporation of Chilliwack* (1922), 31 B.C. 316; *Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198; *Thompson* v. *Mayor, &c., of Brighton. Oliver* v. *Local Board of Horsham* (1894), 1 Q.B. 332. Assuming her story right, if what they did was done legally, and there was no negligence in the construction of the barricade, there is no liability.

Argument

E. A. Lucas, for respondent: The barricade allowed a certain amount of mud and water to escape on to the narrow pathway and it became very slippery. The learned judge below found that this was the cause of the accident and the defendant is responsible. There is ample evidence to justify this finding and this Court should not interfere.

Bull, replied.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The defendant was guilty of misfeas-

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

ance, not of non-feasance. The damages awarded, though large, cannot, I think, be properly reduced by the Court.

The appeal should be dismissed.

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

MCPHILLIPS, J.A.: This case calls for the consideration of somewhat nice points upon the question of whether it was a nuisance or negligence that constituted the right of action, which has been sustained in the Court below. The judgment of the Court below, in my opinion, may be rightly affirmed upon both principles of law, although I favour the liability being imposed upon the ground of nuisance. The distinction has been stated, broadly speaking, to be that in the case of nuisance the duty upon the wrongdoer is an absolute one and if damage be proved liability arises and here it may also be forcefully contended that there was negligence in that there was failure to use the degree of care which was necessary to be used in the particular circumstances of the present case. The plaintiff (the respondent in the appeal) was proceeding along the sidewalk on a public highway in the Municipality of Burnaby, *i.e.,* on the south side of Kingsway when she fell and suffered very severe personal injuries. The Municipality (the appellant in the appeal), a public municipal authority, was at the time constructing a sewer and piled up earth in excavating not only upon the highway used for vehicular traffic, but over and upon the area of the highway provided for pedestrians, *i.e.,* the sidewalk, leaving only a space of 18 inches wide for the purposes of pedestrian traffic and a high barrier of mud was built up on most of the latter area leaving only, as I have stated, a width of but 18 inches for people to walk upon. The work was done in such a careless and negligent manner that the mud so piled up became saturated with water arising firstly from the wet condition of the earth so piled up, and secondly, consequent upon rains occurring at the time, that is, a dangerous seepage took place which oozed out and produced a surface upon this restricted area of 18 inches which was dangerous to all pedestrian traffic. The happening which took place was that the plaintiff when proceeding along this narrow way provided by the appellant for pedestrians, at

MCPHILLIPS, J.A.

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

about 11.30 a.m. on the 20th of March, 1928, slipped upon the muddy surface of the way so provided and fell, sustaining a compound fracture of her right leg. Now, unquestionably the appellant, a statutory public body, was in the exercise of powers conferred by statute, but it is trite law that its powers must be exercised *bona fide* and reasonably. Now, the question is—Did the appellant here proceed reasonably in view of all the circumstances? Turning to the salient facts, it is evident that the appellant did not in the construction of the sewer, dispose of the earth excavated in such a manner as would excuse it from liability; on the contrary, by piling it up as it did in such a negligent manner over and upon the sidewalk, in the manner in which it did, in view of all the circumstances, was the creation of a nuisance which resulted in bringing about the accident that took place and that was the proximate cause of the injuries that the respondent sustained. The witness Grist a witness for the appellant, was in charge of the construction of the sewer. In the evidence the following questions were put to him, in direct examination by counsel for the appellant, to which he made answer:

MCPHILLIPS, J.A.

"You are in the employ of the Municipality of Burnaby, Mr. Grist? Yes.

"And you were in March?

"THE COURT: In what capacity? In charge of the construction of the West Burnaby sewer at that time.

"*Bull*: And on March 20th of this year, were you following that occupation? Yes, sir.

"THE COURT: That is the sewer in question, is it? Yes.

"*Bull*: That is the sewer which was being constructed along Kingsway by Caslo, under a contract from the Municipality? Yes.

"What were your duties in regard to that work? To see that the work was carried on in accordance with the specifications and plans, and to see that the contractor took sufficient care to protect the work and protect pedestrians and Kingsway traffic.

"There was a barricade erected along Kingsway, in front of the McKay bakery for the purpose of keeping the earth from getting on to the place where pedestrians walked. Is that correct? Yes.

"Was that barricade erected under your supervision? Under my direct supervision, under the supervision of the inspector whom I had on that portion of the work.

"And who was that inspector? William Webster.

"You yourself saw the barricade? Oh, yes, every day."

Later under cross-examination by counsel for the respondent:

"The bottom plank of the barricade, Mr. Grist, would be on the asphalt? Yes.

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

McPHILLIPS, J.A.

"That asphalt sidewalk has a somewhat uneven surface, hasn't it? A little, yes.

"It is not like a cement walk? No, it isn't absolutely a plain surface, no.

"So that of course if there were mud behind that barricade, no one would claim of course, that it would be watertight or mudproof, but there would be a certain amount of seepage come through underneath the bottom plank? A certain amount, but very small, as I stated."

The inspector of sewers acting for the appellant was one Webster. Under examination in chief by counsel for the appellant, he testified as follows:

"In March of 1928, what position did you occupy with the Municipality of Burnaby? I was employed as inspector of sewers.

"Are you now with the Municipality? No, I am not; I quit in August.

"What are you doing now? I am contracting myself. Building houses.

"What were your duties in March, 1928, with reference to this sewer on Kingsway near MacKay Avenue? To supervise all work, that is to see that the work was carried out in accordance with the specification directly under Mr. Cross, the engineer.

"What have you to say about the barricade that was built there in front of the McKay bakery? The barricade was built in the usual manner which we employed in conditions, in like manner all over the country both in the East and in the United States and Vancouver, the same barricade as is always put up in the same way.

"And what is the purpose of that barricade? To hold back all the dirt from slipping into the sidewalk or from any point we want to keep clear.

"In this case the barricade covered the whole of the sidewalk, didn't it? It covered all—there may have been two or three inches of the sidewalk sticking out.

"THE COURT: You mean for pedestrian purposes? Absolutely.

"*Bull*: And that left, between the platform of the McKay bakery and the barricade, I think the plan shews two feet, six inches? Somewhere around that, it would be two feet six, or two feet ten, something like that.

"And what do you know of that strip, this part that one would walk on? Well, there was a slight amount of mud on there, very very slight; it would be about the amount that would dirty the bottom of the soles of your shoes.

"What was that? That was gravel and earth packed there by years of travelling over it, packed it down.

"And what about the mud? Well, there was a slight amount of mud. No great amount of mud. We all used, at that time, that is walking up and down the ditch, we used ordinary shoes."

And further on under cross-examination, Webster said:

"You told us in the first place that you kept a pretty sharp look-out on the mud that gathered? Absolutely, that was my duty.

"On the footpath? That was my duty.

"And in case of any accumulating there, it was your duty to notify the contractor at once? Immediately, and get it removed if there was too much there.

"And I suppose that that was because if any accumulated there, to any

extent, it would be dangerous to pedestrians? If any did accumulate there it would be dangerous to pedestrians to walk.

"That was why it was your duty to notify the contractor to get it out of the way? Absolutely.

"You were in the employ of the municipality? At that time yes.

"I see the contractor, by his contract—were you aware of this, agrees to indemnify the municipality for any actions for damages to persons? I read the specifications over; that is my duty.

"And you were aware of that too? I read the specifications.

"And so the contractor also would be keen enough to see there was nothing accumulated? Absolutely, it would be to his advantage to see nothing accumulated."

MCPHILLIPS, J.A.

I do not find it necessary to refer to any more of the evidence in detail, but it may be stated that there was ample evidence before the learned trial judge to find as he did in favour of the respondent, and which entitled his imposing liability upon the appellant for the injuries sustained. The case as it appears to me was undoubtedly the negligent creation of a nuisance on a highway by the action of the appellant, a case of misfeasance, and plain liability therefor at common law. Here we have it completely established that the appellant was constructing the sewer and the work was being done in charge of a special officer of the appellant, namely, Grist, and there was as well an inspector of the work, Webster, so that it was not the case of an independent contractor nor was any such defence pleaded, nor was it advanced here, nor was it advanced in the Court below nor was it the course of the trial, so that all considerations of that character are to be dismissed, not being matters for determination on this appeal. And it is to be remarked that the appellant under the contract for the construction of the sewer had a covenant from the contractor to indemnify it for any actions for damages to persons suffering injuries consequent upon the work.

In *Crane* v. *South Suburban Gas Company* (1916), 1 K.B. 33, we have Avory, J., at pp. 35-6, saying:

"The plaintiff's claim was framed in the alternative, either for negligence or a nuisance. In my opinion there was evidence on both heads of the claim on which the county court judge might properly find a verdict for the plaintiff. If I had tried the case myself I should have preferred to base my decision on the second ground, namely, that what the defendants were doing was a nuisance in the sense that they were doing something on or adjacent to the highway of a character which was dangerous unless steps were taken to guard persons using the highway from the danger. It is

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

clear on the authorities that a person doing something on the highway or on land adjacent to it, which he may lawfully do if he takes proper precautions to guard the public from injury, is guilty in law of a nuisance if he fails to take proper precautions."

In the present case negligence and nuisance were both set up. The Supreme Court of Canada, as recently as last year, gave most careful consideration to a case that really disposes of all the matters debated upon this appeal before this Bar. It was the case of *Prentice* v. *City of Sault Ste. Marie* (1928), S.C.R. 309. There it was the case of the servants of the corporation flushing a private sewer under statutory powers by contract in its capacity as owner and operators of a public water service, and it was held that it negligently created (according to findings sustained by the ultimate Court of Appeal, *viz.*, the Supreme Court of Canada) a nuisance consisting of a patch of dangerous ice on a private houseway lawfully constructed leading from the street sidewalk to the plaintiff's residence, the part of the houseway on which the nuisance was created being on the highway and immediately adjoining the sidewalk and as a result one of the plaintiffs (wife of the other plaintiff) fell on such part of the houseway and was injured. It would occur to me that in view of this decision it is somewhat idle perhaps for me to further pursue the matter. I will, however, make an apposite quotation from the judgment of the learned Chief Justice of Canada (Anglin, C.J.C.) in the above case at p. 316:

MCPHILLIPS, J.A.

"The common law right of action against a municipal corporation for a nuisance on a highway caused by negligence of its servants amounting to misfeasance and which has caused special damage, apart from and in addition to any statutory liability for non-repair, admits of no doubt. *City of Halifax* v. *Tobin* (1914), 50 S.C.R. 404."

(*Patterson* v. *Victoria* (1897), 5 B.C. 628 at p. 645; affirmed (1899), A.C. 615 at p. 620).

It was pressed in the argument at this Bar that there was contributory negligence and that the damages under recent statutory law should be divided. The learned trial judge has not so found, and I cannot persuade myself that there is any evidence to support it (*Hill* v. *Saskatchewan* (1929), 1 W.W.R. 562, Mackenzie, J.A. at pp. 567, 568).

Then as to damages it is submitted by counsel for the appellant that the damages are excessive. I cannot so view the assessment. They would appear to me to be in no way unreasonable.

I would refer to what Lord Moulton said at p. 309, in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299:

"Their Lordships are of opinion that the assessment of damages by the learned judge at the trial should stand. There was evidence on which the learned judge could come to the conclusion that by the negligent behaviour of the defendants' agent the mortgaged property had become deteriorated so that it realized less than it ought to have realized upon sale. The assessment of the damages suffered by the plaintiff from such a cause of action is often far from easy. The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to *quantum* of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck, J.'s assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal."

I would further refer to *Cossette* v. *Dun* (1890), 18 S.C.R. 222. Ritchie, C.J., at p. 242, said:

MCPHILLIPS, J.A.

"This leaves the case then a mere question as to the amount of damages to which Cossette is entitled. The Court of first instance arrived at the conclusion that the plaintiff had established his claim to $2,000. I cannot say that this is a wrong conclusion. In a case of this kind we have no means of weighing in very nice scales the exact amount of damages the plaintiff may have sustained."

And Gwynne, J., at pp. 256-8:

"Upon the question of reduction of damages I am of opinion that the cases of *Gingrass* v. *Desilets*, Cassels's Dig. 116, and of *Levi* v. *Reed* ([(1881)], 6 S.C.R. 482) in this Court must be taken as establishing the principle which is well settled in England and conformable with sound sense, namely, that no Court has any right to reduce the verdict of a jury as to damages where a jury is the tribunal, or of a judge adjudicating without a jury, on the ground of the damages being excessive in cases in which, like the present, the damages recoverable are not ascertainable by the application of any rule prescribing a measure of damages, or are not determinable by precise calculation, unless the damages awarded be so excessive, having regard to the evidence, as to shock the understanding of reasonable persons; to be so outrageous, in fact that no reasonable twelve men, if the tribunal be a jury, could give; and that no judge, if a judge be the tribunal, could rationally give, that is without like shock to the understanding of reasonable persons. The question is not what damages the judge sitting in appeal thinks he would have given if he had tried the case, but whether the judge who did try the case can with propriety be said (as in the case of a jury) to have acted altogether beyond the bounds of reason in awarding the amount of damages which he has awarded. This cannot well be said in the present case, for some of my learned brothers

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

think the damages given by the learned judge of the Superior Court to be reasonably moderate in their view of the evidence. Not having tried the case I cannot for my part precisely say what damages I should have given if I had tried it; I think it sufficient to say that in my opinion the Court of Queen's Bench in appeal should not set aside a judgment on the ground of excessive damages, or have reduced the amount awarded in the present case, unless upon the ground that the amount awarded by the Superior Court was altogether and palpably beyond the bounds of reason; and this cannot, I think, with any propriety be said in the present case, whether I should or should not have given the same amount myself if I had tried the case."

Finally, the judgment is not one which this Court should, in my opinion, disturb, the learned trial judge (MORRISON, J., now Chief Justice of the Supreme Court) arrived as I consider, at the proper conclusion in holding that the appellant created and continued the nuisance which was the proximate and sole cause of the injuries sustained by the respondent.

MCPHILLIPS, J.A.

I might further say that to disturb the judgment would not be following the very late pronouncement of the House of Lords when considering the subject of the reversal of the judgment of the Court below by a Court of Appeal. Lord Sumner at pp. 47-8, in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37, said:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: Order LXVIII., r. 1. It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shewn that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* (1860), 14 Moore, P.C. 210, 235, Lord Kingsdown says: 'They, who require this Board, under such circumstances, to reverse a decision of the Court below upon a point of this description, undertake a task of great and almost insuperable difficulty.

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

. . . We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.' Wood, L.J., in *The Alice* (1868), L.R. 2 P.C. 245, 248, says: 'The principle established by the decision in *The Julia* is most singularly applicable. . . . We should require evidence that would be overpowering in its effect on our judgment with reference to the incredibility of the statements made.' James, L.J., thus laid down the practice in *The Sir Robert Peel* (1880), 4 Asp. M.C. 321, 322: 'The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the judge has had the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression.'

"Again, in *The Glannibanta* (1876), 1 P.D. 283, 287 the Court of Appeal, after referring to *The Julia* and *The Alice*, say that they would not be disposed to reverse, 'except in cases of extreme and overwhelming pressure,' but, being of opinion that the trial judge (contrary to what is the fact here) did not proceed at all on manner or demeanour, but proceeded on inferences, which the Court of Appeal could draw as well as he could, they formed their own view of the facts and decided accordingly. I am not aware that this rule has ever been disowned and, if it has too often been neglected, still the current of authority on the subject runs all the other way."

MCPHILLIPS, J.A.

The present case is not one where it could be said that the learned judge "proceeded upon inferences." I am clearly of the opinion that the case is one for the affirmance of the judgment of the Court below.

I would dismiss the appeal.

MACDONALD, J.A.: The respondent, a married woman, recovered $3,500 general damages and $516.50 for special damages for injuries received through a fall on a slippery improvised pathway on the boulevard along a highway in the District of Burnaby. A barricade made of planks and upright timber was erected by a contractor engaged by appellant and under its supervision to construct a sewer along the south side of Kingsway in said District. The sidewalk was completely covered (or nearly so) by the barricade and by the earth thrown behind it and taken from the sewer so that pedestrians were compelled to use a narrow space about a foot and a half wide running behind it. Due to ordinary rainfall and possibly to the moist character of some of the soil excavated there was a seepage of water carrying slimy particles of clay through the barricade (space between planks) to this temporary pathway. This created a slippery condition under foot causing respondent

MACDONALD, J.A.

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

in passing over it to fall, sustaining a fracture of the ankle involving the ankle joint and two bones that enter into its formation. She was confined to the hospital for three periods, first for one week, and later for two periods of three weeks and in the latter period was treated for phlebitis developing an inflammation of the veins of the leg due to the fracture. Recovery should be complete in one year at least, and possibly in six months. It was urged that the damages awarded were excessive. The amount awarded for special damages is not contested, except in respect to $180 allowed for loss of employment. This sum should have been included in the amount allowed for general damages. She lived with her husband attending to household duties and at times performed services for others for which she was paid $30 a month. With great respect, I think the sum awarded was clearly unreasonable and without sufficient evidence to support it. I would reduce the general damages to $1,500 and deduct the $180 referred to from the special damages awarded.

MACDONALD, J.A.

There was conflicting evidence as to what caused respondent to fall and where she fell. We intimated at the hearing however that we could not interfere with the finding of the learned trial judge, *viz.*, that the accident occurred at the point and in the manner described by respondent. There was no contributory negligence.

As stated the work was carried on by a contractor under the supervision of appellant's inspector in charge of the construction of the sewer. It was the duty of this official to see that the work was performed according to plans and specifications and also to see that the contractor took sufficient care to protect pedestrians and others using the highway or temporary pathway. Is appellant liable because—as the fact was—the barricade was not so constructed as to prevent slimy mud from escaping between the planks on to the temporary pathway substituted for the sidewalk while the work was in progress? If on the other hand it was properly constructed, is appellant liable because slimy material having seeped through—as it was bound to do—it did not take care either to remove it or to make the pathway safe by laying down planks or otherwise?

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

MACDONALD, J.A.

There is no evidence to support the view that there was anything inherently defective in the construction of the barricade. It could not be expected to be waterproof—and it was water escaping carrying particles of clay with it to the pathway that caused the mischief. If however appellant knowing as it should know that moist particles of clay would escape and accumulate on a pathway substituted for a perfectly safe sidewalk, it is liable for an act of omission in failing to clear it away or to make the pathway safe for pedestrians. The barricade (and earth within it) was lawfully on the highway.

It would not, I think, be disputed that if the barricade was out of order and that caused the accident appellant would be liable. A municipality is not liable for damage caused to one using the highway where it is doing an authorized act without negligence. It is not liable either for acts of non-feasance. But if the authorized act was the construction not only of the barricade but of a temporary pathway to take the place of the sidewalk and there was negligence in the construction of the whole—as of one operation—it is liable. If appellant put up a barricade and put down a footpath and did it negligently or omitted to take ordinary care and damage accrues, liability follows but it is not because of alleged failure to repair the highway. The appellant in effect provided a pathway to take the place of the sidewalk and I can see no difference between "providing" and "constructing" a pathway. A question of non-repair therefore, for which it is not liable does not arise. It is not a case of proper construction of a barricade on the one hand and non-repair of a part of the highway on the other because providing a safe passage way was incidental to and a necessary part of the whole work. If by its act upon depriving pedestrians of the use of the sidewalk it endangered a part of the highway intended for temporary use liability ensues on the ground of misfeasance. It may arise from acts of omission resulting in the creation of a nuisance. Appellant was doing work on a public highway of a dangerous character unless means were adopted to guard against danger. Construction work which interferes with the ordinary user of the highway must of necessity contain elements of danger. Failing to take proper precau-

COURT OF APPEAL

1929

June 4.

WATTS v. CORPORATION OF DISTRICT OF BURNABY

MACDONALD, J.A.

tions not in repairing but in providing a safe footway and keeping it safe when the sidewalk was appropriated to other uses a nuisance was created.

I think it would be conceded that if one put slimy material on a sidewalk and permitted it to remain it would be treated as a nuisance. The same result follows if it is allowed to collect on a footpath which pedestrians were compelled to use while the work was in progress. There was authority to dig the sewers and construct the barricade and pile earth behind it but no authority to place any part of it on the pathway or if it got there to leave it unprotected.

I would allow the appeal as indicated on the point of damages otherwise sustaining the judgment of the learned trial judge.

Appeal dismissed, Macdonald, J.A. dissenting in part.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper & McKim.*

Solicitors for respondent: *Lucas & Lucas.*

McCOY v. TRETHEWEY *ET AL.*

COURT OF APPEAL

1929

June 4.

McCoy v. Trethewey

Appeal—Trial without a jury—Findings of trial judge—Grounds for reversing.

The usual practice of not interfering with the findings of fact of the trial judge should not be disregarded unless the evidence coerces the judgment of the appellate Court to do so.

The plaintiff, owner of a hotel at Alice Arm accepted a cheque from T. in March, 1924, paying him partly in cash, the balance covering a board bill at the hotel. T. asked her to hold the cheque for a few days and she put it in an inner receptacle in her safe which she locked. Shortly after she broke the key to this lock and it remained locked until she sold the hotel a year later. T. died in October, 1927, and shortly after this the plaintiff recovered the cheque from the safe. The plaintiff recovered judgment in an action for board and lodging and for moneys advanced.

Held, on appeal, affirming the decision of RUGGLES, Co. J., that the trial judge having given credence to the plaintiff's story and the cheque given in evidence having been proved, this Court will not interfere.

Statement

APPEAL by defendants from the decision of RUGGLES, Co. J. of the 23rd of November, 1928, in an action to recover $500, the amount of a cheque the plaintiff claims to have been given her by the late J. O. Trethewey. The plaintiff was proprietress of the Alice Arm Hotel at Alice Arm in March, 1924, and on the 15th of said month she states that she cashed a cheque in the sum of $500 for J. O. Trethewey, deceased, by giving him $384 in cash and applying the balance (*i.e.,* $116) upon a board bill at said hotel owing by said J. O. Trethewey. The cheque was drawn upon the Royal Bank of Canada at Abbotsford and Trethewey asked her to hold the cheque a while until he had sufficient funds in the Bank upon which it was drawn. She then put the cheque in an inner locked receptacle in her safe. Shortly after this she broke the key which locked this inner receptacle and in October, 1925, she sold the hotel. The inner receptacle of the safe was still locked when she left. Trethewey died on the 22nd of October, 1927. At this time Mrs. McCoy was in Vancouver and a few days later she got the cheque from the safe at Alice Arm. She recovered judgment for the amount of the cheque.

COURT OF APPEAL

1929

June 4.

McCoy v. Trethewey

The appeal was argued at Vancouver on the 6th and 7th of March, 1929, before Macdonald, C.J.A., Martin, Galliher and Macdonald, JJ.A.

Argument

A. E. Bull, for appellants: The man who made the cheque is dead and there is nothing to corroborate the plaintiff's evidence that consideration was given for the cheque. The key to the inner door of the safe was not broken for a year and a half after the cheque was given. That there must be corroboration see *In re Finch. Finch* v. *Finch* (1883), 23 Ch. D. 267. The cheque is not an admission of liability: see *Curley* v. *Briggs* (1920), 53 D.L.R. 351; *Elliott* v. *Crutchley* (1903), 2 K.B. 476; *Adamson* v. *Vachon* (1914), 6 W.W.R. 114.

Macaulay, for respondent: The plaintiff is not an educated woman and her business methods were accordingly irregular. As to the corroboration required in such a case see *McDonald* v. *McDonald* (1903), 33 S.C.R. 145. The cheque itself is corroboration of the claim, also the hotel register is corroboration, and the learned judge below has so found: see *Walker* v. *Foster* (1923), 54 O.L.R. 214.

Bull, replied.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.

Macdonald, C.J.B.C.: The plaintiff made a *prima facie* case, which was duly corroborated, and while her evidence does not appear to me to be altogether satisfactory, yet it was believed by the trial judge.

The defendants have produced no evidence at all in answer, and we are asked to rely wholly on the plaintiff's somewhat contradictory evidence as to why she did not at an earlier time cash the cheque which was admittedly that of the deceased.

I cannot say that the trial judge came to a wrong conclusion, and would therefore dismiss the appeal.

MARTIN, J.A.

Martin, J.A.: I agree in dismissing this appeal.

GALLIHER, J.A.

Galliher, J.A.: Had I been trying this case I should, with respect, have come to an opposite conclusion, but the learned judge below must have given credence to the plaintiff's story

and the cheque being in evidence and having been proved, I am with reluctance and with doubt impelled to dismiss the appeal.

Macdonald, J.A.: While Mr. *A. E. Bull* pointed out many discrepancies in respondent's evidence and strongly urged that it should not be believed I do not think we should disregard the usual practice of not interfering with the findings of fact of the trial judge unless the evidence "coerces our judgment so to do" (*Green, Swift & Co.* v. *Lawrence* (1912), 7 D.L.R. 589 at p. 599). The respondent sued appellant's executors for $500 made up by an alleged board bill contracted by the deceased Trethewey and by money advanced to him by the respondent. The deceased gave respondent a cheque for $500 to cover these two items. The cheque was not presented for payment until after the death of Trethewey three years later. The trial judge accepted respondent's explanation of this undue delay. It was proven that the cheque was signed by the deceased and I see no ground for presuming that it was given for an illegal consideration. That in fact was not suggested by appellants in their dispute note. They did deny, however, that the deceased signed the cheque, in other words, alleged it was spurious and the fact that it was genuine was conclusively established. The cheque was of course revoked by the death of the deceased but it was submitted it afforded corroborative evidence of respondent's claim against the estate of the deceased.

MACDONALD, J.A.

It was submitted that because the cheque was revoked by death it must be treated as if never given. That is not so in an evidentiary sense. It is still useful as evidence. It was also submitted alternatively that the cheque treated as evidence, while consistent with respondent's story, is equally consistent with another view—presumably that the consideration was illegal—and that evidence consistent with two views is not corroborative of either. As intimated I do not think we are obliged to assume an immoral consideration or to give weight to that suggestion particularly without a plea to that effect or evidence to support it.

While I must confess I do not feel free from doubt, that is

COURT OF APPEAL

1929

June 4.

McCOY v. TRETHEWEY

perhaps an additional reason for not interfering with the trial judge who observed the respondent in the witness box.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *A. E. Bull.*
Solicitor for respondent: *G. S. Wismer.*

COURT OF APPEAL

1929

March 22.

BRUIN v. BRUIN

BRUIN v. BRUIN.

Guardianship—Infant—Husband and wife—Separation agreement—Custody of children—Provision as to—Petition by wife to vary agreement—Onus—Stay—R.S.B.C. 1924, Cap. 101, Secs. 11 and 13.

Under a separation agreement between husband and wife the custody of the two older children was given the father and the youngest to the mother. The father left the two children with their paternal grandparents and while in their charge the younger boy was drowned. The mother then petitioned for the custody of the eldest child. There was evidence of the two boys being allowed to run wild and that the paternal grandfather had been convicted on a charge of selling liquor. The petition was granted and custody of the child was given to the mother.

Held, on appeal, reversing the decision of MORRISON, J., that the mother failed to shew good cause why the Court should interfere with the provisions of the separation agreement and the child should be restored to his father.

An application for a stay of proceedings pending the disposition of the appeal was refused.

Held, on appeal, that this was palpably a case where a stay should have been granted.

Statement

APPEAL by defendant from the decision of MORRISON, J. of the 14th of January, 1929, on a petition of the mother for the custody of the eldest child of the plaintiff and defendant. The facts are that on January 8th, 1927, the appellant and his wife entered into a separation agreement, by the terms of which they were to live separately and the father was given the custody of their two eldest children, aged respectively six and five years,

and the mother was given the custody of the youngest child, aged four years; provision was made for the access of both parents to all the children; the father at once took the two oldest boys to his father and mother in Slocan City and he himself lived with the grandparents except at such times as he was compelled to go away from Slocan City to get work in his occupation as a miner and when he was in hospital suffering from wounds received in the war; in May of 1927, the grandfather and grandmother purchased a small hotel in Slocan City and still operate the same; about a year later, in May, 1928, the second son was drowned at Slocan City; in October, 1928, the grandfather was convicted of an offence under the Government Liquor Act, and thereupon the mother launched a petition requesting the custody and control of the eldest son, claiming that the drowning of the second son was caused by the negligence of the grandparents; that the hotel was not a proper place to bring up the boy because he would meet loggers and miners there and on the ground of the conviction; the father alleged that the drowning was purely accidental and that the eldest son had been well taken care of and that there was every prospect of him being well taken care of in the future.

Statement

Upon the hearing it was argued on behalf of the petitioner that the two children should be brought up together and on behalf of the father that in view of the agreement the onus lay on the petitioner to shew that the oldest son was not being properly cared for and that she had not discharged this onus. MORRISON, J. held that the onus was upon the father to shew that the mother was unfit or unable to care for the eldest son and awarded her the custody.

After the order had been made by MORRISON, J., and before the boy had been taken from Slocan City, application was made to him to stay proceedings pending the appeal but the application was refused.

The appeal was argued at Vancouver on the 21st and 22nd of March, 1929, before MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

Argument

H. C. Green, for appellant: This application is under sections 11 and 17 of the Equal Guardianship of Infants Act. One boy

COURT OF APPEAL

1929

March 22.

BRUIN
v.
BRUIN

aged 7 is with the mother. The boy over whom the dispute has arisen is 9 years old. The parents had entered into a separation agreement under which the father was to have the custody of the two older boys and the mother the youngest one. We submit that it is for the welfare of the child to be with his father and although the Court can make the order on the face of the separation agreement the burden is on the mother to shew clearly that it is in the interest of the child to be with his mother, and in this she has failed.

Argument

Buell, for respondent: There was an agreement between husband and wife as to the custody of the children, but section 11 of the Act provides that if either party desires its termination he or she may make an application such as this if the facts justify it. Under section 13 the Court in making an order must have regard to the welfare of the child and the conduct of the parents. One child, in the custody of the father, was drowned. The evidence is clear that the two boys living with the father were allowed to run wild, being at the time in charge of their grandparents. This takes the case out of the category of pure accident. The grandfather was convicted of illicit dealing in liquor and the father was in trouble of the same nature. The mother, whose good character is unquestioned, lives in Vancouver with the youngest son within easy access of good schools. In the circumstances the learned judge below was amply justified in concluding that it was for the welfare of the child that he should be with his mother and younger brother. The learned judge's discretion in the matter should not be disturbed.

MACDONALD, C.J.B.C.: The appeal must be allowed and the order set aside.

MACDONALD, C.J.B.C.

In cases of guardianship of infants, it is often difficult for a Court to decide the merits without knowing the parents and appreciating to some extent their character and demeanour. But this case is free to some extent of that difficulty because the parties themselves had come to an agreement that they should separate, that neither should molest the other, nor interfere with the guardianship of the other. They not only separated themselves, but they separated the children, the youngest son going to the mother and being brought up in Vancouver and the other

two going to the father, who resides at Slocan City. Now, both parents are apparently admirable people. They both appear to have done their duty to their country, the father being severely wounded, apparently permanently wounded, in the war, and the mother having acted overseas as a nurse. Under these circumstances we have to decide the case largely, in fact, altogether on two grounds: First, we start with the agreement. They themselves thought that the best arrangement to make in the interests of their children was that the father should have the two elder children during their minority, and that the mother should have the younger during his minority.

The next question is, Has anything happened since that to justify the Court in interfering with that arrangement? We have the evidence given on behalf of the wife, which shews that she was a perfectly capable person to be given the guardianship of the other child. That is not disputed. We have the evidence of a large number of inhabitants of Slocan City, mining recorder, school teacher, two clergymen, a doctor, the present sitting member of the Legislature and several others who say that the child is being properly cared for; that the grandparents are excellent people, and are properly educating and clothing the boy and that the death of the other boy, in their care, by drowning, was a pure accident, no responsibility resting upon anybody for that occurrence. The only thing that they can say is that the grandfather, at whose hotel the boy is residing—the father also residing there, as I understand it, when he is at home, or when he is not in the hospital—was convicted of the illegal sale of liquor. The explanation given of that was that two Provincial Government agents, representing themselves as returned soldiers, appealed to the sympathy or the partiality of the old gentleman, his son being a returned soldier, induced him to give them some liquor. Now, of course, that was a breach of the law, and he was convicted of that. On reading the evidence of all these witnesses as to the respectability of the grandparents, we cannot see that that single circumstance was ground for breach of the agreement. It will be remembered that the grandfather and the grandmother are not guardians of the infant. The father is guardian and nothing has been proven to shew that he was an improper person to have the guardianship

MACDONALD, C.J.B.C.

COURT OF APPEAL

1929

March 22.

BRUIN v. BRUIN

of this boy, or that anything had changed since the agreement was made which should call for the interference of the Court.

In these circumstances it seems to me that the only proper course open to us is to say that the judgment appealed from was not justified by the facts, and that the old order of things must be restored and the child returned to the custody of the father.

The appeal is allowed.

MARTIN, J.A.

MARTIN, J.A.: I am so completely in accord with what the Chief Justice has said in this very special case, that I shall only draw attention to the fact that at p. 51 of the appeal book, provision is made in the written agreement for the mutual access of the father and mother to the respective children entrusted to their custody; and it contains a very proper clause that in case the parties could not come to an agreement in regard to that access, the question should be referred to an arbitrator by whose opinion they agreed to abide. I therefore think that, with every respect, justice will best be done by the restoration of the agreement that the parties themselves entered into deliberately as being the best in the interests of the children.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I might say that I am of the same opinion as that expressed by my brother, the Chief Justice, yet I have had, during the hearing of this appeal, some hesitancy in arriving at a conclusion. Firstly, it is deplorable, really, that the circumstances are such that the children of a family are divided. Now, that is the case here, but there is the circumstance that my brother MARTIN has referred to, that the father and mother in this case agreed to that. They applied their minds to that point and agreed to a separation, that is, that two boys would be with the father and one with the mother; having all the facts before them, they adopted that course. Now, that separation is indeed a very serious matter when you are not really so much carrying out the law as carrying out as best we can that which ought to be the common decision of the parents they being unable to agree. The Legislature, in its wisdom, has provided that the Court may be appealed to where the father and mother cannot agree. The anomaly in this whole thing is in the language of this particular statute—equal guardianship. How can there be

COURT OF APPEAL

1929

March 22.

BRUIN v. BRUIN

McPHILLIPS, J.A.

equal guardianship when they disagree? Their equal guardianship is at an end. The Court, then, had to do the best it could, the paramount matter being the welfare of the children. One regretful feature of this case is this, that this boy who has been with his father has been removed by virtue of the order which is now under appeal, and brought down to the City of Vancouver from Slocan City and now is with the mother and with his little brother and now going to school here. There was a wrench in taking the boy from the grandparents. It is a matter that strikes very close home—affecting the association of the parents and the grandparents with the children, which must be again broken. The little boy has had, of course, since he has been in Vancouver, the affection of his mother, and now he is torn away. It is a very, very sad case, really. However, applying my mind as best I can to all the circumstances, the order proposed by the Chief Justice would seem to be the proper order to make. I acted for a great number of years, when at the Bar, as honorary counsel in the City of Victoria to the Children's Aid Society, and I had much experience in that class of work, being also the first introducer in the Legislature of the Children's Protection Act, afterwards taken over and made a Government measure.

I have no doubt the learned judge in the Court below felt that the order made was in the best interests of the boy, but especially in view of the separation agreement between the parents, I cannot, with great respect to the learned judge, agree that the order below was rightly made.

It is a matter for regret, and, again with great respect to the learned trial judge, when he was apprised that there would be an appeal and an application was made for a stay of proceedings, that the learned judge did not grant it. Then there was the further mistake made by counsel in not appealing to the power that this Court has to stay proceedings. It was palpably a case for a stay of proceedings, as the little boy, after being some time with his mother and brother, has now to be returned to Slocan City to again take up his abode with the grandparents. It would have been better that he had been allowed to remain there pending the result of the appeal. It is true the father is at times at Slocan City, but unfortunately his work takes him away most

COURT OF APPEAL

1929

March 22.

BRUIN v. BRUIN

of the time. I have no doubt, though, that the little boy will have, as in the past, the careful guardianship of the grandparents and the loving care of the father when he can be with him.

My conclusion from all the facts is that the order was wrongly made and should be set aside.

MACDONALD, J.A.

MACDONALD, J.A.: I do not think, with deference, that proper consideration was given to the separation agreement entered into between the parents, nor any grounds shewn for disturbing that arrangement. Nothing detrimental to the character of either parent is disclosed. It should not be assumed either that because a charge was laid against the father and not proceeded with that it was justified. The child was in good surroundings in Slocan City before the order appealed from was made. If at any time in the future the father's conduct should merit censure or these surroundings should prove unsatisfactory another application, as I understand it, may be made. For the present I think the order made below should be set aside.

May I add that I hope both parents will make an effort to resume their former marital relations for the sake of the children.

Appeal allowed.

MALCOLM v. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR COMPANY, LIMITED.

COURT OF APPEAL

1929

June 4.

MALCOLM v. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR CO.

Contract—Fox farm—Managership of farm given in consideration of loan—Option to purchase—Termination of contract if option exercised—Notice given that option exercised—Release of premises in compliance with agreement—Option in fact not exercised—Fraudulent misrepresentation—Damages.

By written agreement the plaintiff loaned the defendant $2,000 and the defendant agreed to employ him as manager of its fox farm for one year from the 2nd of June, 1927, the plaintiff to occupy the house on the farm and enjoy other perquisites. The agreement contained a stipulation that in the event of a certain option held by another company for the purchase of the fox farm being exercised the plaintiff's services would terminate on the date of the company holding the option taking possession. On the 2nd of August, the plaintiff received a letter from the defendant advising him that the holder of the option "will exercise it and will require possession of the premises on the 8th of August, 1927." The plaintiff was then paid back his loan and gave up possession of the premises. It subsequently came to the knowledge of the plaintiff that the option was not exercised and the holders of the option never went into possession of the premises and he brought action for the salary and emoluments he would have earned had he served for the balance of the year. On motion for non-suit the action was dismissed.

Held, on appeal, reversing the decision of McDONALD, J. (McPHILLIPS, J.A. dissenting), that the representations contained in the notice were false to the knowledge of the defendant's manager; the option-holders did not exercise their option in accordance with its terms or at all; the plaintiff acted upon the representations relying on the truth of them and it has been amply proved that he has suffered loss by reason of his virtual dismissal and he is entitled to judgment for the amount claimed.

Statement

APPEAL by plaintiff from the decision of McDONALD, J. of the 26th of November, 1928, in an action to recover $2,151.29 as damages for breach of contract. On the 2nd of June, 1927, the plaintiff and the defendant entered into a contract whereby the defendant agreed in consideration of the plaintiff making advances to the defendant aggregating $2,000 to employ the plaintiff as manager of the defendant's fox farm for one year at $175 per month with free rent, fuel, electric light, fruit and vegetables. At this time a certain option was in force given by

COURT OF APPEAL

1929

June 4.

Malcolm v. Western Canada Magic Silver Black Fox and Fur Co.

Statement

the defendant to the Western Magic Silver Fox Company, Limited, for the purchase of the fox farm and the contract between the plaintiff and the defendant provided that the defendant would have the right to repay the moneys advanced by the plaintiff and cancel the contract of service as manager of the fox farm within the year, provided the said option were exercised and the option-holder required possession thereof. The plaintiff made said advances and managed the said farm until the 8th of August, 1927. On the 2nd of August, 1927, the defendant gave the plaintiff notice that said option would be exercised and the option-holder would require possession on the 8th of August, 1927. The defendant repaid the plaintiff the moneys advanced by him and the plaintiff gave up possession on the 8th of August and executed a release of any claim he might have against the defendant by virtue of the contract. On the 1st of November following the plaintiff found that said option had not been exercised, no notice of intention to execrise the option had ever been given nor had the option-holders demanded possession.

The appeal was argued at Vancouver on the 7th of March, 1929, before Macdonald, C.J.A., Martin, Galliher, McPhillips and Macdonald, JJ.A.

Argument

Craig, K.C., for appellant: The defendant contended that it advanced money towards taking up the option but this is not true. On evidence in contradiction of one's own witness see *Stanley Piano Co.* v. *Thomson* (1900), 32 Ont. 341. Now as to damages our submission is he is entitled to what he would have received had he remained in possession for one year.

J. A. Russell, for respondent: There are two companies, first the defendant Company; and secondly the company taking the option. He signed an unconditional release and he is bound by it. But assuming there was misrepresentation he is not entitled to the salary for a year. His employment during the seven months must be taken into consideration.

Craig, replied.

Cur. adv. vult.

4th June, 1929.

Macdonald, C.J.B.C.

Macdonald, C.J.B.C.: The plaintiff's engagement with the defendant was for a period of one year from the 2nd of June,

1927, and was under a written contract which contained the following stipulations:

"In the event of a certain option held by the Western Magic Silver Fox Company Limited being exercised the services of the said Malcolm will terminate upon the date on which the said Western Magic Silver Fox Company Limited takes possession."

The option by the terms thereof was open for acceptance not later than the 25th of September, 1927, and "may be accepted by a letter delivered to the Company or mailed postage prepaid and registered . . . accompanied by an accepted cheque or bank draft for the amount to be paid upon acceptance."

By letter (Exhibit 2) the defendant notified the plaintiff that the holder of the option "will exercise it and will require possession of the premises on the 8th of August, 1927." On this representation the plaintiff gave up his contract and the house of which he was in occupation. Subsequently having learned that the representation was untrue, the plaintiff brought this action for the salary and emoluments which he would have earned had he served for the balance of the year.

MACDONALD, C.J.B.C.

The representations contained in the notice were unquestionably false, and false to the knowledge of defendant's manager. The option-holders did not exercise their option in accordance with its terms nor at all; that the plaintiff acted upon the representations relying on the truth of them is not open to doubt and that he has suffered loss by reason of his virtual dismissal has been amply proved. His claim is for the balance of his agreed remuneration, which matured before trial The action was commenced within the period of service but was not tried until after the expiration of that period. The plaintiff was therefore in a position at the trial to prove what his damages were. He made all possible efforts to minimize them by diligently seeking other employment and eventually entered into a brokerage partnership which was a failure and from which he received nothing in reduction of his loss.

In addition to his wages there was a term in his agreement that he should also have free house, free fuel, and free fruits and vegetables. His wages for the balance of the term would have amounted to $1,575; the house at $40 per month, $388.67; fuel, $87.90 and fruits and vegetables $48.65, making in all $2,100.22.

COURT OF APPEAL

1929

June 4.

MALCOLM v. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR CO.

The trial judge dismissed the action without giving reasons. I would reinstate it and direct judgment to be entered for the sum above mentioned and costs.

MARTIN, J.A.: I agree in the disposition of this appeal.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal calls for consideration of facts and circumstances that were alleged at the trial and at this Bar to establish fraud and misrepresentation and that the appellant was induced to give up his employment under contract and grant a release to the respondent upon the false representation that the event had happened which entitled the term of employment being put at an end, *i.e.*, that another company, The Western Magic Silver Fox Company would exercise its option of purchase of the Silver Fox Farm and that possession of the property would be required. The learned trial judge did not give any extended reasons for judgment but the whole argument at the trial is in the appeal book and it was made very clear upon the argument, in my opinion, and supported by the facts, that the eventuality had occurred which was contemplated, that is, that the option given the new company was in the course of being exercised; the facts shew that the new company expended in entering upon the purchase some $12,000, and was put in possession of the property, it was only when it was clear that the enterprise could not be made into a commercial undertaking and would mean running into disaster that the new company desisted and did not further pursue the option and complete the purchase. This was patent to the appellant, he was in possession of the premises and knew all the facts. The appellant really came off very well in the matter, he got seven per cent. from the money he advanced, his money back, and received $175 a month for his services—he went out of possession of the property and gave a release. Now he brings this action for damages for breach of contract of employment and alleges that he was induced to give up his employment by the fraud of the respondent. The new company did exercise its option. It was in the active exercise of the option and the appellant was even paid his salary by the new company for more than two or more months. The action was

disposed of by the learned trial judge upon a motion for non-suit no evidence being given for the defence. Strictly, it is not the practice to move for a non-suit but for a dismissal of the action. The learned trial judge, Mr. Justice D. A. McDONALD, in my opinion, came to a right conclusion in dismissing the action. It is evident that at the trial all the salient facts were well brought out and the learned judge gave careful consideration to all the evidence that was led by the appellant, and the learned judge in dismissing the action held against the allegation of fraud and so determined. The whole case of the appellant at the trial was thrown upon the construction to be put upon the words contained in a letter to the appellant, written by the respondent, being:

"We have received notice from the Western Magic Silver Fox Company Limited that it will exercise its option and requires possession on the 8th of August, 1927,"

and that because no express written notice was received that fraud and deceit were practised upon the appellant. This is a case where it can be forcefully said deeds speak louder than words. The new company actually, as I have pointed out, went into possession and expended large sums of money in the exercise of the option, the appellant knew it, in fact received as we have seen some of the company's money and the appellant has the temerity to set up that there was no exercise of the option. That later the option was not fully carried out is not a matter of moment and cannot aid the appellant. I can not conceive of a more unconscionable contention being advanced by the appellant. The examination of Bert M. Filmer the Paraguay director for the respondent was put in evidence at the trial by the appellant and that evidence in the clearest way demonstrates that the new company entered upon the exercise of its option and also displaces in the clearest manner the presence of fraud.

MCPHILLIPS, J.A.

It is without hesitancy that I arrive at the conclusion that the learned trial judge rightly dismissed the action. When fraud is set up it must be proved to the hilt; here it fails utterly, in my opinion.

I cannot part with my consideration of this appeal without reference to what the guiding principle should be in a Court of Appeal where fraud is set up. Here we have the learned trial

COURT OF APPEAL

1929

June 4.

MALCOLM v. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR CO.

judge holding against fraud and this Court is being asked to say that there was fraud. I would refer to what Mr. Justice Idington said in *Dominion Permanent Loan Co.* v. *Morgan* (1914), 50 S.C.R. 485 at p. 501; 7 W.W.R. 844 at p. 853:

"The learned trial judge, who heard the evidence and saw and heard these defendants and gave credit to their story, ought not to have been reversed, especially in such a case as this, involving thereby a finding of gross fraud and perjury, where there are no collateral facts or circumstances or fundamental facts regarding matters in dispute upon which the Appellate Court so reversing can with absolute confidence and assurance rely and feel they are not mistaken. . . ."

Mr. Justice Idington further said, at p. 863 (50 S.C.R. 516) —exceedingly apposite to the facts in this case:

"In parting with this case I may be permitted to say that in all cases of this character it is generally possible to demonstrate, by reference to collateral facts and attendant and surrounding circumstances, when thoroughly investigated, whether the accused has been guilty of fraud as charged or not, and I regret that so many clues, leading to such disclosures and light as such circumstances and collateral facts might afford, have been entirely neglected."

MCPHILLIPS, J.A.

And at p. 865 (50 S.C.R. 519) we have Duff, J. saying:

"All the facts were before the trial judge, and I see no reason to doubt that any of the considerations which led the majority of the Court of Appeal to reverse him were overlooked by him."

I would also refer to *Nocton* v. *Ashburton* (*Lord*) (1914), A.C. 932, where the Lord Chancellor (Viscount Haldane) said, p. 944:

"My Lords, I do not propose to enter into an examination of the evidence. The action was tried before Neville, J., who had the appellant and the respondent before him in the witness-box. He treated the case as one of fraud simply, as, indeed, according to the statement of claim, in one sense it was. Fraud, he said, must be clearly and unmistakably proved. . . ."

And at p. 945, the Lord Chancellor further said:

"My Lords, I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal."

I am satisfied that the learned trial judge fully considered all the facts, he had the witnesses before him—an advantage which we have not, he did not find fraud—and in my opinion, he was right and his judgment should not be disturbed. I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Appellant sued for a declaration that a certain release executed by him was obtained by fraud and mis-

representation and for damages. In consideration of a loan of $2,000 to the respondent Company, the latter agreed in writing on 2nd June, 1927, to employ appellant as manager of its fox farm for one year at a salary of $175 a month, and in addition allow him the free rent of a house, fuel, light, etc. The contract of hiring after reciting the loan provided that:

"It is mutually agreed that in the event of a certain option held by the Western Magic Silver Fox Company Limited, being exercised the services of the said Malcolm will terminate upon the date on which the said Western Magic Silver Fox Company Limited takes possession and the sum of Two Thousand ($2,000) dollars becomes then due and payable by the Company to the said Malcolm."

On the 2nd of August, 1927, the respondent wrote appellant as follows:

"We have received notice from the Western Magic Silver Fox Company Limited that it will exercise its option and requires possession on the 8th of August, 1927. In pursuance of paragraph 2, page 3, of the agreement entered into between our Company and yourself on the 2nd day of June, 1927, we hereby give you notice that our Company is prepared to repay you the amount of money which you lent the Company, on or after the said 8th day of August. We shall require possession of the ranch house on the 8th day of August, but, as we realize that you have been put to some expense in moving, the directors have decided to allow your salary to August 31st."

MACDONALD, J.A.

Appellant acted upon this notice, submitting to the termination of the contract and upon receiving repayment of his loan executed on 9th August, 1927, an acknowledgment containing a release of

"All claims, suits, debts and demands of every nature and kind which I may now have or hereafter shall or may have against the Company and in full satisfaction as complete performance by the Company of a certain agreement entered into between the Company and myself on the 2nd day of June, 1927."

Appellant alleges that on or about November 1st, 1927, he discovered that the option referred to in the notice he received had not been exercised, nor had the option-holder given notice of intention to exercise it. He submits therefore that the release executed should be avoided because of fraud and damages awarded for deceit in terminating the contract in the manner outlined.

If respondent wrote the letter of 2nd August, 1927, knowing it had not received notice from the Western Magic Silver Fox Company (made up to some extent of the same shareholders) "that it will exercise its option" or knowing as it must be taken

COURT OF APPEAL

1929

June 4.

MALCOLM v. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR CO.

MACDONALD, J.A.

to know the terms of its contract with the appellant, *viz.*, that it was only in the event of that option being exercised that it could terminate the contract then it committed a fraudulent act in misrepresenting the true situation. It cannot escape by asserting that the letter of 2nd August only stated that the option company "will exercise" its option. Its purpose was to bring into operation the clause in an agreement which required that the option should be exercised before it could be terminated, and if by guile it effected that purpose and appellant acting reasonably relied upon it the result is the same. Respondent may escape if before the release was executed appellant knew the true facts, including the state of the negotiations with the option company and with that knowledge chose to execute the release believing that it was in his interest to do so. He would at least secure repayment of the money advanced. These considerations require an examination of the evidence.

Counsel for appellant relied largely on the discovery evidence of Bert M. Filmer managing director of respondent Company. He asked the Court to consider his whole evidence; not parts thereof which taken alone would support respondent's view. Filmer produced an option agreement dated April 2nd, 1927, from respondent Company to Bert M. Filmer (the witness) and S. D. Young for the purchase of its assets for $63,000 plus the sum of $500 to be added for each month intervening between the 31st of March, 1927, and the date of exercising the option, subject also to deductions if part of the assets were disposed of in the meantime. This option was given for a period ending the 25th of September, 1927, and "may be accepted by a letter delivered to the company, etc., accompanied by a cheque for one-eighth of the purchase price," balance payable within six weeks. The option-holders were given the right to form a new company under the name "Western Magic Silver Fox Company Limited" if formed to acquire the property. Filmer and Young by an agreement dated April 9th, 1927, assigned their option to Western Magic Silver Fox Company Limited (the company presumably being incorporated in the meantime).

Filmer in answer to a direct question stated that this option was taken up. If that is true the contract with appellant was properly terminated. How it was "taken up" appears by his

further examination. He said the option company paid a deposit on the exercise of the option. He presumably recited all the facts and if so I can find no evidence to support this allegation. What happened was this. Young went to Europe "to first sell foxes" and sent to Filmer the following cable:

"May 20, 1927.

"Prospects unfavourable sale breeders prices around 450 recent European shipment realized 600 delivered pelt prices average 125. Am endeavouring raise capital two parties interested will cable developments."

The last part of the cable referred to efforts to raise capital for the option company. A further cable was received on 14th July, 1927, as follows:

"Filmer:

"Interested party proposes accompany me B.C. Complete negotiations suggest provide six thousand dollars working capital until finally arranged cash will be available in August. Details of as under consideration will reply shortly when can you send cash? "Young."

On receipt of this communication Filmer cabled to Young as follows:

"July 15, 1927.

"Don't understand cable who provides six thousand dollars see General Stuart British Columbia House Number One Regent Street London."

Whereupon Young replied next day:

"Interested party would advance working capital to enable us maintain ranch during investigations am proposing offer him portion our shares as security further conference Wednesday."

Then on July 19th, 1927, Filmer cabled Young as follows:

"Will deposit stock with Bank you indicate on receipt of money cabled here."

In the meantime Filmer asserts that confident the money would arrive he personally advanced cash to the respondent Company "with the thought in mind of taking up the option with that money as soon as it arrived." Then, in July, 1927, Filmer had a conversation with appellant in which he told him —presumably based upon the cablegrams—that he expected money from the Old Country to take up the option. He also said to him "if the money didn't come over to exercise the option that we were in bad circumstances financially—the old company." Appellant expressed concern that he might lose the money he advanced. Filmer in reply "hoped not." This conversation shews how far from consummation the negotiations were at that stage. It is also open to the suggestion that Filmer

COURT OF APPEAL

1929

June 4.

MALCOLM v. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR CO.

MACDONALD, J.A.

was desirous of implanting fear of loss in the mind of appellant which might induce him to abandon his contract because, Mr. Steele, another director, whose honesty was not impugned told appellant that Filmer's statement of possible bankruptcy was not warranted.

Finally on the 14th or 24th of August, 1927, the sum of $6,000 was received from England by Filmer in his capacity as director of the option company and he first stated that he paid this amount to the respondent Company on the option. The statement was not accurate as subsequent evidence will shew. At all events, the notice to appellant that the option was exercised or that the option-holder "will exercise" it was given on 2nd August, two or three weeks before this date. On August 24th, 1927, after receipt of the money referred to, Filmer cabled Young as follows:

> "Information draft prospectus incorrect fact is only seventy-five cubs. Do not accept any money or bring anyone Vancouver on any other representation. Cable particulars regard six thousand which will be held by bank until matter cleared up. Have made sales eight pairs old foxes nine thousand cash."

And Young replied as follows:

> "Tyrer advised but still wishes look it over we sail as arranged."

These cables shew that the $6,000 was not dealt with as the witness intimated. He afterwards explained that he refused to use it until certain points were cleared up. But he went on to assert that although he held this $6,000 for the time being he advanced moneys of his own to the respondent Company which he regarded as payments under the option. Up to this date, 24th August, 1927, respondent Company did not receive any letter of acceptance from the option Company with the accompanying payment provided for in the agreement. Filmer attempts to surmount this difficulty by asserting that respondent Company received verbal, or rather mental, notice from him as a director of the option Company, and managing director of the respondent Company. He advised himself. He advanced, according to his evidence, as intimated, certain moneys to the respondent Company. As he put it, "I personally took up the option with my own money." He advanced altogether considerable sums to respondent Company in this way. The details of these advances are important. They consist of Filmer's cheques on account of

respondent Company and receipts for moneys received for miscellaneous amounts. The amounts thus advanced prior to August 2nd, 1927, appear to be as follows: June 8, 1927, $20; July 15, 1927, $250; July 26, 1927, $1,000; July 30, 1927, $151. These were the only advances made up to the date notice was given appellant and they appear to be miscellaneous items paid to meet exigencies in the course of respondent Company's business and bearing no direct relation to a payment on an option unless that must be assumed from Filmer's statement and the fact that he made the advances. After the 2nd of August and up to December 15th, 1927, receipts and cheques were filed shewing disbursements in the same way of over $12,000 without any detailed explanation of their purport. It may be that if the negotiations ended in a purchase by the option Company that advances by mutual agreement would be treated as payments on account. At all events, less than $1,300 was paid in this desultory manner before August 2nd, nor did the advances made before that date or after ever culminate in the purchase of the property under the option or otherwise. Filmer insisted that if he found that he could not use the $6,000 referred to he would not regard his advances as a loan to respondent Company. He said he "might have lost it on the option if the old company would have been inclined to see that way." Such a foundation of fact is too tenuous to support the explicit statement in the letter of August 2nd that the option "will be exercised" much less that it was exercised as expressed and required by the hiring contract.

MACDONALD, J.A.

What eventually happened was this. Mr. Tyrer—referred to in a cable—and others were not able to raise a sufficient sum for the purchase—only $14,000 was received—and stock in the respondent Company was issued for this amount. Filmer put it that respondent Company in order to avoid loss of the alleged option moneys paid issued stock in respondent Company to the parties who advanced it. There the matter ended.

The purport of this evidence was to shew that while the option was not exercised nor sufficient progress made to justify the positive statement that it would be exercised still the then existing situation justified the letter to appellant of 2nd August; at all events fraud should not be imputed. Filmer it was said,

COURT OF APPEAL

1929

June 4.

MALCOLM v. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR CO.

MACDONALD, J.A.

entertained confident expectations and acted *bona fide*. But why should the letter be so explicit? "We have received notice." It was a mental notice. The option Company "will exercise its option." It never exercised it and the facts alleged to justify the expectation did not warrant the prediction. Nor is it clear that the words "will exercise" in view of all the facts were intended to, or should be taken to refer to a future event. The notice professes to be "in pursuance of paragraph 2, page 3 of the agreement" and that paragraph does not relate to future contingencies. Yet it is incorporated in the notice. The notice also states "we shall require possession of the ranch house on the 8th day of August." I cannot believe—and it is largely an inference from undisputed facts—that it was an honest letter. Clearly the circumstances at least called for a full explanation of the true situation, so that if possible by negotiations they could procure the termination of the contract without resorting to subterfuge. True, Filmer testified in stating the reasons why appellant signed the release: "I would say it was because he was getting his cash back." He expresses that as an opinion, not as a fact. There is no evidence to support the view that appellant consented to a departure from the strict terms of his contract, a suggestion resting largely on the fact that one or possibly more of the cables quoted were shewn to him. Nowhere is it suggested that he was told the true situation and asked on the strength of that to treat the notice as sufficient. The whole evidence points to an attempt to circumvent the requirements of the contract.

Further, if without fraud respondent Company by a statement made honestly or mistakenly or too optimistically which in fact is untrue induces appellant to throw up the fruits of a contract an action would lie. This ground however does not appear to be pleaded unless paragraph nine of the statement of claim is sufficient. Fraud is alleged and relied upon. The learned trial judge gave effect to a motion for non-suit and dismissed the action. He did not find fraud and that finding is entitled to weight. But as intimated it is largely an inference from undisputed facts coupled with a rejection of literal statements made by Filmer professedly based upon documentary evidence which when examined fails to substantiate them. I feel free to find

that the appellant who did not know the facts was misled to bring about a certain result by one who did know the facts. That is fraud and I would so find.

The appeal should be allowed. I agree with the Chief Justice as to damages.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *R. G. Phipps.*
Solicitors for respondent: *J. A. Russell, Nicholson & Co.*

REX v. RADINSKY.

Criminal law—Keeping a common gaming-house—"Gain"—Game of cards—Rake-off—Payment for refreshments partly furnished on premises—Conviction—Appeal—Criminal Code, Sec. 226.

The defendant was a co-partner in a tobacco and refreshment store, in the rear of which was a room to which persons, chiefly customers, resorted for the purpose of playing "pan," a game played with cards and chips. The defendant took a "rake-off" of 25 cents from each player every half hour for the purpose of paying for cards, cigars and refreshments. No charge was made for the room and the rake-off did not more than cover the cost of the cards, cigars and refreshments, a portion of which was purchased on the premises. The defendant was convicted of keeping a common gaming-house.

Held, on appeal, GALLIHER, J.A. dissenting, that in these circumstances the defendant was properly convicted.

Statement

APPEAL by accused from his conviction by police magistrate Shaw in Vancouver on the 4th of February, 1929, on a charge of unlawfully keeping a disorderly house, to wit: a common gaming-house on Dunsmuir Street in the City of Vancouver. The police raided the premises, there being a room in which customers met to play cards behind a tobacco and refreshment store. At one of the two round tables in the room sat five frequenters with the proprietor. They were playing a game called "Pan." They used cards and chips. The proprietor took

COURT OF APPEAL

1929

June 4.

REX v. RADINSKY

a rake-off of 25 cents from each player every half hour and bought cigars, cigarettes and refreshments with the proceeds of the rake-off for the players. The purchases were made partly on his own premises in front and partly in other places outside. The game was admittedly a mixed game of chance and skill. The accused was convicted and fined $50 and costs.

The appeal was argued at Vancouver on the 11th of March, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Nicholson, for appellant: This is not a common gaming-house within the meaning of the statute. Each player was supposed to pay 25 cents per half hour but payment was entirely voluntary and the money did not go to the keeper of the house. They purchased refreshments with the proceeds but only a portion of the money was spent in the building for this purpose. He is only getting money as a seller of refreshments. The question has been dealt with in two Provinces. The case of *Rex* v. *Cherry and Long* (1924), 42 Can. C.C. 137 is in our favour; see also annotation, 48 Can. C.C. 297 at p. 302; *Reg.* v. *Saunders* (1900), 3 Can. C.C. 495. The case of *Rex* v. *James* (1903), 6 O.L.R. 35 is against us; see also *Rex* v. *Lemaire* (1929), 1 W.W.R. 321 at p. 324; *Rex* v. *Riley* (1916), 23 B.C. 192 at p. 195.

McKay, for the Crown: In *Rex* v. *Cherry and Long* (1924), 42 Can. C.C. 137, the whole argument and reasons are founded on the fact that it was a *bona fide* club in which they played. The case of *Rex* v. *James* (1903), 6 O.L.R. 35 is substantially the same as the one at Bar and I submit should be followed. The proprietor here made his profit out of the cigars and cigarettes he sold the players, and he comes within the statute.

Nicholson, replied.

Cur. adv. vult.

On the 4th of June, 1929, the judgment of the Court was delivered by

Judgment

MACDONALD, C.J.B.C.: The appellant was convicted of keeping a common gaming-house. He was one of the proprietors of

a tobacconist shop and at the rear of this shop was a room to which card-players habitually resorted. The police found the appellant and four others playing a game of chance called "pan." The appellant admitted that the premises were kept by himself and partner and that he took a "rake-off" of 25 cents from each player every half hour. He claimed that this was taken for the purpose of paying for cards, cigars and cigarettes for the players and occasionally fruit, all of which, except the fruit, were taken from the appellant's stock on which there was a profit. In these circumstances, the conviction was right and is sustained by the weight of authority.

Judgment

I would dismiss the appeal.

GALLIHER, J.A.: In the game of poker, and sometimes in other games of chance or of mixed chance and skill, there are two kinds of what is called "rake-off." One where money is taken from the players or the "pots," or some of them as a means of reimbursing the proprietor for furnishing and operating the premises, and in that case the money taken as a rake-off when so taken is the absolute property of the keeper—no player has any interest in it whatever when so taken; it is a direct contribution to the up-keep of the premises.

The other kind of rake-off or "kitty," as it is sometimes called, is where the players agree among themselves that a certain amount shall be set aside from which during the game the players may use to purchase drinks, cigars or other refreshments.

GALLIHER, J.A.

In this fund the proprietor has no interest *qua* proprietor, but if he happens to be one of the players his interest is the same as any other player in the purposes for which it is to be used. This is exemplified by the fact in evidence in this case that should all the money so set aside not be used in the purchase of refreshments what remains is thrown into the last pot and becomes the property of the person winning the pot.

I adopt the language of Beck, J.A., who delivered the judgment of the Alberta Court of Appeal in *Rex* v. *Cherry and Long* (1924), 42 Can. C.C. 137 at p. 141, in these words:

"In my opinion, the only reasonable interpretation of this clause is that it refers, and refers only, to a payment made to the keeper out of one or all of the 'pots' under a rule, regulation, agreement or understanding exacted by the keeper that such a payment shall be made as a rake-off, commission

COURT OF APPEAL

1929

June 4.

REX v. RADINSKY

or other form of profit to the keeper. In my opinion, it is not intended, and certainly does not clearly express, the intention to prohibit the players arranging among themselves that, from each pot, or from certain pots, or from a particular pot, a fixed sum, or a fixed proportion, or a sufficient sum, shall be taken for the purpose of paying for refreshments for the players, and if they do this, and then, with the money so set apart, pay for refreshments, it is a matter of indifference whether the refreshments are purchased from the keeper or from some person unconnected with the premises.

"Such a payment is not made to the keeper *qua* keeper, but as a seller of refreshments. Nor is the money paid *qua* part of the pot, but is in reality a contribution by the several players out of their own pockets, just as much as if they severally contributed to the fund from their own pockets. It is paid for a purpose and for a consideration in no way incident to the game as a game, and I think, therefore, for the two reasons indicated, it is not the kind of payment which is contemplated by the Act."

It was urged that these words must be taken with reference to gambling in a club which the case there was, but my understanding would be that the learned judge was there dealing with section 226 (*b*) apart altogether from whether the offence took place in a club or not.

GALLIHER, J.A.

It was also urged that it was *obiter*, but should either or both submissions be correct, I would still adopt them as my reasons for giving judgment in this case.

When it is clear upon the evidence and not disputed that these contributions were made directly for a specific purpose, it does not necessarily follow that they were made indirectly for another purpose.

In so far as purchases were made from the proprietor, to that extent they directly enhanced his business of sales of cigars, etc., they were neither directly nor indirectly (under the statute as I view it) such as should constitute the place a gaming-house.

I would allow the appeal and quash the conviction.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitor for appellant: *W. J. Murdock.*
Solicitor for respondent: *O. C. Bass.*

[IN BANKRUPTCY.]

MACDONALD, J. (In Chambers)

1929

May 27.

ROSS JOHNSON LTD. v. VICTORIA MINES, LTD.

ROSS JOHNSON LIMITED v. VICTORIA MINES, LIMITED.

Bankruptcy—Preference claims—Bill of costs of execution creditor—Construction of section 25 of Bankruptcy Act, R.S.C. 1927, Cap. 11.

Judgment was obtained by a creditor of the Victoria Mines, Limited, execution issued and placed in the hands of the sheriff on the 13th of April, 1927. On the following day and before any seizure was made by the sheriff, Victoria Mines, Limited, made an authorized assignment in bankruptcy. The creditors' solicitors taxed their costs on the 29th of Apıil following but did not issue execution therefor. On appeal from the decision of the trustee in bankruptcy rejecting the creditors' claim for their costs as a preference claim:—

Held, that as there was no seizure by the sheriff under the writ of *fi. fa.* and subsection 2 of section 25 of the Bankruptcy Act is governed by the prior and enacting portion of the section, the appeal should be dismissed.

APPEAL by plaintiff from the decision of the trustee in bankruptcy of the Victoria Mines, Limited, N.P.L., rejecting the claim of Ross Johnson Limited for $1,093 costs as a preference claim against the estate of Victoria Mines, Limited, N.P.L., in bankruptcy.

Statement

On April 13th, 1927, Ross Johnson Limited, obtained judgment against the Victoria Mines, Limited for $5,757.40 debt and costs to be taxed, and on the same day issued a writ of *fi. fa.* for the said amount and $6 costs for execution, directed to the sheriff for the County of Prince Rupert. On April 14th, 1927, the Victoria Mines, Limited, made an authorized assignment in bankruptcy. The solicitors of Ross Johnson Limited taxed their costs in the sum of $1,093 in respect of the aforesaid judgment on April 29th, 1927, but did not issue execution therefor. The authorized assignment of Victoria Mines, Limited, N.P.L. took place before any seizure was made by the sheriff of the County of Prince Rupert.

The appeal was argued before MACDONALD, J. in Chambers at Victoria on the 27th of May, 1929.

Argument

F. C. Elliott, for appellant: Section 25 of the Bankruptcy

MACDONALD, J. (In Chambers)

1929

May 27.

ROSS JOHNSON LTD. v. VICTORIA MINES, LTD.

Act gives a preference for the costs of the first execution creditor: *Re Toronto Metal and Waste Co.* (1921), 51 O.L.R. 287; 21 O.W.N. 166; 2 C.B.R. 138; *In re Maille* (1923), 4 C.B.R. 163; *McLean Co.* v. *Newton* (1926), 3 W.W.R. 593; 36 Man. L.R. 187; 8 C.B.R. 61. The execution costs referred to in section 25 are not confined to the costs incurred after judgment: *Clarkson* v. *Ryan* (1890), 17 S.C.R. 251.

Argument

O'Halloran, for respondent, the trustee in bankruptcy, Victoria Mines Limited: No seizure had been made by the sheriff, therefore subsection 2 of section 25 of the Bankruptcy Act has no application. In the alternative, if it be held there was seizure by the sheriff, or no necessity for seizure, then preference only for costs subsequent to judgment. Writ of *fi. fa.* binds property only from actual seizure: see subsection (24) of section 2 of Laws Declaratory Act, R.S.B.C. 1924, Cap. 135. No execution for $1,093 costs had been issued, therefore appellant is entitled only to costs of writ, namely, $6 plus sheriff's costs: see *Re Robinson* (1924), 27 O.W.N. 138; 5 C.B.R. 211.

Judgment

MACDONALD, J. *held,* dismissing the appeal, that there had been no seizure by the sheriff under the writ of *fi. fa.* and that subsection 2 of section 25 is governed by the prior and enacting portion of the section; and further held, that assuming under subsection 1 of section 25, that there is to be a payment of costs, then subsection 2 provides that only one bill of costs shall be paid.

[In Bankruptcy.]

MACDONALD, J.

1929

May 30.

IN RE SECHART FISHERIES LIMITED. EDWARD RENNEBERG & SONS COMPANY v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION.

In re Sechart Fisheries Limited.

Edward Renneberg & Sons Co. *v.* Canadian Credit Men's Trust Association

Bankruptcy—Trustee—Power to lease—Application by secured creditor to set aside—Conduct of bankruptcy—R.S.C. 1927, Cap. 11, Secs. 43 and 84.

A secured creditor applied under section 84 of the Bankruptcy Act to reverse the trustee's action authorized by the creditors and the inspectors, in leasing the plant of the bankrupt for the current year.

Held, that no specific power to lease is vested in the trustee under section 43 of the Act and as it appears that the granting of a lease is not beneficial to the winding up of the business of the debtor, the lease should be set aside.

Statement

APPLICATION by a secured creditor under section 84 of the Bankruptcy Act to set aside a lease of the plant of a bankrupt, given by the trustee in bankruptcy. The facts are set out in the reasons for judgment. Heard by Macdonald, J. at Victoria on the 30th of May, 1929.

Argument

O'Halloran, for the creditor: There is no power to lease given by section 43 of the Bankruptcy Act. The lease to Millerd should therefore be set aside. The trustee did not act impartially and should be removed: *Imperial Bank* v. *Barber* (1921), 20 O.W.N. 282; 1 C.B.R. 485; *Re Davies Footwear Co. Limited* (1923), 53 O.L.R. 467; 4 C.B.R. 131.

Montgomery, for the trustee: This creditor has no *status*. It is a secured creditor and has valued its claim for the full amount of the amount owing, except $215. The trustee has power to lease under section 43 (*a*) and (*b*). *In re Gareau* (1922), 3 C.B.R. 76.

Macrae, for the lessee: The trustee did not shew partiality to the lessee.

Judgment

Macdonald, J.: Edward Renneberg & Sons, Company alleges that it is a creditor of the Sechart Fisheries, Limited, and invokes the provisions of section 84, of the Bankruptcy Act, R.S.C. 1927, Cap. 11, reading as follows:

MACDONALD, J.

1929

May 30.

IN RE SECHART FISHERIES LIMITED.

EDWARD RENNEBERG & SONS CO. v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION

"If the debtor or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the Court and the Court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just."

The complaint on the part of such creditor is, in the first place, that the trustee had no power to lease the plant of the bankrupt company.

Before dealing with this question, however, I think I should refer to the objection, taken by counsel for the trustee, that this creditor should not be heard, or, at any rate, its complaint should not be given weight, because it is only a creditor to the extent of $215. It appears that over $30,000 was fixed by the company in filing its claim, as the price for certain plant sold by said Renneberg & Sons to the bankrupt company, for use in their reduction works on the west coast of Vancouver Island. There were certain payments, but the amount I have mentioned, in round figures, was the extent of the indebtedness at the time that the order for bankruptcy was made, on May 31st, 1928. The reason why it is contended that the claim only amounts to $215, is that it appears that Renneberg & Sons in so filing its claim with the trustee, valued its security at such an amount, as would only leave the sum of $215 still owing. The situation is a peculiar one, as, while section 107 requires the creditor to value its securities, still section 110 of the Act enables such creditor, if it has realized upon its security, or under the provisions of section 108, to then substitute an amended valuation. The application of section 110 cannot be made, because the property is still in the possession of the trustee, and no active attempt has been made to realize, and thus determine whether the amount would create an indebtedness beyond the $215, to which I have referred. However, this position, it is contended, is such that unless the Court should be satisfied that it is in the interests of the estate, the course pursued by the trustee should not be interfered with; it being asserted, and I accept the statement, that all the secured creditors save Renneberg & Sons, are satisfied that the lease in question is for the benefit of the estate, and they are not taking any steps to prevent its full operation. Notwithstanding this position, and the nature and extent of its claim, Renneberg & Sons submit that, as a matter of law, the trustee has not the power, asserted by him to execute the lease

Judgment

to Francis Millerd. This contention involves consideration of the powers conferred upon the trustee under the Bankruptcy Act.

Section 43 of the Act outlines the powers that are exercisable by a trustee, with the permission of the inspectors. It was contended before me, in June of 1928, that there was no power to lease given to the trustee. The matter was argued at considerable length under the Bankruptcy Act, and it must have been apparent that no specific power is thus vested in the trustee. There were no notes taken of the argument, nor of my reasons for granting the order, to which I will presently refer. I accept the statement, however, of counsel, that in determining, under the then circumstances, that a proposed lease was proper, I combined the effect of subsections (*a*) and (*b*) of said section 43. I considered at the time, and the order made bears out such conclusion, that while the trustee had no power to give an option to purchase, that it was within the powers of the trustee, and beneficial to the winding up of the estate, that the trustee should enter into a lease of the premises and plant, upon reasonable terms, to the extent of the pilchard fishing season of the year 1928.

Judgment

I will refer, in that connection, to the case of *In re Gareau* (1922), 3 C.B.R. 76. In that case the actions of the trustee, in carrying on the business in a certain manner, were complained of by a creditor, under the section that is now invoked. Mr. Justice Maclennan, in his judgment, refers to the fact that the trustee was doing what was distinctly within his authority under the Act, and that his conduct in the business had not been improper or unreasonable, but had been for the benefit and advantage of the creditors generally, and that he should be allowed to continue operating the business until the close of the present season, when stock would be taken, and the inspectors would consider the sale of the remaining assets of the business. Another portion of the judgment, refers to the fact that the carrying on of the business was shewn to have been for the benefit and advantage of the creditors in general, and that nothing had been done which might prejudice the rights of the general body of the creditors. The principal point for consideration in that case was, as to whether or not, a certain quantity of cloth on hand should be utilized, and the business continued for a

MACDONALD, J.

1929
May 30.

IN RE SECHART FISHERIES LIMITED.

EDWARD RENNEBERG & SONS CO. v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION

Judgment

period for that purpose. Now while that case is instructive, like nearly all cases dealing with facts, it is to be distinguished from the one here presented. In the first place it was an application from a creditor, complaining of the trustee carrying on the business. Here the complaint by the creditor is as to the trustee, through a lease, allowing some third party to carry on the business. There, as here, last year, the period sought for the carrying on of the business was limited. So that such case could well have been cited, as supporting the conclusion which I reached when this matter was argued in June last, but cannot be as well applied this year.

Now practically the same application is made as was fully discussed and considered a year ago. I have, then, to determine, whether I should pursue the same course, without any distinct authority conferred upon the trustee to lease, as being for the benefit of the estate, or, as it is termed in the Act, the beneficial winding up of the business of the debtor. Should I allow another season to be utilized in practically the same manner, as was permitted in 1928?

The Bankruptcy Act was passed for the purpose of speedily winding up the affairs of an insolvent. When the first Bankruptcy Act was in force it became very unpopular through the delay that occurred, the expense that was incurred as well, and eventually was repealed. It was many years before the present Bankruptcy Act was passed by the Parliament of Canada. In my opinion, within proper limitations, a trustee should endeavour, as far as possible, to realize speedily upon the assets of an estate, which comes into his hands. Here, the Canadian Credit Men's Trust Association, a reputable trustee, having extensive business throughout Canada, is being attacked upon several grounds; it is particularly the subject of criticism on the ground that its representative is not acting impartially, on behalf of his company. I have already referred to that during the course of the argument, and I say, not only would it be a disadvantage to him personally, but would not serve any good purpose, for me to discuss that situation at any length, in view of the conclusion I have reached, upon the question of the power to lease. While I am not receding from the conclusion I

reached in June last, I think that the same course should not be again pursued. I might add, in this connection, that it was apparent to the trustee, about two months ago, that some steps should be taken to realize, or to deal with the assets in his hands, before the fishing season approached. Now, upon the verge of fishing, the criticism is made, and attack launched, upon the course he has pursued with respect to this lease. I have already intimated that I do not intend to take any action with respect to the change of the trustee, or say anything further in that respect.

But dealing with the first point as to the lease, which is really the essential one, as far as the present situation is concerned, I do not think that subsections (*a*) and (*b*) of section 43 should be again utilized. If a similar course to that approved last year were again to be pursued, it would be contrary to the intention of the Bankruptcy Act. The order or decision made by the trustee with respect to this lease is set aside.

Judgment

I think it well, however, to make some direction, or rather express an opinion, as to the future, because the assets will be dissipated unless active steps be taken to realize. I have already stated, that in my opinion it is the duty of a trustee to speedily realize the assets, and divide the proceeds among the creditors.

It has been submitted that the action of this attacking creditor is simply for the purpose of compelling the trustee to obtain a purchaser who would be willing, not only to purchase the assets, which are not covered by the security, but also the property that is the subject of security. There may be considerable support to that contention afforded by the circumstances, but such result can be easily obviated if the trustee should immediately endeavour to sell all the assets of the estate, which are not covered by the conditional sale agreement in favour of Renneberg & Sons. It is not in place for me on this application to order him to do so, but the manner of realization may perchance be treated as a test of his Association acting impartially, and thus shewing that the attack made upon its representative is unwarranted.

In view of the experience which must be possessed by the Canadian Credit Men's Trust Association, or its representative Mr. Halliwell, in such matters, and the matter being, strictly speaking, outside the application, I do not deem it necessary nor

MACDONALD, J.

1929

May 30.

IN RE SECHART FISHERIES LIMITED.

EDWARD RENNEBERG & SONS CO. v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION

advisable to give any particular or special instructions, as to the manner of such realization.

Order accordingly.

The costs were ordered to be paid out of the estate; and, counsel for the trustee having requested the fixing of a lump sum, the Court said that a lump sum would be fixed.

Order accordingly.

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

TRENWITH LIMITED v. THE JARVIS ELECTRIC COMPANY LIMITED.

Principal and agent—Sale of goods—Commission—"Handle cash basis"—Meaning of—Right to set off costs in another action—Trade terms—Evidence as to meaning of.

An agent having found a prospective purchaser for a refrigerating plant communicated with a distributor thereof and a telegram in reply, after fixing the price at $1,200, stated: "Your commission 10 per cent. if we finance, 25 per cent. if you handle cash basis." After correspondence the buyer and the seller entered into a written contract of purchase and the seller installed the plant. As the installation was nearing completion the agent, fearing his commission was in jeopardy, persuaded the buyer to deliver to him the cheque (which was made payable to the seller) for the purchase price. On the agent refusing to deliver the cheque unless he received his 25 per cent. commission, the seller sued the buyer for the purchase price but later the agent, on advice of counsel, delivered the cheque to the seller and the action was settled after certain costs had been incurred by him. The agent then sued for the 25 per cent. commission and the seller counterclaimed for the costs he paid in the former action. The trial judge allowed 10 per cent. commission only and allowed the counterclaim directing a set-off against the commission.

Held, on appeal, reversing the decision of SWANSON, Co. J. (GALLIHER, J.A. dissenting in part), that the phrase "handle cash basis" could not be given an alleged trade meaning that the agent should buy from his principal and resell to the prospective purchaser and assume full responsibility for the installation and the agent is entitled to his 25 per cent. commission.

Held, further, that the seller was not entitled in this action to recover the costs he incurred in the first action from the agent.

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

Per MACDONALD, C.J.B.C., and MACDONALD, J.A.: Extrinsic evidence of the trade meaning of the phrase "handle cash basis" failing a proper foundation therefor is not admissible.

APPEAL by plaintiff from the decision of SWANSON, Co. J. of the 11th of December, 1928, in an action to recover $300 commission at the rate of 25 per cent. on the purchase price of a refrigerating plant on the premises of one T. P. Hulme in Kelowna. The plaintiff, a commission agent in Kelowna asked for quotations on a refrigerating plant and in reply received the following telegram on the 12th of February, 1928:

"Model fifty, Lipman will handle box twelve by six and twelve foot counter price installed twelve hundred dollars customer supplies wiring and water connection. If good box guarantee thirty-eight degrees. Counter U. Coil for display only forty-eight degrees. Full automatic delivery four weeks. Your commission ten per cent. if we finance, twenty-five per cent. if you handle cash basis. Writing."

Statement

Correspondence ensued and on the 14th of March the defendant and one Hulme to whom the sale was to be made entered into a conditional sales contract for the installation of the plant by the defendant in Hulme's butcher shop for $1,200 cash, after satisfactory tests. On the 31st of March, the defendant wrote the plaintiff explaining the telegram of the 12th of February as to the basis of commission on the sale stating that if the plaintiff had purchased the machine from them it would have been shipped with a sight draft against a bill of lading and the defendant would have no further responsibility and he (the plaintiff) would be entitled to 25 per cent. commission but as the contract was between the defendant and the customer and the defendant has to do the installing and assume all risks he (the plaintiff) is only entitled to 10 per cent. commission. The plaintiff did not answer this letter and the defendant sent a man up to Kelowna to install the machine. The plaintiff then thinking his 25 per cent. commission was in jeopardy arranged that the cheque for $1,200 be paid to him after installation and testing of the plant. Hulme handed the plaintiff the cheque, which was made payable to the defendant, and the plaintiff refused to hand over the cheque until he received in return a cheque for $300 from the defendant (*i.e.,* 25 per cent. commission). The defendant refused to do this and then brought action against Hulme for the purchase price. The plaintiff then,

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

Statement

on advice of his solicitor, handed over the cheque to the defendant and brought this action for 25 per cent. commission on the sale of the plant. The learned trial judge held that on the evidence the plaintiff was only entitled to $120, being 10 per cent. of the purchase price for his commission but as he had wrongly withheld Hulme's cheque to which the defendant was entitled and thereby occasioned the defendant loss and expense through being compelled to bring action against Hulme to recover the purchase price the defendant is entitled to set off the amount of costs they were put to by the plaintiff's wrongful action, this being fixed at $120.

The appeal was argued at Vancouver on the 5th and 6th of March, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, and MACDONALD, JJ.A.

Argument

H. V. Craig, for appellant: The question is the interpretation to be put on the first telegram as to commission. On evidence as to the meaning of trade terms see Phipson on Evidence, 6th Ed., p. 387; *Embree* v. *McKee* (1908), 14 B.C. 45; *Robertson* v. *Jackson* (1845), 2 C.B. (N.S.) 412; *Curtis* v. *Peek* (1864), 13 W.R. 230. We submit (1) the words are capable of a definite meaning; (2) evidence should not be accepted because it would tend to contradict the contract itself. As to set-off the plaintiff was defendant's agent and entitled to hold the money until paid his commission.

Coady, for respondent: The words in the telegram are "you handle on a cash basis." There is nothing to shew that Trenwith was either able or willing to pay $900 on delivery of the plant. The cost of installing was ours in any event. That evidence was properly admitted as to the contract see Chitty on Contracts, 17th Ed., p. 122; *Morrow Screw and Nut Co.* v. *Hankin* (1918), 58 S.C.R. 74; *Bank of New Zealand* v. *Simpson* (1900), A.C. 182; *Charrington & Co., Limited* v. *Wooder* (1914), A.C. 71.

Craig, replied.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appellants claim $300 commission on the sale of a refrigerating plant. The respondents say

that the commission agreed upon was $120. The rights of the parties depend upon the true construction of the correspondence. It commenced on the 12th of February, 1928, by a letter from the respondent to the appellant in which it said:

"Your commission 10 per cent. if we finance; 25 per cent. if you handle cash basis."

On the 15th of February appellant wrote this:

"We shall know by the end of the month if we can handle locally, but think we might as well let you handle this job as it is the first in this territory. This is a very expensive territory to work and this should certainly be worth more than the 10 per cent. you offer and should like to hear from you as to this."

On the 12th of March respondent wrote:

"We acknowledge your wire March 7th [which reads] 'Rush Hulme order, cash basis.'"

Hulme was the purchaser.

Following this an agreement drawn by respondent was signed by Hulme, in which the payment was recited as "cash." On the question of commission about which a dispute afterwards arose, the respondent wrote:

"As stated in our first telegraphic quotation we will pay 10 per cent. if we handle the sale and finance or allow you 25 per cent. discount if you handle the contract and finance. This means the machine and equipment will be sent to you sight draft attached *and that you would install yourself or pay our installation engineer's wages and expenses on the job.* Either method suits us and we await your final instructions."

The words in italics are now admitted to be wrong, the plant was to be installed by respondent. This construction of the terms of the agency relating to the commission, was disputed.

The machinery was installed and tested and found satisfactory, and the purchaser Hulme gave a cheque for the full price to the appellant in the presence of respondent's engineer, who had conducted the 24-hour running test agreed upon. The appellant held the cheque pending a settlement. Respondent then brought action against Hulme the purchaser for the price of the plant, which was settled out of Court. Thereupon appellant brought this action for its commission of $300. The respondent counterclaimed for the costs incurred in the action against Hulme, which the trial judge awarded at $120 and gave $120 to the appellant for commission and ordered the appellant to pay the respondent's costs.

The respondent's contention put in a few words is, that said

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

offer meant that they would sell the plant for $1,200 cash, less 25 per cent. deduction, or would pay a commission of 10 per cent. A trade meaning was given to the words "cash basis" by the learned trial judge on evidence which, with respect, was neither admissible, failing a proper foundation therefor, nor sufficient in any case. The judge in his reasons said:

"Mr. Jarvis gave his explanation of the phrase 'handle cash basis,' to be that Trenwith should buy this plant on a sight draft attached to the bill of lading and should sell to Hulme assuming full responsibility. In this instance they would have drawn for $900 which is $1,200 less the 25 per cent."

No such usage was sworn to: that was merely Jarvis's interpretation of the words and it is not, as used in the first telegram, the correct one.

I think the learned judge was in error in admitting this evidence. Trade usage or custom is proved by first alleging the custom followed by particulars of it. *Curtis* v. *Peek* (1864), 13 W.R. 230, where the Court in that case said that no proper foundation had been laid for such evidence and pointed out that trade usage was a question the effect of which might alter the meaning of the document and that the evidence should therefore be narrowly watched.

MACDONALD, C.J.B.C.

Now the evidence above referred to appears to me to establish a dealing with an agent, the terms being "10 per cent. commission if we finance; 25 per cent. [commission] if you handle on a cash basis." It was commission in both aspects. It is true that in the letter of the 15th of February the suggestion was made that it might be better if the principal handled the business, but the agent suggested that a higher commission than 10 per cent. should be paid in that event. It was however left open for further consideration. Therefore, when on the 11th of March appellant wired that Hulme's order would be handled on a cash basis that appears to have been accepted at the time by both parties as the basis on which the sale should proceed. When the break came between them respondent was under the impression that the installation should be made at the agent's expense if handled on a cash basis. That admitted mistake would seem to have brought about the trouble between them. On the cash basis there was no financing to be done by respondent. It was in fact a sale for cash negotiated by appellant. I think, there-

fore, that the learned judge was in error in his conclusion. The appellant is entitled to judgment for $300.

The counterclaim is dismissed.

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

MARTIN, J.A.: I agree in the disposition of this appeal.

GALLIHER, J.A.: I am in agreement with the conclusions arrived at by the learned County Court judge in fixing Trenwith's commission at 10 per cent. which would entitle the plaintiff to judgment for $120, but against this the learned judge has set off $120 being costs and expenses in an action brought by defendants against Hulme to compel payment by Hulme to them of $1,200 being the price of a refrigerating plant installed by the defendant for Hulme. This suit was settled before coming to trial by Hulme paying the $1,200, the plaintiff foregoing any right to costs as against Hulme. They now in the present action seek to set off these costs against plaintiff and the learned judge has done so to the extent of $120. With respect, I think the learned judge was in error in so doing.

GALLIHER, J.A.

Trenwith was no party to the suit brought against Hulme and could in no way be bound either by settlement or by judgment if it had gone to trial. The defendant having brought action against Hulme its purchaser with whom it had its contract and who was bound to pay it if the test was satisfactory (which it is agreed it was) cannot forego its claim for costs which would be a part of its remedy flowing from its judgment and seek to set it off against Trenwith's claim for commission.

I would allow the appeal with costs and direct judgment to be entered for the plaintiff for $120 with costs of action below.

MACDONALD, J.A.: The appellant claims $300 as commission (25 per cent. of the sale price) on a sale made by him as respondent's agent to one T. P. Hulme, of a model 50 Lipman full automatic ammonia refrigerating machine and equipment for $1,200 cash upon satisfactory completion of a twenty-four hour running test. Respondent submits that the agreement provided for a commission of 10 per cent. only and the learned trial judge so found awarding appellant $120. There is a further sum in issue. The appellant, fearing a dispute as to the amount of his commission would arise persuaded the purchaser—Hulme

MACDONALD, J.A.

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

—to hand over to him his cheque for $1,200, the purchase price of the machine. The written contract of purchase was entered into between respondent and Hulme and the latter was liable to respondent for the purchase price. Upon learning that the purchaser's cheque was given to the appellant the respondent sued Hulme to recover the amount due under the contract. This action was finally settled after respondent incurred certain costs which the trial judge fixed at $120. He allowed this sum as a set-off against appellant's claim for commission on the ground that the costs were incurred by appellant's act in obtaining and holding the cheque referred to.

We intimated at the hearing that this set-off could not be allowed. These costs were incurred through the failure of Hulme to pay respondent with whom he contracted. He was liable for the amount and should pay the penalty of his own breach of duty. There was, with respect, no authority for shifting Hulme's obligations or the consequences of his default to the appellant.

MACDONALD, J.A.

The amount of appellant's commission depends solely upon the interpretation of the concluding part of the following telegram: [already set out in statement.]

The respondent in interpreting the words "your commission ten per cent. if we finance twenty-five per cent. if you handle cash basis," submitted that inasmuch as it financed the manufacturer's cost using the sale agreement with Hulme as collateral security, to do so it was only liable to pay appellant ten per cent. commission. If on the other hand the machine had been shipped to the appellant direct as to a purchaser with sight draft attached and the appellant on the resale to Hulme assumed responsibility for installation and apparently subsequent guarantees of satisfactory performance (at all events in the first instance) 25 per cent. would be allowed. I find it difficult to add so much to the simple language used. If the agreement was to pay a commission of 25 per cent. only in the event that this circuitous method of completing the sale was resorted to, with the appellant assuming unusual obligations it would require special words to express it. This telegram must be taken as relating to the situation existing as between appellant, respondent and the customer. The manufacturer is not contemplated and the words "if we finance"

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

MACDONALD, J.A.

cannot be strained to include financing between respondent and his vendor. It is the financing of this sale to Hulme that is referred to. If the sale was arranged on terms the respondent would have to carry or finance the outstanding payments and in that event would pay appellant ten per cent. If on the other hand a cash sale was effected—"if you handle cash basis"—respondent would pay 25 per cent.

The learned trial judge admitted evidence as to the meaning of an alleged trade term, *viz.*, "handle cash basis." Respondent's version of the meaning of the term was as follows:

"I would say that the meaning of phrase 'handle cash basis' that Mr. Trenwith should buy this plant on sight draft as usual and should sell to Mr. Hulme, assuming full responsibility. He would be handling that deal and we would have nothing to do with it except sell it to Mr. Trenwith as a manufacturer's agent to a dealer. On that basis we would make a gross profit, or which we call our jobber's discount. In that case the plant would be ordered from the factory and we would draw on Trenwith for the amount of machine at dealer's cost, that is 25 per cent. off dealer's list. In this instance we would have drawn for $900 (which is $1,200 less 25 per cent.—$300). The draft for $900 would be attached to bill of lading. The machine, etc., would come to us in Vancouver. It would be assembled with material and be reshipped by us to Trenwith. The $900 would include installation. We would have our man to do the installation and would pay it ourselves."

Another witness for respondent testified as follows:

"I would say that the words 'handle cash basis' are often used in trade machinery deals. I would say that in trade dealings these words mean to me as a local dealer, buying from a distributor, that I would pay cash with the order on sight draft attached to bill of lading and I would assume the entire responsibility to the purchaser from me, for the satisfactory installation and operation. '10 per cent. commission if we finance' would mean that I would not put up any money, simply act as commission salesman."

I quote the evidence to shew how far afield the suggested definitions carried the phrase defined.

Counsel for appellant objected to this evidence and submitted that the words referred to have no special meaning in the trade and from their ordinary import should be taken to mean that if appellant succeeded in effecting, as he did, a sale for cash he was entitled to 25 per cent. I think the words are clear and unambiguous and because no difficulty is experienced in applying the words to the facts of the case extrinsic evidence was inadmissible. Further, the surrounding facts do not create doubt or difficulty as to the proper application of the words. If

COURT OF APPEAL

1929

June 4.

TRENWITH LTD. v. THE JARVIS ELECTRIC CO.

MACDONALD, J.A.

they did other considerations would arise. They should therefore be construed according to their common meaning, and parol evidence should not be admitted to shew that the parties meant something different. Once the telegram is properly confined to the subject-matter and to the three parties concerned excluding the manufacturer no difficulty arises. The words "handle cash basis" appear to be too simple to require expert explanation. The evidence outlined was therefore wrongly admitted.

The appellant should have judgment for $300.

I would allow the appeal.

Appeal allowed, Galliher, J.A. dissenting in part.

Solicitor for appellant: *H. V. Craig.*
Solicitor for respondent: *J. M. Coady.*

COURT OF APPEAL

1929

June 4.

WINTER v. J. A. DEWAR CO.

WINTER v. J. A. DEWAR COMPANY LIMITED.

Estoppel—Action to recover possession of buildings and machinery under agreement—Previous action to recover possession of the premises in addition to the buildings, machinery, and other material was dismissed—Res judicata—Appeal.

The plaintiff claims the right of possession of certain buildings, plant and fixtures under a memorandum of agreement. He had previously brought action for the possession of all he now claims and for other material in addition founded on the same memorandum of agreement, when it was held that the instrument was at an end and the action was dismissed. It was held that the doctrine of *rest judicata* applied and the action was dismissed.

Held, on appeal, affirming the decision of GREGORY, J., that the plaintiff is estopped and cannot maintain the action.

Statement

APPEAL by plaintiff from the decision of GREGORY, J. of the 12th of June, 1928 (reported, 40 B.C. 228), dismissing an action for a declaration that the plaintiff is the owner of and entitled to possession of the buildings, machinery, plant, tools, equipment and fixtures more particularly referred to in a lease

COURT OF APPEAL

1929

June 4.

WINTER
v.
J. A. DEWAR
Co.

Statement

of the 6th of December, 1923, made between J. A. Dewar & Co. Ltd. as lessor, and the Coast Shingle Co. Ltd. as lessee, and for delivery of possession of said machinery, plant, etc., to the plaintiff or in the alternative damages for conversion. The plaintiff claims that under a memorandum of agreement of the 6th of December, 1923, the defendant did transfer, assign, set over and quit claim to the Coast Shingle Company Limited all right, title and interest in the buildings, machinery, plant, tools, equipment and fixtures unto and to the use of the Coast Shingle Company Limited free from all claims by the defendant and the agreement further provided that said buildings, etc., be considered the property of the Shingle Company and might be removed by the said Shingle Company. The plaintiff demanded possession of said buildings, etc., before action but the defendant refused to allow the plaintiff to enter into possession thereof. In the alternative the plaintiff alleged the defendant had wrongfully converted said buildings, etc., to its own use from which the plaintiff has suffered damages. The plaintiff claims $35,293. The defendant Company had leased the premises in question from the Canadian Pacific Railway in 1910, and subleased said premises to the Coast Shingle Company in December, 1923. In the spring of 1925 the Coast Shingle Company got into difficulties. The creditors had a meeting and decided to sublease the premises to one Johnson, the managing director of the Capilano Timber Company. Johnson went into possession but the J. A. Dewar Company owing to there being arrears in rent opposed Johnson's entry and Johnson then arranged for a lease from the Dewar Company and ignored the Coast Shingle Company. Winter then, as trustee of the Coast Shingle Company, brought action against the J. A. Dewar Company for possession under his lease. The action was dismissed. The defendant claims that the plaintiff in that action sought, amongst other things the same relief as in this action and that he is precluded by said judgment (affirmed by the Supreme Court of Canada: see (1928), S.C.R. 1) from relitigating the questions involved in this and the former action.

The appeal was argued at Vancouver on the 2nd and 3rd of April, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1929

June 4.

WINTER *v.* J. A. DEWAR Co.

Argument

A. Alexander, for appellant: In September, 1925, the Dewar Company put the Coast Shingle Company into bankruptcy and leased the premises in question to the Capilano Timber Company but by agreement of December, 1923, the defendant Company sold the buildings, machinery, plant, tools, equipment and fixtures on the premises to the Coast Shingle Company and we submit nothing has been done to take away our right to them and we have the right to remove them: see *Davy* v. *Lewis* (1859), 18 U.C.Q.B. 21; *Scarth* v. *Ontario Power and Flat Co.* (1894), 24 Ont. 446; *Ex parte Gould. In re Walker* (1884), 13 Q.B.D. 454; *New Hamburg Manufacturing Co.* v. *Webb* (1911), 23 O.L.R. 44 at p. 47; *Dumergue* v. *Rumsey* (1863), 33 L.J., Ex. 88. We were in arrears for rent for four months but the right to distrain does not give the right of ownership. The lessor made a petition in bankruptcy and made us bankrupt and they have about $55,000 worth of chattels for a few dollars of rent. Apart from the terms of the document we have a reasonable time to remove the chattels when the lease is brought to an end by the landlord. Whatever right the landlord has as to fixtures only applies to fixtures. On the question of *res judicata* we submit this was not included in the former action and could not be: see marginal rule 189; see also *Outram* v. *Morewood* (1803), 3 East 346; Halsbury's Laws of England, Vol. 13, p. 355, sec. 494.

Mayers, for respondent: The plaintiff was seeking to recover his term of lease and property. As to the nature of a lease see Williams on Real Property, 23rd Ed., p. 28. That the chattels in question in this case were included in the former action see *Hoystead* v. *Commissioner of Taxation* (1926), A.C. 155 at p. 170; *Henderson* v. *Henderson* (1843), 3 Hare 100 at p. 114. The chattels in question properly belonged to the subject of litigation in the first action: see also *Kennedy* v. *Suydam* (1916), 36 O.L.R. 512 at p. 521; *Glasgow and South-Western Railway Co.* v. *Boyd & Forrest* (1918), S.C. (H.L.) 14 at p. 25; *Serrao* v. *Noel* (1885), 15 Q.B.D. 549; *Macdougall* v. *Knight* (1890), 25 Q.B.D. 1; *Brunsden* v. *Humphrey* (1883), 11 Q.B.D. 712 at p. 714 and on appeal (1884), 14 Q.B.D. 141. In any case he is not entitled to succeed. It is not a question of what are fixtures but the construction of the document.

On the cross-appeal with relation to costs, *Lawson* acted for Dewar & Co. and so appears on the record: see *Armand* v. *Carr* (1927), S.C.R. 348 at p. 350.

Alexander, in reply: There never was a retainer to *Lawson,* and *Baird* could not delegate his authority to him.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.: It may be conceded that the buildings, fixtures, plant and machinery in question, were by the terms of the lease assigned to the Coast Shingle Company, of which the appellant is the trustee in bankruptcy, and were declared as between the parties to be the leesee's property. They could be removed, however, only on the termination of the lease or within 30 days thereafter, and then only provided the lessee were not in default in the payment of rent or the performance of the covenants.

It was also agreed that on the lessee's insolvency the lease should, at the lessor's option, "expire." The lease was terminated by the lessor owing to the insolvency of the lessee, and re-entry was validly made on the 1st of October, 1925. At that time nothing had been removed and the 30 days began to run not later than that date. The former action against the defendant and another for possession of the demised premises, was commenced on the 5th of March, 1926, and judgment was finally pronounced in the Supreme Court of Canada on the 31st of May, 1927, against the appellant. In the statement of claim in that action the appellant recited the assignment of the property now in question, as well as the demise. He claimed possession of the whole premises without separating them. Nor was his separate right to the buildings, etc., litigated in that action but only his right to recover the whole premises. Had he claimed specifically in the alternative the property he is now claiming the Court could, and no doubt would, have disposed of it then.

In these circumstances, I agree with the finding of the learned trial judge, that the appellant is estopped and cannot now maintain this action. I understood Mr. *Alexander* to argue a distribution between those things which were there at the date of

COURT OF APPEAL

1929

June 4.

WINTER v. J. A. DEWAR Co.

the lease and some additions made since. But these additions are fixtures and are governed by law.

Moreover, and apart from estoppel, the appellant had no right to remove the buildings, fixtures, plant and machinery mentioned in the lease, since he was in default in the payment of rent.

MARTIN, J.A.

MARTIN, J.A.: In the main appeal the learned judge below has, in my opinion, reached the right conclusion and therefore it should be dismissed.

The cross-appeal, however, should, I think, be allowed and costs awarded to the defendant, the circumstances of the case bringing it within the principle of *Armand* v. *Carr* (1927), S.C.R. 348.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It would seem to me, notwithstanding the very able argument of Mr. *Alexander,* the learned counsel for the appellant, that the doctrine of *res judicata* applies thereby preventing the appellant recovering anything in the action. It is patent that in the present case it has relation to matters that were in existence at the time of the former action and which the appellant had an opportunity of bringing before the Court. The early decisions have been greatly supported by the most recent decisions and it is in furtherance of the advance in our jurisprudence that there must be a speedy end to litigation. It is very regrettable, of course, where the application of this doctrine works injustice, yet it is not a technical doctrine but a fundamental doctrine and must be given effect to in all proper cases, and the present case would appear to be one for its application.

It is not without regret that I feel constrained by the authorities to so decide, and I do not think any good purpose can be served by particular reference to the numerous cases on the point.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Plaintiff (appellant) as authorized trustee of the Coast Shingle Company Limited claimed against defendant (respondent) a declaration of ownership and right to possession of certain buildings, machinery, plant, tools, equip-

COURT OF APPEAL

1929

June 4.

WINTER
v.
J. A. DEWAR
Co.

MACDONALD,
J.A.

ment and fixtures, valued at $35,293.52 and referred to in an indenture of lease dated December 6th, 1923, between respondent as lessor and the Coast Shingle Company Limited as lessee; and in the alternative damages for conversion.

It is not necessary to trace prior transactions resulting in the lease in question except to say that an earlier lessee intervened and the present appellant claims that the Coast Shingle Company Limited purchased the chattels placed on the premises. The claim therefore is based upon purchase and it is said the present lease contains in effect, a bill of sale of the chattels. The Coast Shingle Company Limited continued in possession until June, 1925, when notice of forfeiture for non-payment of rent was given. The respondent claims the personal property free from any claim of the Coast Shingle Company Limited or its trustee in bankruptcy. Subsequently the premises were leased to the Capilano Timber Company Limited.

Certain questions were litigated in a former action and the defence of *res judicata* is raised. The other action was brought by the same plaintiff as trustee for the Coast Shingle Company Limited against the Capilano Timber Company Limited and the present respondent for a declaration that the lease of 6th December, 1923, now under consideration was a valid and subsisting lease, and that the notice of forfeiture referred to given in June, 1925, was void; also claiming that the plaintiff was entitled to possession of the "premises" comprised in the lease and that the defendant Capilano Timber Company Limited should give up possession. That action was dismissed and after reversal in respect to one issue by the Court of Appeal the judgment of the trial judge was restored by the Supreme Court of Canada. Is appellant now precluded by way of estoppel upon a former judgment from prosecuting the present action? It is true that in a sense no judgment was given on any fact or matter now in dispute. It is, however, the matter alleged in the previous action upon which judgment was based that creates the estoppel. The point is, does the rule apply (1) if the same relief was claimed but not pressed in the former action, (2) or whether claimed or not might have been?

In the former action the present appellant asserted the validity of the lease and his right to possession notwithstanding

COURT OF APPEAL

1929

June 4.

WINTER v. J. A. DEWAR Co.

MACDONALD, J.A.

notice of forfeiture. Was he obliged to anticipate defeat and in the alternative claim possession of buildings, machinery and plant under a special clause in the lease? The appellant formerly tried to sustain the lease; now he admits it was terminated, but claims the chattels passed to him by conveyance and assignment. In *Glasgow and South-Western Railway Co.* v. *Boyd & Forrest* (1918), S.C. (H.L.) 14, where in one action it was claimed a certain contract was not binding upon the parties and another action was brought invoking the contract it was held the matter was *res judicata* because although the foundation of both actions differed the items claimed in one were included in the other.

A further point requires consideration. Have we as contended two distinct agreements in one document—lease of December 6th, 1923—one for the lease itself, and another for the conveyance of the chattels to appellant? and if so, might appellant in the former action ask for a declaration in respect to the lease without raising the question of the alleged transfer of chattels? Might he, in other words, safely assume that his right to the chattels would not be questioned whatever the fate of the lease? Neither action was in respect to the freehold. The first action was in respect to the validity of his term (a chattel interest in land) while the present action also relates to personal property. The complaint in both actions was and is that he was deprived of personal property. A reference to the statement of claim in the former action (paragraphs 4, 5 and 6) shews that the allegations now relied upon in respect to buildings, machinery, plant, etc., were specifically pleaded. He also asked in the prayer for relief for a "declaration that the plaintiff [this appellant] is entitled to possession of the premises comprised in the said lease." Premises would include buildings, etc. In the former action under the pleadings he might have submitted that at least he was entitled to the chattels now claimed. All that was lacking therefore was the argument advanced in the present action and that was a matter of choice or oversight. In *Hoystead* v. *Commissioner of Taxation* (1926), A.C. 155, Lord Shaw at p. 170 quotes Wigram, V.-C., in *Henderson* v. *Henderson* (1843), 3 Hare 100 at p. 114, as follows, stating that it is settled law:

"'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 view, particularly when the facts in *Henderson* v. *Henderson* are considered, is conclusive against the appellant. If he had succeeded in the former action he would have recovered all he now claims and something more. The question now raised properly belonged to the subject-matter of that litigation and when it was pleaded appellant cannot now complain that through lack of diligence or otherwise an alternative submission was not presented. The mere fact that the question was not discussed is not material. Unless therefore by reason of the allegation that the lease contains a special contract transferring the chattels thus creating one of the exceptions in special cases referred to in the extract quoted from Lord Shaw's judgment, the question is concluded adversely to the appellant. I do not say that wholly different points might not arise in different parts of the same instrument creating a special case, but the facts in the case at Bar do not shew a detached agreement transferring the chattels. It is bound up with the conditions of the lease. The alleged agreement for the sale of the chattels was as follows:

MACDONALD, J.A.

"And for the consideration aforesaid the lessor doth hereby transfer, assign, set over and quit claim to and unto the lessee any and all right, title and interest the lessor has or may have in and to the buildings, machinery, plant, tools, equipment and fixtures hereinbefore referred to which are erected and now situate upon the said lands and premises TO HAVE AND TO HOLD the same and every part thereof with the appurtenances thereto unto and to the use of the lessee free from any and all claims of the lessor provided however it is distinctly understood and agreed that the lessor gives no covenant for title in respect to said property, and transfers and assigns only such right, title and interest as the lessor has thereto and therein."

This must be read with other clauses disclosing its provisional nature. The clause following it shews that it was a limited right

COURT OF APPEAL

1929

June 4.

WINTER
v.
J. A. DEWAR
Co.

notwithstanding the language used. It would only exist up to 1930 if the lease was maintained. Another clause provides that:

"The lessor agrees in so far as it has the power so to do, that at the expiration or sooner determination of this lease, and provided the lessee shall not be in default in payment of rent or in the performance of any other covenants hereunder the lessee shall have the right at any time not later than thirty (30) days after such expiration to remove all buildings, fixtures, plant and machinery belonging to the lessee and situate upon the said lands, and it is distinctly understood and agreed that for the purposes hereof the buildings, machinery, plant, fixtures and equipment now situate upon the said lands and hereinbefore dealt with, shall, so far as the lessor is concerned, be considered the property of the lessee and may be removed by the lessee."

It is not happily worded but it is all predicated upon "no default." It is only "for the purposes hereof" that the chattels should be considered the property of the lessee. The clause too should be interpreted in the light of the whole instrument. A further clause as follows sustains this view:

MACDONALD, J.A.

"Notwithstanding anything hereinbefore contained, it is agreed that at the expiration of the lessor's present lease namely on the 1st of December, 1930, the lessee shall at its option not be bound to continue its tenancy of the aforesaid premises, and in the event of its deciding not to do so it may at any time within thirty (30) days before, or thirty (30) days after the first of December, 1930, provided it shall not be in default in payment of rent or performance of any other covenants herein, remove all its buildings, fixtures, plant and machinery now situate or that may hereafter be placed upon the said lands, and for the purposes hereof it is understood and agreed that the buildings, machinery, plant, fixtures and equipment now situate upon the said lands and hereinbefore dealt with shall, so far as the lessor is concerned, be considered the property of the lessee, and may be removed by the lessee."

The clause therefore relied upon as being in reality a separate bill of sale is only one term of the lease and is inseparable from its main provisions.

We were referred to *Brunsden* v. *Humphrey* (1883), 11 Q.B.D. 712, and on appeal in (1884), 14 Q.B.D. 141, where it was held by a majority that a party who brought an action for damages to his cab caused by the negligence of the defendant's servant could afterwards sue the same defendant for personal injuries sustained through the same act of negligence. The cause of action in both cases and the matter to be decided was the negligence of the defendant's servant. The second action was for part of the consequences of the same act. Lord Coleridge, C.J., in a dissenting judgment pointed out that if instead

of plaintiff's cab being injured his trousers were torn he might bring a second action for damage to the trousers that covered the injured leg the subject of damages awarded in the first action. I think, with respect, that the three learned judges whose opinions did not prevail were right, but in any event, if applicable, it is not binding on this Court.

I would dismiss the appeal on the grounds of *res judicata*.

On the cross-appeal as to costs, I think, with respect, the learned trial judge erred in not awarding costs to the defendant in the action.

Appeal dismissed.

Solicitor for appellant: *G. L. Fraser.*
Solicitor for respondent: *James H. Lawson.*

REEVIE v. THE WHITE COMPANY LIMITED, HANSON GARAGE, MACPHERSON AND DRAPER.

Contract—Sale of motor-bus—Conditional sale contract—Terms and conditions — Delivery — Acceptance — R.S.B.C. 1924, Cap. 225, Secs. 40 and 41.

After negotiations, the plaintiff signed and delivered to the defendants an order for a model 53: 17-passenger motor-bus on the 11th of June, 1928. On the 30th of July following the bus was delivered to the plaintiff and the parties at the same time entered into a conditional sale contract whereby the defendants agreed to sell said bus to the plaintiff subject to the terms and conditions therein contained. The contract included a clause that "the purchaser hereby purchases the goods . . . complete with standard attachments and equipment, delivery and acceptance of which in good order, is hereby acknowledged." After operating the car for ten days the plaintiff notified the defendants in writing that he repudiated the conditional sale contract. The plaintiff brought action for a declaration that he was justified in repudiating the contract, that it be declared null and void and that the moneys paid on account of the purchase price be refunded. He recovered judgment.

Held, on appeal, reversing the decision of MACDONALD, J., that there is no

COURT OF APPEAL

1929

June 4.

REEVIE
v.
THE WHITE COMPANY LTD.

statute or other authority for the assumption that the plaintiff had the right to put the motor-bus to a test of actual performance by using it for ten days upon the passenger route before accepting it; moreover, as the contract expressly states that the purchaser acknowledges acceptance of the bus in good order as above stated, he is bound by it.

Statement

APPEAL by defendants from the decision of MACDONALD, J. of the 31st of October, 1928, in an action for rescission of a certain contract in respect of the sale and purchase of a White Motor-bus, model 53, serial No. 40893, made between the Hanson Garage and the plaintiff, and assigned by the Hanson Garage to the White Company Limited, dated July 30th, 1928. The plaintiff is operator of motor-passenger cars between Cranbrook and Kimberley (a distance of about 20 miles) and lives at Cranbrook. The Hanson Garage owned by the defendants McPherson and Draper were agents for The White Company who sold motor-busses, said company having its office in Vancouver. MacPherson and one Ralston who was a special salesman of The White Company Limited approached the plaintiff with a view to his purchasing a motor-bus for his run between Cranbrook and Kimberley and on the 11th of June, 1928, the plaintiff gave them an order for a bus for $10,500. On the 30th of June following plaintiff entered into a conditional sale contract with the Hanson Garage for the purchase of the motor-bus which on that day was delivered to the plaintiff. The plaintiff operated the bus on said route but alleges he found it entirely unsuitable for the run because (a) the power developed by the motor of said bus was insufficient; (b) the hills encountered on the run were too steep for a bus of this make; (c) the bus was too heavy and cumbersome for the run; (d) the bus cannot maintain the regular schedule; (e) owing to the lowness of the body of the car it would not cross a railway-crossing on the route; and (f) the condition of the road in the winter was so much worse that it would then be impossible to drive the car. The plaintiff claimed that MacPherson and Ralston both knew of the road on which he operated and that he relied on their judgment as to the suitability of the car for said route. The plaintiff paid $1,219.64 on account of the purchase price at the time of delivery and gave the Hanson Garage a promissory note for $839 in further part payment of the purchase price. The

plaintiff prays for rescission of the contract and return of the money paid on account of the purchase price and return of the said promissory note.

The appeal was argued at Vancouver on the 26th to the 28th of March, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellants: The route is about 20 miles. The plaintiff operated the bus in question from the 28th of July to the 9th of August, when he repudiated the contract and turned the bus back to the Hanson Garage. He accepted the car and we submit there has been an acceptance within section 41 of the Sale of Goods Act: see *Abbott & Co.* v. *Wolsey* (1895), 2 Q.B. 97 at p. 103. He has acknowledged acceptance and cannot succeed in rescinding the contract: see *British America Paint Co.* v. *Fogh* (1915), 22 B.C. 97; Chalmers on Sale of Goods, 7th Ed., p. 93; *Saunders* v. *Topp* (1849), 4 Ex. 390. In law the action for rescission should be dismissed and he should be driven to an action for damages. He accepted the car and drove it 900 miles.

A. Alexander, for respondent: We submit this was not an acceptance of the bus: see *Walden* v. *Haney Garage, Ltd.* (1928), 39 B.C. 413; *Davis* v. *Burton* (1883), 10 Q.B.D. 414 at p. 416. When a contract is tendered for signature as this was, any ambiguity must be construed against the vendor. We only accepted delivery of the bus in good order: see Benjamin on Sale, 6th Ed., p. 867. A condition gives a right of rejection, a warranty only gives a right in damages: see *Schofield* v. *Emerson-Brantingham Implement Co.* (1918), 3 W.W.R. 434 at p. 448.

Bull, in reply: He saw the car, satisfied himself it was in conformity with the contract and then signed the contract. His remedy is for damages.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.

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

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be allowed primarily upon the ground that the learned judge below has, as

COURT OF APPEAL

1929

June 4.

Reevie v. The White Company Ltd.

Martin, J.A.

his oral reasons shew, dealt with the matter upon the mistaken assumption that the plaintiff, the purchaser of the motor-bus in question, had the right in the entire absence of any agreement to that effect, to put the motor-bus to the test of actual performance by using it for ten days upon the passenger route in question, of about 20 miles, before accepting it. No statute or other authority has been cited that supports such a view of the matter and it is in direct conflict with the "terms and conditions" of the contract which the plaintiff expressly sets up in par. 8 of his statement of claim and which are admitted by par. 8 of the defence, and therefore became common ground and the admitted foundation of the rights of both parties. Furthermore, by that contract it is expressly stated in its opening paragraph that on the day and time the motor-bus was delivered in Cranbrook (31st July, 1928),

"the purchaser hereby purchases the . . . goods complete with standard attachments and equipment, delivery and acceptance of which in good order, is hereby acknowledged. . . ."

and by that statement the plaintiff is bound—*Walden* v. *Haney Garage, Ltd.* (1928), 39 B.C. 413. This is a clear and formal "intimation" of acceptance within section 41 of the Sale of Goods Act, Cap. 225, R.S.B.C. 1924. The "reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract" given by section 40 (pursuant to the common law) is a "right of inspection"—*Bog Lead Mining Co.* v. *Montague* (1861), 10 C.B. (N.S.) 481; 128 R.R. 797, 800—in an action of this kind at least, and not one to make use of a piece of machinery for an indefinite or any time to test its capacity of performance and perfection of construction—*cf.*, also *Abbott & Co.* v. *Wolsey* (1895), 2 Q.B. 97—this purchaser continued to run this bus on his route for ten days before rejecting it and throwing it back on the sellers hands though after four days of possession and use he admitted that the only fault he complained of was the trivial one that a loose seat rattled.

It is apparent to me, after a thorough and close examination of all the evidence, that the real cause of the rejection of this large 17-passenger bus was the fact that the plaintiff could not make as fast time with it as he could with smaller and speedier

cars designed to carry fewer passengers, and there is no evidence to support the submission that the sellers ever agreed to supply a large car that could safely venture to compete in speed with small ones in a country of that hilly description; it was in truth an obvious impossibility to do so. On the case as framed no ground appears, in my opinion, upon which the plaintiff is entitled to escape from the consequences of his contract and avoid payment of the notes he has given, and therefore the appeal should be allowed and the action dismissed.

MARTIN, J.A.

I express no opinion upon the complexion the case might have assumed had it been based upon an alleged warranty, as to which, *cf.*, *British America Paint Co. Ltd.* v. *Fogh* (1915), 22 B.C. 97.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The action was one for the rescission of the contract to purchase a motor-bus not one which it might well have been for breach of an implied warranty. Not that I am of the opinion that upon the facts as led in this action by the plaintiff would establish any such cause of action—far from it. I would not consider that any such action could have been successfully maintained. In the action we have here it was all-important for the plaintiff to establish as against the evidence led by the defendant that there had been no acceptance of the motor-bus. That was not established. The contract of purchase in its terms and the extent of user of the motor-bus well establishes that there was acceptance. It was admitted by counsel for the plaintiff, the respondent in this appeal, that the action was confined to one for rescission of the contract of sale, not one for breach of warranty. Then viewing the action in that character, the question is—are there grounds that make it clear that the action was well founded and that the judgment should be affirmed? It is pressed by the learned counsel for the appellant that there was acceptance of the motor-bus within the meaning of section 41 of the Sale of Goods Act, Cap. 225, R.S.B.C. 1924. With that contention I agree. Here the respondent took delivery of the motor-bus, firstly, under the terms of a contract executed upon the arrival of the motor-bus

COURT OF APPEAL

1929

June 4.

REEVIE v. THE WHITE COMPANY LTD.

by railway transportation, which expressly admitted acceptance, secondly, made use of the motor-bus for a very considerable time in the carrying on of a bus line from Cranbrook to Kimberley. (*Saunders* v. *Topp* (1849), 4 Ex. 390; *Kibble* v. *Gough* (1878), 38 L.T. 204 at p. 206; *Page* v. *Morgan* (1885), 54 L.J., Q.B. 434).

In the conditional sale contract, signed by the respondent, we have this language:

"Delivery and acceptance of which in good order is hereby acknowledged."

Is it at all possible to say that there was not acceptance? The respondent must be held to be bound by the terms of the contract (*Walden* v. *Haney Garage, Ltd.* (1928), 39 B.C. 413).

Then in view of the facts of this case, section 18, Subsec. (3) applies, *viz.*:

"(3.) Where a contract is not severable, and the buyer has accepted the goods or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

MCPHILLIPS, J.A.

Section 58 (Cap. 225, R.S.B.C. 1924) indicates the remedy where it is claimed there has been a breach of warranty, but that is not this action, as previously pointed out.

What will constitute acceptance is well shewn by Lord Justice Rigby in *Abbott & Co.* v. *Wolsey* (1895), 2 Q.B. 97 at p. 103, when considering analogous statute law:

"The question in this case was whether there was an acceptance of the goods by the buyer, which by sub-s. 3 of s. 4 means any act done by him in relation to the goods which recognizes a pre-existing contract of sale. What are the facts of the case? The hay was sent to the defendant's wharf, and with it was sent a receiving note. He was told by that note who was sending the hay, and must have known from its terms that it imported a delivery of the hay under a previous contract, not an offer of it for sale. Thereupon the defendant takes a sample of the hay and inspects it, which is certainly an act done in relation to the goods; and then he explains by contemporaneous words the act he is doing. The effect of what he says is that he is inspecting the hay in order to see whether it is equal to sample. The mere words would as such produce no effect; but an act done in relation to the goods which recognizes a pre-existing contract of sale is sufficient. In this respect the provision of s. 4, sub-s. 3, differs from that of s. 35, which deals with acceptance in performance of the contract, and provides that such acceptance may be not only by acts, but by intimation to the seller that the goods are accepted. I think there was clearly evidence of an acceptance of the hay within the meaning of s. 4 of the Act."

COURT OF APPEAL

1929

June 4.

REEVIE *v.* THE WHITE COMPANY LTD.

Here we have as already pointed out a very extended user of the motor-car upon the stage line, Cranbrook to Kimberley, and return some ten days or more. I would refer to the case of *British America Paint Co.* v. *Fogh* (1915), 22 B.C. 97, before this Court bringing up for consideration the point of law we have here to consider. In that case it was held that there had been an acceptance of specific goods as here and it was held that there was a consequent sinking of the condition into a warranty which could be set up in extinction of the price, and also as giving a right to damages, but this is not an action for the price of the motor-bus, but one to rescind the contract of sale, brought by the vendee against the vendor. The learned counsel for the respondent placed great reliance upon *Schofield* v. *Emerson-Brantingham Implement Co.* (1918), 3 W.W.R. 434 (Supreme Court of Canada), but there, there was present that which is absent here—assurances which prevented the retention and user of the engine by the buyer being invoked as acceptance thereof.

MCPHILLIPS, J.A.

I cannot, with great respect to the learned trial judge, come to the conclusion at which he arrived in this case—that was that the contract of sale and conditional sale agreement should be set aside and the promissory note for $839 should be delivered up to be cancelled and that the counterclaim should be dismissed—on the contrary, I am of the opinion that the action should be dismissed and the counterclaim allowed, that is, that the appeal be allowed.

MACDONALD, J.A.: Appeal by defendants from the judgment of Mr. Justice W. A. MACDONALD rescinding a certain order for the purchase of a motor passenger bus and a conditional sale contract dated July 31st, 1928, and ordering repayment of the amount paid thereunder. The bus was purchased by respondent for use on a highway, somewhat hilly, between Cranbrook and Kimberley. The appellants knew the purpose for which it was required and the learned trial judge held that the bus was not reasonably fit for the intended work. Rescission was ordered on this ground. The findings of fact were contested in argument before us but I do not think we should interfere with the view of the learned trial judge.

MACDONALD, J.A.

The serious question is as to whether or not it was possible to

COURT OF APPEAL

1929

June 4.

REEVIE v. THE WHITE COMPANY LTD.

rescind in view of an alleged acceptance of the motor-bus by the respondent. It was submitted that the respondent's only remedy (if any) was for damages for breach of warranty. This relief was not asked for in the statement of claim. After delivery respondent operated the bus for hire for ten days but finding it had insufficient power and was otherwise unsuitable turned it back to the vendors thus repudiating the purchase.

These words appear in the conditional sale contract signed by the respondent:

"Delivery and acceptance . . . in good order is hereby acknowledged."

A further clause provides:

"There are no agreements, understandings or representations between the parties hereto not embraced herein, it being agreed that this instrument contains the entire agreement between the parties."

This is important on the point as to whether the acknowledgment of acceptance was subject to the implied condition that the car was reasonably fit for the purpose intended.

It was suggested that the repudiation of the purchase by respondent was accepted by the appellant. After operating for ten days respondent left the bus at the Hanson Garage owned by one of the appellants. Respondent had the key to the building where it was finally stored and gave it up upon demand. He also said the bus was driven about town without his knowledge or consent. However this was apparently only to move it from one garage to another. Nothing was done by appellants beyond properly looking after and protecting the bus left on their hands and there was no acceptance on their part.

MACDONALD, J.A.

On the question of acceptance did respondent do any acts in relation to the bus which must be taken as a recognition of an existing contract? I fear it is too evident that he did, to leave room for doubt. He executed the contract in the terms mentioned and took delivery. It was not merely an acceptance for examination; respondent took delivery without any doubt expressed or implied that the bus would be suitable for the work or that it was the subject-matter of the contract executed and put it into service. He afterwards discovered that it would not perform as represented. That later discovery had no bearing on the question of actual acceptance. He might treat the breach of the condition as a breach of warranty. How it is to be treated depends upon the construction of the contract and the surround-

COURT OF APPEAL

1929

June 4.

REEVIE *v.* THE WHITE COMPANY LTD.

MACDONALD, J.A.

ing facts. Section 18 (3) of the Sale of Goods Act (Cap. 225, R.S.B.C. 1924) applies. Section 40 (1) is not applicable to the facts. There is a difference between examination or inspection and a trial of the bus. The right of examination is confined to ascertaining if it is a bus of the description purchased, *i.e.*, outwardly in accordance with the contract. To use it for ten days in the usual course is not making an examination of it nor inspecting it. It was not established in evidence that there was no opportunity to examine the bus when it arrived and we cannot so assume in view of the contract stipulating acceptance "in good order." Respondent's true remedy is shewn in section 58. The real point in issue was not tried.

I would allow the appeal.

Appeal allowed.

Solicitor for appellants: *Alan Graham.*
Solicitors for respondent: *Tiffin & Alexander.*

AICKIN v. J. H. BAXTER & CO.

COURT OF APPEAL

1929

June 4.

AICKIN *v.* J. H. BAXTER & CO.

Contract—Cutting and booming logs—Wrongful taking possession—Measure of damages—Evidence—Counterclaim—Costs.

The plaintiff and defendants entered into a verbal contract for the cutting and booming of piling to be taken from a described area of land by the plaintiff. The defendants were to finance operations, give the plaintiff the use of their logging plant and the remuneration of the plaintiff was fixed at the difference between cost of production, plus one cent per foot, and the sale price of poles and piling prevailing at the time of delivery. The plaintiff commenced operations on the 1st of January, 1926, and continued until the 19th of April, when the defendants took possession of the plant and equipment and ejected the plaintiff. By this time the plaintiff had cut and boomed about one-half of the piling timber contemplated when the agreement was entered into. A few days prior to the termination of the contract the plaintiff sold 346 pieces of piling at ten and one-half cents per foot and the defendants claim this was done without their being consulted and contrary to the agreement. The action for damages for breach of the contract was dismissed but it was held by the Court of Appeal that the contract had been wrongfully

COURT OF APPEAL

1929

June 4.

AICKIN
v.
J. H. BAXTER & Co.

terminated and the action was remitted to the Court appealed from for assessment of damages when it was found that the cost of production with one cent per foot added as provided in the original agreement was eight cents per foot and that the sale of the piling averaged 11.34 cents per foot, the total lineal footage on the limits being 319,209 feet and the resultant damage was $10,661.58.

Held, on appeal, reducing the damages allowed by MORRISON, J. (MCPHILLIPS, J.A. would allow the appeal *in toto*), *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that making all due allowances ten and one-half cents may be taken as the market value of the piling and the damages should be reduced to $7,980.

Per MARTIN and GALLIHER, JJ.A.: That taking Vancouver as the nearest market there should be added to the cost of production half a cent per foot for taking the piling from the limits to Vancouver and 11 cents should be fixed as the sales price in Vancouver making $7,980.22 the sum for which plaintiff should have judgment.

Statement

APPEAL by defendants from the decision of MORRISON, J. of the 8th of February, 1929. In November, 1926, the plaintiff brought action for damages for breach of contract entered into in December, 1925, in respect of lumber operations carried out by the plaintiff for the defendants. The plaintiff was to carry on operations for the production of poles, piles and timber on two limits of the defendants on Texada Island. The poles, piles and timber were to be purchased by the defendants who were to finance the operations and keep accounts during the currency thereof, there being an arrangement as to profits on sales; that the defendants were to receive the actual cost of production of the piles, plus one cent per lineal foot of piles produced and the plaintiff was to receive the balance of what was received on the sale of the piles. Pursuant to said agreement the plaintiff on the 1st of January, 1926, moved an operating plant and equipment to Texada Island and continued operations until the end of April, 1926, when the defendants took possession, ejected the plaintiff and closed down operations. The defendants counterclaimed for $5,496, moneys loaned the plaintiff, goods supplied and board and lodging, and for poles, logs and shingle bolts converted to his own use from the Stillwater operations. On the trial the plaintiff's action was dismissed, and the defendants recovered $205 on the counterclaim, but on appeal it was held that the contract was wrongfully terminated and the action was remitted to the Court appealed from for assessment of dam-

ages by reason of the wrongful termination of the contract. Upon the action again coming before the trial judge it was held that the plaintiff suffered damage by the wrongful termination of the contract in the sum of $10,661.58. This sum was arrived at by finding on the evidence that the cost of producing piles per lieneal foot was eight cents and that the sale of piles averaged 11.34 cents per foot. The loss to the plaintiff by reason of the breach would therefore be 3.34 cents per foot upon a total of 319,209 lineal feet upon the limits. The plaintiff was given the costs of and incidental to his claim for damages and the defendants were given the costs of the counterclaim and of the action other than the issue of damages. The defendants appealed on the ground that the amount allowed for damages was excessive and the plaintiff cross-appealed claiming he was entitled to the costs of the action and of the reference.

Statement

The appeal was argued at Vancouver on the 9th to the 11th of April, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Walkem, for appellants: The learned judge misconceived the action. The plaintiff did not prove a case for damages at all. A mistake was made as to the cost of bringing the poles to Vancouver, and there was no allowance for the cost of booming. Further, there is the cost of insurance, harbour dues and boom-chains. The total expenditure shews a loss in operations. We say (1) The plaintiff has failed to make out a case of damages; and (2) he has suffered no damages: see *Clausen* v. *Canada Timber and Lands Ltd.* (1925), 35 B.C. 461 at p. 464. He must prove the number of piles that were left after his work was stopped. He must prove their size and quality and what it would cost to get them out. Further, he must prove the market price or what he could have sold them at. These are essentials that must be proved and he has not done so.

Argument

J. A. MacInnes, for respondent: As to the meaning of "market" see Benjamin on Sale, 6th Ed., p. 1096. On computation of damages see Leake on Contracts, 6th Ed., p. 765; *Wilson* v. *The Northampton and Banbury Junction Railway Company* (1874), 43 L.J., Ch. 503; *Haack* v. *Martin* (1927), S.C.R. 413; *McIlwee* v. *Foley Bros.* (1919), 1 W.W.R. 403 at p. 406.

COURT OF APPEAL

1929

June 4.

AICKIN v. J. H. BAXTER & Co.

The learned judge had the material before him upon which he came to a conclusion and there was evidence to support his judgment. On the question of costs the learned judge failed to follow marginal rules 976-7. We should have the costs of the action and of the issue on which we succeeded.

Walkem, replied.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.: There has been some unavoidable confusion in this case by reason of the joinder of two distinct causes of action, and the setting aside of the judgment in the action relating to one of these causes and the subsequent reference back to the trial judge to assess the damages for breach of it. One of these contracts called the Stillwater contract, was in writing, and we are not concerned with it in this appeal. The verbal one referred to as the Texada contract is the one with which alone we are concerned.

MACDONALD, C.J.B.C.

This contract was for the cutting and booming of piling to be taken from a described area of land by the plaintiff, who was given the use of the defendants' logging plant for that purpose. The arrangement as stated by the plaintiff was as follows:

"I was to go in there and operate, and they were to get a cent a foot [lineal] for financing and the use of the outfit, and whatever I made over that was mine, my own. Baxter & Co. were to get the poles [not now in question] at a set price. The piling, I was to sell them wherever I could. At that time Mr. Stimson [defendants' manager] and I went up and saw Mr. Kerr, he was a man buying piling, especially piling, from Vancouver. We did not come to any arrangement then. Mr. Kerr offered nine and a half cents for a certain bunch, and Mr. Stimson thought they were worth ten and a half."

The plaintiff operated from January until the 19th of April, when the defendants put an end to the contract and prevented him from completing it. Between the time of the interview with Kerr and the 19th of April, Kerr came to Texada and bought from the plaintiff 396 pieces of piling at ten and one-half cents per lineal foot, the price which Stimson quoted at the said interview. These pieces of piling were smaller and of less value than the balance that were in the boom. This transaction occurred a day or two before the defendants terminated the contract, and was one of the excuses given for cancelling it; they said that

COURT OF APPEAL

1929

June 4.

AICKIN v. J. H. BAXTER & Co.

the plaintiff had no right to sell without their consent. The real reason for the cancellation was that defendants had decided to close their operations at Texada. They immediately sent McAlpine to "clean up." At this date the plaintiff had cut and boomed less than half the piling timber. The defendants then had the boom towed to Vancouver where they peeled it and sold some of it for 11.34 cents a lineal foot and claimed that they could find no sale for the balance and therefore sent it to San Francisco where their head office is, and sold it, but were unable to say what they received for it. They however allow in their statement eight cents per lineal foot for it.

It is in respect of the marketing of the piling that the real dispute has arisen. It was proved that the cost of manufacturing and placing it in the boom was eight cents. The learned judge who assessed the damages took the difference between 11.34 cents per lineal foot, the price at which those sold in Vancouver fetched and the said eight cents as the measure of damages. The defendants appeal and say that there was nothing at all coming to the plaintiff. That the result of the marketing of the piling shews a loss. In other words, that the price averaged less than eight cents per lineal foot. There is some difference between Stimson's statement of the verbal contract and that of the plaintiff. Stimson says that the cent a foot was to apply on a Stillwater debt which, if true, would leave defendants nothing for the use of their plant and for financing the plaintiff. He said:

MACDONALD, C.J.B.C.

"Aickin says he was chargeable with one cent and you say he was chargeable with one cent? Yes.

"You say one cent is not [*sic*] applicable to the Stillwater debt? Yes.

"Well, supposing it turns out that there is no Stillwater debt, is Aickin to be charged with that one cent or not, under your idea of the bargain? Well, there should not be—you could not get it that way. There certainly was a Stillwater debt, and there was not any question of that sort, and the thought never entered into it as to what was to be done with that one cent.

"THE COURT: It was on the understanding that there was a Stillwater debt? Yes."

There was in fact no denial that the plaintiff was to have the use of the plant and that defendants were to make advances to him to enable him to carry out the contract; that plaintiff was to put the piling in the boom and that his profit would be the difference between the market price and the cost of cutting and booming including the one cent. Stimson's evidence of the

COURT OF APPEAL

1929

June 4.

AICKIN v. J. H. BAXTER & Co.

terms of the verbal contract not being clear and consistent, I think the plaintiff's evidence must be accepted, namely, that he was to have the use of the plant, to take off the piling, boom it, pay the defendants one cent per lineal foot for the use of it, and for financing him, and to have the selling, or at all events, to be consulted with regard to the price of the product.

MACDONALD, C.J.B.C.

Now, the defendants without justification, and entirely for their own purposes, and without allowing the plaintiff a voice in the matter, wrongfully took possession of the piling in the boom, towed it to Vancouver, sold some of it and sent the balance to San Francisco, where it was sold for an undisclosed price. The question is, what price ought they to be charged with by way of damages for the piling which they took and for the balance which they prevented the plaintiff from manufacturing? The plaintiff's evidence is that the balance of the piling in the boom, after the 396 pieces had been taken out by Kerr, was worth eleven or twelve cents per lineal foot. Kerr corroborates this, and says that that would be a fair market price at Texada, where he bought his lot. Making all due allowance, ten and one-half cents may safely be taken as the market value at Texada. It was argued that there was no market at Texada. There is no evidence of that. Dealers might well have been found to buy the piling there and take it away. In fact that was what Kerr did.

The plaintiff's damages should be reduced to the sum of $7,980.

The appeal and cross-appeal should be allowed. The counterclaim, as far as it succeeded was a defence, not a counterclaim. The plaintiff should have the costs of the action.

MARTIN, J.A.

MARTIN, J.A. agreed with GALLIHER, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I do not think I would be justified in setting aside the finding of the learned trial judge as to the cost of putting the piling into the water at Texada Island (including the one cent for financing and supply of equipment), at eight cents. There was evidence on which he could so find. This, however, does not dispose of the question.

Aickin's profits depend upon the difference between the costs of production and the market price. The sale to the Creosote

Company averaged 11.34 cents per foot. This sale of which delivery was made at Vancouver by the Baxter Company, the then owner of the timber limits, should have included not only the cost of putting the piles in the water at Texada Island, at eight cents a foot, but the other following items: 1. Assembling piles at Texada for towing; 2. Cost of towing; 3. Insurance; 4. Harbour dues; 5. Handling at Vancouver; and 6. A proper proportion of Workmen's Compensation Board for medical charges. I exclude boom chains as the Baxter Company should supply equipment for handling and these chains would remain their property for further use. The learned judge has taken no account of these items and yet they are all items which go to the cost of producing in a market at Vancouver.

If the contract had been for cost of putting in the water at Texada there would have been no difficulty. Then one would have simply deducted the cost in the water at Texada from the sale price.

It is quite clear that a sale of piles at Texada to be delivered there would have been made at a less price than if delivered in Vancouver, except perhaps as in the isolated sale to Kerr of some 400 poles of a special kind for the Japanese market, which were delivered at Texada. And this raises the question of market value and its meaning. I take market value to be the price obtainable in this instance in the nearest established and regular market, Vancouver.

GALLIHER, J.A.

It was contended that there was a market at Texada for these piles and Kerr's purchase of the 400 poles is cited as proof of that and his evidence as to the value of the remaining poles there. What Kerr said as to their value at Texada predicates—if there is a market there. If there is no market there, it is of no value. Out of a total lineal footage of 319,209, 22,760 lineal feet were sold to Kerr at Texada, less than one-fourteenth of the total.

The learned judge's decision means this: that no matter where these piles are sold the cost only of putting them in the water at Texada is to be considered, and would lead to the conclusion that there was a market for all these piles there, a conclusion which I cannot hold is supported by evidence.

The one instance which the learned judge takes of the sale to the Creosote Company at Vancouver and fixes as a standard,

COURT OF APPEAL

1929

June 4.

AICKIN v. J. H. BAXTER & Co.

which I think should be eleven cents, instead of 11.34 cents, surely cannot be taken to establish the actual profit on those piles without taking into account the costs incurred in making the piles available for a customer at Vancouver, *i.e.*, bringing them to the only practical market for their sale.

In the sale made to Kerr it may be quite right to deduct the eight cents from the ten and one-half cents paid at Texada, where the poles were accepted, but that transaction to my mind, is far from fixing Texada as a market for all these piles, in fact, I treat this isolated transaction as negligible in that respect.

GALLIHER, J.A.

Taking therefore, Vancouver as the nearest market, which I think it is, I would add to the cost of production at Texada whatever is proper in connection with putting them on the market in Vancouver, as I have indicated above. As nearly as I can figure that out it increases the cost of production by half a cent per lineal foot. Deducting then eight and one-half cents from eleven cents, sales price at Vancouver, I find the profit would be two and one-half cents per lineal foot, or $7,980.22, for which sum plaintiff should have judgment.

I would allow the appeal to that extent.

As to the question of costs, I am in agreement with the Chief Justice.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The subject-matter of this appeal is what are (if any) the damages that the respondent suffered by not being allowed to carry out his contract with the appellant to take out poles upon lands in Texada Island, *i.e.*, whether it can be said that any profit would have enured to him, taking into consideration all the facts and circumstances then present, and the state of the market for poles at the time. Following the breach of contract, only two sales took place, made by the appellant, the first at ten and one-half cents at the camp on Texada Island, and the other at 11.34 cents at North Vancouver, a distance of 90 miles from the camp entailing special booming and cost of towage. In the accounts allowed to the respondent no allowance was made for these additions to cost of bringing the poles to the only market available, and further the bark was taken off the poles to effect the sale made and no allowance made for this. There were also costs of insurance and harbour dues;

COURT OF APPEAL

1929

June 4.

AICKIN v. J. H. BAXTER & Co.

McPHILLIPS, J.A.

all proper allowances being made, it is clear that there was a considerable loss and the respondent could not be said to be entitled to any profit upon this transaction. The accounts of the appellants which are elaborate and in my opinion accurate, were in no way shewn to be in error and the respondent failed to produce any accounts by way of surcharge or otherwise to displace the accounts of the appellants. It may be said too, that upon a general survey of the operations that the cost of producing the poles was, taking everything into consideration 15.29 cents per lineal foot and the selling price did not on the whole exceed 9.05 cents. It is clear to demonstration upon the accounts of the appellants that there was a loss throughout and no profit could possibly accrue to the respondent.

I do not feel called upon to in detail point out the inaccuracies of the contention of the respondent in his general claim that he would have made a profit under his contract. He offers, in my opinion, no evidence to support it, and the onus was upon him to make out his case. The accounts are no doubt complicated and require the consideration of experts to fully understand them. The plaintiff, however, had been a long time the foreman of the respondent in the taking out of timber and the very class of timber here calling for consideration and it is a matter for remark that he in my opinion fails in any particular to shew that the accounts were not properly kept or that they were inaccurate in any particular. All that the respondent attempts to do is to make general and vague and unsupported statements that had he been allowed to complete his contract it would have resulted in a profit to him. Further it is to be remembered that the respondent had everything provided for him to proceed with his contract—the timber and most valuable plant and opportunity for making a success of his operations—but the cost of production was such considering the ruling market price at the time, that to continue operations would have been ruinous to all concerned. It is plain that if there had been opportunity to realize a profit in the operations the appellants would not have closed down the work.

I am much impressed with the evidence of the witness O'Flaherty, the accountant of the appellants. His evidence, in

COURT OF APPEAL

1929

June 4.

AICKIN
v.
J. H. BAXTER & Co.

MCPHILLIPS, J.A.

my opinion is conclusive that the respondent could not have reaped any profit had he been allowed to continue the operations.

Now what is the result in law? Had it been that the respondent could have reasonably shewn that by reason of the breach of contract on the part of the appellants he was prevented from making a profit had he been allowed to continue operations under the contract, then undoubtedly he would be entitled to that profit but it was for him to shew what that profit would have been and this he has not shewn. The law is tritely stated by Lord Atkinson in *Wertheim* v. *Chicoutimi Pulp Co.* (1910), 80 L.J., P.C. 91 at p. 93:

"And it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed—*Irvine* v. *Midland-Great Western Railway (Ireland)* (1880), 6 L.R. Ir. 55, 63, approved of by Chief Baron Palles in *Hamilton* v. *Magill* (1883), 12 L.R. Ir. 186, 202. That is a ruling principle. It is a just principle."

Now, what is the respondent entitled to? With the greatest respect to the learned trial judge, I cannot persuade myself that the respondent has made out a case for damages, in truth, he has wholly failed to do so in my opinion. The accounts we have before us demonstrate in the clearest way that the respondent was making no profit in the operations and had he been permitted to further continue the operations it would have been at still greater loss. In these circumstances it is impossible for the respondent to be allowed the damages which have been allowed to him in the taking of the accounts and set forth in the judgment under appeal. However, in that there has been a breach of contract the appellant under the law is called upon to pay nominal damages to the respondent for that breach although it be the fact that the respondent has suffered no real damages. That this is the law it is only necessary to refer to the case of *United Shoe Manufacturing Co. of Canada* v. *Brunet* (1909), 78 L.J., P.C. 101, where Lord Atkinson said 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.

"Their Lordships will therefore humbly advise his Majesty that this appeal should be allowed, that the judgments of the Court of King's Bench and the Superior Court should be reversed, that the interlocutory injunction obtained by the appellants on July 21, 1905, should be declared per-

petual, and that judgment should be entered in favour of the appellants for nominal damages, say one dollar, and costs in both Courts."

I would therefore allow the appeal in part, reducing the damages to nominal damages only, say one dollar, the respondent to have the costs of the trial but no costs of the reference, the appellants to have the general costs of the appeal less such costs as should go to the respondent in succeeding as to nominal damages only.

COURT OF APPEAL

1929

June 4.

AICKIN v. J. H. BAXTER & CO.

MACDONALD, J.A.

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

Appeal allowed in part.

Solicitor for appellants: *Knox Walkem.*
Solicitors for respondent: *MacInnes & Arnold.*

McTAVISH BROTHERS LIMITED v. LANGER AND ALAMO GOLD MINES LIMITED.

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. v. LANGER

Mines and mining—Contract to purchase shares—Misrepresentation as to value of property—Report of engineer in charge—Non-disclosure of to purchaser—Jury—Answers to questions.

The plaintiffs and others incorporated the defendant Company in 1925 for the purpose of acquiring the Alamo group of mines in the State of Oregon, work upon which had been closed down 20 years previously. In 1926, the McTavish Brothers, with two reports, one by one McGuigan, the engineer in charge when the mines were in operation, and certain maps, induced one Langer to finance operations on the mines by subscribing for stock. With the funds so obtained work was carried on by one Barnes until July, 1927, when he advised McTavish Brothers that he could not find any ore of commercial value. Barnes then retired and was succeeded by one Fellows as engineer in charge who gave more encouraging reports as to ore bodies in the mines. On the 17th of November, 1927, with the original reports and maps and Fellows's reports including a favourable telegram received the day before (Barnes's final statements as to the mines being withheld) McTavish Brothers induced Langer to enter into a contract to purchase 750,000 shares in the Company for $93,750. Langer paid $15,000 of this but refused to make any further payments. In an action to

COURT OF APPEAL

1929

June 4.

MCTAVISH BROTHERS LTD. *v.* LANGER

recover the balance of the purchase price of the shares and on the defendants' counterclaim to recover the sums paid, the jury in answer to questions found: "(1) Plaintiffs and their agents in our opinion did not make any statements other than those contained in the reports they had on the Alamo property." "(4) Did such representations induce the defendant Langer to enter into the agreement of November 17th, 1927, relying on such representations and believing them to be true? Yes. (5) Did David Barnes when manager of the Alamo Gold Mines Limited on or about July or August, 1927, report to the plaintiffs that the properties of the Alamo Company were worthless, possessing no ore of commercial value? Yes. (6) If the answer to the last question be in the affirmative then was such report concealed by plaintiffs from defendant Langer? Adverse statement not reported, and later good report was reported. (7) If the answers to the two previous questions be in the affirmative then was defendant Langer induced to enter into the contract of 17th November, 1927, through such concealment? No, we believe defendant bought on Fellows's telegram of the 16th November, 1927." On these findings judgment was given for the plaintiffs.

Held, on appeal (reversing the decision of MACDONALD, J.), *per* MACDONALD, C.J.B.C., that the answers to questions 1, 4 and 7 disclose the jury's opinion that Langer relying on McGuigan's report, coupled with Fellows's telegram entered into the agreement and he would not have been influenced by Barnes's unfavourable opinion of the mines had it been disclosed to him. This is an inference from the evidence that is wholly unjustified and there should be a new trial.

Per MARTIN, J.A.: In order to prevent a miscarriage of justice caused by the uncertainty of the answers to questions 6 and 7 there should be a new trial. When the uncertainty of the answers became apparent the jury should have been sent back to make their meaning plain.

Per MCPHILLIPS, J.A.: That in view of the answers to the other questions by the jury their answer to question 7 is perverse and there should be a new trial.

Per MACDONALD, J.A.: That the appeal should be allowed and the appellant should recover $15,000 on his counterclaim.

Statement

APPEAL by defendant Langer from the decision of MACDONALD, J. of the 4th of January, 1929, and the verdict of a jury in an action to recover $78,750, the balance due on the price of 750,000 shares of Alamo Gold Mines Limited sold by the plaintiffs to the defendant Langer. Said Company was incorporated in British Columbia on the 17th of March, 1925, for the purpose of acquiring the Alamo Group of mines situate in the State of Oregon. These claims were located in 1900 and were worked for five years under the management of one J. P. McGuigan who had about 5,000 feet of work done including three tunnels cross-cutting the vein at different levels. A mill

COURT OF APPEAL

1929

June 4.

McTavish Brothers Ltd. v. Langer

was put in and worked for about six weeks but from McGuigan's statement there was great loss in values owing to the slimey nature of the ore, and as he could not get money to purchase machinery that was necessary to overcome this he shut the mine down in 1905. The property eventually got into the hands of one W. B. Code and he with David Barnes and G. H. Thomas, mining engineers, and the McTavish Brothers, decided to form the defendant Company after obtaining what information they could as to the mine including a report of W. H. Jackson of the 9th of February, 1921, and one of J. P. McGuigan of the 29th of October, 1923. The Company was capitalized at 3,000,000 shares of $1 each. This stock (less five shares held by the original directors) was transferred to Code in consideration of his transferring the Alamo Mines to the Company but by arrangement half the stock was then transferred to the Company and the other half was divided equally among the five shareholders, Code to receive $25,000 later payable in royalties. The Company also acquired a group of claims known as the Evans Group a short distance from the Alamo group and worked them in conjunction with the others. Thomas first took charge of the mines for the Company but in May, 1926, Barnes took charge and continued to do development work until July, 1927, when D. N. McTavish visited the mines and Barnes then told him that he could find no values in the ore and advised shutting down. Shortly after Barnes left and a mining engineer named W. C. Fellows took charge, did development work on both groups largely in the way of clearing the old tunnels, took samples and made reports to McTavish Brothers a final telegram of November 16th, 1927, being as follows:

Statement

"Total width ten feet. First side solid quartz. Next mixed with country rock. Good wall both sides. Starting drift on quartz today. Sending samples both Ruby Creek and Alamo to assayer today."

The McTavish Brothers first interviewed Langer in September, 1926, with a view to his investing in the Alamo Mines representing that it contained large bodies of ore running from $10 to $14 per ton. They shewed him plans of the workings and two reports by mining engineers, one by W. H. Jackson of the 9th of February, 1921, and the other by J. P. McGuigan of the 29th of October, 1923. The latter represented that there

COURT OF APPEAL

1929

June 4.

McTavish Brothers Ltd. v. Langer

were very large quantities of low grade ore from 18 to 30 feet wide running from $3 to $12 per ton, picked samples running from $40 to $60 per ton. On these representations Langer entered into a contract on the 7th of February, 1927, to subscribe for shares for the purpose of financing the mining operations and paid the plaintiffs $28,660. Shortly after he paid a further sum of $35,937 for 250,000 shares. In November, 1927, the plaintiff made further representations to Langer to the effect that 194,000 tons of ore averaging $10 per ton had been blocked out and after shewing him Fellows's reports and telegrams on the 17th of November, 1927, Langer entered into a contract in writing with the McTavish Brothers to purchase 750,000 shares for $93,750 payable in instalments and upon which Langer paid $15,000. The defendant Langer claimed that after the McTavish Brothers received Barnes's adverse report on the property in July, 1927, they should have advised him of this before inducing him to make a further purchase of 750,000 shares in the Company. The questions put to the jury and the answers that are relevant are set out in the head-note and in the judgment of the Chief Justice.

Statement

The appeal was argued at Vancouver on the 23rd to the 26th of March, 1929, before Macdonald, C.J.B.C., Martin, McPhillips and Macdonald, JJ.A.

J. W. deB. Farris, K.C. (*Walkem,* with him), for appellant: They represented to the defendant that there were values that the property did not have and they suppressed the engineer's (Barnes) report while negotiations were going on for the sale of shares: see *Smith* v. *Kay* (1859), 7 H.L. Cas. 750. Fraudulent concealment vitiates the contract: see *Pulsford* v. *Richards* (1853), 17 Beav. 87 at p. 97.

Argument

St. John, for respondents: Langer was well up in mining; he knew assaying and he made a number of visits to the mine forming his own opinion. He had a poor opinion of Barnes's knowledge of the mine.

Farris, in reply, referred to Halsbury's Laws of England, Vol. 20, pp. 678 and 697; *Arnison* v. *Smith* (1889), 37 W.R. 739.

Walkem, on the counterclaim: The defendant is entitled to

recover the amount he has paid for these shares: see *In re Railway Time Tables Publishing Company. Ex parte Sandys* (1889), 42 Ch. D. 98; *London and Provincial Marine Ins. Co.* v. *Davies* (1878), 47 L.J., Ch. 511 at p. 512; *London Assurance* v. *Mansel* (1879), 48 L.J., Ch. 331 at p. 333; *Henderson* v. *Hamilton* (1929), 1 D.L.R. 721 at p. 730; 39 Cyc., p. 659.

St. John, contra: As to the contract being actually void see *Fraser River Mining Co.* v. *Gallagher* (1896), 5 B.C. 82; *Re The British Farmers Oil Cake Co.* (1878), 47 L.J., Ch. 415; *Burkinshaw* v. *Nicolls* (1878), 3 App. Cas. 1004; Palmer's Company Precedents, 13th Ed., Vol. I., p. 40. As to the *locus standi* of the defendant see *Hughes* v. *Northern Electric and Mfg. Co.* (1915), 50 S.C.R. 626 at p. 652. On rejection of evidence see Wigmore on Evidence, Can. Ed., Vol. IV., secs. 1018 and 1025; *Angus* v. *Smith* (1829), M. & M. 473; *Hemming* v. *Maddick* (1872), 7 Chy. App. 395. As to a new trial see *Ex parte Morgan. In re Simpson* (1876), 2 Ch. D. 72.

Argument

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.: On November 17th, 1927, the appellant agreed to purchase from the respondents 750,000 shares in the Alamo Gold Mines Limited.

The jury in answer to questions found:

"1. Plaintiffs and their agents in our opinion did not make any statements other than those contained in the reports they had on the Alamo property."

"4. Did such representations induce the defendant Langer to enter into the agreement of November 17th, 1927, relying on such representations and believing them to be true? Yes.

MACDONALD, C.J.B.C.

"5. Did David Barnes when manager of the Alamo Gold Mines Limited on or about July or August, 1927, report to the plaintiffs that the properties of the Alamo Company were worthless, possessing no ore of commercial value? Yes.

"6. If the answer to the last question be in the affirmative then was such report concealed by the plaintiffs from defendant Langer? Adverse statements not reported, and later good report was reported.

"7. If the answers to the two previous questions be in the affirmative then was defendant Langer induced to enter into the contract of 17th November, 1927, through such concealment? No. We believe defendant bought on Fellows's telegram of the 16th November, 1927."

In the inception of their dealings in 1926, the respondents, who were the president and secretary respectively of the Alamo

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. *v.* LANGER

MACDONALD, C.J.B.C.

Gold Mines Limited, produced to the appellant two reports, one by W. H. Jackson, the other by J. P. McGuigan, on the mines owned by the Company which were known as the "Alamo Group" and the "Evans Group," together with certain maps. It is necessary only to refer to one of these, *viz.*, that of McGuigan, dated in 1923, which concerns the work done on the Alamo Group by him as manager prior to its being closed down in 1905. Jackson's was made in 1921 and appears to me to be unimportant.

The appellant by the first answer is found to have relied, when he made his initial venture in 1926, on these reports and maps. The fourth question and answer, and those following, down to the seventh, have created the real difficulty in this appeal.

Before the 17th of November, 1927, the appellant had taken up some of the Company's shares and had supplied it with money for development purposes but these transactions were distinct from that of the 17th of November, and were induced entirely by McGuigan's report which plaintiffs did not guarantee.

It appears from the evidence of David Barnes and it was found by the answer to question 5, that Barnes, who was manager of the Company's mines from early in 1926 until the middle of August, 1927, had, in July, 1927, reported to the respondents who were directing the Company, that the mines contained no ore of commercial value, and by their answer to question 6 the jury found that the respondents failed to inform the appellant of this report. It was after this adverse report that the sale of the 750,000 shares was negotiated. The evidence of Barnes on this point is most explicit; that he not only expressed such opinion to the respondents in July, but again told them in October after he had left the Company's employ, that McGuigan's report was false and that both groups were practically worthless.

That it was the respondents' duty before making the bargain of 17th November, 1927, the one in question here, to have disclosed Barnes's opinion to the appellant, there can I think, be no doubt. The appellant had relied from the beginning upon McGuigan's report, and when this was declared to be unreliable

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. v. LANGER

and false in the opinion of their manager, it was fraud on respondents' part to have "failed to report" that information or opinion to the person to whom they were offering their own shares. Their letter to the appellant, then in England, of the 13th of August, 1927, carefully conceals the only fact which was, as they knew, of vital interest to him, namely, Barnes's falsification of McGuigan's report. His statement that he disliked spending other people's money on a worthless mine, and his asking to be relieved from his employment was suppressed, and not only was the real reason for his resignation not revealed, but a false reason was given for it.

Mr. Fellows, the new manager, who took charge of the mine in the middle of August, transmitted, on the 16th of November, this telegram to the respondents:

"Total width ten feet. First side solid quartz. Next mixed with country rock. Good wall both sides. Starting drift on quartz today. Sending samples both Ruby Creek and Alamo to assayer today."

This is the "good" report referred to in the sixth answer and it was on the faith of this telegram that the jury say appellant entered into the agreement of the 17th of November.

MACDONALD, C.J.B.C.

On receipt of this telegram the respondents offered their own shares to the appellant and pressed him to buy at once lest the shares should rise in price by reason of Fellows's report. He thereupon bought the shares for $93,750 without awaiting the report of the assayer of the samples mentioned in the telegram, paying $5,000 in cash and giving his promissory note for $10,000 to cover the next instalment of the purchase-money. This promissory note was promptly discounted by respondents and the appellant was obliged to pay it. A few days thereafter the assayer's report came to hand, shewing values per ton from a trace up to 44 cents in all metals in the main tunnels, Number 2 and Number 3. McGuigan in his report stated the values in Number 2 tunnel, sampled and panned for gold by himself, to be from $3 to $12 per ton.

Now reading the answers to questions 1, 4 and 7, what do they disclose? I think they disclose the jury's opinion that the appellant, relying on the McGuigan report and believing it to be true, coupled with Fellows's telegram, entered into the agreement, and further that his mind would not have been influenced

COURT OF APPEAL
1929
June 4.

McTAVISH BROTHERS LTD. v. LANGER

MACDONALD, C.J.B.C.

by Barnes's unfavourable opinion had it been disclosed. The latter is an inference from the evidence which I think is wholly unjustified.

It was argued that Barnes was in no position to form a useful opinion in July, since only parts of the tunnels in the Alamo had been cleared of debris before he left in August, but even if that were a good excuse for the non-disclosure, which I deny, the evidence does not bear it out. Barnes had cleaned out Number 2 tunnel, as well as a large part of Number 3 tunnel. These were the main tunnels, Number 1 being a surface one of 90 feet. He therefore had the opportunity to sample the ore bodies at least in Number 2 tunnel. It turns out now that his opinion was correct, in fact, that he had formed a very conservative opinion when he said he could find no ore of commercial value there. Moreover, Barnes states that he sampled extensively the ores on the dumps taken out in the operations carried on by McGuigan prior to 1903, and could find nothing of value therein. Barnes was a shareholder in the Alamo Gold Mines Limited and the fact that he refused longer to be a party to the wasting of money on these mines is significant of his honesty.

I cannot say that there is no evidence upon which a jury is competent to pass, since the question of fraud is one for the jury, but I am driven to the conclusion that they, owing, perhaps, to the manner in which the questions were framed, were led into grave error. There should be a new trial of both claim and counterclaim. I think the defence that the shares were illegally issued has not been proven. The jury found this question in respondents' favour, and I cannot say that they were wrong.

MARTIN, J.A.

MARTIN, J.A.: With reluctance I can only reach the conclusion that in order to prevent a miscarriage of justice caused by the indefinite answer of the jury to questions 6 and 7 there must be a new trial, and I express my regret that when the uncertainty became apparent the long established and proper course of sending the jury back to make their meaning plain before dismissal was not followed, though it has been repeatedly pointed out by this Court, *vide, e.g., Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361; *Shearer* v. *Canadian Collieries (Duns-*

muir) Limited (1914), 19 B.C. 277; and *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263, 269.

McPHILLIPS, J.A.: I am firmly of the opinion that fraud was made out and that the respondents should recover nothing in this action. I have read the careful judgment of my brother M. A. MACDONALD, in which he details all the salient facts and circumstances demonstrating in the completest way that the respondents were fully aware of the report of the valuelessness of the mine and nevertheless sold shares to the appellant withholding that knowledge and the irony of the situation was that the manager who so reported was actually personally aware of all he reported from actual examination upon the ground and it was money supplied by the appellant which was defraying the cost of the mining operations at the time the manager made the discovery of the valuelessness of the mine. Further, it was upon the continued representations of the strength of previous mining reports then found to be false that the appellant was induced to buy the shares, the price of which is being sued for in this action, *viz.*, $78,750 for shares in the Alamo Gold Mines Limited, the later information being wholly withheld. The jury unquestionably found fraud, but by a series of questions, in my opinion, became confused. Fraud being found that rightly ended the case but the learned trial judge proceeded upon the answer to the seventh question. Three of the qustions put to the jury and the answers made by the jury particularly requiring attention, are the following: [already set out in head-note and in the judgment of MACDONALD, C.J.B.C.].

MCPHILLIPS, J.A.

The telegram of the 16th of November, 1927, from Fellows, was no representation of the value of the mine or that there was any ore of any value therein. It was on this question 7, and the answer thereto that the learned trial judge proceeded and entered judgment for the respondents. In my opinion, fraud being present the judgment of the learned trial judge should have been for the appellant *non obstante veredicto*. In any case the answer of the jury was perverse, it was plain to demonstration, taking the other answers made by the jury into consideration, that the appellant was induced—by representations made to him by the respondents then known to be false—to enter into

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. *v.* LANGER

McPHILLIPS, J.A.

the agreement of November 17th, 1927, the subject-matter of this action. I do not intend to further enlarge upon or refer to the facts, only doing so to the necessary extent. To implement my view fraud being present that should end the action, but two of my brothers are of the view that there should be a new trial. The appeal being heard by four members of this Court, with a division of opinion it might be doubtful as to the effect and as in my view it would be a clear miscarriage of justice if the judgment of the Court below should stand, I have arrived at the conclusion that a new trial be had.

It may well be that it is a proper case for a new trial, when the judgment of the Supreme Court of Canada in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43, is considered. There Mr. Justice Duff said at p. 53:

"By the law of British Columbia, the Court of Appeal in that Province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence. The power given by O. 58, r. 4, 'to draw inferences of fact . . . and to make such further or other order as the case may require' enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, the judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff. This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously: *Paquin* v. *Beauclerk* (1906), A.C. 148 at page 161; and *Skeate* v. *Slaters* (1914), 30 T.L.R. 290.

Whilst I am strongly of the view that but one view of the evidence only can be taken, nevertheless owing to the peculiar circumstances of this case, I am disposed to agree with the view of my brothers, that a new trial be had.

I would therefore allow the appeal and direct a new trial.

MACDONALD, J.A.

MACDONALD, J.A.: The fate of this appeal depends upon the interpretation of answers to questions submitted to a special jury. Plaintiffs (respondents) sued defendant (appellant) for $78,750, balance due on a contract contained in a letter dated November 17th, 1927, and a memorandum written thereon whereby respondent agreed to sell 750,000 shares in Alamo Gold

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. *v.* LANGER

MACDONALD, J.A.

Mines Limited (in the State of Oregon) for $93,750. The sum of $5,000 was paid upon execution of the agreement and $10,000 on March 1st, 1928. Shortly thereafter appellant repudiated liability; hence the action for the balance due. Appellant counterclaims for rescission of the agreement and repayment of the said sum of $15,000 paid thereunder.

Appellant complains respondents represented that the properties constituting the sole assets of the Alamo Gold Mines Limited were valuable properties; that they were operating that part of it known as the "Evans Group" on which a shaft was sunk and assays shewed an average value of $14 per ton; that ore was being milled from an open cut in the Evans Group (Glory Hole) and the mixture of ore from the Evans shaft and the Glory Hole gave the Company a net recovery of $10 per ton, all of which was untrue. Further representations it was alleged were made in respect to operations on the property 20 years before when a vertical shaft was driven for 730 feet cross cut by three tunnels, *viz.*, that a vein at the outcrop 20 feet in width shewed assays of an average value of from $8 to $10 a ton and veins in other tunnels shewed higher values. It was said that an average value of $10 a ton would be shewn when the old tunnels were cleaned out. These representations were alleged to be untrue and the properties worthless.

The respondents gave appellant a blue print shewing a cross-section of the Alamo vein and workings with statements thereon as to values taken from reports of earlier operations. It now transpires that the blue print (with its representations) was grossly misleading although respondents did not know it at that time. Representations were made thereon that 194,050 tons of ore had been blocked out in the Alamo mine from which average samplings shewed a value of $10 per ton and that the value of the blocked ore was at least $8 a ton. These statements were untrue, no such tonnage being blocked out.

Early in 1927, before the contract sued upon was entered into, appellant, relying on the foregoing representations, subscribed and paid for shares in the Alamo Gold Mines Limited to finance operations to the amount of $28,660. He also purchased 250,-000 shares from the respondent paying $35,937.50 therefor. At this time however it was not known that the representations

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. v. LANGER

MACDONALD, J.A.

referred to were untrue. By counterclaim appellant also sought repayment of these amounts but I do not think he is entitled to this relief. He also set up a further defence denying respondents' title to the 750,000 shares sold (under the agreement of November 17th, 1927) and its authority to dispose of them alleging that they were not fully paid and non-assessable nor properly issued. It will not, I find, be necessary to dispose of this issue.

About three weeks before the agreement of November 17th, 1927, was executed, David Barnes, manager of the Alamo Gold Mines Limited, told respondents that the properties were worthless; that it contained no ore bodies of commercial value and that further work was not justified. Respondents flatly contradicted Barnes's evidence but the jury accepted it. The complaint therefore is that respondent fraudulently concealed this vital information from appellant. Had he been told of the statements made by Barnes he would not, he asserts, have obligated himself in the further sum of $93,750 for the purchase of worthless shares. Shortly after the purchase assays revealed the truth in regard to the value of the property, or its lack of value.

Respondents' defence on the main action is that no representations were made, that McTavish Brothers (sole shareholders in respondent company) simply passed on to appellant information received on blue prints originally prepared by others. "This," they say, "was the information we received—use your own judgment." The fraud alleged centres around events in July or August, 1927. One of the McTavish brothers visited the property at that time. Barnes, who was working there as manager for $350 a month, told him as already intimated that the property was worthless—both the Evans and Alamo, and further that he did not believe the representations made in the earlier reports set out in the blue prints referred to. Appellant was then in England. McTavish wrote to him afterwards, *viz.*, on August 13th, 1927, but did not say anything about Barnes's adverse opinion although the letter contained suggestive statements concerning Barnes which would appear to be not without significance. Part of the letter follows:

"I left shortly after seeing you and drove down to Baker. . . . There was no change or no indication to shew that there had been any fault or

slip. I called in Mr. Fellows the engineer who made the survey of the tunnel and he agreed with Mr. Barnes that the only thing to do was to drive straight ahead. . . . Mr. Barnes succeeded in getting air circulating in the Alamo tunnel and ultimately got in 1,200 feet. Here he came to the big porphyry dyke that is mentioned in the reports. This porphyry as you will remember is something like sandy clay and at this point it had caved very badly filling the tunnel for several feet back. It was broken up in very small particles and being wet whenever they attempted to take a shovelful out near the top it would run very energetically right back to the floor of the tunnel. Mr. Fellows suggested that since the weather had turned very hot this might dry out very materially in the next few weeks and he advised giving it a chance. If it is not sufficiently dried out it might be necessary to tunnel around it. It is very encouraging to find that the large porphyry dyke is just as indicated in the various reports. . . . When I reached camp I heard some intimation to the effect that Mr. Barnes had expressed dissatisfaction, excused him on the ground that since his operation last spring he has been anything but well. However, knowing your feelings in the matter I made up my mind that if he gave me any opportunity there was only one thing that I would do. After being there for some days I asked him if he was sincere in the statements he had made regarding his desire to get away. He said he was. I presume he expected that I would try to persuade him to stay on, but I simply informed him that if a man has gotten himself into that frame of mind that of course there was no use arguing with him and asked him when he would be prepared to leave. He then said that he did not wish to leave us in the lurch and that if he got reasonable holidays it might be alright. However, I paid no attention to this remark and told him he did not need to worry about that as I had already spoken to Mr. Fellows and arranged with him to carry on until you returned. Mr. Barnes then suggested that he would carry on until the 15th, so by the time you receive this letter the work will be going on under new management. . . . Mr. Barnes will therefore be leaving the work on Monday. He is coming home to Seattle and will then make a trip up here to see us. At that time he will give us a verbal report of what has happened since I left and if there is anything of interest I shall pass it on to you."

MACDONALD, J.A.

(I think McTavish had some information of interest which he might have passed on, assuming of course that the jury came to the right conclusion on that point.)

Again he wrote appellant on August 17th, 1927, in part as follows:

"We have just been favoured with a visit from Mr. Barnes. He reports that Mr. Evans who has been prospecting alongside the Alamo for the last two years, has at last been rewarded in getting the vein for which he was looking. When Mr. Barnes saw the vein just before leaving, he had a cross-cut in it for 12 feet and had not yet reached the other side. He describes this as a very rich vein the fine stuff in which carries as much gold as the fine stuff in the 9 feet vein on the Evans, and that when crushed the rock really contains more gold than the fine stuff. In other words, he says that

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. v. LANGER

he saw lots of samples that would easily go $200 a ton and intimated that from the surface indications there is a possibility that the vein might go $50 to the ton. I am just passing this information on to you as it came to me. At the same time I have had a letter from Mr. Fellows in which he says that the discovery made by Mr. Evans was undoubtedly very fine. Barnes spent the whole day on the hill and said that he definitely determined that the vein cuts right through our property."

It was suggested that in any event the Alamo was not sufficiently opened up at that time to enable Barnes to express an opinion; also that he was not competent to do so. Why therefore pay heed to what he said? It would at least be fair to report his opinion for what it was worth with (if it was thought of no value) comments upon it.

Mr. Fellows referred to in the letter quoted—a mining engineer—succeeded Barnes. His investigations finally disclosed the same condition but not at the outset. After doing some work he wired respondents as follows:

"November 16th, 1927.

"Total width ten feet. First side solid quartz. Next mixed with country rock. Good wall both sides. Starting drift on quartz today. Sending samples both Ruby Creek and Alamo to assayer today."

MACDONALD, J.A.

This message was referred to in the jury's answers. However, after further work and investigation, he wrote appellant, on November 17th, 1927, saying in part:

"Herewith please find assay certificate as you will see the Alamo has no ore of any value."

Again on November 21st, 1927, he wired respondent as follows:

"All of number two tunnel cleaned out can sample all of ore body. About three hundred feet of ore chute on lower tunnel clean one hundred fifty feet on each side of raise the map shews this to be the centre of ore chute. Impossible to say length of time required to clean out balance. There is absolutely no commercial ore in either the number two tunnel or the lower tunnel. Notwithstanding reports by McGuigan Jackson and others mailed assay certificates Saturday."

Also on December 6th, 1927, he wrote respondent a letter in which this sentence appears:

"It is possible there may be a spot or two that will assay but as for commercial ore there is none."

The questions submitted to the jury with the answers follow: (I omit number 8 as it is no longer material):

"1. Did plaintiffs, [respondents] or their agent duly authorized in that behalf, make representations to the defendant Langer [appellant] as facts, matters which were material and not matters of opinion? Plaintiffs and

their agents in our opinion did not make any statements other than those contained in the reports they had on the Alamo property.

"2. If the answer be in the affirmative, then state which (if any) of such representations were untrue? None of them.

"3. Were such representations made with the intention of thereby inducing the defendant Langer to contract with the plaintiffs for shares in the Alamo Mines Limited? Yes.

"4. Did such representations induce the defendant Langer to enter into the agreement of November 17th, 1927, relying on such representations and believing them to be true? Yes.

"5. Did David Barnes when manager of the Alamo Gold Mines Limited on or about July or August, 1927, report to the plaintiffs that the properties of the Alamo Company were worthless, possessing no ore of commercial value? Yes.

"6. If the answer to the last question be in the affirmative then was such report concealed by plaintiffs from defendant Langer? Adverse statement not reported, and later good report was reported.

"7. If the answer to the two previous questions be in the affirmative then was defendant Langer induced to enter into the contract of 17th November, 1927, through such concealment? No, we believe defendant bought on Fellows's telegram of the 16th November, 1927."

"9. Was the consideration for the transfer by William B. Code to the Alamo Gold Mines Limited of the Alamo mine 3,000,000 fully paid and non-assessable shares of the company or was the consideration 1,500,000 shares? Yes, 3,000,000 shares." [This answer is of importance only on the other branch of the case.]

MACDONALD, J.A.

Taking a general survey the jury by its first answer finds that respondents simply passed on to appellant information contained in statements originally made as a result of operations 20 years before without any knowledge as to whether they were true or not. It follows that in answering the second question the jury do not mean that the mine contained ore bodies and values as set out in these early reports. They mean that it was true such statements appeared and were passed on to appellant. That is the only intelligent explanation of the answer. The answer to number 3 means that representations believed by respondents to be true at that time were intended to induce the contract, while number 4 shews that appellant entered into it relying on said representations. The answers to numbers 5 and 6, should be considered in the light of the charge to the jury on the points involved. His Lordship after repeating question 5, said:

"Now, aside from this question of misrepresentation, innocent though it may be, this involved a direct attack upon the plaintiff of fraud. It is my duty to inform you, under the relationship existing between the plaintiff

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. v. LANGER

and defendant, if they had acquired knowledge of the condition of the mine as outlined in this question then it was their duty to inform Langer to that effect, and furthermore, it was a most fraudulent act on their part to have then negotiated and carried into effect an agreement for the sale of shares in that mining property."

With that in mind the jury found that Barnes reported to the respondents as appellant contended. But respondents say it is not fraud to conceal a report honestly believed to be of no value although it later turned out to be true. The issue was as to whether or not Barnes did make this report. Respondents denied it and the trial judge was of the opinion after hearing the evidence that if the report was made it was fraud to conceal it. I think the answer to number 6 may be read as if the word "yes" preceded the answer and formed part of it.

MACDONALD, J.A.

The answer to number 7 creates the whole difficulty. The jury should have been asked to elucidate it. I have quoted the telegram of November 16th here referred to. Read literally apart from previous answers it would appear that the contract was closed not as a result of fraudulent concealment of a report but by an optimistic telegram from a reliable engineer. Do the jury mean that it was the sole operative inducement—that if respondents had disclosed Barnes's report appellant would treat it as respondents say it should be treated, *viz.*, as the opinion of a man not qualified to judge? I cannot think so. That telegram standing alone could not possibly be the sole inducing cause. It was the final word in a series of events required to bring about this sale. It could not be the sole reason because the jury in earlier answers point to other representations which brought it about. It must at least mean that appellant bought on this telegram coupled with the representations found in answer to questions 1, 2, 3 and 4.

If as the learned trial judge (who gave judgment on the answers) evidently believed the answer to number 7 is all-important, and the answers to 5 and 6 of no vital importance (in view of number 7) in reaching a conclusion, the judgment should not be disturbed. The word "concealed" is used in question number 6. It suggests fraudulent suppression and the trial judge by his charge so regarded it. The result of the jury's finding is that two representations (4 and 7) induced the contract, *viz.*, the blue print and the telegram. Neither one standing alone

would do so but because of the information contained in the blue print the telegram of November 16th settled the matter. Without the earlier representations it could not do so. What follows? The jury would not be expected to know—it is a legal deduction—that although the answers to 1, 2, 3 and 4 originally shew innocent representations their character was entirely changed by the answers given to numbers 5 and 6.

Counsel for appellant put it this way. When blue prints were given containing representations as to value it was an innocent misrepresentation. But when respondent discovered in July or August that these representations innocently made were in fact untrue and suppressed the information received from Barnes shewing it, the original representation being a continuing one must be regarded as dishonest. If A and B are interested in a joint venture and A makes representations to B innocently to induce a sale of his interest in the undertaking and before it is entered into finds his representations were untrue but conceals the discovery and B buys on the faith of the original representation the result is the same as if A knew they were false in the first place. The query would arise as to whether or not he was credibly informed on the point. Before he would be bound to apprize B the information would have to be such that an honest man acting reasonably would act upon it. We have no finding as to whether Barnes's opinion—from his position and the work done—was of any value. But we have the judge's charge on the point and we must view the answers in the light of it. Personally I would experience little difficulty. The manager's exploratory work was not so meagre that he could not express an opinion which at least should seriously be taken into account as between parties standing in such relationship. He was not a qualified engineer but a practical man and he was the manager—their man on the ground. The respondents knew that appellant already invested nearly $70,000. He was the financial pack-horse for the outfit. To say before loading him with a further liability of over $90,000 for worthless shares that he should not be told what his own manager reported offends against one's sense of fair and honest dealing, to say the least. This, of course, is based on the assumption that the jury found—as we must assume—the facts correctly. If they did not a grave injus-

MACDONALD, J.A.

COURT OF APPEAL

1929

June 4.

McTAVISH BROTHERS LTD. v. LANGER

MACDONALD, J.A.

tice was done respondents. I do not say this to intimate that I disagree with the jury's finding. I do not express an opinion one way or the other on that point.

Surveying therefore the answers in this way I cannot find from the answer to question 7 any implication that the answers to the former questions should be ignored; nor that the end was not attained by the state of facts they disclose. The original representations were a *sine qua non.* To say that the jury in answering number 7 meant the Court to ignore the previous answers is to make an incomplete statement. The train of thought leading to the purchase was started by the blue prints and the information therein contained. Upon the suppression of the Barnes report that information must be regarded as untrue *ab initio.* The telegram was the final inducing element but standing alone it would not induce the contract. That is the effect of the jury's answers. We must assume that the jury were acting seriously under the direction of the Court and because they find that the original representations were a factor I would view it as if they answered number 7 by saying "No, we believe defendant bought on the representations contained in the blue prints with the alleged facts recorded thereon, and by the telegram of the 16th of November." The element of fraud was interjected into those representations by the answers to 5 and 6 and when it enters as an inducing element the contract cannot stand.

I think the appeal should be allowed, and that appellant in addition to rescission of the agreement should recover the $15,000 paid thereunder.

New trial ordered.

Solicitor for appellant: *Knox Walkem.*

Solicitors for respondents: *St. John, Dixon & Turner.*

TURNBULL v. EDEN, PETERSEN AND OMAN.

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

Contract—Mines and minerals—Agreement to raise funds for development work—Transfer of interest in claims in consideration—Agreement not carried out—Claims allowed to expire—Relocations.

The defendant Eden, requiring funds to develop, survey and have Crown granted four mineral claims, entered into an agreement with the plaintiff in July, 1923, whereby the plaintiff was to raise $5,000 for this purpose and Eden was to transfer to him a one-quarter interest in the claims by means of which he was to raise the money required. Eden transferred said interest in the claims to the plaintiff but the plaintiff only succeeded in raising $2,000. This money was spent on the claims in the first six months but Eden continued his development work and incurred a further expenditure of $2,000. Then as no further funds were forthcoming from the plaintiff, Eden wrote him and said he could do no more. In 1926, the claims were allowed to expire and the defendants Petersen and Oman who had been working on the claims for Eden, relocated over the same area. In an action for breach of contract, for damages, and for a lien on the relocated claims, it was held that the plaintiff was entitled to recover $2,000 in damages but the action was dismissed as against Petersen and Oman.

Held, on appeal, reversing the decision of McDONALD, J. (MARTIN, J.A. dissenting in part), that when advances by the plaintiff stopped owing to his failure to secure funds, Eden's obligations to incur expenditure on the claims ended and there was no breach of contract for which damages could be given.

Statement

APPEAL by defendant Eden from the decision of McDONALD, J. of the 28th of November, 1928, in an action for a declaration that he is entitled to a one-quarter interest in the mineral claims North Bend, Standard, Gold Coin, and Independence, situate on the North Bend of the Fraser River in the County of Cariboo. In the fall of 1923, the defendant Eden employed the plaintiff to raise money for him to be used in the development of and acquiring a title to four mineral claims known as the Independence, Last Chance, Jennie and Last Hope. In order to raise the money Eden gave the plaintiff a bill of sale for a one-quarter interest in said claims to be used by transferring portions to those who advanced money for development work. Pursuant to the agreement the plaintiff got $2,000 on the security of the one-quarter interest in the claims and sent the

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

Statement

money to Eden. Eden did part of the development work on the claims as agreed but the plaintiff claimed he entered into a fraudulent conspiracy with the defendants, Petersen and Oman to defeat the plaintiff's interest in the claims and when they lapsed the defendants, Petersen and Oman located four claims over the same ground upon which the aforementioned claims were located and called them the North Bend, Standard, Gold Coin and Independence claims. The plaintiff claimed that Petersen and Oman in restaking the ground acted as agents for Eden and were holding them as trustees for Eden. It was held on the trial that the plaintiff was entitled to succeed against Eden for damages, fixed at $2,000, but as there was no evidence of a collusive arrangement to defraud the plaintiff, the action was dismissed as against Petersen and Oman.

The appeal was argued at Vancouver on the 8th and 9th of April, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. H. MacNeill, K.C., for appellant: The action was dismissed as far as fraudulent conspiracy was concerned, the only claim for damages being that Eden did not protect the claims for Turnbull and those who advanced him money. There is no claim for damages for breach of contract. The relief should be specifically stated: see *King* v. *Wilson* (1904), 11 B.C. 109. On the question of giving judgment for something not in the pleadings see *Hipgrave* v. *Case* (1885), 28 Ch. D. 356. As to the notice of appeal we submit that the plea of "that it is against the law and evidence and weight of evidence" is sufficient. If not, we apply for leave to amend the notice of appeal.

Mayers, K.C., for respondent: There is no need to ask for damages: see the Laws Declaratory Act, R.S.B.C. 1924, Cap. 135, Sec. 2 (7); *Greenizen* v. *Twigg* (1921), 30 B.C. 225 at p. 234. If you plead a contract and a breach of contract, damages follow as a matter of course without pleading.

MacNeill, in reply, referred to *Nocton* v. *Ashburton* (*Lord*) (1914), A.C. 932 at p. 963.

Per curiam: Amendments allowed (MACDONALD, C.J.B.C. and MARTIN, J.A. dissenting).

MacNeill, on the merits: Of the $2,000 given to Eden only

$250 of it belonged to Turnbull, so there is no right of action for the balance. Turnbull claims he was Eden's agent: see *Gadd* v. *Houghton* (1876), 1 Ex. D. 357; *Southwell* v. *Bowditch* (1876), 1 C.P.D. 374; Bowstead on Agency, 7th Ed., p. 216, Article 68. The money was disbursed as agreed but the properties were found worthless. In the circumstances why should he take out a certificate of work? This is an interest in land and the contract is not enforceable: see *Fero* v. *Hall* (1898), 6 B.C. 421. The learned judge below granted damages when he could not have ordered specific performance: see Anson on Contracts, 15th Ed., p. 83.

Argument

Mayers: We say this is not an interest in land within the meaning of the Act: see *Mayfield* v. *Wadsley* (1824), 3 B. & C. 357; *Wood* v. *Benson* (1831), 2 C. & J. 94. If driven to it we can make out a case that comes within the statute: see Halsbury's Laws of England, Vol. 7, p. 367. The facts shew the parties intended to restake immediately on the expiration of the old claims. On the question of Turnbull being Eden's agent see *Ex parte White. In re Nevill* (1871), 6 Chy. App. 397 at p. 403; *W. L. Macdonald & Co.* v. *Casein, Ltd.* (1918), 26 B.C. 204; *Chaplin* v. *Hicks* (1911), 2 K.B. 786. A collateral agreement relating to land can be enforced: see *Mann* v. *Nunn* (1874), 43 L.J., C.P. 241; *Angell* v. *Duke* (1875), L.R. 10 Q.B. 174; *Boston* v. *Boston* (1904), 1 K.B. 124; *Re Banks, Deceased. Weldon* v. *Banks* (1912), 56 Sol. Jo. 362.

MacNeill, in reply, referred to *Barron* v. *Kelly* (1918), 56 S.C.R. 455; *McGee* v. *Clark* (1927), 38 B.C. 156.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.: This is the plaintiff's account of the arrangement between himself and the defendant. He said:

MACDONALD, C.J.B.C.

"He [the defendant] told me he would have to start in to explore his own claims in order to get the district proved up, and we discussed the formation of a company to develop his claims; he spoke to me of getting his claims Crown granted and told me it would take about $5,000 to survey these claims, get them Crown granted and put them in shape to get the engineer's inspection of them. What I am speaking of now, refers to the four claims in litigation here. . . . This conversation I am speaking of took place in my office in Regina, in July, 1923, and he told me what money

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

he wanted, and I agreed to try and get it. . . . I remember shaking hands with him and telling him that 'I am not promising you $5,000, I am merely promising to try and get it.'"

For this endeavour the plaintiff stipulated and got in advance an undivided one-quarter interest in the defendant's four claims. His endeavours resulted in his obtaining only $2,000, which sum with much of his own money the defendant used up in assessment and exploration work on the claims. The plaintiff now demands damages because of defendant's failure to obtain grants from the Crown.

MACDONALD, C.J.B.C.

The agreement according to the plaintiff when reduced to its naked terms is, that whether the plaintiff got the money or any of it or not, the defendant bound himself at his own expense to do the assessment work which would cost $2,000, survey the claims which would cost $100 each, fulfil all conditions necessary for the obtaining of a certificate of improvements and thereupon obtain Crown grants of the land and minerals, and if he failed to do this he would be liable in damages to the plaintiff. The defendant on the other hand, said that he sold a one-quarter interest in the claims to the plaintiff for $5,000. Since the judge accepted the plaintiff's evidence where there is conflict in preference to that of the defendant, I shall found my opinion on the correspondence between them. The fair inference from that correspondence is that they had fixed upon $5,000 as the amount necessary for prospecting or exploring and for eventually obtaining Crown grants, if mining engineers on examination and sampling should consider it worth while to obtain permanent title to them. I think the plaintiff left this to defendant's better judgment and experience. What they both were most concerned with was the mineral shewings and values disclosed by the work intended to be done, the permanent title being a mere detail which might or might not justify expense, and which could be done at any time by the expenditure of a few hundred dollars. What they were working for were mines not permanent title, which they did not need if they recorded assessments, and complied with the Mineral Act.

The plaintiff in his evidence emphasizes the necessity of procuring Crown grants, but he shewed no such anxiety in his letters; it was work and shewings, reports and assays which he

wanted. I refer to a letter written by defendant within a month of the said arrangement, namely, on 27th August, 1925 (Exhibit 6), to plaintiff in which he said:

"You remember that you agreed to get $5,000 to prospect these claims to find out what we could do."

No repudiation of this suggestion was made in any subsequent letter of the plaintiff. The statement fairly represents, I think, the tenor of the correspondence upon the question of what the parties were endeavouring to carry out.

Now the plaintiff did supply the defendant with $2,000 of the $5,000 intended to be raised, and within six months it had all been spent and a statement of how it was spent was rendered on the 28th of December of the same year to the plaintiff. No comment upon or objection to that statement was made. The defendant continued in the following spring to incur debts for wages and supplies, having used up all his own resources, and ended in the following summer with a liability of about $2,000, of which a large proportion was for the wages of the men employed on the claims. The plaintiff in response to demands for money assured the defendant from time to time that he was doing his best to obtain it but eventually he failed to get it.

MACDONALD, C.J.B.C.

Finally the defendant told the plaintiff in July, 1924, that he could do no more; that he had no money and had incurred the debts aforesaid. The plaintiff thereupon got independent advice from a lawyer in Prince George, respecting the liability of the claims to liens for the said indebtedness, and was told that no liens had so far been filed. He therefore kept himself in touch with the actual state of affairs at the mines. Finally in 1926 or 1927, owing to default in obtaining certificates of work the claims expired and were restaked by two of the men who had worked upon them and to whom wages were owing.

In this action the plaintiff attacked the restaking and accused the defendant and the restakers who were also defendants originally, of fraudulent collusion. The learned judge decided that issue in favour of the defendants, and dismissed the two relocators from the action, and there has been no appeal against that term of the judgment. The only question which remains is that of breach of contract. It was argued that the statement of claim does not plead a contract nor a breach thereof. But I

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

MACDONALD, C.J.B.C.

will assume that it does. The only conclusion I can draw from the correspondence and the evidence, where not in conflict, is that the parties did not, nor did they intend to make a binding contract, but merely intended to bring about the exploitation of the claims by the plaintiff getting the $5,000 which was to be expended by the defendant in prospecting, developing and eventually Crown granting the claims. This arrangement was not carried out because of plaintiff's failure to obtain the money, but if there were a binding contract at all it was the contract sworn to by the defendant, but as I have already said, I do not believe there was a binding contract. In this result it becomes unnecessary to consider the other question raised in argument.

I would therefore allow the appeal on the ground that the parties entered into a joint venture in which each relied on the good faith of the other, and since bad faith has not been found, a legal obligation in support of this action has not been proved.

MARTIN, J.A.

MARTIN, J.A.: There is here, in my opinion, a cause of action alleged and established for breach of contract, quite apart from the Statute of Frauds, entitling the plaintiff to damages and to that extent I am in accord with the view taken by the learned judge below. I an unable, however, to find evidence justifying his award of $2,000 damages for said breach, seeing that the plaintiff distinctly says he did not agree to indemnify the persons from whom he obtained money on defendant Eden's behalf, and therefore his damages should be restricted to the amount he primarily advanced himself, *viz.*, $500, and so the judgment should be reduced to that amount.

GALLIHER, J.A.

GALLIHER, J.A.: I am still of the opinion that I expressed at the hearing of this appeal, that the pleadings are directed not to a breach of contract but to a conspiracy to defraud. It is true they refer to an agreement and a breach of that agreement, but it was necessary to allege that and to prove it in order to establish the conspiracy otherwise there would have been nothing to rely on in that respect. In my view these declarations are narrative leading up to a foundation for the charge and this is, I think, strengthened to some extent when we examine the relief claimed in the prayer to the statement of claim.

GALLIHER, J.A.

The learned judge has found no fraud as against two of the alleged conspirators, so that charge fails. He says nothing as to whether there was or was not fraud on the part of Eden, but bases his judgment on breach of contract. If the action was for breach of contract, fraud of the defendant, if it could be so found, would be a vital factor, but if I am right in holding that there is no action on a breach of contract alleged, and that the conspiracy charge fails, that is an end of it so far as this appeal goes.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of my brother the Chief Justice of British Columbia, and would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The plaintiff (respondent) by endorsement on the writ asked for a declaration that he was entitled to a quarter interest in four mineral claims in the Cariboo District "the same having been fraudulently relocated by the defendants Petersen and Oman." In his statement of claim the facts relied upon are outlined. He alleged that in 1923 the appellant Eden (the action was dismissed as against his co-defendants) employed respondent to raise money to be used in the development of and in acquiring title to four mineral claims in said district known as the Independence, Last Chance, Jennie and Last Hope. Appellant gave respondent a bill of sale of a quarter interest in the claims to secure advances which respondent might and did obtain from other parties. The moneys so secured were to be used by appellant in doing assessment work, recording it and in obtaining title to these four claims. Pursuant thereto respondent secured $1,750 from associates and advanced $250 himself forwarding all of it to appellant in two amounts of $1,000 each and as respondent alleged he "made himself liable to third persons to convey to them portions of the said claims in return for the said money." It will be observed from the endorsement on the writ and the statement of claim that whatever agreement was entered into between respondent and appellant it was to eventuate in a sharing of title in the claims on the part of the respondent and others who made advances and a declaration as to interest was demanded.

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

Respondent complains that appellant did not expend the moneys advanced in doing assessment work, and in obtaining title but on the contrary entered into a fraudulent conspiracy with his co-defendants to allow the claims to lapse and to arrange for their restaking by said co-defendants. The respondent further alleged that the appellant was the real owner of the four claims subject to respondent's rights or, alternatively that Petersen and Oman restaked as appellant's agents without acquiring any interest therein merely holding them as agents or trustees for the appellant. On these allegations in the statement of claim respondent in his prayer for relief asks for:

"(1) A declaration that he was entitled to a one-quarter interest in the four claims referred to in paragraph 3 hereof, for the purposes herein set out.

"(2) That the plaintiff through the fraud of the defendants, or one or more of them is illegally deprived of his interest in the said claims and should be entitled to a one-quarter interest in the claims referred to in paragraph 7 hereof, for said purposes.

"(3) A declaration that the plaintiff is entitled to a lien upon the claims referred to in paragraph 3 hereof and upon those restaked in substitution therefor as referred to in paragraph 7 hereof for the sum of $2,500 and interest and costs.

MACDONALD, J.A.

"(4) Damages to the extent of $2,500 against the defendants."

The learned trial judge awarded damages against the appellant Eden in the sum of $2,000 for breach of contract dismissing the action against the other defendants, because "there is no evidence . . . that they were parties to any collusive arrangement to defraud the plaintiff."

Counsel for appellant submitted that the judgment of the learned trial judge was not based upon the pleadings; that no specific contract was alleged therein as between appellant and respondent nor damages for breach of contract claimed. Certainly the respondent did not allege a contract in the endorsement on the writ nor ask for damages for breach of contract in the prayer of the statement of claim. In the statement of claim, however, in spite of lack of clarity and non-compliance with marginal rule 231 the terms of a contract may be extracted, *viz.*, that appellant agreed to apply moneys advanced by or through the respondent in a certain way leading eventually to the obtaining of title and a breach was alleged inasmuch as it was stated, that appellant did not apply said moneys for the

purposes designated. I do not think the draftsman meant to claim damages against the appellant personally for breach of contract. At all events the pleadings might very well—as it was submitted—mislead counsel in drafting a statement of defence with the result that the Statute of Frauds was not raised as a defence to an alleged oral agreement. That being so this Court by a majority having the same powers as to amendment as the Court or judge appealed from and there being no allegation of prejudice or any statement that if the amendment had been made at the trial further evidence might have been adduced allowed the notice of appeal to be amended to enable appellant to raise the Statute of Frauds as a defence.

MACDONALD, J.A.

The first task is to ascertain from evidence none too clear just what the contract was, for breach of which damages were awarded and whether or no a breach occurred. The learned trial judge does not make a finding as to the terms of the contract—he simply finds that there was a contract. It is therefore necessary to examine the evidence to find (if a contract existed) what its terms were. In doing so I follow the learned trial judge by accepting the evidence of the respondent where it conflicts with that of the appellant, subject to this—that it must be consistent with reasonable assumptions based on all the facts and circumstances.

Appellant and respondent met in Regina in July, 1923. Four mining claims in the vicinity in question belonged to the North Point Mining Company and respondent had a claim north of this property and east of the claims in dispute herein. The North Point Company lost its claims and they were restaked by appellant. Respondent too, with others was interested in other claims in that locality and his evidence throughout is burdened with allusions to them. I confine my references to the evidence bearing upon the four claims in question in this action. They discussed at this interview the formation of a company to develop appellant's claims. Then as respondent put it "he spoke to me of getting his claims Crown granted and told me it would take about $5,000 to survey the claims, get them Crown granted and put them in shape to get the engineer's inspection of them. And I agreed to try to get him the money." Respondent did not promise to advance $5,000 but simply that

COURT OF APPEAL

1929

June 4.

TURNBULL
v.
EDEN

he would "try to get what money he required up to $5,000." He was to try to do certain things, *viz.*, raise money while appellant (it was submitted) was bound to do certain things, including obtaining title. One would expect that the one would be dependent upon the other. If for example respondent advanced only $500 or even $100 would appellant be obliged to proceed in the same way and obtain title; or if not at what point would he be bound to do so? Obviously appellant's obligations were contingent upon respondent's efforts. From evidence quoted too respondent was told that about $5,000 would be required to enable appellant to do everything contemplated including the securing of the Crown grants. Respondent further testified that "it was agreed that the money was to be used, first to survey these four claims, and second to Crown grant them and any additional money was to be used in trying to explore the leads on the claims so that when an engineer came there he could see them; in other words, put the property in shape to sell."

MACDONALD, J.A.

It will be observed that the Crown granting of the claims was a term of the alleged agreement. It would be immaterial whether it was necessary or advisable to secure Crown grants to "put the property in shape to sell." If it was part of the bargain it would have to be performed dependent upon respondent's efforts to find sufficient funds. According to respondent's evidence also—whether logical or not—the Crown grants were to be secured before the moneys advanced were exhausted because it is stated that "any additional money was to be used in trying to explore the leads." That was respondent's evidence at the trial. I do not find however in the correspondence which should be regarded any complaint that the Crown grants were not obtained before the $2,000, the only amount advanced was expended in development work. Respondent again referring to the agreement, amplified it, stating:

"The final consummation of the deal was that I was to try to raise money for him up to a limit of $5,000. That money along with any other money he could obtain was to be used to survey these four claims, Crown grant them and explore the leads so that an engineer making an inspection could see them and we could lay a foundation for the company which we proposed to incorporate; he was to put me in possession of the quarter interest in those claims."

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

MACDONALD, J.A.

Then in explanation of the quarter interest which respondent was to receive he said it was

"possibly by way of security, so that I could shew the people from whom I got the money that they would have a real run for their money."

This leaves the purpose of executing the bill of sale for a quarter interest somewhat vague. The word "possibly" is used. Appellant's evidence was that he was to give a quarter interest for $5,000 to be advanced.

About a month after appellant's return to Prince George in the Cariboo District he forwarded to respondent a bill of sale of an undivided quarter interest in the four claims. No mention was made in the letter accompanying it of the purpose for which it was executed. Respondent was not then certain that he could raise the balance of the money required by appellant but was "fairly satisfied he would do so"—as stated in a letter of August 21st, 1923.

Referring further to the alleged agreement, appellant in a letter to respondent on August 27th, 1923, stated:

"You remember we agreed to get $5,000 to prospect the claims to find out what we could do."

In a letter dated October 21st, 1923, he said:

"The surveyor is working on the survey so we will soon get our claims and prospect in shape for a big company."

(I make corrections in spelling in appellant's letters.) Respondent wrote appellant on October 25th, 1923, on other matters but makes no reference to the extracts quoted. On November 19th, 1923, appellant wrote to the respondent and in referring to the four claims in question said:

"We are now working our prospect on the Last Hope. I have got supply in for all winter so if you are able to raise some money to pay the men we will be all O.K. and get our group in shape to make a good company soon our prospect is shewing up fine but I can not just now give any report it will take to first of January before I can get where I can take any assay but I will have all claims Crown granted now and in shape for from what I understand is our new Co."

Again in a letter to appellant—on January 3rd, 1924, respondent asks, "Will you Crown grant your own four claims this spring?" and on January 16th, 1924, appellant in reply stated:

"In regard to the Crown grant of the claims I am going to have it done as soon I can get some money. . . . I can not say when I will be able to Crown grant the claims but as soon as I can we may find something any day in the mine which will help me out."

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

At this time all the money advanced was expended. This confirms the view that the claims were to be Crown granted conditional, however, upon obtaining advances. The point is, was appellant bound to assume or guess that only $2,000 would be advanced and reserve a small part of it for this purpose. True it was expected that appellant too would secure funds if he could but he was not bound to do so.

Respondent gave appellant $1,000 when he was in Regina in July, 1923, and another $1,000 in October of the same year. He received $1,000 from one associate; $250 from three others and contributed $250 personally. This was nearly all spent before the end of 1923, and the claims were not Crown granted. On February 9th, 1924, respondent wrote appellant saying:

"I have been trying to get you more money but find it pretty hard. If you can send me a small sample that I can shew them gold in I can make it work."

MACDONALD, J.A.

Respondent did not complain that appellant should have had the claims Crown granted before the $2,000 advanced was expended but on the contrary tacitly acquiesced in the view that it should be conditional upon further funds being received. He recognized the need of more money and said he was trying to get it.

On April 28th, 1924, appellant in a letter to respondent says:

"The boys have come down now and want their pay. They are not going up any more and as I have no money to pay with I can not do anything here any more. The lead looks good, they say the river is not open yet so I can not get up anyway. I can do no good alone if I was up there so I am done at present and the boys can take any action they like to get their pay."

Again on July 3rd, 1924, he wrote respondent, in part saying:

"If you could send me $500 to pay off the men so I could start the Crown grant as it is ready for that but I can not start Crown granting as I have no money and no use to do that and the claims in debt for labour and supplies, it was too bad to have to stop the work as the showing was fine and looked better every foot. Enclose find assay so you can see that the gold value is coming in but we are not in the ore yet, let me know what you are able to do as I must have something done and not have the claims tied up."

On July 11th, 1925, appellant wrote respondent, in part saying:

"As I have done and recorded the assessment on the 4 claims Last Hope, Independence, Jenny and Last Chance for the year of 1924 to the value of $400 and expenses and record amounting to $425 as you hold one-fourth

interest your part due is $106.25. Refer you to Chap. 157 Part I., 28 of B.C. Mining Law. Also try and do something on the old account."

No reply was sent to this letter. On January 11th, 1926, respondent wrote appellant, saying in part:

"As the financial outlook in Western Canada appears, at the moment, to be much better, I think it might be possible to obtain more money for you in order that further work can be done on your four claims at North Point."

Still no complaint that final title was not obtained, although respondent must have been aware of the facts through previous correspondence. It seems to me that undue emphasis was placed on the necessity of Crown granting the claims after the writ was issued fastening upon it as a breach of contract. The usual course is to first develop mining claims to see if they are worth holding.

There were two further interviews between the parties, one in the spring of 1924, the other early in 1926. In February, 1926, the conversation so far as it related to the four claims in question was as follows. Appellant told respondent that he did not think he was ever going to be able to get the claims developed and wanted to sell them along with some other claims he was interested in. Nothing was said about respondent putting up more money. As respondent put it "at that time the question of putting up more money was at an end; he (appellant) was going to sell out and quit." Respondent knew they were not Crown granted; that the moneys advanced were expended and did not at this interview demand that appellant should apply for Crown grants in alleged compliance with the contract. He admitted that appellant was dunning him for money—from December, 1923, to July, 1924. To quote further from his evidence:

MACDONALD, J.A.

"*Fulton*: You never complained at all to Mr. Eden, from the time he started work in August, 1923, until he had finished work in the spring of 1924, you never complained to him about not having completed the survey and Crown granting, did you? Not that I know of."

He had no ground to complain because he could not advance more money although expenditures were incurred by appellant far exceeding the $2,000 advanced by and through the respondent. True respondent's only obligation was to try to raise funds up to $5,000 but if he failed in the effort he agreed to make, his failure must have a corresponding effect on the obligations of the appellant.

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

MACDONALD, J.A.

To shew further the inconclusive and conjectural character of this alleged agreement, I quote from respondent's cross-examination as follows:

"You had your agreement made in July, 1923, and as soon as Mr. Eden got back here he sent you the bill of sale in August? Yes.

"And you had paid him $1,000, and then in October you paid him another $1,000, and that is all you paid. Now, when you got that quarter interest under the bill of sale, were you to have the quarter interest whether you put up $2,000 or $3,000 or $5,000, no matter how much you put up? It was never discussed between us, but as a matter of fact I think that I would not be entitled to a quarter interest unless I got the whole $5,000. It was not discussed, but I don't think I would be entitled to the whole quarter interest unless I got $5,000 for him.

"Your view would be, then, that you and your friends would be entitled to two-fifths of one-quarter interest, is that it? Well, I say there was nothing mentioned about it at that time, but that is my impression, it would be correct.

"That is what you mean? Yes.

"Although it was not discussed? No. It was really my idea.

"Well, the quarter was rather by way of security than a transfer of that interest? I take it as that, yes; it was by way of security, but if I got the $5,000 then the quarter interest would become mine.

"But you did not have that distinctly stated? No, I don't think so.

"You did understand when he left in July that he would send you a bill of sale for a quarter interest? I think he must have. I knew I was to get the quarter interest, but I think it must have been understood that he was to send the bill of sale, because it came in the letter of August 6th. I don't know whether I have said it before or not, I might say that I was not the only person who was to raise money to do this work; what I raised was to go along with what Eden himself could raise to do the work."

This statement that appellant was to raise money also (presumably if he could) is not referred to in the pleadings as part of the agreement.

What on these facts was the contract between the parties? It is remarkable more for what it omits than for what it contains. That it was a speculative venture is evident. If the claims proved to be valuable a company might be incorporated without any agreement as to respective interests. Respondent expected a quarter interest if he raised the full sum of $5,000 but it was not discussed. It seems clear however that respondent's interest was to be contingent upon his efforts in securing funds. He acceded to the suggestion that he and his associates should secure a two-fifths' interest either, I take it, in a company to be formed or in the claims if they succeeded, as they did, in raising two-fifths of the maximum amount. But again that was not dis-

cussed. In only one respect is a definite term insisted upon, *viz.*, that appellant should somehow or other without funds and by incurring debt, carry on work and development to a point where Crown grants might be obtained and actually secure them. I do not think the principle involved is effected because it would cost very little to obtain Crown grants. The point is, was appellant bound to do so? As I read the evidence there was mutual recognition that this speculative venture could not be consummated on an outlay of $2,000 and appellant was not bound to secure money from other sources. Suppose, as already intimated, $500 was advanced, in that event, after it was expended surely all obligations on appellant's part to proceed further would be at an end. There is an attempt to add a term to the contract which it does not contain, *viz.*, that respondent would try to raise a sum up to $5,000 but if he failed to do so, or secured only part of it, however small, appellant would continue from year to year to do assessment work, record it and obtain Crown grants. The latter part of the preceding sentence is not in the contract.

MACDONALD, J.A.

If I were to give a free translation from the evidence and correspondence of what the real contract was I would say it was this: that the respondent on his part would endeavour to raise capital to develop the claims up to $5,000, while appellant with the funds advanced and any assistance he might himself secure acting reasonably and honestly would carry on the usual assessment and development work recording it from year to year, finally Crown granting the claims; but if advances by respondent stopped through his failure to secure funds at a time when it could not be said that in the usual course followed by miners and prospectors Crown grants would be obtained, appellant's obligations were ended. He had the same right to discontinue further efforts as had the respondent. It is not reasonable to say on all the facts, with the respondent confident that he could secure further funds that appellant should have anticipated his failure and set aside part of the $2,000 advanced to pay for Crown grants nor was he bound to use his own money—if he had any, however small the amount—to do so. It is obvious therefore that there was no breach of contract for which damages could be given. We need not speculate on what other rights, if

COURT OF APPEAL

1929

June 4.

TURNBULL v. EDEN

MACDONALD, J.A.

any (such as protecting title himself), respondent might have exercised.

The fact is that respondent's claim, if any, depended upon establishing fraud and that, I am convinced, was the view of the draftsman when preparing the statement of claim. If he could shew that appellant fraudulently used or manipulated funds advanced refraining from obtaining Crown grants in order to deprive respondent of an expectant interest, conspiring too with his co-defendants to allow the claims to lapse and then to restake them different considerations would arise. Counsel for respondent in fact urged that the judgment could be supported on this ground, *viz.,* the fraud of the respondent, and this requires examination. On 7th November, 1927, after the ground in question was restaked by Petersen and Oman, they joined with Eden (who was interested in other claims) in giving an option to one, Loney. This took the place of an earlier option given in May, 1927, to one Hamilton which lapsed. It bears on the charge of fraud and collusion between appellant and his co-defendants, but as the learned judge found notwithstanding suspicious circumstances, that the co-defendants were not parties to any collusive arrangement to defraud the respondent, and as Petersen and Oman are not parties to this appeal that feature need not be considered. It would appear that inferentially the appellant was also acquitted of fraud by the learned trial judge; at all events we have no finding against him. He was not charged in the statement of claim with fraud acting alone; the charge was brought against all the defendants acting in concert. Appellant told Loney when questioned by him about any interest respondent might have, that he (appellant) would settle with him. This was taken to indicate that he knew he was defrauding the respondent. That was consistent, however, with a belief that respondent might claim an interest which appellant did not recognize. Appellant was a party to the option agreement along with his co-defendants, but as he was interested in other claims they were all included in the one action. If it is true that the restaking followed so closely upon the lapsing of the original claims and the explanation of Petersen and Oman as to how they knew the ground was vacant coupled with appellant's action in joining in an option and also staking other claims which

would at least involve as much expense as it would to obtain Crown grants of the four claims in dispute, leads me to share the suspicions entertained by the learned trial judge. But suspicious circumstances in themselves inconclusive are not enough to warrant a finding of fraud for the first time in the Court of Appeal where in so far as it affected the appellant acting alone, apart from his co-defendants, it was not ventilated in the Court below and I do not feel that I can do so. The fraud actually pleaded was disposed of by the learned trial judge adversely to respondent, and I am not disposed to find fraud in another aspect at this stage.

MACDONALD, J.A.

It is not necessary to dispose of the other points raised in argument. I would allow the appeal.

Appeal allowed, Martin, J.A. dissenting in part.

Solicitor for appellant: *A. H. MacNeill.*
Solicitors for respondent: *Wilson & Wilson.*

COURT OF APPEAL

1929

June 6.

NASON v. HODNE

NASON v. HODNE.

Negligence—Plaintiff runs out of gasoline—Stops with left wheels on pavement at night—Run into from behind—Damages—B.C. Stats. 1925, Cap. 16, Sec. 8—Regulations in respect to vehicles.

The plaintiff was driving his car easterly on Kingsway at about 4 o'clock on the morning of the 12th of November, 1928, on a dark night when he ran out of gasoline. He turned to his right but the car stopped just as the left wheels were on the outer edge of the paved portion of the road. He got some gasoline at a station near by and was in the act of cranking his car when the defendant, driving in the same direction, ran into his car from behind. The plaintiff was thrown down and badly injured and his car was damaged. In an action for damages there was conflict in the evidence as to whether the plaintiff had a tail-light but it was held that whether the tail-light was burning or not if the defendant had been keeping a proper look-out he would have seen the plaintiff's car, and his neglecting to do so was the proximate cause of the accident.

Held, on appeal, affirming the decision of MCDONALD, J., that the defendant's head-lights were such as would have enabled him to see the plaintiff's car but notwithstanding this he ran into it. His conduct was the sole cause of the accident.

Statement

APPEAL by defendant from the decision of MCDONALD, J. of the 11th of February, 1929, in an action for damages resulting from the defendant negligently running into the plaintiff's car at about 4 o'clock on the morning of the 12th of November when it was very dark. The plaintiff, while driving his car easterly along Kingsway in the Municipality of Burnaby, ran out of gasoline and turning off the paved portion of the road to the right he stopped, got out, and, after replenishing his car with gasoline, was in the act of cranking his car when the defendant driving in the same direction on Kingsway ran into his car from behind. The car was driven forward several feet and the plaintiff was thrown over and badly injured. The plaintiff claimed $570.50 in special damages and $2,000 general damages. It was held by the trial judge that whether plaintiff's tail-light was lit or not the proximate cause of the accident was the negligence of the defendant.

The appeal was argued at Victoria on the 5th and 6th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

COURT OF APPEAL

1929

June 6.

NASON v. HODNE

Argument

Bray, for appellant: The evidence shews that the plaintiff left his car partly on the roadway and he had no tail-light so that the real cause of the accident was the negligence of the plaintiff himself. Section 8 of the Highway Act Amendment Act, 1925, provides for regulations by the Lieutenant-Governor in Council. The regulations provide that no car shall be left standing on a paved roadway (see British Columbia Gazette, 1926, p. 1997) and that all cars shall have a red tail-light (see British Columbia Gazette, 1927, p. 1759). In this case the learned judge is bound to apply the statute. The statute governs and "proximate cause" is not applicable here: see *Walker* v. *B.C. Electric Ry. Co.* (1926), 36 B.C. 338. The plaintiff set a trap for us and we ran into it: see *The Grand Trunk Railway Company* v. *Anderson* (1898), 28 S.C.R. 541; *The Maritime Coal, Railway and Power Co.* v. *Herdman* (1919), 59 S.C.R. 127 at p. 140.

Sullivan, for respondent: The question here is whether the Contributory Negligence Act applies. The plaintiff was suddenly left without gasoline and when he stopped his left wheels were just touching the paved portion of the road. The evidence is conflicting as to whether he had his tail-light on or not. But the plaintiff is solely to blame for the accident in not keeping a proper look-out and the learned judge has so found: see *Johnston* v. *McMorran* (1927), 39 B.C. 24; *Goudy* v. *Mercer* (1924), 34 B.C. 103; *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at p. 136.

Bray, in reply: After the Act was passed "ultimate negligence" does not apply.

MACDONALD, C.J.B.C.: There is only one point in this case, as the defendant has conceded, and that is as to contributory negligence.

MACDONALD, C.J.B.C.

The defendant admitted in his evidence for discovery that his head-lights were such as would have enabled him, if he had been keeping a proper look-out, to have seen the plaintiff's car. With his eyes open, his lights on, and with the plaintiff's car visible, he ran into it and caused the injury complained of.

His conduct was the cause of the injury, just as in *Johnston* v. *McMorran* (1927), 39 B.C. 24, where in broad daylight the

COURT OF APPEAL

1929

June 6.

NASON v. HODNE

driver of a truck behind, who saw, or ought to have seen, a car close to the curb which had run out of gasoline, and was left standing until some could be procured, struck and injured it.

Was the plaintiff's conduct contributory to the accident? That is the whole point. And my answer is No, since the defendant, with his eyes open, having seen or being in position to have seen the object ahead, went on when he could have avoided it.

MACDONALD, C.J.B.C.

I think there can be no doubt that the accident happened through no fault on the plaintiff's part, and that therefore the appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: My learned brothers having reached so strong a conclusion in this case and wishing to dispose of it now, I will not stand in the way of judgment. But it seems to me that there is much in the case and as I think it is of importance I shall examine it further before coming to a conclusion, and after having done so I shall hand down my reasons if I then deem it desirable to do so, turning as it does on its own special facts.

GALLIHER, J.A.

GALLIHER, J.A.: I do not think I should be justified, under the circumstances of this case, in interfering with the judgment below. There is not much I can add to what has been said by the Chief Justice. It is a little difficult to understand really what the learned judge means by the language used, but apart from that, it would appear to me that we cannot say that the plaintiff contributed to this accident. If I were dealing with the case in the first instance that is the way I would regard it.

MACDONALD, J.A.

MACDONALD, J.A.: As I view it I avoid the legal difficulties suggested in argument. The plaintiff in this case established negligence against the defendant without at the same time disclosing negligence on his own part. The onus was therefore on the defendant to prove contributory negligence, and he failed to do so. There was no finding either way in reference to the tail-light.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *H. R. Bray.*

Solicitors for respondent: *Martin & Sullivan.*

PANTAGES v. CHUNG GEE *ET AL.*

MORRISON, C.J.S.C. (In Chambers)

1929

June 18.

PANTAGES v. CHUNG GEE

Costs—Scale—"Amount involved"—Contributory Negligence Act—Effect of —B.C. Stats. 1925, Cap. 8.

In an action where the plaintiff recovers judgment for only part of the damages he has suffered, through the application of the Contributory Negligence Act, "the amount involved" for the purposes of determining the scale under which the defendant's costs are to be taxed is the difference between the amount recovered by the plaintiff and the amount of his original claim.

APPLICATION to review taxation of costs. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 7th of June, 1929.

Statement

The plaintiff sued for $10,000 general damages, and approximately $700 special damages for personal injuries. The late Chief Justice of British Columbia found that each party was equally at fault, and accordingly assessed the damages of the plaintiff at 50 per cent. The amount of general damages was fixed at $3,000, and the special damages, amounting to approximately $700, were allowed in full, and the plaintiff recovered 50 per cent. of this amount, or approximately $1,800. The judgment provided that the costs should be divided in the same way.

On the taxation of costs the plaintiff presented his bill on the first column of the tariff, whilst the defendant presented his on the third column. The registrar held that the defendant's costs should be based not on the third but on the second column.

Lundell, for plaintiff.
Ray, for defendant.

18th June, 1929.

Judgment

MORRISON, C.J.S.C.: Plaintiff claimed in his writ a sum exceeding $10,000, and if he had been successful for the full amount of his claim he would have taxed his costs under column 3. If his action had been dismissed *in toto* defendant would have taxed under column 3.

He recovered roughly $2,000 net after applying the Con-

MORRISON, C.J.S.C. (In Chambers)

1929

June 18.

PANTAGES v. CHUNG GEE

tributory Negligence Act, B.C. Stats. 1925, Cap. 8, and each party was allowed 50 per cent. of his taxed costs which were to be set off one against the other. Plaintiff presented his bill for taxation drawn under column 1, which was governed by the amount he recovered judgment for, namely, $2,000.

Defendant presented his bill under column 3, contending that the "amount involved" in the action was the original amount of the plaintiff's claim, namely, over $10,000. The registrar held that the amount involved as far as the defendant successfully defended the action was the difference between the amount recovered by the plaintiff and the amount of the original claim roughly $8,000 and accordingly taxed the defendant's bill under column 2.

Judgment

The question to be determined is as to the meaning of the legend "amount involved." Mr. *Ray* contends that when he undertook to defend the action the "amount involved" was that under column 3, and he should get his costs accordingly. Looking at the matter in the light of the registrar's ruling it was submitted that supposing the plaintiff had claimed an amount exceeding $10,000 and had recovered say $8,000, while the defendant was successful in defending the action only to the extent of something over $2,000, still applying the plaintiff's submission he would nevertheless be able to tax his costs under column 3.

The Contributory Negligence Act was passed after the promulgation of the scale of costs in question, and Order LXV., r. 10. It is necessary, however, not to overlook its provisions in determining the question of costs. The amount claimed is to be looked at in order to determine which Court has jurisdiction regardless of the question of costs. When the Court to which the claim is assigned decides upon the amount in controversy to be recovered then that amount is the basis upon which to determine the question of costs.

In my opinion, the registrar was right. The appeal is therefore dismissed. This being really by way of a test ruling, and the first of its kind since the Contributory Negligence Act, there will be no costs.

Appeal dismissed.

REX v. CHEW DEB (No. 2).

MURPHY, J. (In Chambers)

1928

Aug. 3.

REX v. CHEW DEB

Criminal law—Charge of being in possession of still—Conviction by magistrate—Accused not asked to plead—Habeas corpus—Certiorari in aid—Essential—Conviction quashed—R.S.C. 1927, Cap. 60.

The accused was convicted before a stipendiary magistrate on a charge of having been in possession of a still contrary to the provisions of the Excise Act. On an application for a writ of *habeas corpus* with *certiorari* in aid the proceedings disclosed that accused had not been called upon to plead to the charge.

Held, that calling upon the accused to plead is an essential part of the arraignment and the conviction is quashed.

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. The accused was convicted by Maitland Dougall, Esquire, stipendiary magistrate at Duncan, B.C., on a charge of having been in possession of a still contrary to the provisions of the Excise Act and was sentenced to a term of imprisonment. On the return of the writ it appeared from the record that in the proceedings before the magistrate he had never been called upon to plead to the charge. Heard by MURPHY, J. in Chambers at Victoria on the 3rd of August, 1928.

Statement

Jackson, K.C., for accused.
C. G. White, for the Crown.

MURPHY, J.: The asking of the accused whether he pleads guilty or not guilty is an essential part of the arraignment and the magistrate not having done so in this case the conviction is bad. Conviction quashed and prisoner discharged.

Judgment

Conviction quashed.

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

PERRY v. WOODWARD'S LIMITED.

Malicious prosecution—Reasonable and probable cause—Burden of proof—Conflicting evidence—Direction to jury—Damages.

In an action for malicious prosecution the burden of proof as to all issues arising therein lies on the plaintiff and it is the duty of the judge to determine the issue of reasonable and probable cause, but he should submit to the jury questions respecting any facts upon which the evidence conflicts.

The plaintiff entered the defendant's departmental store to purchase a chain-socket and fuse-plugs. On reaching the counter where these articles were displayed, he took a chain-socket and fuse-plug from his pocket, which he had purchased elsewhere, to make comparisons and after he had done so he put them back in his pocket and walked away. The head janitor of the store seeing him put the articles in his pocket and thinking he had stolen them, immediately informed the manager of the department who intercepted the plaintiff and asked him if he had a bill for the things he had in his pocket. The plaintiff replied "No, these things I brought them with me." The manager replied, "You cannot go out of here until we see about them." The plaintiff then explained that he worked for the Canadian Pacific Railway Company and that he had purchased the articles in his pocket (chain-socket and four fuse-plugs) at the Magnet Hardware Store on Commercial Drive and wanted to get a socket with a longer chain. He was detained half an hour and in the meantime, Mr. Woodward, the general superintendent appeared, when the plaintiff said he would be willing to pay for the articles as he was in a hurry to which Mr. Woodward replied, "Settle it with the police." No enquiries were made either at the Canadian Pacific Railway or at the Magnet Hardware Store. The plaintiff was handed over by the departmental manager to the superintendent of the store and on the arrival of a police officer he was taken to the police station. The articles were proved to have been purchased at the Magnet Hardware Store and the charge against the plaintiff was dismissed. In an action for malicious prosecution the judge stated in his charge, "I have no hesitation in directing you that there was want of reasonable and probable cause if you find that Mr. Perry made the Woodward people understand that he could take them to the place or go with them to the place to let them know who he bought these goods from. If he told them; now, whether he said that or not is a matter that I want your assistance on; and if he said that, then I would say there was want of reasonable and probable cause." The verdict was "$1,270 for the plaintiff" for which judgment was entered.

Held, on appeal, affirming the decision of GREGORY, J., that although it would have been less confusing if the learned judge had followed the

usual course of leaving written questions to the jury, a question of fact was submitted on conflicting evidence and the jury by its verdict must have found that reasonable enquiry had not been made. No injustice has been done and the appeal should be dismissed.

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

APPEAL by defendant from the decision of GREGORY, J. of the 21st of November, 1928, in an action for damages for malicious prosecution and false arrest. The plaintiff is a bridge carpenter employed by the Canadian Pacific Railway. On the afternoon of the 5th of May, 1928, the plaintiff was in the electrical department of the defendant's store on Hastings Street in Vancouver. A watchman in the store standing on the stairs above the electrical department stated that he saw the plaintiff pick up from amongst similar articles displayed on a table for sale, a fuse-plug and chain-socket, and place them in his pocket. The plaintiff was not attended by a sales clerk at the time and the said fuse-plug and chain-socket were not wrapped up but were in the same condition and had the same appearance as the other fuse-plugs and chain-sockets that at the time were displayed upon the table. The watchman immediately informed his superiors of what he had seen and the plaintiff was questioned regarding the articles he had placed in his pocket whereupon he offered to pay for them although he denied he had stolen them. A detective, on being sent for, arrived, and after some conversation he took the plaintiff to the police station where he remained some hours before being bailed out. The plaintiff in explanation said he bought the fuse-plugs and chain-socket at the Magnet Hardware Store on Commercial Drive. On being taken to the police station he was charged with stealing electric supplies. The statement by accused that he had bought the articles in question on Commercial Drive was corroborated by evidence of one from the store there and accused was acquitted.

Statement

The appeal was argued at Vancouver on the 11th to the 14th of March, 1929, before MACDONALD, C.J.A., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Collins, for appellant: A special jury brought in a verdict for $1,270 in plaintiff's favour. There were, to say the least, suspicious circumstances as the head janitor states. He saw the plaintiff take the fuse-plug and chain-socket. We say, first, that

Argument

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

Argument

no instructions were given the detective to arrest the plaintiff; and secondly, if any instructions were given they were given without authority from the defendant Company. As to who was responsible for the arrest see *Grinham* v. *Willey* (1859), 28 L.J., Ex. 242; Pollock on Torts, 13th Ed., 226; *Pandit Gaya Parshad Tewari* v. *Sardar Bhagat Singh* (1908), 24 T.L.R. 884; *Danby* v. *Beardsley* (1880), 43 L.T. 603. On the question of agency you must have express agency: see Taylor on Evidence, 11th Ed., Vol. I., p. 414; *Hogg* v. *Garrett* (1849), 12 Ir. Eq. R. 559; *Schumack* v. *Lock* (1825), 3 L.J., C.P. (o.s.) 57. As to the onus of shewing any authority to give directions to the police from which an action for malicious prosecution would lie see *March* v. *Stimpson Computing Scale Co.* (1913), 11 D.L.R. 343; *Thomas* v. *Canadian Pacific R.W. Co. Bush* v. *Canadian Pacific R.W. Co.* (1906), 14 O.L.R. 55; *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270 at p. 288; *Edwards* v. *London and North Western Railway Co.* (1870), L.R. 5 C.P. 445; *Citizens' Life Assurance Company* v. *Brown* (1904), A.C. 423; *Hanson* v. *Waller* (1900), 70 L.J., K.B. 231; *Joseph Rank, Lim.* v. *Craig* (1918), 88 L.J., Ch. 45. On reasonable and probable cause see *Renton* v. *Gallagher* (1910), 19 Man. L.R. 478 and on appeal (1910), 47 S.C.R. 393.

Wismer, for respondent: If a person in his private capacity has one arrested he must shew a felony has been committed: see *Walters* v. *W. H. Smith & Son, Limited* (1914), 1 K.B. 595 at p. 607. On reasonable and probable cause see *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521; *Johnson* v. *Moore et al.* (1912), 1 W.W.R. 308 at p. 309 and on appeal at p. 1102. As to what was done in the store when the plaintiff was arrested, the man in charge should have telephoned the Canadian Pacific Railway also the "Magnet" store on Commercial Drive before he took the responsibility of having the plaintiff arrested. This man (Hudson) arrested the plaintiff in the first place: see *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247; *Hamilton* v. *Cousineau* (1892), 19 A.R. 203; *Archibald* v. *McLaren* (1892), 21 S.C.R. 588; *Bradshaw* v. *Waterlow & Sons, Limited* (1915), 3 K.B. 527 at p. 532. On the question of the charge to the jury see *Manning* v. *Nickerson* (1927), 38

B.C. 535 at pp. 551-2; *Walters* v. *W. H. Smith & Son* (1913), 83 L.J., K.B. 335; *Tanghe* v. *Morgan* (1905), 11 B.C. 455 at p. 463; *Sinclair* v. *Ruddell* (1906), 3 W.L.R. 532; *Brown* v. *Hawkes* (1891), 2 Q.B. 718 at p. 720; *Renton* v. *Gallagher* (1910), 14 W.L.R. 60 at p. 63. We do not have to prove express malice if it can be inferred from reasonable and probable cause.

Collins, in reply, referred to *Nickerson* v. *Manning* (1928), S.C.R. 91.

Cur. adv. vult.

4th June, 1929.

MACDONALD, C.J.B.C.: When a private person either an individual or a corporation detains another and puts him under restraint, he does so at his peril, although the rule is not so strict when that is done by a peace officer.

MACDONALD, C.J.B.C.

After reading those parts of the evidence relating to the question of who brought about the detention of the plaintiff, I am satisfied that defendant did. The jury might well find this on the evidence of defendant's witnesses. P. A. Woodward, who took some part in the transaction said on the witness stand:

"I immediately turned to the group (who were detaining the accused) and I said, 'We evidently cannot get any further with it, you had better let the police decide.' "

meaning, I think—"Give him into custody."

One of the group telephoned to the police and Detective Sergeant Perry (no relative of the accused) came down and after some questions put in the presence of defendant's employees, and as he said, on the understanding that they wanted the accused arrested, took him to the police station. On trial he was discharged by the magistrate. The detective was a witness in this action and when asked why he had arrested the accused said that it was because he understood that these employees wanted the accused arrested, and when asked if he would have arrested him on his own responsibility, he said that he would not have done so; he said he told the accused that as far as he was concerned he might go. The accused giving an account of the same incident said:

"Detective Perry said to me—'as far as I am concerned you can go, but it is up to these fellows.' "

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

MACDONALD, C.J.B.C.

The evidence was brought out in a manner somewhat confusing and unsatisfactory, but I think the gist of it is that the defendant called in the police to arrest the man and indicated clearly enough by its conduct that it was taking the responsibility.

Moreover, before the defendant had sent for the police it had detained him for half an hour. Cheetham, an employee and witness called by the defendant, speaking of what took place when Mr. Woodward was present said:

"Mr. Woodward said, 'Oh,' he said, 'You will pay for them, settle with the police,' that is all there is to it."

A claim was also made for malicious prosecution. The accused was an old man who had resided in Vancouver for upwards of 30 years, and at the time of his arrest was in the employ of the C.P.R. He had vigorously denied the charge that he had stolen the goods, his explanation to the defendant being that he came to the store with the socket in question in his pocket, intending to get one with a longer chain; that he had bought it and the plug which he also was charged with stealing, at another store a few days previously; that he took the socket out of his pocket and after comparing the chains found that they were the same length. He put it back into his pocket and moved to another counter where there were some plugs on exhibition; he examined these but did not find what he wanted and then proceeded to leave the store. A janitor of defendant, who professes to have seen him put the chain-socket in his pocket, informed a superior and the plaintiff was then detained as aforesaid and turned over to the police.

Plaintiff told the defendant's servants that he had bought this chain and socket on Commercial Drive a few days previously. It was not shewn that defendant had lost the articles alleged to have been stolen. It was unable to prove that any article at all had been stolen, yet instead of taking time to investigate the circumstances which were made known to it, gave him in charge without warrant.

The learned trial judge told the jury that the question of reasonable and probable cause was for him to decide, but that he would leave it to them to say whether or not sufficient enquiries into the facts of the case had been made by the defend-

ant, before instituting a prosecution. He instructed them that if they found in the negative, then there was a want of reasonable and probable cause.

Now the jury must have found that reasonable enquiry had not been made. The only enquiry which in the circumstances of this case ought to have been made was an enquiry into the truth of the plaintiff's alleged purchase elsewhere of the articles in question. The evidence that he told the defendant's servants the name of the seller is somewhat unsatisfactory, but I think it is capable of being construed in the affirmative. But in any case, I think whether he told them the name or not, defendant's servants ought to have asked the question or asked that one of them be taken to the seller so that the truth or falsity of the plaintiff's story could be ascertained. While the question was not well put, the jury, I think were in no doubt of what was meant to be asked. It was, had defendant taken reasonable care to inform itself concerning the alleged purchase, the only thing which could on the evidence have been the subject of enquiry. There is high authority in support of the course adopted by the learned judge. On the other hand there has been some criticism in like cases with which I agree. I think, however, that no injustice has been done and that we ought not to direct a new trial. The appeal is dismissed.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This is an appeal from the verdict of a special jury, *coram* GREGORY, J., awarding the plaintiff $1,270 damages in an action for malicious prosecution and also false imprisonment, though this dual aspect of the case was entirely overlooked by the learned judge in his charge to the jury, and also by counsel who took no exception to said charge on that account. It may be that this omission had its origin in the fact that the statement of claim confused the two distinct causes in the inartistic allegations in paragraphs 4 and 6 instead of keeping them distinct in the proper way as is well set out in the standard forms given, *e.g.*, in Bullen & Leake's Precedents of Pleadings, 8th Ed., pp. 433 and 522; that "very learned work" as Lord Chief Justice Isaacs describes it in *Walters* v. *W. H. Smith & Son, Limited* (1914), 1 K.B. 595, 605.

MARTIN, J.A.

But though misleadingly and improperly intermixed the

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

MARTIN, J.A.

essential allegations to support both causes of action can be extracted from the statement of claim and so both causes should have been given to the jury because facts were adduced in evidence which would have entitled the jury to find for the plaintiff upon both causes of action or either of them if they chose to do so after proper instruction. At the same time it must be understood that all the facts given in evidence were properly admitted on the claim of malicious prosecution alone, quite apart from their application to the other distinct claim, because, as was said by the Queen's Bench Division, in *Hicks* v. *Faulkner* (1882), 46 L.T. 127, 130, affirmed by the Court of Appeal, "the jury are to take into consideration all the circumstances of the case" in deciding the question of malice.

The well-known distinction between these two causes of action and the difference between the acts of ministerial and judicial officers of the law were ably pointed out in *Austin* v. *Dowling* (1870), L.R. 5 C.P. 534; and see Hawkins, J., in *Hicks* v. *Faulkner, supra,* wherein he also says:

> "In false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification; whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence."

And Lord Justice Atkin in *Meering* v. *Grahame-White Aviation Company Limited* (1919), 122 L.T. 44, has defined "imprisonment" in terms which clearly include the present case. Compare also *Walters* v. *W. H. Smith & Son, Limited, supra; Trebeck* v. *Croudace* (1918), 1 K.B. 158 (C.A.) and *Isaacs* v. *Keech* (1925), 2 K.B. 354, and *Sinclair* v. *Ruddell* (1906), 16 Man. L.R. 53, 61-4.

No real difficulty arises herein from the jury's finding of malice because there is abundant evidence to support it, and the damages awarded therefor, under our recent decision in *Manning* v. *Nickerson* (1927), 38 B.C. 535, affirmed by the Supreme Court of Canada (1928), S.C.R. 91, but a question of real difficulty does arise out of the way the learned trial judge dealt with the always difficult and anomalous question of "reasonable and probable cause" which terms, as the late Mr. Justice Salmond pointed out in his classic work on Torts, 7th Ed., p. 619 (n) are "mere synonyms" and the "use of the term 'probable' is one of the archaisms of legal diction. . . . *Probabilis*

causa means a good reason—a ground of action which commends itself to reasonable men."

I pause here to say that this appeal confirms me in the view held by many judges that the way in which this class of action must at present be tried is an embarrassing anomaly not creditable to our system of jurisprudence because the trial is in reality split up on questions of fact between the judge and the jury, as to which Mr. Justice Salmond in his said work on Torts says, p. 621 (n):

> "This anomalous rule was established as a precaution against erroneous verdicts for the plaintiff—*per doubt del lay gents*. Reasonable and probable cause was withdrawn from the cognizance of juries, under the pretence that it was a question of law. The old practice was to plead specially the facts relied on as constituting reasonable and probable cause, and the sufficiency of them was determined on demurrer."

And see also Clerk & Lindsell on Torts, 8th Ed., 588-90 where the peculiarities and embarrassments occasioned by the anomaly are well set out, and the strange difference of judicial opinion even as to whether or no the question reserved for the judge is one of fact or law, is commented on: see, *e.g.*, Hawkins, J., in *Hicks* v. *Faulkner*, *supra*, p. 129; the Privy Council in *Bank of New South Wales* v. *Piper* (1897), A.C. 383, 388; and in *Cox* v. *English, Scottish and Australian Bank* (1905), A.C. 168, 171, and the various judgments of the House of Lords in *Lister* v. *Perryman* (1870), L.R. 4 H.L. 521, wherein Lord Chancellor Hatherley (p. 531), Lord Westbury (p. 538) and Lord Colonsay (p. 539) all criticized this anomaly in the law, which it is to be hoped our Legislature will see fit to remove because its bad effects in practice have increased with the years since it was unhappily introduced.

MARTIN, J.A.

Resuming, the most substantial ground of complaint is the submission that the learned trial judge did not in fact decide the question of reasonable and probable cause, as was his admitted duty, but abdicated his judicial functions by leaving it to the jury.

It is, with respect, to be regretted that the learned judge departed from the usual and proper course of trial of this difficult kind of action by not leaving written questions to the jury which in any case of this kind are necessary and all the more so in the present one because two distinct causes of action were

COURT OF APPEAL
1929
June 4.
PERRY v. WOODWARD'S LTD.

set up, but overlooked as already noticed. Had this long-established practice, as recommended, *e.g.,* by Lord Justice Bowen in *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 440, 458 (affirmed by the House of Lords (1886), 11 App. Cas. 247) and approved by the Full Court of this Province nearly 25 years ago in *Tanghe* v. *Morgan* (1905), 11 B.C. 455 (*per* HUNTER, C.J. and myself) been followed, of leaving "specific questions" to the jury difficulty would not occur and in all probability the heavy expense of this appeal would have been avoided; the Lord Justice, after pointing out that "in a very simple kind of case" a judge may venture to take a general verdict, goes on to say:

"But I think it necessary only to state as much as I have stated about it, to see that a very clear head and a very clear tongue will be required to conduct a complicated case to a general verdict in that way. Accordingly, judges have been in the habit of adopting a different course whenever there are circumstances of complication."

An early and good example of how difficulty may be avoided by such questions is to be found in those left to the jury by Wightman, J., in *Williams* v. *Banks* (1859), 1 F. & F. 557.

MARTIN, J.A.

In the discharge of his duty in deciding this question it is conceded that the judge is entitled to the assistance of the jury in finding the facts pertaining to it where they are substantially in dispute, and the cases also shew that where they are so in dispute he should obtain the assistance of the jury but not otherwise—see *Tanghe* v. *Morgan, supra,* and *Archibald* v. *McLaren* (1892), 21 S.C.R. 588, which is the leading case in Canada upon the subject, and the language of Mr. Justice Strong (Fournier, J. concurring) at p. 593; Patterson, J. at pp. 604-5 and Gwynne, J. at pp. 595-6 as follows:

"It was for the learned judge who tried the case to determine whether or not there was anything in the evidence or in the manner in which it was given which created a doubt in his mind as to the defendant's belief in the truth of the statement made to him by the woman Dale, or which cast a doubt in his mind as to the *bona fides* of the defendant in laying the charges against the plaintiffs which he did before the police magistrate. It was upon the learned judge, and, in the absence of contradictory evidence upon essential facts on which the question of existence or non-existence of probable cause depended, upon him alone, that the duty of determining whether the defendant had or had not reasonable and probable cause for making the charges which he did rested."

And further:

"In the absence of evidence which manifestly ought to have created a

doubt as to such belief and *bona fides* of the defendant, I do not think that a judge who has not presided at the trial should interfere with the judgment of the learned trial judge because he did not submit to the jury a question upon a matter which, by the law, it was his duty to pronounce upon and as to which the evidence had failed to create any doubt in his own mind."

This decision is in accord with the later one of the Privy Council in *Bank of New South Wales* v. *Piper, supra,* at pp. 388 and 390, wherein it was said:

"It was for the judge to decide that question, as a matter of law, upon the facts admitted or found by the jury. . . . . The questions which were submitted to the jury were unnecessary, and ought not to have been submitted."

See also *Cox* v. *English, Scottish, and Australian Bank, supra,* 171; *Baker* v. *Kilpatrick* (1900), 7 B.C. 150; and Lord Chelmsford in *Lister* v. *Perryman, supra,* p. 535, says:

"No definite rule can be laid down for the exercise of the judge's judgment. Each case must depend upon its own circumstances, and the result is a conclusion drawn by each judge for himself, whether the facts found by the jury, in his opinion, constitute a defence to the action. The verdict in cases of this description, therefore, is only nominally the verdict of a jury."

MARTIN, J.A.

The decision of the Court of Appeal in *Bradshaw* v. *Waterlow & Sons, Limited* (1915), 3 K.B. 527, is to the same effect, and is instructive in the proper interpretation of the *Abrath* case.

Here there were substantial facts in dispute respecting the important statement made by the plaintiff to the defendant as to the place (Squires' Magnet Hardware Co. on Commercial Drive) where he purchased the articles which he claimed to be his own at the time he was accused in the defendant's store of stealing them there, and detained on that accusation, *vide, e.g.,* A.B. pp. 17, 21, 95, 145, 158, 182 and 186.

In his charge to the jury the learned judge dealt four times with the question of reasonable and probable cause thus:

"Now, an action of this kind has to be decided by two different bodies when you have a jury. The jury have one duty to perform, and the judge has another. It is a matter entirely for the judge to say whether or not there has been reasonable and probable cause, or whether there has been a lack of that. I propose to ask your assistance to help me to decide that question by asking you to find certain facts first, because if you find eventually that the Woodward people should have made further enquiry either of the C.P.R. people or somebody, particularly of the Magnet store, where the goods were bought, before they did anything, if you say they should have done that then I would have no hesitation in saying that there was want of reasonable and probable cause, and I am not going to give you

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

MARTIN, J.A.

a series of questions to answer, but I instruct you now that my direction to you is that there is want of reasonable and probable cause, if, and only if, you come to the conclusion that further enquiry should have been made before anything was done."

Again:

"Now, as I told you before, the question of reasonable and probable cause is entirely a question for the Court. The Court must say, but that is based on facts, and the Court has the right to get the assistance of the jury as to what those facts are, and I am instructing you that if you find that further enquiry should have been made by these people before they instituted the prosecution, if you do find they instituted the prosecution, then I have no hesitation in saying that there was want of reasonable and probable cause."

Again:

"You have heard what I said about that, reasonable and probable cause is for me, but I instruct you that there was want of reasonable and probable cause if, and if only, you come to the conclusion in the circumstances existing there that morning that Woodward's should have made further enquiry into the truthfulness of the man's statements—if you find that he made the statement as to where he had bought these goods, and his C.P.R. connection."

And finally after objection taken to the above, he instructed the jury after recalling them:

"My instruction—if it was not clear, I will try to make it clear now—is this, that I have no hesitation in directing you that there was want of reasonable and probable cause, if you find that Mr. Perry made the Woodward people understand that he could take them to the place or go with them to the place to let them know who he bought these goods from. If he told them; now, whether he said that or not is a matter that I want your assistance on; and if he said that, then I would say there was want of reasonable and probable cause."

These instructions have been the subject of much criticism at this Bar and undoubtedly they do, with respect, leave much to be desired, the final one, moreover, not being wholly consistent with those preceding it, and what is called "his C.P.R. connection" is of little moment and not in substantial dispute. Nevertheless it is clear that the learned judge had no intention of surrendering his functions to the jury even though he adopted a confused way of discharging them, and even taking the final instruction as the governing one the reference to Perry making "the Woodward people understand that he could take them to the place" where he bought the goods is though a variation in words, yet only another, though involved, way of asking the jury "if the defendants took reasonable care to inform themselves of the true state of the case" which question was put by Cave, J., in

the leading case of *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 440 at p. 444, and approved by the Court of Appeal and finally by the House of Lords (1886), 11 App. Cas. 247. Of Mr. Justice Cave's charge to the jury, the Master of the Rolls (Brett) said, p. 449:

"A summing-up of an action for malicious prosecution, I have never read which I more admired."

And in the House of Lords his direction and questions were specifically commended by Lord Chancellor Selborne, Lord Watson and Lord Fitzgerald, the last saying, p. 255:

" . . . Upon the whole of the evidence produced on both sides the learned judge put two questions—and, in my opinion, two very proper questions—to the jury for the purpose of informing his mind as to what was the proper inference for the judge to draw upon this very question of the presence or absence of probable cause."

What the learned judge did here was to put the question hypothetically but that is not a ground for disturbing the verdict as is well pointed out in Salmond on Torts, *supra,* p. 621:

"This division of functions between judge and jury may be effected at the discretion of the judge in two ways. He may either direct the jury to find the facts specially, and then decide for himself on the facts so found whether there was reasonable and probable cause, or he may tell the jury that if they find the facts to be such and such, then there is reasonable and probable cause, and that if they find the facts to be otherwise there is none, thus leaving the jury to find a general verdict on this hypothetical direction."

The learned author points out in the note (*h*) on the high authority of Cave, J., in *Brown* v. *Hawkes* (1891), 2 Q.B. 718 (styled by Bowen, L.J. on appeal, 727, as an "admirable exposition of the law"), that the said question is not appropriate in all cases, *e.g.,* such as those where (p. 721) "the judge is of opinion that there is a *prima facie* case of reasonable and probable cause" or where the facts are "true and undisputed"; and see Lord Esher to the same effect at p. 728.

In *Archibald* v. *McLaren, supra,* Mr. Justice Strong said, p. 592:

"The judge is entitled, no doubt, to the utmost assistance from the jury in finding the facts, and he is entitled for this purpose to put questions to them in any form which his ingenuity may suggest, but he, and not the jury, is to make the deduction, and if he shifts the burden of doing so upon them the case is not properly tried."

The Ontario Court of Appeal in *Hamilton* v. *Cousineau* (1892), 19 A.R. 203, 227, adopts the *Abrath* case and says, *per* Hagarty, C.J.O.:

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

"Of course the judge may put the case hypothetically to the jury, thus: 'If you find that the defendant did not honestly believe, etc., then find a verdict for the plaintiff,' and so as to any other important matter."

And the learned authors of Clerk & Lindsell on Torts, 8th Ed., p. 589, say:

"He [the judge] must accordingly make the jury find the facts and draw the subordinate inferences specially, or he must leave the whole case to them with a hypothetical direction that if they take such and such a view of the case there is reasonable and probable cause, and otherwise not. However numerous and complicated the facts may be, one or other of these courses has to be adopted."

MARTIN, J.A.

Our attention has been drawn to the decision of the Court of Appeal of Manitoba in *Renton* v. *Gallagher* (1910), 14 W.L.R. 60, in which the questions put to the jury in *Abrath's* case and *Brown's* case, *supra,* were considered, but it is to be noted that in the *Renton* case, as pointed out by Richards, J.A., p. 71, the facts were "practically undisputed" and therefore "the trial judge should have himself relied" on the question of reasonable and probable cause and non-suited the plaintiff. And Perdue, J.A., p. 76, puts his decision on the same ground, *viz.*: that there was no contradiction on the facts on which that question depended and therefore no questions should have been submitted to the jury. In my opinion, when the *Renton* case is properly applied to its circumstances there is nothing in it that conflicts with the application of the *Abrath* case to this one.

The learned trial judge herein adopted the said hypothetical course of leaving the case to the jury and his allowance of the plaintiff's motion for judgment in his favour after the jury had returned their general verdict for $1,270 damages involved and was tantamount to his ruling in the plaintiff's favour on the question of reasonable and probable cause. This view, moreover, derives support from *Cox* v. *English, Scottish, and Australian Bank, supra,* wherein the Privy Council adopts the *Abrath* case and at p. 171 says:

"Now the proceedings at the trial in this case were not conducted with extreme strictness, because the question whether there was reasonable and probable cause was left to the jury, whereas the judge ought to have determined that for himself upon the facts found by the jury. That irregularity is pointed out in the judgments of the learned judges in the Full Court. Their Lordships will assume that the learned judge who tried the case, Real, J., in giving judgment for the appellant, intended to express his own concurrence in the finding of the jury to the effect that, upon the facts given in evidence, there was no reasonable or probable cause for the pro-

ceedings; but they must remark that, if this case is tried again, care should be taken by the learned judge who tries it to reserve for himself the duty of saying whether, on the facts given in evidence, there was reasonable or probable cause."

The case at Bar is much stronger in plaintiff's favour, because the trial judge in the *Cox* case made no attempt to decide said question, but as the best report of the case, in 92 L.T. 483, at 484, shews, left it unreservedly to the jury in the second of the nine questions put to them there set out and so *ex facie* abdicated his functions, but nevertheless this was regarded by the Privy Council as an "irregularity" and a lack of "extreme strictness" merely. While there are certain aspects of this case which are not, with respect, satisfactory and it would have been better if the usual and safe procedure (as *e.g.*, adopted by Cave, J. in the *Abrath* case, pp. 443-4, *supra*) instead of the "unusual and hazardous" (*Tanghe* v. *Morgan, supra,* 463) had been followed whereby all difficulty with consequent heavy expense would have been avoided, yet viewing the case as a whole, after most careful consideration, in view of its general importance, I adopt the language of Lord Watson in the *Abrath* case (p. 250) *viz.*:

MARTIN, J.A.

"I feel persuaded . . . that looking at the evidence which was before the jury they could not honestly and fairly have given any other verdict."

Such being the case no substantial wrong or miscarriage of justice has been occasioned by the matters complained of and hence a new trial should not be granted in accordance with the long-established practice of the Appellate Courts of this Province so far back at least as rule 287 of 1880, and our present App. Rule 6 has, if anything, added to our discretion to make the order that we "think fit" to attain justice. Compare *Craig* v. *Hamre* (1925), 36 B.C. 1, 3, 9, 13; *Murray* v. *Delta Copper Co., Ltd.* (1926), S.C.R. 144, 148; and *McDonald* v. *Weir* (1925), 34 B.C. 502, 508, wherein a new trial was ordered though the appellant expressly disclaimed it.

In this case, indeed, to order a new trial would only have the result in all probability of increasing the verdict against the defendant because the award is clearly moderate and if a proper direction had been given upon the proper questions (*cf. Walters* v. *W. H. Smith & Son, supra*) to the jury they must on the facts have awarded substantial damages also on the distinct cause of action for false imprisonment which was by the course of the

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

MARTIN, J.A.

trial unfortunately withdrawn by both judge and counsel by tacit consent from the consideration of the jury—*Scott* v. *Fernie* (1904), 11 B.C. 91; *Victoria Corporation* v. *Patterson* (1899), A.C. 615; 68 L.J., P.C. 128, 130; and *Murray* v. *Delta Copper Co., Ltd., supra.* This verdict, moreover, the plaintiff has accepted as satisfactory by not cross-appealing and therefore the defendant may well regard itself as fortunate in escaping so lightly from the consequences of its hasty actions.

It follows upon all grounds that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: While my view would be in accord with that of Richards, J.A., as to the instruction to the jury on the question of want of reasonable and probable cause in the case of *Renton* v. *Gallagher* (1910), 19 Man. L.R. 488, the practice of putting to the jury the question—"Did the defendants take reasonable care to inform themselves of the true state of the case?" (which in effect was the judge's direction below), and which was approved in the Court of Appeal in England and in the House of Lords in *Abrath* v. *North Eastern Ry. Co.* (1883), 11 Q.B.D. 440, and 11 App. Cas. 247, has so long been followed that I feel that must be accepted as the law and that I should hold myself bound thereby.

The direction then being a proper one, I do not feel that I could interfere with the judgment below, although I have doubts as to whether malice has been sufficiently proved or that the jury would be justified in inferring malice from want of reasonable and probable cause under the circumstances of this case.

I would therefore dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I cannot persuade myself that there is any good ground for the disturbance of the verdict of the jury and the entry of judgment thereon by the learned trial judge—Mr. Justice GREGORY. I am unable to come to the conclusion that it has been made out notwithstanding the very able argument of Mr. *Collins*, the learned counsel for the appellant, that there was any misdirection or non-direction that would admit of a new trial being ordered. Further, it is clear upon the evidence that there was an arrest and what amounted to false

imprisonment of the respondent without reasonable and probable cause in view of all the circumstances, quite apart from the action of the police. At the outset the respondent was not allowed to leave the shop premises by an employee of recognized authority acting for the appellant, before the police were called in. This in itself was false imprisonment which quite justified the jury, upon all the facts and circumstances present in the case, finding the verdict which they did.

I would therefore dismiss the appeal.

MACDONALD, J.A.: This is an appeal from the judgment of Mr. Justice GREGORY and a special jury awarding respondent $1,270 damages in an action for false arrest and imprisonment and for malicious prosecution. In view of the verdict and conflicting evidence we should accept the testimony of the respondent together with parts of the evidence of appellant's witnesses that supports the judgment.

Respondent entered appellant's store to purchase a chain socket worth about 50 cents. He had one in his possession purchased some days before at the Magnet Hardware Store on Commercial Drive, Vancouver, but he wanted one with a longer chain. In looking at chain-sockets in appellant's store he evidently took his own from his pocket to make comparisons. He also wanted some fuse-plugs and looked at several on the counter handling them in doing so but not finding one suitable started to walk away. The fuse-plugs were worth 25 cents each. A servant of appellant, the head janitor, observing respondent's actions from a point of vantage, thinking he purloined a fuse-plug and a chain-socket from the counter sent for Hudson the manager of the department to intercept him as he walked away. Hudson said to respondent, "Have you a bill for these things you have in your pocket?" He replied, "No, these things I brought them in with me." Hudson without further enquiry, said, "You can't go out of here until we see about them." Respondent was then detained for about a half hour. In that interval he explained to Hudson that he worked for the C.P.R., and that he purchased the articles, *viz.,* four fuse-plugs, one switch and a chain-socket on Commercial Drive. He also explained why he was carrying them in his pocket. On several

MACDONALD, J.A.

COURT OF APPEAL

1929

June 4.

PERRY
v.
WOODWARD'S LTD.

MACDONALD, J.A.

occasions too during the detention respondent offered to pay for the articles in order to avoid arrest, take a receipt for them and later see the head of the firm, for an adjustment. He wanted to get back to his work quickly. There were special reasons why he should. This suggestion was not heeded. It was presumably taken as evidence of guilt. The assistant-superintendent or someone in authority arrived on the scene and after hearing the janitor's story said, "Call the police." Respondent remonstrated, insisted that the articles were his own—that he bought them; and he asked, "Why should I have to go to gaol?" The assistant-superintendent replied, "Just because I say so." Shortly after, Detective Sergeant Perry arrived from the police department. Respondent produced the articles and explained to the officer that he purchased them on Commercial Drive. After hearing his explanation the sergeant said, "As far as I am concerned you may go, but it is up to these people." One or two of appellant's officials who were active in the matter were standing by at that time. Sergeant Perry gave evidence for the respondent. He was called to appellant's store and saw Mr. Screech, the assistant-superintendent, and some others presumably in authority. He found they had two men there "accused of stealing out of the store"—the respondent and one Murphy, the latter a well known police character. Sergeant Perry was advised that an employee saw respondent take the articles from the counter. He asked for detailed information and, as he put it in the box, "it struck me that they thought I was rather inquisitive." One of those present said, "That is alright, Woodwards is behind this." The police officer would not arrest respondent, however, on his own responsibility, but he was given to understand that appellant's officials wanted him arrested and he finally acted on their instructions. The instructions were given by Screech or some other official present, or possibly by both. At one stage of the proceedings Mr. Woodward the general superintendent appeared and respondent again offered to pay for the articles. Mr. Woodward replied, "Oh, you will pay for them—settle it with the police."

Screech on discovery admitted respondent said he bought the articles either at the Magnet Hardware Store or at a store somewhere in the Commercial Drive area; also that he worked with

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

MACDONALD, J.A.

the C.P.R. No enquiries were made in either quarter. The store could easily be reached by telephone. A receipt was produced at the trial from the Magnet Hardware Store shewing that similar articles (chain-socket, switch and four fuse-plugs) were purchased there. On the question of authority to arrest, Hudson manager of the department where these goods were kept, stated that it was his duty to take charge of any cases of shop-lifting on that floor—he caught four or five before—until the superintendent got there. Hudson turned respondent over either to Mr. Mowat the superintendent, or to Mr. Screech, the assistant-superintendent.

It is, I think, apparent—and the jury no doubt thought so—that the janitor was at least mistaken in thinking respondent stole these articles of trifling value. The fact that he had similar articles with him and took some of them from his pocket to make comparisons possibly led to the error. Had they called up the Magnet Hardware Store they would have been informed that articles of the same description were purchased there. Once respondent raised the question of ownership they were put upon enquiry. Instead they call the police. True, it is stated they called the police to arrest Murphy but on the arrival of Sergeant Perry they brought respondent's case before him and induced him against his better judgment to take respondent into custody.

Counsel for appellant bases his argument on the law on an erroneous view of the facts. He submitted that the evidence shewed: (1) that the janitor saw respondent take the articles and walk away with them; or if mistaken on this point it was an honest mistake; (2) that only the bare facts were reported to the police sergeant who was called to the store for another purpose, *viz.*, to arrest Murphy and that it was left to the police to decide. If appellant's officials simply gave what they believed to be correct information to the police and without further interference, except to give assistance, the police decided it was a case to prosecute an action for malicious prosecution would not lie. But the evidence of respondent and the police sergeant refutes this contention.

It was also submitted that the instructions for respondent's arrest and prosecution were not given by any one with authority,

COURT OF APPEAL
1929
June 4.

PERRY v. WOODWARD'S LTD.

i.e., by an authorized agent of appellant. We intimated at the hearing that appellant must be held responsible for the arrest and there is ample evidence—when pieced together—to support the view that respondent discharged the onus upon him on this point.

Misdirection by the learned trial judge in his charge to the jury was also alleged:

(1) That he did not properly instruct the jury on the question of appellant's responsibility for the acts of its officials in directing a prosecution, or as to the onus on respondent to shew that instructions were given by one having authority to bind appellant. The facts as found are so clear however that even if there was a departure from the law in some respects no substantial wrong occurred. P. A. Woodward, the general superintendent admitted that he gave instructions for the police to be called in respect to respondent. The learned trial judge said to the jury:

MACDONALD, J.A.

"With reference to the company being responsible, it was suggested throughout the trial, and later on when mention was made that they were not responsible because no one in authority had given these instructions. I have no hesitation in saying to you that if you find this matter was done in the ordinary course of business, that the instructions that were given were given by Mr. P. A. Woodward or Mr. Screech, or any other person, I might say other than the janitor—I think all the others had authority, and you think that in the circumstances you are justified in assuming that these men would have authority to do this, then you can assume that they had."

This, with great respect, is not correct. The jury should have been told that the authority to arrest could only be assumed where the duties of the official who instructed the police could not be satisfactorily performed in his master's interest unless he had power to apprehend shoplifters. There must be either general authority to prosecute on behalf of the employer or a special authority to act in cases of emergency. Shoplifting would appear to call for prompt action, but I do not think that any clerk who discovered it and called the police could make the employer liable without evidence to shew authority. Evidence of emergency was not given. Nor could the detention and prosecution of offenders be assumed to be within the routine duties of heads of separate departments. I should think that presumption would arise in the case of the general superintendent, Mr. Woodward, who had general supervision and control

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

of the Company's property. It can hardly be said that the employer may escape responsibility unless the general superintendent, whose duties were of the widest and most general nature referred it to the board of directors (*Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270 at p. 289.) However on the facts in this case a decision on that point is not necessary. It was suggested that Woodward did not give instructions to the police. He was not there when Sergeant Perry arrived. But he admitted that he gave instructions for the police to be called and if when the sergeant arrived Screech or Webb who received these instructions from Woodward acted upon them the chain is complete. Mr. Woodward was asked:

"Now I suppose there are certain persons in the store who have power to lay information and to order the arrest of people? My brother, myself and Mr. Mowat."

Further evidence shewed that Mr. Mowat was engaged elsewhere and "Mr. Screech would act in Mr. Mowat's absence." Hudson too testified that in four or five cases he dealt with his course of conduct was to call the superintendent's office as he did in this case. Where therefore authority was established by the evidence it cannot be said that any substantial harm occurred from inaccuracies in the charge.

MACDONALD, J.A.

(2) Misdirection on the question of reasonable and probable cause. The trial judge said:

"It is a matter entirely for the judge to say whether or not there has been reasonable and probable cause, or whether there has been a lack of that. I propose to ask your assistance to help me to decide that question by asking you to find certain facts first, because if you find eventually that the Woodward people should have made further enquiry either of the C.P.R. people or somebody, particularly of the Magnet store, where the goods were bought, before they did anything, if you say they should have done that then I would have no hesitation in saying that there was want of reasonable and probable cause, and I am not going to give you a series of questions to answer, but I instruct you now that my direction to you is that there is want of reasonable and probable cause, if, and only if, you come to the conclusion that further enquiry should have been made before anything was done."

The learned trial judge in this paragraph in effect asked the jury to find whether or not the appellant took reasonable care to inform itself of the true facts by enquiry of the C.P.R., where general information as to character might be obtained or by enquiry at the Magnet Hardware Store where it could be found

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

MACDONALD, J.A.

that similar articles were purchased. It was suggested that although it might be reasonable to make these enquiries it does not follow that appellant could not set the law in motion without doing so. The difficulty is this. Had the learned trial judge asked the jury by a question if enquiries were made of the C.P.R., or the Magnet Hardware Store they would be bound to reply in the negative. There was no pretence that they did. He asked the jury to find if they "should have made further enquiry" in these two quarters whereas it was undisputed that no enquiries were made in either place. If the facts are not in dispute there is nothing for the jury to decide and the judge should decide the question of want of reasonable and probable cause or otherwise on the undisputed facts. He is in effect asking the jury to express an opinion on undisputed facts whereas its functions are confined to fact-finding. Such a question is either inocuous or it is asking the jury to say—in part at all events—that there was no reasonable and probable cause for laying the information. The opinion that might be held on that point would be an important element in the question to be decided by the judge. I think the true position is that the trial judge should submit to the jury questions respecting any facts upon which the evidence conflicts. If the trial judge had submitted the question, "Did the defendant take reasonable care to inform himself of the true facts of the case?" he would be submitting a question often asked and approved by the Courts, although with deference, I venture to think it is open to criticism, or at all events, is not appropriate where it is common ground that no enquiries were made. It does not follow that because the question is frequently asked it is pertinent to all situations that may arise in cases of this kind. (Perdue, J.A., in *Renton* v. *Gallagher* (1910), 19 Man. L.R. 488 at p. 496.) However, the matter did not rest with the paragraph in the charge already quoted. The learned trial judge later reverted to the point and said:

"You have heard what I said about that, reasonable and probable cause is for me, but I instruct you that there was want of reasonable and probable cause if, and if only, you come to the conclusion in the circumstances existing there that morning that Woodwards should have made further enquiry into the truthfulness of the man's statements—if you find that he made the statement as to where he had bought these goods, and his C.P.R. connection."

Here he goes much further. He asks the jury to find if appellant should have made further enquiries not only into the truthfulness of the respondent's statements but also to find whether or not he made the statement as to where he bought the goods. Here the facts were in dispute. Appellant's witnesses would not clearly admit that respondent gave them to understand where he purchased the articles. The trial judge referred to this feature at another part of his charge. He said, "Did he make it clear that he had bought them somewhere else?" This fact he asked the jury to find and it was all-important. There should be little difficulty left for the trial judge in discharging his functions when he ascertained as a fact that appellant's officials were positively directed to the store where respondent bought the articles. The charge was made clearer still when after objection the jury were recalled and the learned trial judge again instructed them as follows:

"Some question has been raised, too, with reference to the question of reasonable and probable cause. My instruction—if it was not clear, I will try to make it clear now—is this, that I have no hesitation in directing you that there was want of reasonable and probable cause if you find that Mr. Perry made the Woodward people understand that he could take them to the place or go with them to the place to let them know who he bought these goods from. If he told them; now, whether he said that or not is a matter that I want your assistance on; and if he said that, then I would say there was want of reasonable and probable cause."

MACDONALD, J.A.

I need not comment further. A question of fact was submitted on conflicting evidence. It might be better—less confusing—not to link the two points together by an announcement of a hypothetical finding of want of reasonable and probable cause before the jury's finding, but that is simply criticism.

(3) Misdirection on the question of malice was alleged, but on the whole I do not think it is well founded. It was submitted, however, that there was no evidence to support a finding of malice. Malice may be inferred from want of reasonable and probable cause—it may be evidence of malice—but it does not follow that malice must be inferred in every case. It is a question of fact and we must review the findings of the jury as on any other question where the plaintiff is required to prove his case. Have we reasonable evidence to support the inference of finding of malice, *i.e.*, malice in fact, *malus animus?* It may be an improper motive or an indirect motive (*Manning* v.

COURT OF APPEAL

1929

June 4.

PERRY v. WOODWARD'S LTD.

MACDONALD, J.A.

Nickerson (1927), 38 B.C. 535 at p. 553; (1927), 2 W.W.R. 623 at p. 639). One of appellant's witnesses or perhaps two expressed the opinion at the trial that respondent was guilty. That does not necessarily shew malice. It might shew honesty in invoking the criminal law. But that depends upon the circumstances. The facts may be regarded by the jury as so clear that he could not honestly adhere to an opinion highly offensive to an innocent man. Personally I do not see any ground for the view that respondent stole these articles worth possibly less than a dollar, in view of the evidence of the manager of the Magnet Hardware Store. I would not think so if they were of higher value and the jury were doubtless of the same opinion. I am not prepared to say that a jury observing the demeanour of a witness, hearing the assertion of guilt openly expressed in a public Court against a man of whose innocence they were fully convinced could not find that he had an indirect or improper motive prompted by over-officiousness or zeal or a desire to make an example of this man as a warning to others. The jury had a right to weigh the incident with other facts and surrounding circumstances. Then there was another incident already referred to. The jury no doubt accepted the evidence of the respondent when he said that during the detention he asked the assistant-superintendent why he should have to go to gaol and received the reply, "Just because I say so." Arbitrary action may well be regarded by the jury as evidence of some motive other than a disinterested desire to bring the guilty to justice. Again as pointed out Sergeant Perry on hearing the facts available would not take the responsibility of arresting the respondent. His attitude should have prompted caution. The jury may have felt that having gone so far appellant's officials preferred to insist that he should be taken into custody to vindicate their action in detaining him in the first place. There was, I am satisfied sufficient evidence directly and through surrounding circumstances to justify the inference of malice from that evidence coupled with the want of reasonable and probable cause.

A further cause of action was for false arrest and imprisonment. The different principles applicable thereto were not submitted to the jury. I will not examine it as I am satisfied

the verdict must stand for the reasons given on the other branch of the case.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *F. Kay Collins.*
Solicitor for respondent: *G. S. Wismer.*

BARLOW v. MERCHANTS CASUALTY INSURANCE COMPANY.

Negligence—Damages—Insured against loss through accident—Settlement between insurer and insured—Further settlement between insured and injured person's solicitor—Not accepted by injured person—Action—Judgment obtained but not satisfied—No notice of action or delivery of documents to insurer—Action against insurer—B.C. Stats. 1925, Cap. 20, Secs. 24, 154 (8) and 158.

The plaintiff was injured by M. while driving her automobile. M. was insured against loss through accident in the defendant Company. M. told an adjuster of the defendant Company that she thought she could settle with the plaintiff for $75. He paid her this amount and she gave him a receipt as follows: "Received from J. M. Robertson Co. . . . the sum of seventy-five dollars ($75), being in settlement of claim made against me by Mr. A. Barlow for injuries received in an accident which occurred on Feb'y 18th, 1927, at 7.30 p.m., the said sum to be used by me in making payment of said claim." M. then paid Barlow's solicitor $70 receiving from him the following receipt: "Received from E. Mariacher the sum of $70 A/c of release from A. Barlow of claim under accident. (Sgd.) Bray & Richmond, H. Richmond." Barlow then refused to accept this sum and the solicitor returned it to M., who kept it. Barlow then brought action for damages against M. The action was not contested and Barlow recovered judgment for $1,000 and costs. A writ of execution was returned *nulla bona* and Barlow then brought this action for the amount recovered by the judgment against M., for whom the defendant was the insurer. M. did not advise the insurer of the first action or forward the writ or any other papers in regard thereto. The action was dismissed.

Held, on appeal, affirming the decision of FISHER, J., that the receipt signed by M., the meaning of which is made clear by the evidence, is a com-

COURT OF APPEAL

1929

June 11.

BARLOW v. MERCHANTS CASUALTY INSURANCE Co.

plete and honest settlement between the Insurance Company and the insured; further, under section 8 of the statutory conditions in the Insurance Act the insured must give notice of the commencement of the action and send in documents she received. This not having been done no action lies under subsection (3) of said Act.

The relief provided for by section 158 of the Insurance Act does not apply to this case.

Statement

APPEAL by plaintiff from the decision of FISHER, J. of the 15th of May, 1929, dismissing an action to recover $1,000 and interest, being the amount of a judgment obtained in the Supreme Court in an action between the plaintiff and one Ethel Mariacher of whom the defendant was an insurer. The facts are that the plaintiff had been run down by one Ethel Mariacher when driving her car. Mrs. Mariacher was insured against loss through accidents in the defendant Company. After the accident Mrs. Mariacher had a conference with an adjuster of the defendant Company when she told him she thought she could settle with the plaintiff for $75. He paid her $75 and she gave him the following receipt:

"Received from J. M. Robertson Co. (on behalf of the Merchants Casualty Co.) the sum of seventy-five dollars ($75), being in settlement of claim made against me by Mr. A. Barlow for injuries received in an accident which occurred on Feb'y 18th, 1927. at 7.30 p.m., the said sum to be used by me in making payment of said claim.

"(Sgd.) Ethel Mariacher.

"Assured under Policy No. 16225."

Mrs. Mariacher then endeavoured to make a settlement with Barlow through his solicitor for this amount. She paid $70 to the solicitor who gave her a receipt as follows:

"Received from E. Mariacher the sum of $70 A/c of release from A. Barlow of claim under accident."

"(Sgd.) Bray & Richmond, H. Richmond."

Richmond then saw Barlow who refused to accept this amount and he returned the $70 to Mrs. Mariacher who kept this money. Barlow then brought action against her for damages and recovered judgment for $1,000 and costs, but was unable to realize on the judgment. The defendant in this action claimed: (1) That there was a complete settlement between the Company and the insured; (2) that there was a breach of statutory condition 8 in that she did not forward to the Company the writ and other documents received from the plaintiff but undertook the defence of the action without the knowledge or consent of the Company;

COURT OF APPEAL
1929
June 11.
BARLOW v. MERCHANTS CASUALTY INSURANCE Co.

(3) that under the same statutory condition the insurance company is not liable unless the amount of the liability is fixed by the parties with the approval of the insurance companies or ascertained by a judgment after trial of the issue but they say there was no trial.

The appeal was argued at Victoria on the 11th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

F. A. McDiarmid, for appellant: The plaintiff recovered judgment for $1,000 against Mrs. Mariacher, and the judgment was not satisfied. We have a right of action against the insurer under section 24 of the Insurance Act. They claim they did not receive notice of the action relying on section 8 of the statutory conditions. We submit we are not tied to the technicalities that may be of avail against Mrs. Mariacher. This is a case in which we are entitled to relief under section 158 of the Act.

Alfred Bull, for respondent: Section 24 provides that the action is "subject to the same equities as the insurer would have if the judgment had been satisfied. Barlow left the matter in the hands of his solicitors and the solicitors gave a receipt for the $75 in payment for the claim. The money was never repaid: see *Trawford* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 132 and on appeal (1914), 49 S.C.R. 470; *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), 6 Chy. App. 527 at p. 532. Under section 8 of the statutory conditions we are entitled to notice of the action with the fullest information. This was never done and the conditions provide they cannot succeed in case of non-compliance.

McDiarmid, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: It is conceded that if the settlement which the Company made with Mrs. Mariacher were collusive the plaintiff could recover; but there is no proof of collusion between them and therefore the settlement must be regarded as an honest transaction. The receipt which the adjuster signed is not quite in the form which one would expect in the circumstances, but this is capable of two constructions. First, the adjuster on Mrs. Mariacher's information that she could settle

COURT OF APPEAL

1929

June 11.

BARLOW *v.* MERCHANTS CASUALTY INSURANCE CO.

with plaintiff for $75 said: Here is $75, go and settle if you can. If that were the case it is not a release of her right to indemnity. But it does not read that way. It is this:

"Received from J. M. Robertson Co. (on behalf of the Merchants Casualty Co.) the sum of seventy-five dollars ($75), being in settlement [that is clear enough] of claim made against me by Mr. A. Barlow for injuries received in an accident which occurred on Feb'y 18th, 1927, at 7.30 p.m., the said sum to be used by me in making payment of said claim.

"(Sdg.) Ethel Mariacher.

"Assured under Policy No. 16225."

The last sentence is the only one that throws any doubt upon the intention of the insured to make a settlement with the respondent for $75. It is a statement of the purpose for which the money was intended to be used by her. It is difficult to say on that receipt and on the evidence which makes it clear, as Mr. *Bull* contends, that it was not a complete and honest settlement between the Insurance Company and Mrs. Mariacher.

MACDONALD, C.J.B.C.

There is another branch that is even stronger, to my mind, than that: that is that the statute provides what should be done in a case of this kind. First the insured must give written notice of the accident to the Insurance Company, and that she gave. Secondly, she must give notice of the commencement of the action and send in the documents she received, and admittedly that was not done. And then coming down to subsection (3) we find it declared that no action on this policy shall lie against the Insurance Company, unless the foregoing requirements were complied with.

Now only one of the foregoing requirements was complied with, and the only section of the Act which enables a party to be relieved in default of carrying out these provisions, in my opinion, does not apply.

MARTIN, J.A.

MARTIN, J.A.: The judge below has, in my opinion, reached the right conclusion, and the only proper conclusion that he could have reached under the circumstances of the case.

GALLIHER, J.A.

GALLIHER, J.A.: I rest my judgment on the failure to comply with the statutory requirements, and I also agree that the section in the Act as to relief in default of carrying out the provisions of the Act does not apply in this case.

COURT OF APPEAL

1929

June 11.

BARLOW v. MERCHANTS CASUALTY INSURANCE Co.

McPHILLIPS, J.A.: I think that this is a very unfortunate result. With great respect to my learned brothers I cannot agree with their conclusion.

I would think that it is very illusory legislation if in a claim such as this it is possible to invoke these requirements, which are the requirements on the part of the insured—not this plaintiff. If so, it means that the party really injured, which is this case, will have no right of action at all, if it be that the person who is responsible to him in damages has not followed the provisions of the Act. I do not think that that is the intention of Parliament, nor do I think it is written upon the face of the statute. Parliament, in any case, intended unquestionably, under section 158, to provide that where in the interests of justice these different things had not been done, that where it was apparent that no prejudice had ensued, none of them could be invoked.

McPHILLIPS, J.A.

In this particular case, what prejudice has ensued to the Insurance Company? I am not willing to accept the submission of the learned counsel for the Insurance Company that they were unmindful or oblivious of all the facts, the accident and the claim. Their plain duty when they are advised that an accident has taken place is to see to it that this is disposed of in the only way that it can be disposed of when the claim is made—by a proper release, and that release would have to be from the proper person, that is the person who claims damages for the accident, and as it is indicated in this section here, in 154, which reads:

"(3) No action to recover the amount of a claim . . . . shall lie . . . . unless . . . . such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer."

It is quite evident that the party suffering damages is the proper and necessary party to be dealt with, not the insured only, and it is idle for insurance companies to contend otherwise, the procedure is well known and followed every day.

In this particular case they instruct the adjuster to try to make a settlement, and the adjuster knew very well that the person from whom he had to get the settlement, that was the man who suffered the damages. Mrs. Mariacher was used by the Insurance Company for the purpose of bringing about a settlement; she was the agent for the Company. The receipt

COURT OF APPEAL

1929

June 11.

BARLOW v. MERCHANTS CASUALTY INSURANCE Co.

reads that way: [already set out in the head-note, statement and judgment of MACDONALD, C.J.B.C.].

Now everything was done this self-same day, March 21st. The Company knew at that time there was no settlement, the efforts had failed. The evidence is clear on that point. This $75 was to be used in that way. On that same day, Mr. Richmond, the solicitor, writes the letter to Mrs. Mariacher found on page 63 of the Appeal Book. Mrs. Mariacher had given this receipt, and took the money to Mr. Richmond on this self-same day.

The whole thing breaks down (the attempt to effect a settlement) and the letter written by Mr. Richmond afterwards on November 21st, 1927, well demonstrates this. It reads:

"We have done our utmost with Barlow to settle for $75 on account of which you have paid $70, but he refuses to give us the necessary releases, stating that he has been in consultation with several of his friends who have advised him not to accept such a small amount.

"Complying with my undertaking to you, that if this amount was not accepted in full settlement I was to return the moneys paid on account, I enclose herewith my cheque for $70."

MCPHILLIPS, J.A.

Now all that was asked to be done was done and the attempt was made to settle and the settlement was not achieved. It is absurd to say there was a settlement or a release, the facts are all the other way. The Company knew perfectly well there was no settlement and they adopted this course to bring about a settlement, and they ask the Court to solemnly declare that this amounted to a release. I certainly am unwilling to take that view. The whole transaction indicates in the clearest terms what was intended to be done—what they did not accomplish, and there is no release.

Section 158 I think is sufficient, if it were necessary, to meet any of these other objections, and section 24 entitles this action to be brought by the plaintiff. "The person entitled to damages may recover by action against the insured," etc.

Mrs. Mariacher was the agent of the Company to go about and accomplish, if possible, a settlement for the Company. She was nothing more than the agent of the Company to achieve a settlement and failed. The Company in my opinion is liable, and the plaintiff was entitled to judgment.

I would therefore allow the appeal and would enter judgment

for the plaintiff for the amount proved which, in my opinion, was the judgment the learned trial judge should have given in the Court below.

COURT OF APPEAL

1929

June 11.

BARLOW v. MERCHANTS CASUALTY INSURANCE CO.

MACDONALD, J.A.: I support the judgment on both grounds, namely, as to the settlement, and non-compliance with the statutory conditions.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *H. Richmond.*
Solicitor for respondent: *W. W. Walsh.*

GREEN v. HARRY.

MORRISON, C.J.S.C.

1929

June 10.

GREEN v. HARRY

Malicious prosecution — Reasonable and probable cause—Malice—Onus probandi.

The plaintiff, a motor-car salesman sold the defendant an automobile, one of the inducements leading to the sale being that the plaintiff would take out an all-risk policy of insurance for the defendant for which the defendant paid him $45, for payment of the premium. After using the car for a short time the defendant met with a collision and he then found that the car had not been insured. He laid a charge against the plaintiff for theft of the money paid him to take out the insurance policy. The charge came on for hearing and the plaintiff was acquitted. In an action for malicious prosecution:—

Held, that want of reasonable and probable cause and malice must concur in order to sustain an action for malicious prosecution, but the defendant took reasonable care to inform himself of the facts of the case and honestly believed in the case which he laid before the magistrate and the action should be dismissed.

Statement

ACTION for malicious prosecution. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 15th of May, 1929.

McPhee, for plaintiff Green.
Grossman, for plaintiff Ross.
Castillou, for defendant.

MORRISON, C.J.S.C.

1929

June 10.

GREEN v. HARRY

Judgment

10th June, 1929.

Morrison, C.J.S.C.: The plaintiff was a motor-car salesman and had, at the time material to the issues herein, his pitch in the Maple Ridge District. The defendant is a workman in a lumber mill there and being desirous of possessing an automobile was impressed by the plaintiff's overtures, who succeeded in effecting the sale of a car to him. One of the alleged representations entering into the inducements leading to the consummation of the sale was that he, the plaintiff, would take out an all-risk policy of insurance for a premium of $45. This policy the defendant says was never taken out. After purchasing the car and whilst using it on one occasion he met with a collision and then he found out that the car had not been insured.

A Mr. Ross of the Ross Motors, for whom it appears the plaintiff was salesman, came into the picture after these events and to him the defendant disclosed his grievances regarding the non-insurance of his car. The defendant was so dissatisfied and imbued with the unalterable conviction that Ross and Green between them had taken the $45 wrongfully from him, that, after consulting more than one solicitor, he eventually had Green arrested for the theft of his money. Being a poor man he could not afford to be out the $45 as well as the amount of damages arising out of the collision and other expenses and costs. The charge as laid came on for hearing and Green was acquitted, and thereupon he began this action for malicious prosecution; that is, he claims that the defendant maliciously and without reasonable and probable cause preferred and followed up a criminal charge against him in the Courts.

To succeed in this form of action the plaintiff must first prove that he was prosecuted by the defendant; (2) that the prosecution ended in his favour; (3) that there was want of reasonable and probable cause; (4) that the defendant instituted the prosecution maliciously.

The first obligation imposed upon him he has admittedly discharged.

The second prerequisite the plaintiff has also fulfilled.

As to the third point, there is a little perplexity for I must decide whether there is reasonable and probable cause for the prosecution upon the facts. The burden is on the plaintiff

throughout the trial to prove that the defendant laid the charge without reasonable and probable cause operating on his mind at the time. He must tender some evidence tending to establish that point. After which the defendant must prove that the facts of the case had either been communicated to him or that he ascertained the facts of the case or so much of the facts as would be sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man previous to the charge being laid before the magistrate. He must proceed and prove in justification of his actions that the knowledge of certain facts and circumstances, which were sufficient to make him or any reasonable man believe in the truth of the charge, existed in his mind at the time and was the reason and inducement for his putting the law in motion—*Delegal* v. *Highley* (1837), 3 Bing. (N.C.) 950 at p. 959.

Judgment

A man is not bound before instituting proceedings to see that he has such evidence as will be legally sufficient to secure a conviction. It is enough if he proceeds on such information as a prudent and cautious man may reasonably accept in the ordinary affairs of life. It is not enough to commence proceedings on mere suspicion. But the defendant is not necessarily to be considered unreasonable because he might or ought to know that he had no good ground for proceeding. One's memory or judgment may play false in particular instances, though generally reliable. The taking of legal advice is not of itself sufficient upon which to base reasonable or probable cause. The mistaken opinion of a lawyer does not alter the facts. Yet that may have a bearing on the question of malice. The defendant must at least be convinced of the probability of the plaintiff's guilt. The principle is that reasonable and probable cause depends not on the actual facts, but upon the knowledge and belief of the prosecutor. In the case of *Williams* v. *Banks* (1859), 1 F. & F. 557 the jury in effect found that the plaintiff was guilty of obtaining money by false pretences, but that the defendant at the time when he prosecuted did not believe that the plaintiff had intended to defraud, the judge directed a verdict for the plaintiff.

What determined and justified the impression on the mind of the defendant the moment before he laid the information is to be looked at.

MORRISON, C.J.S.C.

1929

June 10.

GREEN v. HARRY

Judgment

One of the questions to be determined is—Did the defendant take reasonable care to inform himself of the true facts of the case? And another question is—Did he when he went before the magistrate honestly believe in the case which he laid before the magistrate? He must first believe in his own case. If he did not take reasonable care to inform himself of the true facts of the case and that he did not honestly believe in his own case then he had not reasonable and probable cause for the prosecution. But that is not enough. And that brings me to the fourth point that the plaintiff must prove malice which has been defined as being, in a legal sense, a wrongful act done intentionally without just cause or excuse. In order that the plaintiff succeed, it must be found that the defendant in so proceeding as alleged was actuated by malice—that he was moved by an improper desire other than to bring the plaintiff, whom he believed to have committed a crime, to justice. If upon the evidence it appears that the defendant acted from improper motives or without honest belief in the substantiality of his own statements malice may be inferred. The question of honesty of belief is one of reasonable and probable cause. The question of honesty of motive is one of malice. It may be inferred from lack of honesty of belief that there was lack of honest motive. But it does not follow that from the lack of honest motive he did not have an honest belief. A person who acts without grounds for prosecution, acts from some improper motive. But one may be actuated by the most malicious motives and yet have a genuine belief in the guilt of the accused. A want of reasonable and proper cause cannot be implied from malice.

In actions of this kind the law throws upon the plaintiff the burden of proving the presence of malice in the mind of the prosecutor. *Corea* v. *Peiris* (1909), A.C. 549 at p. 555; *Hicks* v. *Faulkner* (1882), 46 L.T. 127.

I find that in the circumstances of this case the defendant took reasonable care to inform himself of the facts of the case and that he honestly believed in the case which he laid before the magistrate. In fact he still honestly adheres to that belief.

These findings amount, as a matter of law, to reasonable and probable cause and the defendant succeeds.

If, however, these findings had been in the negative, then the

MORRISON, C.J.S.C.

1929

June 10.

GREEN v. HARRY

further question would arise, was the defendant actuated by malice? If he was not then the decision again would be for the defendant. Otherwise, if malice were found to have existed.

Want of reasonable and probable cause and malice must concur in order to sustain an action of malicious prosecution. The action is dismissed.

Judgment

I have thus elaborated somewhat my observations because it is difficult for litigants to understand that in cases of this kind the question of the actual guilt of the plaintiff is not in any way determined.

Action dismissed.

McGEER, McGEER & WILSON v. FLETCHER. McLELAN v. FLETCHER.

MACDONALD, J.

1929

June 12.

McGEER, McGEER & WILSON v. FLETCHER

McLELAN v. FLETCHER

Barristers and solicitors—Retainer—Liability of client for costs—Alleged arrangement that solicitor was to look for payment from others—Onus.

Where a retainer or employment of solicitor or counsel by a client is proved, coupled with services rendered, the burden of proof that some person other than the client is to pay for the services, rests upon the party asserting such mode of payment.

ACTIONS for the recovery of costs for legal services as barristers and solicitors. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 6th of June, 1929.

J. W. deB. Farris, K.C., for plaintiff.
Killam, for defendant.

12th June, 1929.

Judgment

MACDONALD, J.: This is an aftermath of the civic *cause celebre* of last year, commonly called the "Police Investigation." It arose from the defendant, as one of the police commissioners, alleging maladministration in the police department of the City and making charges involving the mayor and other persons. He sought an inquiry in the matter before a Royal

MACDONALD, J.

1929 June 12.

McGEER, McGEER & WILSON v. FLETCHER

McLELAN v. FLETCHER

Judgment

Commission and obtained the aid of the plaintiff, G. G. McGeer for that purpose. Their efforts were futile, but eventually the City Council, under its powers, appointed a commission with counsel to assist. Meetings were held and after a lengthy inquiry the commissioner made his report.

Plaintiffs assert, that they acted for defendant throughout these proceedings, thus very shortly adumbrated. The only argument presented, as to the plaintiffs not so acting, was that the engagement by defendant was confined to G. G. McGeer and did not pertain to the other members of the plaintiff firm. Even if I were in doubt as to the defendant having, by using the office of the firm, including their clerical staff and accepting their services, employed such other members of the firm, I would, as I intimated during the argument, allow any necessary amendment.

While there was no written retainer by defendant, still there is no dispute between the parties, as to defendant having retained and requested plaintiff G. G. McGeer to act for him in the matter. This retainer, as I have intimated, upon the facts included the other plaintiffs. Nor is there any doubt that, from the standpoint of the defendant, they all rendered efficient service in support of the position he had assumed and the cause he had espoused. Though criticizing his counsel, at times, during the inquiry, the defendant was well satisfied with his actions and in his cross-examination, by way of praise, stated that the commission would have been futile and not lasted two days, if he had not been represented by such counsel.

It would be improbable that the defendant would, under such circumstances, except in the limited way I have mentioned, deny a retainer or that legal services had been rendered thereunder, but he still disputes liability. His contention is that while he engaged the plaintiffs and obtained the benefit of their services over a lengthy period, that they were not to hold him personally responsible; that they were to look for payment to the "public." In other words that the plaintiffs took the risk that the "public" or some unknown and unascertained portion thereof, with whom they were not brought in contact, might recompense them for their services. Plaintiff, G. G. McGeer, flatly denies any such illusory employment or that there was any understanding or

MACDONALD, J.

1929

June 12.

McGEER, McGEER & WILSON v. FLETCHER

McLELAN v. FLETCHER

arrangement of this nature. He says that the *per diem* amount of $100 which he expected to receive was discussed with the defendant and agreed to by him and that he fully understood he was personally liable and paid $1,000 on account of his liability. Further that, although requested verbally and in writing to make payment, he never disputed liability until after this action was commenced.

Judgment

Where a retainer or employment of solicitor or counsel by a client is proved, coupled with services rendered, the burden of proof that some person other than the client is to pay for services rests upon the party so asserting such mode of payment. In the light of the denial, which I have mentioned, and attendant circumstances, I find that the defendant has failed to satisfy me that he was to be relieved from responsibility for payment of plaintiffs' services. In this connection I might add that he attempted to obtain "indemnity" from the City Council as to the costs claimed by plaintiffs and Major McLelan, and this action, of itself, assumed liability on his part as a primary debtor. I have no doubt that, at the outset, when he sought legal assistance, he expected that, using his own words, "the public would come to his rescue" as to payment. He does not appear to have made any business arrangement to implement this hope or expectation. It failed of fulfilment, except to a limited extent. This fact does not release defendant from his liability to pay the plaintiffs for their services.

I have only to determine the question of liability and there will be a reference, in apt terms, to the registrar to determine the amount of such liability.

The plaintiffs are entitled to their costs.

Judgment for plaintiffs.

McLELAN v. FLETCHER.

12th June, 1929.

Judgment

MACDONALD, J.: This action, to recover costs, was tried at the same time as *McGeer et al.* v. *Fletcher*. It arose out of the same subject-matter and my reasons for judgment in that case and the facts therein outlined may be applied *mutatis mutandis*.

MACDONALD, J.

1929

June 12.

McGEER, McGEER & WILSON v. FLETCHER

McLELAN v. FLETCHER

Judgment

The claim, although also for costs, is somewhat different, as the plaintiff contended defendant owed him $2,250, as the balance found due him on accounts stated between them. There is no dispute as to the plaintiff having been employed and having rendered legal services for the defendant. Evidence was adduced as to the settlement referred to and there did not appear to be any substantial contradiction as to $2,500 being discussed, as the amount payable, but the difficulty arose as to this being a settled amount, less a payment of $250 made by defendant thereafter. There was also a dispute as to the credits to which the defendant was entitled. It appeared that moneys had been advanced for purposes other than legal services. This involved the matter of accounting. Defendant was willing to acknowledge a settlement of the amount, aside from the question of liability arising out of the mode of payment, but only on condition that he should be given credit for payments according to his contention.

As to the defence of non-liability on the ground that the plaintiff was to look "for payment of his account by the City of Vancouver or other authority": I find that this allegation in the pleadings was not borne out by the evidence and that the plaintiff was entitled to be paid for his legal services. Then reverting to the matter of settlement, as the terms thereof are disputed, especially as to payments, if the parties cannot agree as to the amount there should be a reference to determine the extent of the liability of the defendant to the plaintiff. In that event the order would be in the usual terms as between solicitor and client.

The plaintiff is entitled to his costs.

Judgment for plaintiff.

HOWARD v. HENDERSON.

COURT OF APPEAL

1929

March 21.

HOWARD v. HENDERSON

Motor-vehicles — Collision — Negligence — Damages—Owner—Liability for driver's negligence.

The driver of a car, a sister-in-law of the owner, proceeding westerly on Broadway in Vancouver in August at about 8 o'clock in the evening, turned to go south on Carolina Street, and when on the south side of Broadway and about to clear the intersection she was struck by the defendant who was driving his car easterly on Broadway. The evidence disclosed that the driver of the plaintiff's car cut the corner in turning south and as she turned she saw the defendant's car coming when it was about half way up the block beyond the intersection. It was held by the trial judge that the plaintiff's car did cut the corner, but the defendant was going at an excessive rate of speed and not using due care in approaching the intersection was responsible for the accident.

Held, on appeal, affirming the decision of ELLIS, Co. J., that the driver of the plaintiff's car when turning saw the defendant half a block away which would be about 216 feet from the intersection and in crossing 60 feet, which she did at 15 miles an hour, she was run down by the defendant who should have seen her car. In these circumstances the defendant could not escape a finding of negligence. Further, although the plaintiff's driver cut the corner and was short of the statutory turn this did not affect the case as it did not relieve the defendant who ought to have seen her and slowed down to avoid a collision.

Held, further, that when a mere licence is given to another to drive one's car, and that other in driving it injures some person, the owner, apart from legislation, is not responsible for damages.

APPEAL by defendant from the decision of ELLIS, Co. J. of the 11th of December, 1928, in an action for damages resulting from the alleged negligence of the defendant in driving his automobile. The plaintiff owned the car in question and her sister-in-law was driving the car westerly on Broadway on the 17th of August, 1928. When reaching Carolina Street she turned to her left intending to go south on Carolina Street. When she had nearly cleared the south side of Broadway the defendant, who was driving his car easterly on Broadway, ran into her, resulting in damage to the plaintiff's car for which she claimed $318.75 for cost of repairs and depreciation in value of the car.

Statement

The appeal was argued at Vancouver on the 20th and 21st

COURT OF APPEAL

1929

March 21.

HOWARD v. HENDERSON

of March, 1929, before MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MACDONALD, JJ.A.

Argument

Marsden, for appellant: The evidence does not justify the finding that the defendant was travelling at an excessive rate of speed. The plaintiff in turning into Carolina Street cut the corner and in addition it was her duty to be on the look-out for traffic on her right as she turned, the defendant having the right of way: see *Myall* v. *Quick* (1922), 1 W.W.R. 1. Failing to keep a proper look-out for cars having the right of way was the proximate cause of the accident. The learned judge should have found that the defendant had the right of way and that he was not guilty of negligence.

Craig, K.C., for respondent: The evidence justified the conclusion to which the learned trial judge arrived. As to the plaintiff not going around the intersection this was not pleaded. As to the right of action when the plaintiff's sister-in-law was driving the car see *Wellwood* v. *King* (1921), 2 I.R. 274 at p. 308; *The "Bernina"* (1888), 13 App. Cas. 1 at p. 16. As to responsibility of an owner see *Boyer* v. *Moillet* (1921), 30 B.C. 216; *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512 at p. 514; *Hanley* v. *Hayes* (1924), 55 O.L.R. 361; *Macdonald* v. *Tavistock Milling Co.* (1924), 27 O.W.N. 299.

Marsden, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think the appeal should be dismissed. The case is not difficult when the facts are elucidated. The evidence of the plaintiff supported by the evidence of independent witnesses is that she looked before starting to turn off Broadway into Carolina Street, to her right, to ascertain if any cars were approaching and that the defendant's car was at that time at least half a block away, a block being 432 feet, that is to say, the defendant would be at least 216 feet from the intersection while she had to cross the travelled part of Broadway a distance of about 60 feet. Now, in crossing, which she did at 15 miles an hour, she was run down by the defendant, who struck the side of her car. On those facts it is difficult to see how the defendant could escape a finding of negligence against him. He could unquestionably see the car—whether he could see she was

about to turn or not—he could see the car about to cross the street. That is not denied. Instead of slowing down he kept right on until he got close to the intersection and then slackened his speed, but it was then too late to avoid the collision. The learned judge on those facts found the defendant was guilty of negligence. I think there was ample evidence to support the finding. The rule is that when a judge, sitting as a jury, makes a finding of fact that finding is not to be interfered with unless he has proceeded on a wrong principle or unless there be no evidence upon which reasonable men could come to that conclusion. There is ample evidence to satisfy this rule.

MACDONALD, C.J.B.C.

Then on the question of contributory negligence: Although it has not been very well pleaded, yet I think it is open on the pleadings. I do not see any evidence of contributory negligence, since I think she was perfectly right in crossing the street at that time. The only alleged contributory negligence is that the hind wheels of her car did not go beyond the centre of the intersection. They were perhaps a few inches short of making the statutory turn. The learned judge has found that that did not affect the case at all, and I agree with him, because, even if she had cut the corner, as it was alleged she had done, that did not relieve the defendant when he saw her or ought to have seen her in the position in which she was, and he ought to have slowed down to prevent a collision.

There is, of course, the further question that the plaintiff was not the driver, nor was the driver the agent or the servant of the plaintiff. On that point I have no hesitation whatever in holding that the owner is not liable. It seems to me clear that when a mere licence is given to another to drive one's car, and that other in driving it injures another, the owner, apart from legislation, and there is none here, is not responsible for the damage. For those reasons the appeal will be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I entertain no doubt about the finding of negligence on the part of the defendant; I have some as regards the contributory negligence of the plaintiff, which question I think is open on the pleadings, but there is not enough evidence to say the learned judge was clearly wrong in his finding in favour of the plaintiff. It, therefore, is not necessary to decide

COURT OF APPEAL

1929

March 21.

HOWARD v. HENDERSON

MARTIN, J.A.

the nice point of law which arose on contributory negligence in the facts of this case and which are somewhat indefinite and therefore I shall express no opinion thereon without further consideration. I desire to add that I should not like it to be inferred from anything I have said during this hearing that this Court is of opinion that a person who undertakes to make a left-hand turn across the traffic on a main highway should not be constantly vigilant and careful in undertaking something which on the face of it is bound to invite the risk of collision unless all concerned observe that degree of care which such a proceeding necessarily requires.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion the appeal cannot succeed. Upon the whole case I am of the opinion the defendant was clearly guilty of negligence. The evidence established, in view of the circumstances present at the time, first, that the motor-car of the defendant was being driven at an excessive speed in view of all the facts, and the road upon which the respective cars were; secondly, if the plaintiff's car was not seen it should have been seen, and there was negligence in that, and even if the plaintiff had been guilty of negligence in cutting the corner, notwithstanding that negligence the defendant by the exercise of reasonable care could have prevented this accident. So that upon all grounds I think the plaintiff is entitled to succeed. The defendant has not made out any case of contributory negligence. I might say, though, it is a case that very pointedly brings to our notice the principle which governs in the Court of Appeal in cases where there is conflicting evidence and where so much depends upon the trial judge having the opportunity to see the witnesses which we have not; and on that principle I would refer to what Lord Sumner said in a very recent case in the House of Lords. *"Hontestroom"* (*Owners*) v. *"Sagaporack"* (*Owners*) (a ship case) (1926), 95 L.J., P. 153 at pp. 154-5, where Lord Sumner said this:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think that it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, [that is what we have here] including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute."

And the rule in England, I may say, is just the same as the rule we are governed by.

"It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shewn that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If this estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone."

MCPHILLIPS, J.A.

Now, in this case we have the learned trial judge in the Court below saying there was conflicting evidence, which appears upon the record, but he says there were certain independent witnesses who were called and gave salient evidence upon the subject-matter of the trial and he based his judgment upon that independent evidence, and that independent evidence, in my opinion, supports the judgment. Not that I say we should not pay attention to the rest of the evidence, but as I said at the opening of my judgment, on the whole case I consider negligence was established by the plaintiff for which the defendant was liable.

MACDONALD, J.A.: I do not find it necessary to express an opinion on the point of the suggested liability of the owner of the car for the alleged negligence of the driver.

MACDONALD, J.A.

The driver of the plaintiff's car doubtless cut the corner to some extent but the learned judge found that it was not a factor in the result and I cannot say there is not sufficient evidence to support that view. There is sufficient evidence also to support the finding of negligence on the part of the defendant, and I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *P. S. Marsden.*

Solicitors for respondent: *Craig, Ladner, Carmichael, Tysoe & Downs.*

COURT OF APPEAL

1929

June 13.

TEDLOCK v. MCKELVIE

TEDLOCK v. McKELVIE.

Negligence—Damages—Contributory negligence—Right of way—Entering main artery from side street—B.C. Stats. 1925, Cap. 8, Sec. 2; 1926-27, Cap. 44, Sec. 12.

The plaintiff, in a car driven by her son (17 years old) westerly on 41st Street approached its intersection with Marguerite Street at about 8.30 in the evening of March the 15th, 1929, when it was fairly dark and misty. The defendant driving his car northerly on Marguerite Street at the same time attempted to cross the intersection of said streets when he was struck by the plaintiff's car at about the hinges of the door on the right side of his car. It was found that the defendant was travelling without lights. The plaintiff was severely cut about the face and badly bruised. Both the cars were damaged. Counsel for the plaintiff admitted on the trial that there was contributory negligence on the part of the plaintiff but judgment was given for the plaintiff for $2,500. Immediately after notice of appeal was filed by the defendant the plaintiff gave notice consenting to the judgment being modified on the basis of the defendant being liable under the Contributory Negligence Act for two-thirds of the damage, and the plaintiff one-third.

Held, on appeal, varying the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting, and holding there should be an equal division of the damages), that two-thirds of the damage should be borne by the defendant, and one-third by the plaintiff.

Statement

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 3rd of May, 1929, in an action for damages for personal injuries received in an automobile collision at about 8.30 in the evening of the 15th of March, 1929. The plaintiff was in an automobile driven by her son westerly on 41st Street. As they approached the intersection of Marguerite Street the defendant driving north on Marguerite Street entered the intersection slightly before the plaintiff's car, and the plaintiff's car struck him at about the hinges of the door. The plaintiff was going at about 20 miles an hour. The defendant's lights were not on. It was fairly dark at the time. The plaintiff was badly cut about the face and severely bruised. She was taken to the hospital where she remained two weeks. On the trial counsel for the plaintiff admitted that there had been contributory negligence, but judgment was given for the plaintiff for $2,500. After notice of appeal was filed by the defendant the plaintiff

served the defendant with notice consenting to the judgment being modified on the basis of the defendant being liable under the provisions of the Contributory Negligence Act for two-thirds of the damage and the plaintiff for one-third.

The appeal was argued at Victoria on the 12th and 13th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellant: The defendant was well ahead as the rear part of his car was struck by the plaintiff's car. Our submission is that he was sufficiently ahead to have the right of way: *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512. The boy driving should have seen the defendant's car and should have stopped. He is solely responsible. His parents are liable: see section 12 of the Motor-vehicle Act Amendment Act, 1927. If there is negligence on both sides there is the question of degree of fault and it is established the boy was more at fault than the defendant.

Argument

J. W. deB. Farris, K.C., for respondent: The boy had the right of way and his negligence is not more than 25 per cent. as the defendant did not have his lights on. We have admitted fault to the extent of one-third of the damage. In my view the *Collins* case does not help him. The defendant was coming from a cross-road into a main artery of traffic: see Barron on Motor-vehicles, p. 738; 71 Sol. Jo. 336. On the question of contributory negligence see *Monrufet* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 91; *Milligan* v. *B.C. Electric Ry. Co.* (1923), 32 B.C. 161 at p. 163; *Fred Olsen & Co.* v. *The "Princess Adelaide"* (1929), [*ante,* p. 274].

Bull, replied.

MACDONALD, C.J.B.C.: The appeal should be allowed. I think that the damages and costs should be apportioned equally. It is true that the defendant was driving without his head-lights, and in that respect was negligent. I think the evidence establishes that. They were both, it seems to me, equally to blame.

MACDONALD, C.J.B.C.

Not only the plaintiff's driver, but the plaintiff herself sat in the front seat of her car, and she saw the defendant crossing; she saw that he had entered upon the street ahead of her. She

COURT OF APPEAL

1929

June 13.

TEDLOCK v. McKELVIE

said she did not see the lights, and thought the car was travelling the other way. That seems to me to be not only improbable, but absurd; that the direction of a car travelling across the intersection, across the vision of the person who was looking at it, should be mistaken appears to me to be impossible if she were paying any attention to it.

MACDONALD, C.J.B.C.

The defendant was first at the intersection, but since the plaintiff had the statutory right of way, and defendant was not substantially much ahead, he ought to have given way. It would appear as if each was trying to get across first.

In these circumstances I think it is entirely fair to the plaintiff to apportion the damages and the costs equally.

The costs occasioned subsequently to the recipt of the notice are allowed to respondent.

MARTIN, J.A.

MARTIN, J.A.: This matter is somewhat unusual, in one aspect, which is this, that at the trial the learned counsel for the plaintiff admitted that he had been guilty of contributory negligence—negligence directly contributing to the accident—despite which the learned judge gave judgment in her favour, upon the ground that the defendant's conduct was the proximate and sole cause of the accident, as he puts it. In such circumstances the plaintiff, if I may say so, adopted a very wise course, consistent with the practice of this Court, that is to say, that almost immediately after notice of appeal was filed by the defendant appellant, the plaintiff, respondent, served the appellant with a notice which was tantamount to a reduction of the judgment to two-thirds of the damage apportioned as against one-third: *vide* the Contributory Negligence Act of 1925. Upon that notification the appellant could, of course, have accepted the reduction of the judgment, with the ordinary consequences. But he preferred, and quite properly from his viewpoint, to have the opinion of this Court as to whether or no the reduction was sufficient to meet the case.

I am of opinion, after considering carefully the arguments that have been advanced, and the evidence on the point, that the reduction was sufficient to meet the justice of the case, and that the degrees of fault should be apportioned in accordance with that reduction, that is to say, two-thirds of the damage must be

borne by the defendant and one-third by the plaintiff; and in accordance with this there should be an order as to costs.

MARTIN, J.A.

I may say that this statute, our said Contributory Negligence Act is in its present essence the same as the Maritime Conventions Act, Cap. 126 of our National statutes, R.S.C. 1927, Sec. 2, and in the decision of the question of apportionment of liability—often a very difficult question as the House of Lords have said—very nice questions arise as to the respective "degrees of fault" which have been considered frequently of late, and the leading cases on the point will be found collected in the judgment which I delivered in the Admiralty Court a few days ago in *Fred Olsen & Co.* v. *The "Princess Adelaide"* [*ante,* p. 274] and therefore I shall not repeat them here.

The substantial grounds on which I think the degrees of fault are attributable to the defendant, were the lack of a proper look-out—failure to keep a look-out; and on the part of the plaintiff there was failure to look out alone. I cannot distinguish in the degrees of fault in each of those negligent acts.

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal and apportion the liability equally; and also the costs.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: Had it not been for the stand taken by counsel, I would have been quite prepared to dismiss the appeal *in toto* in that I am of the opinion that negligence was established against the plaintiff.

The result, as I understand it, is that the respondent consenting that the judgment do stand reduced by one-third, *i.e.,* the damages are reduced to two-thirds of that allowed in the Court below.

MACDONALD, J.A.

MACDONALD, J.A.: I am of the opinion that there was a greater degree of negligence on the part of the defendant: first, because he did not see the car coming on his right, a car which was properly lighted; second, because his head-lights were not on, as shewn by the evidence; and, thirdly, because he was under a greater obligation to take care in emerging from a side street into the line of traffic on a main thoroughfare. The only

COURT OF APPEAL

1929

June 13.

TEDLOCK v. McKELVIE

negligence of the plaintiff, on the other hand, was failure to see the defendant's car, and that was partly excused by the fact that there were no head-lights showing on it.

I therefore agree with the distribution suggested by my brother MARTIN.

Judgment of Morrison, C.J.S.C. varied, Macdonald, C.J.B.C. and Galliher, J.A. dissenting.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper & McKim.*

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

GREGORY, J.

1929

June 18.

McDONALD v. ROYAL BANK OF CANADA

McDONALD v. ROYAL BANK OF CANADA.

Banks and banking—Depositor—Gives cheque to manager for investment—Payable to bearer—Manager short in his account at bank—Uses cheque to cover his shortage—Liability of bank for amount of cheque.

The manager of a local branch of the defendant Bank suggested an investment to the plaintiff who had an account in the savings bank department. The plaintiff signed a cheque payable to cash or bearer for the amount required and gave it to the manager to complete the investment, when he approved of it. Some time later the manager told the plaintiff that the investment was unsatisfactory and that the money was still in the bank. About two months after he was given the cheque the manager paid it in to his own account to cover shortage for money he had taken from the bank. In an action to recover the amount of the cheque from the bank:—

Held, that the bank cannot take advantage of its own manager's improper use of the cheque to make good his thefts from it, and the plaintiff is entitled to judgment.

Statement

ACTION to recover $1,500 from the defendant Bank, being the amount of a cheque, payable to bearer, that the plaintiff handed to the local manager of the defendant Bank at White Rock for the purpose of investment but was later deposited by the said local manager to his own credit in the Bank to cover

his own shortage for money taken by him from the Bank. The facts are set out in the reasons for judgment. Tried by GREGORY, J. at Vancouver on the 11th of June, 1929.

Argument

A. M. Whiteside, for plaintiff: The plaintiff gave the cheque to the local manager to make a loan. Shortly after, the local manager advised that the loan should not be made and that the money given him was in the Bank. This ended the transaction as far as any personal relation with the manager was concerned. The Bank then continued to hold the cheque as well as the plaintiff's money on the plaintiff's behalf and the evidence of Mr. Ritchie, the Bank's assistant supervisor, confirms this view. The case of *Banbury* v. *Bank of Montreal* (1918), A.C. 626 does not apply. Moreover, it cannot be said the Bank was a gratuitous bailee in taking the plaintiff's money in deposit or in holding the plaintiff's cheque to be applied only for the purpose of payment to a borrower chosen by the manager: see *Thompson* v. *Bell* (1854), 10 Ex. 10; *Hackney* v. *Knight* (1891), 7 T.L.R. 254. The Court is not called upon to decide whether the manager was acting beyond the scope of his employment but that the money "is still in the hands of the Bank" and the Bank must account therefor.

Alfred Bull, for defendant: The plaintiff had kept a savings bank account at the Bank for some years. His agent, one Hughes, looked after his securities and the plaintiff had previously drawn cheques payable to proposed borrowers and left them with Graves (the local manager) who would hand them over when Hughes was satisfied with the security. The local manager was acting purely in a freindly capacity towards the plaintiff. It is undisputed that the Bank never received any benefit of the plaintiff's $1,500. The transaction was not one between the plaintiff and the Bank but between the plaintiff and Graves and the Bank is not responsible for Graves's criminal act in misappropriating his money. On the question of the Bank manager's authority, *Banbury* v. *Bank of Montreal* (1918), A.C. 626 applies to this case. In fact, this case is stronger in favour of the Bank. He was not acting within the scope of his employment in receiving the cheque for $1,500 and the Bank is not responsible: see *Giblin* v. *McMullen* (1868), L.R. 2 P.C.

GREGORY, J.

1929

June 18.

McDONALD v. ROYAL BANK OF CANADA

317; *Foster & Al., Executors,* v. *The Essex Bank* (1821), 17 Mass. 478; *Cheshire* v. *Bailey* (1905), 1 K.B. 237.

18th June, 1929.

GREGORY, J.: The essential facts in this case are not complicated and are easily stated.

The White Rock branch of the defendant Bank was in danger of being closed up. To increase the business and prevent such closing the manager induced the plaintiff to deposit moneys in the Bank pending the finding by the manager of a suitable investment therefor. The manager mentioned an investment and at his request, plaintiff signed a cheque for the amount required to make it and made the cheque payable to cash or bearer, and gave it to the manager to complete the investment when he approved of it. The manager never approved of it and never made it, and subsequently told the plaintiff that it proved to be unsatisfactory and that the money was still in the Bank. The cheque was made in May and not paid until July. The plaintiff believed he was dealing with the Bank through its manager.

Judgment

The evidence of Mr. Ritchie, assistant supervisor for British Columbia, makes it clear that a branch manager had authority to receive on behalf of the Bank customers, cheques, negotiable instruments, etc., and hold them subject to the customers' orders. That the cheque in question was so received and that the occasion for its use never arose, the proposed loan never having been made. It seems clear to me that the manager, Mr. Graves, had already stolen the Bank's moneys and that the Bank now claims the right to recoup itself as to $1,500 of Graves's shortage, because Graves after his thefts, attempted to cover his defalcation by charging the amount to plaintiff's account and surrendering the cheque to the cashier. See Mr. Ritchie's evidence:

"As a matter of fact, it was the Bank's money that Mr. Graves took, was it not? Didn't he enter that cheque simply against his account to cover his own shortage for money he had stolen from the Bank? Yes."

In my opinion the Bank cannot take advantage of its own manager's improper use of the cheque to make good his thefts from it. The case of *Banbury* v. *Bank of Montreal* (1918), A.C. 626 does not appear to me to be in point. That was a case of the responsibility of a Bank for its local manager's advice or

investments, and this is not a case of that kind, the loan that was discussed by plaintiff and Graves was never made, not even Graves pretended that it was. The sole question here is, can the Bank profit by Graves's misuse of the cheque to cover his own defalcations to the Bank? I think not.

There will be judgment for the plaintiff, with costs.

Judgment for plaintiff.

NOWELL *ET AL.* v. YELLOW CAB COMPANY, LIMITED, AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. (No. 3).

Practice—Costs—Joinder of plaintiffs—All successful—One only entitled to costs—Taxation—Review—Appeal—R.S.B.C. 1924, Cap. 51, Sec. 77—Marginal rules 976 and 987.

Where four plaintiffs are rightly joined in an action founded on tort and they are all successful in recovering certain amounts, but only one of them recovers a sufficient amount to entitle her to costs under marginal rule 976, she is entitled to the whole of the party and party costs except such items as are not attributable to her cause of action.

Statement

APPEAL by defendant Yellow Cab Company from the order of MURPHY, J. of the 25th of March, 1929, whereby the plaintiff Freda Nowell was allowed as her costs against the defendant Company the sum of $184.20 instead of $66.30 allowed by the deputy district registrar. In an action for damages against the Yellow Cab Company and the British Columbia Electric Railway Company for injuries received by Mr. and Mrs. Nowell and their two children while passengers in a taxi-cab of the Yellow Cab Company, they being run into by a car of the British Columbia Electric Ry. Co., the British Columbia Electric Railway Company settled the action as against them by payment of $600 and on the action proceeding against the Yellow Cab Company the plaintiffs recovered judgment, and on the

COURT OF APPEAL

1929

June 19.

NOWELL v. YELLOW CAB CO.

Statement

assessment of damages Mr. Nowell recovered $20, Mrs. Nowell $50, H. Nowell, Jr. $20 and Freda Nowell $500. Under section 77 of the Supreme Court Act, Freda Nowell only was entitled to the costs of the action. On the taxation the taxing officer only allowed one-fourth of all items that applied jointly to her and the other plaintiffs and her bill was taxed at $66.30. By the order appealed from all that portion of the bill that applied to her action was allowed.

The appeal was argued at Victoria on the 19th of June, 1929, before MACDONALD, C.J.B.C., MARTIN and McPHILLIPS, JJ.A.

Argument

Craig, K.C., for appellant: The learned judge below allowed the whole of the costs as though Freda were the sole plaintiff. She is only entitled to one-quarter of the common costs: see *Keen* v. *Towler* (1924), 41 T.L.R. 86. Where it is necessary to divide the costs the Court fixes the amount: see *Beaumont* v. *Senior* (1903), 1 K.B. 282; *M'Gowan* v. *Hamilton* (1903), 2 I.R. 311; *Ellingsen* v. *Det Skandinaviske Compani* (1919), 2 K.B. 567.

E. L. Tait, for respondent, was not called upon.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I would dismiss this appeal. It is perfectly clear to me that the order appealed from is right. As an illustration of the absence of any injustice, take the very case before us. There are four plaintiffs; they have been joined; one of them has succeeded in a manner that entitles her to costs. The others have not. The others get their judgment for damages without costs. That means that they are not entitled to claim any costs against the defendant. Freda, on the other hand, gets her judgment for $500 and she is awarded the costs along with that.

Now if there had been four different actions brought, what would have been the result? Freda would have got her damages and costs, the others would have got their damages without costs. So that in any case the defendants would have to pay such costs as are now claimed, and would have also to bear their costs for the other three distinct actions.

The Court's order is that the general costs of the action be paid to Freda, and no costs to the other parties. If there have

COURT OF APPEAL

1929

June 19.

NOWELL *v.* YELLOW CAB CO.

been any additional costs incurred by adding the other plaintiffs, these will be adjusted by the taxing officer.

The appeal is dismissed.

MARTIN, J.A.: I agree. I base my decision upon this ground, as distinguishing it from the cases cited by Mr. *Craig, viz.*: that in the formal judgment which has been entered in this action all of the co-plaintiffs have been successful in their events, one for $50, two for $20 each, and the fourth for $500. In the ordinary course of litigation, by rule 976, successful plaintiffs are entitled to the costs following the event, but the event here is in favour of each of the plaintiffs. Rule 987, however, statutory in its effect, contains a provision which declares that three of the plaintiffs are not entitled to any costs, having recovered a sum below that stated thereby. We are then faced with the situation that the fourth of the successful parties has a judgment in her favour with costs in pursuance of rule 976, and such being the case I am unable to apply the principle that Mr. *Craig* relies upon, because in all his cases the reasoning turns upon the element of non-success, whereas all here are successful. I restrict my observations to these particular circumstances entirely.

MARTIN, J.A.

Of course in taxation it is to be assumed that the taxing master will do what is appropriate to the circumstances, that is to say that no item at all should be allowed to the successful plaintiff, Freda, who recovered the $500 damages, unless it is attributable to her cause of action.

It follows that if the statement of claim contains, *e.g.*, ten paragraphs properly attributable to Freda's claim, they should be allowed her, and if six more paragraphs are not attributable to her, those should not be allowed: if paragraphs are common to them all, *i.e.*, if necessary to Freda as well as the others, she will be entitled to have them taxed to her.

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

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitor for appellant: *J. F. Downs.*

Solicitor for respondent: *A. H. Fleishman.*

MACDONALD, J.

1929

June 21.

ENGBLOM v. BLAKEMAN

ENGBLOM AND ERICKSON v. BLAKEMAN.

Land—Sale of—Cheque in part payment—Dishonoured—Consideration—Tainted with illegality—Beer licence—Transfer of—Transferee not a voter—Regulation 28 of Liquor Control Board—R.S.B.C. 1924, Cap. 146, Secs. 72 and 119.

The plaintiffs sold the defendant a lease of the Globe Hotel in the City of Nanaimo with the furniture and fixtures on the premises for $6,000. The defendant gave the plaintiffs a cheque for $3,000 and executed a chattel mortgage on the furniture and fixtures on the premises for the balance of the purchase price. Although the total consideration for the $6,000 payment appeared by the bill of sale and affidavit of *bona fides* to be the goods, chattels and fixtures in the hotel, it is admitted by the parties that an assignment of the beer licence attached to the property was an important part of the consideration. Regulation No. 28 of the Liquor Control Board provides that a beer licence cannot be granted or transferred, save to "a person who is registered or entitled to be registered as a voter in some electoral district in the Province." The defendant at the time of the sale was neither a voter nor through insufficient residence, entitled to be registered as a voter but the plaintiff was unaware of this and he attempted to carry out the sale in its entirety assuming the defendant was qualified to hold a beer licence. After the bill of sale and chattel mortgage had been executed and the $3,000 cheque delivered, the defendant went into possession and placed one H. in charge. Shortly after, concluding there would be difficulty as to transfer of the beer licence, he decided to abandon the property and he stopped payment of the $3,000 cheque. The plaintiffs then took possession under the chattel mortgage and brought action on the cheque.

Held, that the defendant's actions indicated that with full knowledge of his inability to then acquire the beer licence he was willing to forego for the time being, at any rate, the contemplated transfer. The consideration mentioned in the bill of sale included the $3,000 cheque and he treated it as binding between the parties and he represented to the plaintiffs that the sale was fully completed. He is estopped from asserting that there is any other contract between himself and the plaintiffs than the bill of sale and assignment of the lease and has severed from the consideration for the cheque the transfer of the licence.

Statement

ACTION to recover $3,000, the amount of a cheque which was dishonoured. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Nanaimo on the 15th of May, 1929.

Morton, for plaintiffs.
Maitland, K.C., and *Fleishman*, for defendant.

MACDONALD, J.
1929
June 21.
ENGBLOM v. BLAKEMAN

21st June, 1929.

MACDONALD, J.: Plaintiffs seek to recover the amount of a cheque, given by the defendant in their favour for $3,000 which was dishonoured. It represented the cash payment, in respect of the sale by the plaintiffs to the defendant of the lease, furniture and fixtures of the premises, known as the Globe Hotel in the City of Nanaimo for the sum of $6,000. Plaintiffs admit by par. 3 of their reply to the statement of defence that "as part of the consideration for the said $6,000" the plaintiffs were to execute a transfer of their beer licence for the said premises.

Defendant alleged various grounds of defence, such as fraud, conspiracy and misrepresentation and also that the cheque was not to be paid until the lease was assigned and that, in the meantime, it should be held in escrow. These grounds all failed in their proof and I find were unwarranted. In fact, as to the cheque being held in escrow, this was abandoned at the commencement of the trial. There was no deception practised upon the defendant. The only defence requiring consideration is, as to whether the consideration for the cheque was tainted with illegality and the defendant thereby was relieved from liability.

Judgment

The defendant contends that while the total consideration for the payment of the $6,000 would appear by the bill of sale and his affidavit of *bona fides* thereon, to be simply the goods, chattels and fixtures in the hotel, still that an assignment of the beer licence attached to the property was an important part of the consideration. This contention is supported, as I have mentioned, by the admission of plaintiffs in the pleadings. I have no doubt, that the defendant was anxious, when he gave the cheque to become not only the proprietor of the hotel, but also to obtain the benefit of operating a portion of the premises under a beer licence. Aside from the pleadings and the oral evidence, the deposit receipt for $100 given by Arnold Hickling, an agent acting for the plaintiffs, refers to the licence being included in the sale. Defendant was, however, well aware before he received the bill of sale and executed a chattel mortgage for the balance of the purchase price, that there were difficulties which he might

MACDONALD, J.

1929

June 21.

ENGBLOM v. BLAKEMAN

Judgment

encounter in obtaining a licence of this nature in his own name. In this connection, as I intimated at the trial, I accept the evidence of C. E. Love, one of the staff of Messrs. Pemberton & Son Vancouver Ltd. who fully explained the matter to the defendant. Then both parties assumedly knew the law of the Province, that beer licences could not be granted or transferred, according to regulation No. 28 of the Liquor Control Board, save to "a person who is registered or entitled to be registered as a voter in some electoral district of the Province." This regulation has the same force as if it were part of the Government Liquor Act and any breach or attempted breach of its provisions might invalidate the transaction, as being a prohibited act, with attendant penalties, according to section 70 of the said Act. This section provides, that every person who violates any provision of the Act or the regulations shall be guilty of an offence against the Act, whether otherwise so declared or not. Section 72 of the Act provides a penalty, for any offence for which no penalty had been specifically provided.

As a matter of fact the defendant, at the time of his purchase and contemplated transfer of the licence was neither a voter nor, through insufficient residence, entitled to be registered as a voter, in British Columbia, but the plaintiffs were unaware of this impediment in the way of the transfer. I think defendant was not concerned, however, and expected that this difficulty would be overcome. Plaintiffs, in good faith, attempted to carry out the sale in its entirety, assuming that the defendant was qualified to hold a beer licence. Their want of knowledge in this respect is shewn by the letter signed by the plaintiff Engblom (who had the licence in his name) addressed to the secretary of the Liquor Control Board (Exhibit 10) which was to be delivered in due course, appointing the defendant, manager of the Globe Hotel and beer parlor "pending the transfer to him of beer licence No. 156."

Even with this lack of knowledge on the part of the plaintiffs, that they were innocently assisting in what would, if accomplished, be a violation of the said regulation still, as it was part of the consideration for the cheque of $3,000, it might have been effective as a defence, by the defendant, if he had taken and consistently retained that position from the outset, although such

a conclusion might depend upon the view which would be adopted as to the actions of the plaintiffs. This question of illegality and what its effect may be, upon both parties to a contract was recently discussed in an article in the Canadian Bar Review, Vol. 7, p. 326. Although not altogether applicable to this case a portion thereof is instructive and might have a bearing upon the rights of the parties, *viz.* (pp. 328-9):

"The more recent authorities turn upon the answer to the question whether the intention to accomplish an ultimate illegal purpose was common to both parties or was entertained by one party to the knowledge of the other. Pollock: Principles of Contract, 9th Ed., p. 444. But in the case of an agreement for the transfer of property, it appears that mere knowledge in the mind of the transferor that the transferee intends to apply the property when transferred to him for an illegal purpose will not make the agreement unenforceable. It must be possible to draw a just inference from the facts in evidence, having regard to the particular nature of the subject-matter and to the condition in life of the transferee, that the transferor shared with the transferee the intention that the *res* should be applied for the ultimate illegal purpose, before the Court will treat the agreement as unenforceable. See *Clark* v. *Hagar* (1893), 22 S.C.R. 510, particularly at pp. 539-540 [and other cases cited]."

Judgment

After the bill of sale and chattel mortgage had been executed and the cheque of $3,000 delivered, thus apparently closing the transaction, except as to the defendant taking actual physical possession of the property, he returned from Nanaimo to Vancouver. He then appears to have rued his bargain and stopped payment of the cheque. By chance he shortly thereafter became acquainted with one Hubbard and engaged him to return to Nanaimo with a view, as originally arranged, of taking possession as owner, of the property, covered by the bill of sale. I find he took possession of the premises and appointed Hubbard to take charge. Defendant then, if there could be any doubt before, knew his true position as to the licence. Once again, shortly thereafter, he changed his mind and formed the determination to abandon the property and, if possible, annul the sale. Plaintiffs, to protect themselves, retook possession, a course which, irrespective of any other rights, they were justified in taking under the terms of the chattel mortgage.

Plaintiff, upon the cheque being dishonoured, commenced this action and shortly thereafter the defendant sent one Sykes to Nanaimo to negotiate with the plaintiffs, as to purchasing the property, of which the defendant was the owner, subject to the

MACDONALD, J. 1929 June 21.

ENGBLOM v. BLAKEMAN

chattel mortgage. I am satisfied this movement on the part of the defendant was simply to induce the plaintiffs to act in a way which would jeopardize their rights against the defendant. This action of the defendant proved abortive and is immaterial, except as shewing an attempt made by the defendant to escape liability.

Judgment

The real question to be determined is, whether the defendant, with a full knowledge of his inability to then acquire the beer licence, was willing to forego for the time being, at any rate, the contemplated transfer. His actions would indicate that this was his intention when he returned to Nanaimo and took possession of the property in the manner shortly outlined. The consideration mentioned in the bill of sale, included the amount of the $3,000 cheque and he then treated it as binding between the parties. In effect he represented to the plaintiffs that the sale was fully completed notwithstanding anything he may have said or done. Is he not now estopped from asserting that there is any other contract between himself and the plaintiffs than the bill of sale and assignment of the lease? I think defendant has thus severed from the consideration for the cheque, the transfer of the licence and cannot set it up as a defence to avoid payment.

There will be judgment for the plaintiffs for $3,000 and interest. If plaintiffs desire a payment out of moneys in Court I will consider an application for that purpose. Plaintiffs are entitled to their costs.

Judgment for plaintiffs.

THE KING v. THE "MARY C. FISCHER."

MARTIN, LO.J.A.

1929

July 18.

THE KING v. THE "MARY C. FISCHER"

Admiralty law — Ship — Foreign fishing-vessel within three-mile limit— "Unavoidable cause"—Seizure—Costs—"Probable cause"—R.S.C. 1927, Cap. 42, Sec. 183; Cap. 43, Sec. 10 (b).

The defendant ship, a foreign fishing-vessel, was seized by a Canadian fisheries protection officer because of an alleged infraction of section 10 of the Customs and Fisheries Protection Act. The defence was that the entry into Canadian waters was occasioned by the fact that in anchoring where the vessel did the one man in temporary command during the illness of the master thought he was without the three-mile limit and anchored at a place which in the dark he believed was without the territorial waters of Canada. The evidence disclosed that the sole man in charge had, after two days' battling with the elements, with a very sick comrade below, become exhausted, having had only two or three hours' sleep in 72 hours.

Held, that in the special circumstances of this case the mistaken position of the vessel can be deemed to be an "unavoidable cause" within section 183 of the Customs Act. The Court must look upon their position with "a lenient eye" as being the misfortunes of innocent and much distressed mariners, and the ship must be released.

Held, further, that in the complicated circumstances of this case, and the unusual elements that it presents it would be impossible to say that the seizing officer did not have "probable cause" for seizure. The claimant will therefore be deprived of the costs which he otherwise would have had in the ordinary practice of this Court.

Statement

ACTION for the forfeiture of the schooner "Mary C. Fischer" a foreign fishing-vessel seized north of Prince Rupert by the fisheries protection officer because of an alleged infraction of the Customs and Fisheries Protection Act. Tried by MARTIN, Lo.J.A. at Victoria on the 15th of July, 1929.

O'Halloran, for the Crown.
Savage, for the ship "Mary C. Fischer."

18th July, 1929.

Judgment

MARTIN, Lo.J.A.: This case presents some features which are quite different from those in the other cases in which judgment has been given in that there is no question here about the intention of the vessel to come within Canadian waters because of stress of weather, or for any cause at all. The position taken by

MARTIN, LO.J.A.

1929

July 18.

THE KING v. THE "MARY C. FISCHER"

Judgment

the defence is that the entry into Canadian waters was occasioned by the fact that in anchoring where the vessel did, the crew, or the one man who was in temporary command during the illness of the master, thought that he was without the three-mile limit and anchored at a place which in the dark he believed was without the territorial waters of Canada. In this I think that he was genuinely mistaken. The evidence leads me to believe that as a matter of fact the place of anchorage that was chosen was really within the waters of Canada, and that he had by misadventure "entered" wrongfully and contrary to the statute—section 183, Cap. 42, R.S.C. 1927. But the question is, was such entry in the circumstances an "unavoidable cause" within section 183 of the Customs Act? And that is the turning point of the case.

As I have before pointed out in the cases that have been decided at the present sittings of this Court, that phrase is a very wide one, and depends upon the circumstances of each particular case, and no definition should be attempted, or could, in ever-varying circumstances, be given of it.

It is apparent that what the vessel (registered at Ketchikan, Alaska) was endeavouring to do was to return to Alaskan waters and refit at the Hutchison Station at Noyes Island, where there were special opportunities for so doing, and at a very small expense, and where it would be most convenient for her to do so. Having that object in view, which was a proper object, that explains the reason why she did not go to Prince Rupert. And there is also this other very substantial reason, *viz.*, that the owners who were on board did not have the money to refit at Prince Rupert, or to obtain medical advice or assistance there.

The disturbing point of the case is as to whether or no a certain anchor was on deck, the larger anchor, as Captain Sheppard deposed, at the time the arrest was made by him. It is a difficult situation when these extraordinary conflicts of evidence arise in the testimony of witnesses who seem to be respectable and truthful men. And it is the more unfortunate that a conflict should have arisen on this point, because it has turned out to be a question of very considerable importance. I must find, without the slightest reflection upon Captain Sheppard, that he was mistaken in regard to that anchor. What finally induces

me to come to that decision is the uncontradicted fact that before the two men, the owners, left Prince Rupert to come here, they went on board the ship, by permission, they say, of the Customs authorities, and removed or shifted two anchors from below the remaining tons of ice on board the vessel. Now I pause here to say that it seems to me a very odd thing, and to me an inexplicable thing that these two men were allowed by the authorities who were in custody of the vessel—not the marshal of this Court at that time, but the local Customs authority at Prince Rupert—they say they got the permit from—to go on board without anybody accompanying them to see what they were doing. I do not wish to say for one moment that what they were endeavouring to do was not perfectly proper, *i.e.,* to put the vessel in order before coming down to attend the trial. But at the same time I feel impelled to say that common precaution should have suggested to those in charge, the local Customs authority, that when those two men were allowed to go on that vessel that was then under seizure, some officer should have gone with them so as to have seen exactly what happened, and then this whole question as to the anchors would have been cleared up. But the fact remains that the uncontradicted testimony of these two men is that they did go aboard the day before they started to come here, and removed those two anchors from beneath the ice, bringing one up on deck and leaving the larger below. Now if the authorities in charge of a seized vessel permit people to go on board of it without any one accompanying them to keep the Crown advised, so to speak, as to what is being done upon the vessel under seizure, this Court is really left in a very awkward position, an unsatisfactory position, I may say; the result being that I must find that there was no anchor practically available for the vessel other than the small one, the 25-pound one, then on deck and which was put out that night.

Judgment

Such being the case, the only question remains as to whether or no the putting out of that anchor in that position, that mistaken position, can be deemed to be under the circumstances an "unavoidable cause"? I have come to the conclusion that in the special circumstances of this case it must be held to be so. For this reason, that the sole man in charge had after two days battling with the elements, with a very sick comrade below, in a

MARTIN, LO. J.A.

1929 July 18.

THE KING v. THE "MARY C. FISCHER"

Judgment

very courageous and pertinacious manner, which I must praise him for, become exhausted, having had only a few hours' sleep—two or three hours' sleep in 72 hours. And I must say that both common sense and humanity suggest that in the circumstances, such dire circumstances, it would be a harsh, and to my mind an unconscionable stand to take that he must then be regarded as a mariner in ordinary conditions and be called upon to take such precautions as would in other circumstances be required by this Court. In other words, he was prevented from doing what he otherwise would have done, or should otherwise have done, by the exhaustion of his natural forces, and it was not possible for him to remove the ice that was necessary to move in order to get one of the larger anchors below it; it was, in short, not physically possible for him to do more in the circumstances than he did. Just to illustrate—suppose, for instance, in attempting to put out the anchor, he had after that long period of stress and trial fallen into a faint, succumbed, and the ship had drifted ashore, under such circumstances it would be perfectly apparent to everybody that such inshore drift would be an "unavoidable cause." It then comes to the question of degree; and the degree in the circumstances here is such that he has, in my opinion, established what is really within the true meaning of section 183 of the Customs Act, an "unavoidable cause" for being where he was upon that night and the next morning in question.

The ship, then, must be released, as it comes within the "permission" given by section 10 (*b*) of Cap. 43, R.S.C. 1927. The circumstances of the whole case are such, as I said fifteen years ago in the case of *The King* v. *The Valiant* (1914), 19 B.C. 521, 525, that this Court will look upon them with (as the historical expression is) "a lenient eye" as being the misfortunes of innocent and much distressed mariners.

The ship, then, as I have said, will be released. But that does not dispose of the other question, as to whether or no in the circumstances the seizure was made in pursuance of section 27 of Cap. 43—that is to say, was there a "probable cause" for it? That point I must decide—the authority being given by that section to this Court to certify to "probable cause" with regard to costs; it is a special direction outside the ordinary jurisdic-

tion of this Court; and by that direction of Parliament I must be governed. Have you anything to say, then, Mr. *O'Halloran,* upon section 27, which says if I certify there was "probable cause for seizure the claimant shall not be entitled to costs"?

O'Halloran: On the evidence I would submit that there was reasonable and probable cause for the seizure.

THE COURT: What do you say, Mr. *Savage?*

Savage: This, particularly, my Lord, is a case in which I felt moved before the defence was commenced to ask for a non-suit; because in this case particularly the captain was informed of the reasons why the men were there; and having been so informed it then became, I submit, his duty to make further enquiry, under section 6, Cap. 43, which he did not do, but chose to disbelieve the story of these men. And under the circumstances, my Lord, I say he did not fulfil the duty, or the opportunity which he had to make sufficient enquiry to prevent the necessity for these proceedings.

Judgment

THE COURT: You see, the difficulty is there, Mr. *Savage,* and this is a very difficult case upon that point, it is the most difficult of all of them that I have had at these sittings, to determine that question; because the circumstances of the case are such as to preclude, really, the seizing officer having an opportunity to go into all these facts. At the time that officer saw those men that morning, one of them had by then practically recovered, and the other man seemed to him to be in good health. Of course the physical effects of a sound sleep of that length are very marked. And then he found them in that position and was told something that was really untrue, that is that the vessel had anchored five miles out. His nautical knowledge convinced him, and properly convinced him, that that was a mistake, and with the set of the tides, and the local conditions, it could not be so. So therefore he was faced with a knowledge of something that he knew from his own nautical experience could not be the fact, and I have found that he was right in that.

Savage: Yes, I have to regard that finding, my Lord.

THE COURT: You see, it is the turning point; because if I were to find, for example, that there was not "probable," that is to say "reasonable" cause (Salmond on Torts, 17th Ed., p.

MARTIN, LO.J.A.

1929

July 18.

THE KING v. THE "MARY C. FISCHER"

619 (*n*)) for this seizure, I would have to hold in the circumstances, in effect, that Captain Sheppard did something which was really not part of his duty, or exceeded his duty.

Savage: I can only urge, my Lord, that he had sufficient knowledge; he had knowledge of the previous days' distresses, and should have had knowledge of the anchor, according to the finding of the Court this morning—the insufficiency of the anchor. He did have knowledge of the engine trouble to such an extent that before he reached Prince Rupert he had to put his own engineer aboard to remedy that.

THE COURT: But it was so quickly repaired, you see, that he would infer from that that perhaps it was not a genuine claim.

Savage: Well, I cannot submit more, by Lord.

THE COURT: No. I realize it is a hard position, Mr. *Savage,* and all I can say is that if it was within the ordinary jurisdiction of this Court it would give me no trouble whatever, but I am compelled to make a decision which is special in its nature.

Judgment

Savage: I think a further enquiry, under the statute, which is provided under section 6, would have brought out all the facts which have been brought out today. I cannot urge further than that.

THE COURT: I think, in the complicated circumstances of this case, the unusual elements that it presents, that it would be impossible for me to say that the seizing officer here, Captain Sheppard, did not have, as the statute says, "probable cause" for seizure, and it therefore becomes my duty to certify to that effect. The consequence will be that the claimant will be deprived of the costs which he otherwise would have had in the ordinary practice of this Court.

Judgment accordingly.

IN RE NOTARIES ACT AND J. A. STEWART.

MORRISON, C.J.S.C. (In Chambers)

1929

July 19.

IN RE NOTARIES ACT AND J. A. STEWART

Notaries—Application for order for examination and enrolment—Need of notary public in applicant's district—B.C. Stats. 1926-27, Cap. 49, Secs. 5 and 6.

An applicant for an order for examination and enrolment under the Notaries Act being Provincial assessor for the Fort Steele Assessment District and his duties taking him constantly into the more sparsely settled portions of the district:—

Held, that although there are more than a sufficient number of notaries public in the three larger towns within the district there is a public necessity for having a notary available in the outlying portions thereof and the application should be granted.

Statement

APPLICATION for an order for examination and enrolment under sections 5 and 6 of the Notaries Act. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 9th of July, 1929.

P. McD. Kerr, for the application.
P. R. Leighton, for the Law Society of British Columbia.

19th July, 1929.

MORRISON, C.J.S.C.: This is an application by John Alexander Stewart of Cranbrook, seeking enrolment af a Notary Public pursuant to the provision of the Notaries Act, section 6 of which sets out the prerequisites to which an applicant must respond: (a) "That the applicant is a fit person"; (b) "that there is need of a Notary Public . . . where the applicant desires to practise."

Judgment

The applicant is a "fit and proper person." The contest raised by counsel appearing for the Law Society turns on (b) *viz.*: That there is no present necessity for more notaries in that region. The applicant is a civil servant of the Province being Provincial assessor in and for the Fort Steele Assessment District which embraces the Fernie and Cranbrook Land Districts including the towns of Fernie, Kimberley and Cranbrook. The Fort Steele District is roughly about 80 miles by 80 miles. The applicant's duties bring him there. In Cranbrook town there

MORRISON, C.J.S.C. (In Chambers)

1929

July 19.

IN RE NOTARIES ACT AND J. A. STEWART

Judgment

are eight notaries. In the town of Kimberley, not far from Cranbrook, there are three and in the town of Fernie there are seven, making eighteen in the Fort Steele Land District, but they are accumulated in those three towns in all of which there are solicitors, barristers and real-estate agents. Settlers desiring the services of a notary, for which the cost would be negligible if a notary were readily available are now obliged, either, to incur the expense of going to one of the towns mentioned or pay a notary to come to them. This, to poor settlers might mean a loss of time and expense which would be an awkward burden of which one would think they should be relieved. That is the ground upon which the applicant bases his desire to become a notary; to render necessary aid to these people at a minimum of cost, convenience and expense. He does not desire or intend to practise as a notary generally in order, adventitiously, to supplement his present stipend, nor to come into competition with those already having their patent. There are small operators in the mining and lumbering business, hand loggers, prospectors and traders struggling with the conditions usually found in those remote and sparsely settled portions of the Province. I am satisfied that there is a public necessity for having a notary available in those parts. It may well be that there are too many notaries already in Fort Steele Land District. The objection, if such is the case, lies in the fact that too many have been appointed who perform their duties in the several towns mentioned. The town should not be served with so many at the expense of the outlying portions of the District. I think the public would be greatly convenienced by the appointment of Mr. Stewart. The application is granted. Application under the Act should be decided upon the particular exigencies and necessities of each case as it arises.

Application granted.

GEORGIA CONSTRUCTION COMPANY LIMITED AND BANK OF TORONTO v. PACIFIC GREAT EASTERN RAILWAY COMPANY.

MORRISON, C.J.S.C.

1929

July 22.

GEORGIA CONSTRUCTION CO. *v.* PACIFIC GREAT EASTERN RY. CO.

Execution—Application for stay pending appeal to Privy Council—Financial inability of successful litigant to return amount of judgment in case of reversal—Improbability of obtaining leave to appeal.

The defendant applied to stay execution pending an appeal from the Supreme Court of Canada to the Privy Council on the ground of the financial inability of the plaintiff the Georgia Construction Company to return the amount of the judgment in the event of a reversal. The plaintiff, the Bank of Toronto, had an assignment of the moneys claimed under the contract sued upon.

The application was refused as the material in support does not justify depriving the plaintiffs of the fruits of their judgment, and further in the event of the defendant's success on appeal repayment of the moneys paid is secured by the joinder of the Bank of Toronto as a plaintiff in the action.

Per curiam: Decisions of the Supreme Court of Canada are final on general questions connected merely with the construction of agreements which do not raise either far-reaching questions of law or matters of dominant public importance.

APPLICATION by defendant for a stay of execution pending an appeal to His Majesty in Council from the decision of the Supreme Court of Canada. The facts are set out in the reasons for judgment. Heard by MORRISON, C.J.S.C. at Vancouver on the 6th of July, 1929.

Statement

Locke, for the application.
J. W. deB. Farris, K.C., contra.

22nd July, 1929.

MORRISON, C.J.S.C.: This is an application made on behalf of the defendants for a stay of execution pending an appeal to His Majesty in Council from the judgment of the Supreme Court of Canada reversing the judgment of the Court of Appeal of British Columbia and restoring that of the trial judge in favour of the plaintiffs.

Judgment

The main ground upon which counsel bases the application is the alleged financial inability of the Georgia Construction

MORRISON, C.J.S.C.

1929

July 22.

GEORGIA CONSTRUCTION CO. v. PACIFIC GREAT EASTERN RY. CO.

Judgment

Company to return the amount of the judgment in the event of a reversal by the Privy Council, should it now be paid out to them. However that may be, it must be borne in mind that the other plaintiff is the Bank of Toronto which has an assignment of the moneys claimed under the contract sued upon, for advances made, and to whom meanwhile the fruits of the judgment would go.

The security for repayment which the joinder of the Bank affords, takes the application out of the category to which the cases cited by Mr. *Locke* apply. Should the amount of the judgment exceed that assigned to the Bank by some few thousand dollars, there is existing another claim by the plaintiffs against the defendant for $10,900, not included in the judgment. A cheque for this amount had been given by the defendant in favour of the plaintiffs to which however a string was attached sufficiently strong to bear the strain of a pull back after the result of the hearing before the Court of Appeal in their favour became known to the defendant. Mr. *Farris* submits that these two grounds alone are a sufficient answer to the application. He goes further and desires me to consider the question of the great improbability of the defendant succeeding in obtaining leave to appeal, and in support of this contention he cites *Albright* v. *Hydro-Electric Power Commissioners of Ontario* (1922), 92 L.J., P.C. 80. Viscount Haldane in the Privy Council dismissing the petition for leave to appeal from the judgment of the Supreme Court of Canada indicates the policy of the Board. In that case the amount was considerably larger than here and in which the questions involved were of somewhat the same character:

"In this case their Lordships are not able to recommend that special leave should be given to appeal from the Supreme Court of Canada. The policy of their Lordships' Board has been not to entertain applications which will prevent the decision of the Supreme Court from being final on general questions connected merely with the construction of agreements which do not raise either far-reaching questions of law or matters of dominant public importance. Here there was an individual agreement; it may have been construed rightly or wrongly by the Supreme Court of Canada, but it is an individual agreement, and the decision turned upon a question of construction. The view which was taken is a view the effect of which may be obviated in future agreements by the employment of apt language. In these circumstances their Lordships think that they would

not be justified in recommending the intervention of the Crown to entertain an appeal from the judgment of the Supreme Court."

That aptly fits this case, to shew the nature of which it will suffice to quote from the opening words of the learned judge Mr. Justice Duff who delivered the unanimous judgment of their Lordships of the Supreme Court of Canada:

"The controversies in this appeal relate to questions of documentary evidence, and in part upon an appreciation of the weight of oral evidence adduced at the trial, upon which the conclusions of the learned judge were set aside by the Court of Appeal."

So that here there is sought an appeal to the Privy Council in a case which "raises no far-reaching questions of law or matters of dominant public importance." By the Supreme Court Act, being Cap. 35, R.S.C. 1929, Sec. 54, the Supreme Court of Canada is made the Court of final appeal in Canada when its pronouncements are sought. That section enacts:

"54. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative."

Judgment

The defendant could, had it been so advised, have launched its appeal direct to the Privy Council instead of to the Court of Appeal. On the way to a final decision there are these two *termini*, the Supreme Court of Canada and the Privy Council. Having chosen the one, the other cannot be sought unless by praying His Majesty in Council to exercise the Royal Prerogative to review the judgment. In a proper case this is seldom or never withheld. It does appear that a very great burden is thrown upon litigants who are parties to an agreement personal to themselves, being subjected to the expense and loss of time involved in appeals to His Majesty in Council from the decision of our final Court of Appeal in a case which has swept the gamut of our higher Courts. Litigants in Canada possess the inestimable advantage of having the ambit of appeal extended to the Privy Council by the Constitution of the country, a privilege of which I trust we shall not readily be deprived. The facilities thus afforded should not be employed to advance the contest beyond the scope indicated so pointedly and on more than one occasion by their Lordships who are advisers to His

MORRISON, C.J.S.C.

1929. July 22.

GEORGIA CONSTRUCTION CO. *v.* PACIFIC GREAT EASTERN RY. CO.

Judgment

Majesty in Council. That I think is what is sought in this application. I indulge the hope, which I trust may not be in vain, that a settled practice may be established throughout Canada based upon what should be interpreted as a kindly request by Their Lordships of the Privy Council to intermit the plague of appeals from judgments of the Supreme Court of Canada, our final Court, on questions with which their Lordships of that Court, I respectfully submit, should be left to deal. The application is refused on the ground that the material in support falls short of that which would justify one in depriving the plaintiffs of the present fruits of their judgment; and on the further ground that upon the contingency happening that leave is given and that the appeal is allowed the defendant shall be able to secure the full repayment to it of any moneys with which in the meantime it is obliged to part. Notwithstanding this, however, I accede to Mr. *Locke's* plea *ad misericordiam* and order that the defendant pay the amount of the judgment to the Bank of Toronto to be retained by them pending the result of this appeal.

Application dismissed.

MACDONALD MURPHY LUMBER COMPANY LIMITED v. ATTORNEY-GENERAL OF BRITISH COLUMBIA.

MORRISON, C.J.S.C.

1929

July 23.

MACDONALD MURPHY LUMBER CO. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

Constitutional law—Legislative power of Province—Timber exported from Province—Taxation—Direct or indirect tax—Validity of sections 58, 62 and 127 of Forest Act—Ultra vires—R.S.B.C. 1924, Cap. 93.

The tax imposed by the Forest Act on timber which is cut within and exported from the Province is an indirect tax and its imposition is therefore *ultra vires* of the Provincial Legislature.

City of Halifax v. *Fairbanks' Estate* (1928), A.C. 117 applied.

Statement

ACTION for a declaratory judgment as to the validity of sections 58, 62 and 127 of the Forest Act. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 16th of July, 1929.

O'Brian, K.C., and *Hossie*, for plaintiff.
Griffin, K.C., and *DesBrisay*, for defendant.

23rd July, 1929.

Judgment

MORRISON, C.J.S.C.: This is in the nature of a test action by which the plaintiff is seeking by means of a declaratory judgment to test the validity of certain sections of the Forest Act, R.S.B.C. 1924, Cap. 93, namely, sections 58, 62 and 127.

The plaintiff, a company incorporated in the Province of British Columbia, is the owner in fee simple of certain timber lands on Vancouver Island in what is known as the Esquimalt and Nanaimo Railway belt and particularly section 1, Renfrew District, and also block 75 Cowichan Lake District and has the right to fell trees growing upon the said areas and to remove the timber. In the conduct of its logging operations it has complied with the provisions of the Forest Act promulgated in that behalf by the department of lands in the Province, Forest branch, paying the scaling fees and expenses and all proper taxes payable in respect of the timber shewn in its accounts, other than that upon the timber taken from block 75 and section 1 which when it came to tender was refused on the ground

MORRISON, C.J.S.C.

1929 July 23.

MACDONALD MURPHY LUMBER CO. v. ATTORNEY-GENERAL OF BRITISH COLUMBIA

that the tender was not accompanied by a return on what is known as Form F. B. 38 or by the further sum of $2,025.24 being the amount of a timber tax alleged to be due on the timber cut from block 75 and section 1, referred to also at the trial as an export tax.

The plaintiff in the course of its business had entered into contracts to sell the timber in question to a concern in the State of Washington, who manufacture timber into various articles of commerce and was prevented from carrying out its contract by the acts aforesaid of the department. The timber is suitable for and is used in the manufacture of various articles of commerce. It was not the intention of the plaintiff, or the purchaser, in Washington to use the said timber in British Columbia or to cause it to be manufactured into sawn lumber or other manufactured wood product in British Columbia or to dispose of the said timber to any one who would use the same in British Columbia. It also appears that there is no royalty reserved to the Province of British Columbia upon the said timber and that there is no royalty or tax paid to the Dominion of Canada in respect of it.

Judgment

When the plaintiff informed the department of its intention to deliver this commodity to the purchasers in the State of Washington it was asked to sign Form F. B. 38 and to pay the sum of $2,025.24 as a timber tax pursuant to section 58 of the Forest Act to which there are four schedules. The plaintiff refused to make the return or to pay the tax demanded. The defendant took prompt and effective steps to prevent the logs being taken across the border. They are now assembled in booms in British Columbia waters pending eventualities. The plaintiff also claims damages. An old branch of trade is the purchase and sale of standing timber in British Columbia. The traffic in logs has been and still is an important feature in the trade and commerce of the Province both foreign and domestic in which are engaged producers, middlemen, manufacturers and buyers of logs both in British Columbia and the State of Washington.

The plaintiff submits that section 58 of the Forest Act, the return in Form F. B. 38 and other returns provided by the Act,

as well as section 62 and section 127 of said Act, in so far as they refer to the plaintiff, are *ultra vires* the Legislature of the Province of British Columbia. Section 58 enacts:

"There shall be due and payable to His Majesty a tax upon all timber cut within the Province, save and except that upon which a royalty is reserved by this Act or the Timber Royalty Act, [repealed by 1924, Cap. 20, Sec. 13] or that upon which any royalty or tax is payable to the Government of the Dominion, which tax shall be in accordance with the following Schedules:—

"SCHEDULE No. 1.

"Timber suitable for the manufacture of lumber and shingles, two dollars per thousand feet, board measure, on No. 1 grade; one dollar and fifty cents per thousand feet, board measure, on No. 2 grade; and one dollar per thousand feet, board measure, on No. 3 grade; Provided that a rebate of all the tax over one cent per thousand feet, board measure, shall be allowed when the timber upon which it is due or payable is manufactured or used in the Province."

Section 62:

"(1.) No person shall export or remove from the Province any timber in respect of which any royalty, tax, or revenue is payable to His Majesty in right of the Province, unless a permit is obtained from an officer of the Forest Branch certifying that the timber has been scaled, and all royalty, taxes, and revenue so payable in respect thereof have been paid.

"(2.) Every contravention of the provisions of this section shall render the offender liable to forfeit and pay to His Majesty the sum of one thousand dollars, to be recovered, with all costs as between solicitor and client, in an action brought in the name of His Majesty in any Court of competent jurisdiction.

Judgment

"(3.) The Minister, or any person authorized by him, may do all things necessary to prevent a breach of the provisions of this section and to secure compliance therewith, and may for such purpose take, seize, and hold all timber which is, or is suspected to be, in course of transit out of the Province in contravention of the provisions of this section, and may also take, seize, and hold every boat which is towing any such timber; and if the Minister decides that it is not the intention of the holder, owner, or person in possession of the timber to use it in the Province, or to manufacture it or cause it to be manufactured into sawn lumber or other manufactured wood product in the Province, or to dispose of the timber to others who will use the same in the Province, or have the same so manufactured in the Province, the Minister may sell or cause to be sold such timber and boat by public auction, and the proceeds of the sale shall be the property of His Majesty, and shall form part of the Consolidated Revenue Fund. . . . ."

It is submitted on behalf of the plaintiff that these provisions are restrictive and tend to prohibit freedom of export trade in this article of commerce. As an inducement to the producer of the logs, the Provincial Government relaxes and offers a rebate

MORRISON, C.J.S.C.

1929

July 23.

MACDONALD MURPHY LUMBER CO. *v.* ATTORNEY-GENERAL OF BRITISH COLUMBIA

Judgment

if the logs are not exported. Should it be sought to export them the tax is demanded which, if paid, it is perforce added by the purchaser to the cost of the commodity. The Act does not in terms state that this tax is an export tax. The defendant contends that the tax is a tax intended to be imposed upon timber after being cut, that it is a "timber tax," the levying of which is within the power of the Legislature. The plaintiff on the other hand contends that it is in effect, though perhaps not in form, an export tax. Applying epithets does not as a rule disclose the true character of a transaction or of a statutory enactment. Both parties invoke the apposite and well-known clauses of The B.N.A. Act, 1867, Cap. 3, in their contentions as to whether this tax is direct or indirect. The two latest pronouncements by the Privy Council are cited, *viz., Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934; 96 L.J., P.C. 149; (1927), 3 W.W.R. 460; *City of Halifax* v. *Fairbanks' Estate* (1927), 3 W.W.R. 493; 97 L.J., P.C. 11; (1928), A.C. 117. In my judgment, following the trial of the first case (*Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co., supra*) I dealt at length with the authorities which up to that time had, in my opinion, any useful bearing on this aspect of the case and which were also cited at the present trial. No purpose can be served by now again referring to them in leading up to the ultimate judgments in the Privy Council in these cases. The Lord Chancellor in *City of Halifax* v. *Fairbanks' Estate, supra,* at p. 498 [W.W.R.] expresses the opinion, which is to be taken as a guide in determining whether a tax is direct or indirect, that "It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity" and his Lordship observes that the established classification of the old and well-known species of taxation should not be disturbed by attempting to apply a new test to every particular member of those species:

"The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with

Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation."

If the meaning is that a tax may be placed in a category or bloc, such as the trade and commerce bloc; the customs and excise bloc; the personal property bloc and so forth, which are separated by border lines not very clearly defined, I find no difficulty in assigning this tax to one of the blocs upon which the Province must not trespass. I find that the nature and general tendency of the tax assailed is to pass it on to the purchaser, and is an indirect tax which is *ultra vires* the Legislature of British Columbia.

The preliminary question, as to whether the plaintiff should not have proceeded by way of petition of right was spoken to briefly and if counsel desire to be heard further, I shall fix a day.

Judgment accordingly.

FISHER, J.
(In Chambers)

1929
July 27.

WATSON
v.
BARRETT

WATSON v. BARRETT *ET AL.*

Practice—Action by shareholder on behalf of himself and others against directors — General meeting—Resolutions—Alleged invalidity—Shareholders waiting outside while meeting held in inner office.

In an action against a company and its directors, the plaintiff who was suing on behalf of himself and the other shareholders applied for an order to continue an *interim* injunction until after the trial restraining the defendants from carrying on as a board of directors. The act complained of was that some of the defendants did not wish certain of the other shareholders to be present or represented at the annual general meeting of the company and prevented such presence or representation by having the meeting take place in an inner office of the place of meeting while some of the other shareholders were waiting to attend in the outer office to the knowledge of the defendants.

Held, that if irregularities were committed in the conduct of the meeting at which resolutions complained of were passed it could be regularized by the passing of fresh and effective resolutions. The Court will not interfere in the internal management of the company and the application should be dismissed.

Foss v. *Harbottle* (1843), 2 Hare 461 applied.

APPLICATION by plaintiff to continue until after the trial an *interim* injunction granted to restrain the defendants from carrying on as a board of directors of the defendant Company. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 27th of July, 1929.

Marsden, for the application.
Grossman, contra.

Statement

FISHER, J.: This is an application on the part of the plaintiff to continue until after the trial the *interim* injunction granted restraining the defendants from carrying on as a board of directors of the defendant Company. Action is brought by the plaintiff on behalf of himself and all other shareholders of the defendant Company. The question at once arises whether the plaintiff can maintain the action in the circumstances of this case, and it is frankly admitted by Mr. *Marsden,* on behalf of the plaintiff, that in order to do so he must satisfy the Court

that the acts complained of are of a fraudulent character. I note, however, that in describing such acts none of the affidavits filed by the plaintiff use the word "fraudulent" or any equivalent expression. Nevertheless it is suggested that some of the defendants did not wish certain of the other shareholders to be present or represented at the annual general meeting of the defendant Company on the 8th instant, and so prevented such presence or representation by having the meeting take place in the inner office of the place of meeting while some of the other shareholders were waiting for the meeting in the outer office to the knowledge of the said defendants.

Counsel for the defendants relies on the cases of *Foss* v. *Harbottle* (1843), 2 Hare 461; *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13; and *Cotter* v. *National Union of Seamen* (1929), 2 Ch. 58.

Judgment

In the *MacDougall* case it was alleged that the chairman had, in order to stifle the discussion, and to prevent the matters being voted upon to consider which the meeting was called, in collusion with the other directors, or some of them, determined to carry a vote of adjournment by show of hands and then to refuse a poll on that question, so as to prevent the proxies given to the plaintiff and his supporters from being used in support of the resolutions which he was about to bring forward, and which would undoubtedly have been passed but for the conduct of the defendants. One of the shareholders filed a bill on behalf of himself and all other shareholders, except the directors, against the directors and the company alleging that the course taken at the meeting was taken in collusion with the directors with a view of stifling discussion and that the directors were intending to carry out certain measures injurious to the company without submitting the terms to a general meeting, and praying for an injunction to restrain the directors from carrying out the proposed arrangements without submitting them to the shareholders for their approval. It was held on *demurrer* that the bill could not be sustained inasmuch as it violated the rule laid down in *Foss* v. *Harbottle, supra,* and asked the interference of the Court in the internal management of the Company.

In the *Cotter* v. *National Union of Seamen* case it was alleged, *inter alia,* that the disputed meeting was not properly convened;

FISHER, J. (In Chambers)

1929

July 27.

WATSON v. BARRETT

Judgment

that persons voted who were not entitled to vote; that the four plaintiffs all attempted to attend and take part in the meeting; that two of them were unlawfully excluded and the other two unlawfully expelled from the meeting. The plaintiffs sought an injunction restraining the defendant from acting on the resolutions passed at such disputed meeting. The Court held that the rule laid down in *Foss* v. *Harbottle, supra,* applied. If, therefore, irregularities were committed in the convening and conduct of the meeting at which the resolutions complained of were passed, the matter could be regularized by the passing of fresh and effective resolutions. It was held, therefore, that the Court would refuse to interfere by injunction at the instance of individual members of the Union.

Upon the material before me I cannot find that the acts complained of in the present case are essentially different in character from those complained of in the cases above referred to. The application is therefore dismissed and the *interim* injunction dissolved.

Application dismissed.

HALL v. GEIGER.

MCDONALD, J.

1929

June 25.

HALL
v.
GEIGER

Defamation—Libel—Publication—Dictating letter to stenographer—Pleadings—No cause of action shewn.

A letter was dictated by the defendant to his stenographer, transcribed by her and posted by the defendant to the plaintiff. In an action for libel it was held that there was publication to the stenographer.

The statement of claim contained the following: "Defendant George Mason Geiger falsely and maliciously wrote and published of plaintiff in a letter of April 5th, 1929, addressed by defendant to plaintiff the words following, that is to say," etc.

Held, that inasmuch as publication to a third person is not pleaded, the statement of claim discloses no cause of action.

Statement

ACTION for libel. Tried by MCDONALD, J. at Vancouver on the 13th of June, 1929.

Hamilton Read, for plaintiff.
Coulter, for defendant.

25th June, 1929.

MCDONALD, J.: This is an action for libel arising out of a letter dictated by the defendant to his stenographer, transcribed by her and posted by him to the plaintiff. The letter is libellous and I hold was so understood by the stenographer. Upon the authorities *Pullman* v. *Hill & Co.* (1891), 1 Q.B. 524; *Puterbaugh* v. *Gold Medal Mfg. Co.* (1904), 7 O.L.R. 582; and *Quillinan* v. *Stuart* (1917), 38 O.L.R. 623 I am bound to hold that there was publication to the stenographer and if the plaintiff is entitled to succeed I would assess his damages at $250.

Judgment

It is contended, however, that inasmuch as publication to a third person is not pleaded, the statement of claim discloses no cause of action. This question I reserved. At the trial both parties sought an amendment but as neither would consent to the application of the other no amendments were allowed. The pleading reads as follows:

"Defendant George Mason Geiger falsely and maliciously wrote and published of plaintiff in a letter of April 5th, 1929, addressed by defendant to plaintiff the words following that is to say," etc.

Plaintiff's counsel contends that it was for defendant to

MCDONALD, J. 1929 June 25.

HALL v. GEIGER

Judgment

demand particulars as to the person to whom publication was made, and to move for particulars under Order XIX. if same were not delivered. I think the better opinion is that the defendant was within his rights in meeting the pleading as it stands; and, as it stands, it clearly discloses no cause of action. The authorities cited by Mr. *Coulter* seem decisive. See Odgers on Libel and Slander, 5th Ed., 629:

"It is no part of the defendant's duty to reform the plaintiff's pleading."

Halsbury's Laws of England, Vol. 18, sec. 1217:

"The plaintiff in an action of libel must allege and prove that the defendant published . . . to some person other than the plaintiff."

Judgment for plaintiff.

FISHER, J. (In Chambers) 1929 Aug. 3.

MIDGLEY v. MIDGLEY

MIDGLEY v. MIDGLEY.

Contempt of court—Order for registration of property in names of certain persons in trust—Disobedience—Divorce and matrimonial causes—Power to commit—Inherent jurisdiction of Court—R.S.B.C. 1924, Cap. 70, Sec. 36—Divorce rule 79.

On the 27th of April, 1925, HUNTER, C.J.B.C. made an order "that in the event of the respondent selling his interest in the property as aforesaid, he shall immediately reinvest the proceeds of the purchase-moneys in the purchase of a new home. The said new home shall be registered jointly in the names of the official guardian and the said Victor Rainsford Midgley, in trust for the children of this marriage, until the youngest thereof shall attain the age of twenty-one years."

The respondent sold his interest in the property and reinvested it in a new home but he registered the new home in his own name and subsequently gave a mortgage on the property to secure a loan, which was duly registered.

On an application by the petitioner that the respondent be committed for disobedience of the order:—

Held, that there is jurisdiction to enforce the order and the contempt has been so gross and the disobedience so wilful that the respondent should be committed.

Statement

APPLICATION by petitioner that Victor Rainsford Midgley be committed for contempt of Court for disobedience of an order made in this action by HUNTER, C.J.B.C. of the 27th of

April, 1925. The facts are set out fully in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 28th of June, 1929.

L. H. Jackson, for the petitioner.
Garfield A. King, for respondent.

3rd August, 1929.

Judgment

FISHER, J.: This is an application by the petitioner that Victor Rainsford Midgley, the respondent herein stand committed to Oakalla Prison for that:

"1. Having sold the residence known as 3751 Keefer Street in the Municipality of Burnaby, Province of British Columbia, the said Victor Rainsford Midgley did, contrary to the Order of the Honourable Gordon Hunter made herein on the 27th day of April, 1925, fail to immediately, or at any time reinvest the proceeds in the purchase of a new home and has not so reinvested the said proceeds.

"2. Having sold the said residence known as 3751 Keefer Street under and pursuant to the terms of a certain agreement for sale dated the 12th day of May, 1925, and made between the said Victor Rainsford Midgley and one Alexander McKenzie, and having discounted the said agreement for sale to one Katherine Curry, the said Victor Rainsford Midgley did fail to immediately or at any time, reinvest the proceeds in the purchase of a new home, but did only immediately reinvest the sum of Three Hundred Dollars ($300) and has neglected and refused up to the present time to so reinvest the balance of the proceeds and up to the present time has only so reinvested the sum of Three Hundred and Ninety-five Dollars ($395).

"3. Having reinvested the sum of Three Hundred and Ninety-five Dollars ($395) in the purchase of a new home ostensibly pursuant to the said order of April 27th, 1925, the said Victor Rainsford Midgley did fail to register the said new home jointly in the names of the official guardian and Victor Rainsford Midgley in trust for the children of this marriage, Evelyn, Victor and Edward Midgley until the youngest thereof should attain the age of twenty-one years, or in the name of the official guardian at all.

"4. Having reinvested the sum of Three Hundred and Ninety-five Dollars ($395) in the purchase of a new home ostensibly pursuant to the said order of April 27th, 1925, the said Victor Rainsford Midgley did register the said home in the name of Victor Rainsford Midgley, and pursuant to a certain so-called trust deed dated the 7th day of June, 1926, did nominate himself trustee in name, but reserving such rights to himself as in fact to nullify any trust and give himself the sole control over the said property.

"5. Having reinvested the sum of Three Hundred and Ninety-five Dollars ($395) in the purchase of a new home ostensibly pursuant to the said order of April 27th, 1925, the said Victor Rainsford Midgley did encumber the said new home, being the West one-half of lot Nine (9), block Three Hundred and Twenty-four (324), Subdivision of District Lot Five Hundred and Twenty-six (526), Group One (1), New Westminster District by causing a

FISHER, J. (In Chambers) 1929 Aug. 3. MIDGLEY v. MIDGLEY

mortgage to be given to one Annie Daykin for the sum of Five Hundred Dollars ($500) according to the terms set out in a certain mortgage between the said Victor Rainsford Midgley as trustee and Annie Daykin, which mortgage is dated the 15th day of December, 1928."

Part of the said order of the late Chief Justice HUNTER made herein on the 27th of April, 1925, reads as follows:

"AND IT IS FURTHER ORDERED that in the event of the respondent selling his interest in the property as aforesaid, he shall immediately reinvest the proceeds of the purchase-moneys in the purchase of a new home. The said new home shall be registered jointly in the names of the official guardian and the said Victor Rainsford Midgley, in trust for the children of this marriage, until the youngest thereof shall attain the age of twenty-one years."

It is quite apparent from the material before me that the respondent sold his interest in the said property, and the respondent says that he reinvested the proceeds of the purchase money in the purchase of a new home. With respect to registration, however, I find that the respondent has not complied with the said order, as he has not registered the new home jointly in the names of the official guardian and himself in trust for the children aforesaid, and a breach of this part of the order in the circumstances constitutes a contempt of Court.

Judgment

It is submitted, however, on behalf of the respondent that in any case there neither was nor is power in the Supreme Court of British Columbia, in divorce and matrimonial causes to enforce the said order as the proceedings herein were commenced before the 1st of September, 1925, and the Divorce Rules applicable do not contain any section similar to section 79 of our present Divorce Rules *re* the enforcement of orders, nor any section similar to section 97 of the present Divorce Rules which states that in any matter of practice or procedure which is not covered by statute or dealt with by "these [Divorce] Rules," the Rules of the Supreme Court in respect of like matters shall be deemed to apply. In reply counsel for petitioner refers to section 36 of our Divorce Act, being chapter 70, R.S.B.C. 1924, which reads as follows:

"All decrees and orders to be made by the Court in any suit, proceeding, or petition to be instituted under authority of this Act shall be enforced and put in execution in the same or the like manner as the judgments, orders, and decrees of the High Court of Chancery may be now enforced and put in execution."

In *Townend* v. *Townend* (1905), 93 L.T. 680 at p. 683

doubt was expressed in the Court of Appeal as to the applicability to divorce matters of rule 5 of Order XLI. or the old Chancery practice upon which that rule was based. It may be noted that it must also be considered doubtful whether the rule applies to an undertaking (see Yearly Practice, 1929, p. 681 and cases there referred to).

Counsel for the respondent suggests that this is a case of a *hiatus* where nothing can be done. Yet we find that the Court in the case of *D.* v. *A. & Co.* (1900), 1 Ch. 484 holds that an undertaking may be enforced by committal while, at the same time, pointing out that there was no express authority as to what was the proper mode of enforcing an undertaking as distinct from an order. Similarly we find Oswald in his book on Contempt of Court, 3rd (Canadian) Ed. stating (see p. 202) that the rule (above referred to) does not apply to an undertaking and yet elsewhere (see p. 108) he says "where the undertaking is to do anything other than to pay money . . . it is enforceable by committal." Oswald (p. 8) also refers to the inherent right of a Superior Court to commit for contempt, while stating that Courts not of Record (p. 12) have no jurisdiction to punish for contempt of Court unless it is specially conferred by statute. On page 9 of his book Oswald also says as follows:

Judgment

"A Court of Justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which would not be permitted to exist in any civilized community. Without such protection Courts of Justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible."

In *Royal Bank* v. *McLennan* (1918), 25 B.C. 183 at p. 191 Mr. Justice McPHILLIPS also speaks of the inherent power of the Court, in these words:

"In this particular case it cannot be said to be other than an order for payment of money. That is the order that has been made. Now if it had been any other order, *i.e.*, within the zone of a contumacious act with respect to an order of the Court, the inherent power of the Court is exercisable to see that its orders are always obeyed. That, of course, the Court is very jealous of, and rightly so; otherwise Courts would be brought into contempt."

I refuse, therefore, to agree with the submission as aforesaid of counsel on behalf of the respondent that the order herein cannot be enforced by committal, but it is further submitted on behalf of the respondent, that in any event, it is obvious from

FISHER, J. (In Chambers)

1929

Aug. 3.

MIDGLEY v. MIDGLEY

Judgment

the memorandum which was endorsed upon the order before service upon the respondent that it was the intention of those who served the process to comply with the rule referred to, and it is pointed out that this cannot be complied with as the said order did not fix the time within which the act required should be done. However, following *Halford* v. *Hardy* (1899), 81 L.T. 721, I would hold that the word "immediately" is a sufficient statement of time. As to the question of service of the order within the time limited by the order for doing the act, it is pointed out that though the order was served upon the solicitor for the respondent on June 19th, 1925, it was not served upon the respondent himself until October 8th, 1928. It might be that under certain circumstances there should be a supplemental order extending the time, and such order served personally. In this case, however, I find that the respondent after personal service of the order did encumber the new home by causing a mortgage dated the 15th of December, 1928, to be given to one, Annie Daykin for the sum of $500, and this mortgage was registered on December 27th, 1928. Under these circumstances I would hold that the contempt has been so gross and the disobedience so wilful as to justify committal without any such supplemental order. (Oswald, *supra,* at p. 199).

There will be on order that Victor Rainsford Midgley, the respondent herein do stand committed to the common gaol at Oakalla, in the Province of British Columbia, for the said contempt, and that he do pay to the petitioner her costs of this application; the order to lie in the District Registry of this Court at Vancouver, B.C., for the period of one calendar month from date, thereafter to be delivered out to the said petitioner or her solicitor unless otherwise ordered.

Order accordingly.

MOSDELL *ET AL.* v. JARDINE AND NANAIMO REDUCTION WORKS LIMITED.

FISHER, J.

1929

Aug. 21.

MOSDELL v. JARDINE

Vendor and purchaser—Sale of shares in company—Payment on account of purchase price—Default in second payment—Action by purchasers for specific performance—Abandonment—Return of moneys paid—Equitable relief.

A purchaser who has never in fact abandoned or receded from his contract, but has by reason of laches or otherwise, from causes not falling within abandonment or rescission, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance, *prima facie,* entitled to a return of the deposit or part payment, unless some facts are shewn that would render this inequitable.

Statement

ACTION for specific performance of an agreement between the plaintiffs as purchasers and the defendant Jennie Jardine as vendor for the sale of 166 shares in the capital stock of the defendant Company. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 26th of June, 1929.

Bray, for plaintiffs.
Collins, for defendants.

24th August, 1929.

Judgment

FISHER, J.: This is an action brought by the plaintiffs claiming in the first instance, *inter alia,* specific performance of an agreement made between the plaintiffs, as purchasers, and the defendant, Jennie Jardine, as vendor, for the sale of 166 shares in the capital stock of the defendant Company for $20,000. At the trial liberty was asked and obtained by the plaintiffs to amend their pleading by inserting a claim for relief against forfeiture. It would appear that the defendant, Mrs. Jennie Jardine, acknowledges receipt of the sum of $6,351.91 from the plaintiffs pursuant to the said agreement, such moneys having been paid out of moneys belonging to the defendant Company and the three plaintiffs being debited on the books of the Company with the said amount, the plaintiff, Noah Mosdell, being debited with the sum of $3,175.95 and the plaintiffs, Robert Mosdell and John Langley Mosdell, being each debited with the

FISHER, J.

1929

Aug. 21.

MOSDELL v. JARDINE

sum of $1,587.98. At the time the agreement for sale was entered into on the 9th of April, 1927, the vendor, as I find, was the owner of or entitled to 166 shares in the defendant Company and the plaintiffs to 84 shares in said Company in which 250 shares had been issued. Paragraph 3 of the said agreement reads as follows:

"The vendor agrees forthwith upon the execution of this agreement to deposit in escrow in the Bank of Montreal, Nanaimo, B.C., share certificates representing the said 166 shares duly endorsed by the vendor to the purchasers together with instructions to the said bank to deliver such share certificates to the purchasers upon the purchasers paying to the said bank to the credit of the vendor the purchase price in full with interest as set out in paragraph 2 hereof."

Judgment

Plaintiffs set up the contention that at no time since the said 9th of April, 1927, were the said 166 shares duly endorsed by the vendor to the purchasers deposited in the Bank of Montreal, Nanaimo, B.C., pursuant to the terms of the said agreement and that the plaintiffs were therefore not in default although they did not make the payment of $7,500 required to be made under said agreement on or before the 1st of June, 1928. As a matter of fact the said 166 shares were not duly endorsed and deposited but I cannot find on the evidence that the defendant was any more responsible for this than the plaintiffs and the letter from the plaintiff, Noah Mosdell, to Mrs. Jardine, a copy of which is set out in Exhibit 14, which is dated July 15th, 1928, would seem to be an admission by him that the plaintiffs were in default and I find as a fact that plaintiffs were in default with respect to the payment of $7,500 on the 1st of June, 1928. As time was expressly made of the essence of the agreement it is clear from the authorities (see *Steedman* v. *Drinkle* (1916), 1 A.C. 275 and *Brickles* v. *Snell* (1916), 2 A.C. 599) that specific performance of said agreement could not be decreed in favour of the purchasers who were in default. Probably it was in view of the possibility of his being faced with this difficulty that counsel for the plaintiffs applied for and obtained at the trial leave to amend so as to claim alternatively "relief from forfeiture if any of the rights of the plaintiffs." After the amendment and reply thereto had been made counsel for the plaintiff himself expressed doubt as to whether his amendment had been aptly worded so as to claim relief against the vendor's retention

of the moneys, and, as it might be more aptly worded so as clearly to claim such relief, counsel may have leave to redraft it if he so desires as of the date of the application as I am satisfied that since that date the amendment has been understood as referring to the vendor's retention of the moneys. In reply to this claim for relief against the retention of the moneys by the defendant, Mrs. Jardine, counsel for the latter in the first place submits that the plaintiffs have been guilty not only of default but also of abandonment or repudiation and have thus disentitled themselves to such relief and refers to Heap on Canadian Decisions as to Sales of Land, p. 254, sec. 666, and cases there referred to. In support of such submission it is argued that abandonment or repudiation should be inferred from the return of the share certificate for the 166 shares to the solicitors for Mrs. Jardine by letter dated July 25th, 1928, and subsequent acts on the part of the plaintiffs such as sending notices of meeting to Mrs. Jardine and attending at meetings with her without objecting to her presence and discussing with her business matters and the possibility of a new agreement. The letter from plaintiffs' solicitors, however, enclosing said share certificate reads as follows:

Judgment

"We are instructed by Mr. Robert Mosdell and Mrs. Noah S. Mosdell, directors and shareholders in Nanaimo Reduction Works Limited, to inform you that they do not propose to recognize the notice of default under the agreement dated the 9th of April, 1927, which was sent by you to them on behalf of Mrs. Jardine on June 2nd, 1928, because they take the position that no default has been made by them under this agreement and that they have at all times been prepared to carry out their covenants in this agreement."

This letter from the plaintiffs' solicitors, though written after that of Noah Mosdell, obviously takes the position that the notice is not recognized and that the plaintiffs are not in default, apparently on the ground that the share certificate covering 166 shares had not been deposited in escrow so that the return of the shares with such letter could hardly be considered an abandonment. With regard to the course of conduct pursued thereafter each side would seem to have been taking the position that the other was in default. The situation was a somewhat unusual one. The business in question was a going concern and, as pointed out, the plaintiffs were the holders of some 84 shares in above Company at the time the said agreement was entered into

FISHER, J.

1929

Aug. 21.

MOSDELL v. JARDINE

Judgment

and have continued to be so. After their default they continued not only to be employed by the defendant Company but also to take an active interest as shareholders in its affairs in the meantime asking for an extension of time and also discussing with Mrs. Jardine on one occasion at least a possible sale of the entire property of the Company and a division in such case of the proceeds of the sale which would have given them a larger share in such than they would have been entitled to simply as the owners of the 84 shares. Under all the circumstances I find that the plaintiff never abandoned or repudiated the agreement as to the 166 shares.

> "The rule seems tolerably clear that a purchaser who has never in fact abandoned or receded from his contract, but yet been by reason of laches or otherwise, from causes not falling within abandonment or recession, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance *prima facie* entitled to [relief from the forfeiture of the money paid] unless some facts are shewn that would render this inequitable":

see *March Brothers & Wells* v. *Banton* (1911), 45 S.C.R. 338 at pp. 343-4.

Heap, *supra,* sec. 664, says as follows:

> "Whether time is of the essence or not, there is always equitable jurisdiction to relieve the purchaser from extra-judicial forfeiture of purchase moneys paid (even though the forfeiture is legal and valid, having been duly effected, *i.e.,* in the exact manner prescribed in that behalf by the contract, as by notice, etc.)."

Then after citing a number of authorities including *Steedman* v. *Drinkle, supra,* and *Brickles* v. *Snell, supra,* and *Verma* v. *Donahue* (1913), 18 B.C. 468 Heap goes on apparently to say that there is this jurisdiction to relieve the purchaser "notwithstanding express provision in the contract for 'retention' of such moneys or to like effect." It is nevertheless stoutly contended by Mr. *Collins* that none of the cases will be found to grant relief unless the claimant has tendered the overdue payment and here the plaintiffs instead of doing so asked for an extension of time. This contention might be deemed as another form of the submission that the plaintiffs have disentitled themselves to relief by abandoning the contract and *Thagard* v. *Edmiston* (1925), 35 Man. L.R. 319; (1925), 3 W.W.R. 527 is relied on. This case is authority for the proposition that it will be deemed abandonment or repudiation where the purchaser, in a

vendor's action for specific performance or cancellation, continues in default after the time appointed by the Court for payment by the former. However, as stated, the facts here are that the plaintiffs (purchasers) though in default were claiming specific performance and the vendor Mrs. Jardine was resisting same. If Mrs. Jardine had asked for or submitted to specific performance there might have been a properly framed judgment for specific performance which when worked out might have left her with the money already paid and the shares if later default made in the payment of the balance. In any event however I cannot find that it has been expressly laid down in any of the cases that the jurisdiction to relieve the purchaser from forfeiture of purchase-moneys paid is limited to cases where the overdue payment has been tendered. In *Sutherland* v. *Jones* (1922), 68 D.L.R. 498, Beck, J.A. says:

"My opinion is that the second agreement between the plaintiff and the defendant of September, 1918, was a concluded agreement which the plaintiff might have enforced; that as the defendant refused to carry it out the plaintiff could rightly revert to the agreement sued upon; that the acts and conduct of the defendant, in selling to Warren, evinced an intention no longer to be bound by the contract (2 Smith's L.C., 12th Ed., p. 43) a position from which he could not withdraw (as he attempted to do by getting a reconveyance from Warren) after the plaintiff had accepted that position as he did by bringing his action; that the fact that the plaintiff's rights under the first agreement were those of executor and his rights under the second personal is of no consequence inasmuch as, in fact, he was the sole beneficiary of the estate and the second agreement was one which dealt with the interests of the estate under the first agreement; that although the plaintiff was in default on the first agreement and had made it clear that he was not able to fulfil the first agreement by payment yet that was not equivalent to an abandonment of all interest under the agreement for he still had at least a right to be relieved from the result of the forfeiture: *Brickles* v. *Snell*, 30 D.L.R. 31, (1916), 2 A.C. 599; 86 L.J., P.C. 22.

Judgment

"I think, therefore, that the plaintiff had a right to relief from the forfeiture which is never necessarily the return of the whole amount of the purchase-money. His action is not expressly based upon the equitable right of relief from forfeiture but I think the action might well have been treated at the trial as brought for that purpose and the necessary amendments made with, if necessary, a reference to ascertain the proper amount of refund to which the plaintiff was entitled. As a majority of the Court are in favour of a dismissal of the action which I think is technically the correct course, I however think it is clear from the reasoning of a majority of the members of the Court, the plaintiff is at liberty to bring an action for relief from forfeiture, while at the same time I am not intending to intimate that there may not be an answer to such an action."

FISHER, J.

1929

Aug. 21.

MOSDELL v. JARDINE

Judgment

In the same case at pp. 503-4 Simmons, J.A. says as follows:

"The plaintiff's claim is an action at law for breach of contract on the assumption that the Warren sale was a renunciation by the defendant of the original contract of sale which entitled the defendant to an action for damages. The plaintiff has deprived himself of this right of action by his admissions prior to the Warren sale of his inability to carry out his part of the agreement, his offer to treat the defendant as an owner entitled to sell; his negotiations to repurchase on the basis that the defendant had the right to sell. There was no waiver by the defendant and no offer to recognize the original contract as in force when the plaintiff brought his action. The plaintiff was then on his own admission unable to implement his part of the contract and, therefore, his action at law fails. The offer of the defendant at the trial to reinstate the original contract and treat it as still effective can not derogate from his right at the moment the action was brought to treat the plaintiff's defaults as a ground for terminating the agreement. It may be that when the plaintiff brought his action he might have asserted a right to equitable relief from forfeiture of the purchase moneys paid under the agreement. *Kilmer* v. *B.C. Orchard Lands Co.* 10 D.L.R. 172, (1913), A.C. 319, 82 L.J., P.C. 77, as explained in *Steedman* v. *Drinkle*, 25 D.L.R. 420, (1916), 1 A.C. 275, 85 L.J., P.C. 79."

In the same case, at p. 504, Hyndman, J.A. says:

"The plaintiff however, being in default and never at any time having offered to remedy such default, is not in a position to maintain an action for damages or specific performance but I think might invoke the equitable jurisdiction of the Court and ask to be relieved from the effect of the forfeiture of the $6,400 paid on account of the purchase price."

In *Brown* v. *Walsh* (1919), 45 O.L.R. 646, Meredith, C.J.C.P. giving the judgment of the whole Court, at p. 649, says as follows:

"In the case of *Steedman* v. *Drinkle* (1916), 1 A.C. 275, 25 D.L.R. 420, although there was an expressed contract for retention by the seller, as liquidated damages, of moneys paid, the purchaser was held to be entitled to recover the 'down payment' made by him, the case being treated as one for relief from forfeiture.

"So that the Privy Council at all events has gone pretty near to the rule that if the seller be fully compensated that is enough: a very reasonable rule, at all events under ordinary circumstances: . . ."

Then again in the case of *Boericke* v. *Sinclair* (1928), 63 O.L.R. 237 the Ontario Court (Appellate Division) held that the facts shewed mere default in payment and not abandonment and "the plaintiffs are entitled to be relieved from forfeiture of the payments made . . ." From these authorities it would seem that a purchaser even though in default and admitting inability to pay prior to an action against the vendor, is entitled to relief from the forfeiture of the money paid unless this would be inequitable. As to the equity of giving relief in this

case it does not seem equitable to me that the vendor should be permitted to insist upon the "letter of the bond" with regard to the retention of the moneys against the plaintiff when it is admitted by her counsel that it is practically impossible to carry out the "letter of the bond" as against her with regard to allowing the purchasers the dividends payable upon the said 166 shares as provided in said agreement so long as the purchasers were not in default, as it is impossible to estimate fairly or accurately what such dividends should be from the 9th of April, 1927, to the default on the 2nd of June, 1928.

As stated in *Brown* v. *Walsh,* above, it would appear that if the seller is fully compensated that is enough. If in this case the money had been actually paid by the plaintiffs to the defendant, Mrs. Jardine, I think that the money paid should have been returned to them less such damages as the said defendant was proved to have sustained by reason of the plaintiffs' breach of the contract. As, however, the plaintiffs did not actually pay the money but the facts are that the said defendant received the moneys as stated through the Company and the plaintiffs were debited with the amounts as before set out and not credited with any profits on the 166 shares during the period in question, I think justice will be done by ordering, as I do, that the plaintiffs should now be credited on the books of the defendant Company with the amounts with which they have been respectively debited with respect to the agreement, that Mrs. Jardine should be considered as entitled as against the plaintiffs to any and all dividends on the said 166 shares before as well as after the default and that Mrs. Jardine, instead of paying back into the treasury of the Company the said sum of $6,351.91, should pay to the plaintiffs the difference between that sum and that part of same which would as against the plaintiffs really belong to her as owner of 166 of the 250 shares in case such sum was paid direct to the Company, less the sum of $500 which I would allow Mrs. Jardine as damages sustained by reason of the plaintiffs' breach of the contract. Noah S. Mosdell and Robert Mosdell, being owners of 83 of the 84 shares held by the three plaintiffs, would be entitled as between the three plaintiffs themselves to a corresponding proportion of the amount to be paid by Mrs. Jardine. The claims of the plaintiffs for specific performance

Judgment

FISHER, J. — 1929 Aug. 21. — MOSDELL v. JARDINE

and for the declarations sought in pars. 2, 4, 5 and 6 of prayer are refused and the interlocutory injunction granted until trial is dissolved. Judgment accordingly. Question of costs to be spoken to.

Judgment accordingly.

COURT OF APPEAL — 1929 Oct. 1. — NOWELL v. YELLOW CAB CO.

NOWELL *ET AL.* v. YELLOW CAB COMPANY, LIMITED. (No. 2.)

Negligence—Two defendants sued on separate torts in one action—Payment by one in settlement as against them—Negligence found against other defendant—Damages reduced by amount already paid—Costs—Appeal.

The plaintiffs (man and wife with two children) were passengers in a taxicab of the defendant Company going westerly on Broadway East in the City of Vancouver on a morning when there was a thick fog. While proceeding on the northerly tracks of the street railway they ran into a car in front with sufficient force to stall the taxicab. The chauffeur immediately got out, leaving his passengers locked in and proceeded to crank the car. While so doing a street-car of the British Columbia Electric Railway Company, proceeding westerly, ran into the taxicab from behind and the four occupants of the taxicab were injured. In an action against the British Columbia Electric Railway Company and the Yellow Cab Company on separate torts, the British Columbia Electric Railway Company settled for $600 and on the trial as against the Yellow Cab Company, the plaintiffs recovered $590, but it was held that this amount should be reduced by the sum remaining after deducting solicitor and client costs payable by the Railway Company from the $600.

Held, on appeal, reversing the decision of MURPHY, J., *per* MACDONALD, C.J.B.C. and MCPHILLIPS, J.A., that the Railway Company admitted liability by payment of $600 as compensation only and the plaintiffs having failed to recover more than this amount on the trial, the action should be dismissed.

Per MARTIN and MACDONALD, JJ.A.: It was held on the trial that the chauffeur was negligent in not letting his passengers out of the cab before he proceeded to crank his car. There was error in this finding, no negligence was proved on the part of the chauffeur and the action should be dismissed.

Statement

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

COURT OF APPEAL

1929

Oct. 1.

NOWELL v. YELLOW CAB CO.

Statement

the 15th of February, 1929 (reported *ante,* p. 238) in an action for damages for injuries sustained when a taxicab of the Yellow Cab Company, Limited, in which they were driving as passengers was run into by a car of the British Columbia Electric Railway Company. On the morning of the 21st of November, 1928, the plaintiffs were being driven, in a very thick fog, in a westerly direction on Broadway in the City of Vancouver in said taxicab. When coming in contact with a car in front, the taxicab was stalled on the northerly street-car tracks of the British Columbia Electric Railway Company. The chauffeur, leaving the plaintiffs locked in, got out and proceeded to crank the car, and while in the act of doing so, a street-car of the British Columbia Electric Railway Company proceeding westerly on said tracks ran into the taxicab from behind. The plaintiffs were all severely cut and bruised and suffered severe nervous shocks. The action was settled as between the plaintiffs and the British Columbia Electric Railway Company and continued against the Yellow Cab Company, Limited, only.

The appeal was argued at Victoria on the 18th and 19th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Craig, K.C., for appellant: The plaintiffs were passengers in a Yellow taxicab on a very foggy morning. As they were going along Broadway they bumped into a car in front and stalled. The driver got out and had an altercation with the driver of the other car when a street-car ran into his taxi from behind causing the injuries complained of. Judgment was given on an issue that was never tried as the learned judge found the driver got out to crank his car. The battle raged over the question whether the driver crossed the street to argue with the driver of the other car. The issue of neglecting to let the plaintiffs out of the car was never tried. The British Columbia Electric Railway Company settled for $600, and the damages assessed should be reduced by this amount. There was error in allowing solicitor and client costs to be first deducted from the $600.

Griffin, K.C., for respondents: He was negligent as his primary duty was to look after his passengers. He was travelling on the tracks when he could not see ten feet ahead of him.

COURT OF APPEAL

1929

Oct. 1.

NOWELL v. YELLOW CAB CO.

The learned judge decided that the damages allowed should be reduced by the $600 less the full amount of costs that were incurred by the plaintiffs and we submit that he can do this.

Craig, in reply: There is no finding of fact that an unreasonable time was taken in cranking the car. There is nothing in the pleadings that the cab was wrongly constructed or that we should not have driven along the tracks. The judgment against us is that we must let the passengers out before cranking the car and we submit this is wrong.

Cur. adv. vult.

1st October, 1929.

MACDONALD, C.J.B.C.: The action was against two defendants for negligence causing bodily injuries. Before the trial the defendant, the British Columbia Electric Railway Company made a settlement with the plaintiffs and was dropped from the action, leaving only the above-named defendant. At the opening of the trial, plaintiffs' counsel addressing the learned judge said:

"The action although originally against the British Columbia Electric Railway Company, has been arranged, without admission on either side, an agreement has been made with them [the British Columbia Electric Railway] regarding the compensation."

Nevertheless the plaintiffs proceeded to trial against the other defendant.

MACDONALD, C.J.B.C.

The learned trial judge found that the damages suffered were less than the sum paid in by the Railway Company; he also found that the said defendant, the Yellow Cab Company was negligent. The result was that while the Yellow Cab Company was declared to have been negligent the plaintiffs had been paid by the Railway Company before trial the full damages recoverable against both defendants. Had the two defendants been joint tort feasors the settlement with the Railway Company would have ended the action, but he held, and I think rightly, that the defendants were independent tort feasors, and on that holding the plaintiffs were entitled to go on with their action against the Yellow Cab Company.

The learned trial judge in coming to his conclusion respecting the disposition of the action relied upon *Penny* v. *Wimbledon Urban Council* (1899), 2 K.B. 72. There is this difference

between that case and this: in that case both defendants denied liability but one of them paid a sum of money into Court with the denial of liability; it was held that the other could not claim the benefit of this payment; Vaughan Williams, L.J., at p. 77 said:

"But when that payment is made with a denial of liability the defence is that denial."

Here there was no such thing. The Railway Company admitted liability by payment of compensation and the plaintiffs received that compensation which was greater than they were entitled to recover against both defendants. The only question in the appeal arises in respect to the costs. Had the $600 been allocated partly to costs and partly to compensation, there would be no difficulty about the case. If the compensation by such an allocation reduced the amount of the damages paid to a sum below what the judge held them to be, the Yellow Cab Company would be liable for the balance and the costs would have to be disposed of accordingly.

MACDONALD, C.J.B.C.

On the admission aforesaid, the $600 was paid as compensation, *i.e.*, damages, and the plaintiffs having, in the event failed the action should be dismissed. The costs should follow the event and should be awarded to the appellant here and below.

MARTIN, J.A.: This appeal should, in my opinion, be allowed upon the facts as found by the learned judge below because the legal effect of such findings is in the circumstances to absolve the appellant from the remaining allegation of negligence after the formal abandonment of the charge that it was negligent to have the taxicab so constructed that its right-hand door could only be opened from the outside.

MARTIN, J.A.

The learned judge adopts (p. 85) the "story of the accident" given by the taxicab driver and properly does not find that it was negligent for him, in proceeding at a very slow rate through a dense fog, to seek to guide himself by the street-car rails (double track) on his proper side of the highway but he infers that the driver should at once have let his passengers out of the cab before he attempted immediately to start his car again after it had stalled on the car track, and in the course of which attempt he and his cab were run down and injured in an admittedly

COURT OF APPEAL

1929

Oct. 1.

NOWELL v. YELLOW CAB CO.

negligent manner by a street-car, causing further injury also to the plaintiffs.

MARTIN, J.A.

With respect, I am unable to draw that inference; the evidence of the driver, accepted by the learned judge, is that there was no delay on his part in trying to start his cab again and move away, and that he was hit by the street-car within a minute after he got out of his cab to do so, and that while directly so doing he saw the street car coming and "signalled" (whistled and waved his arms, the plaintiff H. Nowell admits) to stop it but without avail. That under such circumstances it was negligence *per se* to refrain from turning his passengers out in the stream of traffic of a main highway in a dense fog, without being requested to do so, before making any attempt to start his cab, is something I cannot subscribe to: indeed they might well have objected to leave the cab under such circumstances. The Street Traffic and Parking By-law relied upon by plaintiffs does not, whatever may be its scope, apply to such a case as the present where the position of the vehicle upon the tracks was the result of an accident not caused by negligence on the part of the driver, and in the way the driver was "staying upon" that part of the highway where the right-hand tracks were laid he did not violate the provisions of section 18 (9) of said by-law, *viz.*:

"He shall not stay upon or occupy any portion of any street upon which street-car tracks are laid, or drive along or across the same, so as to impede, obstruct, or intercept the movement or progress of any street-car or vehicle."

The object of that section is obviously not to prohibit vehicles from using, crosswise or lengthwise, that "portion of any street" used by street-car tracks, and from abusing the inevitable and proper use of such portion by improperly, *i.e.*, negligently, impeding and obstructing other vehicles and street-cars in their proper use of the same.

It follows that the appeal should be allowed and the action dismissed against the appellant.

MCPHILLIPS, J.A.

McPhillips, J.A.: I agree in allowing the appeal for the reasons given by the Chief Justice.

MACDONALD, J.A.

Macdonald, J.A.: The driver of a taxicab was held to be negligent and damages were awarded against appellant, his employer, the Yellow Cab Company Limited under the follow-

ing circumstances. He was driving respondents (his passengers) on a Vancouver street in very foggy weather proceeding slowly on the right side of the roadway astride a street-car rail. It is common practice to do so in a fog as the rail is more easily seen than the curb and in addition cars are often parked along the curb. He bumped into another motor-car ahead of him (without negligence) but the impact killed his engine. He at once got out of the taxi and proceeded to crank the engine to start it up again but while doing so a street-car approached from behind. The taxicab driver waved his arms to attract the motor-man's attention but the latter not seeing him slowly ran into the stationary car injuring the passengers but fortunately not very seriously. The damages awarded were $590.

MACDONALD, J.A.

The learned trial judge doubted the wisdom of driving on the street-car line but did not base his judgment on that fact. With respect, I think it is a prudent thing to do. It is possible some drivers might prefer to "hug the curb" but I think for reasons intimated and the additional reason that the fog obscures the curb as it is the same colour as the pavement it is much safer to follow the street-car tracks. A mere difference of opinion on this point should not lead to a charge of negligence. The trial judge thought, however, that the driver's first duty was to get his passengers out of the car before attempting to crank it to get it under way again. This is an inference from undisputed facts; or at all events a matter of opinion and this Court is free to take a contrary view. With respect, I think his proper course was to at once crank the car and proceed on his way. The mischief was that the engine was stalled. He should at once proceed to repair the mischief and did so. To do otherwise would be to leave an obstruction in the way of traffic (to the possible danger of others) longer than necessary. At all events in this emergency it is simply criticism to say that one course rather than the other should have been pursued. Negligence is not established by mere suggestions of a critical nature or by honest differences of opinion. There must be positive acts—something that a reasonable man would not do or omit to do. I think appellant's driver adopted the proper course. He would know that a street-car following or another motor-car would in all probability not see his taxicab in time to avoid a collision.

COURT OF APPEAL
1929
Oct. 1.

NOWELL v. YELLOW CAB CO.

MACDONALD, J.A.

He should therefore get his car under way as quickly as possible. He would know too that his passengers, if ordered out, might either prefer to stay in the car for the short time necessary to crank it or might receive injuries if thrust into the traffic in the centre of a block in foggy weather.

The respondents (the passengers) testified, however, that their driver did not proceed at once to crank the car. They said he walked over about 30 feet to where the car he bumped into was brought to rest by its driver to ascertain what damage, if any, occurred, later returning to crank his own car when the collision with the street-car occurred. If he did so he was negligent. His first duty was to his passengers. But the learned trial judge said:

"I do not find it proven that he went over to the Chevrolet, but that he did attempt to crank the car."

And again:

"My findings are based on the story of the accident given by the taxi-driver himself plus the uncontested facts of the places in the cab occupied by plaintiffs and of the locked door next to Nowell, Sr."

It was not seriously suggested that the locked door was an element if the driver followed the proper course in at once cranking the car. During the trial the learned trial judge said:

"No one is alleging this against you as negligence."

One door is always locked so that only the driver can open it from the outside. That is for the safety of passengers. The reference by the trial judge to the locked door is in connection with his view that the appellant's driver should have unlocked the door to release the passengers before cranking the engine. But on the main point argued before us, *viz.*, the alleged negligent act of appellant's driver in wasting time by going over to the Chevrolet, the trial judge accepts appellant's evidence and from his evidence and that of two other witnesses it is clear he did not do so. It follows therefore that the alleged negligent act found was the attempt to crank the car before or instead of releasing the passengers. On that point the facts as found are not in dispute and I differ, with respect, from the learned trial judge in the conclusion arrived at.

It was submitted also that appellant's driver was negligent in driving astride the outside rail because it was in breach of a traffic by-law. I do not think so. One clause requires a driver

of a vehicle "when travelling at the rate of a walk" to keep "as close as possible to the right-hand curb." He was travelling at least five miles per hour: slow for a motor-car but a reasonable speed in a fog. But that rate of speed is much faster than a walk. I do not think we are obliged to interpret this clause—if they choose to use that language—as applicable to a vehicle going nearly twice as fast as an ordinary walk. If one was proceeding "at the rate of a walk" he might possibly hug the curb with safety but if he did so he would find it necessary to zigzag at intervals to avoid parked cars causing more confusion and possibly damage. I would therefore interpret the clause literally and also regard "as close as possible" to mean as close as feasible. On many streets one is not very far from the curb when astride the outside rail; certainly not too far to avoid stationary cars in a fog. The street in question was wider than usual, but the by-law applies to all streets. Another clause sheds light on the one referred to although it was suggested that it also was violated. It is:

MACDONALD, J.A.

> "He shall not stay upon or occupy any portion of any street upon which street-car tracks are laid, or drive along or cross the same, so as to impede, obstruct, or intercept the movement or progress of any street-car or vehicle."

This assists appellant. The driver would be at fault if he stayed upon or occupied the tracks. Hence the need of cranking up and getting away as soon as possible. He was really found to be negligent because of his haste to avoid a breach of the by-law. It does not mean that he must keep close to the curb and avoid the tracks. The direction is not to "stay upon" or "occupy" the tracks "so as to impede . . . any street-car or vehicle." The mischief is so to act as to impede traffic. Driving astride the track does not do so. No other clauses require consideration.

It follows from the foregoing that in my opinion the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *J. F. Downs.*
Solicitor for respondents: *A. H. Fleishman.*

MCDONALD, J.

1929

Sept. 11.

RUDGE v. HADDINGTON ISLAND QUARRY CO.

RUDGE *ET AL.* v. HADDINGTON ISLAND QUARRY COMPANY LIMITED *ET AL.*

Mortgage—Power of sale exercised—Action to redeem and set aside sale—Fraud not alleged—Action dismissed—Further action to redeem and set aside sale on ground of fraud—Res judicata.

In 1895, H., R. and G., the owners of Haddington Island gave a mortgage on the island to M. to secure a loan of $3,500. In 1908, M. assigned the mortgage to the Commissioner of Lands and Works for British Columbia for $1,100 the amount still due on the mortgage. Meanwhile a firm of contractors, McDonald, Wilson & Snider obtained the contract to build the Court House at Vancouver which specified that Haddington Island stone should be used. Messrs. *Eberts & Taylor*, a firm of solicitors then incorporated a company known as Haddington Island Quarry Company Limited and the Commissioner of Lands assigned the mortgage to the Company for $1,150. The above solicitors estimated the value of the property at $3,000, and under the power of sale contained in the mortgage the quarry company sold the island to Messrs. McDonald, Wilson & Snider for $3,250, the sum over the amount due on the mortgage (*i.e.*, $2,000) being held by Messrs. *Eberts & Taylor*, there being doubt as to whom it should be paid. The conveyance was made to one Walker, manager of the Royal Bank in Vancouver as bare trustee for McDonald, Wilson & Snider. This conveyance was never registered owing to a *lis pendens* being filed. In March, 1909, H. and the heirs of R. & G. brought action for redemption and to set aside the sale. The action was dismissed but the Court of Appeal reversed the decision on the ground that the sale was made without proper regard for the interests of the mortgagees (see 16 B.C. 98). The Privy Council reversed the Court of Appeal and dismissed the action on the ground that fraud had not been alleged in the pleadings. A similar action was immediately commenced in the name of a grandson of G. alleging fraud, but was settled by Messrs. *Eberts & Taylor* being allowed to retain the $2,000 in their hands for the costs incurred in the first action. For some years the quarry was operated by Messrs. McDonald, Wilson & Snider, then by McDonald alone, and in 1915, one Coughlan who was appointed assignee for the benefit of the creditors of McDonald, Wilson & Snider, continued to operate the quarry. Later discussions arose as to the title as the conveyance to Walker was not registered and he hesitated to execute any document of disclaimer, so in 1917 it was arranged that a conveyance should be made to another trustee, one Temple, an accountant in Victoria, and a conveyance was accordingly made to him by the Haddington Island Quarry Company Limited pursuant to the powers contained in the mortgage. Another company named the Haddington Quarry Company was incorporated in 1918, and Temple conveyed to this company to which a certificate of

indefeasible title was issued on the 28th of May, 1918. Coughlan still claimed title for McDonald and an action by all those interested against him was settled by dividing the property: one-third to Coughlan; one-twelfth each to McDonald's two sons, and one-half to *W. J. Taylor* to cover the costs of his firm. Judgment was entered accordingly and duly registered. Action was brought by the heirs of the original owners (all deceased) on the 1st of October, 1928, for redemption, and to set aside the conveyance by the Haddington Island Quarry Company Limited to Temple under power of sale contained in the mortgage on the ground of fraud.

Held, that the evidence does not disclose that the property was sold at such an undervalue as to constitute fraud; further the plea of *res judicata* applies and the action fails.

Statement

ACTION for redemption of a mortgage and to set aside a sale of the property under power of sale contained in the mortgage on the ground of fraud. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Victoria on the 17th to the 23rd of June, 1929.

Maclean, K.C. (*Brethour,* with him), for plaintiffs.
Griffin, K.C., for defendants, J. A. and C. H. McDonald.
Bourne, for J. J. Coughlan.
W. J. Taylor, K.C., in person.

11th September, 1929.

Judgment

McDONALD, J.: In the year 1893 Alden Wesley Huson, Henry Rudge and Samuel Gray, being the owners of section 10, Rupert District, commonly known as Haddington Island, mortgaged the same to one W. J. Macaulay for $3,500 and interest at 12 per cent. per annum. In 1908 Macaulay assigned this mortgage to the Commissioner of Lands and Works for the Province of British Columbia receiving in payment the amount then due, *viz.,* $400 principal and $700 interest. Meanwhile the firm of McDonald, Wilson & Snider had obtained a contract for the construction of a Court House at Vancouver and it was specified that Haddington Island stone should be used. Messrs. *Eberts & Taylor,* a firm of solicitors practising in Victoria, having ascertained that the Commissioner was willing to assign the mortgage for the amount due thereon, incorporated a company on the 6th of March, 1908, known as Haddington Island Quarry Company Limited and procured an assignment of the mortgage to that Company on the 11th of March, 1908, the price paid

MCDONALD, J.

1929

Sept. 11.

RUDGE v. HADDINGTON ISLAND QUARRY CO.

Judgment

being the amount then due, *viz.*, $1,150.87. It was estimated by *Eberts & Taylor* that the property was then worth about $3,000 and when they were approached by McDonald of the above firm with a view to purchasing the property a sale was agreed upon at the price of $3,250, that being approximately $2,000 over and above the amount due on the mortgage. This surplus of $2,000 was retained by Messrs. *Eberts & Taylor* as there was considerable doubt as to the parties to whom it ought to be paid. In order to effect what was intended, a conveyance under the power of sale contained in the mortgage was made by Haddington Island Quarry Company Limited to one Walker, the manager of the Royal Bank in Vancouver, who took title as a bare trustee for McDonald, Wilson & Snider to whom the sale was in fact made, and who paid the purchase-money. In February, 1909, Huson consulted Mr. *Frank Higgins*, barrister, of Victoria, with a view to redeeming the mortgage but, upon enquiry being made of the Commissioner, it was ascertained that the mortgage had been already assigned and the power of sale exercised. No actual tender was made but shortly afterwards, in March, 1909, Mr. *Higgins* brought an action in which the following parties were plaintiffs, *viz.*, (1) Alden Wesley Huson, (2) Herbert Albert Rudge, Walter P. Rudge, Harry Rudge, Frederick Rudge, Nellie Barlow and Jennie Stannard (being the heirs at law of Henry Rudge who died in March, 1900); and (3) Samuel Wesley Gray and Elizabeth Edna Wright being two of the heirs at law of Samuel Gray who had died in July, 1895. The defendants were Haddington Island Quarry Company Limited, F. T. Walker and McDonald, Wilson & Snider. A certificate of *lis pendens* was filed and for that reason the conveyance to Walker, when it was deposited in the Land Registry office, could not be registered though it remained in the Land Registry office a considerable time. In that action the plaintiffs claimed to redeem and among other things claimed the delivery up and cancellation of the conveyance from the defendant Company to Walker. The plaintiffs at that time were aware of every fact which up to then had occurred as fully as they or their survivors are today. I repeat there was not one fact, whether to be proven by oral or documentary evidence, in existence when that action was brought in 1909 or when finally

decided in 1911 which was not as fully known to the plaintiffs as it is today. In fact Huson wrote a letter in February, 1908, to the Commissioner charging fraud; and in the present action Elizabeth Wright testified that she and her brother Samuel had always been suspicious of fraud. The action was tried and the claim was dismissed. This judgment was reversed by the Court of Appeal upon the ground that the defendants were guilty of fraud in having sold the property at a price greatly below its value. An appeal to the Judicial Committee of the Privy Council was begun and Mr. *Higgins,* realizing the danger of a reversal (inasmuch as fraud had not been pleaded), made an arrangement with another solicitor, Mr. *Aikman,* that so soon as the decision of the Judicial Committee was known in England, he would telegraph to *Aikman,* so that in case the decision of the Judicial Committee was unfavourable *Aikman* should thereupon immediately issue a writ in the name of a grandson of the deceased Samuel Gray who had not been made a party to the action. The Judicial Committee did reverse the judgment of the Court of Appeal upon the ground that fraud had not been pleaded and *Aikman* accordingly issued his writ alleging fraud. The costs of the first action amounted to $7,000 or more and in December, 1909, *Higgins* and *Aikman,* for reasons which are not disclosed but which may well be surmised, agreed with the defendants to discontinue the action brought by *Aikman,* to remove the certificate of *lis pendens* from the register and to set off the $2,000 in the hands of *Eberts & Taylor* against the costs in the action which costs were owing to the firm of *Eberts & Taylor,* who agreed to abandon any further claim against the plaintiffs for costs.

Judgment

For some years after this the quarry was operated by McDonald, Wilson & Snider and later by McDonald alone. After September, 1915, the quarry was operated by J. J. Coughlan, who was in September of that year appointed assignee for the benefit of creditors of W. S. McDonald, Wilson and Snider having retired from the firm. Coughlan remained in possession and took out stone from time to time under the impression that his assignor was the sole beneficial owner, Walker holding the legal estate as a bare trustee. Sometime after Coughlan appeared on the scene discussions took place with Mr. *Taylor's* firm

MCDONALD, J.

1929

Sept. 11.

RUDGE
v.
HADDINGTON
ISLAND
QUARRY CO.

Judgment

regarding the condition of the title, it having developed that Walker, though claiming no title whatever, hesitated to execute any document of disclaimer. In order to clear the title it appeared necessary to bring an action against him but as that seemed an unnecessary expense and it was clear that he never had claimed and never would claim any interest and that the conveyance to him had never been registered, it was arranged in 1917 that a conveyance should be made to another trustee, *viz.*, Ernest Temple, an accountant, residing in Victoria. On the 3rd of July, 1917, a conveyance was accordingly made from the Haddington Island Quarry Company Limited to Temple. This conveyance does not recite all the facts that had taken place and was really intended to take the place of the prior conveyance to Walker. It recites that the conveyance is made pursuant to the powers of sale contained in the mortgage in question. Another Company named Haddington Quarry Company Limited was incorporated in May, 1918, and the property was conveyed by Temple to that Company on the 14th of May, 1918, to which Company a certificate of indefeasible title was issued on the 28th of May, 1918. Coughlan still claiming that he, as trustee for W. S. McDonald, was the owner of the property, an action was brought by Haddington Quarry Company Limited, Haddington Island Quarry Company Limited, Ernest Temple, C. H. McDonald and J. A. McDonald (sons of W. S. McDonald, they having on the 29th of July, 1919, acquired the interest of Snider) against J. J. Coughlan, W. S. McDonald and George Snider. This action was contested honestly and sincerely by eminent counsel on both sides and finally came to trial on the 18th of December, 1922, when, after negotiations between counsel, a settlement was reached declaring the interests of the various parties to be: that Coughlan is the owner of four undivided twelfth parts, that C. H. McDonald is the owner of one-twelfth part; that J. A. McDonald is the owner of one-twelfth part and that *W. J. Taylor* is the owner of six one-twelfth parts, *Taylor's* claim being based on the fact that he had never been paid his costs of the actions in which the two Companies had been concerned. Judgment was entered accordingly in pursuance of the settlement but it appearing, when applications to register the various interests were made, that under section 48

of the Land Registry Act such a judgment could not be registered unless it contained a certificate that the judge had investigated the title a further application was made to the learned judge and an order made on the 28th of May, 1925 (under what is known as the slip rule), which provided that the judgment should be amended to include such declaration. In order that this matter may be disposed of now, I may say that one of the many contentions in the present case is that that action (which I shall call the Coughlan action) was dishonestly brought and conducted and that the judgment and amending order were a fraud upon the Court. I stated at the trial, and I repeat, that having regard to the eminent counsel who were engaged, some of whom gave evidence upon the trial, such a claim is scandalous and ridiculous and ought never to have been made. The Coughlan action was honestly brought, honestly contested and honestly settled. There was no fraud upon the Court. It is true that in his evidence my brother GREGORY stated that if he had to consider the matter again he would before signing the amending order have made some investigation of the title. I do not take his Lordship to mean that he would personally have examined the title, but that he would have taken some precautions to see that the title had been examined by some responsible person. For myself I may say that if the matter had come before me I would have depended, as his Lordship did, upon the counsel who were engaged in the case and if it devolved upon me to examine the title I would have found myself quite incapable of doing so. I have never examined or passed upon a title in British Columbia, but I have had some experience with counsel practising at this Bar and under the same circumstances I should, without hesitation, have made the order which his Lordship made. If all the parties were not represented or if there appeared any doubt about the matter then I should require a certificate from the registrar of titles. If such certificate had been called for in this case it would have revealed that Haddington Quarry Company Limited held a certificate of indefeasible title and I have always been under the impression that that was the best evidence of title which is procurable in this Province. Before leaving this branch of the case I may say that considerable discussion arose as to whether there existed on the 22nd of December, 1918,

Judgment

MCDONALD, J.

1929

Sept. 11.

RUDGE v. HADDINGTON ISLAND QUARRY CO.

Judgment

what is referred to in the order of that date (Exhibit 12), an assurance dated the 11th of December, 1922, from F. T. Walker. It was contended by counsel for the defendants that no such assurance ever existed. Upon hearing the evidence of Mr. *Mayers,* who saw the document and was one of counsel engaged in the case, I of course had no doubt whatever that the document did exist. Any doubt that could have existed in the mind of any one is now removed by the fact that there is now produced a letter from Walker to Mr. *Griffin* of counsel engaged in the present case enclosing a copy of that assurance. I note on examining the exhibits that this letter and document do not bear an exhibit mark. I want to make it clear, however, that I have admitted this document in evidence and it may be marked by the registrar with its proper number. The whole trouble in this matter was that the original document had in some way been lost.

The present action was brought on October 1st, 1928, and it will be noted with regard to the three parties originally interested, who are all deceased, that Allen Wesley Huson is represented in the present action by his son Spencer Huson, though the latter has two brothers still living and equally interested with him; that Henry Rudge is represented in this action, as in the former action by six members of his family; whilst Samuel Gray is represented by Hattie Beaven (who has died pending this action and whose estate is not now represented) and Elizabeth Wright, while in the former action the Gray interests were represented by a son, Samuel Wesley Gray, and the said Elizabeth Wright. Samuel Wesley Gray, son of Samuel Gray, is since deceased as is also his brother James, both James and Samuel Wesley having left children who are still living. As to the grandson of Samuel Gray, Edward Walter Gray, who was the plaintiff in the action brought by Mr. *Aikman,* I have no note of any evidence having been given as to whether or not he is still living. It is to be noted therefore that with very few exceptions the plaintiffs in this action were plaintiffs in the former action and it is to be noted further that some of the interests were not and are not represented in either action. I make the latter observation for the reason that it seems to me, in view of the history of this case and the arrangement that was made between Messrs. *Higgins* and *Aikman* referred to

above, it is not an unfair suggestion to make that if the present action should turn out to be unsuccessful another member or members of one of these families will commence another action so that the litigation regarding this property may go on "till time shall be no more." While it is true that our rules provide that no action shall fail for want of parties still I think the Court should have some control over its own process and that there is real substance in the defendants' objection that by reason of want of parties this action ought not to succeed. I do not, however, base my judgment upon that, but upon other grounds.

Judgment

While in the former action the plaintiffs omitted to charge fraud they have shewn no hesitancy in making such charges in the present action. The pleadings are full of allegations of fraud and collusion. It is charged that the whole scheme of forming the two companies and of the conveyances to Walker and to Temple were fraudulent. Where is the fraud? A limited company, even a "one man" company is recognized at least ever since *Salomon* v. *Salomon & Co.* (1897), A.C. 22 as a distinct entity with all the rights of a private individual and that, even though no shares are issued except those necessary for procuring incorporation. There is no concealment. It was never suggested nor alleged that any money had passed. The companies were incorporated and the conveyance made for the reasons already stated which reasons, so far as I can see, were quite honest. It is contended that the sale from Haddington Island Quarry Company Limited to Walker was fraudulent and void as being really a sale from McDonald, Wilson & Snider to themselves. This is not so. The sale was made by Haddington Island Quarry Company Limited to McDonald, Wilson & Snider and as such is quite valid. Exactly the same principles apply as in *Farrar* v. *Farrars Limited* (1888), 40 Ch. D. 395. Of course upon this branch the main contention is that the property was sold at a gross undervalue and that such sale in itself amounts to fraud. If the facts were proven that would of course be so, but I am not satisfied on the evidence produced before me that the property was sold at an undervalue. We have had for the plaintiffs the evidence of Spencer Huson, Herbert A. Rudge and Alexander Stewart. Of the three Stewart is the only one who appeared to me to be giving honest evidence, but the

MCDONALD, J. 1929 Sept. 11.

RUDGE v. HADDINGTON ISLAND QUARRY Co.

trouble with Stewart is that he is a stone-cutter and not an operator of quarries and I do not think he qualified himself as an expert able to give a proper valuation of the property in question. On the other hand, we have this fact that C. H. and J. A. McDonald acquired Snider's one-sixth interest on the 29th of July, 1919, for the price of $1,000 and that they operated the property for several years at a heavy loss. C. H. McDonald, who has probably had more experience with the operation of this quarry than any other person, gives it as his opinion that a fair value would be the capitalized value of $225 per annum invested at 7 per cent. It is true that *Taylor* has since sold his one-half interest to C. H. and J. A. McDonald for $15,000 but this happened after these men had invested thousands of dollars in developing the property and installing expensive plant and they were therefore able, and naturally willing, to pay a much higher price than any one else would pay rather than that a third party (for instance, a competitor) should purchase *Taylor's* interest. So far as I am concerned, I am not prepared to find upon the whole of this evidence that the property was sold at such an undervalue as to constitute fraud.

Judgment

Many interesting questions relating to laches, estoppel and the Statute of Limitations were ably argued by counsel but I have reached the conclusion that this case falls to be decided upon the doctrine of *res judicata*. I have already stated the facts regarding the parties and my views upon the other facts and I think this case clearly falls within the rule laid down in *Henderson* v. *Henderson* (1843), 3 Hare 100 at p. 115:

"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."

See also the judgment of Earl Cairns, L.C. in *Phosphate Sewage Company* v. *Molleson* (1879), 4 App. Cas. 801 at p. 814.

I have throughout, for convenience, dealt with all the defendants as if they were upon the same basis. Of course this is not so. So far as the defendants Coughlan, C. H. McDonald and J. A. McDonald are concerned I doubt very much that there is any allegation of fraud and I am sure that as against them there is not the slightest suggestion of any proof of fraud.

The action is dismissed with costs.

Action dismissed.

IN RE ESTATE OF MARY GRANT, DECEASED. MORRISON v. GRANT.

COURT OF APPEAL

1929

Oct. 1.

MORRISON *v.* GRANT

Devolution of estates—Intestacy—Distribution among nephews and nieces—R.S.B.C. 1924, Cap. 5, Secs. 114, 116 and 126.

On the death of an intestate, leaving her surviving her husband and the children of deceased brothers and sisters, the proviso to section 116 of the Administration Act applies, and after the husband's share of the estate has been segregated, the residue is divided amongst the nephews and nieces *per capita.*

Statement

APPEAL by W. L. Morrison, one of the nephews of Mary Grant, deceased, from the order of McDONALD, J. of the 16th of April, 1929, whereby it was ordered that that part of the estate of the deceased going to persons other than the deceased's husband be distributed amongst such persons *per capita.* Mary Grant died in the City of Vancouver on the 9th of January, 1927, intestate, leaving an estate of about $50,000. Deceased's husband applied for letters of administration, the other beneficiaries being three nephews and five nieces all living in the United States. The appellant contends that the said balance of the estate should be distributed amongst the nephews and nieces *per stirpes.*

The appeal was argued at Victoria on the 11th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

A. deB. McPhillips, for appellant: This case comes under Part VII. of the Administration Act as amended in 1925. We submit that under section 116 the nephews and nieces take *per stirpes.* The proviso to this section does not apply here as there is the husband to provide for in addition to the nephews and nieces. The result in the cases of *In re Smith* (1919), 3 W.W.R. 745, and *In re McCabe Estate* (1921), 3 W.W.R. 169 does not apply.

Haldane, for respondent: The nephews and nieces are the only persons entitled to the balance of the estate after the husband has taken his share (over which there is no dispute) so that the proviso to section 116 applies. If the word "only" in the

COURT OF APPEAL

1929

Oct. 1.

MORRISON v. GRANT

proviso takes our case out of the section then sections 117 and 118 gives us the right to a division *per capita*: see *In re Smith* (1919), 3 W.W.R. 745 at p. 747. If the appeal be allowed the costs should be payable out of that portion of the estate that goes to the nephews and nieces: see *In re Barlow* (1887), 35 W.R. 737 at p. 739.

McPhillips, replied.

Cur. adv. vult.

1st October, 1929.

MACDONALD, C.J.B.C.: By section 126 of the Administration Act, Cap. 5, R.S.B.C. 1924, the expression "widow" may include a husband.

The intestate here was a woman who left her surviving a husband, and nephews and nieces.

The husband is entitled to $20,000, the estate being upwards of that sum. Subsection (3) of section 114 reads:

"Of the residue of the estate, after payment of the said sum of twenty thousand dollars, and interest, one-half shall go to the widow [in this case the husband] and one-half to those who would take the estate, if there were no widow, under section 115, 116 or 117, as the case may be."

The present case is governed by section 116, which reads as follows:

MACDONALD, C.J.B.C.

"If an intestate dies leaving no widow or issue or father or mother, his estate shall go to his brothers and sisters in equal shares, and if any brother or sister be dead the children of the deceased brother or sister shall take the share their parent would have taken, if living: Provided that where the only persons entitled are children of the deceased brothers and sisters, they shall take *per capita*."

Had there been one or more brothers or sisters surviving the intestate and one or more who had predeceased the intestate leaving children, the distribution under section 116 would be *per stirpes*.

There were, however, no brothers or sisters surviving but only children of such who predeceased the intestate.

In my opinion the above proviso applies to such a state of facts. The section deals with the one subject, namely, the distribution of the residue after the husband's share had been segregated. By the words "the only persons entitled" is meant the persons entitled to the residue and therefore in the words of the proviso the nephews and nieces take *per capita*.

The cases to which we were referred have no direct bearing upon the question here, which is one entirely of construction of

COURT OF APPEAL

1929

Oct. 1.

MORRISON v. GRANT

the statute before us. The statute in question in *In re Smith Estate* (1919), 3 W.W.R. 745, essentially differs from ours.

The costs should follow the event, and must be paid by the appellant. *In re Barlow* (1887), 35 W.R. 737.

MARTIN, J.A.

MARTIN, J.A.: In this case where all the "persons entitled" to the portion of the estate in dispute are the nephews and nieces of their deceased aunt there seems no good reason for excluding the application of the proviso in section 116 of Part VII. of the Administration Act Amendment Act, 1925, Cap. 2, and therefore the learned judge below was right in directing that they shall take *per capita*—*cf.*, *In re Smith* (1919), 3 W.W.R. 745, and *In re McCabe Estate* (1921), 3 W.W.R. 169.

It follows that the appeal should be dismissed, and no good cause exists for making any direction as to costs other than the usual one—*cf.*, rr. 989a and b.

GALLIHER, J.A.

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

If there had been no widower of the deceased the nephews and nieces of the deceased brothers and sisters would have taken the whole estate and would have taken *per capita*—see proviso in section 116, Part VII., B.C. Stats. 1925, Cap. 2.

There is a widower here who has been appointed administrator and there is no dispute as to what he takes.

My reading of the Act would be that the remaining portion of the residue to be divided among the nephews and nieces should be divided *per capita* and not *per stirpes*. They are all in the same degree and the fact here that the husband survives the deceased and takes a certain portion of the estate should not alter the manner of distribution to the nephews and nieces as to the shares to which they are entitled.

In *In re Smith* (1919), 3 W.W.R. 745, there is this difference only, that there the widow predeceased the husband while here, the husband survives the deceased whose property is to be distributed, but this seems to me to make no difference as to the shares coming to the nephews and nieces.

MACDONALD, J.A.

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

Appeal dismissed.

Solicitors for appellant: *McPhillips, Duncan & McPhillips.*
Solicitors for respondent: *Lawson & Clark.*

COURT OF APPEAL

1929

Oct. 1.

TURNER v. CANTONE

TURNER v. CANTONE: WHELAN AND BRUNHAM, THIRD PARTIES.

Motor-vehicles—Collision—Reasonable speed—Findings of fact—Appeal.

The plaintiff was a gratuitous passenger in the defendant C.'s car going east on Georgia Street in Vancouver and approaching Hornby Street at about 25 miles an hour. A taxi-driver had let a passenger out at the Devonshire Apartments on the north side of Georgia Street just east of Hornby Street. He started from the apartments going west, intending to turn south on Hornby Street. He turned south at the intersection and was nearly across when his rear right fender was struck by C.'s car. The collision took place at 3 o'clock in the morning when it was raining. The plaintiff was badly injured. An action for damages was dismissed by the trial judge with hesitation he stating it would be a satisfaction to him if the case went to review.

Held, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.B.C. and MACDONALD, J.A. dissenting), that the defendant's negligence was the cause of the accident and the case should be remitted to the Court below for assessment of damages.

Per MARTIN, J.A.: Where the trial judge has decided on the facts, with hesitation and expresses the wish that his judgment should be reviewed, the Court of Appeal is freed from the usual rules respecting its attitude towards the findings of fact at the trial.

Per GALLIHER and MCPHILLIPS, JJ.A.: Where the evidence in all material respects is undisputed and the question of credibility of witnesses is not involved a Court of Appeal is in as good a position as the trial judge was to come to a conclusion on the facts and should not shrink from overruling the trial judge's judgment if it decides that the judgment was wrong.

Statement

APPEAL by plaintiff from the decision of MURPHY, J. of the 13th of December, 1928, dismissing the action against the defendant Cantone, in an action for damages resulting from the defendant's negligence. The facts are that at about 3 in the morning of the 26th of February, 1928, when it was raining, the plaintiff on the invitation of the defendant Cantone was a passenger in his motor-car which he was driving easterly on Georgia Street in the City of Vancouver. On reaching the intersection of Hornby Street, he ran into the rear right side of a car owned by the defendant Whelan and driven by the defendant Brunham. Brunham had stopped at the Devonshire Apartments on the north side of Georgia Street just east of Hornby Street to let out

a passenger. He then started west and turned to his left, south, on Hornby Street. Brunham saw Cantone's car coming about 300 feet east of Hornby Street when he started from the Devonshire door, but turned south on Hornby thinking he could get across before the Cantone car reached him. The plaintiff was badly cut about the face and she received other injuries that incapacitated her for her work as a stenographer. The action was first brought against Cantone, Whelan and Brunham, but discontinued as against Whelan and Brunham. Then, at the instance of the defendant Cantone, Whelan and Brunham were added as third parties under Order XVI. of the Supreme Court Rules.

Statement

The appeal was argued at Victoria on the 12th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Donaghy, K.C., for appellant: Cantone and his passengers had been at a party and he had been drinking. It was a rainy night and he was travelling at 25 miles an hour. This is too fast and the result was that he ran into Brunham when there is no doubt Brunham was well ahead of him and entitled to cross the intersection first. This is in accordance with the cases that have been decided on this question. The reasoning in *McCarthy* v. *The King* (1921), 62 S.C.R. 40 applies.

Alfred Bull, for respondent: Cantone was within his rights; he had the right of way and it was his duty to watch for cars coming into Georgia Street on his right. Brunham should have allowed Cantone to pass and in trying to go over in front of him he did so at his own risk. The trial judge properly decided this case.

Argument

Craig, K.C., for third parties: If the learned judge below did not deal with the third-party issue this Court cannot make any order. If he dismissed the action as against the third parties then no notice of appeal has been given. The order of the Court of Appeal for service of notice of appeal on the third parties does not affect the matter. We submit we are not properly before the Court as the respondent cannot get any relief against the third parties here. There is no negligence proved against the taxi-driver.

Donaghy, replied. *Cur. adv. vult.*

COURT OF APPEAL

1929

Oct. 1.

TURNER v. CANTONE

1st October, 1929.

MACDONALD, C.J.B.C.: The trial judge who had the witnesses before him, exonerated defendant from blame, with, it is true, some hesitation. It is not often that we find a plaintiff giving evidence which would exonerate the defendant from blame, and the defendant on his part giving evidence which, in the absence of an explanation would implicate himself. This appears to be the situation here.

MACDONALD, C.J.B.C.

The accident occurred at about 3 o'clock in the morning, when the respondent and the appellant were returning, with others, from a dance. The appellant was a gratuitous passenger in her friend's car. Respondent was approaching Hornby Street, at its intersection with Georgia Street, on which he was driving; he was on his proper side of the road, was travelling at about 25 miles an hour, a speed which is not unreasonable. It was raining hard, which tended to blur his windshield, but I do not attach much importance to this because I think even if his windshield were perfectly clean he could not, in the circumstances of this case, have avoided the collision. The other car was a taxicab which had been standing in front of the Devonshire Apartments, on the north side of Georgia Street. The driver started up, intending to turn south into Hornby, he would therefore have to proceed some distance on his proper side of Georgia until he had cleared the centre of the intersecting streets, or what is called the "deadman," when he would have to switch sharply across the street in order to proceed on Hornby. In doing this he shot directly in front of respondent's car. The occurrence would take place in an instant. The appellant who was riding in the seat beside the respondent, stated on her examination for discovery, this:

"You did not see it [the taxi] until you were right there, just a moment before? That is right.

"No time to avoid it? I couldn't say. It was a very short distance from it.

"Cantone could not have seen it before you saw it, could he? I presume not.

"Did Mr. Cantone try to stop his car? Yes, he applied the brakes. It was very close at the time of the collision.

"Did you see how Mr. Cantone could have avoided the accident? I could not say that.

"Well, can you suggest to me how he could have done so? No, I could not see that it could have been avoided."

At the trial she said the same thing. She spoke of the defendant as a careful driver; that the visibility was bad, in fact she could not in any way suggest that he had done anything which a careful driver should not have done.

Now the taxi-driver, who was turning on to Hornby had not the right of way, the respondent had it under the statute. If he turned as he said he did, beyond the "deadman," that turn would be the first intimation respondent would have that he was going to cross. No wonder then that appellant could not have seen how the collision could have been avoided.

Now, on this evidence and on the evidence of the respondent himself, which is to the same effect, I find it impossible to say that there was negligence on his part or breach of duty towards the plaintiff.

But much stress has been placed upon what took place the night of the accident. The plaintiff who was slightly cut and bruised, was taken to the hospital. The two drivers went to the hospital, I presume for the purpose of enquiring as to her injuries. While they were in a room together waiting, two detectives belonging to the Crime Investigation Department of the City Police, came to the hospital to make enquiries. They found the two drivers there and proceeded to question them. I think the respondent did not wish to implicate the driver of the taxi, who was the suspected criminal, and therefore took the blame upon himself. He said the taxi-driver went around the "deadman" properly. This is in respondent's favour. If he had cut the corner, as suggested, respondent would have known what he was attempting to do, and perhaps have noticed it and acted accordingly; but as it was, he had no intimation of the taxi-driver's intention until he was almost in front of him. When cross-examined at the trial, he did not deny the detective's statements; he said:

"You have heard what the detectives have said as to what you said at the hospital, will you say that they said what was wrong? No, I wouldn't say it was wrong.

"They are repeating what you told them at the time, are they? I believe so, I don't remember, but I have no reason to doubt it.

"Then will you explain how you came to tell them what you told them? I can't explain.

"You knew what they were meaning when they asked you whether Brun-

COURT OF APPEAL

1929

Oct. 1.

TURNER v. CANTONE

ham [the taxi-driver] had cut the corner, did you not? Oh, I believe I did, yes."

Detective Macleod said:

"When you were talking to Cantone in the hospital, he was in a highly nervous state, was he not? He was."

The other detective Champion tells a slightly different story. He said:

"Cantone said at that time he took the blame for the accident, that the taxi-driver was not to blame at all. In conversation with him he said the windshield was dirty and that he wore glasses. He said his eyes were not quite right. That is about all."

Now the purpose for which these detectives were questioning the two drivers appears from the following evidence of Champion:

"We were there for the purpose of taking some man in for negligence, and we saw there was no negligence, so we did not take any person into custody."

MACDONALD, C.J.B.C.

Respondent's statements at the hospital, considering the nature of the detectives' quest, are understandable, though not defensible; they are not statements made under oath, nor did he when in the witness box, verify them as true, he frankly confessed that he made them but he remembers very little about it.

Detective Champion said further:

"Do you see any reason why he should blame himself now? No, I don't, but he did blame himself."

In deciding the rights of parties, I think we should look to the real occurrence as clearly demonstrated by the witnesses, and that too much importance ought not to be attached to the statements made by the respondent in the circumstances above related. I must confess that I am unable to say on the uncontradicted evidence of what took place at the time that the respondent was negligent, unless it were in respect of the rate of speed, which appears from the learned judge's reasons, not to have been pressed at the trial, and which I am unable to say was an unreasonable speed at that hour and in those circumstances.

I would therefore dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: In coming to his decision the learned judge below experienced so much doubt that he expressed the wish that his judgment should be reviewed and in such circumstances we are freed from our usual rules respecting findings of fact. I

COURT OF APPEAL

1929

Oct. 1.

TURNER v. CANTONE

find it, then, only necessary to say that on his own evidence the sole cause of the accident was due to the negligence of Cantone, the remaining defendant, and the case should be remitted to the Court below for the assessment of damages.

MARTIN, J.A.

The action was discontinued (by order of 12th October, 1928) against the original defendants Whelan and Brunham (the owner and driver respectively of the taxicab) but they were brought in (by order of 2nd November, 1928) on a third-party notice by the defendant Cantone (rr. 170-7) and so if they wish, in view of our reversal of the judgment, to speak to the form of the order that we should pronounce concerning them, they should be given that opportunity; the judgment appealed from contains no provision respecting them.

GALLIHER, J.A.

GALLIHER, J.A.: I have come to the same conclusion as my brother McPHILLIPS, whose judgment I have had the advantage of reading, and with which I agree.

McPHILLIPS, J.A.

McPHILLIPS, J.A.: This is an appeal in a negligence action tried by Mr. Justice MURPHY, without the intervention of a jury.

It is always a difficult matter to come to a different conclusion to that arrived at by the learned trial judge, when it is upon rival evidence that the learned judge has proceeded, or where the question of credibility arises. Here, however, in my opinion, no difficulty presents itself. The learned trial judge in dismissing the action said this:

"Now, with some hesitation, I am going to hold that that onus is not satisfied."

And further on we have the learned judge saying:

"I do not think the case is made out. It is a matter of speculation, I suppose, to some extent, but surrounding circumstances have to be regarded. . . . . I say this with some hesitation and it would be a satisfaction to me if this case went to review."

The learned judge dismissed the action but as we have seen "with some hesitation," and with the expressed hope that the case would receive consideration in appeal.

In my opinion, the Court of Appeal in this case is in as good a position as the learned trial judge was—not being a case, such as *Bryce* v. *C.P.R.* (1909), 15 B.C. 510, 513. Lord Gorell in the Privy Council in that case said:

"Their Lordships consider that the facts appear to have been very fully

COURT OF APPEAL

1929

Oct. 1.

TURNER v. CANTONE

McPHILLIPS, J.A.

and carefully investigated by MARTIN, J. [now Mr. Justice MARTIN of this Court].

Their Lordships of the Privy Council affirmed the judgment. Lord Gorell further said in that case, speaking of the learned trial judge:

"He had the great advantage of seeing and hearing the witnesses, and unless it could be shewn that he had taken a mistaken or erroneous view of the facts, or acted under some misapprehension, or clearly came to an unreasonable decision about the facts, he should not, in accordance with well-recognized principles, be overruled on matters of fact which depended mainly upon the credibility of the witnesses."

Here it is not that case, the facts seem to be in all material respects undisputed facts. That the car with which the defendant Cantone collided "cut the corner" as contended for by counsel for the respondent is not supported by the evidence as I read it. Further, if it had been the fact it was in no way the effective cause of the accident, as I view it. I would refer to what Lindley, M.R., said in *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402:

"The case was not tried with a jury, and the appeal from the decision of the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the materials before the judge, with such other materials, if any, as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong."

It now becomes necessary to consider the facts of the present case and before proceeding to do so, I may say that there is independent evidence in the case, *i.e.*, from witnesses not concerned in the outcome of the action, notably two police officers. McLeod, one of the police officers, saw the defendant Cantone (the respondent in the appeal) at St. Paul's Hospital, at 3.20 a.m., shortly after the accident. Cantone was the driver of the car which collided with the car of the defendant, Brunham, and McLeod in his examination in chief said:

"Was Cantone there? Yes, he was present.

"Proceed? And he said he was going in a westerly direction, started from the front of the Devonshire Hotel and turned to go south on Hornby Street. I asked Mr. Cantone which direction he was proceeding in and he said he was going east on Georgia. I asked Mr. Cantone then if the taxi-driver, as I called him, had cut the corner, and he said he had not. I said

'Was he going fast?' And Mr. Cantone said 'No.' And I said 'Did he do what he should have done in getting around the intersection?' And he said he did. So I asked the taxi-driver then 'Was this man Cantone driving at a fast rate of speed,' and he said 'No, he was not going fast.' So I then said to Mr. Cantone, 'Why didn't you stop?' This was after they had described the accident to me. I said 'Why didn't you stop then, instead of running into him?' And I can't remember the words, but he blamed it, I think it was the weather, I am almost sure he said there was rain on the windshield, or he couldn't see on account of the weather or something like that, and as far as I could ascertain he accepted the responsibility."

Then we have the other police officer, Champion, saying:

"In company with McLeod, we went to St. Paul's Hospital to investigate an accident. A phone message came to the station that a girl was seriously injured. We went to St. Paul's Hospital, and this girl was then on the operating table. We met two men in a side room. One said he was a taxi-driver who was in the collision and one was, I just forget his name now, but he said he was the owner of the other car that the girl was injured in.

"Would you know the name if you heard it? Yes, sir.

"Do you know the name of Louis Cantone? Louis Cantone, that is the name.

"They were both present? They were both present when we were having a conversation. Cantone said at that time he took the blame for the accident, that the taxi-driver was not to blame at all. In conversation with him he said the windshield was dirty and he also wore glasses. He said his eyes were not quite right. That is about all."

MCPHILLIPS, J.A.

And it is to be remarked that Cantone in his evidence admits the truth of the evidence of the two police officers above set forth as to what he said to them.

The plaintiff (the appellant in the appeal) in her evidence under cross-examination, said, first referring to the car which was struck by the car in which she was driving:

"How fast was the taxi going when you first saw it? It wasn't going very fast, I imagine 15 or 20 miles an hour.

"Do you remember the answer you gave on discovery, question 46: You say it was not going very fast. What do you mean by that: Not very fast? It was moving, that is all I could say. It was moving toward the other side of Georgia Street.

"Which way was it facing when you saw it? It was out from the curb near the Devonshire Court. It was out almost about half way across the street, may have been a little more.

"In fact you saw it almost at the same time as the collision? Yes, very close to the time of the collision.

"How fast was Mr. Cantone driving, do you know? No, I should say 25 or 30 miles.

"Did Mr. Cantone apply his brakes? Yes, he did.

"Did he swerve his car at all? Slightly to the left.

"What was the weather like? Raining.

BOARD OF SCHOOL

1929

Oct. 1.

TURNER v. CANTONE

"Was it foggy? No, it was dismal, raining.

"Could you see any distance? Yes, I don't remember of any fog. It was just raining.

"You could see some distance, could you not? Yes.

"Provided you were looking? Yes."

Then we have Cantone in his evidence in chief saying, referring to the taxi he struck, that he first saw the taxi when at the distance of 40 feet.

"When did you first see this taxi? About 40 feet, I should say."

Upon cross-examination Cantone said:

"As you approached Hornby you looked to the right, did you? Yes.

"And then you resumed your glance ahead. Do you say you were 40 feet from the taxi when you saw it? I wouldn't say exactly 40 feet, somewhere in that distance.

"Do you remember telling me on examination for discovery you were about 20 feet from the taxi when you first saw it? I might have told you that.

"Now, when you first saw the taxi it had practically completed its turn into Hornby Street, had it not? I don't know just what you mean by practically completed.

"In order to make the turn it would have to go around the intersection of the corner from Georgia on to Hornby and when it got flattened out on to Hornby it would have completed? I would say it would complete the turn when he was facing north and south on Hornby.

"He had almost completed his turn before you struck him, had he not? Fairly nearly, yes. . . . .

MCPHILLIPS, J.A.

"Now, you said on your discovery you were going about 25 miles an hour? That is right.

"Do you think it is safe to proceed at 25 miles an hour along a wet street as you did on the night in question crossing an intersection like Hornby Street? Probably not."

The outstanding facts of the case as shewn by the evidence are that the plaintiff, a young woman, is being driven in a motor-car in the early hours of the morning by the defendant Cantone. It was bad weather, raining, and it was difficult to see through the windshield. Cantone sees the car which he struck some 40 feet away, but driving at such an excessive speed in view of the circumstances from 25 or 30 miles an hour, it was evidently impossible for him to pull up within the 40 feet, hence the collision. It would seem to me that it is not difficult to determine where the actionable negligence was in this case. Excessive speed was unquestionably the proximate cause of the accident. Had the defendant Cantone been driving at a reasonable rate of speed no accident would have occurred. I am not at all surprised that the defendant Cantone, when the facts were all fresh

COURT OF APPEAL

1929

Oct. 1.

TURNER v. CANTONE

in his mind, frankly accepted the responsibility. Such is the evidence of the police officer McLeod, quoted above. We also have his (Cantone's) admission sworn to by the police officer, Champion—"He [Cantone] took the blame for the accident. . . . He said the windshield was dirty. . . . He said his eyes were not quite right."

Now, we have the whole case, it was a rainy night, the windshield of Cantone's car was obscured, he was driving at the excessive speed of possibly 30 miles an hour, in any case, from 25 to 30 miles an hour, he only sees the car which he struck when 40 feet away and is then unable to stop. Can there be but one answer upon these facts? In my opinion, there cannot, and that answer must be that upon the facts, the defendant Cantone was guilty of actionable negligence.

MCPHILLIPS, J.A.

The circumstances here were such that the defendant Cantone was unquestionably guilty of gross negligence—late at night, or more properly, at an early hour of the morning, driving his motor-car at the speed of 30 miles an hour during a heavy rain that causes his windshield to become obscured, is wearing glasses and further admits that "his eyes were not quite right"—that is, there was some difficulty or defect of vision. It would seem to me as I have already said, that there can be but one answer. The evidence as I read it is conclusive that the appellant suffered the personal injuries consequent upon the collision owing and solely owing to the defendant Cantone's gross negligence. I would refer to *Rex* v. *McCarthy* (1921), 2 W.W.R. 751, where Mr. Justice Duff at p. 754 said:

"Where the accused, having brought into operation a dangerous agency which he has under his control (that is to say, dangerous in the sense that it is calculated to endanger human life), fails to take those precautions which a man of ordinary humanity and reasonably competent understanding would take in the given circumstances for the purpose of avoiding or neutralizing the risk, his conduct in itself implies a degree of recklessness justifying the description 'gross negligence.' The facts of course may disclose an explanation or excuse bringing the accused's conduct within the category of 'reasonable' conduct."

The defendant Cantone, driving in the reckless manner he was, was guilty of negligence upon the further ground that the car he struck was in the act of crossing the street, *i.e.*, from Georgia into Hornby, and was almost wholly into Hornby when struck. The authorities shew, the traffic coming up must not

COURT OF APPEAL

1929

Oct. 1.

TURNER *v.* CANTONE

MCPHILLIPS, J.A.

proceed until that traffic can clear the car crossing in front—see Lord Sumner in *Rex* v. *Broad* (1915), A.C. 1110 and *Zellinsky* v. *Rant* (1926), 37 B.C. 119 at pp. 123-5.

Therefore, in my opinion, the judgment should be reversed and a new trial directed, confined to the assessment of damages only, upon the basis that the defendant Cantone was guilty of actionable negligence and answerable to the plaintiff for the personal injuries sustained by her owing to such negligence. The appeal should succeed.

MACDONALD, J.A.

MACDONALD, J.A.: After carefully weighing the evidence I am satisfied the learned trial judge rightly dismissed the action. The relative distances of respondent Cantone's car and the taxi-cab from the point of impact at the time the taxi-driver started up his car shews that the latter should have permitted Cantone to cross the intersection ahead of him. Cantone's car was under way travelling about 25 miles an hour along a main thoroughfare and he was only 300 feet from the intersection when the taxi-driver started from a dead stop 50 feet therefrom and about 100 feet from the point of impact. The taxi-driver had to start in low gear, later changing to second necessarily taking more time than he had available to carry him safely around the point where the silent policeman is usually placed before the arrival of Cantone's car at the same point.

When we find that the taxi-driver only attained a speed of eight or nine miles an hour on the turn it is clear that he could not safely cross in front of Cantone's car. He should not have made the attempt. A driver proceeding in a direct line on the highway so long as he takes reasonable care, watching particularly for traffic to his right, should not be called upon to apply brakes and practically stop his car to permit another driver in the act of changing his course to pass before him. If either driver must stop or slacken speed the obligation to do so rests primarily on the one who wishes to cut into traffic proceeding in a direct route by making a turn. It was the taxi-driver's duty to make a full turn and pass behind Cantone's car. I think too with the learned trial judge, that the taxi-driver did "cut the corner." It is probably the only way he could reach the point of impact in the time at his disposal. That inference

might well be drawn from the evidence. True the respondent Cantone after the accident told two officers that the taxi-driver did not cut the corner; also that he (Cantone) was to blame for the collision. The learned trial judge was perhaps not overly credulous respecting self-condemning evidence from one who while nominally defending the action was as the evidence discloses (without objection) protected by an insurance company. He may have felt more friendly disposed towards the injured appellant, or thought he was protecting the taxi-driver, the real culprit, from criminal proceedings. It is noteworthy that one of the officers stated at the trial that he personally could not see any reason why respondent Cantone should assume the blame. Relative positions and the undisputed facts are more important in reaching a conclusion.

MACDONALD, J.A.

Only one suggestion can be put forward to justify a reversal of the finding below, *viz.*, that Cantone should have seen the taxi-driver. That suggestion would have more force if the taxi-driver came up on his right. His failure to see the taxi-driver sooner did not cause the accident. It occurred solely because the taxi-driver wrongly attempted to cross in front of Cantone's car. When Cantone did see him it was too late to avoid a collision. Had he seen him earlier he would have a right to assume that the taxi-driver would do his duty, *viz.*, make a proper turn and pass behind him. It is in evidence too that the taxi-driver had a clear view of the approach of Cantone's car and had therefore less excuse for making an abortive effort to forestall him at the corner.

I would dismiss the appeal.

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

Solicitor for appellant: *D. Donaghy.*

Solicitors for respondent: *Walsh, Bull, Housser, Tupper & McKim.*

Solicitors for third parties: *Caple & Bond.*

COURT OF APPEAL

1929
Oct. 1.

LERIK
v.
ZAFERIS

LERIK v. ZAFERIS *ET AL.*

Partnership—Dissolution—Covenant by retiring partner—Breach—Inducing retiring partner to commit breach—Conspiracy to injure business—Restraint of trade.

The plaintiff and the defendant Z. were partners in a restaurant business. Z. sold his interest to the plaintiff and covenanted that he would not during the following three years "carry on or be engaged in, either directly or indirectly, and whether as principal, agent, director of a company, servant or otherwise, or take part in the business of a restaurant or cafe, or hotel, within the City of Victoria. . . ." The defendants P. and Z.'s wife opened a combined cafe and candy store a few doors from the plaintiff's restaurant and about five months after said dissolution they employed Z. to manage it. An action against Z. for damages for breach of covenant and for an injunction to restrain further breaches and for damages against P. and Z.'s wife for inducing Z. to commit such breach and against the three defendants for wrongfully conspiring to injure his business, was dismissed.

Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS and MACDONALD, JJ.A. dissenting), that the plaintiff has established his right to recover damages from Z. and there is clear evidence of conspiracy on the part of the three defendants. The appeal should be allowed and damages fixed at $1,500.

Statement

APPEAL by plaintiff from the decision of MURPHY, J. of the 18th of April, 1929, dismissing an action for damages for breach of covenant in an agreement of the 17th of May, 1928. The plaintiff and the defendant James Zaferis, were partners in a restaurant known as the Gem Cafe on Johnson Street, Victoria. They dissolved partnership and under the terms of the agreement the defendant Zaferis covenanted that for a term of three years he would not carry on or be engaged in the restaurant business in the City of Victoria. The defendant V. Paul and Amelia Zaferis, the wife of James Zaferis started a restaurant known as the "Busy Bee" a few doors away from the Gem Cafe, and about five months after the dissolution they employed James Zaferis to manage it. The plaintiff claims breach of covenant in engaging in said business and in soliciting old customers of his business and as against V. Paul and Amelia Zaferis for wilfully inducing or procuring the said James

Zaferis to break his agreement and soliciting old customers and for damages against all the defendants for unlawfully conspiring to destroy the plaintiff's business.

The appeal was argued at Victoria on the 26th and 27th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Higgins, K.C., for appellant: James covenanted not to engage in the business for three years and Paul and James's wife induced him to break his agreement. They are all liable in damages: see *In re Griffin; Ex parte Board of Trade* (1890), 60 L.J., Q.B. 235 at p. 237; *Drew* v. *Guy* (1894), 3 Ch. 25; *Parnell* v. *Dean* (1900), 31 Ont. 517; *Gophir Diamond Company* v. *Wood* (1902), 1 Ch. 950; *Geo. Hill and Co.* v. *Hill* (1886), 55 L.T. 769. Where one person induces another to break a contract he is liable: see *Pratt* v. *British Medical Association* (1919), 1 K.B. 244. The act of inducing a person to break a contract is distinguished from conspiracy.

Argument

Stuart Henderson, for respondents Paul and Mrs. Zaferis: They must shew that Paul and Mrs. Zaferis contrived to make Zaferis break his contract: see *Humphrey* v. *Wilson* (1917), 25 B.C. 110; *Sweeney* v. *Coote* (1907), A.C. 221 at p. 222. The facts must be such that they cannot fairly admit of any other inference being drawn from them. When the partnership was dissolved Zaferis went away and was employed by the Canadian Northern Railway. In the meantime Paul and Mrs. Zaferis started the Busy Bee Cafe. Zaferis then came back and he was employed by Paul to buy supplies for him. There is no evidence of his attempting to induce Zaferis to break his contract. That it is a contract in restraint of trade see *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535.

D. S. Tait, for respondent Zaferis: This was Paul's business and Zaferis came afterwards but he has nothing to do with the restaurant part of the business: see *Loe* v. *Lardner* (1856), 4 W.R. 597; *Smith* v. *Hancock* (1894), 1 Ch. 209 and in appeal (1894), 2 Ch. 377; *Bird* v. *Lake* (1863), 1 H. & M. 111 and in appeal p. 338. As to a contract in restraint of trade see

William Cory & Son, Limited v. *Harrison* (1906), A.C. 274; *Hall* v. *More* (1928), 39 B.C. 346. With relation to its being a like business see *Lovell and Christmas Limited* v. *Wall* (1911), 104 L.T. 85; *Stuart* v. *Diplock* (1889), 43 Ch. D. 343.

Higgins, replied.

Cur. adv. vult.

1st October, 1929.

MACDONALD, C.J.B.C.: Damages are claimed for breach of a covenant made by the defendant Zaferis with his late partner the plaintiff. The plaintiff bought Zaferis's interest in the partnership and the latter covenanted with him that during the period of three years from the date of the agreement, he would not "carry on or engage in, either directly or indirectly, and whether as a principal, agent, director of a company, servant or otherwise, or take part in the business of a restaurant or cafe or store" within the City of Victoria. The defendants are alleged to have conspired together to break this covenant, and I think the conspiracy has been amply proved.

MACDONALD, C.J.B.C.

I have read the evidence through with care. It is impossible in a short summary to give a complete statement of its purport, but in my opinion, taken all together there is clear evidence of a conspiracy on the part of the three defendants. The learned trial judge founded his opinion on the evidence of one Johnson, defendants' witness. Johnson was a rental agent for the owner of the building in which the new cafe is carried on, and said that for some years past the defendant Paul had suggested to him that the premises would be suitable for a cafe. On this evidence the learned judge thought that the opening of the cafe there by Paul was not a new idea and that to his mind this evidence rebutted any presumption of participation in a conspiracy to break plaintiff's covenant. With great respect, I cannot regard that evidence of importance in this case. In view of the other evidence which discloses Paul's knowledge of the covenant and his participation in the scheme to circumvent it. To note a few only of the ear-marks of fraud, it appears that Zaferis handed over to his wife, the money, or the greater part of it, which he had received from the plaintiff for his share in the business; she says she loaned the money to Paul to start the

new business; she was engaged as manager of it and her husband Zaferis was employed to look after Paul's candy business, which was a branch of the new business of the combined cafe and candy store. Zaferis took an active part in assisting Paul to furnish the cafe, going from shop to shop advising him what to buy. He invited former customers to go to the new place. In fact, the whole scheme is such an obvious one that when exposed it does not admit of any serious doubt that it was a clumsy and dishonest attempt by the defendants to break the covenant.

MACDONALD, C.J.B.C.

I would allow the appeal, grant the injunction and assess the damages at $1,500.

MARTIN, J.A.: This action arises out of the alleged breach of the following covenant made at the dissolution of partnership, *viz.*:

"And the party of the first part hereby covenants with the party of the second part that he, the party of the first part, will not, during the period of three (3) years from the date of these presents, carry on or be engaged in, either directly or indirectly, and whether as principal, agent, director of a company, servant or otherwise, or take part in the business of a restaurant or cafe, or hotel, within the said City of Victoria, except on behalf or with the consent in writing of the said party of the second part."

In construing this covenant the learned judge below regarded it as not wider than that in *Smith* v. *Hancock* (1894), 2 Ch. 377, wherein the vendor of a business covenanted (p. 378)

MARTIN, J.A.

"Not to carry on or be in anywise interested in the businesses of a wholesale or retail grocer and provision dealer and baker, or any of them, within a distance of five miles from the said premises."

With respect, I am unable to take that view because the word "interested" was defined by Lords Justices Lindley and Smith as being a "proprietary or pecuniary" nature and so the active, voluntary and unremunerated "interest" of the vendor as assisting his wife to carry on for her sole use and benefit another business was not within the legal covenant though it was a dishonourable course of conduct in the circumstances. A. L. Smith, L.J., said, p. 391:

"I agree that [there] is evidence which might well lead to the inference that the business was in reality his, and not his wife's, or partly his and partly hers, which would suffice to constitute a breach of covenant by the husband, for he would then have an interest in the business. But, when this inference is disproved, as, in my judgment, it is in this case, how do

COURT OF APPEAL

1929

Oct. 1.

LERIK v. ZAFERIS

MARTIN, J.A.

the acts of the husband constitute a breach of the agreement sued on? He has no interest whatever in the business itself, which is that of his wife, carried on by her for her own purposes, though he has taken an interest in her succeeding therein, which these acts of his shew that he has done. If the husband had performed similar acts in like circumstances for a stranger who was setting up business on his own account, in my judgment it could not be said that he was in anywise interested in the business, though he had interested himself on behalf of the stranger; and so now the same result follows if he does the same acts for his wife."

But the covenant before us is of a wider scope of "interest" embracing the carrying on or being engaged in the restaurant business in Victoria either directly or indirectly, and whether as principal, agent, director of a company, servant or otherwise, several of which capacities are quite distinct in their nature from the sole "interest" that was in question in *Smith* v. *Hancock,* and in considering that case Swinfen Eady, J. pointed out in *Gophir Diamond Company* v. *Wood* (1902), 1 Ch. 950, that a servant is excluded from the expression "interested" in a business, and hence that employment should be the subject of a special covenant, as is the case here, and concludes (p. 953):

"The covenant, fairly construed, prohibits the defendant from being interested, directly or indirectly, in a similar business in the sense that he must not have a proprietary or pecuniary interest in the success or failure thereof. If his remuneration in any way depended on the profits or gross returns, he would be 'interested' in the business, but the mere fact that he is employed as a servant at a fixed salary gives him no such interest and constitutes no breach of his covenant."

The House of Lords in *William Cory & Son, Limited* v. *Harrison* (1906), A.C. 274, held that the expression "concerned or interested in" a business must be looked at in the light of the facts of the particular case and in the "business meaning of the words," not in their very wide popular signification which would, *e.g.,* include the "interest" of a creditor in the welfare of the debtor and also being "on affectionate terms with the person carrying on the business."

On the facts before us I agree that the appellant has established his right to recover damages from the defendant James Zaferis for breach of said covenant and also from him and the other defendants as deliberate parties to a fraudulent scheme to injure the plaintiff by setting up a competitive business in another name in breach of the said covenant. Though in the circumstances it is unavoidably difficult to ascertain the damages

with precision, yet, as it is beyond doubt that the damages suffered are very substantial it is the duty of the jury or judge to assess them as best they may, even though in such a case as the present the assessment "must be more or less guess work," as the Privy Council said in *Toronto Hockey Club, Ltd.* v. *Arena Gardens of Toronto, Ltd.* (1926), 3 W.W.R. 26; (1926), 4 D.L.R. 1; and see also *Bovet* v. *Walter* (1917), 62 Sol. Jo. 104; and *McHugh* v. *Union Bank of Canada* (1913), A.C. 299. On the facts before us I am satisfied they amount to at least $1,500, and hence there should be judgment for that sum, and the appellant is also entitled to an injunction to restrain further breaches of the covenant.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. I am in complete agreement with the learned trial judge.

With respect to the alleged cause of action against V. Paul and Amelia Zaferis, that they induced or procured the defendant James Zaferis to commit a breach of contract and that all the defendants wrongfully and maliciously conspired and combined amongst themselves to injure or destroy the business of the plaintiff, the Gem Cafe, all I can say is, that there was the most woeful failure to establish any such case at the trial, and it was peculiarly the province of the learned trial judge to dispose of such a case seeing the witnesses and hearing their evidence.

MCPHILLIPS, J.A.

The allegations made are serious ones. The learned trial judge, Mr. Justice MURPHY, gave the whole question the most careful consideration; his reasons for judgment demonstrate this. Now, the attempt is to have this Court disregard the judgment of the trial judge in such a case as this and interpose a different view of the evidence in a case where so much depends upon the demeanour of witnesses, *i.e.*, to find, although the trial judge had not so found, that the defendant, James Zaferis, has been guilty of a breach of covenant and that V. Paul and Amelia Zaferis induced James Zaferis to commit such breach, also that all the defendants combined together and maliciously conspired to injure or destroy the business of the Gem Cafe. A case set up of such a nature always calls for the most precise proof. The

COURT OF APPEAL

1929

Oct. 1.

LERIK v. ZAFERIS

MCPHILLIPS, J.A.

evidence fell greatly short of this and to the extent it did go was palpably disbelieved by the learned trial judge. It would certainly be a travesty of justice to now reagitate a case which undoubtedly had its proper ending by being dismissed out of Court. However, it is perhaps well to give some further attention to the matter as it has been apparently seriously argued that the learned judge, although he gave the obvious judgment at the trial, was in error and that his judgment is wrong, and should be reversed.

The governing decision in matters of restraint of trade and the public policy which has to be considered, is to be found in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Company* (1894), A.C. 535, a case I referred to upon the argument at this Bar. There Lord Macnaghten said at p. 565:

> "The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."

Unquestionably the original principle still obtains, a man should not be permitted to restrain himself from carrying on any legitimate business in accordance with his judgment and in his own way. It is true there are some exceptions. The question is, is the covenant in question here contrary to public policy and therefore void? In considering this I would refer to what Lord Macnaghten said at p. 565. In my opinion the restriction in the covenant in the present case is unreasonable and therefore the covenant is void. The covenant reads as follows: [already set out in the judgment of MARTIN, J.A.].

Unreasonable in this respect, that the defendant James Zaferis is restrained from being a servant "in the business of a restaurant or cafe." This in effect destroys the opportunity for a man to gain his livelihood. It means that even in a menial

capacity he cannot work. This far transcends reasonableness and is against, and must be against, public policy. In so far as entering into competition with the plaintiff it is reasonable, but the defendant James Zaferis had not done this—he is merely a servant and not even a servant in "a restaurant or cafe or hotel within the said City of Victoria," a servant only in a candy shop; that it should be contiguous to but not a part of the premises of a restaurant or cafe cannot be enough, he had nothing whatever to do with the business of a restaurant or cafe. Quite apart from the validity or invalidity of the covenant, there has upon the facts here been no breach of contract upon the part of James Zaferis.

I would refer to what that master of the law, the Right Honourable Sir Frederick Pollock said, at pp. 430-1, in his work on the Principles of Contract, 9th Ed.:

"Policy of partial exceptions.—The qualified admission of restraints has been commonly spoken of as an exception to the general policy of the law. But it seems better to regard it rather as another branch of it. Public policy requires on the one hand that a man shall not by contract deprive himself or the state of his labour, skill, or talent; and on the other hand, that he shall be able to preclude himself from competing with particular persons so far as necessary to obtain the best price for his business or knowledge, when he chooses to sell it. Restriction which is reasonable for the protection of the parties in such a case is allowed by the very same policy that forbids restrictions generally, and for the like reasons (James, V.-C. *Leather Cloth Co.* v. *Lorsont* (1869), L.R. 9 Eq. 345, at p. 353); but, it must be remembered, subject to the paramount interest of the public."

In so far as the covenant provides against competition it may be said to be reasonable, but when it deprives a man of the right to labour in the calling that he knows it is unreasonable, and the covenant in this case is that, and being that the covenant is void, such is my opinion.

However, in the present case even if the covenant could be said to be valid there has been no infraction of it (*Smith* v. *Hancock* (1894), 1 Ch. 209, and in appeal (1894), 2 Ch. 377). And the learned judge has made that finding of fact and there is ample evidence to support the learned judge in so finding, that being the case his judgment should not be disturbed (*Sweeney* v. *Coote* (1907), A.C. 221 at p. 222; *William Cory & Son, Limited* v. *Harrison* (1906), A.C. 274; *Lovell and Christmas*

COURT OF APPEAL

1929

Oct. 1.

LERIK v. ZAFERIS

MCPHILLIPS, J.A.

Limited v. *Wall* (1911), 104 L.T. 85; and *Stuart* v. *Diplock* (1889), 43 Ch. D. 343).

I might further refer to what the late Sir John Salmond said in that monumental work of his on the principles of the Law of Contracts, 1927, at p. 168, when considering the *Nordenfelt* case, *supra*:

"On the same principle contracts are void which are in unreasonable restraint of trade—which impose, for example, unreasonable and mischievous restrictions or the right of one of the contracting parties to carry on his business."

In principle, in my opinion, the present case, being a case of alleged wilful inducement upon the part of two of the defendants to bring about a breach of contract and of wrongfully and maliciously conspiring together (of all three) to injure or destroy the business of the plaintiff, and the learned judge having acquitted the defendants of all this the judgment of the trial judge should not be disturbed. In *Horne* v. *Gordon* (1909), 42 S.C.R. 240 at p. 241, "the question being one of fact depending upon the proper view of conflicting testimony the judgment of the trial judge should not have been disturbed." In *Nocton* v. *Ashburton* (*Lord*) (1914), A.C. 932, it was a case where Neville, J. found that the charge of fraud was not proved and dismissed the action and Mr. Justice MURPHY in the present case dismissed the action. The Court of Appeal reversed this finding of Neville, J., and granted relief on the footing of fraud. Here the Court of Appeal is asked to do a similar thing. The House of Lords, however, reversed the Court of Appeal holding that in the circumstances the Court of Appeal was not justified in reversing the finding of fact of the judge of first instance. When the facts of the present case are kept in mind and the serious charges made against the appellants are considered, it is well to heed the warning words of Viscount Haldane, L.C. at p. 945, in *Nocton* v. *Ashburton* (*Lord*), *supra*:

"My Lords, I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal."

And at p. 957, Viscount Haldane, L.C. further said:

"The judges of the Court of Appeal appear to have taken some such view, with this difference, that they found actual fraud. I think, as I have already said, that it is only in exceptional circumstances that judges of appeal, who have not seen the witness in the box, ought to differ from the

COURT OF APPEAL

1929

Oct. 1.

LERIK *v.* ZAFERIS

finding of fact of the judge who tried the case as to the state of mind of the witness."

In *Nanoose Wellington Collieries, Limited* v. *Adam Jack* (1926), S.C.R. 495, Anglin, C.J.C. at p. 498, said:

"Without casting the slightest doubt on the right of the Court of Appeal in a proper case to find fraud established notwithstanding the contrary view taken by the trial judge (*Annable* v. *Coventry* (1912), 46 S.C.R. 573), we are all very clearly of the opinion that, under the circumstances of this case, the explicit findings of the trial judge, which obviously rested largely on his appreciation of the respective credibility of the . . . witnesses who testified before him . . . should not have been disturbed. *Nocton* v. *Lord Ashburton* (1914), A.C. 932, at pp. 945, 957-8."

MCPHILLIPS, J.A.

It was eminently a case for the determination of the trial judge, especially as the learned judge had sufficient evidence before him to warrant the findings of fact which he made (Lord Sumner in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8).

I would therefore affirm the judgment of the learned trial judge and would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: It is true an air of suspicion surrounds the transaction. I might have reached a different conclusion in the first instance if at the trial, but cannot say now, after reading the evidence that I am convinced the learned trial judge was clearly wrong in the following findings of fact: (1) That the new restaurant was started solely by the respondent Paul on his own initiative; (2) that he finally decided to open it, not because of assistance financial or otherwise given by respondent Zaferis or his wife, but because another party might obtain the premises ahead of him if he delayed his decision; (3) that there was no concerted action between the three respondents to establish a business, ostensibly Paul's but in reality belonging to all of them; (4) that Zaferis and his wife were not interested in Paul's new venture nor surreptitiously promoting it; (5) that Zaferis did not make representations to others that he was about to open up another cafe or to be interested therein as a partner or otherwise; (6) that Zaferis did not act as an employee in the new restaurant but only for a short time in a confectionery store next door owned by respondent Paul but which so far as the public knew was a separate business; (7) that the extent of Zaferis's intervention was to assist respondent Paul in purchas-

COURT OF APPEAL

1929

Oct. 1.

LERIK v. ZAFERIS

MACDONALD, J.A.

ing equipment for the new restaurant; (8) that Zaferis's gift of $600 to his wife was made *bona fide* without an intention on his part that it should be invested in the new business. If it was a gift his wife's subsequent action in loaning it to the respondent Paul would not constitute a breach of the covenant by Zaferis nor afford evidence of a conspiracy. As intimated I do not feel satisfied of the respondent's good faith but the best time and place to form an opinion on that point for obvious reasons was at the trial. I do not feel compelled to differ from the learned trial judge respecting evidence he accepted and other evidence rejected, and as it is not a case of misconceiving evidence adhering to the principles followed by appellate Courts in reviewing findings of fact I would not interfere.

It follows that there was no breach of a covenant designed to protect the appellant from the competition of the respondent Zaferis. I would dismiss the appeal.

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

Solicitor for appellant: *Frank Higgins.*

Solicitors for respondent Zaferis: *Tait & Marchant.*

Solicitor for respondents Paul and Amelia Zaferis: *Stuart Henderson.*

W. J. ALBUTT & COMPANY LIMITED v. CONTINENTAL GUARANTY CORPORATION OF CANADA LIMITED, AND E. W. SHEASGREEN.

MURPHY, J.

1929

May 7.

COURT OF APPEAL

Oct. 1.

W. J. ALBUTT & Co. *v.* CONTINENTAL GUARANTY CORPORATION OF CANADA

Sale of goods—Automobile—Conditional sale agreement—Assignment to plaintiff—Delivery to mercantile agent on default—Resale under conditional sale agreement without notice—Assignment of agreement to another person—R.S.B.C. 1924, Cap. 44, Sec. 4; Cap. 225, Sec. 60.

Under a conditional sale agreement, the Pacific Motors Limited sold a car and assigned the agreement to the plaintiffs. Shortly after the buyer defaulted in her payments and the car was taken back by the Pacific Motors Limited and with the plaintiffs' consent was resold to one F. under a conditional sale agreement which was assigned to the plaintiffs. F. then defaulted in his payments and the car, without the plaintiffs' knowledge or consent, was taken back and resold by the Pacific Motors Limited to the defendant S. under a conditional sale agreement which the Pacific Motors Limited discounted with the defendant Continental Guaranty Corporation, said company taking the assignment in good faith. All the agreements were duly registered. In an action for damages for conversion and for a declaration that the plaintiffs were the owners and entitled to possession of the car, the Continental Guaranty Corporation disclaimed any interest therein and it was held, applying section 4 of the Conditional Sales Act that S. had obtained title to the car and that the action be dismissed.

Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the appeal should be allowed except as to the claim for damages for conversion and that the plaintiffs should be declared the owners and entitled to possession of the car.

Statement

APPEAL by plaintiffs from the decision of MURPHY, J. in an action tried by him at Vancouver on the 1st of May, 1929, for a declaration that the plaintiffs are the owners of a certain automobile described as Moon Cabriolet Roadster, Serial 9093, Engine No. 2858, and that the plaintiffs are entitled to a transfer and delivery of a certain conditional sale agreement wherein the defendant Sheasgreen is purchaser and the defendant Pacific Motors Limited is vendor dated the 11th of May, 1928, said agreement having been assigned to the defendant Continental Guaranty Corporation of Canada Limited by the defendant Pacific Motors Limited, which assignment is a fraud on the

MURPHY, J.

1929

May 7.

COURT OF APPEAL

Oct. 1.

W. J. ALBUTT & Co. v. CONTINENTAL GUARANTY CORPORATION OF CANADA

Statement

plaintiffs. The facts are that the automobile in question while in possession of the Pacific Motors Limited was sold on the 23rd of March, 1927, to L. M. Swanston under a conditional sale agreement and on the same day the conditional sale agreement was assigned to the plaintiffs. Shortly after, Swanston, being unable to complete the purchase, returned the automobile to the Pacific Motors Limited. On the 21st of October, 1927, the Pacific Motors Limited resold the automobile under conditional sale agreement to one C. Francis for $2,190 upon which $415 was paid and on the same day the conditional sale agreement was assigned to the plaintiffs. On the 11th of May, 1928, the Pacific Motors Limited, without the knowledge of the plaintiffs, secured possession of the said automobile and purported to sell same to one Sheasgreen under conditional sale agreement for $1,556, and on the same day assigned said conditional sale agreement to the defendant the Continental Guaranty Corporation of Canada Limited.

J. A. MacInnes, for plaintiffs.
Symes, for defendants.

7th May, 1929.

MURPHY, J.: As to the claim against the Continental Guaranty Company, in my opinion, the action fails since that defendant never has made, nor does it now make, any claim to the motor-car in question. But it is said it has done what amounts to a conversion because of what occurred in its office on May 12th, 1928. On May 11th, 1928, defendant Pacific Motors Limited sold the motor-car to defendant Sheasgreen under conditional sale. The document was drawn up and signed and the transaction was in every way complete. The next day Swanston, manager of Pacific Motors Limited, went to the Continental Guaranty Corporation and requested that it discount the Sheasgreen agreement of May 11th. The Continental Corporation's manager refused because the Sheasgreen agreement, after stipulating for two or three comparatively small payments, required a final large payment. Sheasgreen was then sent for and a new agreement was drawn up between Pacific Motors and him on a form furnished by the Continental Guaranty Corporation. This

MURPHY, J.

agreement differed from the one of May 11th, 1928, only in requiring a series of moderate payments spread over a greater length of time. It is argued that this is such a meddling with the motor-car by the Continental Guaranty Corporation as amounts to a conversion. I do not agree. The Continental Guaranty Corporation were, in my view, not interfering in the sale at all. That was not the matter under discussion with it. What was under discussion was the discounting of the Sheasgreen agreement. The Continental Guaranty Corporation declined to discount the agreement as it stood. It gave its reason —the so-called "balloon payment." Thereupon Swanston got Sheasgreen to change the terms of payment so as to suit the Continental Guaranty Corporation. All the latter company did in effect was to state the kind of agreement it was prepared to discount. The giving of the form was a mere act of courtesy.

Then it is said that the registration of the assignment by Continental Guaranty Corporation is an assertion of title amounting to conversion and that the insistence by that defendant of payment to it by Sheasgreen is also conversion. It is further argued that as Swanston's act was fraudulent, plaintiffs are the equitable owners of the Sheasgreen undertaking to pay and the Continental Guaranty Corporation's insistence that he pay the remainder of the purchase price to it is conversion. All these contentions, whether correct in law or not are, in my view, met by my decision hereinafter set out in favour of Sheasgreen.

MURPHY, J.

I think the action against him must likewise be dismissed because he comes within the provisions of either section 60 of the Sale of Goods Act or section 4 of the Conditional Sales Act or possibly of both of them. It is argued that the Conditional Sales Act is a code and therefore section 60 of the Sale of Goods Act does not apply and that Sheasgreen is not within the protection of section 4 of the Conditional Sales Act. I need not decide the first of these contentions because I consider Sheasgreen is protected by section 4 of the Conditional Sales Act. It is argued that because of the sale to Francis and its assignment to plaintiffs it cannot be said that the motor-car was, to the knowledge of plaintiffs, in the possession of Pacific Motors Limited at the time of the sale to Sheasgreen with the consent,

MURPHY, J.
1929
May 7.
COURT OF APPEAL
Oct. 1.
W. J. ALBUTT & Co. v. CONTINENTAL GUARANTY CORPORATION OF CANADA

express or implied, of plaintiffs to Pacific Motors Limited to resell it. This contention overlooks the terms of the sale to Francis of which terms plaintiffs were aware since it held the discounted agreement. The sale to Francis was the ordinary conditional sale. Under its terms title remained in Pacific Motors Limited which company could on default repossess and resell the car as in fact it did. This would be done in its ordinary course of business if Francis defaulted and I hold on the evidence plaintiffs must have been aware that such was the case. These findings lead me to hold that when the sale to Sheasgreen took place Pacific Motors Limited had possession of the car and that knowledge of that fact must be attributed to plaintiffs and that it had such possession with, at any rate, the implied consent of the plaintiffs that Pacific Motors Limited might resell the car.

MURPHY, J.

The action is dismissed with costs as against the Continental Guaranty Corporation and Sheasgreen.

From this decision the plaintiffs appealed.

The appeal was argued at Victoria on the 21st of June, 1929, before MACDONALD, C.J.B.C., MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellants: The case centres around the fraudulent acts of Alexander Swanston who was manager of the Pacific Motors Limited. He sold first to his wife who could not pay and then to C. Francis assigning the conditional sale agreements in both cases to the plaintiffs. Later he recovered possession of the car and sold it to Sheasgreen under a conditional sale agreement that he assigned to the Continental Guaranty Corporation. The plaintiffs knew nothing of this transaction. This last sale does not come within section 4 of the Conditional Sales Act. On the facts and law we are entitled to possession of the car.

Harold B. Robertson, K.C., for respondents: We say the car was at the Pacific Motors Limited with the implied consent of the owners. Under subsection (4) of section 60 of the Sale of Goods Act this must be assumed. The Pacific Motors Limited sold as the plaintiffs' agent: see *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R.

601. On the 10th of May, 1928, and prior to the sale they dictated terms of sale to Sheasgreen. On the question of conversion see Halsbury's Laws of England, Vol. 27, pp. 890 and 895; *Lancashire Wagon Co.* v. *Fitzhugh* (1861), 6 H. & N. 502; *Centre Star* v. *Rossland-Kootenay Mining Co.* (1905), 11 B.C. 231 at pp. 235-6 and 240; *Union Credit Bank* v. *Mersey Docks and Harbour Board* (1899), 2 Q.B. 205. The proceedings throughout shew that what happened was what would be expected: see *Lowther* v. *Harris* (1927), 1 K.B. 393. Subsection (4) of section 60 of the Sale of Goods Act is important.

Argument

MacInnes, in reply: On the question of mercantile agency see *Bush* v. *Fry* (1887), 15 Ont. 122; *Ontario Wind Engine and Pump Co.* v. *Lockie* (1904), 7 O.L.R. 385. On the question of conversion as to the sale by Swanston to Sheasgreen the Continental Guaranty Corporation took an active part in this sale: see Halsbury's Laws of England, Vol. 27, p. 898, sec. 1578 and p. 890, sec. 1569; 38 Cyc. pp. 2019 and 2023 (note D); Addison on Torts, 8th Ed., pp. 585-6; *M'Combie* v. *Davies* (1805), 6 East 538; *Kirby* v. *Cahill et al.* (1843), 6 U.C.Q.B. (o.s.) 510; *Driffill* v. *McFall* (1877), 41 U.C.Q.B. 313 at pp. 319-20. We say not only Swanston and Sheasgreen were guilty of conversion but also the Continental Guaranty Corporation. When the Continental Guaranty Corporation took the assignment and collected payments we were entitled to the value of the car at the time of conversion. *Lowther* v. *Harris* (1927), 1 K.B. 393 is against him.

Cur. adv. vult.

1st October, 1929.

MACDONALD, C.J.B.C.: The action is for a declaration that the plaintiffs are the owners of a certain automobile and are entitled to possession of it.

MACDONALD, C.J.B.C.

The trial judge dismissed the action. I think he was right in dismissing it as against the respondent, Continental Guaranty Corporation, since that defendant disclaimed any interest in the automobile. As to the other respondent E. W. Sheasgreen, I would reverse the judgment and direct that it be entered for the plaintiffs.

MURPHY, J.

1929

May 7.

COURT OF APPEAL

Oct. 1.

W. J. ALBUTT & Co. v. CONTINENTAL GUARANTY CORPORATION OF CANADA

MACDONALD, C.J.B.C.

The plaintiffs sold the car in question to the Pacific Motors Limited, retail dealers in cars, under a conditional sale agreement, who sold it to the wife of its manager, who failed in her payments and with plaintiffs' consent, the car was taken back and again offered for sale by the Pacific Motors Limited. It was then, with the plaintiffs' consent, sold to one Francis under a conditional sale agreement, which was duly assigned to the plaintiffs with all rights under it. Francis made default and by some means undisclosed by the evidence, the car, without the plaintiffs' knowledge or consent, was again brought into the show rooms of the Pacific Motors Limited, who sold it to the defendant Sheasgreen, again under a conditional sale agreement, which the Pacific Motors Limited discounted with the respondent, the Continental Guaranty Corporation. The plaintiffs had no knowledge of this sale or of the assignment of the agreement to the Continental Guaranty Corporation. That company was an innocent purchaser and took the assignment in good faith without notice of the premises. The plaintiffs rely upon section 4 of the Conditional Sales Act, R.S.B.C. 1924, Cap. 44, which reads:

"If the goods are delivered to a trader or other person, and the seller expressly or impliedly consents that the buyer may resell them in the course of business, and such trader or other person resells the goods in the ordinary course of his business, the property in the goods shall pass to the purchasers notwithstanding the other provisions of this Act."

That the car was delivered to the Pacific Motors Limited, a trader, with a consent at least implied, that that company might resell it is not questioned. Nor is it questioned that the plaintiffs cannot object to the recapture of the car from the first purchaser thereof, nor to the resale to Francis. But the Pacific Motors Limited got the car back from Francis without the consent or knowledge of the plaintiffs, and sold it to Sheasgreen in fraud of the plaintiffs. The possession obtained from Francis cannot be regarded as possession obtained from the plaintiffs, and therefore, assuming that it was sold to Sheasgreen in the course of the Motor Company's business the transaction is not within the section unless the original delivery and consents to resales can be held to be delivery and consent to the sale to Sheasgreen. I think it cannot.

There should be judgment for the plaintiffs against Sheasgreen for the possession of the car.

McPHILLIPS, J.A.: I would dismiss the appeal, being of the opinion that Mr. Justice MURPHY, the learned trial judge, arrived at the correct conclusion upon all the evidence adduced at the trial and the statute governing in such cases.

It would indeed be most perilous if upon the facts of this case the defendant Sheasgreen were not to be held to be the owner of the motor-car in question. It was just to protect purchasers in the position of the defendant Sheasgreen that section 4 of the Conditional Sales Act (Cap. 44, R.S.B.C. 1924) was passed. The Legislature very properly in its wisdom determined that in all such cases the property in the goods should be held to be in the purchaser: section 4 reads as follows: [already set out in the judgment of MACDONALD, C.J.B.C.].

It would be intolerable and work grave injustice indeed, if motor-cars in open display in the show windows of dealers, and publicly sold in the ordinary course of business, should notwithstanding be held to be the property of other than the purchaser, who in good faith has become the purchaser thereof. I am in complete agreement with the learned trial judge, that upon the facts of the present case, the appellants must be held to have, if not expressly, impliedly consented to the defendant the Pacific Motors Limited being in possession of the motor-car in question, at the time of the sale by it in the ordinary course of business to the defendant Sheasgreen. The statute in my opinion applied to the sale and the defendant Sheasgreen is entitled to the possession and ownership of the motor-car, being a purchaser thereof in the ordinary course of business from the Pacific Motors Limited, the Pacific Motors Limited being rightly in possession of the motor-car and clothed with the authority to sell the same.

MCPHILLIPS, J.A.

There is, however, another ground upon which the appeal should be dismissed, and that is that it was a disposition or sale of the motor to the respondent Sheasgreen by the Pacific Motors Limited acting as a mercantile agent, the respondent Sheasgreen took the car in good faith with no knowledge that the Pacific Motors Limited was without authority to make the sale. Upon

MURPHY, J.
1929
May 7.
COURT OF APPEAL
Oct. 1.
W. J. ALBUTT & Co. v. CONTINENTAL GUARANTY CORPORATION OF CANADA

the facts, in my opinion, though and in accordance with the holdings of fact of the learned trial judge, with which I agree, the appellant must be held to have had the motor-car in question with the consent of the appellants. The statutory position of the Pacific Motors Limited was quite within the provisions of section 60 of the Sale of Goods Act (Cap. 225, R.S.B.C. 1924) and the sale of the motor-car to the respondent Sheasgreen by the Pacific Motors Limited was as valid as if the Pacific Motors Limited "was expressly authorized by the owner of the goods to make the same," *i.e.,* the Pacific Motors Limited in effecting the sale was acting quite within the provisions of the statute and the appellant cannot be held to complain and the respondent Sheasgreen became vested with complete title to the motor-car. *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601, 605, 606, 608, a decision of the Appellate Division of Ontario, is absolutely in point in this case and supports and sustains—in the reasoning of the learned judges of the Court of Appeal—the disposition the learned trial judge made of the present case.

MCPHILLIPS, J.A.

Then upon the facts, it cannot be said there was any conversion of the motor-car; the facts are in complete rebuttal of this. This was a case of sale and in my opinion a justifiable sale by a mercantile agent, and could not in any way be considered a conversion (*Lancashire Wagon Co.* v. *Fitzhugh* (1861), 6 H. & N. 502, Pollock, C.B. at p. 508; *Union Credit Bank* v. *Mersey Docks and Harbour Board* (1899), 2 Q.B. 205, 214, 215; *Centre Star* v. *Rossland-Kootenay Mining Co.* (1905), 11 B.C. 231 at pp. 233, 236, 240; *Lowther* v. *Harris* (1927), 1 K.B. 393 at pp. 399, 400, 401).

The present case, in my opinion, is not one in which the judgment of the learned trial judge should be disturbed. The question of good faith runs throughout the whole case, and in such a case it is always and peculiarly a question for the learned trial judge who saw the witnesses and heard their evidence. It would only be in an extreme case, which this is not, in my opinion, where the Court of Appeal would disagree with the learned trial judge. I would refer to what Lord Sumner said in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at p. 47.

I would dismiss the appeal.

MACDONALD, J.A.: The appellant seeks a declaration that it is the legal and equitable owner of a motor-car; also damages for conversion. The car was placed by appellant on the selling floor of Pacific Motors Limited under a conditional contract of sale. It was first sold by Pacific Motors Limited to its manager's wife by conditional contract duly assigned to appellants. She being unable to complete returned the car to the sales floor, with the knowledge and consent of appellants. It was again sold by Pacific Motors Limited under a conditional sale agreement to one Francis and this contract was assigned to appellants. All these transfers were duly filed in the County Court Registry.

Some months thereafter Pacific Motors Limited (through default in payments) this time without the knowledge or consent of appellants, secured possession of the car, again placed it on its sales floor and sold it to the respondent Sheasgreen, taking from him a conditional agreement. This conditional agreement was assigned by Pacific Motors Limited to respondent, Continental Guaranty Corporation of Canada Limited, and filed. The latter company like appellant financed such transactions. All parties acted *bona fide* except the manager of Pacific Motors Limited. Neither respondent searched the County Court Registry before completing the Sheasgreen purchase.

On this state of facts the learned trial judge held that because the sale to Francis was by the ordinary conditional sale under which Pacific Motors Limited could, on default, repossess and resell the car, as in fact it did, to respondent Sheasgreen, knowledge of the later sale must be imputed to appellants; in other words that when the sale to Sheasgreen took place, Pacific Motors Limited had possession of the car with the implied consent of appellants to a resale. Applying therefore section 4 of the Conditional Sales Act (R.S.B.C. 1924, Cap. 44) and section 60 of the Sale of Goods Act (R.S.B.C. 1924, Cap. 225) the respondent Sheasgreen obtained title to the car. With great respect, I do not agree.

Section 4 reads: [already set out in the judgment of MACDONALD, C.J.B.C.].

Assuming Pacific Motors Limited was a "trader" and appellants a "seller" there was on the evidence no consent express or

MURPHY, J.

1929

May 7.

COURT OF APPEAL

Oct. 1.

W. J. ALBUTT & Co. *v.* CONTINENTAL GUARANTY CORPORATION OF CANADA

MACDONALD, J.A.

implied to the sale to respondent Sheasgreen in the ordinary course of the business of Pacific Motors Limited. There could scarcely be consent express or implied by appellant to the commission of an injury on itself by Pacific Motors Limited. The decision in *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601, would only apply to the sale to Francis, if that agreement had been assigned to respondent Continental Guaranty Corporation of Canada Limited. Here the manager of Pacific Motors Limited, to serve his own purpose, repossessed the car behind appellants' back, and sold it to respondent Sheasgreen. I cannot hold that appellants impliedly consented to such a sale or that the "trader" sold "in the ordinary course of his business." This interpretation of the statute is designed to prevent fraud and only places on ultimate purchasers the slight burden of searching in the County Court Registry.

Nor do I think section 60 of the Sale of Goods Act assists respondents. It reads:

"60. (1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

"(4) For the purposes of this Act, the consent of the owner shall be presumed in the absence of evidence to the contrary."

There was evidence to the contrary. A "mercantile agent" is defined in section 2. I need only say that when Pacific Motors Limited repossessed the car from Francis, it was not then "with the consent of appellants in possession" of the car. The appellants knew nothing about it. It only had appellants' consent to repossession when the first sale to the manager's wife was terminated. Literal clandestine possession for a fraudulent purpose is not contemplated. Pacific Motors Limited at that stage departed from "the ordinary course of business," when it did not at least advise appellants of such repossession, so that on a resale its interests could be protected. There was no consent by appellants to self-injury.

I agree with the learned trial judge that on the evidence claim

for damages for conversion fails. As to respondent Continental Guaranty Corporation of Canada, it makes no claim to the car, only to its securities. It never had possession of it. Respondent Sheasgreen purchased in good faith. There is no evidence that respondents acted together to convert the property in the car, nor to do, what in law, amounts to conversion. If appellants had demanded the car from defendant Sheasgreen and the latter refused to deliver it, an action for conversion might be maintained. That did not occur. Appellants' solicitor wrote to respondent Sheasgreen, saying "There may be some doubt as to our right to repossess this car as against you," and asked only that he should make his payments to appellants. The appellants are only entitled to a declaration of ownership and the right to repossess the car.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitors for respondents: *Robertson, Douglas & Symes.*

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

HORNBY AND HORNBY v. PATERSON.

Negligence—Motor-vehicles—Collision between car emerging from private road and car on highway—Contributory negligence—B.C. Stats. 1925, Cap. 8.

In the forenoon of the 1st of December, 1928, the defendant was driving her father in his car on a private road from their home on the south side of Delta Trunk Road. As she emerged on to the main road the plaintiff was about 200 feet to her left driving her father's car easterly on the Delta Trunk Road at about 35 miles an hour. As the defendant intended to turn her car westerly she thought she had time to cross to the north side of the main road before the plaintiff reached her. When 200 feet away the plaintiff saw the defendant's car emerging from the private road and expecting it to stop to let her pass, continued on at the same speed but as the defendant did not stop, she then turned to the left hoping to clear the car on the outside. The rear right side of her car struck the defendant's and she was thrown into the ditch on the north side of the road and badly injured, the car being wrecked. It was held on the trial that the collision was attributable to the defendant's negligence and judgment was given for the plaintiffs.

Held, on appeal, varying the decision of McDONALD, J., *per* MARTIN and GALLIHER, JJ.A., that the accident was the result of want of care by both drivers and the damages should be apportioned equally under the Contributory Negligence Act.

Per MACDONALD, C.J.B.C.: That the defendant knowing the danger, ran into it, and the appeal should be dismissed.

Per McPHILLIPS, J.A.: That the plaintiff alone was guilty of negligence, and the appeal should be allowed.

Statement

APPEAL by defendant from the decision of McDONALD, J. of the 18th of April, 1929, in an action for damages for personal injuries to the plaintiff Doris Hornby and for damage to the automobile of Leyland F. Hornby sustained in a collision between an automobile driven by the defendant and that of the plaintiff Doris Hornby alleged to be due to the negligence of the defendant. In the forenoon of the 1st of December, 1928, the plaintiff Doris Hornby was driving her father's car easterly on the Delta Trunk Road. The defendant driving her father in his car on the roadway from their home on the south side of Delta Trunk Road came on to the Delta Trunk Road when the plaintiff was about 200 feet away intending to turn to her left westerly on the road. She saw the plaintiff's car coming but

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

Statement

thought she could get over to the north side of the road before the plaintiff reached her. The plaintiff saw the defendant's car emerge from the private roadway. She was travelling at about 35 miles an hour and thinking the defendant would stop to let her pass she proceeded at the same speed and turned over to the left side of the road with a view to passing in front of the defendant's car. In so doing the rear right side of her car hit the front of the defendant's car. The plaintiff's car was hurled off the highway into the deep ditch on the northerly side of the road. Miss Hornby was severely injured and the automobile was badly wrecked.

The appeal was argued at Victoria on the 14th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Alfred Bull, for appellant: The plaintiff saw the defendant's car coming on to the road when 200 feet away. The defendant had the right of way and it was the plaintiff's duty to slow down and keep on her own side of the road, instead of that she kept going at the same speed and turned on to the left side of the road. This is a clearer case against the plaintiff than *Paul* v. *Dines* (1929), 41 B.C. 49.

Sullivan, for respondents: It was held by the trial judge that 35 miles an hour, in the circumstances, was not an excessive speed; that she is not required to slow down at every side road and that she used her best judgment in the circumstances. He further found that persons coming out of a side road into a main artery of traffic should give way to those travelling on the main road: see *Fraser* v. *B.C. Electric Ry. Co.* (1919), 26 B.C. 536 and Barron on Canadian Law of Motor Vehicles, p. 751.

Bull, replied.

Cur. adv. vult.

1st October, 1929.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The defendant was approaching the highway from her house and saw the plaintiff, Miss Hornby, driving at a speed which is said to have been 35 miles an hour, approaching the point at which the defendant would emerge on to the highway. The plaintiff thought that defendant would stop before coming upon the travelled portion of the road, as a

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

MACDONALD, C.J.B.C.

prudent driver would have done, seeing as she did the approaching car. Miss Hornby, seeing the defendant coming out to the highway and expecting her to do the prudent thing, continued on her way but when she finally saw that the other did not intend to stop and swung to the left to avoid her, it being too late to stop. Her action in turning to the left to avoid the collision was the result of the excitement of the moment and not of negligence. On the other hand, the defendant knowing the danger, ran into it. In my opinion, therefore, the negligence was hers.

The judgment is sustained.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from a judgment of Mr. Justice McDONALD awarding damages to the plaintiff because of the negligence of the defendant in driving her motor-car in such a way as to cause a collision between her car and the plaintiffs'. The learned judge below held that the collision was attributable to the negligence of the defendant alone and so judgment was entered accordingly but, with respect, that is not, in my opinion, the judgment that should have been entered because while there is ample evidence to support the finding of the defendant's negligence yet the female plaintiff's own evidence clearly discloses contributory negligence on her part in not substantially reducing her speed of 35 miles per hour when the risk of collision became obvious but on the contrary substantially maintaining it and going over to the wrong (left) side of the highway in the rash attempt to cross in front of the defendant's car which she saw a distance of over 200 feet continuing to emerge from a private road on the right-hand side. The action, therefore, would have to be dismissed were it not for the saving provisions of our recent statute of 1925 "Respecting the Liability of the Parties in an Action for Damages for Negligence where more than One Party is in Fault" which changed the common law by declaring that—

"2. 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:

"Provided that:—

"(*a.*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

"(*b.*) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed."

As I pointed out recently in the Admiralty Court in the case of *Fred Olsen & Co.* v. *The "Princess Adelaide." Canadian Pacific Ry. Co.* v. *The "Hampholm"* (1929), [*ante,* p. 274]; 2 W.W.R. 629 this apportionment of liability is often a difficult thing and it is not easy in the present case, but I agree with my brother GALLIHER that it should be equally apportioned on the facts before us; there is no counterclaim by defendant for damages. The appeal, therefore, I think should be allowed and the present judgment vacated and judgment entered in accordance with the view above expressed.

MARTIN, J.A.

It is well to add that while agreeing with the learned trial judge that the defendant was negligent in the way she drove her car from a private road into a main highway it would appear, with respect, that he gave a further effect against the defendant to the solitary observations of our late brother IRVING in *Monrufet* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 91, than our brother intended when he said, p. 92:

"There are two Scotch cases cited in the 21st volume of Halsbury's Laws of England, at p. 414, to which I would call attention. These cases lead me to believe (something I have always understood was incumbent on a person driving on a cross-road), that it is the duty of persons coming out of a cross-road into a main artery of traffic to wait and give way to that traffic, and not to throw themselves headlong into the advancing traffic along the main travelled road: *Macandrew* v. *Tillard* (1908), 46 Sc.L.R. 111; and *Campbell and Cowan & Co.* v. *Train* (1910), 47 Sc. L.R. 475."

This language it is true is not precise yet it is to be observed, first, that he is primarily speaking of a "headlong throwing" into a stream of traffic which would be negligence by any driver in any circumstances, and, second, as to "waiting and giving way" that since the cases he cites the matter has been further considered by the Scotch Court of Sessions in two cases, *viz., M'Nair* v. *Glasgow Corporation* (1923), S.C. 397, and *Hutchison* v. *Leslie* (1927), S.C. 95, and in the latter the proper view of the general duty of persons entering upon main highways from lesser highways or private roads is laid down in a way which commends itself in general though it must always be borne in mind that the general duty may be changed by particular statutes and traffic regulations in different localities.

The whole of the *Hutchison* case in which both motor-cars

COURT OF APPEAL
1929
Oct. 1.
HORNBY v. PATERSON

were held to blame is of assistance and it shews that there is no such thing as a paramount and persistent right of way in favour of those vehicles on main trunk roads over other vehicles entering it from private or cross roads. The following extracts merit citation: the Lord President says, pp. 99-100:

"The decision of the case in the Court below was apparently to some extent affected by the idea, which I should have been glad to think was now finally exploded, that a person who travels on a main road is absolved from the duty of care and consideration for other traffic which approaches and enters on that main road from a side road. In *M'Nair* v. *Corporation of Glasgow* (1923), S.C. 397, I gave my reasons for thinking that this idea is both fallacious and mischievous; . . . But when it is said that a 'greater duty' rests on the side-road traffic, all that is meant is that the duty incumbent on the person in charge of a traffic-unit varies according to the degree of risk and difficulty involved in the particular movement or manœuvre in which he happens to be engaged at the moment. There is more risk involved in entering a main road or street from a side road or street than in pursuing a steady course in the direction of the main road or street; and there is more difficulty involved in interrupting the main stream of traffic by a crossing or turning movement than in following the main stream. The more risky and difficult the movement or manœuvre, the 'greater' the 'duty' incumbent on the driver. In other words, the 'duty' varies in degree—as it must—with the circumstances in which it has to be performed. But this is a very different proposition from saying that main-road traffic is in any way absolved from the duty of avoiding collision with traffic from a side road, or that side-road traffic has no claim to consideration from vehicles using the main road."

MARTIN, J.A.

And Lord Sands (pp. 100-1):

"In my view where cars are approaching a cross road in such circumstances that, if they persevere without regard to one another, a collision may take place, the understanding is that the driver upon the side road gives way to the driver upon the main road. Even apart from any question of actual danger of collision, as it seems to me, it makes for good harmony and courtesy on the road that there should be a general understanding as to which of two cars shall momentarily give way, when one or other must. It does not, in my view, follow that this absolves the main-road driver from responsibility if he maintains his course and speed. The driver on the side road may fail to observe the car upon the main road, or may misjudge pace and distance, or may fail to recognize his road as being a side road. Accordingly, the duty of the driver upon the main road is not to rely absolutely upon the side-road vehicle giving way. He must watch the vehicle approaching on the side road, and be prepared to take the necessary steps to avoid collision if this vehicle does not give way to him."

If these common-sense views had been followed in the present case by both parties there would have been no collision, and the circumstances exclude any resort by the defendant to the excuse of a mistake of judgment caused by the agony of collision. It

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

is indeed almost unaccountable that the drivers of two cars who had a clear view of one another for over 200 feet should collide and the defendant who saw the plaintiffs' approaching car at a fast, though not excessive speed, did not take due care to ascertain its rate of progress before adopting the dangerous manœuvre of turning in a way to bring herself across its course; if she had been turning in the same course the manœuvre would have been much safer, if not entirely so, under the circumstances; and no explanation is given why she did not give any signal of her intentions even when in the very act of turning towards the plaintiff though the learned judge referred to that point during the argument and the defendant alleged in her defence par. 4 (f) that "she took all reasonable and proper precautions," in entering upon the main road. The truth is that both parties failed to exercise due caution and took dangerous risks with the usual result, instead of exercising that necessary degree of care commensurate to the ever varying circumstances of each case including the amount of traffic upon the respective roads; as an illustration of which last element it is to be noted that upon the main road in question at the time of the collision only these two vehicles were near the scene and hence the defendant would not even have been inconvenienced by "momentarily giving way," as Lord Sands put it, to the solitary vehicle in sight however rash or unjustified its manner of approach might be.

MARTIN, J.A.

GALLIHER, J.A.: As I view the evidence, this is a case where I consider both drivers were at fault, and I would allow the appeal in part and apportion the damages equally.

GALLIHER, J.A.

MCPHILLIPS, J.A.: It would seem to be common ground that when the motor-car driven by the appellant entered upon the main highway, *i.e.*, the Delta Trunk Road, the motor-car driven by the respondent Doris Hornby, was then 200 feet away from the point at which the appellant in her car had come upon the road, and both the appellant and respondent, Doris Hornby, were conscious of this fact. The motor-car of the appellant was being driven slowly across the road, the motor-car of the respondent, Doris Hornby, was going at a speed of 35 miles an hour upon the paved way of the road, 16 feet in width, and a little to

MCPHILLIPS, J.A.

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

MCPHILLIPS, J.A.

the left of the centre line of the paved portion of the road. It would seem that the respondent, Doris Hornby, came to the conclusion that the appellant would stop her car and not continue to cross the road and being of that view, bore still further to the left which she thought would ensure her passing safely in front of the car of the appellant. This was a step contrary to the rule of the road. Seeing the car of the appellant in motion and in the act of crossing the road, the duty of the respondent was to bear to the extreme right-hand side of the road, and if she had done so, no accident would have occurred. Further, if the respondent, Doris Hornby, was of the opinion that the appellant would stop her car then it was the duty of the respondent to bring her car under control so as to obviate an accident. The respondent, Doris Hornby, did not do this but travelled ahead at the excessive speed of 35 miles an hour, intending to pass to the left and in front of the car of the appellant, and this she did do, and in the result that happened which could not fail to happen, the car of the respondent, Doris Hornby, struck the car of the appellant a glancing blow and went into the ditch, and the respondent, Doris Hornby, suffered personal injuries and the car was also damaged.

With this summing up of the salient facts it is well to quote the concrete evidence as given by the respondent, Doris Hornby, at the trial, and upon this evidence, in my opinion, it is impossible to come to but one conclusion, and that is, that the respondent, Doris Hornby, was guilty of negligence and was the author of her own injuries, and the injuries to the car, which she was driving. The respondent in examination in chief swore to the following facts:

"Now, will you describe the Delta Trunk Road? All the way from Ladner?"

"No. How is the road constructed? Perfectly straight road, except—well, just west of the Benson Road there is a slight jog; and then there is another one up about another three or four miles. But generally speaking the road is perfectly straight and you have a clear view all the way along it.

"And what construction is the surface of the road? It is a paved road.

"Now, as you neared the vicinity of the Benson Road, before you came to it, what was your speed? I would say in the neighbourhood of 30 or 35 miles per hour.

"Was that speed decreased? I decreased the speed to make certain there

was nothing approaching from the Benson Road, and when I was certain there was not, I resumed my speed again.

"Where were you when you first saw the defendant's car—the Paterson car? I was well past the milkstand.

"THE COURT: What? Where? Well, past the milkstand.

"How far past would you say? Well, I would not like to say, in measurement; but I know I was well past it.

"*Sullivan*: Could you put it in terms of car lengths?

"*Bull*: Is this when she first saw the——

"*Sullivan*: Saw the Paterson car. I was certainly a car length past the milkstand.

"At all events you were a car length past the milkstand; and your speed at that time was—what? In the neighbourhood of 35 miles per hour.

"Where was the Paterson car when you first saw it? When I first saw the Paterson car, I just noticed the nose of the car coming beyond the Paterson hedge.

"On your right? On my right.

"THE COURT: It was just coming out? Beyond the hedge.

"*Sullivan*: What distance would you say it was out from the hedge when you first saw it? It was a very slight distance. I would not say. Half the length of the radiator.

"I see. You saw it when it first emerged, then? Practically so.

"Did you see the Paterson car at any time previous to that? No, sir.

"What would you say——

"THE COURT: Shew me that on the map. Look here for one moment.

MCPHILLIPS, J.A.

"*Sullivan*: Will you go up there, Miss, please.

[Witness explains map to Court].

"THE COURT: You were a considerable distance apart at that time. The two cars were quite a long way apart.

"*Sullivan*: Why didn't you see the Paterson car earlier? When you are driving east on the Delta Trunk Road, unless you are looking particularly for a car in the driveway, you are not able to see on account of shrubbery which is there.

"I see. When you then saw the Paterson car emerging, what did you do? I bore slightly to the left-hand side of the road, and I put my foot on the brake, gently; not in order to stop the car, but simply to reduce my speed slightly.

"Yes? And then what occurred, after that? Just describe it. As the Paterson car emerged, I kept in a straight line bearing to the left-hand side of the road; and at a point a little further along, the thought flashed in my mind they surely did see my car approaching. So I tooted the horn. Still their car came. And for a moment I did not know what to do. I thought of the possibility of turning suddenly to the right. I saw this was impossible, as there is a telephone post there. Also a post, which is a 'Sun' container. So I knew it would be evident to them I was taking the left-hand side of the road, and they would stop, thus enabling me to clear the front of their car.

"Yes. You took the left-hand side of the road, in front of their car? Yes, sir.

"Then, what occurred after that? Well, from what point?

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

MCPHILLIPS, J.A.

"You bore to the left. How far to your left did you bear? In a straight line, until finally all four wheels were off the pavement. There is a grass strip between the pavement and the ditch.

"I see. All my four wheels off the pavement. And I managed to clear the front of my car, but as their car continued to come, I felt the impact when they hit my rear right wheel.

"And what happened to your car then? It went into the ditch."

Then turning to the cross-examination of the respondent, Doris Hornby, in answer to counsel for the appellant, she swore to the following facts:

"When you got to Benson Road and found all clear, it would be safe to say you resumed your speed and were going 35? In the neighbourhood of 30 or 35.

"And when you got past the milkstand about a car length, which is—what? About 200 feet from the Paterson driveway? Well, I am—I would not like to judge distances, by measurement.

"It is something like that? I think that is what the plan shews.

"You saw this car was coming out. You could have stopped in that time, couldn't you? I don't know if I could or not.

"Well, you say 35 miles per hour; and we have 200 feet within which to stop? Had I known at that point, right then, that I must stop, I may have been able to.

"Let me put it this way: When you first saw the Paterson car coming out of the hedge, and when you were just past the milkstand, you could have brought your car into a position of absolute control? My car was under that control.

"Always under control? Certainly.

"You could have stopped then? Had I known it would be necessary.

"If you had made up your mind when you first saw the Paterson car coming out, you could have stopped? If I had made up my mind I would have to, I suppose I could have.

"I am assuming you had made up your mind at the milkstand that you were stopping your car before coming to the driveway; you could have done so? Yes.

"You are quite sure of that? Yes, sir.

"That also means, doesn't it, that you could have got your car into such a position of control that you could have met any eventuality between the milkstand and the Paterson driveway? Knowing that road as I do, I did not see what would happen.

"That is, you could have had your car under complete control within the distance? Yes.

"Yes.

"THE COURT: Now, better get an understanding of 'being under control.' I take it that Mr. *Bull* means you could stop at any time you wanted to, within, say, six feet? Oh, certainly not.

"*Bull*: No. I think his Lordship understands what I mean. What I mean is this: when you were at the milkstand and the Paterson car was just coming out of the driveway, you could have put your car under such control within that space, by reducing the speed, that you could have abso-

lute control over it at any time in that 200 feet? That is what I meant; when I first saw their car, I could have stopped.

"THE COURT: You could have got your car going very slowly, that it would take only a few feet to stop, supposing there was a bunch of children and you said 'I don't know what they will do'—could you then? I think so.

"You could have got your car in such a position that you could have stopped it? Yes, I think so.

"*Bull*: That is what I mean. Instead of doing that from a point just past the milkstand you made up your mind to a certain course of action, didn't you? Yes.

"That is, you would bear to the left, and continue at a slightly reduced rate of speed only? Well, I did not estimate at what speed I was going to go, but I suppose unconsciously I reduced the speed slightly.

"You cannot say you did, but you think, unconsciously you did reduce the speed? I know I reduced it, but I cannot say at what speed I estimated I was going to be when I reached the driveway.

"The course of action you laid out for yourself at that moment, was, you would bear to the left—that is, going on the wrong side of the road—and miss the Paterson car if it came out? Well, it never dawned on me that the car would continue to come out.

"But, at any rate, that is the course you made up your mind to follow? Well, at the moment, it seemed the logical thing to do.

"Don't you know now, if you had kept to the right-hand side of the road, you would have been all right? I would not have been all right. If I had gone to the right-hand side of the road, I would have struck their car.

"If you had kept your right-hand side of the road and got your car under the state of control I suggested, nothing would have happened, would it? Because you could have stopped within six feet, if necessary? But I had not applied my brakes as though I was intending to stop.

MCPHILLIPS, J.A.

"You had not? No, sir.

"No; that is what I say; at the milkstand—— At the milkstand I did not intend; I did not think it was necessary to stop."

It is made clear that if the respondent, Doris Hornby, had adhered to the rule of the road keeping on her right-hand side which is the rule of the road, and brought her car under control which she admits she could have done, there would have been no accident.

With great respect to the learned trial judge, I cannot agree that the respondent "used her best judgment" or what should have been her best judgment. Her duty was to keep to the right, her proper side of the road, and her further duty was, upon seeing a motor-car enter upon the road from the right, then being 200 feet ahead of her, with the plain purpose of crossing the road in front of her, to at once reduce her speed and bring her car under control to meet any possible eventuality, on the other hand she breaks the rule of the road, goes to the left and would not appear to have appreciably reduced her speed at all.

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

This was not a situation so well known in Admiralty law of "agony of collision," a situation also paid attention to in Common Law Courts. It was the case, on the part of the respondent, Doris Hornby, of ill-conceived action in breach of the rule of the road and peril to the occupants of the other car, as well as peril to herself. The anomaly of the situation here is—as I view it—that the respondent, Doris Hornby, was clearly in the wrong, guilty of negligence in disobeying the rule of the road, guilty of negligence in driving at an excessive speed and admittedly able to bring her car under control and not doing so; is awarded damages to the extent of $1,110, and the respondent Leyland F. Hornby, the owner of the car, is allowed $671.86, being damages to the car.

I cannot persuade myself, with the greatest respect to the learned trial judge, that the judgment of the Court below should be sustained. I have dealt with the facts at some length and perhaps it is necessary to give some attention as well to the governing authorities which I consider relevant and applicable to the present case.

MCPHILLIPS, J.A.

To visualize this case, if the appellant entering upon the highway when the respondent Doris Hornby was at a distance of 200 feet, constituted negligence, the intention of the appellant being to cross the highway, then it means that the farmers along the highway are forever marooned upon their farms because waiting for the motorist who is 200 feet away, to pass means on this much frequented highway that by that time one or more other motorists are 200 feet away and this will go on *ad infinitum*. This is by no means an extreme view if the judgment under appeal stands, and a permitted speed of 35 miles an hour is approved, a menace to all traffic on the highway—in short, to maintain this judgment, in my opinion, will be the endorsement of a miscarriage of justice. In truth rather than the respondent Doris Hornby being entitled to sustain an action against the appellant for negligence she may well be congratulated that she was not answerable for the death or serious injury of the appellant. This is well indicated by the judgment of the Privy Council in *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719. Lord Sumner at p. 723, said:

COURT OF APPEAL

1929

Oct. 1.

HORNBY v. PATERSON

MCPHILLIPS, J.A.

"It was the motorman's duty, on seeing the peril of Sands, to make a reasonable use of his brakes in order to avoid injuring him, although it was by his own negligence that Sands was in danger. Apparently he did his best [in the present case the respondent, Doris Hornby did not] as things then were, but partly the bad brake and partly the excessive speed, for both of which the appellants were responsible, prevented him from stopping, as he could otherwise have done. On these facts, which the jury were entitled to accept, and appear to have accepted, only one conclusion is possible. What actually killed Sands was the negligence of the railway company, and not his own, though it was a close thing."

So that upon this line of reasoning of Lord Sumner the respondent Doris Hornby was the one guilty of negligence and it was her negligence that occasioned the injuries she suffered and likewise her negligence that damaged the other, respondent's, car, which she was driving and had under her control.

I would refer to *Paul* v. *Dines* (1929), [*ante,* p. 49], a decision of this Court. There the plaintiff was travelling on the highway at 35 miles an hour, and a vehicle came out of a side road. It was held that travelling at that speed was excessive and negligent under the circumstances; further that it should have been possible to have stopped within a distance of 90 feet with efficient brakes and the action brought was dismissed. In that case judgment had been entered for the party guilty of the negligence, as here. This Court holding that the plaintiff in travelling at such a speed when approaching an intersection (here it was from a private entrance upon the highway, but as we have seen when the appellant's car had entered on the highway, it was in full view of the plaintiff and it was then 200 feet away from the respondent Doris Hornby) was guilty of negligence, that the evidence shewed the defendant took due care upon approaching the highway and the plaintiff was solely responsible for the collision. In the present case I consider that the appellant took care in approaching the highway, and in entering upon the highway and that the respondent, Doris Hornby, was solely responsible for the collision.

There was the right here in the appellant to cross the highway, a right equally as great as the respondent, Doris Hornby, in driving her car on the highway. The respondent in a reckless manner, as I view it, was travelling at an excessive speed and seeing the appellant when 200 feet away, disobeyed the rule of the road and continued at this reckless speed driving to

the left when she should have continued to the right bringing her car under control, a collision takes place by reason of her own negligence; further, admittedly she could have stopped her car within the 200 feet, but did not do so. It is instructive upon this point to note what Lord Sumner said when delivering the judgment of their Lordships of the Privy Council, in *Rex* v. *Broad* (1915), A.C. 1110 at p. 1115:

> "Where a highway is crossed at right angles as of right priority of passage belongs to the first comer; he has a right to be on the crossing, and, so long as he is crossing with all convenient speed, the second comer cannot disregard or object to his presence, but must wait his turn if he cannot pass clear."

MCPHILLIPS, J.A.

I unhesitatingly am of the view that the judgment of the Court below cannot be sustained. It is true it means the reversal of the judgment of the trial judge, who has seen the witnesses, but the case does not turn upon disputed facts or rival evidence, nor questions of credibility. The essential facts are plain and distinct and as they appear, they in my opinion establish conclusively that the respondent, Doris Hornby, was guilty of negligence and that the appellant was guiltless of any negligence.

I would refer to what Lindley, M.R., said in *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402:

> "The case was not tried with a jury, and the appeal from the decision of the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the materials before the judge, with such other materials, if any, as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong."

In my opinion, with great respect to the learned trial judge, the judgment of the Court below is wrong and should be overruled. The action should have been dismissed, therefore, I would overrule the judgment of the Court below and allow the appeal.

Appeal allowed in part, Macdonald, C.J.B.C. dissenting.

Solicitors for appellant: *Walsh, Bull, Housser, Tupper & McKim.*

Solicitors for respondents: *Martin & Sullivan.*

APPENDIX.

Cases reported in this volume appealed to the Exchequer Court of Canada or to the Judicial Committee of the Privy Council:

BURRARD INLET TUNNEL & BRIDGE COMPANY, THE v. THE S.S. "EURANA" (p. 225).—Affirmed by Exchequer Court of Canada, 7th December, 1929. See (1930), Ex. C.R. 38.

MACDONALD MURPHY LUMBER COMPANY LIMITED v. ATTORNEY-GENERAL OF BRITISH COLUMBIA (p. 473).—Affirmed by the Judicial Committee of the Privy Council, 4th March, 1930. See 46 T.L.R. 266.

OLSEN (FRED & CO.) v. THE "PRINCESS ADELAIDE." CANADIAN PACIFIC RAILWAY COMPANY v. THE "HAMPHOLM" (p. 274).—Reversed by Exchequer Court of Canada, 18th November, 1929. See (1930), Ex. C.R. 10.

Cases reported in 40 B.C. and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

GEORGIA CONSTRUCTION COMPANY, LIMITED AND BANK OF TORONTO v. PACIFIC GREAT EASTERN RAILWAY COMPANY (p. 290).—Reversed by Supreme Court of Canada, 13th June, 1929. See (1929), S.C.R. 630; (1929), 4 D.L.R. 161.

MADDISON v. DONALD H. BAIN LIMITED (p. 499).—Affirmed by Supreme Court of Canada, 4th November, 1929. See (1930), 1 D.L.R. 63.

MURPHY v. McSORLEY (p. 403).—Affirmed by Supreme Court of Canada, 13th June, 1929. See (1929), S.C.R. 542; (1929), 4 D.L.R. 247.

REX v. CHUNG CHUCK (p. 512).—Affirmed by the Judicial Committee of the Privy Council, 25th November, 1929. See (1930), A.C. 244; 99 L.J., P.C. 71; 46 T.L.R. 134; (1930), 2 D.L.R. 97.

REX v. WONG KIT (p. 512).—Affirmed by the Judicial Committee of the Privy Council, 25th November, 1929. See (1930), A.C. 244; 99 L.J., P.C. 71; 46 T.L.R. 134; (1930), 2 D.L.R. 97.

INDEX.

ABANDONMENT. - - - - **487**
See VENDOR AND PURCHASER.

ABSCONDING DEBTOR. - - - **64**
See ARREST. 1.

ACCEPTANCE. - - - - - **345**
See CONTRACT. 4.

ACCIDENT AND GUARANTEE INSURANCE. - - - - - - -
See under INSURANCE, ACCIDENT AND GUARANTEE.

ADMIRALTY LAW—*Ship—Foreign fishing-vessel within three-mile limit—"Unavoidable cause"—Seizure — Costs — "Probable cause"—R.S.C. 1927, Cap. 42, Sec. 183; Cap. 43, Sec. 10 (b).*] The defendant ship, a foreign fishing-vessel, was seized by a Canadian fisheries protection officer because of an alleged infraction of section 10 of the Customs and Fisheries Protection Act. The defence was that the entry into Canadian waters was occasioned by the fact that in anchoring where the vessel did the one man in temporary command during the illness of the master thought he was without the three-mile limit and anchored at a place which in the dark he believed was without the territorial waters of Canada. The evidence disclosed that the sole man in charge had, after two days' battling with the elements, with a very sick comrade below, become exhausted, having had only two or three hours' sleep in 72 hours. *Held,* that in the special circumstances of this case the mistaken position of the vessel can be deemed to be an "unavoidable cause" within section 183 of the Customs Act. The Court must look upon their position with "a lenient eye" as being the misfortunes of innocent and much distressed mariners, and the ship must be released. *Held,* further, that in the complicated circumstances of this case, and the unusual elements that it presents it would be impossible to say that the seizing officer did not have "probable cause" for seizure. The claimant will therefore be deprived of the costs which he otherwise would have had in the ordinary practice of this Court. THE KING v. THE "MARY C. FISCHER." - - - - - **461**

ADMIRALTY LAW—*Continued.*

2.——*Shipping—Damage to bridge by vessel—Tidal currents—Inevitable accident—Counterclaim—Authority to erect bridge—Construction—Interference with navigation—Can. Stats. 1910, Cap. 74, Secs. 8, 9, 14 and 16—R.S.C. 1927, Cap. 170.*] The defendant steamship with a full cargo of lumber in attempting to pass through the bascule span of the bridge across the Second Narrows of Burrard Inlet, outward bound, when the tide was at the last of the slack water or slightly on the ebb, collided with the east side of the bridge. In an action for the resulting damage to the bridge:—*Held,* that the accident was caused by a very strong incoming sub-surface current setting north-easterly across the bridge and not visible on the surface which continued to indicate slack water. This undercurrent at a distance of 500-600 feet from the bridge suddenly and unexpectedly greatly increased in strength and took control of the ship causing her to sheer suddenly from the proper course she had been on and was still holding at a proper speed and which in ordinary circumstances would have taken her safely through the bascule span, so that the allegations of negligence against her are not sustained by the evidence either with respect to the time of making the attempt or of the manner in which that attempt was carried out. Further no fault is to be found in the measures taken by the ship to extricate herself, though ineffectually, from the imminent danger in which she suddenly found herself and which she had no reason to anticipate. The collision could not possibly have been prevented by the exercise of ordinary care, caution and "maritime skill" on the part of the ship and the case becomes one of "inevitable accident." The defendant ship counterclaimed for damages to her caused by the collision based upon the allegation that the plaintiff wrongfully and illegally erected the bridge and maintains it as a public nuisance as being an obstruction which impedes the free and convenient navigation of the Second Narrows by ships having lawful occasion to navigate said waters and which obstruction was the cause of the damage to the ship while

ADMIRALTY LAW—*Continued.*

endeavouring to proceed through without colliding with it. *Held*, that all statutory conditions were fulfilled which are necessary to support the validity of the various orders of the Board that the plaintiff relies upon, and that it has in fact and without negligence constructed the bridge at the site and in accordance with the plans and specifications duly authorized originally and later by alterations in certain particulars validly approved, and no liability attaches to the plaintiff for the consequences of the proper construction, operation and maintenance of its undertaking under its Act of Parliament. THE BURRARD INLET TUNNEL & BRIDGE COMPANY v. THE S.S. "EURANA." - **225**

ADULTERY—Particulars of. - **184**
See DIVORCE. 3.

ADVERSE POSSESSION. - - **258**
See MORTGAGE. 2.

AFFIDAVIT IN SUPPORT — *Capias ad respondendum.* - - **206**
See ARREST. 2.

AFFIDAVIT OF MERITS — Sworn before notary public. - - - **33**
See CRIMINAL LAW. 1.

AGREEMENT FOR SALE OF LAND—Foreclosure — Period of redemption. - - - - - - - **160**
See PRACTICE. 3.

ALIMONY—Final judgment for—Action on foreign judgment. - - **201**
See HUSBAND AND WIFE. 1.

AMALGAMATION. - - - **78**
See COMPANIES.

AMENDMENT—Power of. - - **218**
See CRIMINAL LAW. 7.

APPEAL. - - **317, 336, 514**
See CRIMINAL LAW. 10.
ESTOPPEL. 2.
MOTOR-VEHICLES. 2.

2.——*Application to abridge time for hearing — Court of Appeal Act, R.S.B.C. 1924, Cap. 52, Sec. 24—Costs of application costs in the cause.* - - - - **217**
See PRACTICE. 4.

3.——*Application to extend time for giving notice of—Foreign Attorneys—Instructions as to time for appeal mislaid.* - **182**
See PRACTICE. 9.

APPEAL—*Continued.*

4.——*Costs—Taxation—Review.* - **453**
See PRACTICE. 6.

5.——*From summary conviction—Notice of appeal given to wrong Court—Second notice of appeal to proper Court.* - **33**
See CRIMINAL LAW. 1.

6.——*Trial without a jury—Findings of trial judge—Grounds for reversing.*] The usual practice of not interfering with the findings of fact of the trial judge should not be disregarded unless the evidence coerces the judgment of the appellate Court to do so. The plaintiff, owner of a hotel at Alice Arm accepted a cheque from T. in March, 1924, paying him partly in cash, the balance covering a board bill at the hotel. T. asked her to hold the cheque for a few days and she put it in an inner receptacle in her safe which she locked. Shortly after she broke the key to this lock and it remained locked until she sold the hotel a year later. T. died in October, 1927, and shortly after this the plaintiff recovered the cheque from the safe. The plaintiff recovered judgment in an action for board and lodging and for moneys advanced. *Held*, on appeal, affirming the decision of RUGGLES, Co. J., that the trial judge having given credence to the plaintiff's story and the cheque given in evidence having been proved, this Court will not interfere. MCCOY v. TRETHEWEY *et al.* - - - - - - - - - **295**

ARBITRATION—*Expropriation of land—Elevator site — Compensation — Principles governing—Can. Stats. 1913, Cap. 158, Sec. 12—R.S.C. 1927, Cap. 170, Sec. 232 (5).*] On expropriation proceedings under section 12 of The New Westminster Harbour Commissioners Act, where the award discloses the fact that the arbitrator omitted to give any or manifestly inadequate compensation for a certain portion of the land appropriated, the Court of Appeal should correct the award under section 232 (5) of the Railway Act and increase it in such amount as the evidence justifies. ARMSTRONG AND SUTHERLAND v. NEW WESTMINSTER HARBOUR BOARD. - - - - - - - - **1**

ARREST — *Absconding debtor — Through ticket from Ontario to China—Arrested on British Columbia capias on way through—"Quit the Province" — Interpretation—R.S.B.C. 1924, Cap. 15, Secs. 3 and 15.*] The defendant (of Chinese origin) being sent by his parents to Canada in 1912, for his education, attended various colleges finishing at McGill University, Montreal, in 1920.

ARREST—*Continued.*

Shortly after he, with certain Chinamen, formed a syndicate for the purpose of purchasing a restaurant in Windsor, Ontario, for $9,000. The syndicate paid him the money to make the purchase but he only paid $7,000 on account of the purchase price and the vendor brought action for the balance due in 1922 and obtained judgment. In the summer of 1927 the defendant left Ontario obtaining transportation through to China. The vendor then brought action in British Columbia upon the Ontario judgment, obtained an order under section 3 of the Arrest and Imprisonment for Debt Act, and the defendant was arrested under a writ of *capias* in Victoria, B.C., in June, 1927. An application for the discharge of the prisoner under section 3 of said Act was dismissed on the 19th of November, 1928. *Held*, on appeal, reversing the decision of HUNTER, C.J.B.C. (MARTIN, J.A. dissenting), that there was not reasonable evidence in the Court below that the defendant had means or the ability to satisfy the judgment or any part thereof and he should be discharged from custody. PING LEE v. PAUL WISE. **64**

2.——*Ca. re.—Affidavit in support—Application to disclose—R.S.B.C. 1924, Cap. 15, Secs. 3 and 7—1 & 2 Vict. (Imperial), Cap. 110.*] On an application for discharge from custody under section 7 of the Arrest and Imprisonment for Debt Act, if the Court is satisfied that the defendant had no intention of quitting the Province at the time the writ of *capias* was issued, he should be discharged. THOMPSON v. SCOLLARD. - **206**

3.——*Legality of.* - - - - **242**
See CRIMINAL LAW. 6.

ATTORNEYS—Foreign. - - - **182**
See PRACTICE. 9.

AUTOMOBILE—Conditional sale agreement—Assignment to plaintiff—Delivery to mercantile agent on default—Resale under conditional sale agreement without notice—Assignment of agreement to another person. - - - - - - **537**
See SALE OF GOODS. 1.

AUTREFOIS ACQUIT. - - **190**
See CRIMINAL LAW. 11.

BAIL—In foreign country—Contract of indemnity in British Columbia—Legality—Mortgage to indemnify obligor—Enforcement. - **221**
See CONFLICT OF LAWS.

BANKRUPTCY—Preference. - - - **145**
See SOLICITOR.

2.——*Preference claims—Bill of costs of execution creditor—Construction of section 25 of Bankruptcy Act, R.S.C. 1927, Cap. 11.*] Judgment was obtained by a creditor of the Victoria Mines, Limited, execution issued and placed in the hands of the sheriff on the 13th of April, 1927. On the following day and before any seizure was made by the sheriff, Victoria Mines, Limited, made an authorized assignment in bankruptcy. The creditors' solicitors taxed their costs on the 29th of April following but did not issue execution therefor. On appeal from the decision of the trustee in bankruptcy rejecting the creditors' claim for their costs as a preference claim:—*Held*, that as there was no seizure by the sheriff under the writ of *fi. fa.* and subsection 2 of section 25 of the Bankruptcy Act is governed by the prior and enacting portion of the section, the appeal should be dismissed. ROSS JOHNSON LIMITED v. VICTORIA MINES, LIMITED. **321**

3.——*Removal and disposal of goods to defraud creditors—"Creditors," meaning of—Evidence—Criminal Code, Sec. 417 (a) (ii.).* - - - - - - - **166**
CRIMINAL LAW. 3.

4.——*Trustee—Power to lease—Application by secured creditor to set aside—Conduct of bankruptcy—R.S.C. 1927, Cap. 11, Secs. 43 and 84.*] A secured creditor applied under section 84 of the Bankruptcy Act to reverse the trustee's action authorized by the creditors and the inspectors, in leasing the plant of the bankrupt for the current year. *Held*, that no specific power to lease is vested in the trustee under section 43 of the Act and as it appears that the granting of a lease is not beneficial to the winding up of the business of the debtor, the lease should be set aside. *In re* SECHART FISHERIES LIMITED. EDWARD RENNEBERG & SONS COMPANY v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION. - - - - **323**

BANKS AND BANKING—*Depositor—Gives cheque to manager for investment—Payable to bearer—Manager short in his account at bank—Uses cheque to cover his shortage—Liability of bank for amount of cheque.*] The manager of a local branch of the defendant Bank suggested an investment to the plaintiff who had an account in the savings bank department. The plaintiff signed a cheque payable to cash or bearer for the amount required and gave it to the manager to complete the investment when he approved of it. Some time later the man-

BANKS AND BANKING—*Continued.*

ager told the plaintiff that the investment was unsatisfactory and that the money was still in the bank. About two months after he was given the cheque the manager paid it in to his own account to cover shortage for money he had taken from the bank. In an action to recover the amount of the cheque from the bank:—*Held*, that the bank cannot take advantage of its own manager's improper use of the cheque to make good his thefts from it, and the plaintiff is entitled to judgment. McDonald v. Royal Bank of Canada. - - - - - **450**

2.—— *Loans — Security — Purchaser of right to cut timber — Whether "owner" within Bank Act—Vendor's reservation of title—Effect of—Conditional Sales Act—R.S.B.C. 1924, Cap. 44, Sec. 9 (2)—R.S.C. 1927, Cap. 12, Sec. 88.*] Under an agreement of sale, the Exchange National Bank of Olean and the Olean Trust Company sold to the Blue River Pole & Tie Company Limited a number of timber licences with all trees and timber standing, lying and being thereon, the purchase price being paid by instalments at so much per foot as the cut lumber and poles were shipped. The agreement contained the following term: "It is understood and agreed that the property and title in the said timber licences and lots and all timber cut therefrom shall remain in the vendors until the same are fully paid for by the purchaser." The Blue River Company then applied for and obtained a line of credit from the plaintiff Bank and gave security therefor under section 88 of the Bank Act. Said Company proceeded to cut and ship poles but later became bankrupt at which time it was in arrears in payments to the vendors for poles shipped in a sum exceeding $6,000, and there was owing on advances by the Bank a sum exceeding $18,000. By order of the Court the trustee in bankruptcy sold and disposed of the poles lying on the property and after paying the expenses of the trustee in getting out the poles, the Government taxes and royalties, the claims of wage-earners holding valid liens and 2 cents per lineal foot of stumpage on all poles shipped by the trustee, he paid a balance of $9,500 into Court. On a special case as to whether the Bank has a valid security under section 88 of the Bank Act, and entitled to payment of its account in priority to the vendor's claim to a lien and to payment of their claim on poles shipped prior to the bankruptcy:—*Held*, that only an "owner" can give security under section 88 of the Bank Act and as the Blue River Company was not an "owner"

BANKS AND BANKING—*Continued.*

within the meaning of said section, the assignments made to the Bank under said section are invalid. Royal Bank of Canada v. Hodges *et al.* - - - - - **203**

BARRISTERS AND SOLICITORS—*Retainer—Liability of client for costs — Alleged arrangement that solicitor was to look for payment from others — Onus.*] Where a retainer or employment of solicitor or counsel by a client is proved, coupled with services rendered, the burden of proof that some person other than the client is to pay for the services, rests upon the party asserting such mode of payment. McGeer, McGeer & Wilson v. Fletcher. McLelan v. Fletcher. - - - - - - **437**

BEER LICENCE—Transfer of. - **456**
See Sale of Land. 2.

BRIDGE—Damage to by vessel—Tidal currents—Inevitable accident. - **225**
See Admiralty Law. 2.

BURGLARY—Entry by tearing away fly-screen from windows—"Actual force and violence" — "Visible marks made on premises at place of entry by tools"—Construction of—Burden of proof—Evidence. **81**
See Insurance, Burglary.

BURGLARY INSURANCE. - - -
See under Insurance, Burglary.

CAPIAS AD RESPONDENDUM. - **206**
See Arrest. 2.

CARNAL KNOWLEDGE—Attempt. - **36**
See Criminal Law. 2.

CERTIORARI. - - **403, 242, 9**
See Criminal Law. 4, 6.
Motor-vehicles. 4.

COLLISION—Automobiles—Right of way—Want of reasonable care approaching side street. - - - **49**
See Negligence. 1.

2.——*Fire—Excessive speed.* - **274**
See Shipping.

3.——*Negligence — Damages — Owner—Liability for driver's negligence.* - **441**
See Motor-vehicles. 1.

4.——*Reasonable speed.* - - **514**
See Motor-vehicles. 2.

COLLISION—*Continued.*

5.——*Regulations—Article 16.* - **274**
See Shipping.

COMMISSION—Sale of goods—"Handle cash basis"—Meaning of. - **328**
See Principal and Agent.

COMMIT—Power to. - - - **482**
See Contempt of Court.

COMMON GAMING-HOUSE. - **317**
See Criminal Law. 10.

COMPANIES—*Amalgamation—Transfer of property and assets for shares in amalgamation—Absence of extraordinary resolution sanctioning purchase—R.S.B.C. 1924, Cap. 38, Sec. 15—Effect of section.*] The plaintiff Company entered into an agreement for the purpose of effecting an amalgamation with various companies engaged in the business of purchasing, packing and selling fruits and vegetables and turned over its business and assets to the defendant Company which was formed to acquire the business and assets of the various companies, in consideration for which the plaintiff Company received certain shares in the defendant Company. In an action to set aside the sale and declare the plaintiff the owner of the property and assets which had been turned over to the defendant Company on the ground that the transaction was *ultra vires* and void as the sale and purchase were never submitted to or concurred in by the shareholders of the plaintiff Company and that said shareholders had not passed a resolution pursuant to section 15 of the Companies Act:—*Held*, that the conveyances and other documents of transfer were validly executed and section 15 does not prevent property passing under a conveyance or instrument which under the ordinary circumstances of the law would pass it, nor does section 15 make the taking of shares by a company unlawful *per se*. There is not total failure of consideration as the shares given the plaintiff had value and any failure of consideration results not from absence of value in the shares but from want of capacity in the plaintiff Company to hold them. Under section 15, the question of capacity is wholly a matter for the plaintiff Company which could at any time clothe itself with the necessary capacity by complying with the provision of the section and the action should be dismissed. Pacific Berry Growers Limited v. The Western Packing Corporation Limited *et al.* - - - **78**

COMPANY—General Meeting. - **478**
See Practice. 1.

CONDITIONAL SALE AGREEMENT. **537**
See Sale of Goods. 1.

CONDITIONAL SALES ACT. - **203**
See Banks and Banking. 2.

CONDITIONAL SALES CONTRACT. **345**
See Contract. 4.

CONFLICT OF LAWS—*Bail in foreign country—Contract of indemnity in British Columbia—Legality—Mortgage to indemnify obligor—Enforcement.*] The plaintiff Company entered into a bail bond in the State of Washington to secure the attendance of the defendant's husband at his trial in that State, and the defendant executed a mortgage in British Columbia on lands situate in British Columbia to secure the plaintiff from loss under the bond. The husband did not appear at the trial and the bail was estreated. In an action on the mortgage:—*Held*, that as the giving of this security offends against our ideas of natural justice and right dealing, the contract is not enforceable in British Columbia. National Surety Company v. Larsen. - **221**

CONSTITUTIONAL LAW — *Legislative power of Province—Timber exported from Province—Taxation—Direct or indirect tax—Validity of sections 58, 62 and 127 of Forest Act—Ultra vires—R.S.B.C. 1924, Cap. 93.*] The tax imposed by the Forest Act on timber which is cut within and exported from the Province is an indirect tax and its imposition is therefore *ultra vires* of the Provincial Legislature. *City of Halifax* v. *Fairbanks' Estate* (1928), A.C. 117 applied. Macdonald Murphy Lumber Company Limited v. Attorney-General of British Columbia. - - - **473**

CONTEMPT OF COURT—*Order for registration of property in names of certain persons in trust—Disobedience—Divorce and matrimonial causes—Power to commit—Inherent jurisdiction of Court—R.S.B.C. 1924, Cap. 70, Sec. 36—Divorce rule 79.*] On the 27th of April, 1925, Hunter, C.J.B.C. made an order "that in the event of the respondent selling his interest in the property as aforesaid, he shall immediately reinvest the proceeds of the purchase-moneys in the purchase of a new home. The said new home shall be registered jointly in the names of the official guardian and the said Victor Rainsford Midgley, in trust for the children of this marriage, until the young-

CONTEMPT OF COURT—*Continued.*

est thereof shall attain the age of twenty-one years." The respondent sold his interest in the property and reinvested it in a new home but he registered the new home in his own name and subsequently gave a mortgage on the property to secure a loan, which was duly registered. On an application by the petitioner that the respondent be committed for disobedience of the order:—*Held*, that there is jurisdiction to enforce the order and the contempt has been so gross and the disobedience so wilful that the respondent should be committed. MIDGLEY V. MIDGLEY. - - - - - - - - - - - **482**

CONTRACT—*Cutting and booming logs—Wrongful taking possession—Measure of damages—Evidence—Counterclaim—Costs.*] The plaintiff and defendants entered into a verbal contract for the cutting and booming of piling to be taken from a described area of land by the plaintiff. The defendants were to finance operations, give the plaintiff the use of their logging plant and the remuneration of the plaintiff was fixed at the difference between cost of production, plus one cent per foot, and the sale price of poles and piling prevailing at the time of delivery. The plaintiff commenced operations on the 1st of January, 1926, and continued until the 19th of April, when the defendants took possession of the plant and equipment and ejected the plaintiff. By this time the plaintiff had cut and boomed about one-half of the piling timber contemplated when the agreement was entered into. A few days prior to the termination of the contract the plaintiff sold 346 pieces of piling at ten and one-half cents per foot and the defendants claim this was done without their being consulted and contrary to the agreement. The action for damages for breach of the contract was dismissed but it was held by the Court of Appeal that the contract had been wrongfully terminated and the action was remitted to the Court appealed from for assessment of damages when it was found that the costs of production with one cent per foot added as provided in the original agreement was eight cents per foot and that the sale of the piling averaged 11.34 cents per foot, the total lineal footage on the limits being 319,209 feet and the resultant damage was $10,-661.58. *Held*, on appeal, reducing the damages allowed by MORRISON, J. (MCPHILLIPS, J.A. would allow the appeal *in toto*), *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that making all due allowances ten and one-half cents may be taken as the market value of the piling and the damages should

CONTRACT—*Continued.*

be reduced to $7,980. *Per* MARTIN and GALLIHER, JJ.A.: That taking Vancouver as the nearest market there should be added to the cost of production half a cent per foot for taking the piling from the limits to Vancouver and 11 cents should be fixed as the sales price in Vancouver making $7,980.22 the sum for which plaintiff should have judgment. AICKIN V. J. H. BAXTER & CO. - - - - - - - - **353**

2.——*Fox farm—Managership of farm given in consideration of loan—Option to purchase—Termination of contract if option exercised—Notice given that option exercised—Release of premises in compliance with agreement—Option in fact not exercised—Fraudulent misrepresentation—Damages.*] By written agreement the plaintiff loaned the defendant $2,000 and the defendant agreed to employ him as manager of its fox farm for one year from the 2nd of June, 1927, the plaintiff to occupy the house on the farm and enjoy other perquisites. The agreement contained a stipulation that in the event of a certain option held by another company for the purchase of the fox farm being exercised the plaintiff's services would terminate on the date of the company holding the option taking possession. On the 2nd of August, the plaintiff received a letter from the defendant advising him that the holder of the option "will exercise it and will require possession of the premises on the 8th of August, 1927." The plaintiff was then paid back his loan and gave up possession of the premises. It subsequently came to the knowledge of the plaintiff that the option was not exercised and the holders of the option never went into possession of the premises and he brought action for the salary and emoluments he would have earned had he served for the balance of the year. On motion for non-suit the action was dismissed. *Held*, on appeal, reversing the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the representations contained in the notice were false to the knowledge of the defendant's manager; the option-holders did not exercise their option in accordance with its terms or at all; the plaintiff acted upon the representations relying on the truth of them and it has been amply proved that he has suffered loss by reason of his virtual dismissal and he is entitled to judgment for the amount claimed. MALCOLM V. WESTERN CANADA MAGIC SILVER BLACK FOX AND FUR COMPANY, LIMITED. - - - - - **305**

3.——*Mines and minerals—Agreement to raise funds for development work—Transfer*

CONTRACT—*Continued.*

of interest in claims in consideration—Agreement not carried out—Claims allowed to expire—Relocations.] The defendant Eden, requiring funds to develop, survey and have Crown granted four mineral claims, entered into an agreement with the plaintiff in July, 1923, whereby the plaintiff was to raise $5,000 for this purpose and Eden was to transfer to him a one-quarter interest in the claims by means of which he was to raise the money required. Eden transferred said interest in the claims to the plaintiff but the plaintiff only succeeded in raising $2,000. This money was spent on the claims in the first six months but Eden continued his development work and incurred a further expenditure of $2,000. Then as no further funds were forthcoming from the plaintiff, Eden wrote him and said he could do no more. In 1926, the claims were allowed to expire and the defendants Petersen and Oman who had been working on the claims for Eden, relocated over the same area. In an action for breach of contract, for damages, and for a lien on the relocated claims, it was held that the plaintiff was entitled to recover $2,000 in damages but the action was dismissed as against Petersen and Oman. *Held*, on appeal, reversing the decision of McDONALD, J. (MARTIN, J.A. dissenting in part), that when advances by the plaintiff stopped owing to his failure to secure funds, Eden's obligations to incur expenditure on the claims ended and there was no breach of contract for which damages could be given. TURNBULL v. EDEN, PETERSEN and OMAN. - - - - **381**

4.——*Sale of motor-bus — Conditional sale contract—Terms and conditions—Delivery—Acceptance—R.S.B.C. 1924, Cap. 225, Secs. 40 and 41.*] After negotiations, the plaintiff signed and delivered to the defendants an order for a model 53: 17-passenger motor-bus on the 11th of June, 1928. On the 30th of July following the bus was delivered to the plaintiff and the parties at the same time entered into a conditional sale contract whereby the defendants agreed to sell said bus to the plaintiff subject to the terms and conditions therein contained. The contract included a clause that "the purchaser hereby purchases the goods . . . . complete with standard attachments and equipment, delivery and acceptance of which in good order, is hereby acknowledged." After operating the car for ten days the plaintiff notified the defendants in writing that he repudiated the conditional sale contract. The plaintiff brought action for a declaration that he was justified in repudiating the contract, that it be declared null and void and that the moneys paid on account of the purchase price be refunded. He recovered judgment. *Held*, on appeal, reversing the decision of MACDONALD, J., that there is no statute or other authority for the assumption that the plaintiff had the right to put the motor-bus to a test of actual performance by using it for ten days upon the passenger route before accepting it; moreover, as the contract expressly states that the purchaser acknowledges acceptance of the bus in good order as above stated, he is bound by it. REEVIE v. THE WHITE COMPANY LIMITED, HANSON GARAGE, MACPHERSON AND DRAPER. - - **345**

CONTRIBUTORY NEGLIGENCE. - **548**
See NEGLIGENCE. 7.

2.——*Effect of.* - - - - **401**
See COSTS. 7.

3.——*Right of way.* - - - **446**
See NEGLIGENCE. 2.

CONVICTION — By magistrate — Accused not asked to plead—*Habeas corpus*—*Certiorari* in aid—Essential—Conviction quashed. - **403**
See CRIMINAL LAW. 4.

2.——*Imposition of fine and costs—Certiorari—Conviction sustained but costs set aside.* - - - - - - - - **9**
See MOTOR-VEHICLES. 4.

3.——*Jurisdiction of magistrate—Right of applicant to shew lack of—Evidence supporting conviction—Inability of judge to consider sufficiency of.* - - - - **214**
See CRIMINAL LAW. 9.

4.——*Offence not properly described—Power to amend—Exercise of—Costs.* **218**
See CRIMINAL LAW. 7.

5.——*Severance of.* - - - - **242**
See CRIMINAL LAW. 6.

COUNTY COURT—Action for account in—Jurisdiction. - - - - **223**
See PRACTICE. 11.

COURT—Inherent jurisdiction of. - **482**
See CONTEMPT OF COURT.

COSTS. - **461, 353, 218, 238, 294**
See ADMIRALTY LAW. 1.
CONTRACT. 1.
CRIMINAL LAW. 7.
NEGLIGENCE. 12.

COSTS—*Continued.*

2.——*Charge on property recovered or preserved.* - - - - - - **145**
See Solicitor.

3.——*Defence of tender—Payment into Court—County Court Order VI., rr. 5 and 10.* - - - - - - - - - **80**
See Practice. 5.

4.——*Joinder of plaintiffs—All successful—One only entitled to costs—Taxation—Review—Appeal.* - - - - - **453**
See Practice. 6.

5.——*Liability of client for.* - **437**
See Barristers and Solicitors.

6.—*Of application to abridge time for hearing appeal.* - - - - - **217**
See Practice. 4.

7.——*Scale—"Amount involved"—Contributory negligence Act—Effect of—B.C. Stats. 1925, Cap. 8.*] In an action where the plaintiff recovers judgment for only part of the damages he has suffered, through the application of the Contributory Negligence Act, "the amount involved" for the purposes of determining the scale under which the defendant's costs are to be taxed is the difference between the amount recovered by the plaintiff and the amount of his original claim. Pantages v. Chung Gee *et al.* - - - - - - - - **401**

8.—*Solicitor and client—Client in employ of police—Client arrested—Undertaking by police department to pay costs if client innocent—Bill of costs submitted to police and paid—Liability of client to further costs—Evidence.*] The plaintiff, who was a member of the Narcotic Squad of the Royal Canadian Mounted Police, was arrested in August, 1923, with others of the Force and charged with an infraction of The Opium and Narcotic Drug Act. On the advice of his superior officer, who stated that if he cleared himself to the satisfaction of his superior officers the police department would pay his costs, he consulted the defendant and retained his services as counsel. The defendant appeared as counsel for the plaintiff on the above charge, and subsequently on a charge of perjury, also before a Royal Commission. The plaintiff cleared himself to the satisfaction of his superior officers and on the defendant submitting his bills to the police department at Ottawa they were taxed and paid. During the proceedings the plaintiff advanced the defendant $450 for disbursements and on the perjury charge he paid the defendant $2,000 to be deposited as bail, but the bail was otherwise provided and the dependant paid back $1,000, but retained the other $1,000, the defendant claiming that the costs paid by the police department did not cover all his costs. In an action for the return of the $1,450 it was held that the plaintiff's account should be accepted in preference to that of the defendant who failed to take the precaution of having a written retainer. *Held*, on appeal, affirming the decision of Gregory, J., that the defendant submitted his bill of costs against the plaintiff to the department of justice, the plaintiff having been in the Government employ, and the proper inference from the whole evidence is that his bill was paid on the assumption that it was his whole bill against the plaintiff and that its payment entirely relieved the plaintiff from any responsibility for the costs of the proceedings therein set out. Eccles v. Russell. - - **161**

9.——*Unequal apportionment of damages.* - - - - - - - - **274**
See Shipping.

COVENANT—Breach. - - - - **526**
See Partnership.

CRIMINAL LAW—*Appeal from summary conviction—Notice of appeal given to wrong Court—Second notice of appeal to proper Court—Government Liquor Act—Affidavit of merits—Sworn before notary public—R.S.B.C. 1924, Cap. 245, Secs. 77, 78 and 99.*] Where an appeal is taken under the Summary Convictions Act of British Columbia, and the notice of appeal is given to the wrong Court, this does not prevent the giving of a second notice of appeal to the proper Court within the time fixed by statute. Where an appeal is taken from a conviction for keeping liquor for sale contrary to the Government Liquor Act, the affidavit of merits required by section 99 of that Act must be sworn before a "justice," a notary public will not do, even where the notary is also a justice of the peace though having taken the affidavit in his capacity as a notary public. Rex v. Chin Chong, *alias* Jeanne. - - - - - - - - **33**

2.—*Attempt to have carnal knowledge of girl under 14 years—What acts necessary to constitute an "attempt"—Evidence for jury—Sentence—Reduction of—Evidence of girl not being married to accused—Sufficiency of.*] The accused was charged with unlawfully attempting to have carnal knowledge of a girl under the age of fourteen years.

CRIMINAL LAW—*Continued.*

The evidence disclosed that the accused, who was a stranger to a girl of eleven years who lived with her parents and two sisters (fourteen and nine years respectively) in a house across the Thompson River from Kamloops, approached the house before the noon hour and from outside the fence spoke to the girl who was on the porch with her younger sister. After speaking about a doll the younger sister had he asked her if she liked candy. On her replying "yes" he said "I will have to buy you some." He then went across the bridge to the town. At about 4 o'clock in the afternoon the girl and her two sisters went to town on an errand for their mother when they met the accused who went into a store and bought candies which he gave them. He then asked the girl to "walk home to your place with me" to which she replied, "no, I have to go with my sisters." He then left them and they went home. The girl and her sister then went on the porch for their dolls when accused again came to the fence and said "I did not bring very many candies." He then gave them some candies and the smaller sister went away. The accused then beckoned to the girl and said "I will give you two bucks if you will come down to the bushes with me," to which the girl replied, "no, my mother would not allow me to." The girl then went to her mother to whom she told what had happened and the mother then went to the porch and told him to go away. He then used indecent language to the mother who told him she would call for the police. The evidence disclosed that during the afternoon the accused was in an intoxicated condition. The jury found the accused guilty and he was sentenced to two years' imprisonment and fifteen lashes. *Held*, on appeal, affirming the decision of MCDONALD, J. but reducing the sentence (GALLIHER and MCPHILLIPS, JJ.A. dissenting), that the evidence disclosed a persistent intention by repeated overt acts by means of verbal and gestural invitation, by gifts and by promises of money to try to persuade the child to succumb to the carnal desires of the appellant, and the fact that she did not do so does not alter the legal consequences of his sustained endeavour to accomplish his object, but considering the circumstances the sentence should be reduced to one year's imprisonment only. To the objection raised that there was no evidence to shew that the girl was not the wife of the accused:—*Held*, that proof of a fact of this kind need not be direct but may reasonably be inferred from all the evidence and here the fact that the child had never seen the appellant before that day was sufficient to support the ruling of the learned judge below. REX v. RUMP. - - - - - - - - - - **36**

3.——*Bankruptcy—Removal and disposal of goods to defraud creditors—"Creditors," meaning of—Evidence—Criminal Code, Sec. 417 (a) (ii.).*] B., who carried on a grocery business in two stores in Vancouver, incorporated in 1925 a company known as "Bell's Grocery and Meat Market Limited," he taking 500 shares in consideration of transferring the business in the two stores to the company, and his two daughters buying 350, the returns to the registrar of joint-stock companies disclosing this transaction. B. continued in control as manager of the business. In August, 1928, not meeting its obligations, the creditors, after holding a meeting, took over the business and upon investigation laid a charge against B. of unlawfully with intent to defraud his creditors, concealing and disposing of certain moneys and cheques amounting to between $4,000 and $5,000 contrary to section 417 (*a*) (ii.) of the Criminal Code. He was convicted. *Held*, on appeal, reversing the decision of Magistrate Shaw (MARTIN and GALLIHER, JJ.A. dissenting), that the Crown was obliged to prove that the creditors who were alleged to have been defrauded were B.'s creditors but the evidence disclosed that the persons who claimed to have been defrauded were not B.'s creditors but those of a joint-stock company, *i.e.*, "Bell's Grocery and Meat Market Limited" of which B. was an officer and manager and there is therefore no warrant for the prosecution. The question of whose creditors had been defrauded, namely, those of B.'s or of "Bell's Grocery and Meat Market Limited" was the crucial point in the case and the onus of proving this was on the Crown. The Crown therefore had no right to call a witness in rebuttal of the defendant's evidence on this point. REX v. BELL. - **166**

4.——*Charge of being in possession of still—Conviction by magistrate—Accused not asked to plead—Habeas corpus—Certiorari in aid—Essential—Conviction quashed—R.S.C. 1927, Cap. 60.*] The accused was convicted before a stipendiary magistrate on a charge of having been in possession of a still contrary to the provisions of the Excise Act. On an application for a writ of *habeas corpus* with *certiorari* in aid the proceedings disclosed that accused had not been called upon to plead to the charge. *Held*, that calling upon the accused to plead is an

CRIMINAL LAW—*Continued.*

essential part of the arraignment and the conviction is quashed. Rex v. Chew Deb (No. 2). - - - - - - **403**

5.——*Charge of having opium in his possession—Convicted of minor offence—Jurisdiction—Mandamus—R.S.C. 1927, Cap. 144, Secs. 4 (d) and 10.*] An accused was charged with having opium in his possession contrary to section 4 (*d*) of The Opium and Narcotic Drug Act. On the trial before a County Court judge under Part XVIII., of the Criminal Code the offence was proved, but he was convicted of the minor offence of smoking opium under section 10 of said Act. On an application for a prerogative writ of *mandamus* directed to the County Court judge commanded him to proceed with and conclude the trial of the accused on the charge laid:—*Held*, that if a charge under section 4 (*d*) of said Act be proved the Court should convict under that section and not reduce or substitute an offence under other sections of the Act. The conviction as entered is a nullity. *Mandamus* should issue to compel completion of the unfinished trial with an order for the rearrest of the accused. Rex v. Wong Sack Joe. - **254**

6.——*Excise Act — Infraction — Habeas corpus — Certiorari — Legality of arrest—Effect on jurisdiction—Informant—Authority to act—Extrinsic evidence as to jurisdiction — Severance of conviction — R.S.C. 1927, Cap. 60.*] On an information for an offence against the Excise Act, the informant is described as a customs and excise officer on behalf of His Majesty the King. *Held*, sufficient to shew that he belonged to the class of persons by whom such an information may be laid and gives the magistrate the right to proceed thereunder. If a summary trial is proceeded with under the Excise Act by a stipendiary magistrate who had jurisdiction territorially and otherwise to try a case of this kind, it is immaterial whether the proceedings prior to the trial were legal or not. On *habeas corpus* proceedings with *certiorari* in aid with respect to a conviction and imprisonment under the Excise Act, proof of the informant's authorization to lay the information is immaterial but the case of *Rex* v. *Nat Bell Liquors Ld.* (1922), 2 A.C. 128, does not deprive an applicant from proving *dehors* the record that the magistrate has no jurisdiction to convict him. The imposition of a fine less than that prescribed by the statute is no ground for holding the conviction invalid. Where a conviction is valid with respect to the term of imprisonment imposed, but a provision therein as to costs is beyond the jurisdiction of the magistrate, the portion which provides for imprisonment nevertheless remains good. Rex v. Henderson *et al.* - - **242**

7.——*Fisheries—Fishery regulation No. 21—"Keeping purse-seine open," etc.—Conviction—Offence not properly described—Power to amend—Exercise of—Costs.*] Section 21 of the fishery regulations makes it an offence for a purse-seine to be kept open for any time after being cast in the manner known as an "open set." The alleged offence set out in the conviction is that the accused "did fish for salmon with a purse-seine in the manner known as an 'open set.'" *Held*, that the offence created by said section 21 is not properly described in the conviction and the conviction should be quashed. *Held*, further, that on proceedings such as these, the rule, in civil matters, that costs must follow the event unless good cause be shewn, should be followed. Rex v. McPherson. - - - - - - **218**

8.——*Gaming — Gambling machine — What constitutes—Game of skill—Criminal Code, Secs. 226 and 236, Subsecs. (b), (d) and (e).*] The plaintiff, an expert checker player, who designed and patented the Advertoshare Problem Checker Board, sold a number of boards to the defendants. The board has on its upper right cover the face of a checker board, the checker squares being numbered consecutively. On the left upper corner are ten names (Venus, Curve, Blind, etc., each representing a checker problem) with the numbers of the squares following the names of the problems in each case on which the black and white checkers are to be placed to constitute the problem. Across the bottom of the board are 1,000 punch holes covered with seals. Each punch-hole contains the name of one of the problems. A certain sum is paid by a customer for each punch and upon drawing a name, and solving the problem it represents, he receives a prize. The defendant refused to pay for the boards on the ground that they were devices for playing at a game of chance or a mixed game of chance and skill and their use would be a violation of sections 226 and 236 of the Criminal Code. In an action to recover the cost of the boards it was held that the problems to be played were games of skill only and the use of the boards did not constitute a violation of the Criminal Code. *Held*, on appeal, affirming the decision of Ellis, Co. J., that the only element of chance alleged was involved in selecting

CRIMINAL LAW—*Continued.*

the game to be played which was done by the player punching a board, but the result of the draw did not affect the character of the game as all the problems were capable of solution by the player provided he had sufficient skill. D'ORIO v. LEIGH & CUTHBERTSON LIMITED. - - - - - **153**

9.——*Habeas corpus—Conviction—Jurisdiction of magistrate—Right of applicant to shew lack of—Evidence supporting conviction—Inability of judge to consider sufficiency of.*] On application for *habeas corpus* with *certiorari* in aid evidence may be submitted by affidavit to shew that the convicting magistrate lacked jurisdiction but the judge before whom the application is made cannot pass upon whether there was sufficient or any evidence to support the conviction. REX v. CHIN YOW HING. - - - - - - - - - **214**

10.——*Keeping a common gaming-house—"Gain"—Game of cards—Rake-off—Payment for refreshments partly furnished on premises — Conviction —Appeal — Criminal Code, Sec. 226.*] The defendant was a copartner in a tobacco and refreshment store, in the rear of which was a room to which persons, chiefly customers, resorted for the purpose of playing "pan," a game played with cards and chips. The defendant took a "rake-off" of 25 cents from each player every half hour for the purpose of paying for cards, cigars and refreshments. No charge was made for the room and the rake-off did not more than cover the cost of the cards, cigars and refreshments, a portion of which was purchased on the premises. The defendant was convicted of keeping a common gaming-house. *Held,* on appeal, GALLIHER, J.A. dissenting, that in these circumstances the defendant was properly convicted. REX v. RADINSKY. - **317**

11.——*Writ of prohibition—Charge of sale of intoxicating liquor—Withdrawal of summons—Effect of—Issue of subsequent summons—Jurisdiction—Autrefois acquit.*] An information was laid against the defendant for unlawfully selling intoxicating liquor. On the hearing before the police magistrate Crown counsel obtained unconditional leave from the magistrate to withdraw the information before the accused had been called upon to plead thereto. On the same day a second information was laid in the same terms as the first one, except that added thereto was an allegation of a prior conviction. Objection to the magistrate's jurisdiction to hear the charge on the ground of *autrefois acquit* being overruled, the accused applied for a writ of prohibition which was refused. *Held,* on appeal, affirming the decision of MURPHY, J., that the principle to be gathered from the cases is that unless it can be said on the facts that there has been an adjudication and acquittal on the merits, the permission of the Court to withdraw a charge is not equivalent to a dismissal which can be pleaded in bar of subsequent proceedings. There was no determination of this matter on the first summons and the magistrate had jurisdiction to hear and determine the second summons. REX v. SOMERS. - **190**

DAMAGES. 305, 404, 427, 17, 398
See CONTRACT. 2.
MALICIOUS PROSECUTION. 1.
NEGLIGENCE. 3, 9, 10.

2.——*Collision — Negligence — Owner — Liability for driver's negligence.* - **441**
See NEGLIGENCE. 4.

3.——*Contributory negligence—Right of way.* - - - - - - - **446**
See NEGLIGENCE. 2.

4.——*Joint owners—One driving—Liability of both.* - - - - - - **55**
See NEGLIGENCE. 6.

5.——*Measure of.* - - - - **353**
See CONTRACT. 1.

6.——*Negligence—Municipal corporation—Highway — Misfeasance— Nuisance—Personal injuries—Whether damages excessive.*] In constructing a sewer along the south side of Kingsway the defendant Municipality erected a barricade of planks against which the earth taken from the excavation was piled up. The barricade was near the inside edge of the sidewalk and left a space of about two and one-half feet between the barricade and private properties for the use of pedestrians. From the wet condition of the earth so piled up and from occasional rain the clay seeped through the cracks on to the narrow pathway resulting in its surface becoming very slippery. The plaintiff coming from a store behind the barricade on to this pathway, slipped and fell, breaking certain bones in her ankle. In an action for damages it was held that the defendant had created and continued a nuisance which was the sole cause of the accident. *Held,* on appeal, affirming the decision of MORRISON, J. (MACDONALD, J.A. would reduce the damages), that the defendant was guilty of misfeasance and that the damages awarded

DAMAGES—*Continued.*

should be affirmed. *Per* McPHILLIPS, J.A.: That the judgment could be affirmed on the grounds both of nuisance and of negligence, although under the circumstances the imposition of liability on the ground of nuisance was to be favoured. MACDONALD, J.A.: That in failing to take proper precautions to provide a safe footway and to keep it safe when the sidewalk was appropriated to other uses, the defendant created a nuisance. WATTS v. THE CORPORATION OF THE DISTRICT OF BURNABY. - **282**

7.——*To bridge by vessel—Tidal currents —Inevitable accident.* - - - - **225**
See ADMIRALTY LAW. 2.

8.——*Unequal apportionment of—Costs.* - - - - - - - - - - - **274**
See SHIPPING. 1.

DEFAMATION — *Libel—Publication—Dictating letter to stenographer—Pleadings—No cause of action shewn.* A letter was dictated by the defendant to his stenographer, transcribed by her and posted by the defendant to the plaintiff. In an action for libel it was held that there was publication to the stenographer. The statement of claim contained the following: "Defendant George Mason Geiger falsely and maliciously wrote and published of plaintiff in a letter of April 5th, 1929, addressed by defendant to plaintiff the words following, that is to say," etc. *Held,* that inasmuch as publication to a third person is not pleaded, the statement of claim discloses no cause of action. HALL v. GEIGER. - - **481**

DEFENCE OF TENDER. - - **80**
See PRACTICE. 5.

DELIVERY—Acceptances. - - **345**
See CONTRACT. 4.

DEPOSITOR—Gives cheque to manager for investment—Payable to bearer—Manager short in his account at bank—Uses cheque to cover his shortage—Liability of bank for amount of cheque. - - **450**
See BANKS AND BANKING. 1.

DEVOLUTION OF ESTATES—*Intestacy—Distribution among nephews and nieces—R.S.B.C. 1924, Cap. 5, Secs. 114, 116 and 126.*] On the death of an intestate, leaving her surviving her husband and the children of deceased brothers and sisters, the proviso to section 116 of the Administration Act applies, and after the husband's share of the estate has been segregated, the residue is divided amongst the nephews and nieces *per capita.* *In re* ESTATE OF MARY GRANT, DECEASED. MORRISON v. GRANT. - **511**

DISCOVERY — Interrogatories — Material only as tending to establish adultery—Inadmissible. - - **224**
See DIVORCE. 2.

2.——*Patents.* - - - - - **252**
See PRACTICE. 10.

DISSOLUTION. - - - - - **526**
See PARTNERSHIP.

DISTRAINT—Goods and chattels—Validity. - - - - - - - - - **24**
See LANDLORD AND TENANT.

DISTRESS WARRANT—Issued by officers —Distraint of goods and chattels —Validity. - - - - - **24**
See LANDLORD AND TENANT.

DIVORCE—Foreign decree for—Alimony—Final judgment for—Action on foreign judgment. - - **201**
See HUSBAND AND WIFE. 1.

2.——*Petition for—Discovery—Interrogatories—Material only as tending to establish adultery—Inadmissible.*] The Court will not order interrogatories in a petition for divorce where they can be material only in so far as they may tend to establish adultery. *Redfern* v. *Redfern* (1891), P. 139 and *Levy* v. *Levy* (1906), 12 B.C. 60 applied. BRAMMALL v. BRAMMALL. (No. 2). - **224**

3.——*Practice—Particulars of adultery —Intervener not bound by order made at instance of respondent—Divorce rules 27 and 41.*] On the application of the intervener in a divorce action for further and better particulars giving the time and places where the alleged adultery was committed, as her reputation is at stake, she is entitled to press for the fullest particulars and is not bound by any order previously made at the instance of the respondent. B. v. B. AND S., INTERVENER. - - - - **184**

DIVORCE AND MATRIMONIAL CAUSES. - - - - - - - - **482**
See CONTEMPT OF COURT.

DOCUMENTS—Inspection of. - **252**
See PRACTICE. 10.

EQUITABLE RELIEF. - - - **487**
See VENDOR AND PURCHASER.

ESTOPPEL. - - - - - - **110**
See Insurance, Accident and Guarantee.

2.——*Action to recover possession of buildings and machinery under agreement—Previous action to recover possession of the premises in addition to the buildings, machinery, and other material was dismissed—Res judicata—Appeal.*] The plaintiff claims the right of possession of certain buildings, plant and fixtures under a memorandum of agreement. He had previously brought action for the possession of all he now claims and for other material in addition founded on the same memorandum of agreement, when it was held that the instrument was at an end and the action was dismissed. It was held that the doctrine of *res judicata* applied and the action was dismissed. *Held*, on appeal, affirming the decision of Gregory, J., that the plaintiff is estopped and cannot maintain the action. Winter v. J. A. Dewar Company Limited. - - - - - - - - - - **336**

EVIDENCE. - **353, 161, 166, 49**
See Contract. 1.
Costs. 8.
Criminal Law. 3.
Negligence. 1.

2.——*Burglary.* - - - - - **81**
See Insurance, Burglary.

3.——*Conflicting.* - - - - **404**
See Malicious Prosecution. 1.

4.——*Credibility.* - - - - **17**
See Negligence. 9.

5.——*Extrinsic as to jurisdiction.* **242**
See Criminal Law. 6.

6.——*Supporting conviction — Inability of judge to consider sufficiency of.* - **214**
See Criminal Law. 9.

EXCESSIVE DAMAGES. - - **282**
See Damages. 6.

EXCISE ACT—Infraction. - - **242**
See Criminal Law. 6.

EXECUTION—*Application for stay pending appeal to Privy Council—Financial inability of successful litigant to return amount of judgment in case of reversal—Improbability of obtaining leave to appeal.*] The defendant applied to stay execution pending an appeal from the Supreme Court of Canada to the Privy Council on the ground of the financial inability of the plaintiff the Georgia Construction Company to return the amount of

EXECUTION—*Continued.*

the judgment in the event of a reversal. The plaintiff, the Bank of Toronto, had an assignment of the moneys claimed under the contract sued upon. The application was refused as the material in support does not justify depriving the plaintiffs of the fruits of their judgment, and further in the event of the defendant's success on appeal repayment of the moneys paid is secured by the joinder of the Bank of Toronto as a plaintiff in the action. *Per curiam*: Decisions of the Supreme Court of Canada are final on general questions connected merely with the construction of agreements which do not raise either far-reaching questions of law or matters of dominant public importance. Georgia Construction Company Limited and Bank of Toronto v. Pacific Great Eastern Railway Company. - **469**

EXPROPRIATION OF LAND — Elevator site — Compensation — Principles governing. - - - - - **1**
See Arbitration.

FINAL JUDGMENT—Alimony. - **201**
See Husband and Wife. 1.

FISHERIES—Fishery regulation No. 21—"Keeping purse-seine open," etc.—Conviction. - - - **218**
See Criminal Law. 7.

FORECLOSURE. - - - - - **258**
See Mortgage. 2.

2.——*Agreement for sale of land—Period of redemption.* - - - - - **160**
See Practice. 3.

FOREIGN JUDGMENT—Action on. - - - - - - **201, 241**
See Husband and Wife. 1.
Practice. 2.

2.——*Appeal—Action in British Columbia on same subject-matter—Stay of proceedings pending appeal—Discretion.* **185**
See Practice. 8.

FOREST ACT—Sections 56, 62 and 127—Validity of—*Ultra vires.* - **473**
See Constitutional Law.

FRAUD. - - - - - - - - **502**
See Mortgage. 3.

FRAUDULENT MISREPRESENTATIONS. - - - - - - - **305**
See Contract. 2.

GAME OF SKILL. - - - - - **153**
See CRIMINAL LAW. 8.

GAMING—Gambling machine—What constitutes—Game of skill—Criminal Code, Secs. 226 and 236, Subsecs. (*b*), (*d*) and (*e*) - - - **153**
See CRIMINAL LAW. 8.

GOODS—Sale of—Principal and agent. - - - - - - **328, 537**
See SALE OF GOODS. 1.

GOODS AND CHATTELS—Distraint of. - - - - - - - - - **24**
See LANDLORD AND TENANT.

GOVERNMENT LIQUOR ACT. - **33**
See CRIMINAL LAW. 1.

GRATUITOUS PASSENGER. - **55**
See NEGLIGENCE. 6.

GUARDIANSHIP — *Infant* — *Husband and wife* — *Separation agreement* — *Custody of children*—*Provision as to*—*Petition by wife to vary agreement*—*Onus*—*Stay*—*R.S.B.C. 1924, Cap. 101, Secs. 11 and 13.*] Under a separation agreement between husband and wife the custody of the two older children was given the father and the youngest to the mother. The father left the two children with their paternal grandparents and while in their charge the younger boy was drowned. The mother then petitioned for the custody of the eldest child. There was evidence of the two boys being allowed to run wild and that the paternal grandfather had been convicted on a charge of selling liquor. The petition was granted and custody of the child was given to the mother. *Held*, on appeal, reversing the decision of MORRISON, J., that the mother failed to shew good cause why the Court should interfere with the provisions of the separation agreement and the child should be restored to his father. An application for a stay of proceedings pending the disposition of the appeal was refused. *Held*, on appeal, that this was palpably a case where a stay should have been granted. BRUIN v. BRUIN. - - - - - - - - - - **298**

HABEAS CORPUS. - **403, 242, 214**
See CRIMINAL LAW. 4, 6, 9.

2.——*Japanese obtains certificate of naturalization* — *Subsequent attempt of wife and children to enter Canada*—*No passport from Japan*—*Entry refused*—*Section 3 (t) of Immigration Act subject to other disqualification*—*R.S.C. 1927, Cap. 93, Sec. 3 (i) and (t).* M., an immigrant from Japan in 1914, subsequently obtained a certificate of naturalization as a Canadian citizen. In 1928 his wife and two children on arriving at Victoria from Japan were refused entry on the ground that they had not in their possession a valid passport issued in and by the Government of the country of which they were citizens as required by order in council pursuant to section 3 (*i*) of the Immigration Act. On *habeas corpus* proceedings the applicants claimed that notwithstanding their not having a passport, they were entitled to admission into Canada by virtue of section 3 (*t*) of the Immigration Act. *Held*, that said section 3 (*t*) is restricted to the question of illiteracy of relatives of an admitted immigrant and when otherwise disqualified such persons are prohibited from entering Canada. *In re* IMMIGRATION ACT AND TOKU NISHI *et al.* - - - - - - **199**

HIGHWAY—Municipal corporation—Negligence—Misfeasance—Nuisance. - - - - - - - - **282**
See DAMAGES. 6.

HUSBAND AND WIFE—*Foreign decree for divorce* — *Alimony* — *Final judgment for*—*Action on foreign judgment.*] A husband's action in the State of Washington for a divorce being unopposed, a decree was granted not on account of any misconduct of the wife but rather that of the husband. The grounds, however, would not justify a decree of divorce in British Columbia. As ancillary to the decree, judgment was entered for the wife for $35 per month alimony for maintenance of wife and infant child. Later the child died and final judgment was then entered for the wife for $5,000. In an action brought by the wife in British Columbia upon the judgment:—*Held*, that a divorce granted in a foreign jurisdiction is valid here provided the husband was domiciled within the jurisdiction of the Court granting the decree. The merits are all with the plaintiff and the defendant having brought his action in the Washington Court and having chosen his forum is bound by the decision of that Court, and the plaintiff is entitled to judgment. BURPEE v. BURPEE. - - - - - - - - - - **201**

2.——*Separation agreement*—*Custody of children*—*Provision as to*—*Petition by wife to vary agreement*—*Onus*—*Stay.* - **298**
See GUARDIANSHIP.

3.——*Will* — *Application for relief by widow*—*Duty of Court*—*R.S.B.C. 1924, Cap. 256.*] - - - - - - - **269**
See TESTATOR'S FAMILY MAINTENANCE ACT.

INFANT—Husband and wife—Separation agreement—Custody of children—Provision as to—Petition of wife to vary agreement—Onus—Stay. - - - - - - - **298**
See GUARDIANSHIP.

INHERENT JURISDICTION OF COURT. - - - - - - - **482**
See CONTEMPT OF COURT.

INJUNCTION — *Interim* — *Application to continue—Electric power—Supply for mines—Conditional water licences—Use of power circumscribed—R.S.B.C. 1897, Cap. 190, Sec. 118; B.C. Stats. 1897, Caps. 45, 62, 63 and 67; B.C. Stats. 1899, Cap. 77.*] The defendant Company, incorporated in 1897, was authorized to generate electric power and transmit same within a radius of 50 miles from the City of Rossland. At the same time the South Kootenay Water Power and Light Company Limited and the Okanagan Water Power Company were incorporated with like powers of generating and transmitting electric power, the first mentioned within an area of the same size adjoining the defendant Company's area to the east and the other within an area of like size adjoining further to the east. These two companies never constructed works, but the defendant Company constructed extensive works at Bonnington Falls on the Kootenay River and by separate agreements leased the whole of the undertakings of the other two companies, constructing extensive transmission lines in their respective areas. One transmission line supplied power to the plaintiff Company's mines situate within the area of the Okanagan Water Power Co. Upon the termination of the contract under which this power was supplied the defendant Company threatened to cease supplying power and the plaintiff Company then obtained an *interim* injunction restraining the defendant Company from cutting off the power it had hitherto supplied. An application to continue the injunction on the ground that the defendant Company was obliged to supply power to the plaintiff under section 118 of the Water Clauses Consolidation Act, 1897, was dismissed. *Held*, on appeal, affirming the decision of MURPHY, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that neither the defendant Company nor the Okanagan Water Power Co. was entitled to claim the use of water for generating power under their respective Acts of incorporation but must have acquired it under the Water Clauses Consolidation Act. The Okanagan Water Power Co., the mines in question being within its area for the supply of power, never acquired licences under the Water Clauses Consolidation Act and was therefore under no obligation to supply power to the plaintiff's mines and having leased its entire franchise to the defendant, the defendant would be under no further obligation. The defendant Company only acquired licences for the use of water under the Water Clauses Consolidation Act, but its supply of power is confined to an area within 50 miles of Rossland. The defendant Company is not compelled to supply the plaintiff Company's mines with electric power under section 118 of the Water Clauses Consolidation Act. THE GRANBY CONSOLIDATED MINING SMELTING & POWER COMPANY LIMITED v. WEST KOOTENAY POWER AND LIGHT COMPANY LIMITED. - **89**

INSURANCE—Loss through accident. **427**
See NEGLIGENCE. 3.

INSURANCE, ACCIDENT AND GUARANTEE — *Conduct of insured — Conditions—Construction — Waiver — Estoppel — B.C. Stats. 1925, Cap. 20, Secs. 147, 154 and 158.*] The respondent held a policy of insurance in the appellant Company to indemnify him against loss for any liability imposed by law for damages on account of bodily injuries suffered by any other person through an accident while such person was a passenger in his automobile. One D., a gratuitous passenger in the respondent's car received injuries while the respondent was driving his car. Immediately after the accident an insurance adjuster, acting for D., obtained from the respondent a statutory declaration detailing the facts leading up to the accident. D. brought an action for damages, and the appellant, in pursuance of a condition of the policy, assumed the defence. On the examination of the respondent for discovery, counsel for the appellant learned of the statutory declaration that the respondent had made, but the appellant continued the defence down to judgment awarding damages to D. The respondent brought this action to recover the amount paid by him to D. The appellant pleaded that by making the statutory declaration the respondent had practically admitted liability in breach of a condition in the policy thus relieving the appellant of liability. The respondent recovered judgment for the sums recovered in the former action. *Held*, on appeal, affirming the decision of GREGORY, J., that irrespective of whether the respondent was guilty of a breach of a statutory condition in making the statutory declaration, once the breach came to the knowledge

INSURANCE, ACCIDENT AND GUARANTEE—*Continued.*

of the appellant, its solicitor by continuing to defend after knowledge, could only do so on the assumption that the policy was valid and subsisting. It is a representation by acts that the appellant would assume any judgment obtained within the limits of the policy. CADEDDU v. MOUNT ROYAL ASSURANCE COMPANY. - - - - - **110**

INSURANCE, BURGLARY—*Entry by tearing away fly-screen from window—"Actual force and violence"—"Visible marks made on premises at place of entry by tools"—Construction of — Burden of proof — Evidence.*] The plaintiff, who was a sausage manufacturer, had his premises insured in the defendant Company against loss by burglary. The premises required a free passage of air and the plaintiff removed the glass from the upper sashes in three windows and covered the apertures with fly-screens. Prior to issuing the policy the Company's inspectors, on examining the premises, were shewn the screens and advised that a burglary had previously taken place by breaking through one of the screens. While the policy was in force burglars broke in and stole sausage casings valued at $412.75. On the morning following the burglary it was found that one of the fly-screens on a window had been torn away from its fastenings. The policy provided, *inter alia*, that the assured was indemnified against loss by burglary, etc., "occasioned by any person making felonious entry into the premises by actual force and violence when the premises are not open for business, of which force and violence there shall be visible marks made upon the premises at the place of such entry by tools," etc. The plaintiff recovered judgment on the policy for the loss sustained. *Held*, on appeal, affirming the decision of RUGGLES, Co. J., that there was evidence to justify the finding of the Court below that there were "visible marks made upon the premises at the place of such entry by tools" within the policy of burglary insurance in question. MULLETT v. UNITED STATES FIDELITY & GUARANTY CO. - - **81**

INTERROGATORIES — Material only as tending to establish adultery—Inadmissible. - - - - **224**
See DIVORCE. 2.

INTESTACY. - - - - - **511**
See DEVOLUTION OF ESTATES.

INTOXICATING LIQUOR—Sale of. **190**
See CRIMINAL LAW. 11.

JOINT OWNERS—Of automobile — One driving—Liability of both. - **55**
See NEGLIGENCE. 6.

JUDGMENT—Not satisfied. - - **427**
See NEGLIGENCE. 3.

JURISDICTION. - - - - - **242**
See CRIMINAL LAW. 6.

2.——*Autrefois acquit.* - - **190**
See CRIMINAL LAW. 11.

3.——*County Court.* - - - - **223**
See PRACTICE. 11.

4.——*Mandamus.* - - - - **254**
See CRIMINAL LAW. 5.

JURY—Answers to questions. - **363**
See MINES AND MINING. 1.

2.——*Direction to.* - - - - **404**
See MALICIOUS PROSECUTION. 1.

LACHES. - - - - - - **262**
See MINES AND MINING. 2.

LAND—Sale of. - - **160, 456, 256**
See PRACTICE. 3.
SALE OF LAND. 2, 3.

LANDLORD AND TENANT—*Unincorporated body, owner—Regulations—Officers duly elected—Distress warrant issued by officers—Distraint of goods and chattels—Validity.*] The members of The Chinese National League of Canada (called the League) subscribed money for the purchase of a site and the erection of a building in Vancouver for its headquarters. As the League was unincorporated the conveyance of the property was taken in the name of a company with the same name that was incorporated under the Benevolent Societies Act with headquarters at Victoria. This company had nothing to do with the purchase of the property and was in no way connected with the League. After the erection of the building the president and secretary of the League (duly elected in accordance with its regulations) leased a portion of the premises in July, 1922, to the plaintiff Company. The plaintiff paid rents to the League for some time but falling in arrears the president and secretary of the League issued a distress warrant in April, 1927, and the defendants (bailiffs) distrained the goods, chattels and fixtures of the plaintiff. In an action for illegal distraint the plaintiff recovered $500 damages. *Held*, on appeal, reversing the decision of MURPHY, J., that the League being unincorporated is no bar to authorizing its

LANDLORD AND TENANT—*Continued.*

officers to make a lease. It is in the nature of a social club with regulations under which the president and secretary were regularly elected, and through its officers had possession and entire management of the property. The lease and distress warrant were executed in accordance with the existing regulations of the League as landlord and there being a landlord his title cannot be questioned by the tenant who is estopped from enquiring into his *status*. CANADA MORNING NEWS COMPANY LIMITED v. THOMPSON *et al.* - - - - - **24**

LIBEL — Publication — Dictating letter to stenographer—Pleadings—No cause of action shewn. - - **481**
See DEFAMATION.

LIQUOR CONTROL BOARD. - **456**
See SALE OF LAND. 2.

LOANS—Security. - - - - - **203**
See BANKS AND BANKING. 2.

LOCUS IN QUO—View of. - - **9**
See MOTOR-VEHICLES. 4.

MAGISTRATE—Jurisdiction. - **214**
See CRIMINAL LAW. 9.

MALICE—*Onus probandi.* - - **433**
See MALICIOUS PROSECUTION. 2.

MALICIOUS PROSECUTION—*Reasonable and probable cause—Burden of proof—Conflicting evidence—Direction to jury—Damages.*] In an action for malicious prosecution the burden of proof as to all issues arising therein lies on the plaintiff and it is the duty of the judge to determine the issue of reasonable and probable cause, but he should submit to the jury questions respecting any facts upon which the evidence conflicts. The plaintiff entered the defendant's departmental store to purchase a chain-socket and fuse-plugs. On reaching the counter where these articles were displayed, he took a chain-socket and fuse-plug from his pocket, which he had purchased elsewhere, to make comparisons and after he had done so he put them back in his pocket and walked away. The head janitor of the store seeing him put the articles in his pocket and thinking he had stolen them, immediately informed the manager of the department who intercepted the plaintiff and asked him if he had a bill for the things he had in his pocket. The plaintiff replied "No, these things I brought them with me." The manager replied, "You cannot go out of here until we see about them." The plaintiff then explained that he worked for the Canadian Pacific Railway Company and that he had purchased the articles in his pocket (chain socket and four fuse-plugs) at the Magnet Hardware Store on Commercial Drive and wanted to get a socket with a longer chain. He was detained half an hour and in the meantime, Mr. Woodward, the general superintendent appeared, when the plaintiff said he would be willing to pay for the articles as he was in a hurry to which Mr. Woodward replied, "Settle it with the police." No enquiries were made either at the Canadian Pacific Railway or at the Magnet Hardware Store. The plaintiff was handed over by the departmental manager to the superintendent of the store and on the arrival of a police officer he was taken to the police station. The articles were proved to have been purchased at the Magnet Hardware Store and the charge against the plaintiff was dismissed. In an action for malicious prosecution the judge stated in his charge, "I have no hesitation in directing you that there was want of reasonable and probable cause if you find that Mr. Perry made the Woodward people understand that he could take them to the place or go with them to the place to let them know who he bought these goods from. If he told them; now, whether he said that or not is a matter that I want your assistance on; and if he said that, then I would say there was want of reasonable and probable cause." The verdict was "$1,270 for the plaintiff" for which judgment was entered. *Held*, on appeal, affirming the decision of GREGORY, J., that although it would have been less confusing if the learned judge had followed the usual course of leaving written questions to the jury, a question of fact was submitted on conflicting evidence and the jury by its verdict must have found that reasonable enquiry had not been made. No injustice has been done and the appeal should be dismissed. PERRY v. WOODWARD'S, LIMITED. - - - - - - **404**

2.——*Reasonable and probable cause—Malice—Onus probandi.*] The plaintiff, a motor-car salesman sold the defendant an automobile, one of the inducements leading to the sale being that the plaintiff would take out an all-risk policy of insurance for the defendant for which the defendant paid him $45, for payment of the premium. After using the car for a short time the defendant met with a collision and he then found that the car had not been insured. He laid a charge against the plaintiff for theft of the

MALICIOUS PROSECUTION—*Continued.*

money paid him to take out the insurance policy. The charge came on for hearing and the plaintiff was acquitted. In an action for malicious prosecution:—*Held*, that want of reasonable and probable cause and malice must concur in order to sustain an action for malicious prosecution, but the defendant took reasonable care to inform himself of the facts of the case and honestly believed in the case which he laid before the magistrate and the action should be dismissed. GREEN v. HARRY. - - - - - **433**

MANDAMUS. - - - - - **254**
See CRIMINAL LAW. 5.

MERGER. - - - - - - **74**
See MORTGAGE. 4.

MINERAL CLAIMS. - - - - **262**
See MINES AND MINING. 2.

2.——*Allowed to expire—Relocations.* - - - - - - - - - - **381**
See CONTRACT. 3.

MINES AND MINERALS. - - **381**
See CONTRACT. 3.

MINES AND MINING—*Contract to purchase shares—Misrepresentation as to value of property—Report of engineer in charge—Non-disclosure of to purchaser — Jury—Answers to questions.*] The plaintiffs and others incorporated the defendant Company in 1925 for the purpose of acquiring the Alamo group of mines in the State of Oregon, work upon which had been closed down 20 years previously. In 1926, the McTavish Brothers, with two reports, one by one McGuigan, the engineer in charge when the mines were in operation, and certain maps, induced one Langer to finance operations on the mines by subscribing for stock. With the funds so obtained work was carried on by one Barnes until July, 1927, when he advised McTavish Brothers that he could not find any ore of commercial value. Barnes then retired and was succeeded by one Fellows as engineer in charge who gave more encouraging reports as to ore bodies in the mines. On the 17th of November, 1927, with the original reports and maps and Fellows's report including a favourable telegram received the day before (Barnes's final statements as to the mines being withheld) McTavish Brothers induced Langer to enter into a contract to purchase 750,000 shares in the Company for $93,750. Langer paid $15,000 of this but refused to make any further payments. In an action to recover the balance of the purchase price of the shares and on the defendants' counterclaim to recover the sums paid, the jury in answer to questions found: "(1) Plaintiffs and their agents in our opinion did not make any statements other than those contained in the reports they had on the Alamo property." "(4) Did such representations induce the defendant Langer to enter into the agreement of November 17th, 1927, relying on such representations and believing them to be true? Yes. (5) Did David Barnes when manager of the Alamo Gold Mines Limited on or about July or August, 1927, report to the plaintiffs that the properties of the Alamo Company were worthless, possessing no ore of commercial value? Yes. (6) If the answer to the last question be in the affirmative then was such report concealed by plaintiffs from defendant Langer? Adverse statement not reported, and later good report was reported. (7) If the answers to the two previous questions be in the affirmative then was defendant Langer induced to enter into the contract of 17th November, 1927, through such concealment? No, we believe defendant bought on Fellows's telegram of the 16th November, 1927." On these findings judgment was given for the plaintiffs. *Held*, on appeal (reversing the decision of MACDONALD, J.), *per* MACDONALD, C.J.B.C., that the answers to questions 1, 4 and 7 disclose the jury's opinion that Langer relying on McGuigan's report, coupled with Fellows's telegram entered into the agreement and he would not have been influenced by Barnes's unfavourable opinion of the mines had it been disclosed to him. This is an inference from the evidence that is wholly unjustified and there should be a new trial. *Per* MARTIN, J.A.: In order to prevent a miscarriage of justice caused by the uncertainty of the answers to questions 6 and 7 there should be a new trial. When the uncertainty of the answers became apparent the jury should have been sent back to make their meaning plain. *Per* MCPHILLIPS, J.A.: That in view of the answers to the other questions by the jury their answer to question 7 is perverse and there should be a new trial. *Per* MACDONALD, J.A.: That the appeal should be allowed and the appellant should recover $15,000 on his counterclaim. MCTAVISH BROTHERS LIMITED v. LANGER AND ALAMO GOLD MINES LIMITED. - **363**

2.——*Group of claims—Oral agreement between owner and two miners—Two miners to do assessment work and manage claims generally — Consideration, two-thirds of*

MINES AND MINING—*Continued.*

claims—Claims relocated and Crown granted and eventually sold—Action by original owner for his share of purchase price under original agreement — Statute of Frauds—Laches.] H. acquired three mineral claims in the Stewart mining division known as the "Jumbo Group" in 1904 and kept them in good standing until the 9th of August, 1909. In May, 1908, he went to Queen Charlotte Island to work mineral claims he owned there, where he met two old friends S. and P. with whom he entered into a verbal agreement whereby S. and P. were to do the assessment work and record same on the "Jumbo Group" and manage same including "handling," selling, optioning and Crown granting for which they were to receive two-thirds of all money and profits derived from the claims, H. to receive a one-third share of all moneys received from said claims and all other claims grouped therewith. S. and P. proceeded to the "ground" in question and on the way met the two L. brothers with whom they agreed to share their interest in the claims. On reaching the claims they decided to let H.'s locations expire and the ground was relocated including adjoining ground. Ten claims were located and called the "Big Missouri" group. The valuable portion of the group was within the original locations. An option was given on the group in December, 1909, and from the money received $100 was sent to H. and in 1910 other small sums were sent to him. Another option was given on the claims in 1914, of which H. was not notified and in 1916 the claims were Crown granted. In 1917 the claims were again sold under an option upon which $12,000 was paid but the option ran out and nothing further was done until 1925, when the group was sold for $275,000. In the meantime S. and P. and one of the L. brothers had died and the final sale was made by the remaining L. brother and the representatives of the three deceased partners. H. then brought action for $100,000 being a one-third share of moneys received from the sale of the "Big Missouri" group. *Held*, that as the agreement as pleaded was entered into between H., S. and P. and the L. brothers acquired their interest on the footing of the agreement and identified themselves with it, the plaintiff is therefore entitled to judgment for the amount claimed. Having regard to the evidence and writings supplementing the oral agreement the Statute of Frauds does not apply nor does the defence of laches avail. HARRIS v. LINDEBORG *et al.* - - - - - **262**

MISFEASANCE. - - - - - **282**
See DAMAGES. 6.

MISREPRESENTATION—Value of property. - - - - - - **363**
See MINES AND MINING. 1.

MORTGAGE—Balance of purchase price. - - - - - - - **256**
See SALE OF LAND. 3.

2.——*Foreclosure — Defence of adverse possession raised—Consent judgment in previous action between the same parties on same issues—Res judicata.*] 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 matters which might have been brought forward as part of the subject in contest but which were not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plaintiff and defendant P. had been parties to a prior action in which the main issue was the ownership of the land covered by the mortgage and in which a consent judgment was given dismissing the action as against the present plaintiff (who was a defendant in that action) and declaring that the title to the land was subject to the mortgage now sought to be foreclosed, and vesting the land in P. subject to said mortgage. P. now raises the defence of adverse possession, a point which had not been raised in the former action. *Held*, that the defence is not open to P. on the principle of *res judicata* or at least on the principle that a judgment is conclusive proof between the parties of the matters actually decided, and a consent judgment should be regarded as a judgment after a hearing on the merits. CANADA PERMANENT CORPORATION v. CHRISTENSEN *et al.* - **258**

3.——*Power of sale exercised—Action to redeem and set aside sale — Fraud not alleged—Action dismissed—Further action to redeem and set aside sale on ground of fraud—Res judicata.*] In 1895, H., R. and G., the owners of Haddington Island gave a mortgage on the island to M. to secure a loan of $3,500. In 1908, M. assigned the mortgage to the Commissioner of Lands and Works for British Columbia for $1,100 the amount still due on the mortgage. Meanwhile a firm of contractors, McDonald, Wilson & Snider obtained the contract to build the Court House at Vancouver which

MORTGAGE—*Continued.*

specified that Haddington Island stone should be used. Messrs. *Eberts & Taylor,* a firm of solicitors then incorporated a company known as Haddington Island Quarry Company Limited and the Commissioner of Lands assigned the mortgage to the Company for $1,150. The above solicitors estimated the value of the property at $3,000, and under the power of sale contained in the mortgage the quarry company sold the island to Messrs. McDonald, Wilson & Snider for $3,250, the sum over the amount due on the mortgage (*i.e.,* $2,000) being held by Messrs. *Eberts & Taylor,* there being doubt as to whom it should be paid. The conveyance was made to one Walker, manager of the Royal Bank in Vancouver as bare trustee for McDonald, Wilson & Snider. This conveyance was never registered owing to a *lis pendens* being filed. In March, 1909, H. and the heirs of R. & G. brought action for redemption and to set aside the sale. The action was dismissed but the Court of Appeal reversed the decision on the ground that the sale was made without proper regard for the interests of the mortgagees (see 16 B.C. 98). The Privy Council reversed the Court of Appeal and dismissed the action on the ground that fraud had not been alleged in the pleadings. A similar action was immediately commenced in the name of a grandson of G. alleging fraud, but was settled by Messrs. *Eberts & Taylor* being allowed to retain the $2,000 in their hands for the costs incurred in the first action. For some years the quarry was operated by Messrs. McDonald, Wilson & Snider, then by McDonald alone, and in 1915, one Coughlan who was appointed assignee for the benefit of the creditors of McDonald, Wilson & Snider, continued to operate the quarry. Later discussions arose as to the title as the conveyance to Walker was not registered and he hesitated to execute any document of disclaimer, so in 1917 it was arranged that a conveyance should be made to another trustee, one Temple, an accountant in Victoria, and a conveyance was accordingly made to him by the Haddington Island Quarry Company Limited pursuant to the powers contained in the mortgage. Another company named the Haddington Quarry Company was incorporated in 1918, and Temple conveyed to this company to which a certificate of indefeasible title was issued on the 28th of May, 1918. Coughlan still claimed title for McDonald and an action by all those interested against him was settled by dividing the property: one-third to Coughlan; one-twelfth each to McDonald's two sons, and one-half to *W. J. Taylor* to cover the costs of his firm. Judgment was entered accordingly and duly registered. Action was brought by the heirs of the original owners (all deceased) on the 1st of October, 1928, for redemption, and to set aside the conveyance by the Haddington Island Quarry Company Limited to Temple under power of sale contained in the mortgage on the ground of fraud. *Held,* that the evidence does not disclose that the property was sold at such an undervalue as to constitute fraud; further the plea of *res judicata* applies and the action fails. RUDGE *et al.* v. HADDINGTON ISLAND QUARRY COMPANY LIMITED *et al.* - - **502**

4.——*Quit claim by mortgagor to mortgagee—Quit claim registered by mortgagee but subject to his mortgage — Judgment against mortgagor registered after mortgage but before quit claim—No merger—Exercise of power of sale.*] A mortgagee who takes a quit claim from the mortgagor, expressed to be in satisfaction of all claims against the mortgagor, but who registers the quit claim subject to his mortgage, does not thereby let in as a first charge a judgment registered against the mortgagor between the dates of the mortgage and the quit claim. The taking of the quit claim creates no merger of the mortgage unless the mortgagee so intends, and registration in the way mentioned negatives such intention. The mortgagee may exercise the power of sale in the mortgage, although the mortgagor is released from personal liability. *In re* LAND REGISTRY ACT AND BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED v. WALDRON APARTMENTS LIMITED. - - - - - - - - - - - **74**

5.——*To indemnify obligor.* - **221**
See CONFLICT OF LAWS.

MOTOR-VEHICLES—*Collision—Negligence—Damages—Owner—Liability for driver's negligence.*] The driver of a car, a sister-in-law of the owner, proceeding westerly on Broadway in Vancouver in August at about 8 o'clock in the evening, turned to go south on Carolina Street, and when on the south side of Broadway and about to clear the intersection she was struck by the defendant who was driving his car easterly on Broadway. The evidence disclosed that the driver of the plaintiff's car cut the corner in turning south and as she turned she saw the defendant's car coming when it was about half way up the block beyond the intersection. It was held by the trial judge that the plaintiff's car did cut the corner,

MOTOR-VEHICLES—*Continued.*

but the defendant was going at an excessive rate of speed and not using due care in approaching the intersection was responsible for the accident. *Held*, on appeal, affirming the decision of ELLIS, Co. J., that the driver of the plaintiff's car when turning saw the defendant half a block away which would be about 216 feet from the intersection and in crossing 60 feet, which she did at 15 miles an hour, she was run down by the defendant who should have seen her car. In these circumstances the defendant could not escape a finding of negligence. Further, although the plaintiff's driver cut the corner and was short of the statutory turn this did not affect the case as it did not relieve the defendant who ought to have seen her and slowed down to avoid a collision. *Held*, further, that when a mere licence is given to another to drive one's car, and that other in driving it injures some person, the owner, apart from legislation, is not responsible for damages. HOWARD v. HENDERSON. - - - - - **441**

2.——*Collision—Reasonable speed—Findings of fact—Appeal.*] The plaintiff was a gratuitous passenger in the defendant C.'s car going east on Georgia Street in Vancouver and approaching Hornby Street at about 25 miles an hour. A taxi-driver had let a passenger out at the Devonshire Apartments on the north side of Georgia Street just east of Hornby Street. He started from the apartments going west, intending to turn south on Hornby Street. He turned south at the intersection and was nearly across when his rear right fender was struck by C.'s car. The collision took place at 3 o'clock in the morning when it was raining. The plaintiff was badly injured. An action for damages was dismissed by the trial judge with hesitation he stating it would be a satisfaction to him if the case went to review. *Held*, on appeal, reversing the decision of MURPHY, J. (MACDONALD, C.J.B.C. and MACDONALD, J.A. dissenting), that the defendant's negligence was the cause of the accident and the case should be remitted to the Court below for assessment of damages. *Per* MARTIN, J.A.: Where the trial judge has decided on the facts, with hesitation and expresses the wish that his judgment should be reviewed, the Court of Appeal is freed from the usual rules respecting its attitude towards the findings of fact at the trial. *Per* GALLIHER and MCPHILLIPS, JJ.A.: Where the evidence in all material respects is undisputed and the question of credibility of witnesses is not involved a Court of Appeal is in as good a position as

MOTOR-VEHICLES—*Continued.*

the trial judge was to come to a conclusion on the facts and should not shrink from overruling the trial judge's judgment if it decides that the judgment was wrong. TURNER v. CANTONE: WHELAN AND BRUNHAM, THIRD PARTIES. - - - **514**

3. —— *Collision between car emerging from private road—Contributory negligence.* - - - - - - - - - **548**
See NEGLIGENCE. 7.

4.——*Driving to the common danger—Conviction—Imposition of fine and costs—Certiorari—Conviction sustained but costs set aside—View of locus in quo by justice—At the request of accused's counsel and consent of Crown counsel—R.S.B.C. 1924, Cap. 177, Secs. 13 (1) and 29—B.C. Stats. 1925, Cap. 33, Sec. 10—R.S.B.C. 1924, Cap. 245, Secs. 36 (3), 38 and 101.*] An accused was convicted before a justice of the peace of driving a motor-vehicle to the common danger contrary to section 13 (1) of the Motor-vehicle Act and was fined $10, and $2.50 costs. On application for *certiorari* the conviction imposing the fine was sustained but the part relating to costs was set aside. *Held*, on appeal, affirming the decision of MACDONALD, J., that under sections 82 and 101 of the Summary Convictions Act the judge below had the power to strike out the order as to costs and the rest of the conviction was properly sustained. At the request of the appellant, with the consent of the prosecutor and in the presence of the appellant and his counsel and of the prosecutor, the justice took a view of the *locus in quo* after the evidence was completed. *Held*, that the Court will not accede to an application to set aside a conviction because of the alleged wrongful procedure brought about at the express request of the appellant. REX v. COX. - - - - - - **9**

5.——*Violation of Motor-vehicle Act—Negligence of driver — Responsibility of owner—R.S.B.C. 1924, Cap. 177, Sec. 35.*] Section 35 of the Motor-vehicle Act does not impose civil liability on an owner in excess of that which attaches at common law. *Boyer* v. *Moillet* (1921), 30 B.C. 216, and *Perrin* v. *Vancouver Drive Yourself Auto Livery, ib.* 241 followed. NEILSON *et al.* v. RICHARD *et al.* - - - - - - **220**

MUNICIPAL CORPORATION—Negligence —Highway — Misfeasance — Nuisance—Personal injuries—Whether damages excessive. - **282**
See DAMAGES. 6.

NATURALIZATION—Certificate of. **199**
See Habeas Corpus. 2.

NAVIGATION—Interference with. **225**
See Admiralty Law. 2.

NEGLIGENCE—*Collision between automobiles—Right of way—Want of reasonable care approaching side street—Evidence—R.S.B.C. 1924, Cap. 177, Sec. 13; B.C. Stats. 1924, Cap. 33, Sec. 5; 1925, Cap. 33, Sec. 10.*] On the 28th of June, 1928, at 6 o'clock in the morning the plaintiff, with four passengers, was proceeding south on the Island Highway towards Nanaimo and approaching a spot where Jenkins Road (coming from the west) entered the Highway. He was travelling at from 30 to 35 miles per hour and when about 90 feet from Jenkins Road he saw the defendant's truck coming on to the highway at a slow speed from Jenkins Road. The foliage was thick at this spot and the plaintiff could not see the truck until it was on the highway. As the defendant continued on, intending to turn north, the plaintiff proceeded with the intention of going past to the rear of the truck but his car skidded and crashed into it. In an action for damages, it was held that the defendant did not exercise due care in entering the highway and he was guilty of negligence. *Held*, on appeal, reversing the decision of Barker, Co. J. (Macdonald, J.A. dissenting, and holding the defendant was guilty of contributory negligence), that the plaintiff in travelling at such a speed when approaching an intersection was guilty of negligence, that the evidence shewed the defendant took due care upon approaching the highway and the plaintiff was solely responsible for the collision. Paul and Paul v. Dines. - - - - - **49**

2.——*Damages—Contributory negligence—Right of way—Entering main artery from side street—B.C. Stats. 1925, Cap. 8, Sec. 2; 1926-27, Cap. 44, Sec. 12.*] The plaintiff, in a car driven by her son (17 years old) westerly on 41st Street approached its intersection with Marguerite Street at about 8.30 in the evening of March the 15th, 1929, when it was fairly dark and misty. The defendant driving his car northerly on Marguerite Street at the same time attempted to cross the intersection of said streets when he was struck by the plaintiff's car at about the hinges of the door on the right side of his car. It was found that the defendant was travelling without lights. The plaintiff was severely cut about the face and badly bruised. Both the cars were damaged. Counsel for the plaintiff admitted on the trial that there was contributory negligence

NEGLIGENCE—*Continued.*

on the part of the plaintiff but judgment was given for the plaintiff for $2,500. Immediately after notice of appeal was filed by the defendant the plaintiff gave notice consenting to the judgment being modified on the basis of the defendant being liable under the Contributory Negligence Act for two-thirds of the damage, and the plaintiff one-third. *Held*, on appeal, varying the decision of Morrison, C.J.S.C. (Macdonald, C.J.B.C. and Galliher, J.A. dissenting, and holding there should be an equal division of the damages), that two-thirds of the damage should be borne by the defendant, and one-third by the plaintiff. Tedlock v. McKelvie. - - - - - - - - - - **446**

3.——*Damages — Insured against loss through accident — Settlement between insurer and insured—Further settlement between insured and injured person's solicitor—Not accepted by injured person—Action—Judgment obtained but not satisfied—No notice of action or delivery of documents to insurer—Action against insurer—B.C. Stats. 1925, Cap. 20, Secs. 24, 154 (8) and 158.*] The plaintiff was injured by M. while driving her automobile. M. was insured against loss through accident in the defendant Company. M. told an adjuster of the defendant Company that she thought she could settle with the plaintiff for $75. He paid her this amount and she gave him a receipt as follows: "Received from J. M. Robertson Co. . . . the sum of seventy-five dollars ($75), being in settlement of claim made against me by Mr. A. Barlow for injuries received in an accident which occurred on Feb'y 18th, 1927, at 7.30 p.m., the said sum to be used by me in making payment of said claim." M. then paid Barlow's solicitor $70 receiving from him the following receipt: "Received from E. Mariacher the sum of $70 A/c of release from A. Barlow of claim under accident. (Sgd.) Bray & Richmond, H. Richmond." Barlow then refused to accept this sum and the solicitor returned it to M., who kept it. Barlow then brought action for damages against M. The action was not contested and Barlow recovered judgment for $1,000 and costs. A writ of execution was returned *nulla bona* and Barlow then brought this action for the amount recovered by the judgment against M., for whom the defendant was the insurer. M. did not advise the insurer of the first action or forward the writ or any other papers in regard thereto. The action was dismissed. *Held*, on appeal, affirming the decision of Fisher, J., that the receipt signed by M., the meaning of which

NEGLIGENCE—*Continued.*

is made clear by the evidence, is a complete and honest settlement between the Insurance Company and the insured; further, under section 8 of the statutory conditions in the Insurance Act the insured must give notice of the commencement of the action and send in documents she received. This not having been done no action lies under subsection (3) of said Act. The relief provided for by section 158 of the Insurance Act does not apply to this case. BARLOW v. MERCHANTS CASUALTY INSURANCE COMPANY. - - - - - - - - **427**

4.——*Damages — Owner — Liability for driver's negligence.* - - - - **441**
See MOTOR-VEHICLES. 1.

5.——*Driver of motor-vehicle—Responsibility of owner.* - - - - - **220**
See MOTOR-VEHICLES. 5.

6.——*Driving automobile at excessive speed—Car swerves striking obstacle near pavement — Two gratuitous passengers — Both injured—Damages—Joint owners—One driving—Liability of both—B.C. Stats. 1924, Cap. 33, Sec. 5 (2).]* The plaintiffs who were the respective mothers of the two defendants were invited by their daughters to accompany them on a motor trip through the Western States and Canada. The daughters were joint owners of the car and drove alternately on the trip. Shortly after passing Cloverdale on the way to Vancouver on the Pacific Highway in the early afternoon with the two girls in the front seat and the mothers behind and hurrying in order to get back to Bellingham that night, the right wheels of the car went off the pavement, then in turning on to the pavement the car went too far to the left and then swerved back too far to the right going off the pavement and striking a milk-stand. The two mothers were thrown out of the car and severely injured. The car stopped on the left side of the road about 70 feet beyond the milk-stand in a damaged condition. There was no eye witness of the accident, the only evidence being that of the two plaintiffs who testified as to excessive speed and that after the right wheels went off the pavement the car swerved suddenly to the left side of the road and then back to the right side where it struck the milk-stand. They also testified that the driver only had one hand on the driving wheel when the car swerved. There was the further evidence that the girl who was not driving at the time assisted the driver by applying the emergency brake when necessary. The mothers recovered judgment

NEGLIGENCE—*Continued.*

in an action for damages. *Held,* on appeal, affirming the decision of MORRISON, J. (MCPHILLIPS, J.A. dissenting in part), that it was negligent driving that caused the car to leave the pavement, swerve to the left and then to the right again leaving the pavement and striking a milk-stand. Inferences may be drawn from admitted facts and this, coupled with the evidence referred to, establishes negligence. *Held,* further, that as the defendants were co-owners, driving alternately with the understanding that the co-owner might assist the driver by applying the emergency brake when necessary, they were both liable. HAMMER v. HAMMER AND LUTHMER. LUTHMER v. HAMMER AND LUTHMER. - - - **55**

7.——*Motor-vehicles — Collision between car emerging from private road and car on highway — Contributory negligence — B.C. Stats. 1925, Cap. 8.]* In the forenoon of the 1st of December, 1928, the defendant was driving her father in his car on a private road from their home on the south side of Delta Trunk Road. As she emerged on to the main road the plaintiff was about 200 feet to her left driving her father's car easterly on the Delta Trunk Road at about 35 miles an hour. As the defendant intended to turn her car westerly she thought she had time to cross to the north side of the main road before the plaintiff reached her. When 200 feet away the plaintiff saw the defendant's car emerging from the private road and expecting it to stop to let her pass, continued on at the same speed but as the defendant did not stop, she then turned to the left hoping to clear the car on the outside. The rear right side of her car struck the defendant's and she was thrown into the ditch on the north side of the road and badly injured, the car being wrecked. It was held on the trial that the collision was attributable to the defendant's negligence and judgment was given for the plaintiffs. *Held,* on appeal, varying the decision of MCDONALD, J., *per* MARTIN and GALLIHER, JJ.A., that the accident was the result of want of care by both drivers and the damages should be apportioned equally under the Contributory Negligence Act. *Per* MACDONALD, C.J.B.C.: That the defendant knowing the danger, ran into it, and the appeal should be dismissed. *Per* MCPHILLIPS, J.A.: That the plaintiff alone was guilty of negligence, and the appeal should be allowed. HORNBY AND HORNBY v. PATERSON. - **548**

8.——*Municipal corporation — Highway —Maintenance — Misfeasance — Nuisance—*

NEGLIGENCE—*Continued.*

Personal injuries—Whether damages excessive. - - - - - - **282**
See Damages. 6.

9.——*Operation of street-car—Starting car before passenger alights—Passenger thrown to pavement sustaining injuries—Evidence of conductor and motorman that a passenger pulled bell-cord—Credibility—Finding of trial judge—Damages.*] When the plaintiff was about to alight from a street-car at about 5 o'clock in the afternoon, it suddenly started without warning, and she was thrown violently to the pavement sustaining injuries. The conductor and motorman swore that the bell-cord was pulled by some unauthorized person which caused the motorman to start the car prematurely. It was found by the trial judge that, owing to the crowded condition of the car and the hour of the day, the conductor and motorman were mistaken as to the incidents occurring on the occasion, and he gave judgment for the plaintiff. *Held,* on appeal, affirming the decision of Morrison, J. (Martin, J.A. dissenting, and would order a new trial), that the only excuse offered for the premature starting of the car was the alleged pulling of the bell-cord by some unauthorized person. The evidence on that defence was plainly disposed of by the judge against the defendant. The Court will not interfere with this finding of fact and the appeal should be dismissed. Calbick v. British Columbia Electric Railway Company, Limited. - - **17**

10.——*Plaintiff runs out of gasoline—Stops with left wheels on pavement at night—Run into from behind—Damages—B.C. Stats. 1925, Cap. 16, Sec. 8—Regulations in respect to vehicles.*] The plaintiff was driving his car easterly on Kingsway at about 4 o'clock on the morning of the 12th of November, 1928, on a dark night when he ran out of gasoline. He turned to his right but the car stopped just as the left wheels were on the outer edge of the paved portion of the road. He got some gasoline at a station near by and was in the act of cranking his car when the defendant, driving in the same direction, ran into his car from behind. The plaintiff was thrown down and badly injured and his car was damaged. In an action for damages there was conflict in the evidence as to whether the plaintiff had a tail-light but it was held that whether the tail-light was burning or not if the defendant had been keeping a proper look-out he would have seen the plainiff's car, and his neglecting to do so was the proximate cause of the accident. *Held,* on appeal, affirming the decision of McDonald, J., that the defendant's head-lights were such as would have enabled him to see the plaintiff's car but notwithstanding this he ran into it. His conduct was the sole cause of the accident. Nason v. Hodne. - - **398**

11.——*Pupil leaving school—Struck by falling tree on highway just outside school grounds—Tree stood on opposite side of road—Dollar Company's property—Personal injuries—Duty of invitor—Tree leaning towards road and dead for many years—Liability of school board—Nuisance—Dedication of road—Liability of Canadian Robert Dollar Company—R.S.B.C. 1924, Cap. 226.*] The plaintiff attended a municipal school in North Vancouver which adjoined the Dollarton Road. The school grounds were cleared up to the road allowance and a path led from the school grounds through the brush on the side of the road allowance to the cleared road in the centre. The Canadian Robert Dollar Company owned the property on the opposite side of the road, densely wooded. Early in the afternoon the plaintiff started for home and when nearly through the pathway on the road allowance he heard a tree cracking and he turned and ran back towards the school but just before reaching the school grounds he was struck by the branches of a tree which fell across the road from the Dollar property, the top of the tree reching about ten feet into the school grounds. He was very badly injured and in an action for damages recovered judgment against the Board of School Trustees, but his action against the Robert Dollar Company was dismissed. *Held,* on appeal, reversing the decision of Morrison, J. as to the action against the Board of School Trustees (McPhillips, J.A. dissenting), that there is no duty imposed on a board of school trustees to protect pupils from injury on the highway after they have left the school premises. *Held,* further, affirming the decision of Morrison, J. as to the action against the Canadian Robert Dollar Company (McPhillips and Macdonald, JJ.A. dissenting), that the occupier of land on which is standing a decayed forest tree, grown there naturally, is not responsible for damage done by its falling either on a neighbour's premises or on a highway adjoining. *Reed* v. *Smith* (1914), 19 B.C. 139 followed. Patterson v. Board of School Trustees of the District of North Vancouver. Patterson v. Canadian Robert Dollar Company Limited. - - - - - - - - - **123**

NEGLIGENCE—*Continued.*

12.——*Two defendants sued on separate torts in one action—Payment made by one in settlement of action as against them—Reduction of damages against other by amount paid in damages—Costs.*] Where two defendants are sued for damages resulting from separate acts of negligence by each of them, and one of them pays a certain sum in settlement of the action as against him, the damages assessed in the action in favour of the plaintiff as against the other defendant must be reduced by the amount paid in settlement by his co-defendant less solicitor and client costs. [Reversed on appeal.] NOWELL v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED *et al.* - - - - - - - - **238, 494**

NOTARIES — *Application for order for examination and enrolment—Need of notary public in applicant's district—B.C. Stats. 1926-27, Cap. 49, Secs. 5 and 6.*] An applicant for an order for examination and enrolment under the Notaries Act being Provincial assessor for the Fort Steele Assessment District and his duties taking him constantly into the more sparsely settled portions of the district:—*Held,* that although there are more than a sufficient number of notaries public in the three larger towns within the district there is a public necessity for having a notary available in the outlying portions thereof and the application should be granted. *In re* NOTARIES ACT AND J. A. STEWART. - - - - - - - **467**

NUISANCE. - - - - - - - **123**
See NEGLIGENCE. 11.

2.——*Personal injuries.* - - **282**
See DAMAGES. 6.

ONUS. - - - - - **437, 298**
See BARRISTERS AND SOLICITORS.
GUARDIANSHIP.

ONUS PROBANDI. - - - **433**
See MALICIOUS PROSECUTION. 2.

OPIUM—Possession of. - - - **254**
See CRIMINAL LAW. 5.

OPTION—Exercise of. - - - - **305**
See CONTRACT. 2.

OWNER—Liability. - - - - **441**
See MOTOR-VEHICLES. 1.

2.——*Responsibility of.* - - **220**
See MOTOR-VEHICLES. 5.

PARTNERSHIP—*Dissolution—Covenant by retiring partner—Breach—Inducing retiring partner to commit breach—Conspiracy to injure business—Restraint of trade.*] The plaintiff and the defendant Z. were partners in a restaurant business. Z. sold his interest to the plaintiff and covenanted that he would not during the following three years "carry on or be engaged in, either directly or indirectly, and whether as principal, agent, director of a company, servant or otherwise, or take part in the business of a restaurant or cafe, or hotel, within the City of Victoria. . . ." The defendants P. and Z.'s wife opened a combined cafe and candy store a few doors from the plaintiff's restaurant and about five months after said dissolution they employed Z. to manage it. An action against Z. for damages for breach of covenant and for an injunction to restrain further breaches and for damages against P. and Z.'s wife for inducing Z. to commit such breach and against the three defendants for wrongfully conspiring to injure his business, was dismissed. *Held,* on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS and MACDONALD, JJ.A. dissenting), that the plaintiff has established his right to recover damages from Z. and there is clear evidence of conspiracy on the part of the three defendants. The appeal should be allowed and damages fixed at $1,500. LERIK v. ZAFERIS *et al.* - - - - **526**

PASSPORT. - - - - - - **199**
See HABEAS CORPUS. 2.

PATENTS—Infringement. - - **252**
See PRACTICE. 10.

PLEADINGS. - - - - - **481**
See DEFAMATION.

POWER OF SALE. - - - **502**
See MORTGAGE. 3.

2.——*Exercise of.* - - - - **74**
See MORTGAGE. 4.

PRACTICE — *Action by shareholder on behalf of himself and others against directors — General meeting — Resolutions—Alleged invalidity — Shareholders waiting outside while meeting held in inner office.*] In an action against a company and its directors, the plaintiff who was suing on behalf of himself and the other shareholders applied for an order to continue an *interim* injunction until after the trial restraining the defendants from carrying on as a board of directors. The act complained of was that some of the defendants did not wish certain of the other shareholders to be pres-

PRACTICE—*Continued.*

ent or represented at the annual general meeting of the company and prevented such presence or representation by having the meeting take place in an inner office of the place of meeting while some of the other shareholders were waiting to attend in the outer office to the knowledge of the defendants. *Held*, that if irregularities were committed in the conduct of the meeting at which resolutions complained of were passed it could be regularized by the passing of fresh and effective resolutions. The Court will not interfere in the internal management of the company and the application should be dismissed. *Foss* v. *Harbottle* (1843), 2 Hare 461 applied. WATSON v. BARRETT *et al.* - - - - - **478**

2.——*Action on foreign judgment—Counterclaim for malicious prosecution—Right to file—Marginal rule 279.*] In an action on a foreign judgment the defendant, after filing his defence, filed a counterclaim in which he claimed damages for malicious prosecution. A motion to strike out the counterclaim on the grounds that (a) it ought not to have been filed without leave and (b) that it cannot be conveniently tried with the claim, was dismissed. THOMPSON v. SCOLLARD. (No. 2). - - - - **241**

3.——*Agreement for sale of land—Foreclosure—Period of redemption.*] In an action for foreclosure under an agreement of sale there is no hard and fast rule as to the time to be given the purchaser in which to make good his default, but each individual case must be dealt with on its own merits, having regard particularly to the question of whether or not the vendor is secured, and whether there is any probability of the purchaser being able to pay. SINGER v. GARRETT. - - - - - **160**

4.——*Application to abridge time for hearing appeal—Section 24 of Court of Appeal Act—Costs of application costs in the cause—R.S.B.C. 1924, Cap. 52, Sec. 24.*] Where an order is made abridging the time for hearing an appeal on an application that is justified on the merits and within the statute, the costs of the application should be costs in the cause (MARTIN and MCPHILLIPS, JJ.A. dissenting). AICKIN v. J. H. BAXTER & Co. - - - - - **217**

5.——*Costs—Defence of tender—Payment into Court—County Court Order VI., rr. 5 and 10.*] In an action to recover $283.06 the defendant paid into Court $100.43 under a defence of tender. The plaintiff only recovered $100.43 on the trial but it was found that the defence of tender was not sustained by the evidence. *Held*, that Order VI., r. 10 of the County Court Rules applies, and the plaintiff is entitled to the costs of the action on the scale based on the amount recovered. BLAIR v. THE CANADIAN FISHING COMPANY LIMITED. **80**

6.——*Costs—Joinder of plaintiffs—All successful—One only entitled to costs—Taxation—Review—Appeal—R.S.B.C. 1924, Cap. 51, Sec. 77—Marginal rules 976 and 987.*] Where four plaintiffs are rightly joined in an action founded on tort and they are all successful in recovering certain amounts, but only one of them recovers a sufficient amount to entitle her to costs under marginal rule 976, she is entitled to the whole of the party and party costs except such items as are not attributable to her cause of action. NOWELL *et al.* v. YELLOW CAB COMPANY, LIMITED, AND BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. (No. 3). - - - - **453**

7.——*Divorce—Particulars of adultery—Intervener not bound by order made at instance of respondent—Divorce Rules 27 and 41.*] - - - - - - **184**
See DIVORCE. 3.

8.——*Foreign judgment on which appeal is taken—Action in British Columbia on same subject-matter—Stay of proceedings pending appeal—Discretion.*] The defendants obtained judgment in an action in the State of Oregon and then sued upon that judgment and obtained judgment in British Columbia where certain mining properties in dispute are situate. Later the plaintiffs brought action in the State of Oregon to set aside the judgment obtained there on the ground that it was obtained through fraud practised on the Court and obtained judgment in their favour. The defendants appealed from this judgment to the Supreme Court of Oregon and proceedings in the Court below were stayed pending the disposition of the appeal. The plaintiffs also brought action in British Columbia to set aside the judgment obtained here that was based on the original Oregon judgment on the ground of fraud and the defendants then applied for a stay of proceedings in the action pending the result of the appeal in the State of Oregon. The application was refused. *Held*, on appeal, reversing the order of HUNTER, C.J.B.C. (MACDONALD, C.J.B.C. and MACDONALD, J.A. dissenting), that there should be a stay of the action here until the Supreme Court of Oregon has

PRACTICE—*Continued.*

decided whether or not a fraud was practised on their Circuit Court in order to obtain the judgment which is attacked. MAY AND MAY v. ROBERTS *et al.* (No. 2). - - - - - - - - - - **185**

9.——*Interlocutory order — Application to extend time for giving notice of appeal—Foreign attorneys—Instructions as to time for appeal mislaid.*] On the dismissal of an application in Vancouver to stay proceedings in an action pending the determination of an appeal in a similar action between the same parties in Portland, Oregon, the solicitors in Vancouver who were instructed by the defendants' attorneys in Portland, advised an appeal. The Portland attorneys in reply asked how much time they had in which to appeal. They received a letter in answer that notice of appeal must be served within fifteen days from the date of judgment. Four days after the expiration of the time for appeal the Vancouver solicitors received instructions to appeal. On being advised that the time for appeal had expired and that an application to extend the time for giving notice of appeal must be supported by an explanation for the delay, the Portland attorneys replied that a partner in its firm who had sole charge of the case moved suddenly from Portland and had neglected to leave the Vancouver solicitors' letter giving information as to time for appeal in the file of the case, the letter not being found until they were informed that the time for appeal had expired, they being under the impression they could give notice any time before the opening of the Court of Appeal a few days later. *Held*, that in the circumstances the time should be extended for giving notice of appeal. MAY AND MAY v. ROBERTS *et al.* - - - - - **182**

10.——*Patents—Action for infringement—Discovery — Inspection of documents—Correspondence between plaintiff and his patent attorney—Privilege.*] In an action for infringement of letters patent held by the plaintiff in Canada the defendant moved for an order for inspection of certain correspondence which passed between the plaintiff and his patent attorney in the United States in respect of applications of the plaintiff pending before the United States Patent Office. *Held*, that the general rule that patent agents are not considered as professional legal advisers and communications with them are not privileged, does not apply, and the plaintiff is not required to disclose details relating to applications not before the Court, that are pending at Washington. MCKERCHER v. VANCOUVER-IOWA SHINGLE COMPANY LTD. *et al.* - - **252**

11.——*Prohibition—Action for account in County Court — Jurisdiction.*] In an action in the County Court where the plaint asks for an account, the case is not *ex facie* beyond the jurisdiction of the County Court as that Court has jurisdiction in such actions up to $1,000. An application for a writ of prohibition will therefore be refused especially where it appears that the plaintiff has filed a waiver of any claim over $1,000. NEARY v. CREDIT SERVICE EXCHANGE. - - - - - - - - - - **223**

PREFERENCE CLAIMS—Bill of costs of execution creditor. - - **321**
See BANKRUPTCY. 2.

PRINCIPAL AND AGENT—*Sale of goods—Commission—"Handle cash basis"—Meaning of—Right to set off costs in another action—Trade terms—Evidence as to meaning of.*] An agent having found a prospective purchaser for a refrigerating plant communicated with a distributor thereof and a telegram in reply, after fixing the price at $1,200, stated: "Your commission 10 per cent. if we finance, 25 per cent. if you handle cash basis." After correspondence the buyer and the seller entered into a written contract of purchase and the seller installed the plant. As the installation was nearing completion the agent, fearing his commission was in jeopardy, persuaded the buyer to deliver to him the cheque (which was made payable to the seller) for the purchase price. On the agent refusing to deliver the cheque unless he received his 25 per cent. commission, the seller sued the buyer for the purchase price but later the agent, on advice of counsel, delivered the cheque to the seller and the action was settled after certain costs had been incurred by him. The agent then sued for the 25 per cent. commission and the seller counterclaimed for the costs he paid in the former action. The trial judge allowed 10 per cent. commission only and allowed the counterclaim directing a set-off against the commission. *Held*, on appeal, reversing the decision of SWANSON, Co. J. (GALLIHER, J.A. dissenting in part), that the phrase "handle cash basis" could not be given an alleged trade meaning that the agent should buy from his principal and resell to the prospective purchaser and assume full responsibility for the installation and the agent is entitled to his 25 per cent. commission. *Held*, further, that the seller was not entitled in this action to

PRINCIPAL AND AGENT—*Continued.*

recover the costs he incurred in the first action from the agent. *Per* MACDONALD, C.J.B.C., and MACDONALD, J.A.: Extrinsic evidence of the trade meaning of the phrase "handle cash basis" failing a proper foundation therefor is not admissible. TRENWITH LIMITED v. THE JARVIS ELECTRIC COMPANY LIMITED. - - - - - - **328**

PRIVILEGE—Correspondence. - **252**
See PRACTICE. 10.

PRIVY COUNCIL—Application for stay pending appeal to. - - **469**
See EXECUTION.

PROHIBITION—Writ of. - **190, 223**
See CRIMINAL LAW. 11.
PRACTICE. 11.

PROOF—Burden of. - - - - **404**
See MALICIOUS PROSECUTION. 1.

QUIT CLAIM. - - - - - **74**
See MORTGAGE. 4.

RAKE-OFF—Game of cards. - **317**
See CRIMINAL LAW. 10.

REASONABLE AND PROBABLE CAUSE—Burden of proof—Conflicting evidence — Direction to jury—Damages. - - - - - **404**
See MALICIOUS PROSECUTION. 1.

2.——*Malice—Onus probandi.* - **433**
See MALICIOUS PROSECUTION. 2.

REGULATIONS—Unincorporated body. **24**
See LANDLORD AND TENANT.

2.——*Vehicles.* - - - - - **398**
See NEGLIGENCE. 10.

RES JUDICATA. - **336, 258, 502**
See ESTOPPEL. 2.
MORTGAGE. 2, 3.

RESTRAINT OF TRADE. - - **526**
See PARTNERSHIP.

RETAINER. - - - - - - **437**
See BARRISTERS AND SOLICITORS.

RIGHT OF WAY. - - - - **49, 446**
See NEGLIGENCE. 1, 2.

ROAD—Dedication of. - - - **123**
See NEGLIGENCE. 11.

RULES AND ORDERS — County Court Order VI., rr. 5 and 10. - **80**
See PRACTICE. 5.

2.——*Divorce Rules 27 and 41.* - **184**
See DIVORCE. 3.

3.——*Divorce rule 79.* - - - **482**
See CONTEMPT OF COURT.

4.——*Marginal rule 279.* - - **241**
See PRACTICE. 2.

5.——*Marginal rules 976 and 987.* **453**
See PRACTICE. 6.

SALE OF GOODS — *Automobile—Conditional sale agreement — Assignment to plaintiff—Delivery to mercantile agent on default—Resale under conditional sale agreement without notice—Assignment of agreement to another person—R.S.B.C. 1924, Cap. 44, Sec. 4; Cap. 225, Sec. 60.*] Under a conditional sale agreement, the Pacific Motors Limited sold a car and assigned the agreement to the plaintiffs. Shortly after the buyer defaulted in her payments and the car was taken back by the Pacific Motors Limited and with the plaintiffs' consent was resold to one F. under a conditional sale agreement which was assigned to the plaintiffs. F. then defaulted in his payments and the car, without the plaintiffs' knowledge or consent, was taken back and resold by the Pacific Motors Limited to the defendant S. under a conditional sale agreement which the Pacific Motors Limited discounted with the defendant Continental Guaranty Corporation, said company taking the assignment in good faith. All the agreements were duly registered. In an action for damages for conversion and for a declaration that the plaintiffs were the owners and entitled to possession of the car, the Continental Guaranty Corporation disclaimed any interest therein and it was held, applying section 4 of the Conditional Sales Act that S. had obtained title to the car and that the action be dismissed. *Held*, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the appeal should be allowed except as to the claim for damages for conversion and that the plaintiffs should be declared the owners and entitled to possession of the car. W. J. ALBUTT & COMPANY LIMITED v. CONTINENTAL GUARANTY CORPORATION OF CANADA LIMITED, AND E. W. SHEASGREEN. - **537**

2.——*Commission—"Handle cash basis"—Meaning of.* - - - - - **328**
See PRINCIPAL AND AGENT.

SALE OF LAND — Agreement for—Foreclosure—Period of redemption. - - - - - - - **160**
See PRACTICE. 3.

2.——*Cheque in part payment—Dishonoured—Consideration—Tainted with illegality—Beer licence—Transfer of—Transferee not a voter—Regulation 28 of Liquor Control Board—R.S.B.C. 1924, Cap. 146, Secs. 72 and 119.*] The plaintiffs sold the defendant a lease of the Globe Hotel in the City of Nanaimo with the furniture and fixtures on the premises for $6,000. The defendant gave the plaintiffs a cheque for $3,000 and executed a chattel mortgage on the furniture and fixtures on the premises for the balance of the purchase price. Although the total consideration for the $6,000 payment appeared by the bill of sale and affidavit of *bona fides* to be the goods, chattels and fixtures in the hotel, it is admitted by the parties that an assignment of the beer licence attached to the property was an important part of the consideration. Regulation No. 28 of the Liquor Control Board provides that a beer licence cannot be granted or transferred, save to "a person who is registered or entitled to be registered as a voter in some electoral district in the Province." The defendant at the time of the sale was neither a voter nor through insufficient residence, entitled to be registered as a voter but the plaintiff was unaware of this and he attempted to carry out the sale in its entirety assuming the defendant was qualified to hold a beer licence. After the bill of sale and chattel mortgage had been executed and the $3,000 cheque delivered, the defendant went into possession and placed one H. in charge. Shortly after, concluding there would be difficulty as to transfer of the beer licence, he decided to abandon the property and he stopped payment of the $3,000 cheque. The plaintiffs then took possession under the chattel mortgage and brought action on the cheque. *Held*, that the defendant's actions indicated that with full knowledge of his inability to then acquire the beer licence he was willing to forego for the time being, at any rate, the contemplated transfer. The consideration mentioned in the bill of sale included the $3,000 cheque and he treated it as binding between the parties and he represented to the plaintiffs that the sale was fully completed. He is estopped from asserting that there is any other contract between himself and the plaintiffs than the bill of sale and assignment of the lease and has severed from the consideration for the cheque the transfer of the licence. ENGBLOM AND ERICKSON V. BLAKEMAN. - **456**

SALE OF LAND—*Continued.*

3.——*Written agreement as to—Proviso for mortgage for balance of purchase price—Mortgage must be registrable—Specific performance.*] One of the terms of a written agreement for the sale of an interest in a farm was that the purchaser should give the vendor a mortgage for $2,000 upon the property for the balance of the purchase price. The vendor transferred the property to the purchaser but the purchaser refused to deliver a registrable mortgage to the vendor. In an action for specific performance:—*Held*, that the word "mortgage" in the agreement means a registrable mortgage that would give the vendor a first charge upon the property free from encumbrances. BASANT SINGH AND JAGAT SINGH V. KEHAR SINGH GILL. - - - - - - **256**

SEIZURE—Costs, - - - - - **461**
See ADMIRALTY LAW. 1.

SENTENCE—Reduction of. - - **36**
See CRIMINAL LAW. 2.

SHARES—Sale of. - - - - **487**
See VENDOR AND PURCHASER.

SHIP—Foreign fishing-vessel within three-mile limit—"Unavoidable cause"—Seizure—Costs—"Probable cause." - - - - - - - **461**
See ADMIRALTY LAW. 1.

SHIPPING — *Collision — Fog — Excessive speed—Unequal apportionment of damages—Costs—Collision regulations—Article 16.*] The steamship "Princess Adelaide" after leaving Vancouver at 11 a.m. cleared the First Narrows in calm weather, but in a dense fog, and proceeded at a speed of about twelve knots on a course S.W.¾S. When about three miles off the Narrows the master stopped his engines on hearing fog whistles, one from a tug to port and another from a ship to starboard (which turned out to be the "Hampholm") and almost immediately he saw the "Hampholm" emerging from the fog about 300 feet away on his starboard bow. He tried to clear her by putting his helm hard astarboard with full speed ahead but was too late, the "Hampholm" cutting into the "Adelaide" a little forward of amidships. The "Hampholm" inward bound to the Narrows passed half a mile from Point Atkinson at about 4 knots and owing to the fog decided not to attempt to enter the Narrows but to proceed "slow ahead" and "stop" alternately to the usual anchorage in the southerly part of English Bay. While so proceeding (her

SHIPPING—*Continued.*

speed being reduced to from 2 to 3 knots) she heard the signal of another vessel (which turned out to be the "Adelaide") about 5-6 points on her port bow. She stopped her engines and blew her whistle. On the third alternate whistle the "Adelaide" appeared from the fog heading across her bow. The "Hampholm" then reversed her engines full speed and turned her helm hard aport. The "Hampholm" still had way on her of one and one-half knots when the "Adelaide" was sighted and the collision took place about half a minute after the vessels came in sight of one another. *Held,* that the "Adelaide" had committed a gross breach of article 16 of the Collision Regulations without any extenuating circumstances but that the master of the "Hampholm" knew they were crossing the main stream of traffic through the Narrows in going southerly to anchorage which required the exercise of much caution, and on hearing the second whistle of the "Adelaide" should have realized that as it shewed no indication of broadening, the danger was imminently increasing and if he had then given the order to reverse the engines the "Adelaide" would have swung clear or at the worst a scraping only would have resulted. As the former deliberately violated the regulations in a gross degree and the latter erred in her manner of endeavouring to carry them out the liability for "degrees of the fault" should be apportioned as two-thirds on the part of the "Princess Adelaide" and one-third on that of the "Hampholm." *Held,* further, that as there is "unfettered discretion" over costs in cases of unequal apportionment, two-thirds of the costs in both actions should be awarded the "Hampholm" and one-third to the "Princess Adelaide." [Reversed by Exchequer Court of Canada.] Fred Olsen & Co. v. The "Princess Adelaide" and Canadian Pacific Railway Company v. The "Hampholm." - **274**

2.——*Damage to bridge by vessel—Tidal currents—Inevitable accident.* - **225**
See Admiralty Law. 2.

SOLICITOR — *Costs—Charge on property recovered or preserved—Bankruptcy—Preference—R.S.C. 1927, Cap. 11—R.S.B.C. 1924, Cap. 136, Sec. 104.*] The applicant, a solicitor, under instructions, defended five actions for the Victoria Mines, Limited: (1) To recover $5,000 commission owing by the Company: (2) to recover $1,400 for professional services as a mining engineer; (3) a mechanic's lien action for work done in the mines, $702.50 claimed; (4) to recover

SOLICITOR—*Continued.*

$1,000 and interest on a promissory note; and (5) to recover $46.45 for goods sold. The amount recovered in each case was substantially less than the amount claimed. The solicitor's bills of costs, when delivered, were passed and accepted at a meeting of the directors and shortly after the Company went into bankruptcy. The solicitor filed his claim with the trustee in bankruptcy for $1,722.60, claiming $225 thereof as an ordinary creditor and $1,497.60 as a secured creditor. The trustee rejected the latter claim on the ground that it was not a preference claim and that the bills should be taxed by the registrar before being filed. On an application for directions to a judge in bankruptcy it was held: (1) That the accounts should be taxed; (2) that the solicitor had a charge or lien upon and a right to payment out of the property of the company under section 104 of the Legal Professions Act; (3) that the solicitor's claim did not constitute a preference under the Bankruptcy Act. *Held,* on appeal, reversing the decision of Morrison, J. in part, that all the cases defended by the solicitor, with the exception of the mechanic's lien action, were personal actions and not actions *in rem* and they do not come within the words "property recovered or preserved" in section 104 of the Legal Professions Act, but in the mechanic's lien action the property upon which the lien attached was relieved to the extent of $52.50 and for that amount (or so much thereof as shall be taxed) the solicitor is entitled to rank as a preferred creditor. Miller v. Wollaston. - - - - - - - **145**

SOLICITOR AND CLIENT—Client in employ of police—Client arrested—Undertaking by police department to pay costs if client innocent—Bill of costs submitted to police and paid—Liability of client to further costs—Evidence. - - **161**
See Costs. 8.

SPECIFIC PERFORMANCE. - **256**
See Sale of Land. 3.

2.——*Action for.* - - - **487**
See Vendor and Purchaser.

STATUTE OF FRAUDS. - - **262**
See Mines and Mining. 2.

STATUTES—1 & 2 Vict. (Imperial), Cap. 110. - - - - - - **206**
See Arrest. 2.

STATUTES—*Continued.*

B.C. Stats. 1897, Caps. 45, 62, 63 and 67. - - - - - - - **89**
See Injunction.

B.C. Stats. 1899, Cap. 77. - - - **89**
See Injunction.

B.C. Stats. 1924, Cap. 33, Sec. 5. - **49**
See Negligence. 1.

B.C. Stats. 1924, Cap. 33, Sec 5 (2). - **55**
See Negligence. 6.

B.C. Stats. 1925, Cap. 8. - **401, 548**
See Costs. 7.
Negligence. 7.

B.C. Stats. 1925, Cap. 8, Sec. 2. - **446**
See Negligence. 2.

B.C. Stats. 1925, Cap. 16, Sec. 8. - **398**
See Negligence. 10.

B.C. Stats. 1925, Cap. 20, Secs. 24, 154 (8) and 158. - - - - - **427**
See Negligence. 3.

B.C. Stats. 1925, Cap. 20, Secs. 147, 154 and 158. - - - - - **110**
See Insurance, Accident and Guarantee.

B.C. Stats. 1925, Cap. 33, Sec. 10. - **9, 49**
See Motor-vehicles. 4.
Negligence. 1.

B.C. Stats. 1926-27, Cap. 48, Sec. 12. - **446**
See Negligence. 2.

B.C. Stats. 1926-27, Cap. 49, Secs. 5 and 6. - - - - - - - - **467**
See Notaries.

Can. Stats. 1910, Cap. 74, Secs. 8, 9, 14 and 16. - - - - - **225**
See Admiralty Law. 2.

Can. Stats. 1913, Cap. 158, Sec. 12. - **1**
See Arbitration.

Criminal Code, Sec. 226. - - - **317**
See Criminal Law. 10.

Criminal Code, Secs. 226 and 236, Subsecs. (*b*), (*d*) and (*e*). - - **153**
See Criminal Law. 8.

Criminal Code, Sec. 417 (*a*) (ii.) - **166**
See Criminal Law. 3.

R.S.B.C. 1897, Cap. 190, Sec. 118. - **89**
See Injunction.

R.S.B.C. 1924, Cap. 5, Secs. 114, 116 and 126. - - - - - **511**
See Devolution of Estates.

STATUTES—*Continued.*

R.S.B.C. 1924, Cap. 15, Secs. 3 and 7. - - - - - - - - **206**
See Arrest. 2.

R.S.B.C. 1924, Cap. 15, Secs. 3 and 15. **64**
See Arrest. 1.

R.S.B.C. 1924, Cap. 38, Sec. 15. - **78**
See Companies.

R.S.B.C. 1924, Cap. 44, Sec. 4. - **537**
See Sale of Goods. 1.

R.S.B.C. 1924, Cap. 44, Sec. 9 (2). - **203**
See Banks and Banking. 2.

R.S.B.C. 1924, Cap. 51, Sec. 77. - **453**
See Practice. 6.

R.S.B.C. 1924, Cap. 52, Sec. 24. - **217**
See Practice. 4.

R.S.B.C. 1924, Cap. 70, Sec. 36. - **482**
See Contempt of Court.

R.S.B.C. 1924, Cap. 93. - - - **473**
See Constitutional Law.

R.S.B.C. 1924, Cap. 101, Secs. 11 and 13. - - - - - - **298**
See Guardianship.

R.S.B.C. 1924, Cap. 136, Sec. 104. - **145**
See Solicitor.

R.S.B.C. 1924, Cap. 146, Secs. 72 and 119. - - - - - - - - **456**
See Sale of Land. 2.

R.S.B.C. 1924, Cap. 177, Sec. 13. - **49**
See Negligence. 1.

R.S.B.C. 1924, Cap. 177, Secs. 13 (1) and 29. - - - - - - **9**
See Motor-vehicles. 4.

R.S.B.C. 1924, Cap. 177, Sec. 35. - **220**
See Motor-vehicles. 5.

R.S.B.C. 1924, Cap. 225, Secs. 40 and 41. - - - - - - - - **345**
See Contract. 4.

R.S.B.C. 1924, Cap. 225, Sec. 60. - **537**
See Sale of Goods. 1.

R.S.B.C. 1924, Cap. 226. - - **123**
See Negligence. 11.

R.S.B.C. 1924, Cap. 245, Secs. 36 (3), 38 and 101. - - - - - **9**
See Motor-vehicles. 4.

R.S.B.C. 1924, Cap. 245, Secs. 77, 78 and 99. - - - - - - - - **33**
See Criminal Law. 1.

STATUTES—*Continued.*

R.S.B.C. 1924, Cap. 256. - - - **269**
See TESTATOR'S FAMILY MAINTENANCE ACT.

R.S.C. 1927, Cap. 11. - - - - **145**
See SOLICITOR.

R.S.C. 1927, Cap. 11, Sec. 25. - **321**
See BANKRUPTCY. 2.

R.S.C. 1927, Cap. 11, Secs. 43 and 84. - - - - - - - - **323**
See BANKRUPTCY. 4.

R.S.C. 1927, Cap. 42, Sec. 183. - **461**
See ADMIRALTY LAW. 1.

R.S.C. 1927, Cap. 43, Sec. 10 (*b*). - **461**
See ADMIRALTY LAW. 1.

R.S.C. 1927, Cap. 12, Sec. 88. - **203**
See BANKS AND BANKING. 2.

R.S.C. 1927, Cap. 60. - - **403, 242**
See CRIMINAL LAW. 4, 6.

R.S.C. 1927, Cap. 93, Sec. 3 (*i*) and (*t*). - - - - - - - - **199**
See HABEAS CORPUS. 2.

R.S.C. 1927, Cap. 14, Sec. 4 (*d*) and 10. - - - - - - - - **254**
See CRIMINAL LAW. 5.

R.S.C. 1927, Cap. 170. - - - **225**
See ADMIRALTY LAW. 2.

R.S.C. 1927, Cap. 170, Secs. 232 (5). - **1**
See ARBITRATION.

STAY. - - - - - - - **298**
See GUARDIANSHIP.

STAY OF PROCEEDINGS—Pending appeal. - - - - - - - - **185**
See PRACTICE. 8.

STILL—In possession of—Conviction by magistrate—Accused not asked to plead—*Habeas corpus* — *Certiorari* in aid — Essential — Conviction quashed. - - - - **403**
See CRIMINAL LAW. 4.

SUMMONS — Withdrawal of—Effect of—Issue of subsequent summons—Jurisdiction—*Autrefois acquit*. - - - - - - - - **190**
See CRIMINAL LAW. 11.

TAXATION—Costs—Review—Appeal. **453**
See PRACTICE. 6.

2.——*Direct or indirect tax.* - **473**
See CONSTITUTIONAL LAW.

TESTATOR'S FAMILY MAINTENANCE ACT—*Will — Husband and wife—Application for relief by widow—Duty of Court—R.S.B.C. 1924, Cap. 256.*] On an application by a widow for relief under the Testator's Family Maintenance Act, it is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband owes towards his wife, and if it be found that the testator has been guilty of a breach of such moral duty, it is the duty of the Court to make such an order as appears to be sufficient, but no more than sufficient, to repair it. A husband conveyed his house to his wife shortly before he died and by will left her all his household effects and directed his trustees to invest $75,000 and pay her the net income therefrom. She also received $2,000 from insurance upon her husband's life. She had one son (step-son of deceased) attending a university. On an application for relief under the above mentioned Act it was held that although the estate was large enough to make a further allowance to the petitioner, in the circumstances adequate provision was made by the testator for the proper maintenance and support of his wife. *Allardice* v. *Allardice* (1911), A.C. 730, applied. *In re* ESTATE OF HUGH FERGUSON, DECEASED. - **269**

TIDAL CURRENTS. - - - - **225**
See ADMIRALTY LAW. 2.

TORTS—Two defendants sued on separate torts in one action—Payment made by one in settlement of action as against them—Reduction of damages against other by amount paid in damages—Costs. - **238, 494**
See NEGLIGENCE. 12.

TRADE TERMS—Evidence as to meaning of. - - - - - **328**
See PRINCIPAL AND AGENT.

TRIAL JUDGE — Findings of fact by—Grounds for reversing. - **295**
See APPEAL. 6.

TRUSTEE—Power to lease. - - **323**
See BANKRUPTCY. 4.

VENDOR AND PURCHASER — *Sale of shares in company—Payment on account of purchase price—Default in second payment —Action by purchasers for specific perform-*

VENDOR AND PURCHASER—*Continued.*

ance—Abandonment—Return of moneys paid —Equitable relief.] A purchaser who has never in fact abandoned or receded from his contract, but has by reason of laches or otherwise, from causes not falling within abandonment or rescission, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance, *prima facie,* entitled to a return of the deposit or part payment, unless some facts are shewn that would render this inequitable. MOSDELL *et al.* v. JARDINE AND NANAIMO REDUCTION WORKS LIMITED. - - - - - - **487**

WAIVER—Estoppel. - - - - **110**
See INSURANCE, ACCIDENT AND GUARANTEE.

WATER LICENCES—Conditional. - **89**
See INJUNCTION.

WILL—Husband and wife—Application for relief by widow—Duty of Court—R.S.B.C. 1924, Cap. 256. - **269**
See TESTATOR'S FAMILY MAINTENANCE ACT.

WORDS AND PHRASES—"Amount involved"—Interpretation. - **401**
See COSTS. 7.

2.——*"Attempt"—Meaning of.* - **36**
See CRIMINAL LAW. 2.

3.——*"Creditors"—Meaning of.* - **166**
See CRIMINAL LAW. 3.

4.——*"Gain" Meaning of in game of cards.* - - - - - - - - - - **317**
See CRIMINAL LAW. 10.

5.——*"Handle on cash basis"—Meaning of.* - - - - - - - - **328**
See PRINCIPAL AND AGENT.

6.——*"Owner"—Within Bank Act.* **203**
See BANKS AND BANKING. 2.

7.——*"Probable cause"—Seizure.* - **461**
See ADMIRALTY LAW. 1.

8.——*"Quit the Province"—Interpretation.* - - - - - - - - - - **64**
See ARREST. 1.

9.——*"Unavoidable cause"—Meaning of.* - - - - - - - - - - **461**
See ADMIRALTY LAW. 1.