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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1930.

JUDGES

OF THE

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

During the period of this Volume.

CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

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

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. AULAY MORRISON.

PUISNE JUDGES:

THE HON. DENIS MURPHY.
THE HON. FRANCIS BROOKE GREGORY.
THE HON. WILLIAM ALEXANDER MACDONALD.
THE HON. DAVID ALEXANDER McDONALD.
THE HON. ALEXANDER INGRAM FISHER.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

DEPUTY LOCAL JUDGE IN ADMIRALTY:

THE HON. WILLIAM ALFRED GALLIHER.

COUNTY COURT JUDGES:

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

ATTORNEY-GENERAL:

THE HON. ROBERT HENRY POOLEY, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

TABLE OF CASES CITED

A

B

C

D

M

S

T

Z

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

THE NATIONAL SURETY COMPANY v. LARSEN.

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

Conflict of laws—Bail in foreign country—Contract of indemnity in British Columbia—Mortgage to indemnify obligor—Enforceability in British Columbia.

The plaintiff 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 in the plaintiff's favour on lands situate in British Columbia to secure the plaintiff from loss under the bond. The husband failed to appear on the trial and the bail was estreated. An action to recover on the mortgage was dismissed.

Held, on appeal, reversing the decision of McDONALD, J., that where a contract of indemnity against loss with respect to bail given in proceedings in a Court of a foreign country is lawful under the law of that country, the contract and the security given in implement of it can be enforced in Canada although the contract was executed in Canada and the security is a mortgage on lands in Canada.

APPEAL by plaintiff from the decision of McDONALD, J. of the 10th of April, 1929 (reported, 41 B.C. 221) in an action that an account be taken of what is due for principal and interest under a mortgage of the 8th of February, 1924, made by the defendant in British Columbia in favour of the plaintiff on certain lands in the district of New Westminster, British

Statement

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

Statement

Columbia, for judgment against the defendant for the amount so found to be due and in default of payment for foreclosure. The mortgage was given by the defendant for the purpose of indemnifying the plaintiff against loss in respect of a certain bail bond entered into by the plaintiff for bail for Conrad and Ingarl Larsen in a criminal cause in the Federal Court of the State of Washington. Conrad and Ingarl Larsen did not appear in accordance with the provisions of the said bail bond and in consequence the same was ordered forfeited and the plaintiff paid $3,417.15 in respect of the bond. It was held on the trial that the contract is not enforceable in British Columbia and the action was dismissed.

The appeal was argued at Victoria on the 5th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Wismer, for appellant: This is not an illegal transaction in the United States so that the consideration for the mortgage is valid: see *Hermann* v. *Jeuchner* (1885), 54 L.J., Q.B. 340. There is nothing unconscionable in this procedure: see Story's Conflict of Laws, 8th Ed., p. 340; Westlake's Private International Law, 6th Ed., p. 293. The learned judge below based his decision on *Kaufman* v. *Gerson* (1904), 73 L.J., K.B. 320 and *Moulis* v. *Owen* (1907), 76 L.J., K.B. 396, but these cases do not apply to a mortgage validly entered into in Canada.

Adam Smith Johnston, for respondent: This is an agreement to indemnify bail and by English law is illegal: see *Rex* v. *Porter* (1910), 1 K.B. 369; English & Empire Digest, Vol. 12, p. 261, sec. 2131; *Consolidated Exploration and Finance Company* v. *Musgrave* (1900), 1 Ch. 37; *Langlois* v. *Baby* (1864), 11 Gr. 21; *Waters* v. *Campbell* (1914), 6 W.W.R. 957; *Forbes* v. *Cochrane* (1824), 2 B. & C. 448 at p. 456; *Grell* v. *Levy* (1864), 16 C.B. (N.S.) 73; Dicey on Conflict of Laws, 4th Ed., p. 640. He relied on *Saxby* v. *Fulton* (1909), 2 K.B. 208, but that case does not apply here: see also *Robinson* v. *Bland* (1760) 2 Burr. 1077.

Wismer, in reply, referred to *Grell* v. *Levy* (1864), 16 C.B. (N.S.) 73 at p. 78 and *Saxby* v. *Fulton* (1909), 2 K.B. 208 at p. 230.

Cur. adv. vult.

1st October, 1929.

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

MACDONALD, C.J.B.C.: The respondent's husband being under arrest for an alleged crime committed in the State of Washington, procured the appellant (the plaintiff in this action) to become his bail, whereupon the respondent agreed to indemnify the appellant against liability on the bond by giving it a mortgage on land in this Province.

It is conceded that by the law of the State of Washington, the indemnification of bail is lawful. It is also conceded that under our law an indemnity of this kind in proceedings in our Courts would be unlawful, as being against public policy. The indemnity here was given by the wife of the accused. Whether it was agreed upon in this Province or in the State of Washington, to my mind, does not affect this case.

None of the cases cited assists us. It is clearly settled that security given for gambling debts mentioned in 9 Anne, c. 14, were by that statute declared null and void when payable in England notwithstanding that they were valid in the country in which the unlawful games took place. This law was modified by 5 & 6 Will. 4, c. 41, designed to protect the holders for value without notice, but the question remained whether or not the contract, apart from the security, could be enforced in England when the debt was made payable there. That was the question considered in *Moulis* v. *Owen* (1907), 76 L.J., K.B. 396, and *Saxby* v. *Fulton* (1909), 2 K.B. 208, relied upon in argument and also by the learned trial judge but it is not the question here.

MACDONALD, C.J.B.C.

The question here is whether or not our rule is directed only against the indemnification of bail in our own Courts. To quote the words of the author of Westlake's Private International Law:

"The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation."

The object of our rule is not the protection of the indemnifier; if it were, this case, I think, would fall within it. It is to assure the attendance of the accused for trial in our Courts. The accused is delivered to the bail and they must not render themselves indifferent by taking an indemnity.

It cannot therefore, I think, be that it is against the policy of

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

this country that an accused person or his wife, should indemnify bail in proceedings in a foreign Court, and unless the rule goes that far, there is no reason for disregarding the settled law that a contract good in the foreign country will be enforced here unless prohibited or unless it be contrary to our conceptions of essential justice and morality. Bail proceedings, except those in our own Courts, are not of our concern. We have no policy with regard to them.

MACDONALD, C.J.B.C.

With respect, I think the judgment appealed from cannot be sustained, and I would allow the appeal.

MARTIN, J.A.: This is an appeal from the dismissal of an action to enforce payment of a mortgage for $3,400 given by the defendant to the plaintiff to secure her husband's original contract to indemnify the plaintiff against loss on a bail bond given by it in certain criminal proceedings pending in the State of Washington, U.S.A., in the Federal Court to secure the *interim* release of defendant's husband, Conrad Larsen, and her son Ingarl, who were then prisoners in the custody of a United States marshal in the King County jail, Seattle, on charges of violating the laws of the United States by smuggling aliens into that country. The accused were released on bail furnished by plaintiff and in due course were tried, convicted and sentenced to fine and imprisonment.

MARTIN, J.A.

From this sentence they appealed on the 23rd of May, 1924, and on the same day the plaintiff gave a second bail bond on their behalf pending the hearing of the appeal which was dismissed by the circuit Court of Appeals on the 30th of April, 1925, but as the convicts did not appear to answer their sentences the bail was forfeited by order of the Court on 8th May, 1925, and the plaintiff, on 28th May, 1926, paid into Court the sum of $3,417.15, pursuant to *scire facias* proceedings.

The admitted evidence is that the plaintiff made it a condition of furnishing the two successive bail bonds that a contract for indemnity on each occasion should be given to it by Conrad Larsen secured by a mortgage on the Larsen farm from the owners of that property, and the real agreement with Conrad Larsen was that the plaintiff was to get a mortgage on said Larsen farm to secure Larsen's contract of indemnity in con-

sideration of its procuring bail, which in the circumstances meant, in effect, that the defendant as well as her husband was to give a mortgage upon it, and Larsen undertook to procure it from her and did so and handed it over to the plaintiff in Seattle, together with his own individual indemnity agreement, after the prisoners had been released under the bail bond which the plaintiff furnished pursuant to the agreement; this appears by the uncontradicted evidence of their attorney, Olsen, which is very clear that the two successive mortgages were given to secure the contract to indemnify the plaintiff on its two successive bail bonds, and in fact the second mortgage, now sued on, of the 24th of May, 1924, contains a special clause initialled by defendant, declaring that "it is given in substitution for and to replace a certain indenture of mortgage made between the parties hereto on the 8th of February, 1924, for the sum of $3,000," *i.e.*, the first mortgage pending the said trial.

The second mortgage was signed by Conrad Larsen in Seattle, and later by the defendant in the Canadian Customs House at Murrayville, B.C., at the international boundary, on the 24th of May, the day after the second bail bond was given and the release of the prisoners thereunder, and after an interview with her husband and his said Seattle attorney at their farm (covered by the mortgage) situate in British Columbia near the boundary line. The defendant admits that she signed the mortgage at the request of her husband, who came down the evening before from Seattle for that purpose, and that it was necessary to do so "in order to keep him out of jail" pending the appeal. The first mortgage was signed and delivered by the husband in Seattle and the execution of it by the wife was obtained later at Lynden in the State of Washington, according to said attorney, or in this Province, according to her, apparently, though her story is not easy to follow as she being a Norwegian speaks "very unintelligible" English though she has lived in Canada for 16 years, and so her evidence comes through an interpreter, and is not very satisfactory. In her evidence she said that she was the owner of the property, since it had been "turned over" to her by her husband "about eleven years ago."

MARTIN, J.A.

In view of the authorities to be cited presently it is necessary to recite all these circumstances in order to understand exactly

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

MARTIN, J.A.

the real situation, which is that the main contract to indemnify the plaintiff was made by Larsen and carried out by him and the plaintiff in the State of Washington, and the procuring by him of the mortgage from the defendant to the plaintiff was something "done in implement of the contract," as Lord Chancellor Herschell puts it in *Hamlyn & Co.* v. *Talisker Distillery* (1894), A.C. 202 (H.L.) at p. 207.

To that contract the defendant became in reality a party when she executed the successive mortgages to the plaintiff direct containing a covenant to pay to the plaintiff the respective sums secured thereby which represented the amounts of the respective bail bonds furnished by the plaintiff, and there can be no room for doubt that she intended that the present mortgage was, pursuant to the contract, to be delivered by her husband on her behalf to the plaintiff in Seattle after she executed and gave it to him in the Custom House, and it was so delivered, and to that substantial extent at least she was an active participant in the performance of the main contract in Seattle.

In circumstances of this unusual kind the general observations of Lord Herschell in *Hamlyn & Co.* v. *Talisker Distillery* are of much assistance in solving the difficult legal situation they create, *viz.*, pp. 207-8:

"Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the Bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at and the rights under it must be regulated by the intention of the parties as appearing from the contract."

And Lord Watson, p. 212:

"When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construc-

tion depends upon their mutual intention, either as expressed in their contract, or as derivable by fair implication from its terms. In the absence of any other clear expression of their intention, it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties; and amongst these considerations, the *locus contractus* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one form, and the place of performance in another."

Looking, then, at "the whole of the contract" before us the effect of it is, in my opinion, that the defendant became indebted to the plaintiff after the forfeiture of the bail bond and the payment into Court by plaintiff to the extent at least of the amount of the mortgage, *viz.*, $3,400 and interest as therein specified, and that sum should have been paid to the plaintiff in Seattle, and it is to be noted that the mortgage does not specify any place for payment thereof. In so "looking" the Court will regard the substance and not the form of the transaction, as was long ago decided in *Wynne* v. *Callander* (1826), 1 Russ. 293, wherein the Court declined to deal with a gambling debt on the basis of certain notes given therefor which were made, delivered, and payable in France and thus *ex facie* a purely French transaction but dealt with them as an English transaction founded upon original bills given in England for a gambling debt contracted there.

The learned judge below to a considerable extent took this view of the matter saying:

"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), 1 K.B. 746; 76 L.J., K.B. 396 and *Kaufman* v. *Gerson* (1904), 1 K.B. 591."

His conclusion, that the giving of the security "offends against our ideas of natural justice and right dealing" and therefore our Courts should not enforce it, is what the appellant's counsel complains of and submits, in the exceptional circumstances at least,

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

is not in accordance with authority so far as it may be in point, though the case stands by itself apparently, because after a very diligent search I have also been unable to find one substantially identical. Furthermore, in my opinion, the "act of completion" of the contract took place in Seattle where the defendant by her husband and agent *ad hoc* delivered, jointly with him, the mortgage to the plaintiff.

The state of the law upon the subject of "contracts which contain foreign elements" is well described in the work on Contracts (1927) of that eminent judge, the late Mr. Justice Salmond, at pp. 535-6; 540, at which last page he truly says:

> "The foregoing observations are sufficient to illustrate the difficulties and uncertainties which still affect the determination of the limits within which the English law of contracts is applicable to contracts which are not exclusively English but contain a foreign element. It would be unprofitable to attempt in any further detail a speculative inquiry into a branch of law which has been so imperfectly developed by judicial decisions."

And in *Moulis* v. *Owen* (1907), 1 K.B. 746 (C.A.) Cozens-Hardy, L.J. said, p. 755, that "the course of the decisions has been remarkable" in their inconsistency, and Fletcher Moulton, L.J. at p. 757 speaks of the "unsatisfactory state of the authorities" upon an "extremely difficult point." That case is of little, if any, assistance in determining the present one because it is founded solely upon the consequences of suing on a negotiable security, a cheque, apart from the debt (*i.e.*, consideration) for which it was given, as pointed out at pp. 750, 752, 756, 757; though it does usefully consider *Quarrier* v. *Colston* (1842), 1 Ph. 147, which is of much assistance and wherein Lord Chancellor Lyndhurst held that money lent in Germany for gambling purposes, or won there at play, could be recovered in the Courts of England because gambling was not illegal in Germany, though it was in England, but owing to the statute of Anne securities given abroad for gaming could not be enforced in England being expressly avoided by that statute—in other words a positive enactment of the Legislature upon the subject-matter which prevented the Courts from entertaining the action. In the leading case of *Saxby* v. *Fulton* (1909), 78 L.J., K.B. 781; (1909), 2 K.B. 208, the Court of Appeal approved and followed *Quarrier* v. *Colston,* and permitted the plaintiff to recover a debt in England for money lent in Monte Carlo for the purpose

MARTIN, J.A.

of gaming there where gaming was lawful. The Court pointed out that at common law there was nothing to prevent a person from recovering in an action money won by him at gaming and that it was by a gradual progress in morality, traced by Vaughan Williams, L.J., p. 790, that the Legislature had penalized "illegitimate gaming," and the Lord Justice after distinguishing *Hope* v. *Hope* (1857), 26 L.J., Ch. 417 (relied on by the learned trial judge herein) and pointing out that it was a domestic case of collusive divorce (Turner, L.J. at p. 425, described its object as being "the destruction of the marital relation without any sufficient cause shewn") and therefore clearly contrary to public morality in England, went on to say, p. 791:

"Several instances were given in the course of the argument by Lord Justice Buckley in which it would be impossible to assume that there was any general principle of public policy compelling the English Courts to refuse to allow the recovery of money lent for the purpose of gambling abroad, upon the ground that such purpose is contrary to the statute law of England. It seems to me to be impossible so to hold. The English Courts can only refuse to allow the recovery of money so lent where it has in fact been lent for some purpose not only contrary to some existing English statute, but also contrary to the basis of morality which, irrespective of statute law, is assumed to prevail in this country."

And Buckley, L.J. said, pp. 791-2:

"Coming, then, to the question of public policy, it cannot be said that it is contrary to public policy for the English Courts to recognize the validity of a debt contracted for the purpose of wagering abroad in a place where such wager was legal. *Kaufman* v. *Gerson* (1904), 1 K.B. 591; 73 L.J., K.B. 320 is perhaps one of the best cases to which to refer as an illustration of the law upon the question of public policy. There is nothing in the case before us, as there was in *Kaufman* v. *Gerson* to lead this Court to refuse to enforce the contract on the ground that, although it was valid by the law of the country where it was made, yet it was contrary to some essential principle of justice or morality. The Courts of this country will not lend their aid to enforce such a contract. But a betting or gaming contract made in a country in which betting or gaming is recognized by the law cannot be said to be contrary to essential principles of morality or justice."

And Kennedy, L.J., p. 793:

"Assuming it to be the fact that the money was knowingly lent by the plaintiff for the purpose of its being used for gaming, the question is whether any defence on the ground either of some statutory prohibition or of the contract being contrary to public policy can be successfully set up. There is no doubt that *prima facie*, according to the law of England, where a contract sued upon here is proved or is admitted to have been made abroad in a civilized country, where it would be a lawful contract, that

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

contract would be treated as being governed by the *lex loci contractus*, and would be enforced in the Courts of this country."

Again at p. 794:

"There is another exception, no doubt, which was referred to by counsel for the defendant—namely, the class of case in which the policy of the law in this country is such that we will not allow a contract, although good in the place of its making, to be good in our own Courts of law—such a class of case, for example, as *Kaufman* v. *Gerson* (1904), 1 K.B. 591; 73 L.J., K.B. 320, and the earlier case of *Hope* v. *Hope* [(1857)], 26 L.J., Ch. 417; 8 De G. M. & G. 731, where something is to be found in the transaction which may be contrary to what may be called the morality of civilized nations as we understand that morality to be. . . . It has been said that the idea of public morality was advanced, and that sufficient proof of the immorality is given by the passing of statutes whose object is to render such transactions unlawful; but that seems to me to shew that it is the policy of our Legislature rather to deal in a disciplinary fashion with certain particular manifestations of the spirit of gambling than to make betting or games of chance in themselves unlawful. The Acts of 1845 and 1892 were referred to as the more recent legislation on the subject; but those Acts relate to actual gaming transactions. I do not think that either Act has been applied to claims for the repayment of money lent. These Acts are not sufficient in themselves to create a public policy—such as counsel for the defendant has sought to make out that they do—militating against the plaintiff's right to recover."

MARTIN, J.A.

It will be observed that this leading case contains the answer to the three other cases relied upon by the learned trial judge herein, the *Kaufman* case being one wherein a wife was coerced by threats of the dishonour of her husband and children, as Lord Collins pointed out, and Mathew, L.J., held that pressure amounting to torture had been resorted to in procuring the document, and therefore it violated a principle "which ought to be generally recognized" and so the defendant was "entitled to the protection of an English Court"; a later case upon the same principle, decided by Scrutton, J., is *Societe des Hotels Reunis* v. *Hawker* (1913), 29 T.L.R. 578; and in *Grell* v. *Levy* (1864), 16 C.B. (N.S.) 73, the contract was a champertous one and therefore it was "an illegal thing for an officer of this Court to make such a bargain," p. 76.

It was conceded by appellant's counsel that if the transaction here can be said to be "contrary to the basis of morality which, irrespective of statute law, is assumed to prevail in this country," then our Courts should close their doors upon it, because, as Lord Halsbury, L.C. pithily said in *In re Missouri Steamship Company* (1889), 42 Ch. D. 321 at p. 336:

"Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilized country would be called on to enforce it."

And Lord Watson said in *Hamlyn & Co.* v. *Talisker Distillery, supra,* p. 214:

"I am not disposed to hold that Scotch Courts are bound to give effect to every stipulation in a foreign contract, unless it is shewn to be *contra bonos mores,* in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy, that her Courts would be justified in declining to recognize them."

There is a valuable consideration of the matter by Lord Justice Scrutton in *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.* (1921), 3 K.B. 532 at pp. 557-9, a case of "duress and compromise of alleged crime," in the course of which he says:

"Two cases in particular in which English Courts have ignored foreign law of which they disapproved, *Simpson* v. *Fogo* [(1863)], 1 H. & M. 195, 247 and *Kaufman* v. *Gerson* (1904), 1 K.B. 591 have been the subject of considerable adverse comment. The former can perhaps be treated as a retaliation by English Courts on foreign states whose tribunals refuse to recognize rights acquired by English law. The latter decision, in which English Courts refused to recognize a contract validly made in France on the ground that it was contrary to English principles of morality, is adversely criticized by Mr. Dicey who treats it as a mistaken application of the sound principle that English Courts will not enforce foreign contracts, valid where made, where the Court deems the contract to be in contravention of some essential principle of justice and morality. But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a *casus belli;* and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign has recognized."

The criticism referred to of the *Kaufman* case—much relied on by the respondent herein—occurs in Dicey's Conflict of Laws, 4th Ed., pp. 828-30, and the notable decision of the Court of Exchequer Chamber in *Santos* v. *Illidge* (1860), 8 C.B. (N.S.) 861; 29 L.J., C.P. 348, is referred to wherein that Court (by four out of six judges) held that a contract respecting the sale of slaves to be performed in Brazil, where it was lawful, could be enforced in England. Mr. Dicey pertinently asks: "Are we to believe that compounding an offence is more obviously contrary to universal justice than slavery?" It would, indeed, be

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

difficult to imagine anything more contrary to public policy than the finally aroused moral feelings of the English people against the horrors of the slave trade which in the celebrated case of the slave *Somerset* (v. *Stewart*) (1772), Lofft 1, had been declared by the Court of King's Bench, *per* Lord Chief Justice Mansfield, to be odious and immoral, saying, p. 19:

"The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."

Furthermore the King's government had formally declared the slave traffic to be "unjust and inhuman" and "nefarious" and disentitled to the protection of their flags in the respective treaties to suppress it made between the King of Great Britain and the Kings of Spain and of the Netherlands in 1817-8 (cited in section 52 of the Abolition of the Slave Trade Act of 1824, Cap. 113), and there were further denunciations of it by the Courts, *e.g.*, in the Admiralty Court by Sir Wm. Scott in *The Diana* (1813), 1 Dod. 95, 98, as "generally contrary to the principles of justice and humanity," and repeatedly the King's Bench, in, *e.g.*, *Madrazo* v. *Willes* (1820), 3 B. & Ald. 353, and *Forbes* v. *Cochrane* (1824), 2 B. & C. 448 wherein Mr. Justice Best gives a brief history of this "horrible traffic in human beings" (*Madrazo* case, p. 358) and says, p. 466:

MARTIN, J.A.

"The crime of slavery is the crime of the nation, and every individual in the nation should contribute to put an end to it as soon as possible. It is a relation which ought not to be continued one moment longer than is necessary to fit the slave for a state of freedom. For our convenience or our gain it ought not to be allowed to exist."

But despite all these violations of the general principles of justice and humanity the English Courts did not deem it contrary to the public policy of their country to close their doors to the enforcement of contracts relating to it as above mentioned.

It is further to be observed that the English decisions based upon public policy respecting illegal provisions for illegitimate children will have to be reconsidered since the passage in England of the recent "Act to amend the law relating to children

born out of wedlock" (Cap. 60, 1926) which brought about the greatest change in public moral policy in marital relations since 1295 when the barons made by the Statute of Merton, contrary to the wish of the bishops, their famous declaration on that subject—*"Nolumus leges Angliæ mutari."* Dicey also asks, p. 830, this further question:

"It is now settled law that English Courts will recognize the decrees of a foreign Government confiscating British property within its boundaries. Is there anything so different in essence between a contract and a conveyance that it should be unlawful to enforce the one, because to some, not all, minds it may seem objectionable, but perfectly lawful to recognize and give effect to the other which has no serious defenders among men of sound judgment?"

To this there can be, to my mind, but one answer.

Speaking of public policy Lord Chancellor Halsbury said in *Janson* v. *Driefontein Consolidated Mines Lim.* (1902), 71 L.J., K.B. 857, 860:

"I do not think that the phrase 'against public policy' is one which in a Court of law explains itself. It does not leave at large to each tribunal to find that a particular contract is against public policy."

And Lord Watson in the leading case in the House of Lords of *Nordenfelt* v. *Maxim, Nordenfelt Guns and Ammunition Company* (1894), A.C. 535, 553-4, sounds the following note of warning most appropriate to the present case:

MARTIN, J.A.

"A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and for promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its Courts. In England, at least, it is beyond the jurisdiction of her tribunals to mould and stereotype national policy. Their function, when a case like the present is brought before them, is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain, with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule and would, if judicially enforced, prove injurious to the community."

What would "prove injurious to the community" of this Province by the enforcement of the present contract respecting bail in the United States however it might be regarded in other circumstances in other countries.

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

There are, of course, many cases of "immorality" so patent that the Courts would not entertain them, *e.g.*, those arising out of prostitution, in addition to those opposed to the national interests of a State, of which many apt illustrations are given in Story's Conflict of Laws, 8th Ed., sec. 259, p. 344; and also those opposed to the "general estimation of mankind [as] illegal and immoral," *e.g.*, piracy—*per* Sir Wm. Scott in *The Diana, supra,* 99. Lord Collins, M.R., in *Kaufman* v. *Gerson, supra,* p. 598, quotes with approval the following passage from Westlake on Private International Law:

> "The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation; and where a breach of English law is not contemplated, this is necessarily a question on which there is room for much difference of opinion among judges."

It is this "difference of opinion" in the application of the principle that has occasioned the inconsistency in the decisions hereinbefore noted and gives rise to the difficulty respecting the contract at Bar, which the appellant's counsel submits is not subject to any of the said disabilities in its enforcement here,

MARTIN, J.A.

and is not only not opposed to public policy in the State of Washington but in accordance with it as declared by the Legislature of that State and its Supreme Court in *Essig* v. *Turner* (1910), 60 Wash. 175 and the evidence of the legal experts to that effect is admittedly correct, and the same public policy obtains in other States of the Union, such as New York—*Moloney* v. *Nelson* (1899), 53 N.E. 31, a unanimous decision of the Court of Appeals of that great State.

Since there can be no suggestion that the State of Washington is not a highly civilized one, what essential principle of morality or justice is lacking in this transaction which compels the Courts of this Province to refuse to enforce it? As regards the defendant it has not been suggested that there was any "immorality" in giving her farm as security to get and keep her husband and son out of jail; on the contrary, as a matter of morals it was a praiseworthy marital and maternal proceeding, and on the part of the plaintiff it was one authorized by the Legislature of the State, so the question comes down to one of an "essential principle of justice," in this Province of the kind described by Lord Watson, *supra, viz.*, "so deeply rooted and important" locally

that we "would be justified in declining to recognize" the foreign element in the transaction.

This necessitates a consideration of the giving of indemnity to bail and in the absence of any statute the respondent relies upon certain decisions, the first being *Langlois* v. *Baby* (1863), 10 Gr. 358; (1864), 11 Gr. 21, in which the Court of Chancery of Upper Canada declared, *per* Chancellor Vankoughnet (p. 22):

"It was *contra bonos mores* for the plaintiff to induce the bail to swear, and for the bail to swear that the property was his, if he held it on a secret trust for the plaintiff, and that this trust cannot be set up."

This has been wrongly cited as a decision on giving indemnity to the bail but it is not so; on the contrary, as Mowat, V.C. points out,—

"A security by Langlois to indemnify would, of course, have been quite legal, but this transaction is admitted to have had another object, and one which I think we must hold a fraud on Ford, at whose suit Langlois was arrested, and a fraud on the law which regulates the bail to be given by a defendant."

The report of the case below, *coram* Spragge, V.C. (10 Gr. 358) shews that the arrest was on civil process, not criminal, and he held the transaction to be "immoral because it was the inducement to an oath which could not be made with a good conscience"; in other words, subornation of perjury.

MARTIN, J.A.

Such a case has no real resemblance to the present one.

The other cases cited are *Wilson* v. *Strugnell* (1881), 7 Q.B.D. 548; *Herman* v. *Jeuchner* (1885), 15 Q.B.D. 561; *Consolidated Exploration and Finance Company* v. *Musgrave* (1900), 1 Ch. 37; and *Rex* v. *Porter* (1909), 3 Cr. App. R. 237; 79 L.J., K.B. 241; 26 T.L.R. 200; (1910), 1 K.B. 369.

Except the last the effect of them is to hold simply that it is illegal in England for the bail to be indemnified either by the prisoner or a third party, as being contrary to public policy in that country, for the reason succinctly given by North, J., in the *Consolidated Exploration Company's* case, *supra,* p. 39:

"The reason why the indemnity to bail is void is that the bail has no longer the same motive to put in force the extensive powers given him by law to enable him to fulfil his duty to produce the prisoner."

In *Rex* v. *Porter,* the Court of Criminal Appeal held that it was an unlawful conspiracy for an accused person to indemnify his bail; the fact being that Porter and Brindley had gone bail for £50 each for one Clark who had been committed for trial at

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

MARTIN, J.A.

Quarter Sessions and Clark had agreed to give, and did give, Porter and Brindley £50 each as security for his due appearance at his trial so that they would lose nothing if he (Clark) did not appear. The Court (Alverstone, L.C.J., Darling and Phillimore, JJ.) said, p. 245, Cr. App. R.:

"I find it difficult to imagine a state of circumstances in which such an agreement as this would not tend to produce a public mischief. It is to the public interest that criminals should be brought to trial. The taking of sureties for the attendance at their trial of accused persons is the only security the public has; so it was that for many years it was held that sureties were personally responsible for the surrender of an accused, and if they knew that he intended to abscond, they ought to have him arrested. The counsel for the appellant has urged that in the altered conditions of modern life, no other duty is expected or exacted from the bail than that of paying the amount of the recognizance on the principal's failure—that, in short, he makes a bargain with the Crown whereby he becomes a debtor to the Crown, and that if he pays the debt he is relieved of all responsibility unless it can be expressly shewn that he was party to a design to effect the escape of the culprit. If such an agreement were lawful, what possible interest has the surety in the principal's appearance? Baron Martin has, no doubt, said in *Broome's* case [(1851), 18 L.T. Jo. 19], that it was no objection to a proposed surety that the person in whose behalf bail was tendered had promised to indemnify the bail; the Court, however, has no hesitation in holding that *dictum*, and any decision which followed it, *e.g.* [*Rex* v.] *Stockwell* (1902), 66 J.P. 376 to be wrong."

I have taken this citation from the Cr. App. R. because the report of it in the Law Reports begins with the sentence:

"It is, in our opinion difficult to conceive any act more likely to tend to produce a public mischief than what was done in this case. . . ."

It is impossible to believe that the Court used such extravagant language, and as it is not to be found in the three other reports cited it should be rejected as erroneous and misleading.

The decision is not binding on this Court, and moreover is not, with every respect, a satisfactory one because it entirely and strangely ignores the decision binding upon it, of a very strong Court of six eminent, including two at least great, judges in the Court of Exchequer Chamber (see Wharton's Law Lexicon, 334) sitting in appeal from the Court of Queen's Bench *in banc* in *Cripps* v. *Hartnoll* (1862), 2 B. & S. 697; (1863), 4 B. & S. 414; 8 L.T. 765; 32 L.J., Q.B. 381; 10 Jur. (N.S.) 200; 11 W.R. 953, though that decision was properly much relied upon by appellant's counsel in his able argument (p. 241) and was the subject of elaborate consideration by the Supreme Court of the

United States in *United States* v. *Ryder* (1884), 110 U.S. 729, wherein it was unanimously given the effect submitted by said counsel. The Supreme Court said, pp. 735-6:

"In the subsequent case of *Cripps* v. *Hartnoll* [(1863)], 4 B. & S. 414, it was held by the Court of Exchequer Chamber, upon much consideration, that an express contract to indemnify the bail in a criminal case might be sustained, but that no such contract is implied by law. In that case, the plaintiff had become bail for defendant's daughter upon his promise to hold the plaintiff harmless. The daughter making default, and the plaintiff being obliged to pay his recognizance, sued the defendant on his promise. The latter set up the Statute of Frauds, and the question was whether the promise was or was not a collateral one; if the person for whose appearance bail was given (the daughter of the defendant) was in law liable to indemnify her bail, then the promise of the father was a collateral one, and void by the Statute of Frauds for not being in writing; if she was not thus liable, then the father's promise was an original promise of indemnity, and the Statute of Frauds did not apply. The case was fully argued, first in the King's Bench, [(1862)], 2 B. & S. 697, and afterwards in the Exchequer Chamber on error. The King's Bench held, in deference to a former case of *Green* v. *Cresswell* [(1839)], 10 A. & E. 453, that the daughter was primarily liable, and that the promise of the father was collateral. But in the Exchequer Chamber it was pointed out that *Green* v. *Cresswell* was a case of bail in a civil, and not in a criminal, proceeding, and therefore not an authority in the case under consideration; and the Court held that the daughter was not legally liable, and that the promise was not a collateral one; and reversed the judgment of the Court of King's Bench. Chief Baron Pollock, after pointing out the distinction, said:

MARTIN, J.A.

" 'Here the bail was given in a criminal proceeding; and, where the bail is given in such a proceeding, there is no contract on the part of the person bailed to indemnify the person who became bail for him. There is no debt, and with respect to the person who bails there is hardly a duty; and it may very well be that the promise to indemnify the bail in a criminal matter should be considered purely as an indemnity, which it has been decided to be.'

"This decision (made in 1863) has not, so far as we are aware, been shaken by any subsequent case in England or in this country; and we think it is based on very satisfactory grounds."

The Court went on to hold on another and distinct aspect of the matter, that a surety did not acquire a right of subrogation against the "peculiar remedies which the government may have in collecting the penalty"—737.

It is important to note that the Exchequer Chamber was of opinion that "with respect to the person who bails there is hardly a duty," which is markedly opposed to the whole tenor of the judgment in *Porter's* case, which on this point of indemnity is not based on any authority in criminal law, and in *Jones* v.

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

Orchard (1855), 16 C.B. 614, 623, the question was properly excluded, p. 624, from the decision which involved only the costs of the prosecutor, and so the Court declined to be "embarrassed . . . with the consideration of other questions," but despite that disclaimer, Stephen, J. treated it as a "direct authority" on which to ground his unsatisfactory decision in *Wilson* v. *Strugnell, supra,* and he was also unaware of the decision in *Cripps's* case with its inevitable implication. The *Orchard* case was discussed in argument before the Exchequer Chamber in *Cripps's* case, 416, but it was not treated as an authority upon the present point.

There was no authority therefore in the way of Baron Martin's decisions—on two successive days after repeated discussion—in 1851 in *Reg.* v. *Broome, supra,* in an application for bail that it was not an objection to the proposed bail that they had been indemnified by a promissory note from the prisoner, saying, after the reargument of the case on the second day (p. 20):

MARTIN, J.A.

"The object of bail is to secure, by a pecuniary penalty, the appearance of the prisoner at the trial, and the persons who enter into the bail ought to be able to pay that penalty in the event of the defendant not appearing. The form of the recognizance shews this; the bail acknowledges himself to owe a certain sum to the Queen, with a condition that such debt shall become cancelled or void if the obligor surrenders the defendant at a certain time and place; if he does not surrender him, the money is forfeited. The law imposes that as the consequence; it at the same time gives the magistrate a discretionary power to fix the bail, not at an unreasonable but at a proper amount. Suppose a man were really innocent, it would be very unfortunate that he should be held to bail at all, but it would be still harder that he should for months remain in prison because he had no friends who would voluntarily bail him, and because he was not permitted to induce them to do so by holding them free from pecuniary responsibility. If a true bill were found against a man, and he did not appear, the money must be paid by the bail, but still the defendant might be arrested again in any part of the kingdom; and if real efforts were made for that purpose, he doubtless would be taken in any part of it. Even if he should actually get out of the way and escape, it could only be by leaving the country, so that in effect the man would be banished."

This view of the law was adopted by the Central Criminal Court (Old Bailey, London) in 1902 in *Rex* v. *Stockwell, supra,* the Recorder saying, p. 377:

"I shall follow the decision of Martin, B., and hold that no criminal offence has been committed by the defendants unless an intention to pervert

justice is proved. The jury have already expressly said that they find that there was no intention on the part of the defendants to pervert or interfere with the course of justice, so in my opinion the defendants are entitled to be acquitted."

This aspect of the case is important because the decision of Baron Martin was given in 1851, seven years prior to the 19th of November, 1858, and by our "Act Respecting the General Application of English Law" in this Province, R.S.B.C. 1924, Cap. 80, Sec. 2,—

"The Civil and Criminal Laws of England, as the same existed on the nineteenth day of November, 1858, and so far as the same are not from local circumstances inapplicable, shall be in force in all parts of the Province; but the said laws shall be held to be modified and altered by all legislation having the force of law in the Province, or in any former Colony comprised within the geographical limits thereof."

No "legislation" has been passed here to alter the "existing" law as declared by *Reg.* v. *Broome,* nor was it "modified or altered" in England by other decisions for many years thereafter.

It is to me unthinkable that not one of the ten judges of England who, at the trial and on appeal, 12 years after *Reg.* v. *Broome,* sat on the *Cripps* case, did not *ex mero motu* raise the question of public policy if it existed at all, because if it did it appeared *ex facie* the record and therefore it was the duty of the Court to raise it for the protection of the public, because, as Scrutton, L.J. said in the *Societe des Hotels Reunis, supra* (p. 579):

MARTIN, J.A.

"The Gaming Acts were not pleaded, and application was made at the trial to amend by pleading them. In my view, however, if the Court be satisfied that a transaction is illegal or unenforceable by statute, it must take the objection itself, though the parties do not wish to raise it."

The truth of the matter is, of course, that though this aspect of it was *ex necessitate* sharply presented to the said judges by the unusual circumstances of the case it never occurred to one of them that it was in any way immoral or contrary to public policy that a father in order to procure bail for his daughter committed for trial should agree to indemnify the bail against loss, nor likewise would it occur to me when a wife and mother comes to the same assistance of her husband and son, that the transaction should be differently regarded.

As has been seen every case of this kind must be considered on its special circumstances, and after applying all the fore-

COURT OF APPEAL

1929

Oct. 1.

going authorities to the present one there is no sound ground upon which the Courts of this Province should decline to entertain and enforce this contract and therefore this appeal should be allowed.

THE NATIONAL SURETY CO. v. LARSEN

GALLIHER, J.A.: I would allow the appeal for the reasons given by my learned brother, the Chief Justice.

MACDONALD, J.A.: The appellant—The National Surety Company Limited—brought an action to have an account taken of what was due under a mortgage for $3,400 given to it by respondent and for foreclosure and personal judgment. The mortgage was given by a married woman to indemnify appellant against loss under a bail bond entered into on behalf of respondent's husband and son who were prosecuted in a criminal cause in the Federal Courts of the State of Washington for smuggling aliens into the United States. It is conceded that to give security against loss in respect to bail bonds is legal in that State. The bond was forfeited in accordance with its provisions and appellant paid the amount thereof to the clerk of the United States District Court. Default was made in payment under the mortgage; hence this action. It was dismissed by the learned trial judge.

MACDONALD, J.A.

The mortgage was executed in this Province in respect to land in the Province although negotiations leading to execution took place in the State of Washington. The defence is that the mortgage is unenforceable because of illegality as it is contrary to public policy in British Columbia to indemnify a surety against loss under a bail bond. Such contracts in British Columbia are considered to be against public policy, involving interference with the due administration of justice. Should that principle be applied to prevent the maintenance of an action where, although the contract was made in British Columbia it was in respect to a legal and valid transaction in another country? The contract being made here the *lex loci contractus* governs; contracts too in respect to land are governed by the *lex situs*.

The bail bond was given by appellant in the State of Washington in respect to the performance of an obligation in that

State and it was by the laws of that State legal to protect itself against default. It was the failure of respondent's husband and son to abide by the terms of a bond to be performed abroad that made it necessary for appellant to come into the Courts of this Province to enforce its remedies. In doing so does it have to aver an act of moral turpitude? The principle is that where, as here, there is conflict between foreign and domestic law a contract valid when made in a foreign country will not be enforced in the domestic forum if founded on immorality or if it offends against the principles of natural justice as entertained in the country in which the action is brought (Story on Conflict of Laws, 8th Ed., pp. 340-41). True these principles are stated in respect to contracts made abroad while the contract in question was made here in respect to a transaction abroad. That difference in fact does not affect the general principles enunciated. It is, I think, difficult to say that where the Courts of a highly civilized country regard a course of procedure as legitimate and legal it should offend against the principles of natural justice in this country to give effect to it. I do not say that it is not sound practice to prevent one giving bail from accepting security, it may be from a friend of the accused or from the accused himself thus permitting the latter if so disposed to escape without loss to the bailor. It goes further than a question of practice. It is based upon principles of the greatest importance. But we must go further if this mortgage is to be regarded as unenforceable and say that for our Courts to countenance the practice followed elsewhere would mean the violation of public, moral and social interests.

MACDONALD, J.A.

The authorities are only of assistance as a guide in determining the general principles applicable. Their application must be left to the opinion of the judges on the facts in each case, with, I confess, much room for differences of opinion. In *Kaufman* v. *Gerson* (1904), 73 L.J., K.B. 320, the English Courts refused to enforce an agreement made in a foreign country and valid by the laws of that country. It was obtained by threats of a criminal prosecution. The wife of the party against whom the threats were made was coerced into signing an agreement to pay a sum of money to protect her husband from prosecution. In France it could be enforced. Such a contract would not pre-

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

vent justice from taking its course if the public prosecutor chose to intervene ignoring the private arrangement. Collins, M.R. states the principles which should govern English Courts, at pp. 323-4:

"In Story's Conflict of Laws, s. 258, it is said, in reference to contracts which in their own nature are founded in moral turpitude and are inconsistent with the good order and solid interests of society, that 'even though they might be held valid in the country where they are made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality or of even natural justice are allowed to have their due force and influence in the administration of international jurisprudence.' The Court called upon to enforce a foreign contract will enquire whether it violates such principles. It is a principle of our Courts that a person who comes to seek a remedy must come with clean hands; and if he is obliged to aver something against public morality which would debar him from obtaining relief if the contract were made here, he is debarred from suing here on a contract made abroad, and which may be good by foreign law; the fact that in other countries he might be allowed to sue in such circumstances does not control the English Courts."

I do not think these principles should be applied to the case at Bar. We think it is sound practice to prevent a bailor taking security. But quite conceivably another Court elsewhere might take a contrary view and it does not shock one's conscience that it should do so. We should be able to say that our view on the question should prevail everywhere. As Romer, L.J. stated at p. 324:

MACDONALD, J.A.

"To enforce a contract made under such circumstances would be to do something which would conflict with what our law deems essential moral interests."

Or again to quote Mathew, L.J., at pp. 324-5:

"The means used by the plaintiff in this case to obtain the contract sued on were nothing less than a form of moral torture. It would be a violation of essential moral principle if this Court were to enforce such a contract."

The case therefore is only important as to guiding principles, assuming as I do that no different principles arise from the fact that in the case at Bar the contract was made in this Province in respect to a foreign transaction while in the *Kaufman* case the contract was made abroad.

Moulis v. *Owen* (1907), 76 L.J., K.B. 396, is perhaps more in point. The defendant while playing baccarat in a club in Algiers borrowed money from the plaintiff—manager of the club—to pay his gaming losses and to continue playing giving him in exchange an English cheque drawn upon a London bank.

Here a British Columbia mortgage was given on lands in this Province. The plaintiff sued in England on the cheque as it was dishonoured on presentation. The consideration for the cheque was valid by the laws of France, and an action could be maintained upon it in France either for the consideration or on the security given for it. It was held the plaintiff could not recover in the English Courts because by the law of England and particularly because of an English statute—9 Anne—the plaintiff was precluded from maintaining the action. This would appear like an attempt to extend the operations of the statute to transactions in another country. Unless the *ratio decidendi* was the statute which provided that all bills given by any person where the consideration was money won by gaming or lent to any person gaming should be deemed to be given for an illegal consideration it is somewhat analogous to the case at Bar. Apart from the statute it would appear that the moral principles underlying gaming were at least no higher than those which regard it as against public policy for a bailor to take security. But gaming was apparently regarded as particularly heinous. Sir W. Blackstone stated in *Robinson* v. *Bland* (1760), 1 W. Bl. 234 at p. 245, referred to in the judgments, said that:

MACDONALD, J.A.

> "Gaming to excess gives a loose to every furious passion that deforms the human mind."

This introduces the element of moral turpitude but it is perhaps too strong a view for modern conceptions. It depends upon the excess. In the *Bland* case, also an English bill for a gambling debt incurred in France, Lord Mansfield held that no action could be maintained by reason of the statute of Anne but that money lent for gaming purposes as distinct from money lost might be recovered on the original consideration. The decision in *Moulis* v. *Owen, supra,* turned however on the validity of the cheque. The cheque as a writing was void and it was immaterial where the transaction for which it was given took place. It was decided on the statute so that the case is not of value in determining whether public policy should prevent us from enforcing the mortgage security in the case at Bar. Nor can it be said that because giving security to a bailor is against our laws it must be treated in the same way as if such securities were made expressly

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

void by statute. That as shewn in *Kaufman* v. *Gerson, supra,* is not the principle upon which our Courts will refuse to enforce such contracts. If there is no element of moral turpitude in such transactions and nothing inherently wrong in allowing a bailor to take security but simply a different point of view in different countries on a matter concerning the administration of justice our Courts should not refuse to allow an action to be maintained on the security.

A further argument was presented by counsel for the respondent. It was rightly submitted that an agreement between a person against whom a criminal charge is pending and another that if the latter should enter into a recognizance he would indemnify him against estreatment in case of non-surrender is an indictable offence as it tends to produce a public mischief. *Rex* v. *Porter* (1910), 1 K.B. 369 so decides. It is a conspiracy by the accused and the bailor. But such a charge could not be laid on the facts in the case at Bar. The case is important not for the fact that it holds that such a transaction if it took place within the domestic forum would be a criminal offence but

MACDONALD, J.A.

rather for the principles enunciated that such agreements are against public policy. Lord Alverstone who held it was an indictable offence, said at p. 373:

> "It is, in our opinion, difficult to conceive any act more likely to tend to produce a public mischief than that which was done in this case. It is to the interest of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are bail responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of the fact. It has been suggested to us that the more modern view of bail is that it is a mere contract of suretyship, and that an agreement to indemnify bail, therefore, does not involve any illegality. If that were so, as soon as the bail had got his indemnity, he would have no interest whatever in seeing that the accused person was forthcoming to take his trial, and it is obvious that criminals, particularly if possessed of means, would very frequently abscond from justice."

And again at p. 374:

> "In these circumstances we are of opinion that Jelf, J. rightly held that the agreement entered into by the appellant was an illegal contract, not only in the sense of being unenforceable, but also as being one which clearly tended to produce a public mischief, and that it amounted to a criminal conspiracy, without any necessity for a finding by the jury that there was an intent to pervert or obstruct the course of justice."

The accused in that case was a party to an agreement with the bondsmen that he would give them £50 cash as security so that they should lose nothing if he absconded. In the case at Bar the accused procured his wife to execute a mortgage in favour of the surety company so that if he failed to appear it would be protected. The transaction in both cases was in some respects similar but while a criminal charge lay in *Rex* v. *Porter* a similar charge could not be laid in respect to this transaction. The bail bond was given in the State of Washington where it was legal to secure the bailor and there was no intention to pervert justice. That is the essence of the criminal charge. *Rex* v. *Porter* therefore is only of assistance in so far as Lord Alverstone's views should be extended and applied to the enforcement of contracts in civil cases. It is not a safe guide to take general expressions used in reference to the criminal aspects of the case decided and apply them to different facts disclosed in a civil action. The enquiry as to the consideration that should be given to the laws of a foreign country and how far our Courts should regard them as offensive to public morals is not assisted by the decision referred to.

MACDONALD, J.A.

I do not think we should say that if the transaction is simply against "public policy" as we view it, our Courts should refuse to enforce the mortgage security. The writers on conflict of laws do not confine the principle to questions of public policy *solus*. They speak of "essential public or moral interests," and contracts "founded in moral turpitude," and "inconsistent with the good order and solid interests of society." All such contracts though valid where made are void here. One must look at the facts of the case under consideration and enquire if what took place, *viz.*, the wife giving security for the appearance of her husband and son, is within the mischief of the phrases quoted. I cannot think so, and I must form an independent judgment on the point.

In *Hope* v. *Hope* (1857), 8 De G. M. & G. 731, it was held that an agreement between a husband and wife domiciled in France governed by French law and valid by that law would not be enforced in an English Court because among other provisions it contained a term that the wife would not oppose a suit for divorce instituted by her husband in the English Courts. It

COURT OF APPEAL

1929

Oct. 1.

THE NATIONAL SURETY CO. v. LARSEN

would appear from the head-note that the ground was that such a clause in the agreement was inconsistent with the law and policy of England, just as it is inconsistent with our policy to support contracts indemnifying a bailor. That view supports the contention of the respondent. But the language of Lord Justice Turner shews that higher moral considerations were involved than mere inconsistency with English law. He said at pp. 744-5:

"There is nothing which the Courts of this country have watched with more anxious jealousy, and I will venture to say, with more reasonable jealousy, than contracts which have for their object the disturbance of the marital relations. The peace of families—the welfare of children, depends, to an extent almost immeasurable, upon the undisturbed continuance of those relations; and so strong is the policy of our law upon this subject, that not only is marriage indissoluble, except by the Legislature, but divorces *a mensa et thoro* are granted only in cases of cruelty or adultery. But what is this article of the agreement? That the wife shall not oppose the husband's suit for a divorce, but, on the contrary, shall facilitate the obtaining it. I can conceive nothing more contrary to the policy of our law than this provision of the agreement. It is, as it seems to me, repugnant to the law, both as to the object which it has in view and the means by which that object is to be effected. Its object is the discontinuance of the marital relations without, so far as appears by this bill, any sufficient cause for the purpose, for the bill states no more than that there was a suit by the plaintiff for a divorce and evidence taken upon it, and that upon that evidence the responsive allegation, the purpose of which is not stated, was dismissed; and the means by which this object is to be effected are, as I understand this agreement, by evading the due administration of justice in the Courts of this country."

MACDONALD, J.A.

So also in *Forbes* v. *Cochrane* (1824), 2 B. & C. 448, where it was sought to maintain an action against the commander of a ship for harbouring slaves. One can only refer to cases to shew the range of facts and circumstances in a variety of contracts which in the past led Courts to refuse enforcement and throughout it would appear that the element of moral turpitude enters. I cannot think it is present in the case at Bar. Indeed it is conceivable that while the general practice is open to serious objection on grounds of public policy and because of interference with the due administration of justice there may yet be merit in the arrangement made in this case. The mortgage was executed by the wife. She was therefore concerned in seeing that her husband and son observed the terms of the bond. The Court did have some one vitally interested in procuring the

attendance of the accused. Why equitably should she escape liability? It is different where the accused indemnifies the bailor so that the latter need not concern himself, or where it is done in order that the accused may escape. It is the special facts of this case we are concerned with, and I think it at least not inequitable or unfair that the mortgage security should be enforced. If that is so no element of moral turpitude intervenes.

I confess greater difficulty in distinguishing cases where champertous agreements valid in France were sought to be enforced in England. In *Grell* v. *Levy* (1864), 16 C.B. (N.S.) 73, the English Courts refused to enforce an agreement to be carried into effect in England where an attorney was to receive a moiety of the amount recovered. The judgments are short and do little more than announce the decision although Williams, J. speaks of "rights and duties" overridden by the agreement. As pointed out by Williams, J., however, in the course of the argument, they were dealing with an officer of the Court and (p. 76)—

"the question is, whether we must not hold it to be an illegal thing for an officer of this Court to make such a bargain."

It can be justified on that ground. Courts naturally require strict observance of the law from its own officers. The appellant is not in that position. It pursued remedies and adopted a course of action first by becoming surety and then by taking security in a legal manner. We are not forced to conclude that principles set out in other cases were departed from in this decision. As already intimated each case on its facts requires independent treatment. On the whole, therefore, in view of the parties concerned, *viz.*, the wife, husband and son, the validity of the transaction in the State of Washington I think it is just that the mortgage security should be enforced. I cannot say that it is essentially and inherently repugnant to moral and public interests in this Province to permit the appellant to prosecute the action.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *G. S. Wismer.*
Solicitor for respondent: *Adam Smith Johnston.*

COURT OF APPEAL

1929

Oct. 1.

REX v. HALTER.

Criminal law—Intoxicating liquors—Sale by employee on premises—Liability of occupant—Extension of time—Dual liability—R.S.B.C. 1924, Cap. 146, Secs. 28 and 98; Cap. 245, Sec. 80 (3).

REX v. HALTER

Where liquor is sold by an employee of the occupant of a premises contrary to the provisions of the Government Liquor Act, the occupant is subject to conviction and a prior conviction of the employee is no bar to such a conviction.

APPEAL by accused from the decision of HOWAY, Co. J. of the 1st of March, 1929, by way of appeal from the dismissal by the magistrate at New Westminster of a charge against the accused for selling intoxicating liquor in the Central Hotel at New Westminster. The accused was convicted, constituting a third offence, and sentenced to nine months' imprisonment. One J. H. Askew, a bartender at the Central Hotel, was a witness for the Crown before the stipendiary magistrate, but he was not called on the rehearing before His Honour Judge HOWAY, a constable whose duty it was to procure the witnesses stating that he tried to find Askew but was unable to locate him.

Statement

The appeal was argued at Victoria on the 27th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Adam Smith Johnston, for appellant: On the rehearing the Crown undertook to call one Askew, a bartender, who gave evidence before the magistrate but he was not called. The constable said he could not find him. Our request to read the evidence of this witness taken before the magistrate was refused. This evidence had an important bearing on the case: see *Regina* v. *Washington* (1881), 46 U.C.Q.B. 221; *Mulvihill* v. *The King* (1914), 49 S.C.R. 587. We have the right to read this evidence under section 80 (3) of the Summary Convictions Act: see *Rex* v. *Williams* (1928), 63 O.L.R. 191; *Rex* v. *Cianci* (1917), 24 B.C. 81. British Columbia is the only Province that has not done away with dual liability.

Argument

Johnson, K.C., for respondent: The prior conviction of an

employee is no bar to a charge against the owner: see *Whimster* v. *Dragoni* (1920), 28 B.C. 132 at p. 138. As to not allowing in Askew's evidence taken before the magistrate, this is in the discretion of the learned judge and I submit is not reviewable by this Court.

Johnston, replied.

Cur. adv. vult.

1st October, 1929.

MACDONALD, C.J.B.C.: The appeal should be dismissed. The trial judge found that the occupant of the disorderly house was the appellant. He rejected the evidence that there had been a sublease to one, Iverson, as being a mere pretence. We think he was right in this and that sections 28 and 98 of the Government Liquor Act read together cover the case.

MACDONALD, C.J.B.C.

MARTIN, J.A.: We held during the argument that no ground has been established which would justify us in disturbing the ruling of the learned judge below that he would not adjourn the trial—*Rex* v. *Mulvihill* (1914), 19 B.C. 197; 49 S.C.R. 587.

As to the rejection of Askew's evidence, there was abundant evidence to support the ruling that "reasonable efforts" had not been made to obtain his personal attendance within section 80 (3) of the Summary Convictions Act, Cap. 245, R.S.B.C. 1924.

MARTIN, J.A.

The ground as to the double conviction of the occupant and his servant is covered by section 98 of the Government Liquor Act and our decision in *Whimster* v. *Dragoni* (1920), 28 B.C. 132.

It follows that the appeal should be dismissed.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I agree in the result.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree that the appeal should be dismissed.

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *O. C. Bass.*

Solicitor for respondent: *W. M. Gilchrist.*

COURT OF APPEAL

1929

Oct. 22.

DOBIE v. CANADIAN PACIFIC RY. CO.

DOBIE v. CANADIAN PACIFIC RAILWAY COMPANY.

Negligence—Railway company—Permanent injury through falling from platform of moving train—Platforms enclosed by vestibules—Evidence of side doors of vestibule being left open—R.S.C. 1906, Cap. 37, Sec. 282—Can. Stats. 1917, Cap. 37, Sec. 10.

The plaintiff, when nine years old, was travelling west as a passenger on a transcontinental train of the defendant. A vestibule enclosed the platforms between the car in which the plaintiff was travelling and the one in the rear. The boy, with a companion, had been getting off at stations for exercise and as the train slowed down nearing Piapot Station in Alberta they went out on the platform intending to get off but the train only slowed down to pick up messages and after reaching the station started to accelerate speed again without stopping. The plaintiff claims that on reaching the rear door of his car the train gave a sudden jerk forward and the door at the end of the car struck him throwing him down the steps, the side door in the vestibule having been left open. He grabbed the hand-rails but as the train gained speed he was unable to hold on and fell upon the track below losing both legs. Twenty minutes before the accident a trainman passed through the vestibule. He saw the boys there and ordered them back into their car. He stated the side doors of the vestibule were shut and in this he was corroborated by another trainman who passed through about the same time. The action was commenced over nine years after the accident. The jury after answering questions gave a verdict for the plaintiff for $10,000. On defendant's application for judgment it was held that there was no negligence in law established by the evidence or found by the jury; further, that the action was barred by section 282 of the Railway Act, 1906.

Held, on appeal, affirming the decision of MORRISON, J. (MARTIN and MACDONALD, JJ.A. dissenting), that the plaintiff has failed to satisfy the onus of proof which rested upon him of shewing negligence or want of care on the part of the defendant.

Per MACDONALD, C.J.B.C. and GALLIHER, J.A.: This was a vestibule car, the steps of which were protected by trap-doors, and although the defendant is not bound to adopt such protection, having done so, it is its duty to take due care to keep the trap-doors closed while the train is in motion.

Statement

APPEAL by plaintiff from the decision of MORRISON, J. of the 19th of January, 1929, in an action for damages for personal injuries sustained by the plaintiff on the 28th of March, 1919, caused by the negligent operation of the train of the defendant Company upon which the plaintiff was travelling as a passenger.

At the time of the accident the plaintiff was nine years old and was travelling on a transcontinental train west bound. The train had slowed down almost to a standstill as it was coming into Piapot Station in the Province of Alberta and the plaintiff believing the train was about to stop and intending to alight therefrom on the platform went through the rear door of his compartment on to the vestibule and as he was passing through the door the train gave a sudden jerk, the door slammed on him and he was thrown down the steps by which the passengers enter the car, the door protecting same being open. He grabbed the hand-rails and held on as long as he could, but the train proceeded on without stopping at this station and as it gained speed he was unable to hang on and he fell between the rails. Both his legs were taken off by the car behind. The plaintiff claims the defendant Company was negligent in leaving the door of the vestibule open and unguarded and omitted to exercise that special care required in carrying as a passenger a child of immature years, and in starting the train forward with a sudden jerk after slowing down. There was another boy in the same car with the plaintiff and they were in the habit of getting off and on at stations where the train stopped *en route*. The answers to questions put to the jury were as follow:

Statement

"Was the defendant guilty of negligence, if so, what? Yes, exits from train not properly safeguarded.

"Was the plaintiff guilty of negligence, if so, what? No.

"What was the proximate cause of the accident? Falling off the train."

It was held on the trial that there was no legal duty imposed upon the defendant Company to have vestibule doors at all and there was no evidence that they were defective or left in such a way as to invite a passenger to rely on their structure and condition and further that the action was barred by section 282 of the Railway Act, 1906, as re-enacted by section 390 of the Railway Act of 1919.

The appeal was argued at Victoria on the 7th and 10th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

D. S. Tait (*A. Leighton,* with him), for appellant: The learned judge relied on *Skelton* v. *London and North Western Railway Co.* (1867), L.R. 2 C.P. 631, but that was a clear case

Argument

COURT OF APPEAL

1929

Oct. 22.

DOBIE v. CANADIAN PACIFIC RY. CO.

of contributory negligence and does not apply here. That leaving the door in the vestibule open is negligence on the part of the Company see *Directors, &c., of North Eastern Railway Co.* v. *Wanless* (1874), L.R. 7 H.L. 12. As to the neglect to perform a self-imposed duty see *Mercer* v. *S.E. & C. Ry. Cos.' Managing Committee* (1922), 2 K.B. 549 at p. 554; *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70; *Smith* v. *South Eastern Railway Co.* (1896), 1 Q.B. 178. That there was evidence of negligence see *Gee* v. *Metropolitan Railway Co.* (1873), L.R. 8 Q.B. 161; *Ford* v. *The London and South Western Railway Company* (1862), 2 F. & F. 730; *Black* v. *Calgary* (1915), 8 W.W.R. 646; *Atherton* v. *London and North-Western Railway Co.* (1905), 93 L.T. 464; *Jarvis* v. *London Street Ry. Co.* (1919), 25 Can. Ry. Cas. 184; *Campbell* v. *Canadian Pacific Railway Company* (1901), 1 Can. Ry. Cas. 258; *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229 at p. 238; *Glasgow Corporation* v. *Taylor* (1921), 91 L.J., P.C. 49; *Jewson* v. *Gatti* (1886), 2 T.L.R. 381; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1155.

Argument

McMullen, for respondent: This action is barred by section 390 of the Railway Act. This section has been in force since 1906: see R.S.C. 1906, Cap. 37, Sec. 282; secondly, under Canadian law it is not open to a jury to find that a railway company should provide any particular kind of appliances in connection with trains. The Railway Act provides what precautions should be taken and as the Act has made no provision for doors shutting in the vestibule, there is no duty imposed on the Railway to keep them closed if they have them there. Thirdly, the doors were closed 25 minutes before the accident and the onus is on the plaintiff to shew circumstances from which inference of negligence can be drawn. That he cannot recover when on the vestibule contrary to section 390 of the Act see *Campbell* v. *Canadian Pacific Railway Company* (1901), 1 Can. Ry. Cas. 258; *Grand Trunk Rway. Co.* v. *McKay* (1903), 34 S.C.R. 81 at pp. 96 and 98. The conflicting stories of the two boys negative the evidence of the train jerking: see *Mercer* v. *S.E. & C. Ry. Cos.' Managing Committee* (1922), 2 K.B. 549. As to the duty of the Railway Company to a passenger see *Norman* v.

Great Western Railway (1915), 1 K.B. 584; *Waite* v. *N.E. Railway Company* (1858), El. Bl. & El. 719; *The Bernina (2)* (1887), 12 P.D. 58 at p. 92; Beven on Negligence, 4th Ed., Vol. I., pp. 199 and 229; *Adams* v. *Lancashire and Yorkshire Railway Co.* (1869), L.R. 4 C.P. 739; *Siner* v. *Great Western Railway Co.* (1869), L.R. 4 Ex. 117.

Tait, in reply, referred to *McKay* v. *Grand Trunk R.W. Co.* (1903), 5 O.L.R. 313 at p. 319; *The Lake Erie and Detroit River Railway Company* v. *Barclay* (1900), 30 S.C.R. 360.

Cur. adv. vult.

22nd October, 1929.

MACDONALD, C.J.B.C.: The plaintiff, then a boy between the age of 9 and 10 years, was travelling with his mother upon the defendant's train. On approaching the station of Piapot, the train slowed down as if about to stop. The plaintiff's story is that he was going out of the car in which he was a passenger with the intention of getting off temporarily when the train stopped; that he had gone to the door of the car leading to the platform when a sudden jerk threw him forward on to the platform, and down the steps, as a result of which he fell from the steps and received the injuries of which he complains. This occurred about ten years ago, but it was conceded by both counsel that the action was in time since the plaintiff was in infancy. No question, therefore, has arisen in respect of time.

MACDONALD, C.J.B.C.

The jury in answer to questions found that the defendant was negligent in leaving the car steps unprotected; that the plaintiff was not guilty of contributory negligence, and that the approximate cause of the accident was the plaintiff's falling off the car; they assessed damages at $10,000.

The learned trial judge dismissed the action on the ground that the plaintiff had committed a breach of section 382 of the Railway Act, prohibiting passengers from loitering on the car platform.

The car in question was a vestibule car, the steps of which were protected by a trap-door preventing access to them from the platform of the car. This type of car has been standard equipment for many years past, and although it may be, as the learned judge said, that the defendant was not bound to adopt

COURT OF APPEAL

1929

Oct. 22.

DOBIE v. CANADIAN PACIFIC RY. CO.

such protection, yet, having done so, I think it was their duty to have taken due care to keep the trap-door closed while the train was in motion.

The real question in the appeal is, whether the evidence discloses the absence of such care. The servants, whose duty it was to close the doors passed through the train after it left Tompkins, the last stop, and found that all the doors were securely closed. How it came to be open the evidence does not disclose. Now while it was the duty of the defendant to keep that door closed while the train was in motion yet there is no evidence that any servant of the defendant opened the door. There was no reason why it should have been opened by any one. The porter on that car was not available as a witness having left the country, but no one saw him near the door or in the vestibule before the accident occurred. Neither was it suggested that the trainmen had opened the door. The case is remarkable for the absence of evidence in this respect and the fair inference I think is that both parties had failed to find a witness who could give evidence upon it. That question is a decisive one in this appeal. I think it cannot reasonably be suggested that the defendant should have kept guards at the various doors of its cars to see that they were always closed while the train was in motion.

MACDONALD, C.J.B.C.

I have considered with much care the only point upon which it could be suggested that the train officials were remiss in their duty. Potter, one of the trainmen, when the train approached Piapot, came out on the platform of the caboose. He says he saw the two boys in the vestibule of the car ahead. He warned them to go back to the car. There is no evidence that Potter could have seen that the door over the steps was then open. He, therefore, had no notice of danger in that respect. After staying a short time on the platform he went down the steps and from that point saw that Hunt had come back into the vestibule of his car and down the steps of that car. He must, therefore, have known that at that time at all events, of the open door. He warned Hunt back and Hunt in his evidence says, that when he had reached the top of the steps the plaintiff then went down and fell off the car. Now conceding that Potter knew when he warned Hunt back the second time that the door in question

must have been opened, he did the only thing that he could do in the circumstances. He was down at the bottom of the caboose steps. Hunt went immediately back when he was told to do so and then immediately the plaintiff is said to have come down the steps. Hunt's evidence was not accurate when he said the plaintiff went down the steps. The plaintiff was hurled down the steps by the jerk of the train. The other trainman Lent was standing in the caboose door and saw nothing to indicate that the door of plaintiff's car had been opened.

This, therefore, is the evidence upon which, if at all, defendant's negligence must be found and, in my opinion, it is insufficient.

MACDONALD, C.J.B.C.

I cannot agree that there should be a new trial. No objection was taken to the charge either in the notice of appeal or in the argument. There is nothing new to be tried, or, if there be, each party had ample opportunity to bring out the facts. The choice is between the dismissal and the allowance of the appeal. It is true that the answers to the questions are not as precise as they might have been, but the jury's view, I think, cannot be mistaken. I, therefore, feel impelled to dismiss the appeal not on the grounds stated in the trial Court but on the ground that the plaintiff has failed to satisfy the onus of proof which rested upon him of shewing negligence or want of care on the part of the defendant.

MARTIN, J.A.

MARTIN, J.A.: Being of opinion that justice requires a new trial herein I shall refrain from canvassing the evidence and content myself by saying that there was a case to go to the jury on at least two heads of negligence, and that after the jury had found for the plaintiff the learned judge below should not, with respect, on the facts and findings, have acceded to defendant's motion to dismiss the action. But after a careful consideration of the finding "in the light of the issues presented by the pleadings, the evidence and the charge of the trial judge," as is the only proper way—*Dunphy* v. *British Columbia Electric Rway. Co.* (1919), 59 S.C.R. 263, 271—I am forced to the conclusion that there has been a mistrial in that the jury returned no definite finding upon the vital question of "what was the proximate cause of the accident?" but simply said that it was "falling

COURT OF APPEAL

1929

Oct. 22.

DOBIE v. CANADIAN PACIFIC RY. CO.

from train," which is, in the circumstances, meaningless and has no other effect than if the question had remained unanswered, and shews that the mind of the jury was not properly directed to the gist of the case.

Under such circumstances of obvious uncertainty and inconclusion it was the duty of the learned trial judge, so as to avoid "speculation" (as our late brother IRVING put it in *Rayfield* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 361 at p. 366) and in the interests of all parties, not to dismiss the jury but to give them such further instruction as was necessary to direct their minds to the real and definite answering of the essential question, as has repeatedly been decided, *e.g.,* in *Rayfield's* case, *supra; Shearer* v. *Canadian Collieries (Dunsmuir), Limited* (1914), 19 B.C. 277, 282; *Bank of Toronto* v. *Harrell* (1916), 23 B.C. 203, 213; *Sawyer* v. *Millett* (1918), 25 B.C. 193; *Dunphy* v. *British Columbia Electric Rway. Co., supra,* and *Wabash Railway Co.* v. *Follick* (1920), 60 S.C.R. 375. But as that necessary course of immediately elucidating the matter was not adopted, the verdict, in my opinion, is incomplete in essentials because the vital question of what "was the sole direct cause, *causa causans,* of the infant plaintiff's injury" (*per* the Chief Justice of Canada in *McLaughlin* v. *Long* (1927), S.C.R. 303) still remains unanswered and there is no general verdict to fall back upon (assuming that to be possible) and therefore no judgment can be given in favour of either party, and so, to attain justice, the judgment entered should be set aside and a new trial had, the costs of the first trial to abide the result thereof, and the costs of this appeal to follow the event.

MARTIN, J.A.

I think it well to add that though no objection was taken to the charge yet it became necessary, as aforesaid, to consider it carefully in trying to discover the real intention of the jury and in the course of that consideration it became apparent that it was not an adequate or satisfactory presentation of an unusual case specially requiring clear definition to the jury, and this is an important element in the exercise of our wide jurisdiction to grant *ex mero motu* a new trial under Appeal Rule 6 lately considered in *Perry* v. *Woodward's Ltd.* (1929), [41 B.C. 404]; 3 W.W.R. 49, 59, and see also the recent decision of the Supreme

Court in *Hall* v. *Toronto Guelph Express Co.* (1929), 1 D.L.R. 378 at p. 390.

GALLIHER, J.A.: I agree for the reasons given by the Chief Justice.

MACDONALD, J.A.: A jury awarded appellant $10,000 damages for personal injuries sustained on the 28th of March, 1919, through falling off respondent's train but the learned trial judge dismissed the action. Appellant (then nine years old) was travelling with his mother and often got off at points where the train stopped to walk about the station platform. As the train approached Piapot in Alberta it reduced its speed, not to stop, but to pick up orders while going slowly past the station. Appellant thinking it was about to stop walked out on the platform between the car on which he was travelling and the one following (a caboose attached at the rear) and while his hand was still on the door knob of the car through which he passed the train gave a jerk throwing him down the outer steps. After clinging for a few moments to a side rail he fell to the ground receiving injuries resulting in the loss of both legs. The vestibule was fitted with a combination platform and door, but at this time the platform was raised and the lower door was open, although trainmen testified that it was closed 25 minutes before the accident. The jury may or may not have accepted that evidence. If it was accepted they must have found that for at least a short interval before the accident it was open to the knowledge of one or possibly two trainmen and that they failed to close it. The porter on this car who should know was not called; possibly after so many years he was not available. A trainman called by respondent when asked if appellant could open this trap-door or platform, said "I don't know." He was not so sure that boys could open it. It was respondent's duty to keep it closed. I think the jury might draw the inference from the evidence that the unusual did not occur, *viz.*, that appellant or some unauthorized person opened the trap-door. The point loses its importance to some extent when we find that a trainman, who was standing on the back platform of the caboose immediately adjoining the vestibule of the car in question, two or three minutes before the

COURT OF APPEAL

1929

Oct. 22.

DOBIE v. CANADIAN PACIFIC RY. CO.

accident saw another boy—Hunt—and possibly the appellant, standing on or near the steps. This trainman ordered Hunt back presumably because he thought he was in danger and the only danger would be from an open doorway. His attention was thus directed to the vestibule and he either noticed that the door was open or should have noticed it and would have ample time to close it before the accident occurred. With therefore the door admittedly open at the time of the accident; the duty on the respondent to keep it closed; the improbability of the boys or any other passenger opening it and the fact that the trainman's attention was directed to that area at least two or three minutes before the accident, when it was undoubtedly open, it cannot be said that the jury were not justified in imputing to respondent negligence in respect thereto. The evidence was sufficient to justify the inference that the door was open to the knowledge of respondent's servants and the answer to question one (1) cannot be disregarded for want of evidence.

The questions submitted to the jury and answered were as follow: [already set out in statement.]

MACDONALD, J.A.

The learned trial judge held that the appellant was not entitled to judgment on these findings. The answer to the second part of question one is not happily worded but we must interpret it by the evidence. The jury meant to say that the trap-door was lifted up and the lower door open; in other words, the exits were not properly safeguarded in that sense. They do not mean that further safeguards should have been provided. The answer to question three is not illuminative and gives rise to difficulty as proximate cause is a decisive element. The answer tells what occurred—not why it occurred. The jury meant to find in answers to questions one and three that the proximate cause of the accident was not "falling from train"—that is meaningless—but rather falling through a platform door negligently left open. The answer to the two questions gives the proximate cause. The jury should have been sent back to elucidate their findings but as no objection was taken to the charge nor any request made for a new trial I think on the whole, with the negligence that caused the accident clearly established we should not direct a new trial.

It was argued that the jury must have found against appel-

lant's contention that a jerk took place thereby throwing him off his balance. I do not think that necessarily follows. There was evidence by appellant and at least one other witness that it did take place and the evidence of respondent's witnesses was of a negative character. They simply did not notice it. If it is essential that we should have a finding on two points to sustain the jury's verdict, *viz.*, a jerk and an open trap-door, I think we would be justified in assuming that the jury found the jerk actually occurred, because of the general conclusion reached by the jury.

It was submitted that there was no legal duty on respondent to have its train equipped with a combination door and platform at all; that it was not ordered to provide these safeguards by the Board of Railway Commissioners at or before the time the accident occurred. *Skelton* v. *London and North Western Railway Co.* (1867), L.R. 2 C.P. 631, was referred to. The point however is having provided it—whether obliged to do so or not—was respondent bound to keep it safely secured? In other words is failure to perform a self-imposed duty negligence for which an action may be brought? Willes, J., at p. 636 said:

"If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it."

MACDONALD, J.A.

Respondent in other words would not be at fault if this equipment was not installed. The voluntary act was not only to provide the trap-door which when closed secured the outer door but to keep it closed. There was a tacit undertaking to do so. There would in effect be no voluntary act performed at all if left continuously open. Having provided it, leaving it open was improper performance. Without discussing the *Skelton* case further, I do not think, with respect, that it warrants the conclusion reached by the learned trial judge. It was the uniform practice of respondent to keep the trap-door closed, except at stations when discharging or receiving passengers, and there was therefore (apart from statutory prohibitions later referred to) a tacit invitation to passengers to use the platform for certain purposes knowing that it would or should be closed, except at stations and that it was safe to do so. There was an invitation to passengers to make the ordinary use of facilities provided without being exposed to undue risk and it is not unusual nor

COURT OF APPEAL

1929

Oct. 22.

DOBIE v. CANADIAN PACIFIC RY. CO.

improper for passengers to make their way to the rear platform when the train reduces its speed preparatory to stopping at a station in order to be ready to alight at the earliest moment. Nor can passengers be charged with exceeding the limits of the invitation if under a mistaken impression (derived from a gradual reduction in speed) that the train is about to stop they make their way to the rear platform. Such conduct is not inconsistent with what passengers usually do and ought to be permitted to do while travelling by rail. If, therefore, the trap-door should be left open they are exposed to, what to them, is an unknown danger. The Railway Company having voluntarily supplied special safeguards and familiarized passengers with their use should keep them securely closed except at stations. If they do not that is negligence as the jury found. If on the other hand it is suggested that it is negligence on the part of the passenger to act on the assumption that the trap-door will be kept closed except at stations, the jury negatived it in this case.

The case turns upon the doctrine of invitation to a specially constructed area. It is to be regarded as a room (in the same way as the smoking room) fitted up in a certain way to which passengers are invited at limited times and for limited purposes. We are not concerned therefore with whether or not in providing the vestibule with trap-doors respondent did more than the law or the directions of the Board of Railway Commissioners demanded.

MACDONALD, J.A.

I think the decision in *Mercer* v. *S.E. & C. Ry. Cos.' Managing Committee* (1922), 2 K.B. 549, assists the appellant. At a railway crossing a small wicket gate was provided for pedestrians. By the company's practice it was kept locked when trains were passing and unlocked only when it was safe to cross the line. This practice was known to the plaintiff. Through the negligence of a servant of the defendant it was left unlocked when a train was approaching and the plaintiff passing through it was knocked down by a train and injured. It was held that defendant by leaving the gate unlocked gave an invitation to the plaintiff to cross the line; that he used ordinary and reasonable care in doing so and was entitled to recover. After applying the principle stated by Willes, J. in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, Lush, J. said (p. 553):

"If the danger was so obvious that, even though the plaintiff was thrown off his guard by reason of the gate being unlocked, he ought to have known of it, and would have known of it if he had used ordinary or reasonable care, he cannot recover. If on the other hand if was not so obvious, if the plaintiff can properly be said to have got in front of the train without seeing that it was there because he was thrown off his guard by what the company's servants did, notwithstanding that he was still using what was in the circumstances ordinary and reasonable care, then he can recover. . . .

"I should certainly hesitate to hold that if in a case of this kind a person wishing to use the level crossing were, merely because he found the gate unlocked, to omit to look and see whether the way was clear when there was nothing to prevent him from doing so, and were to walk on, reading a newspaper, for example, he could make the company liable if he were run down by a train that he could easily have seen or heard. The railway company may have tacitly invited him to cross the line, but they did not invite him to leave his common sense behind him . . . inasmuch as, owing to the position of the down train, the plaintiff could neither see nor hear the up train."

As stated the jury in the case at Bar absolved appellant of contributory negligence. They were justified in doing so. It was said that the danger was obvious; that the boy should have looked and had he done so would have seen that the trap-door was open and have avoided it. That is not the evidence. As he described the occurrence,—

"I had one hand on the door and just going to close the door when—I had one foot on the doorstep and one on the vestibule and the train gave a jerk and the door slammed to, and I went right down the steps."

He was in the act of passing through the door when precipitated by the jerk. There was neither time nor opportunity to examine the platform to make sure that it was safely guarded. Had the jerk not occurred he would, on passing out to the vestibule, realize the situation and if "leaving his common sense behind him" he proceeded down the steps, a jury might have difficulty in acquitting him of contributory negligence. Their finding in this regard is an indication that they found the jerk occurred. It is supported by the weight of evidence. It is on the question of supporting the jury's finding of absence of negligence on appellant's part that the incident of the jerking of the train is important. A jerk is a rather common occurrence. But coming when it did the question of why the plaintiff did not take precautions in looking about him loses its importance. Respondent's negligence as found was that the exits from the train were not properly safeguarded. The jerk would not have

COURT OF APPEAL

1929

Oct. 22.

DOBIE v. CANADIAN PACIFIC RY. CO.

caused the accident if the exits were guarded. It was, however, an act by respondent—doubtless in suddenly increasing the speed causing a jerk, coming at a time when appellant was in the position described that assisted the jury in finding that appellant should not be charged with negligence for failure to see the danger because at the moment when under other circumstances he would have seen it he was hurtled down the steps.

It was urged however, that there was no invitation to use the vestibule at this time. Section 390 of chapter 170, R.S.C. 1927, in force at the time, reads as follows:

"No person injured while on the platform of a car, or on any baggage, or freight car, in violation of the printed regulations posted up at the time, shall have any claim in respect of the injury, if room inside of the passenger cars, sufficient for the proper accommodation of the passengers, was furnished at the time."

A notice was posted in the train in the following terms:

"No person shall use the platform or any step of any car on any line of railway owned or leased or operated by the Company as a place on which to stand or stay, but only as a place over which to pass on getting on or off a car, or from car to car; and no person shall travel or be in any baggage car or other car not intended for the conveyance of passengers."

MACDONALD, J.A.

But section 390 has reference only to riding "on the platform of a car." It is obvious that one may use the platform to alight at the proper time and place. It follows that a passenger is justified in going to the platform while the train is reducing speed preparatory to stopping. It might be safer not to do so. But we must have regard to what reasonably prudent people do and it is notorious that an exodus towards the platform starts before the train actually stops. It should not be held that one on the platform at that time getting ready to alight is within the prohibitions contained in the section. The notice posted up is in harmony with this view. There is no permission to "stand or stay" on the platform. But there is an invitation to use it to get on or off. The Railway Company, therefore, tacitly invited appellant to proceed in safety to the platform when the train reduced its speed; nor was the invitation withdrawn because although there was every indication that it would stop it did not actually do so. It was reasonable to suppose it would and respondent was obliged to guard against danger to passengers acting reasonably even although it was a mistaken belief. It was an invitation to resort to a place where a condition which

did not exist should have existed. Appellant was misled. He alighted at stations all along the line, and knew what to expect. The danger of course was obvious but appellant "was thrown off his guard" by the jerk referred to. That is the special circumstance in this case. To again quote Lush, J., in the *Mercer* case, at p. 554:

"It may seem a hardship on a railway company to hold them responsible for the omission to do something which they were under no legal obligation to do, and which they only did for the protection of the public. They ought, however, to have contemplated that if a self-imposed duty is ordinarily performed, those who know of it will draw an inference if on a given occasion it is not performed. If they wish to protect themselves against the inference being drawn they should do so by giving notice, and they did not do so in this case."

It was suggested that the appellant was out on the platform before the accident and was warned by a trainman to go back. The evidence shews that another boy who played with him was warned but it does not clearly appear that appellant heard the warning. Without considering what effect, if any, the warning, if given, would have on the result it is enough to say that all the facts were before the jury.

I would allow the appeal and direct that judgment be entered for the amount found by the jury.

The Court being equally divided, the appeal was dismissed.

Solicitor for appellant: *Arthur Leighton.*
Solicitor for respondent: *J. E. McMullen.*

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA v. HODGES

THE ROYAL BANK OF CANADA v. HODGES *ET AL.*

Banks and banking—Loans—Security—Purchase of right to cut timber—Bank Act—"Owner," meaning of—Vendor's reservation of title—Effect of—R.S.B.C. 1924, Cap. 44, Secs. 2, 3 and 9 (2)—R.S.C. 1927, Cap. 12, Sec. 88.

Under an agreement for 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 to be paid by instalments at so much per foot as the cut timber 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 Pole & Tie 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 in 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 vendors' claim to a lien and to payment of their claim on poles shipped prior to the bankruptcy it was held that the Blue River Company was not an "owner" within the meaning of section 88 of the Bank Act and the Conditional Sales Act did not apply as "possession" in the sense in which the word is used in section 3 thereof was never given; the assignments to the Bank were therefore invalid.

Held, on appeal, reversing the decision of MCDONALD, J., that the Blue River Pole & Tie Company must be held to be the "owner" of the timber within the intent and meaning of section 88 of the Bank Act and further the Company was in "possession" within the meaning of the Conditional Sales Act.

Statement

APPEAL by plaintiff from the decisions of MCDONALD, J. of the 10th and 24th of April, 1929 (reported, 41 B.C. 203), in an action for a declaration that two assignments dated the 15th of October, 1927, and the 19th of April, 1928, made by the

Blue River Pole & Tie Company Limited in favour of the plaintiff, pursuant to section 88 of the Bank Act, of poles, ties, logs and lumber in or about certain timber limits of said company on the North Thompson River are good and valid securities for $18,066.16 and interest advanced by the plaintiff to said company; that by virtue thereof the plaintiff is entitled to repayment of said sum out of the proceeds of the sale of said poles, ties, logs and lumber and for an account of what is due the plaintiff. The defendants, the Exchange National Bank of Olean and the Olean Trust Company sold the Blue River Pole & Tie Company the timber licences in question, the purchase price being payable by instalments as the lumber and poles were shipped, the agreement containing 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." After entering into the agreement the Blue River Pole & Tie Company applied to the plaintiff Bank for a line of credit giving the security to the Bank as above stated. Later the Blue River Pole & Tie Company became bankrupt and the defendant Hodges became its authorized trustee. Under order of the Court Hodges disposed of a portion of the poles and lumber and after paying the expenses incurred in getting out the poles and lumber he had a balance of $9,500 on hand. The Bank claimed this balance under the said assignments and its action was dismissed on the ground that the Blue River Pole & Tie Company was not an "owner" within the meaning of section 88 of the Bank Act.

Statement

The appeal was argued at Victoria on the 17th of June, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellant: The respondents sold to the Blue River Pole & Tie Company on a stumpage basis in January, 1927, and said company operated until May, 1928, when it went into bankruptcy. The Bank's claim amounts to $18,000, but the respondents claim the Blue River Pole & Tie Company was in arrears in payment for stumpage on logs sold previously in the sum of $6,000 and that they are entitled to payment of this sum

Argument

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA v. HODGES

for the balance held by the trustee. The contest is over the $6,000 arrears for stumpage. We were given possession under the agreement and it was never taken from us. The learned judge below said we were not an "owner." We say we are entitled to this balance under section 3 (1) of the Conditional Sales Act: see *Forsyth* v. *The Imperial Accident and Guarantee Ins. Co. of Canada* (1925), 36 B.C. 253 at pp. 256-7; *C. C. Motor Sales Ltd.* v. *Chan* (1926), S.C.R. 485 at pp. 490-1; *The North British and Mercantile Insurance Company* v. *McLellan* (1892), 21 S.C.R. 288 at p. 300; *The Western Assurance Company* v. *Temple* (1901), 31 S.C.R. 373. The agreement was not registered so that it is void as against subsequent purchasers: see *Foster* v. *International Typesetting Machine Co.* (1919), 2 W.W.R. 652, and on appeal (1920), 60 S.C.R. 416; *Mutchenbacker* v. *Dominion Bank* (1911), 18 W.L.R. 19; *Marshall* v. *Wawanesa Mutual Insurance Co.* (1924), 33 B.C. 404.

Argument

Macrae, for respondents: On the question of ownership the cases he referred to do not apply as no possession was ever given. They merely had a licence to cut. In giving security under section 88 of the Bank Act they cannot give any better title than what they have. In giving their statement to the Bank they said they were "owners" but we submit they were not: see Maclaren on Banks and Banking, 5th Ed., p. 304. He relies on the fact that we did not register under section 3 of the Conditional Sales Act, but this does not apply to us, because (1) a Provincial statute cannot override the Dominion Act; (2) not having given up possession the Act does not apply to us; (3) this is not a mortgage but at best a pledge: see *Jones* v. *Smith* (1794), 2 Ves. 372 at p. 378; Halsbury's Laws of England, Vol. 21, p. 73; *Anderson and Craig* v. *McNair Lumber and Shingles Ltd.* (1929), 40 B.C. 466. The Bank must take subject to what rights we have as vendors. We have a possessory lien: see Halsbury's Laws of England, Vol. 19, pp. 14 and 15.

Bull, replied.

Cur. adv. vult.

22nd October, 1929.

MACDONALD, C.J.B.C.

MACONALD, C.J.B.C.: The respondents' counsel confined his argument to two questions. He submitted that the Blue River

Pole & Tie Company Limited was not the owner of the timber in question, within the meaning of that expression in section 88 of the Bank Act, and further, that that Company was not in possession of the timber in question at the date of the assignment thereof to the appellant.

The said company agreed to buy from the respondents certain timber licences which carried with them the right to cut and remove timber from specified timber areas. The agreement was a conditional sale agreement, that is to say, the vendors retained the property in the timber but gave to the company the right to cut and remove it upon terms therein set forth, involving, as I think, the possession of the timber when severed. Terms were inserted in the agreement enabling the vendors on default to reoccupy the timber berths and to take possession of and sell any timber which had been cut by the company and not removed. These rights were to be exercised upon fifteen days' written notice. Now, while default had been made the rights thus given were never exercised in accordance with the agreement and when the company later became bankrupt the timber which had been severed was taken possession of by the trustee and the net proceeds thereof is the subject of this action.

The respondents as original vendors claim stumpage, that is to say, the amount agreed to be paid by the vendee for the timber as cut and removed. The appellant on the other hand claims the timber under assignments made by the company to it to secure advances.

I am of opinion that the timber was, at the date of the several assignments mentioned in the special case, in the possession of the company. The effect of the agreement between it and the respondents is that the timber should be severed and that upon severance the possession of it should be that of the company, though the ownership remained in the respondents. What took place between Mr. *Macrae,* respondents' solicitor, Shaw, the president of the company and Johnson, respondents' agent, in January, 1928, did not, in my opinion, amount to a taking of possession of the severed timber, or any part of it, by the respondents.

On the question of the meaning of "owner" in section 88, it is first necessary to see what the company got under its agreement

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA v. HODGES

MACDONALD, C.J.B.C.

with the respondents. It got an agreement of sale by which the vendors retained the property in the thing sold; it got possession of the timber when severed. Had the respondents registered the agreement in accordance with the provisions of the Conditional Sales Act, R.S.B.C. 1924, Cap. 44, they would have made effective against subsequent purchasers or mortgagees for valuable consideration without notice, their position as owners. But by section 3 of that Act the terms respecting the retention of the property in goods are rendered void as against such purchasers or mortgagees unless the agreement were registered in accordance with the Act. While as between the company and the respondents it was not necessary that the agreement should have been registered, the contest here is between a subsequent mortgagee for valuable consideration without notice of the respondents' retention of the property in the timber, and it is the respective rights of such contestants that we must now decide.

It was argued that the Provincial legislation does not affect the question; that the question is, whether or not the company was the owner within the purview of section 88. In my opinion the Provincial legislation has a great deal to do with that question. In the premises it is as if the company were an unconditional purchaser, able to transfer the ownership to the appellant. When the Bank's interest intervened it was not competent to the respondents to set up the ownership clause in their agreement with the company. In the transaction with the appellant the company must be regarded as the legal owner, and therefore the owner within the intent and meaning of section 88.

The appeal should therefore be allowed.

MARTIN, J.A.

MARTIN, J.A.: I agree with my learned brothers that this appeal should be allowed on the grounds, briefly stated, (1) that under the circumstances set out in the special case the defendant Blue River Company must be held to be an "owner of the products" in question within the meaning of section 88 (5) of the Bank Act, Cap. 12, R.S.C. 1927, and to have had possession thereof within the meaning of that word as set out in Schedule C. to said section, which recognizes that the existence of "mortgages, liens and charges" is not inconsistent with ownership and possession as contemplated and dealt with thereby;

and also (2) that the transaction is within the Conditional Sales Act, Cap. 44, R.S.B.C. 1924, as defined by section 2 thereof.

The cases cited and others shew clearly that the meaning of the word "owner" varies with different circumstances and in an ordinary business transaction of this nature within the scope of a piece of legislation aimed to promote business the meaning attached thereto should be that which would be in the minds of ordinary business men; and the same view applies to "possession" as to which both the Privy Council in *Kirby* v. *Cowderoy* (1912), A.C. 599 and our National Supreme Court in *Tweedie* v. *The King* (1915), 52 S.C.R. 197, 215, have adopted Lord O'Hagan's views as expressed in *Lord Advocate* v. *Lord Lovat* (1880), 5 App. Cas. 273, 288, as follows:

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

MARTIN, J.A.

It is, furthermore, to be noted that in the agreement for sale of the timber licences in question "together with all trees and timber standing, lying and being thereon" the "purchaser" the Blue River Pole Co., was not only empowered but obligated "to remove all merchantable timber from the said area," and in default thereof the "vendors" (defendants) were "at liberty to repossess the said licences or lots and all timber, logs, etc., cut therefrom by the purchaser and remaining on the ground. . . ," which "repossession" by the vendors recognizes a prior "possession" *de facto* by the "purchasers" for the purpose of carrying out the agreement in the interests of all parties.

MCPHILLIPS, J.A.: The question is one of priority and according to the judgment of the learned trial judge the Bank is held to be entitled to only $3,500 out of $9,500 in Court.

MCPHILLIPS, J.A.

The Bank took security on certain timber, *i.e.*, poles, under section 88 of the Bank Act (R.S.C. 1927, Cap. 12) from the Blue River Pole & Tie Company Limited; this company later became bankrupt and a special case was stated for the opinion of the Court and coming on for decision before Mr. Justice D. A.

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA *v.* HODGES

MCDONALD that learned judge held that the respondents, the Exchange National Bank of Olean and Olean Trust Company should recover to the extent of $6,099.90 out of the special fund held by the authorized trustee of the property of the Blue River Pole & Tie Company Limited, and now on deposit in Court, the appellant to be entitled to the balance only, *viz.*, $3,500.

The learned judge held that the appellant had no valid security under section 88 of the Bank Act as against the said respondents the Exchange National Bank of Olean and Olean Trust Company. The learned judge, though, further held that upon the $6,099.90 being paid to the National Bank of Olean and the Olean Trust Company the security under section 88 of the Bank Act would become effective and the Bank would be entitled to payment of the balance remaining in the special fund in the hands of the authorized trustee, W. E. Hodges. The claim of the respondents given effect to was based on overdue or back stumpage due by the Blue River Pole & Tie Company Limited to the respondents.

MCPHILLIPS, J.A.

In arriving at his decision now under appeal, the learned judge has held that the Blue River Pole & Tie Company Limited was not the "owner" within the meaning of the Bank Act.

Section 88 (5) of the Bank Act reads as follows:

"5. Any such security, as mentioned in the foregoing provisions of this section, may be given by the owner of said products, goods, wares and merchandise, stock or products thereof, or grain."

The Blue River Pole & Tie Company Limited (hereinafter referred to as the Company) was the purchaser and the respondents the vendors under an agreement of the 9th of September, 1927, whereby the vendors agreed to sell and the purchaser agreed to purchase from the vendors certain timber licences, together with all trees and timber standing, lying and being thereon, subject to the terms and conditions in the agreement contained. There are express provisions permitting the purchaser to enter upon the lands covered by the licences and cut the timber thereon until default be made in payments or default in compliance with any other of the covenants and conditions, it being agreed that the property and title in the timber licences and lots and all timber cut therefrom should remain in the

vendors until the same were fully paid for by the purchaser and the vendors were to be at liberty to repossess the licences or lots and all timber, logs, poles and piling cut therefrom by the purchaser and remaining on the ground or in its yards with the liberty to resell the same to any purchaser without any claim by the purchaser, the company (the Blue River Pole & Tie Company Limited). It is important to note paragraphs 18 and 21 of the special case which read as follows:

"18. The said Company was prior to the said 5th day of May, 1928, engaged through subcontractors in cutting poles and ties off certain timber limits near Blue River, British Columbia, being the timber limits referred to in the schedule to the agreement of the 9th of September, 1927, set forth in paragraph 2 hereof, and the said Company was a wholesale purchaser or shipper of or dealer in products of the forest, within the meaning of section 88 of the Bank Act, R.S.C. 1927, Cap. 12. From the 2nd day of January, 1928, the said Company did not carry on any cutting or other operations on any of the said properties except through subcontractors."

"21. The poles referred to in the preceding paragraph hereof were cut by the said Company pursuant to the agreement of the 9th of September, 1927, and were embraced in the two assignments to the plaintiff referred to in paragraph 13 hereof, and were on the date the receiving order was made and always had been on the property described in the agreement of the 9th of September, 1927."

Poles were cut by the company and remained on the land covered by the agreement and the company was at all times in possession of the poles.

The Bank in taking its security followed Schedule C of the Bank Act, R.S.C. 1927, Cap. 12 and the Bank's position as taken at this Bar and in the Court below is, that the company was the owner of the poles at the time the security was taken. The case of *Forsyth* v. *The Imperial Accident & Guarantee Ins. Co. of Canada* (1925), 36 B.C. 253, is very much in point. It was an action to enforce a claim under a policy of insurance, the policy containing a provision that "unless otherwise specifically stated in the policy or endorsed thereon, the insurers shall not be liable if the interest of the insured in the automobile is other than unconditional and sole ownership," this Court held that where the insured is the owner of the car subject to a charge by way of security for a debt he ought to be regarded as the exclusive owner and may so declare himself to an insurance company and applied *The North British and Mercantile Insurance Company* v. *McLellan* (1892), 21 S.C.R. 288. In the

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA v. HODGES

Supreme Court of Canada, Strong, J. (afterwards Chief Justice of Canada), at p. 300, said:

"The legal property in the lease was no doubt in Palmer, but the clause in the agreement providing that he was to reconvey this property to the respondent after the completion of the contract, coupled with the stipulation in the agreement with Raynes that he was to renew in favour of McLellan, shews that Mr. Palmer held this property in the leasehold merely as a mortgagee and by way of security. Then there was nothing in this nor in the bill of sale to Barnhill inconsistent with the respondent's statement that he was the owner. A mortgagor is deemed the owner of property mortgaged both in a popular and in a technical sense, and the last alternative of the 14th question shews that the word 'property' in the first part of the interrogation is used as contra-distinguished from the interest of a trustee, mortgagee or commission agent, and the question being read and construed in this sense the respondent was perfectly justified in saying that he was, according to the meaning thus attached to the word 'property' by the appellants themselves, the exclusive owner of the icehouse as well as of the ice."

In a previous case before this Court of *Marshall* v. *Wawanesa Mutual Insurance Co.* (1924), 33 B.C. 404, the same point was debated, *i.e.*, the question of who could be properly styled "owner," and it was held that a purchaser from the Land Settlement Board under an agreement of sale could be styled "owner," my brother, the Chief Justice (MACDONALD, C.J.A., now Chief Justice of British Columbia), at p. 408, saying:

MCPHILLIPS, J.A.

"On the hearing of the appeal the question came up as to whether the representation in the application that the plaintiff was the 'owner' of the land was a misrepresentation in view of the fact that he was a purchaser merely under agreement with the Soldier Settlement Board. We held that the word 'owner' in the circumstances was not a misrepresentation of his title, not because he had explained his title to the agent, but because he could fairly be described as such."

Then we have the case of *Chan* v. *C.C. Motor Sales Ltd.* (1926), 36 B.C. 488, affirmed in (1926) S.C.R. 485 at p. 491. Mr. Justice Newcombe delivered the unanimous judgment of the Court and that learned judge concluded his judgment by these words:

"Equity looks to the intent of the transaction rather than to the form, and the intent is made clear by the terms of the instrument."

Let us turn to the instrument in the present case, the agreement of the 9th of September, 1927. The respondents are stated to be the vendors, the Company the purchaser. The agreement provides for the sale of the timber to the purchaser and for all necessary purposes of the consideration of the present

case—as to the poles, two cents per lineal foot on each carload loaded and shipped, copies of invoices and shipping bills to be forwarded to the respondents. It will be noticed that payments were not to be made at the time of shipment but only after about the lapse of a year from the date of the agreement, *viz.*, the 1st of July, 1928, a minimum amount of $25,000 and in the following seven years a minimum amount of $50,000 a year and thereafter the minimum amount of $25,000 a year. Then it is clearly apparent that during this long time the company was entitled to go on and cut the timber and only make the stipulated payments and during the currency of the time to make sales and shipments of the timber as owners. How otherwise could the purchasers of the timber from the company get title to the timber so cut and shipped? It was not a consignment, say, to a bank, the purchaser from the company to pay the bank upon delivery, if the timber were shipped. This would be the method if the respondents were to ensure payment to them. That was not the transaction or agreement come to at all. The respondents sold the timber to the company and the company was the owner and entitled to make sales good and sufficient in law and purchasers from them were to get good title, likewise the appellant Bank here was entitled to view the company as the owner and deal with it as such and take the security authorized by the Bank Act. It is to be observed that the respondents were aware of this position of things as provisions are contained by way of their protection, notably, covenant (e) which reads as follows:

MCPHILLIPS, J.A.

"(e) In the event of any liens for wages, materials or otherwise being filed it will forthwith pay and discharge the same, and that it will furnish the vendors with a bond for the sum of Ten thousand dollars ($10,000) by some reputable company approved by the vendors for the protection of the vendors against woodmen's and other liens."

It is seen that a bond had to be furnished the company for the protection of the respondents against woodmen's and other liens. But this was not all the provision made by the respondents to protect themselves from loss, we find this further covenant whereby the party of the third part to the agreement, James Arthur Shaw, covenanted with the respondents in the following terms:

"The party of the third part by the execution by him of this agreement hereby guarantees the punctual and faithful observance and performance by

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA v. HODGES

the purchaser of all the covenants, terms and conditions contained in this agreement, and by the purchaser to be observed and performed and the payment of all moneys at any time payable by the purchaser to the vendors under the terms hereof. This guarantee shall not be revocable by notice or by reason of the death of the party of the third part, but it shall remain in full force and effect until the completion or other termination of this agreement. The liability of the party of the third part hereunder shall not be impaired or discharged by reason of any time or other indulgence granted by or with the consent of the vendors, or by reason of any arrangement entered into or composition accepted by them modifying (by operation of law or otherwise) their rights and remedies under this agreement."

That is to say, the respondents fully protected themselves against any losses they might sustain by the company doing what it was entitled to do, sell or otherwise charge or render subject to any charge or lien any of the timber cut under the terms of the agreement. Can there be any doubt of the legal position here—that the company was entitled to borrow from the appellant Bank and give the security authorized to be taken by a bank in such a transaction? In my opinion there can be no other answer but an affirmative one. Upon a close study of the agreement and consideration given to the whole transaction between the parties, the company became the owner of the timber and cutting the same was entitled to deal with it as owners, and sell and otherwise deal with it in any commercial way and in giving the security it did under the Bank Act to the appellant Bank, it proceeded in a manner permissible under the terms of the purchase of the timber, that is, the security must be deemed to be a valid security under section 88 of the Bank Act.

MCPHILLIPS, J.A.

It cannot be gainsaid—bearing in mind the words of the judgment in part hereinbefore quoted—what the "intent of the transaction" was in the present case, it was to give the company the absolute right to go out into the world and sell the timber authorized to be cut and to otherwise deal with it as its own, carrying with it the right to finance its operations in accordance with commercial usage and custom. To borrow money from a bank authorized by the law of the land to make advances upon the security of the timber in the course of carrying on its operations was a happening that must have occurred to the respondents, if not, should have occurred to them. In my opinion it did occur to the respondents, as we have seen, due provision was taken for their protection, *i.e.*, by way of bond and guarantee.

Section 89 (2) of the Bank Act is all-important in considering the position of the Bank in the present case, and no knowledge of the vendors' claim was brought home to the Bank. Further, it is to be remembered that counsel for the respondents in this appeal specifically disclaimed any claim by way of vendor's lien. This, of course, must be when it is pressed that the respondents always remained the owners of the timber. Unquestionably, the position must be that the company became the owners after the execution of the agreement of the 9th of September, 1927, and the company going into possession of the lands and cutting the poles thereon. Section 89 (2) of the Bank Act reads as follows:

"89. If goods, wares and merchandise are manufactured or produced from the goods, wares and merchandise, or any of them, included in or covered by any warehouse receipt, or included in or covered by any security given under section 88 of this Act, while so covered, the bank holding such warehouse receipt or security shall hold or continue to hold such goods, wares and merchandise, during the process and after the completion of such manufacture or production, with the same right and title, and for the same purposes and upon the same conditions, as it held or could have held the original goods, wares and merchandise.

"2. All advances made on the security of any bill of lading or warehouse receipt, or of any security given under section 88 of this Act, shall give to the bank making the advances a claim for the repayment of the advances on the products or stock, goods, wares and merchandise therein mentioned, or into which they have been converted, prior to and by preference over the claim of any unpaid vendor; but such preference shall not be given over the claim of any unpaid vendor who had a lien upon the products or stock, goods, wares and merchandise at the time of the acquisition by the bank of such warehouse receipt, bill of lading, or security, unless the same was acquired without knowledge on the part of the bank of such lieu."

MCPHILLIPS, J.A.

In *Mutchenbacker* v. *Dominion Bank* (1911), 18 W.L.R. 19 the Court of Appeal of Manitoba had a question similar to that which arises in this appeal to decide, and I think it is extremely useful and instructive to quote portions of the judgment of Perdue, J.A. (now Chief Justice of Manitoba). The first contention in the Manitoba case was a vendor's lien, but that is not claimed here. Perdue, J.A. at pp. 23-5, said:

"The second contention of the plaintiffs is founded upon the following clause in the agreement between them and McCutcheon for the sale of the timber berth: 'Provided that in each and every year during the currency of this agreement, all logs, lumber, laths, timber, etc., shall be deemed to be the property of the parties of the first part unless and until the party

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA v. HODGES

MCPHILLIPS, J.A.

of the second part shall have paid all arrears of principal and interest which may be due hereunder, and the party of the second part hereby covenants with the parties of the first part not to sell, assign, or transfer any such logs, lumber, timber, etc., until all arrears due as of such date are fully paid and satisfied.'

"In order to arrive at the meaning of the parties, the agreement must be regarded as a whole. The agreement recites that the plaintiffs, Asa and Herman Mutchenbacker, are the licensees of the timber berth in question and that it is free from incumbrance. The instrument then recites that the Mutchenbackers have agreed to sell, assign, and transfer their interest in the timber berth to McCutcheon for the sum of $19,000, payable in the manner mentioned. The agreement then states that the parties of the first part, the Mutchenbackers, agree to sell, and the party of the second part, McCutcheon, agrees to buy, the interest of the parties of the first part in the timber berth, for the above sum, payment to be made as set forth. Then follow covenants on the part of the purchaser to pay Crown dues on the lumber, etc., manufactured, ground rent, and the licensees' share of fire-guarding the timber, to make returns required by the Government, to keep books, etc., as required by the licence, and to guard against cancellation. It further provides that, if more than two and one half millions of feet of lumber is cut in any one year or season, the purchaser will pay the sum of $2 per thousand of the lumber cut over and above the aforesaid amount. There is a proviso that, if the berth is worked out before the expiration of the agreement, the balance of the purchase price and all notes given shall at once become due. Then follows the clause above set forth in full. Provision is made for enabling the vendors, on default by the purchaser, to determine the agreement by notice and for forfeiting the moneys already paid. Provision is also made for the entry by the vendors for the purpose of examining the berth and for their obtaining information as to the proper keeping of sale books, etc. There are several other provisions which do not affect the present case.

"Under this agreement the purchaser was let into possession of the timber berth, and he and his assignees, the McCutcheon Lumber Company, commenced to cut and dispose of the timber upon it.

"Now, what was the intention of the parties as expressed by this agreement? I think it is clear that the intention was to sell the timber berth to McCutcheon, who was to enter into possession of it, operate it, and sell the lumber manufactured from the timber growing upon it. The property in and ownership of the timber berth was intended to pass to McCutcheon, subject to the right of cancellation upon default, and subject to the other provisions contained in the written document. This would confer upon him and on his transferees an equitable estate in the timber berth and in the trees growing upon it. McCutcheon, therefore, became the owner of the growing trees until the vendors cancelled the agreement for default in payment of the purchase-money. That being so, how could the logs produced from these trees revest in the vendors upon being cut, so as to 'be deemed' or to become forthwith the property of the vendors as against purchasers for value from McCutcheon or from his transferees?

"While McCutcheon's assignees, the McCutcheon Lumber Company, were still the owners of the berth, under the equitable title conferred by the

vendor's agreement, the logs in question were cut and removed to the yards of the company. The logs thereupon became chattels and subject to the provisions of the Bills of Sale and Chattel Mortgage Act. The plaintiffs could prevent the application of that Act only by shewing that the ownership of the chattels had never passed out of them: *Ex parte Crawcour* [(1878)], 9 Ch. D. 419. Whatever effect the clause in question might have, as between the parties to the agreement, in regard to revesting the logs in the Mutchenbackers until they should be paid for, the defendants, as in incumbrancees for value in good faith, are protected by the combined effect of the provisions of the Bills of Sale and Chattel Mortgage Act and of the Bank Act.

"I have endeavoured to interpret the agreement in question in accordance with the rules of construction adopted in *McEntire* v. *Crossley* (1895), A.C. 457.

"The appeal should be dismissed with costs."

It would seem to me that the decision in the Manitoba Court of Appeal covers the present case. The provision as to the property in the timber cut, *i.e.*, the poles, is quite similar and it was determined by the Manitoba Court of Appeal that the property in the timber cut was in the purchaser.

We have the learned judge proceeding in the present case solely on the ground of ownership, saying 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."

MCPHILLIPS, J.A.

With great respect to the learned judge, I cannot persuade myself that he arrived at a correct conclusion in holding as he did. The controlling authorities in my opinion are to the contrary, and fully establish that the Company was the owner and that the security held by the Bank is good and sufficient to entitle the Bank to the money in Court.

Upon full consideration of the able argument of Mr. *Macrae,* the learned counsel for the respondents, I cannot persuade myself that the present case presents any of the elements essential in establishing a pledge or a common law lien, entitling the respondents to the money in Court, being the proceeds derivable from the sale of the poles.

With great respect to the learned judge, the judgment should have been an affirmative answer to question 1 of the special case, which reads as follows:

"1. Whether the plaintiff has a valid security under section 88 of the

COURT OF APPEAL

1929

Oct. 22.

THE ROYAL BANK OF CANADA v. HODGES

Bank Act, and if so, whether it is entitled to payment of its claim of $18,638.15 and interest, or to the extent of the amount in the Special Account in priority to the claim of the said defendants."

It therefore follows that, in my opinion, the Bank will be entitled to the money in Court, *viz.*, the $9,500, together with the costs here and below, that is, the appeal, in my opinion, should be allowed.

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

Appeal allowed.

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

Solicitors for respondents: *J. K. Macrae & Duncan.*

FISHER, J. (In Chambers)

1929

Sept. 9.

REX v. GUSTAFSON

REX v. GUSTAFSON.

Criminal law — Conviction—Habeas corpus—Certiorari—Evidence—Admissibility as to magistrate's jurisdiction—Costs.

On an application for a writ of *habeas corpus* with *certiorari* in aid, if the jurisdiction of the magistrate is conceded, the formal conviction is conclusive and excludes from consideration, on *certiorari*, the sufficiency of the evidence supporting the conviction as to the facts alleged, but extrinsic evidence may be received to shew that an accused person pleading "not guilty" in a Court with limited territorial jurisdiction was deprived of the right to have it established in the course of the evidence as a condition precedent to the exercise of its jurisdiction that the charge was one triable in the Court purporting to deal with it.

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

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 23rd of August, 1929.

Statement

Benjamin Taylor, for the accused.

Wasson, for the Crown.

9th September, 1929.

FISHER, J. (In Chambers)

1929

Sept. 9.

REX v. GUSTAFSON

FISHER, J.: This is an application on behalf of one Isaac Gustafson for a writ of *habeas corpus* and for a writ of *certiorari* in aid thereof for the following amongst other reasons:

"1. That the said Isaac Gustafson having been charged with selling liquor in the City of Vancouver, and tried before the deputy police magistrate for the said City of Vancouver, it was not proved that the offence alleged was committed within the territorial jurisdiction of the said deputy police magistrate.

"2. That the conviction and the warrant for commitment are invalid in that the said deputy police magistrate had no power to make the said conviction and warrant for commitment without such proof that the offence alleged was committed within the territorial jurisdiction over which he is authorized to adjudicate."

Counsel on behalf of the applicant relies on *Rex* v. *Montemurro* (1924), 2 W.W.R. 250 in which case it was held that the result of what is commonly known as the *Nat Bell* case (*Rex* v. *Nat Bell Liquors Ld.*) (1922), 2 A.C. 128; (1922), 2 W.W.R. 30, while very far-reaching in some ways, did not deprive the applicant of the right to seek his discharge by proving a want of jurisdiction *dehors* the record. On behalf of the Crown it is submitted that the applicant in this case has not proved a want of jurisdiction by an affidavit stating simply that he pleaded "not guilty" and that, at the trial, it was not proved that the alleged offence was committed within the territorial jurisdiction of the said deputy police magistrate. It is submitted that the affidavit must go further and say that the offence, if it occurred at all, did not occur within the jurisdiction of the presiding magistrate. The reply of counsel for applicant is that in the absence of any evidence at the trial, as to the locality of the alleged offence, the suggested affidavit could not be made by an innocent person who knows not where nor whether the alleged offence has occurred. However, the objection is pressed by the Crown that the conviction as it stands is conclusive as against such affidavit and the decision in the *Nat Bell* case, *supra,* is relied on and reference is made especially to the following passages (p. 165):

Judgment

"Their Lordships are of opinion that the provisions of the Canadian Criminal Code and of the Alberta Liquor Act have not the effect of undoing the consequences of the enactment of a general form of conviction; that the evidence, thus forming no part of the record, is not available material on which the superior Court can enter on an examination of the proceedings

FISHER, J. (In Chambers)

1929

Sept. 9.

REX v. GUSTAFSON

below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, and that it is not competent to the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact which had to be sworn to in order to render a conviction a right exercise of his jurisdiction."

At pp. 142-3:

"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."

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. 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."

Judgment

It would seem however that in these passages the principles laid down are based on the assumption that the jurisdiction of the magistrate has been established. This view of the matter may also be fairly gathered from a lengthy reference to the judgment in the case of *Rex* v. *Chin Yow Hing* (1929), [41 B.C. 214]; 2 W.W.R. 73 where the Court, in referring to the *Nat Bell* case says at p. 74:

"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."

This would seem to be a fair inference also from other applicable portions of the judgment in the *Nat Bell* case as follows (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, or want of qualification in the justices who acted, 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."

At p. 158:

"This misapprehension of the meaning of the Judicial Committee's opinion is probably due to the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior Court, which it is within the competence of that Court to inquire into and to determine, and facts essential thereto which are only within the competence of the superior Court. As Lord Esher points out in *Reg.* v. *Income Tax Commissioners* (1888), 21 Q.B.D. 313, 319, 57 L.J., Q.B. 513, if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard; but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior Court. On the other hand the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as part of the general inquiry into the charge which is being heard."

At p. 156:

"That the superior Court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise."

Judgment

Perhaps it is in view of these portions of the said judgment that it is apparently conceded by the Crown that the present application should be granted if it were suggested that the depositions shewed that the offence had occurred outside the jurisdiction of the magistrate but it is argued that it should not be if the depositions are only silent as to where it occurred. This argument would mean that in a trial before a magistrate whose territorial jurisdiction is limited the less said about the territory in which the offence occurred the better. It might also be pointed out that in the *Nat Bell* judgment, at p. 141, the statements are made that the charge was one "which was triable in the Court which dealt with it, and . . . . no conditions precedent to the exercise of his jurisdiction were unfulfilled." As I read the case it holds that, if the jurisdiction of the magistrate is conceded, then the formal conviction is conclusive and excludes from consideration the sufficiency of the evidence supporting the conviction as to the facts alleged therein but the result of the case is not so far-reaching as to prevent the receipt

FISHER, J. (In Chambers)

1929

Sept. 9.

REX v. GUSTAFSON

of extrinsic evidence to shew that an accused person pleading not guilty in a Court with limited territorial jurisdiction was deprived of the right to have it established in the course of the evidence as a condition precedent to the exercise of its jurisdiction that the charge was one triable in the Court purporting to deal with it, a right which has long been conceded, otherwise a metropolitan magistrate might be found exercising extra-territorial jurisdiction without question. See *The King* v. *Chandler* (1811), 14 East 267; *Rex* v. *Oberlander* (1910), 15 B.C. 134 at p. 138.

Judgment

I hold, therefore, that I am entitled in this matter to receive extrinsic evidence to shew that there was an absence of any evidence to prove that the magistrate had jurisdiction. The application will, therefore, be granted.

There will be no costs. See *Rex* v. *Volpatti* (1919), 1 W.W.R. 358; *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C. 284; *Rex* v. *Liden* (1922), 31 B.C. 126; *Matson* v. *Leask* (1919), 2 W.W.R. 59; *Rex* v. *McLane* (1927), 38 B.C. 306.

Application granted.

MACKEY v. MACKEY AND MAGUR.

FISHER, J. (In Chambers)

1929

Aug. 28.

MACKEY v. MACKEY

Practice—Ex parte injunction—Appearance of defendant—Not made known to judge—Motion to dissolve—Costs.

If a defendant has entered an appearance in an action, the plaintiff, on applying for an *ex parte* injunction, should inform the judge of that fact, otherwise, the defendant, on a motion to dissolve, is entitled to his costs in any event.

APPLICATION to dissolve an injunction. Heard by FISHER, J. in Chambers at Vancouver on the 23rd of August, 1929. Statement

Fleishman, for plaintiff.
Fillmore, for defendant.

28th August, 1929.

FISHER, J.: Application of plaintiff, to continue until trial an injunction order made herein on August 12th, 1929, granted. Liberty to apply in case trial not expedited. Costs of this application reserved to be disposed of by trial judge or by further order if no trial.

Application of defendant William Magur, to dissolve injunction and to set aside order allowing amendment of writ of summons, refused. In a case such as this where a defendant has appeared, the plaintiff, on applying for an *ex parte* injunction, ought to inform the judge of the fact. *Mexican Company of London* v. *Maldonado* (1890), W.N. 8 referring to *Harrison* v. *Cockerell* (1817), 3 Mer. 1. This rule was not complied with and the defendant William Magur who had appeared should have his costs of his application in any event. Judgment

Application dismissed.

FISHER, J.
(In Chambers)

1929

Sept. 12.

REX
v.
WONG YORK

REX v. WONG YORK.

Certiorari — Summary conviction — Depositions taken by stenographer— Return to writ—Whether depositions in custody of magistrate— Whether payment of fees for transcript necessary before return is made —Crown Office rule 36—R.S.B.C. 1924, Cap. 245, Secs. 37 and 51.

When a magistrate has the evidence taken by a stenographer appointed by himself under section 37 of the Summary Convictions Act and the depositions are ordered to be returned on *certiorari*, the depositions or transcripts must be deemed to be in the custody or power of the magistrate.

Neither payment to the magistrate of the fees for the transcript nor a decision as to who should pay are conditions precedent to the allowance of a writ of *certiorari* or compliance therewith by the magistrate. Entering into the recognizance required under Crown Office rule 36 by the applicant, is all that is necessary for the issue of the writ and compliance therewith.

Statement

APPLICATION by defendant for an order that the magistrate make a return to the Court of the depositions taken on the trial in answer to a writ of *certiorari*. A stenographer was appointed by the magistrate to take the evidence pursuant to section 37 of the Summary Convictions Act and the magistrate refused to make a return of the depositions until the stenographer's fees for transcript were paid. Heard by FISHER, J. in Chambers at Vancouver on the 7th of September, 1929.

Bray, for the application.
Harold B. Robertson, K.C., contra.

12th September, 1929.

Judgment

FISHER, J.: In this matter a writ of *certiorari* was issued out of the Supreme Court on August 9th, 1929, directed to Harry G. Johnston, Esquire, Stipendiary Magistrate, in and for the County of New Westminster, and reading in part as follows:

"We being willing for certain reasons that all and singular proceedings at trial, depositions, orders and records of conviction made by you whereby Wong York was on the 7th day of August, 1929, convicted by you for that he (as is said) did on the 19th day of July, 1929, at Delta Municipality in the County of Westminster in the Province British Columbia, unlawfully market potatoes, grown in that part of British Columbia above described,

of the 1929 crop, To WIT, Fifty eight (58) sacks of potatoes of the said crop, without having first attached a tag supplied by the said Mainland Potato Committee of Direction, to each and every sack contrary to the regulations of the Mainland Potato Committee of Direction and section 15, chapter 54, being the Produce Marketing Act of British Columbia, 1926-27, and amendments thereto, and whatever warrant, authority or commission you then had to try and convict the said Wong York as aforesaid and perform the acts and things precedent thereto, be sent by you before us, do command you that you do send forthwith under your seal before us in the Supreme Court of British Columbia at the Court House at Vancouver, B.C., all and singular the said proceedings at trial, depositions, orders, records of conviction, warrant authority or commission with all things touching the same, as fully and perfectly as have been made by you, and now remain in your custody or power, together with this our writ, that we may cause further to be done thereon what of right and according to the law we shall see fit to be done."

It appears that on August 24th the magistrate made return of the following documents, *viz.*, original information, original conviction Exhibits 1 to 14, and copy of notes. The depositions taken at the trial and referred to in the writ of *certiorari* were not returned and an application is now made on behalf of the said Wong York for an order that the magistrate should forthwith make return to this Court of the said depositions or in the alternative that he be declared in contempt for failure to make such return.

Judgment

It is first submitted on behalf of the magistrate that the depositions are not in his custody or power and that the writ calls upon him to return only what is in his custody or power. It is not suggested however in the return that has been made by the magistrate that the depositions had been forwarded elsewhere according to law but the suggestion is that the depositions are not in the custody or power of the magistrate, but in the custody or power of a stenographer who asks payment of approximately $40 for the transcript. The stenographer, however, was appointed by the magistrate himself to take the evidence pursuant to the authority given under the Summary Convictions Act, R.S.B.C. 1924, Cap. 245, Sec. 37, which reads as follows:

"(1.) The Justice shall cause the depositions to be written in a legible hand, and on one side only of each sheet of paper on which they are written: Provided that the evidence or any part of the same may be taken in shorthand by a stenographer, who may be appointed by the Justice, and who before acting shall, unless he is a duly sworn official stenographer, make oath that he shall truly and faithfully report the evidence.

FISHER, J. (In Chambers)

1929

Sept. 12.

REX v. WONG YORK

"(2.) Where evidence is so taken it shall be sufficient if the transcripts be signed by the Justice and be accompanied by an affidavit of the stenographer or, if the stenographer is a duly sworn Court stenographer, by the stenographer's certificate that it is a true report of the evidence."

It is apparent, therefore, that instead of causing the depositions to be written the magistrate had the evidence taken by a stenographer appointed by himself and in such case, where the depositions are ordered to be returned on *certiorari,* I would hold that the depositions or transcripts must be deemed to be in the custody or power of the magistrate.

It is further submitted, however, on behalf of the magistrate that the writ of *certiorari* should not be allowed to remove the depositions or oblige the magistrate to return them until the magistrate has been paid the fees for same and section 51 of the Summary Convictions Act and the tariff of fees in the schedule thereto is referred to, said section reading as follows:

"The fees mentioned in the tariff appended to this Act and no others shall be and constitute the fees to be taken on proceedings before Justices under this Act."

Judgment

I have already held in this matter that Crown Office rule (Civil) No. 36 applied and that a condition precedent to the allowance of the writ of *certiorari* herein was that the party prosecuting such *certiorari,* in this case the accused Wong York, should enter into a recognizance in the sum of $100 as provided by said rule. On behalf of the magistrate it is admitted that Wong York has now entered into the required recognizance but it is apparently contended that there is another condition precedent, *viz.,* the payment to the magistrate of the fees for the transcript. On behalf of the applicant it is submitted that the entering into the recognizance is all that is required for the allowance of the writ and that the writ must be forthwith complied with.

The magistrate may have some remedy under the Summary Convictions Act or otherwise to compel payment of the fees for the transcript but, in my opinion, his remedy is not by way of a refusal to comply with the writ until payment or until a decision as to who is liable for such payment. I do not think that a decision as to such liability could be given on the present application or on the material now before the Court. In any event I hold that neither payment to the magistrate of the fees

FISHER, J. (In Chambers)

1929

Sept. 12.

REX v. WONG YORK

for the transcript nor a decision as to who should pay has been made a condition precedent to the allowance of the writ or compliance by the magistrate therewith. In my opinion the condition precedent in this matter was fulfilled when the applicant entered into the required recognizance. It is admitted that the writ of *certiorari* herein was properly issued and the party suing out the writ, having entered into a proper recognizance, such as the rule requires, is entitled now to call upon the magistrate to allow it. I think this is a fair inference also from the case of *Rex* v. *Dunn* (1799), 8 Term Rep. 217, cited by counsel on the previous application to quash the allowance of the writ herein. The magistrate should, therefore, forthwith return to this Court the depositions as ordered by the writ of *certiorari*. Order accordingly.

Judgment

Order accordingly.

REX v. CHOW KEE.

COURT OF APPEAL

1929

Oct. 1.

REX v. CHOW KEE

Criminal law — Wounding with intent to murder — Conviction — Appeal— Motion to admit new evidence.

Gladys Ing, who was the wife of the accused, but had not been living with him for four years, left a Chinese theatre on Columbia Avenue, Vancouver, at about nine o'clock in the evening with a companion, Ah Cum, and turned north towards Pender Street. On reaching an alley just north of the theatre, Ah Cum being two or three paces ahead of her, Gladys Ing turned to cross Columbia Avenue. Before reaching the middle of the street she was struck on the head with an axe from behind and knocked down. She stated in evidence that she looked around and recognized the accused as he was about to strike her. Two witnesses (Chinamen) also recognized the accused when in the act of striking her, one being at the door of the theatre, above which was a light and the other on the opposite side of Columbia Avenue across from the theatre door. After striking the girl the attacker dropped the axe and ran up the alley. The girl Ah Cum could not be found to give evidence on the trial. The accused was convicted. On appeal the appellant moved to admit the evidence of Ah Cum, whose affidavit, read on the motion, disclosed that she was a few feet ahead of Gladys Ing.

COURT OF APPEAL

1929

Oct. 1.

REX v. CHOW KEE

When she heard her scream she turned around and saw Gladys Ing on the ground. She had a clear view of the street and with the exception of Gladys Ing, herself, and three other Chinese girls, who had gone ahead there was no person on Columbia Avenue south of Pender Street but there was evidence that one W. S. Chow who acted as interpreter for the defence had interviewed Ah Cum on behalf of the prisoner prior to the trial.

Held, that as it appears the interpreter for the defence had interviewed Ah Cum on behalf of the prisoner prior to the trial her evidence is not newly-discovered evidence and does not come within the rule, but even if her evidence were accepted at its full value it would not furnish ground for a new trial, as the injured girl identified the accused and she was corroborated by two witnesses who were unshaken in their evidence both having clearly identified the prisoner whom they knew. The appeal should therefore be dismissed.

APPEAL by accused from the decision of GREGORY, J. of the 26th of April, 1929. The accused was convicted of wounding Gladys Ing Ah Ghun, with intent to murder her, and was sentenced to five years' imprisonment. The wounded girl was the accused's wife but they had separated and she was working in an alley off Pender Street. On the evening of the 11th of February, 1929, Gladys Ing, with a Chinese girl friend who worked in a restaurant with her, went to a Chinese theatre on Columbia Avenue, a street running south off Pender Street. They left the theatre about 9 o'clock in the evening to return to the restaurant where they were employed, the girl friend proceeding north towards Pender Street a little ahead of Gladys Ing. When they had proceeded as far as an alley coming into Columbia Avenue from their right just beyond the theatre, Gladys Ing turned to cross the street. After taking a few paces she was struck on the head with an axe and knocked down. The attacker then ran up the alley. Gladys Ing said she heard someone following her and she turned round and saw Chow Kee when he was about to strike her. Immediately after being knocked down she got up and ran past her girl friend and continued to run until she arrived at the restaurant where she was employed. The girl friend heard Gladys Ing scream and turning around saw her on the ground but she did not see the attacker nor did she see two witnesses (Chinamen) who testified that they were close by and recognized the accused as he struck his wife with the axe. The girl stated positively there was no one on Columbia

Statement

Avenue but herself, the wounded woman and two Chinese girls who had been at the theatre and had gone towards Pender Street ahead of them.

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

J. W. deB. Farris, K.C. (*Ian Cameron,* with him), for appellant: The defence is an *alibi*. The Crown brought as witnesses two Chinamen who testified that they were near the scene of the attack and recognized the accused when he struck his wife. The girl Ah Cum was with Gladys Ing coming from the theatre. Every possible effort was made to find her for the trial but she could not be found and her evidence should be accepted now. When she heard Gladys Ing (who was just behind her) scream she looked around and she stated positively no one was on the street except herself, Gladys Ing and three Chinese girls who had gone ahead of them. This evidence should be admitted: see *Mulvihill* v. *Regem* (1914), 49 S.C.R. 587. The learned judge did not charge the jury as fully as he should have on the question of an *alibi*: see *Rex* v. *Paris* (1922), 38 Can. C.C. 126.

W. J. Baird, for the Crown: The accused and his wife separated in 1925, but the accused was continually trying to see her, which brought about altercations between them. The corroborative evidence is complete and it would be very dangerous to allow in evidence such as that of Ah Cum which is negative. She should have been produced at the trial and the evidence that there was due diligence exercised in trying to find her is unsatisfactory. As to the defence of *alibi* see *Rex* v. *Pope* (1909), 2 Cr. App. R. 22; *Rex* v. *Trevarthen* (1912), 8 Cr. App. R. 97. Argument

Farris, in reply, referred to *Rex* v. *Haskins* (1928), 50 Can. C.C. 412; *Rex* v. *Vye* (1925), 36 B.C. 200; 44 Can. C.C. 249; *Rex* v. *Cumyow* (1925), 36 B.C. 435; 45 Can. C.C. 172 at pp. 175-7; *Rex* v. *Shandro* (1923), 38 Can. C.C. 337 at pp. 342-3.

Cur. adv. vult.

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

COURT OF APPEAL

1929

Oct. 1.

REX v. CHOW KEE

MACDONALD, C.J.B.C.: No question of law is raised in the notice of appeal; the only grounds being "questions of mixed law and fact."

A motion was made to admit new evidence alleged to have been discovered since the trial, which, if denied, will end the appeal.

The charge against the prisoner was one of attempted murder of his wife, Gladys Ing Ah Ghun, whom I shall hereinafter call Ah Ghun. It occurred on a public street, when the prisoner struck Ah Ghun with an axe, whereupon he ran into an alley and disappeared. The assault took place close to the Chinese Theatre on Columbia Street, at about 9.15 in the evening.

The new evidence of which admission is sought, is that of Ah Cum, who makes an affidavit that she was just ahead of Ah Ghun at the time of the assault and hearing a scream looked back and saw Ah Ghun get to her feet and run towards her; she thought Ah Ghun had slipped on the icy street; she did not realize that an assault had occurred. It is proposed by the evidence of Ah Cum to discredit the evidence of the Crown witnesses, a purpose foreign to the rule. These witnesses were Ah Ghun herself, who gave a clear account of the occurrence; George Shou, a Chinese working-man, who was at or near the front of the theatre, and plainly saw what happened, and Kook Foo, a Chinese fruit merchant, who was standing at the doorway of the Canton Cafe on the other side of the street from the theatre. Both these witnesses were unshaken in their evidence and both clearly identified the prisoner whom they knew. Ah Cum, in her affidavit, said that when she heard Ah Ghun scream she looked back; there were no men on the street in the vicinity at that time. Ah Cum cross-examined on this affidavit, in answer to the question:

Judgment

"Well, did you take any notice around the front of the theatre when you looked back?"

said:

"I did not take particular notice. There is nobody there, at least I did not see anybody there, just the few girls who were walking along there."

Even if we were to accept this evidence at its full value it would not furnish ground for a new trial. It would therefore seem unnecessary to refer to the other circumstances shewing that the appellant has utterly failed to bring himself within the

rule but as this phase of the matter was very strenuously presented in argument, I shall refer briefly to it.

The evidence is not newly-discovered evidence. The affidavit of the appellant's counsel, Mr. *Cameron,* and the cross-examination of Ah Cum, make this perfectly clear. At the preliminary inquiry Ah Ghun mentioned one of the girls who was close to her when the attack was made. This girl, I am satisfied was Ah Cum. Mr. *Cameron* says that this girl was afterwards interviewed on the prisoner's behalf. It is noticeable that Mr. *Cameron* does not identify her nor give her name, but in Ah Cum's cross-examination she says she was interviewed several times by a Mr. W. S. Chow, who appears to have assisted the defence as interpreter. One of these in which she says she told Chow all she knew about the case, took place long before the trial. Chow was also the interpreter employed by the defence in obtaining her affidavit.

Judgment

The motion to admit the evidence fails and the motion by way of appeal should be dismissed.

CLARK v. McKENZIE.

Nuisance—Injunction—Damages—Construction of building—Encroachment on another's land—Mistake—Possession.

Where an owner of land had in good faith erected valuable buildings upon his own property and it afterwards appeared that his walls encroached slightly upon his neighbour's land he will not be compelled to demolish the walls which extend beyond the true boundary line but should be allowed to retain it upon payment of reasonable indemnity.

ACTION for damages and for a mandatory injunction. The defendant's building encroached three and a quarter inches on the plaintiff's lot and the plaintiff brought action for an injunction to compel the removal of the building. Tried by MACDONALD, J. at Vancouver on the 23rd of October, 1929.

Statement

Miss *Paterson,* for plaintiff.
Gillespie, for defendant.

MACDONALD, J.: In this action, the plaintiff seeks to obtain damages for trespass, and also a mandatory injunction, directing

Judgment

MACDONALD, J.

1929

Oct. 23.

CLARK v. MCKENZIE

the defendant to forthwith pull down and remove so much of her building, as is erected upon and encroaches upon a lot alleged to be the property of the plaintiff.

It appears that at least fifteen years ago a building was erected on lot 25, block 237, district lot 526, according to plan No. 590 deposited in the Land Registry office in Vancouver. This land is situate in this city. I may assume, for the purpose of this action, that the City of Vancouver became owner of the neighbouring lot, namely, lot 26, and, in due course, gave what is termed "an option to purchase" to the plaintiff, dated 14th January, 1929. According to this agreement, the plaintiff obtained the right to exercise an option to purchase within a certain time, the said lot 26. The purchase price of the lot was stated to be $1,050, but, in reality, the plaintiff would be required to pay $350 as an initial payment to secure the option. This should be taken into account in determining the purchase price. For the said sum of $350 he obtained only an option to purchase, and there is no provision in this agreement whereby the plaintiff is entitled to possession of the property. So that, as far as legal title is concerned, there has been no evidence adduced at the trial to shew that the plaintiff is owner of the said lot 26; as a matter of fact, he does not so allege in his statement of claim, but simply states that he is in possession of the said lot.

Judgment

Evidence as to possession, as an actual fact, entitling him to redress if possession is interfered with, is rather meagre. There was no actual physical possession of the property by the plaintiff. It is true that, accepting his evidence in that connection, he bought the lot with a view to erecting a building upon it at an early date, and had plans prepared for that purpose. Subsequently he had a survey of the property, and then it was that the discovery was made that the building situate on lot 25 encroached to a slight extent on lot 26. And then, after some negotiations, the plaintiff brought this action for the purpose that I have already indicated.

At the time that the survey took place, shewing the encroachment to the extent, mentioned during the evidence, namely, three and a quarter inches on the front of the lot, and varying to some extent to a lesser degree of encroachment at the rear end of the lot, I can assume that the defendant, or her predecessor in

title, was not aware that this encroachment existed. In other words, the building was erected, through a mistake, beyond the confines of the lot owned by the party so constructing the building.

Under ordinary circumstances, one would expect that with a mistake of this kind, when discovered, a solution of the difficulty without a lawsuit and heavy expense might be accomplished. I think a party, in the position of the plaintiff, in the words of Cozens-Hardy, L.J., in *Home and Colonial Stores, Limited* v. *Colls* (1902), 1 Ch. 302 at p. 311, though applied to ancient lights, should not "be fanciful or fastidious: he must recognize the necessity of give and take in matters of this nature." It is not out of place for me to say, that in my opinion, in a growing city where people build in a block which, while it has been surveyed, still there may have been an error, or the stakes showing the different lots may have been moved, mistakes of this kind might occur. They should be easily adjusted without the difficulty which is presented in this case. Again, it very often happens that a person constructing a house in a new locality, erects a fence, and the neighbouring owner in turn desires to build a house, and the fence line has to be determined; that also, I should think, is adjustable without any difficulty. Here, however, the facts are quite different. The encroachment was trivial to the plaintiff desiring to build, although it was amplified during the trial, while the said encroachment would materially affect the owner of the building, if she were called upon to destroy part of it, in order to satisfy the demand of the plaintiff.

Judgment

Now, dealing with the first point as to title, I am quite satisfied that title has not been shewn, which would obviate the necessity of dealing with the other position, namely, possession. I think possession, as I have already mentioned, has not been established in as complete a manner as one would desire, but, if I were to dispose of the case on the ground that there is neither title nor possession shewn, the result would be that there would be further litigation over this very trivial dispute, because the plaintiff could establish his position by making further payments and securing title or solidify his position by actual possession of the property. So, while, as I have already intimated, the

MACDONALD, J.

1929

Oct. 23.

CLARK v. MCKENZIE

evidence of possession is not so complete as might have been requisite, still I do not feel disposed to decide the matter on that basis.

The next point then to consider is, whether it being assumed that the plaintiff's rights have been and are now invaded by this encroachment, whether the invasion or interference of such rights is to be settled and compensated, by the payment of money. Would it be an adequate remedy? Plaintiff apparently so considered.

A number of cases have been cited, and I think that the situation is summed up in a case, to which I will presently refer. The facts are that a payment of $50, as compensation, was mentioned, and was tendered by the defendant through her agent, and refused. The payment of $50, having in view that the plaintiff would only pay $1,400 for the lot, would be ample for the amount of three and a quarter inches, if that encroachment were even carried to the end of the lot. Evidence has been given that the purchase price of $1,400 was beyond the market price, but I am assuming, with reference to this case, that this is a fair price, and worthy of consideration in estimating the value of the portion of the lot so encroached upon.

Judgment

The plaintiff, on the contrary, while refusing the offer of $50, made, through his solicitor, a demand for $500. This, I consider, a most exorbitant claim to make, and is simply taking advantage of a situation which was likely created in an innocent way, and has existed for years without objection from the adjoining owner. Plaintiff has shewn that "he only wants money." If I thought for a moment that the slight encroachment had been intentional, even though the plaintiff was not the owner of the property at the time, I might take a different view. I repeat that the demand of $500, to my mind, caused the defendant to conclude that, although the encroachment existed and could not be remedied for that amount, it would be better to submit her rights to the Court than to pay such amount, or to remedy the encroachment at double that amount. The offer to accept $500 as damages being refused, it is contended by plaintiff that delay is not a bar and that the Court has, upon the facts, no jurisdiction to award damages where an injunction is sought. That the result would be in effect an involuntary conveyance from one party to another of a piece of property. The

position is that the plaintiff seeks to have the removal take place, irrespective of cost, while the defendant says in effect, "I have been there for a number of years and I desire to make proper compensation for the land I have thus innocently taken instead of removing a portion of the building which is encroaching upon the plaintiff's property."

Without discussing the cases at any length, I will simply read a portion of Kerr on Injunctions, 6th Ed., p. 40:

"The jurisdiction to grant a mandatory injunction is exercised with caution and is strictly confined to cases where the remedy by damages is inadequate for the purposes of justice, and the restoring things to their former condition is the only remedy which will meet the requirements of the case."

Dealing with this last proposition of law, it seems to me that the payment of $50 would meet the requirements of the case. I refuse to accept the suggestion or evidence, if such existed, that an architect, having drawn plans for a building with 25 feet frontage, cannot reduce, in a very short time, that building so as to have a frontage of only 24 feet and some odd inches, especially in view of the fact that it is not to be built on such a scale as may be usual in the centre of the city, nor is it to be a residence requiring certain lines of exterior design, but is to be an ordinary store building with apartments above.

Judgment

Then dealing again with the proposition presented by counsel for the plaintiff, that the Court has no right to invade another person's property or compel, as it were, a sale, I quite agree with that contention generally speaking, but the very authority cited in support of that proposition shews that there are exceptions to the rule. I am reading from *Cowper* v. *Laidler* (1903), 2 Ch. 337 at p. 341. Buckley, J., in that case, after referring to *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. 287 at p. 316, and other cases on the point, emphasizes the point taken by counsel for the plaintiff as follows:

"To refuse to aid the legal right by injunction and to give damages instead is in fact to compel the plaintiff to part with his easement for money."

I might digress, for a moment, to say that to my mind the cases involving interference with ancient lights and encroachment of one building on another are hardly of the same nature, and might not fully govern, except that where you find principles laid down they should be followed by our Courts. The learned justice then proceeds:

MACDONALD, J.

1929

Oct. 23.

CLARK v. MCKENZIE

"The Court has no right to compel him to do so. . . . If the injury be trivial and the damages would be measured by a very small sum, say 20*l.* or 5*l.* or 6*l.* the Court may, where there is jurisdiction, give damages instead of an injunction."

Cases are cited on the point. They may all refer to interference with ancient lights and air, but the principle of allowing damages in lieu of injunction is the same, *cf. Delorme* v. *Cusson* (1897), 28 S.C.R. 66, where the encroachment was greater than here.

Now, the case of *Shelfer* v. *City of London Electric Lighting Company, supra,* lays down a guide to follow, where you give damages instead of granting an injunction. I will read a portion of that case, which is very instructive, on the point I am discussing. A. L. Smith, L.J., at p. 322, says:

"Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *prima facie* entitled to an injunction. There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section. In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out. In my opinion, it may be stated as a good working rule that—(1.) If the injury to the plaintiff's legal rights is small, (2.) And is one which is capable of being estimated in money, (3.) And is one which can be adequately compensated by a small money payment, (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction:—then damages in substitution for an injunction may be given."

Judgment

Reading these four working rules as applicable to the situation here presented, I find on the evidence that, in my opinion, the plaintiff should have accepted the $50 offered to him and avoided the expense of a lawsuit. It would be an "adequate remedy." This amount was not only tendered, but paid into Court, so there will be judgment dismissing the action. The plaintiff will be entitled to payment of the $50 in Court, and the defendant is entitled to costs.

Action dismissed.

REX v. THOMPSON *ET AL.*

MACDONALD, J.

1929

Oct. 9.

REX v. THOMPSON

Criminal law—White person in possession of intoxicant in abode of Indian off reserve — Conviction—Application to quash—Costs—R.S.C. 1927, Cap. 98, Sec. 126 (c).

Section 126 (*c*) of the Indian Act provides that every one who "(*c*) is found in possession of any intoxicant in the house, tent, wigwam, or place of abode of any Indian or non-treaty Indian or of any person on any reserve or special reserve, or on any other part of any reserve or special reserve; shall, on summary conviction," etc.

Held, that a white person found in possession of an intoxicant off a reserve, in a place where an Indian may be living, temporarily or permanently cannot be convicted under this portion of the Act. The words "on any reserve" with the subsequent words of the subsection govern and if a person does not come within them, no offence has been committed.

APPLICATION to quash a conviction under section 126 (*c*) of the Indian Act. Heard by MACDONALD, J. at Vancouver on the 9th of October, 1929. Statement

T. W. Brown, for the application.
Bray, for the magistrate.
Pratt, for the Attorney-General.

MACDONALD, J.: Robert Thompson was convicted, by the police magistrate of the City of Prince Rupert, that on Sunday, August 4th, 1929, he was found in possession of an intoxicant, to wit, rum, in the place of abode of one Susan Leighton, an Indian, of the Metlakatla band, the place of abode being room 6 of the Western Rooms situated on Fraser Street, in Prince Rupert, County of Prince Rupert, contrary to section 126, subsection (*c*) of the Indian Act, R.S.C. 1927, Cap. 98.

He, in conjunction with the others, who were alleged to have thus committed an offence and similarly convicted, seeks to have the conviction quashed on the ground that upon its face, it does not shew an offence coming within the provisions of the Act referred to. Judgment

The whole question turns upon the construction to be placed upon subsection (*c*) of section 126, of the Indian Act reading in part as follows:

MACDONALD, J.

1929

Oct. 9.

REX v THOMPSON

"(c) is found in possession of any intoxicant in the house, tent, wigwam, or place of abode of any Indian or non-treaty Indian or of any person on any reserve or special reserve, or on any other part of any reserve or special reserve."

The point is, as to whether a person found in possession of an intoxicant off a reserve, in a place where an Indian may be living temporarily or permanently, can be properly convicted under this portion of the Act. The Act is clear upon its face. There is no attempt made to bring Thompson and the others within subsection (c) in so far as he, as a white man, may be found guilty of having rum in the place of abode of an Indian on a reserve; or to put it the other way, there is no reference made to such place of abode, being either on or off a reserve.

The question then is whether a "person" (who is defined by the Act to be "all individuals other than Indians") can be so convicted.

Now, in construing the Indian Act, one cannot overlook the fact that the mischief sought to be remedied is that of preventing the use of intoxicants by Indians. This object is indicated by the Act generally and especially by the provisions of section 126.

Judgment

Is this subsection (c) then to be construed as creating an offence, if a white man happens to be in the abode of an Indian off a reserve, perchance for a perfectly legitimate purpose, and has in his possession liquor which has been properly purchased? Instances might be related where this would be a most drastic law to be invoked and I have intimated some of these during the argument. Is it intended, as it were, to outlaw Indians living off a reserve and associating with white people, so that they could not be invited to visit at the home of any other person, where liquor is possessed by the host or any of his guests?

Then again, is an Indian domestic seeking employment, and thus making her abode with a white person, to be handicapped in her field for employment because such white person could not, without committing an offence, have an intoxicant either in his possession, or that of any one of his family?

I am not considering the facts pertaining to the conviction and have not perused the depositions, because under the oft-referred-to *Nat Bell* case (1922), 2 A.C. 128; 91 L.J., P.C. 146; (1922), 2 W.W.R. 30, one is not allowed to consider

whether there is evidence or not upon which a conviction should have been found.

Referring then to a consideration of this subsection, I bear in mind that punctuations are not a governing factor in construing an Act. I also do not overlook the fact that every Act is deemed to be remedial and should receive such fair and large and liberal construction in its interpretation as would best insure the object and attainment of the Act according to its intent, meaning and spirit.

If I were to be governed by the paramount mischief to be remedied by the Act, I might place a liberal construction upon this particular provision, but I must bear in mind other circumstances and especially that the Act is penal and intended to create a statutory offence. So I should not give it too strict a construction.

Penal statutes must be construed strictly. Blackburn, J., in *Willis* v. *Thorp* (1875), L.R. 10 Q.B. 383 at pp. 387-8; 44 L.J., Q.B. 137, said:

"When the Legislature imposes a penalty the words imposing it must be clear and distinct."

Pollock, C.B., in *Attorney-General* v. *Sillem* (1863), 2 H. & C. 431 at p. 510; 33 L.J., Ex. 92, said: Judgment

"I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law."

Marshall, Ch. J., in *United States* v. *Wiltberger* (1820), 5 Wheat. 76 at p. 95, said that this rule was

"founded on the tenderness of the law for the rights of individuals, and on the plain principle, that the power of punishment is vested in the legislative, not in the judicial department. It is the Legislature, not the Court, which is to define a crime, and ordain its punishment."

Compare Maxwell on Statutes, 7th Ed., p. 244:

"The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself."

In my opinion said subsection (*c*), coupled with the surrounding subsections of section 126, was intended to create an offence (as defined by the Act) if any "person" were found "in possession of any intoxicant in the house, tent, wigwam, or place of abode of any Indian or non-treaty Indian, or of any person

MACDONALD, J.

1929

Oct. 9.

REX v. THOMPSON

on any reserve or special reserve." Shortly put, the words "on any reserve" with the subsequent words of that subsection govern the whole subsection, and if a "person" does not come within such construction, no offence has been committed.

Having this opinion and regretting I have not more time at my disposal to better extend my remarks, I find that the conviction of Thompson is faulty as not shewing an offence on its face and should be quashed. The same result will follow in the other applications.

As to costs counsel frankly admits that this is a case of first impression, so there will be no costs.

Brown: Yes, I realize that was the impression your Lordship had, but I want to argue the matter.

[Argument by counsel.]

Judgment

THE COURT: Now, unless the magistrate has acted, I may say, in a very peculiar manner (and he has not in this case) I am very reluctant and have refused over and over again to give costs against a magistrate. You see the position in which it would place any magistrate. He would probably resign.

Brown: He is amply protected by the statute.

Bray: He is a servant of the Crown.

THE COURT: More than that, I think that while I should give the subject, who has been fined, the benefit of the construction which I have placed upon a statute of that kind, it is quite arguable and has proceeded upon proper lines. I feel it would be improper to award costs against a magistrate who is endeavouring to do his duty. You may draw up the orders.

Application allowed.

QUINSTROM v. PETERSON.

COURT OF APPEAL

1929

Oct. 14.

QUINSTROM v. PETERSON

Practice—County Court—No reply to counterclaim filed—Judgment without reference to counterclaim—Motion after judgment to file reply to counterclaim and vary judgment—Order made—R.S.B.C. 1924, Cap. 53, Sec. 83—County Court Rules, Order V., r. 21.

In an action in the County Court to recover a balance due on the construction of a dwelling-house, the defendant counterclaimed for the cost of completing the house. The plaintiff filed no reply to the counterclaim and the action proceeded, the issue raised on the counterclaim being fought out on the trial. Judgment was given for the plaintiff's claim without any mention of the counterclaim. The defendant gave notice of appeal and then on motion of the plaintiff, before the trial judge, the plaintiff was granted leave to file a reply to the counterclaim and the judgment was amended by adding thereto the dismissal of the counterclaim.

Held, on appeal, affirming the decision of NISBET, Co. J. (MCPHILLIPS, J.A. dissenting), that the appeal should be dismissed.

Per MACDONALD, C.J.B.C.: That when judgment was entered the judge had no power to reopen it. He was *functus officio*. The original judgment as entered should stand.

Per MARTIN, J.A.: The judge had power to make the amendment under both the statute and the rules, and the appeal should be dismissed.

Per GALLIHER, J.A.: The question of the counterclaim was gone into as well as that of the claim and the decision in favour of the plaintiff involves the consideration of the counterclaim. The principle laid down in *Scott* v. *Fernie* (1904), 11 B.C. 91 applies, and the appeal should be dismissed.

Per MACDONALD, J.A.: On what took place in the course of the trial the appeal should be dismissed without reference to the order that was made after notice of appeal was given.

APPEAL by defendant from the decision of NISBET, Co. J. of the 18th of June, 1929. The plaintiff's action was for the sum of $220 being the balance due for services rendered and material supplied in respect to the construction of a house by the plaintiff for the defendant at defendant's request. The defendant entered a dispute note and counterclaimed for the sum of $220 being cost of completion of the house and for inconvenience and delay after the plaintiff had refused to do any further work on the house. On the 18th of June, the action was tried, the plaintiff not having entered any reply to the

Statement

COURT OF APPEAL

1929

Oct. 14.

QUINSTROM v. PETERSON

counterclaim, and judgment was given for the plaintiff with costs. Notice of appeal was filed on the 2nd of July, 1929, and on the 19th of July the plaintiff gave notice of an application to the judge in Chambers at Nelson for an order giving the plaintiff leave to file a reply to the defendant's counterclaim in the action and that the plaintiff be at liberty to amend the judgment entered in the action by adding thereto the following words:

"And it is further adjudged that the counterclaim be and the same is hereby dismissed with costs."

The order was then made granting the plaintiff leave to file a reply to the counterclaim and amending the judgment as applied for in the notice of motion. An affidavit filed on the motion for leave to file a reply to the counterclaim disclosed that at the trial counsel for the plaintiff asked for an extension of time to file a reply to the counterclaim but as the counterclaim was in reality a defence the learned judge treated the action as if all matter had been put in issue and did not consider it necessary to file a reply to the counterclaim.

Statement

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

A. H. MacNeill, K.C., for appellant: The plaintiff's claim is for the balance due for constructing a dwelling. A dispute note and counterclaim were filed but there was no reply to the counterclaim and judgment was given for the plaintiff's claim without any reference to the counterclaim. After the trial an order was made setting aside the judgment. This he cannot do.

Argument

Wismer, for respondent: The question of the counterclaim was gone into fully on the trial. There was no necessity for a counterclaim.

MacNeill, in reply: The defendant went on and completed the house, the cost of which we were entitled to deduct, but no effect was given to this. The case does not come within the slip rule as regards the order made after judgment.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The learned judge decided that the plaintiff was entitled to $200 balance on his contract, and gave judgment for that amount. He said nothing about the counter-

claim. There is nothing to shew that he gave a decision upon the counterclaim. The judgment was entered without any mention of counterclaim. When that judgment was entered, the judge had no power to reopen it. He was *functus officio*. He had no power to add to or change it. The proceedings were so irregular, and the amendment made without authority, that the original judgment must stand stripped of the amendment. The slip rule was inapplicable, and the Court had no inherent jurisdiction to deal with the counterclaim in the way it did.

MacNeill: I appealed from the order refusing the judgment on the counterclaim on the proceedings at the trial.

MACDONALD, C.J.B.C.: Are you willing to have the original judgment restored?

MacNeill: As long as the counterclaim is opened up. That is the ground of my appeal. The portion of the learned judge's judgment which affects my client is this. He has refused me judgment on my counterclaim. I want to be in position to try my counterclaim. It is dismissed now. It was refused at the trial.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: According to my judgment the learned judge had no power to interfere with the original judgment by adding to it.

McPHILLIPS, J.A.: Will that portion be struck out?

MACDONALD, C.J.B.C.: No, I would not strike it out. I would simply say the original judgment must stand as it was entered, and the appeal dismissed.

The appeal is dismissed.

MARTIN, J.A.: I also agree the appeal should be dismissed, although on somewhat different grounds. I think the learned judge had power to make the amendment to his original order at the trial which he did make, pursuant to the amending powers contained in section 25 of the Act and Order VII., r. 6, and also he had additional power to cope with the situation under section 77 of the Act which says the practice and procedure of the Supreme Court may be invoked in cases not specifically provided for. That, of itself, would cover the objection that the learned judge had no jurisdiction. I refrain, for the moment, as it is not necessary, to consider the question of the learned judge hav-

MARTIN, J.A.

COURT OF APPEAL

1929

Oct. 14.

QUINSTROM v. PETERSON

ing inherent jurisdiction in his Court of record, because that is what the County Court is. I should be inclined to think a Court of record—the County Court—would have the same jurisdiction to see that its record is proper evidence of its decision as it would have to punish contempt *ex facie* and protect its records from abuse or scandal. Such being the case, *viz.*, that by statute and by rule the learned judge had jurisdiction to make the order he did, I think, or I am inclined to think, without expressly deciding the matter without further investigation, that he also had power inherently; however, as there was power both by the statute and the rule the appeal should be dismissed on that ground alone in any event.

MARTIN, J.A.

But there is another ground on which the appeal should be dismissed, *i.e.*, that the uncontradicted affidavit of the respondent's solicitor shews this case was fought out on issues of real substance, as rule 7 says, before the judge below. That affidavit has not been attacked in this Court, nor could it be because the learned judge himself, under very exceptional circumstances, adopted the statement made therein, therefore we have the unrefuted statement of that learned judge that the affidavit contains the truth of what happened before him. If that be so then the case is brought within the old Full Court decision of *Scott* v. *Fernie* (1904), 11 B.C. 91, often followed by this Court, and the decision of the Privy Council in *Victoria Corporation* v. *Patterson* (1899), A.C. 615. On those two grounds certainly, without what I think must be said in favour of the third ground, the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal on the ground last mentioned by my brother MARTIN. The principle laid down in *Scott* v. *Fernie* (1904), 11 B.C. 91 governs. The trial went on and proceeded on the basis as if the counterclaim had been in. The question of counterclaim was gone into as well as the question of the claim, and the decision in favour of Quinstrom certainly involves the consideration of the counterclaim.

On the other point mentioned, my present view is as stated by the Chief Justice, in fact it has always been my impression, but I do not definitely decide the point.

McPHILLIPS, J.A.: In my opinion the appeal should be allowed. I consider the learned judge acted without authority in amending the judgment because at that time judgment had been taken out and duly entered and he could not in the face of a mandatory provision of the statute enter judgment and dismiss the counterclaim because the mandatory provision of the statute was that a reply not having been put in, judgment would go upon the counterclaim.

I think it a proper case to proceed under rule 6 of the Court of Appeal Rules which reads:

"If upon the hearing of an appeal it shall appear to the Court that a new trial ought to be had, it shall be lawful for the said Court, if it shall think fit, to order that the verdict and judgment shall be set aside and that a new trial shall be had."

MCPHILLIPS, J.A.

I consider, in the interest of justice, a new trial should be had, otherwise, it seems to me, we are precluding parties who may have a good cause of action having that action tried.

MACDONALD, J.A.: I base my judgment, in dismissing the appeal, on what took place in the course of the trial as disclosed by affidavit, and without reference to the order made after notice of appeal was given.

MACDONALD, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *R. J. Clegg.*
Solicitor for respondent: *H. W. McInnes.*

COURT OF APPEAL

1929

Oct. 22.

AICKIN v. J. H. BAXTER & CO.

Practice—Costs—Appeal—Costs to follow event—Costs of issues.

Under contract between the two parties the plaintiff was to carry on logging operations in two distinct areas, namely, Stillwater and Texada Island. An action for damages for breach of contract and for an accounting was dismissed. On appeal the judgment was upheld in respect of the Stillwater operations but that the Texada operations had been wrongfully terminated and the action was remitted to the Court appealed from for assessment of damages in respect to the operations there. The damages were assessed in a substantial amount and on appeal the amount assessed was reduced in a substantial sum (see 41 B.C. 353). On motion to settle the minutes of judgment:—

Held, that the plaintiff is entitled to the general costs of the action and the defendants are entitled to the costs of the issue on which they succeeded, *i.e.*, the Stillwater branch of the case.

AICKIN *v.* J. H. BAXTER & CO.

MOTION to the Court of Appeal to settle the minutes of the judgment of the Court delivered on the 4th of June, 1929 (see 41 B.C. 353). Heard by MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A. at Vancouver on the 2nd of October, 1929.

Statement

Walkem, for the motion: There were two distinct causes of action, namely, the Stillwater operations and the Texada Island operations. On the Stillwater operations we succeeded on the trial and that was never disturbed. They succeeded on the Texada Island operations. We are entitled to our costs on the issue on which we succeeded: see *Seattle Construction and Dry Dock Co.* v. *Grant Smith & Co.* (1919), 26 B.C. 560; *Reid, Hewitt and Company* v. *Joseph* (1918), A.C. 717.

Argument

J. A. MacInnes, contra: We were substantially the successful party in the action and entitled to the general costs.

Walkem, replied.

Cur. adv. vult.

On the 22nd of October, 1929, the judgment of the Court was delivered orally by

Judgment

MACDONALD, C.J.B.C.: There were two branches to the

action, one claiming an accounting of the Stillwater transaction, the other was a claim for damages for breach of contract, what is known as the Texada Island contract. In the first, the defendant succeeded. Mr. Justice MORRISON, who was the trial judge, decided the defendants were entitled to a balance on the taking of the accounts of $205. He, however, dismissed the other branch of the case, namely, the Texada Island contract. On appeal to the Court of Appeal, we sustained his judgment in respect of the accounting, but ordered a new trial on the Texada Island branch. That trial resulted in judgment for the plaintiff for a substantial amount. An appeal was taken from that to the Court of Appeal, and it is in respect of that appeal that the question of the distribution of costs arose. Having perused those several transactions and judgments, the Court is of opinion the plaintiff is entitled to the general costs of the action and the defendants are entitled to the costs of the issue on which they succeeded, namely, the Stillwater branch of the case.

Judgment

Order accordingly.

FISHER, J.

1929

Oct. 10.

KILPATRICK v. KILPATRICK.

Divorce—Custody of children—Children living outside Province—Domicil—Jurisdiction.

KILPATRICK v. KILPATRICK

On petition, by a wife, for divorce and for the custody of her children, where the father's domicil is in British Columbia but the mother is living in the Province of Alberta with her children:—

Held, that the domicil of the children is the same as that of the father during his lifetime and there is jurisdiction to make an order granting the custody of the children to the petitioner.

Statement

PETITION for divorce by Flossie Ellen Kilpatrick and for the custody of her children. Heard by FISHER, J. at Vancouver on the 10th of October, 1929.

R. H. Tupper, for the petitioner.

No one, *contra.*

10th October, 1929.

Judgment

FISHER, J.: In this matter I made a decree absolute dissolving the marriage between the petitioner and the respondent subject to the filing of further documents *re* the marriage and such documents have now been filed.

I reserved the question of the custody of the four infant children of the marriage as they are not living within the Province of British Columbia but with their mother the petitioner in the Province of Alberta. The respondent was proven on the hearing of the petition to be domiciled in the Province of British Columbia and Mr. *Tupper,* counsel for the petitioner, who is asking for the custody of the children, all of whom were born in Alberta, has referred me to a number of authorities (which seem to be conclusive) cited on p. 115 of the 4th edition of Dicey's Conflict of Laws, in support of the statement that the domicil of the infant children is, during the lifetime of the father, the same as and changes with the domicil of the father. Hall on Divorce, p. 513, says:

"In suits for divorce it may be premised that a petitioner must have a domicil, and nothing short of a domicil in its full and complete sense, situate within the jurisdiction of the Court, in order that the decree of the Court may be a valid decree."

The domicil of the petitioner being within the jurisdiction of the Court and a decree absolute being granted, the custody of the infant children, if any, would appear to be dealt with as incidental thereto. See section 20 of the Divorce and Matrimonial Causes Act. The domicil of the petitioner here is that of her husband. See Hall, *supra,* p. 514 and cases there referred to. In my opinion the petitioner is entitled to the custody of the infant children and there will therefore be a decree absolute dissolving the marriage and giving the custody of the said children to the petitioner. At the same time attention might be called to the following passage in Eversley on Domestic Relations, 4th Ed., 628-9:

"Where an infant is within the jurisdiction of the Court of Chancery for whom a guardian has been appointed in a foreign country (whether by act of parties or some competent tribunal), difficult questions sometimes arise as to the rights and powers of the foreign guardian within the jurisdiction of the Court of Chancery. This conflict arises from the fact that the appointment of a guardian is territorial, that is, confined to the jurisdiction of a country in which he is appointed, and cannot, except by the comity of nations, be recognized by foreign countries. Mr. Dicey, in his work on Domicil sums up very accurately the strict rule of law on the subject. He says: 'A guardian appointed under the law of a foreign country (called hereinafter a foreign guardian), has no direct authority as guardian in England; but the English Courts recognize the existence of a foreign guardianship, and will, in their discretion, give effect to a foreign guardian's authority over his ward.' This rule coincides with the opinion of Story, who holds that 'notwithstanding that a foreign guardian has no absolute rights as such in a foreign jurisdiction, the fact that he is such is entitled to great weight in the Courts of another when called upon to determine, in their discretion, to whose custody a minor child shall be committed; and if it appears for the best interests of the child that he should be under the care and custody of a guardian appointed in a foreign State, the Court may so decree, even though another guardian has been appointed in the State where the minor subsequently is found.' Thus, it may be said that foreign guardians as such have no rights here in England, their powers and functions are confined to the limits of the country in which they have been appointed; and the Court of Chancery has the power to appoint its own guardians for any infant within its jurisdiction, who is without a parent or guardian, whether the infant does or does not possess property within the jurisdiction."

Judgment

Petition granted.

COURT OF APPEAL

1929

Oct. 23.

WATT v. REID

WATT v. REID.

Negligence—Automobiles—Collision—Intersection of cross roads—Right of way—Contributory negligence—B.C. Stats. 1925, Cap. 8, Sec. 2.

The plaintiff, driving his car north on Woodland Avenue in the afternoon, when crossing Napier Street came in contact with the defendant who was driving his car westerly on Napier Street. The defendant, who had the right of way, assumed the plaintiff would let him pass, but when 15 feet from the point of contact, seeing the plaintiff was trying to pass ahead of him, he tried to stop and at the same time turn his car north on Woodland Avenue. The plaintiff, going at 30 miles an hour struck the left side of the defendant's car and swerving, turned over in the ditch at the north-west corner of the intersection. The trial judge found both parties at fault and held the plaintiff liable for three-quarters of the damages and the defendant for one-quarter thereof.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (GALLIHER, J.A. dissenting), that the evidence supports the conclusion to which the trial judge has arrived and the appeal should be dismissed.

APPEAL by plaintiff from the decision of CAYLEY, Co. J. of the 16th of May, 1929, in an action for damages for negligence. At about one o'clock in the afternoon of the 18th of February, 1929, the plaintiff Watt, with one Birch as a passenger, was driving his motor-car north on Woodland Avenue in Vancouver. As he was crossing Napier Street he collided with the defendant who was driving his car westerly on Napier Street. The defendant stated he saw the plaintiff's car coming along Woodland Avenue but having the right of way he thought the plaintiff would let him pass and did not realize he would not do so until he was about 15 feet away. He then endeavoured to stop, at the same time turning north on Woodland Avenue to try to avoid him but the plaintiff was coming at about 30 miles an hour and he brushed the left side of the defendant's car sufficiently to send him over into the ditch on the north-west corner of the intersection. The learned trial judge found both parties to blame and under the Contributory Negligence Act decided that the plaintiff should pay three-quarters of the damages and costs and the defendant one-quarter.

Statement

The appeal was argued at Vancouver on the 22nd and 23rd

of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1929

Oct. 23.

WATT v. REID

Craig, K.C., for appellant: On the evidence the learned judge should have found that the plaintiff was appreciably ahead of the defendant and the defendant should have given way and let him pass: see *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512; *Acorn* v. *MacDonald* (1929), 3 D.L.R. 173 at p. 176; *Hanley* v. *Hayes et al.* (1925), 3 D.L.R. 782. Where there is ultimate negligence then the Contributory Negligence Act does not apply: see *McLaughlin* v. *Long* (1927), S.C.R. 303; *Walker* v. *Forbes* (1925), 56 O.L.R. 532; *Farber* v. *Toronto Transportation Commission, ib.* 537.

Argument

Durrant, for respondent, referred to *Harper* v. *McLean* (1928), 39 B.C. 426 and Ont. Stats. 1924, Cap. 32, Sec. 3.

MACDONALD, C.J.B.C.: I think this is a very clear case. In fact, I think if I had been deciding it in the first place I should have held that the defendant (respondent) was not guilty of any negligence at all.

The plaintiff (appellant) was proceeding in defiance of a statutory rule which requires him to give the right of way to one coming from the right. The defendant was proceeding, relying upon that rule. He might very justly have expected that the plaintiff coming from his left and being in full sight of him, without any obstruction to vision, would have respected his right of way and would have given it to him.

MACDONALD, C.J.B.C.

The defendant only realized that he was not going to be given the right of way when he was within 15 feet of the intersection, and was unable to avoid a collision.

The judge finds that the plaintiff was coming at an excessive rate of speed.

Now this was the situation. The defendant was within 15 feet of the intersection—of his line of travel, the plaintiff was within 30 or 40 feet of it.

Defendant says:

"When I realized that the plaintiff was not slowing down at all I immediately put on my brakes and tried to save the situation and I turned to the north and tried to escape but he was coming at 30 miles an hour [as he

COURT OF APPEAL

1929

Oct. 23.

WATT v. REID

puts it] and he touched my car, and he crossed in front of my car and went off into the ditch."

On those facts and on that situation how could the learned judge have come to any other conclusion than that to which he came? The only blame that he attributes to the defendant is to be found in his reasons for judgment: "Where I blame him is that he allowed himself to come within 15 feet of the intersection without knowing [it]." That is to say, without seeing "that there was a car coming rapidly towards him on his left."

MACDONALD, C.J.B.C.

Now, that is when I think there was no fault at all. He was 15 feet from entering on the intersection and the other man was farther back, coming at an excessive rate of speed. I cannot see any blame to be attributed to him so long as he did what the learned judge says he did, all in his power to prevent the accident when he saw it was imminent.

In these circumstances, I think we ought not to interfere with the learned trial judge's division of the damages. There is no cross-appeal on this and, therefore, we cannot relieve the defendant from the judgment, but must sustain his finding.

The appeal must be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I am of the same opinion.

Once it was decided that the Contributory Negligence Act, Cap. 8 of 1925, applies to this case (as I think it does), then no other question need be considered except that referring to the apportionment of the different degrees of fault. And as to that, I refer to the judgment of Lord Shaw in *The Clara Camus* (1926), 17 Asp. M.C. 171 at p. 173 and the citation given there in the salutation thereof, which I gave recently in the Admiralty Court, in the case of *Fred Olsen & Co.* v. *The "Princess Adelaide"* (1929), 41 B.C. 274.

Lord Shaw points out there the difficulty of applying the statute as he states:

"There may be 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 on 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."

Such being the case it would be only under the very clearest circumstances where we can say the learned judge, in the exercise of that, had taken the wrong view (and there is nothing in this case which would warrant us in going to that length) and, therefore, the adjudication of the learned judge should not be disturbed.

Therefore the question does not really arise under the circumstances in this case at all, otherwise I would have been in favour of reserving the decision, if the authorities were conflicting at all, and in trying to harmonize them on that point.

MARTIN, J.A.

GALLIHER, J.A.: In deference to the same rule, the learned trial judge specifically states he does not decide the question of who came to the intersection first, and in my view of the case, a great deal depends upon that, and therefore the learned trial judge, not having found that, I am free to come to my conclusions on the facts as I view them.

I think the evidence is quite clear, as I view it, that the plaintiff came to the intersection first, that he proceeded along in his course upon that intersection in full view of the defendant when he was approaching with his car.

Having entered upon the intersection first and having proceeded what we may call a reasonable distance along that intersection, being all the time in view of the man who had not yet entered the intersection (as I find upon the evidence) he could, if he had chosen, stopped his car before he did enter upon the intersection, the fault of his not doing so in entering upon that intersection, with all visible that was to be visible, he is solely to blame for this accident, and my judgment will be that the plaintiff have judgment for the amount as found.

GALLIHER, J.A.

I do not know (because I have not compared it with the statement of claim) whether or not that was the same amount that the judge below found. But he should have judgment with costs, and there should be no apportionment at all, the defendant, in my opinion, being solely to blame for the accident, based, as I say, on my view and understanding of the evidence as to who entered that intersection first.

COURT OF APPEAL

1929

Oct. 23.

WATT v. REID

As I understand in the *Collins* case we decided the question of right of way, when a person who originally has the right of way discovers another car crossing the intersection at a point, before he reaches the intersection and which car has advanced appreciably on that intersection that any claim he may have to the right of way cannot then be urged.

MCPHILLIPS, J.A.: In my opinion the appeal must fail. I am willing to admit the plaintiff really made out a case if believed. The evidence that was adduced on the part of the plaintiff was, however, diametrically met by the defence and rival evidence is present in this appeal, that is, there are really two pictures of the occurrence presented to us. That being the case, where the Court of Appeal has before it rival evidence, it is not deemed to be the province of the Court to differ from the learned judge in the Court below, because he has had the opportunity of seeing the witnesses and observe their demeanour in giving their testimony.

A crucial point in the case was this: Who was first at the intersection? If the plaintiff was, unquestionably the defendant was at fault, because the defendant could have stopped, and it was his duty to have stopped. On the other hand the evidence of the defence is that the defendant was at the intersection first and the plaintiff was coming up at an excessive speed which, being believed, displaces the case for the plaintiff.

MCPHILLIPS, J.A.

Now being presented with such a case, what is the Court of Appeal to do? I think, following the authorities in the matter, we must refuse to disturb the finding of the learned judge in the Court below.

Lord Buckmaster said in *Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95 at p. 96:

> "But upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

Further the defendant's case is buttressed by independent evidence.

In my view, there was ample evidence to make out the defendant's case, and the defendant's case having been believed

by the judge below, I do not see how we could rightly interfere with the judgment of the Court below.

MACDONALD, J.A.: I think there is sufficient evidence to support the judgment of the Court below.

It has been suggested that we should discard the oral evidence in favour of the ocular evidence as indicated by marks on the car. The marks would appear to support Mr. *Craig's* contention.

However, when a car careens across the street and upsets, it is difficult to know accurately just how the marks on the car were made. I do not think we would be justified in discarding the oral evidence because the marks would appear to point to a different conclusion.

I think the proper apportionment was made.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitor for appellant: *J. M. Macdonald.*
Solicitors for respondent: *Yarwood & Durrant.*

FISHER, J.

1929

Oct. 25.

METCALFE v. STEWART.

Malicious prosecution—Charge of stealing automobile—Reasonable and probable cause—Malice.

METCALFE v. STEWART

The defendant laid an information against the plaintiff on the 20th of December, 1928, for stealing his automobile. The plaintiff was arrested on a warrant and on being tried before a magistrate the charge was dismissed. In an action for malicious prosecution, the defendant swore that the plaintiff had taken the car out of his garage without permission although he admitted he gave the plaintiff the keys of the car but only for the purpose of examining the car and trying the engine. He further admits that when handing over the keys, the plaintiff gave him his telephone number. The plaintiff swore the defendant authorized him to take the car away from the garage to demonstrate it with a view to finding a purchaser. Shortly after the car was taken away it was damaged and brought to a garage for repairs.

Held, that there was no fraudulent taking of the car or conversion by the plaintiff and the defendant's account of what took place when he handed over the keys cannot be accepted. The defendant acted without reasonable and probable cause, and from the surrounding circumstances, coupled with want of reasonable and probable cause, malice must be inferred.

Statement

ACTION for malicious prosecution and false imprisonment. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 27th of September, 1929.

Fleishman, for plaintiff.
Donaghy, K.C., for defendant.

25th October, 1929.

Judgment

FISHER, J.: From the documents filed as Exhibit 1 herein it would appear that on the 20th of December, 1928, the defendant laid an information before a justice of the peace charging that at the City of Vancouver between the 6th of December and the 8th of December, 1928, Metcalfe (the plaintiff) did unlawfully steal an automobile, the property of H. A. Stewart (the defendant) and a warrant was issued by the justice of the peace pursuant to which the plaintiff was arrested, and he was subsequently tried summarily before H. C. Shaw, Esquire, the police magistrate for the said City, who dismissed the charge. The

plaintiff claims damages based upon the allegation in his statement of claim that the defendant, on the 20th of December, 1928, maliciously and without reasonable and probable cause, preferred a charge against the plaintiff of unlawfully stealing an automobile, British Columbia Licence No. 61-269, the property of the defendant, between the 6th and 8th of December, 1928, before a justice of the peace sitting at the City aforesaid, caused the plaintiff to be arrested on the said charge and to be sent up for trial on the same and prosecuted the plaintiff thereon in the police Court before the presiding magistrate there on the 9th of January, 1929, where the plaintiff was acquitted and the said charge was dismissed.

Counsel for the plaintiff at the trial stated that he was claiming for false imprisonment as well as for malicious prosecution but if it was so intended it would have been better if the statement of claim had kept the two causes of action distinct. See Bullen & Leake's Precedents of Pleadings, 8th Ed., pp. 433 and 522. The distinction between these two causes of action and the difference between the acts of ministerial and judicial officers of the law were pointed out in *Austin* v. *Dowling* (1870), L.R. 5 C.P. 534; 39 L.J., P.C. 260 and commented on by Stephen in his book on Malicious Prosecution, p. 122, and in this case I would hold that the defendant is not liable to an action for false imprisonment for though he set the criminal law in motion it was a judicial officer whom he set in motion and it cannot be said here that the acts of such officer were ministerial only.

Judgment

As to the action for malicious prosecution it is contended by the defendant's counsel that in such an action the plaintiff must prove that he was innocent of the charge for which he was prosecuted. The judgment of Bowen, L.J., in *Abrath* v. *North Eastern Rail. Co.* (1883), 11 Q.B.D. 440 at p. 455, would appear to lay down this proposition though it may be noted that Mr. Stephen in his book, at p. 108, says that he knows of no other authority for such. In the case at Bar it was established that the innocence of the plaintiff was pronounced by the tribunal before which the accusation was made but it is argued that some aspects of the case may have been overlooked. The defendant himself still insists that the plaintiff had taken his (*i.e.*, the defendant's) car out of his garage without his permis-

FISHER, J.

1929

Oct. 25.

METCALFE v. STEWART

sion though he admits that he gave the plaintiff the keys of the car and in answers to questions says as follows:

"What did you give him the keys for? To go in the car, the same as you would look at a house, to look at the inside of a house."

"Your suggestion is you just gave him the keys to look at the car? Yes.

"And to be able to open the doors? Open the doors and look at the car. If he had asked me to try the car I would give him that permission but he did not ask that."

"What did you think he was going to do with the keys? I thought he would look into the car, probably start the engine.

"And after that what would he do? He would naturally bring the keys back into the house."

"What arrangements did he make with you as to when he would give the keys back?" Well I figured he would bring the keys right back into the house.

"But nothing was said about that? Not a thing that I remember."

The defendant says that from the day he gave the plaintiff the keys of the car he had not seen him at all until after the plaintiff was arrested nor did he see his car until the day he swore out the information on the 20th of December, 1928. It was on the 6th of December that the defendant gave the plaintiff the keys and no information about the matter was furnished the police or other authorities until the day the information was sworn out. The plaintiff, on the other hand, says that the defendant authorized him to take the car away from the garage to demonstrate it with a view to finding a purchaser. It is admitted by the defendant that the plaintiff gave him his 'phone number at the time he took the car away. Under the circumstances I cannot accept the defendant's account of what happened at the time he gave the plaintiff the keys and find that the plaintiff was authorized to take the car away as claimed by him.

Judgment

Mr. *Donaghy,* however, on behalf of the defendant, strenuously contends that in any case, whether the car was or was not in the plaintiff's lawful possession in the first place, the plaintiff was guilty of statutory theft later on in handing the car over to the witness Rutledge who got the car from the plaintiff on Saturday, December 8th, and used it over the week-end for joy-riding. The car was damaged while in use by Rutledge and sent to a garage for repairs. Counsel for the defendant relied on the case of *Rex* v. *Vanbuskirk* (1921), 35 Can. C.C. 203 where it was held that a fraudulent taking of a motor-car without

colour of right with intent to deprive the owner thereof temporarily is statutory theft. The facts here would seem somewhat unusual as the plaintiff was apparently paid $5 by Rutledge but there would not be much, if any, pecuniary gain to the plaintiff from the transaction after payment for the oil and gas that would be used in the joy-riding over a week-end and, although I find it hard to understand why the plaintiff should ask or receive $5 from Rutledge in payment of oil and gas if the object was to have the car demonstrated with a view to finding a purchaser, I cannot find that there was any fraudulent taking or conversion on the part of the plaintiff and would hold therefore that the plaintiff has sustained the burden if cast upon him with reference to proof of his innocence.

As to whether or not there was a want of reasonable and probable cause for the prosecution I think that the plaintiff has proven the want of such. As I have already found, the defendant himself gave the plaintiff permission to take the car away and I am satisfied that nothing then or thereafter known to the defendant constituted justification for the prosecution. Admittedly the plaintiff had given the defendant his 'phone number and when the defendant wished to enquire about his car he was able to get through the 'phone number given, first a friend of the plaintiff, then the wife of the plaintiff, and finally the plaintiff himself. The defendant apparently got some information about the car from the friend but complains that he was unable to get any information from the plaintiff's wife who might easily not know anything about the particular business in question. In any event, however, the plaintiff was advised that the defendant was enquiring for him and the defendant admits that the plaintiff himself 'phoned him but says he did not give him much definite information and promised to 'phone him again the next day and did not do so. I think the plaintiff was disturbed on account of the damage to the car and hoped to have it fixed up before talking very much about it. The plaintiff frankly admits he made a mistake in not immediately notifying the defendant about the accident to the car. The defendant says he asked the plaintiff over the 'phone if he took the car. He says he wanted to know what kind of explanation he would give for taking the car. He says he was waiting for the plaintiff

Judgment

FISHER, J.

1929

Oct. 25.

METCALFE v. STEWART

who he says he felt was a thief, to 'phone him the next day. At the same time the defendant says in one part of his evidence that he did not know who the thief was. His exact words in another place are:

"I did not want to be too hard on this man, and to have an explanation from him and give him a little time and find out what was the matter with the man whether he was a thief or what he would be that would take my car in that way."

All through the defendant is apparently persisting in his position that the plaintiff had taken his car from his garage without his permission and says that, when the plaintiff did not 'phone him the next day he went looking for his car and having found the car in or near a repair garage had him arrested when he found out that he really took the car there. The defendant says that he believed that the plaintiff had stolen his car though he says that he had met the plaintiff a couple of years before that and knew nothing wrong about him. He knew where the plaintiff lived, had seen his wife there and should have arranged to see the plaintiff himself or make further enquiries. I do not think that the defendant honestly believed at any time that the plaintiff had stolen his car. It seems to me that the defendant was acting without reasonable and probable cause. It must be proved, however, that the defendant acted maliciously: see *Jones* v. *Eckley* (1928), 40 B.C. 75 at p. 79.

FISHER, J.

On the question of malice counsel for defendant cited *Brown* v. *Hawkes* (1891), 2 Q.B. 718 but in that case there was a finding of honest belief which I have found did not exist here. *Scott* v. *Harris* (1918), 14 Alta. L.R. 143 is also cited and it is stoutly contended that malice is different from want of reasonable and probable cause and is a state of mind which should not be inferred here. As pointed out, however, by MACDONALD, J.A. in *Manning* v. *Nickerson* (1927), 38 B.C. 535 at p. 553, one is at liberty—but not bound—to infer malice from the want of reasonable and probable cause and, if I interpret properly the view of MACDONALD, J.A. at p. 555, apparently concurred in by MARTIN, J.A. inferences as to malice may also be drawn from the evidence of the defendant given at the trial. As already pointed out the defendant at the trial insisted that the plaintiff had taken his car without his permission. I do not see how he

could honestly adhere to such a position and from this and the surrounding circumstances, coupled with the want of reasonable and probable cause, I would infer malice.

The plaintiff is, therefore, entitled to succeed and I would allow him $300 general damages and $150 special damages being amount paid for defence on charge. Judgment accordingly for $450 with costs.

Judgment for plaintiff.

FISHER, J.

1929

Oct. 25.

METCALFE v. STEWART

IN RE DAVENPORT AND MALE MINIMUM WAGE BOARD.

MURPHY, J. (In Chambers)

1929

Oct. 28.

IN RE DAVENPORT AND MALE MINIMUM WAGE BOARD

Wages—Licentiates of pharmacy—Male Minimum Wage Board—Mandamus —"Profession" not included in "occupation"—R.S.B.C. 1924, Cap. 193, Secs. 8 and 36—B.C. Stats. 1929, Cap. 43, Sec. 17.

On the ground that statutes which limit common law rights must be expressed in clear and unambiguous language an application by licentiates of pharmacy for a *mandamus* to compel the Board under the Male Minimum Wage Act to fix a minimum wage for licentiates of pharmacy was refused.

Pharmacy is described as a profession in the Act and the word "occupation" in section 17 of the Male Minimum Wage Act does not include "profession" clearly and without ambiguity as required by the principle above stated. [Reversed on appeal].

APPLICATION by certain licentiates of pharmacy for a *mandamus* to compel the Board under the Male Minimum Wage Act to fix a common wage for licentiates under the said Act. Heard by MURPHY, J. in Chambers at Victoria on the 22nd of October, 1929. Statement

Davey, for the applicants.
Haldane, for the Board.
Crease, K.C., for the Victoria Pharmacists.
Hogg, for the Vancouver Pharmacists.

MURPHY, J. (In Chambers)

1929

Oct. 28.

IN RE DAVENPORT AND MALE MINIMUM WAGE BOARD

28th October, 1929.

MURPHY, J.: I would refuse the *mandamus* on the ground that to grant it would be to infringe the principle that statutes which limit common law rights must be expressed in clear unambiguous language. Halsbury's Laws of England, Vol. 27, p. 150 and authorities there cited.

Freedom of contract is a right jealously guarded by the common law. The Male Minimum Wage Act, where applicable, greatly curtails, if indeed it does not destroy, this right.

The applicants herein are licentiates of pharmacy duly authorized to practice pharmacy under the Pharmacy Act. This art is in said Act described as a profession (section 8 and section 36). It is in addition, in my opinion, unquestionably a "profession" within the meaning of that word as used in modern English speech. Its practitioners are consequently members of a profession.

Section 17, the governing section of the Male Minimum Wage Act reads:

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

Judgment

The next question therefore is, does the word "occupation" include "profession" clearly and without ambiguity as required by the legal principle above cited? I would say it does not. Used loosely as it frequently is, it would, but accuracy in the use of English would, I think, require pharmacy to be described as a profession, not as an occupation. As stated, the Legislature has so described it. If therefore the Legislature intended to interfere with freedom of contract in the professions it could have put the matter beyond question by using the word.

Again, if the Male Minimum Wage Act applies to one profession, it must apply to all. "Wages" under the Male Minimum Wage Act is thus defined:

"'Wage' or 'wages' includes any compensation for labour or services, measured by time, piece, or otherwise."

Members of professions, especially when young, frequently give their services gratuitously or for nominal remuneration, in order to gain experience. To put a money value on this experience would seem to be an impossible task, yet if the Act applies that is what the Board would be called upon to do under section

4 thereof. Further, "wages" so set by the Board must by section 4 be set for all employees in the occupation dealt with and at a rate applicable to all. Yet I think it obvious that the value of experience may and indeed must vary with the individual concerned. Section 6 does indeed give power to the Board to grant exemptions from payment of set wages but only in the case of "any casual employee, part time employee, apprentice employee, or employee handicapped by reason of advanced age or physical infirmity." Clearly, I think those words cannot extend to members of a profession *qua* such membership.

The consequences of action by the Board with regard to professions might prove so serious to the public that if the Legislature intended them it would, I think, have used the apt word "profession" in defining the scope of the Act. Hospitals, for instance, might well find it impossible to accept medical interns. Youthful medical men would thus be prevented from securing what I think may be said to be experience essential to them. Hospitals would be crippled to some extent by being deprived of the presence at all times of men who if not of mature experience, have at any rate, received a thorough medical education.

Judgment

The application is dismissed.

Application dismissed.

COURT OF APPEAL

1929

Oct. 29.

HEALMAN v. PRYCE

HEALMAN v. PRYCE.

Automobile—Sale of—Conditional sale agreement—Promissory note attached for purchase price payable in monthly instalments—Clause providing that all payments became due on default in payment of any instalment—Default—Seizure of car—Notice of sale—Action—Sale of car—Right of action for balance of purchase price—R.S.B.C. 1924, Cap. 44, Sec. 10—B.C. Stats. 1929, Cap. 13, Sec. 3.

Under a conditional sale agreement the plaintiff sold the defendant an automobile for $1,165.50. Attached to the agreement was a promissory note made by the plaintiff for payment of the instalments with a clause that in the event of default in payment of an instalment, all payments become due and payable. The defendant was in default as to the second payment on the 23rd of September, 1928. On the 5th of December, 1928, the car was seized and one month later notice was given the defendant that if the balance was not paid on the 14th of January, 1929, the car would be sold. Action was commenced for the balance due on the promissory note on the 22nd of February, 1929, and the car was sold on the 22nd of April following. The plaintiff recovered the balance due on the promissory note after deducting the amount obtained in the resale of the car.

Held, on appeal, reversing the decision of ELLIS, Co. J., that as a condition of his right to recover any balance due after the proceeds of the sale are applied, the plaintiff, under the Conditional Sales Act in force at that time, must serve notice of "the intended sale," specifying the time and place of the sale. As the notice does not comply with this provision he has lost his right to recover the balance due.

APPEAL by defendant from the decision of ELLIS, Co. J. of the 10th of September, 1929, in an action against the defendant as maker of a promissory note in favour of the plaintiff for $1,165.50 payable by monthly instalments of $50 for eleven months commencing on the 23rd of September, 1928, and the balance of $615.51 on the 23rd of the twelfth month. The promissory note contained a proviso that in case of default in payment of any instalment the whole amount remaining became due and payable. The defendant paid the first instalment but being in default as to the second instalment the plaintiff brought action for the balance due. On the 23rd of August, 1928, the plaintiff sold the defendant an automobile under a conditional sale agreement for $1,165.50 payable in instalments as set out

Statement

in the promissory note given as security for payment of the amount due on the sale. The defendant not having paid the second instalment the car was seized on the 5th of December, 1928. On the 5th of January following written notice was given the defendant by the bailiff that if the balance due be not paid on or before the 14th of January following, the automobile would be sold. The car was sold on the 22nd of April following. Action was commenced on the 22nd of February, 1929.

Statement

The appeal was argued at Vancouver on the 29th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Jeremy, for appellant: In seizing the car he made his election and destroyed his right to bring action on the note. The purchaser has 20 days in which to redeem under the Conditional Sales Act and the notice of sale is not in accordance with the Act as it does not state when or where the sale is to take place: see *Chan* v. *C.C. Motor Sales Ltd.* (1926), 36 B.C. 488 at p. 491 and on appeal (1926), S.C.R. 485; *National Trust Co. (Nelson Estate)* v. *Larson* (1928), 3 W.W.R. 723; *Hewison* v. *Ricketts* (1894), 63 L.J., Q.B. 711; *Sawyer* v. *Pringle* (1891), 18 A.R. 218. The notice was not given within the time required by subsection (6) of section 10 of the Act: see *Motorcar Loan Co.* v. *Bonser* (1928), 40 B.C. 55. On the question of election see *Blanchette* v. *Massey-Harris Co.* (1919), 3 W.W.R. 870.

Argument

St. John, for respondent: The note contained an acceleration clause. That the note is valid see Byles on Bills, 18th Ed., p. 10. Section 3 of the 1929 amending Act cures the defect (if any) in the notice of sale. That this section has a retrospective aspect see Maxwell on the Interpretation of Statutes, 7th Ed., pp. 194-5; *Killoran* v. *The Monticello State Bank* (1921), 61 S.C.R. 528. The notice is sufficient to comply with the law at the time we took action in pursuance thereof.

MACDONALD, C.J.B.C.: The appeal should be allowed. The Conditional Sales Act provides, first, that the debtor shall have 20 days in which to redeem the goods. The creditor or vendor may, if he chooses, sell the goods at the expiration of the 20 days. As a condition of his right to recover any balance which

MACDONALD, C.J.B.C.

COURT OF APPEAL

1929

Oct. 29.

HEALMAN v. PRYCE

might remain after the proceeds of the sale were applied, he was permitted by the Act in force at that time to serve a notice of "the intended sale." We held in the case of *Motorcar Loan Co.* v. *Bonser* (1928), 40 B.C. 55 that the notice must specify the time and place of the sale. Now, the notice in question in this case does not comply with that provision; is not a notice of an intended sale, and since that notice was a condition precedent to his right to recover any such balance, he has lost that right. He must take the proceeds of the sale and be satisfied with that. He has no right to sue for the balance.

MACDONALD, C.J.B.C.

MARTIN, J.A.

MARTIN, J.A.: I am of the same opinion. It comes to this, that unless the amendment cures the defective notice the plaintiff cannot maintain this action, and to me it is quite clear that the curative Act does not apply to the situation.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I must say that this appeal raises quite a nice point. I do not propose to formally dissent from the opinion of my brothers. I understand the majority favour the allowance of the appeal.

MACDONALD, J.A.

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

Appeal allowed.

Solicitor for appellant: *J. E. Jeremy.*
Solicitors for respondent: *St. John, Dixon & Turner.*

WELCH *ET AL.* v. GENERAL REFRIGERATION LIMITED.

MCDONALD, J.

1929

Oct. 30.

WELCH v. GENERAL REFRIGERATION LTD.

Conditional sale agreement—"Purchaser" and "subsequent purchaser"—Building contract—"Owner"—Fixtures—R.S.B.C. 1924, Cap. 44.

A contract for the erection of a building is for work and labour and not for the sale of goods, the owner not being a "purchaser" within the meaning of the Conditional Sales Act of materials such as a refrigerating plant, which was provided for in the contract for the construction of the building, and where materials are bought by the contractor after entering into the contract with the owner, the owner is not a "subsequent purchaser."

A refrigeration system installed in an apartment block on its erection with the object of equipping each apartment with an "ice box" is a fixture.

ACTION for damages for the improper removal of fixtures in connection with a refrigeration system installed in an apartment-house. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 23rd of October, 1929.

Statement

McLorg, for plaintiffs.

A. Alexander, and *Ian Shaw,* for defendant.

MCDONALD, J.: At all times material to this action plaintiffs or some or one of them have been the owners of certain lands situate within the City of Vancouver. On the 18th of January, 1929, they entered into a contract with one Allen whereby the latter agreed to construct and build an apartment block upon the said lands, the contract price being $25,855. The specifications included the following provision:

"REFRIGERATION—Norge refrigeration to be installed where shewn on plans."

Judgment

On the 29th of January Allen addressed in writing an order to the defendant for the installation of a "Norge compressor and 12 coils" to be installed and in full running order, the price to be $1,056, payable $264 on completion of roughing in, $528 on installation and the balance of $264 in 30 days thereafter. This order was signed by Allen and contained a clause to the effect that the title and ownership "of the above goods" should remain in the vendor until the purchase price should be paid in full.

MCDONALD, J.

1929

Oct. 30.

WELCH v. GENERAL REFRIGERATION LTD.

Allen proceeded with the construction of the building and his work was practically completed on the 23rd of August, 1929, on which date the defendant completed the installation of the refrigeration system. The defendant failed to register its agreement with Allen, under the Conditional Sales Act, and none of the plaintiffs had notice of the existence of such agreement until on or about the 3rd of September, 1929. Meanwhile Allen had failed to make a profit on his contract and the plaintiffs, in order to protect themselves against claims of sub-contractors, had overpaid him to a considerable amount. On 3rd September, 1929, the defendant having been paid by Allen only $250 on account registered its agreement and without the plaintiffs' knowledge or consent entered upon the premises and removed certain parts of the material which it had installed. The plaintiffs sue for damages.

The refrigeration system in question consists of a motor and compressor combined, situate in the basement of the apartment building, resting upon its own weight and not attached to the floor in any way; a system of piping attached to the compressor and running within the walls of the building to each of twelve apartment suites, and a set of coils within a cabinet or box situate in each suite. There is one system of pipe leading from the compressor to each cabinet and another returning from each cabinet to the compressor. The pipes are connected with the compressor in the basement simply by screw nuts while in each cabinet the pipes projecting from the partition wall enter the cabinet through a hole in the back and are again attached to the coils by screw nuts. What the defendant did was to unscrew the nuts in the basement and in each of the twelve cabinets and to remove and carry away the motor and compressor and the twelve coils and the hangers which supported the coils within each cabinet. What is left is the system of piping, concealed within the walls except where the open ends appear in the basement and within each cabinet. The evidence is uncontradicted that the cost of installation as distinguished from the value of the material is $10 per suite, making in all $120. This I understand to be simply an estimate as the defendant in making its contract with Allen made no segregation of the respective costs of labour and material.

Judgment

It seems to be admitted that the defendant in any event is guilty of trespass. The sum of $10 has been paid into Court and as no damage was done to the building I think this is a reasonable amount to allow in this connection.

The plaintiffs claim damages on two grounds:

Firstly, that they are subsequent purchasers, *bona fide,* for value without notice, and secondly, that in any event the goods which have been removed were fixtures and had become a part of the freehold. Mr. *Alexander* for the defendant contends that the plaintiffs must fail on the first ground for the reason, in the first place, that the contract between the plaintiffs and Allen was not a contract for the sale of goods but for work and materials and that the plaintiffs are therefore not purchasers of the materials in question, and further that in no event can they claim they were subsequent purchasers, for the reason that their rights were acquired when they entered into the contract with Allen on the 18th of January, 1929, prior to and not subsequent to the acquisition by Allen of his rights against the defendant.

I think upon the authorities cited both these contentions are sound. See Halsbury's Laws of England, Vol. 3, p. 171, and Vol. 28, p. 861; also *Liquid Carbonic Co. Limited* v. *Rountree* (1923), 54 O.L.R. 75.

The ever-recurring question of whether or not certain goods being affixed to the freehold have become a part of the freehold is always difficult to solve even although the principles involved have been so often stated. The effort always is of course to ascertain the intention of the parties and it is stated that that intention may best be ascertained by a consideration of the degree of the annexation and the object of the annexation. In the present case the degree of annexation was slight indeed. The goods were removed without injury to the building, simply by the unscrewing of a few nuts. On the other hand it seems clear to me that the object of the annexation was to make these goods a part of the building. I have no doubt that the intention of the parties was to install a system of refrigeration in this apartment block so that every tenant who occupied a suite would have for his use "an ice-box" in the same way as he had a bath-tub and a plumbing system. There never could be any intention that one or the other should be severed or removed except perhaps for the

MCDONALD, J.

1929

Oct. 30.

WELCH v. GENERAL REFRIGERATION LTD.

purpose of repairs. Counsel made the comparison of a radio instrument which is connected usually to an aerial wire and a ground wire. Comparison was also made with an electric stove, an electric range or a gas-stove. It seems to me the comparisons do not greatly aid one, for one can imagine that under certain circumstances even these might be considered fixtures as was the kitchen range in *Hayward & Dodds* v. *Lim Bang* (1914), 19 B.C. 381. Generally speaking of course a radio is taken into an apartment suite by the tenant, attached by him and removed by him without question. On the other hand, in some of the larger city apartment blocks and some of the more modern hotels a complete system is installed by which a radio instrument is provided in every room with connections and branch connections. In such cases as between vendor and purchaser, mortgagor and mortgagee or landlord and tenant I should think that the radio instruments would each be considered a part of a system installed for the better enjoyment of the whole building (I am not suggesting of course that enjoyment would necessarily result) and would hence be treated as a part of the freehold. I have consulted the various cases cited by counsel and other cases, but really no new principles have been laid down in recent times and perhaps the law is as clearly stated in *Stack* v. *Eaton* (1902), 4 O.L.R. 335 as anywhere. On the whole I am satisfied that the goods in question were fixtures and that inasmuch as the defendant failed to register its agreement within the time limited by the Conditional Sales Act it had no right to remove the goods in question. In addition to the $10 allowed for trespass I fix the damages at $936, being the value of the goods when installed less $120, the estimated cost of installation. There will be judgment for $946 with the proviso that if the defendant within 10 days of this date reinstalls the goods leaving the system in good running order and undertaking to stand by its guarantee as contained in its agreement with Allen, this judgment shall be considered satisfied. The defendant of course must pay the costs. I have made the time short within which the defendant must make its election, for the reason that the plaintiffs are losing money every day by reason of tenants refusing to rent the suites in question on account of lack of refrigeration.

Judgment

Judgment for plaintiffs.

MATTERN v. WELCH *ET AL.*

COURT OF APPEAL

1929

Oct. 1.

MATTERN v. WELCH

Landlord and tenant—Lease—Breach of covenants—Subletting without leave—Forfeiture—Relief against.

The plaintiff conveyed certain property in Vancouver to her daughter in 1926, but in the following year the conveyance was set aside on the ground that it was obtained by duress. While the property was held by the daughter she leased the premises to the defendant, the lease containing a covenant that the lessees would not sublet without leave. The lessees did sublet a portion of the premises without leave but the daughter raised no objection and her agents collected the rents. Upon the plaintiff, after recovering title, bringing action for possession from the lessees it was held that there was no breach but even if there was the lessees were entitled to relief against forfeiture."

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that on general equitable principles the learned Chief Justice below had jurisdiction to relieve from the said covenant and in the very unusual circumstances the Court was not prepared to say that he was wrong in so holding.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 30th of April, 1929, in an action to recover possession of lot 6, block 22, district lot 541, group 1, New Westminster District. The facts are that the plaintiff conveyed the property in question to her daughter, Mrs. Henriette M. Robinson on the 10th of September, 1926, and on the 14th of October following, Mrs. Robinson leased the premises in question to the defendants for the term of three years. By a judgment of HUNTER, C.J.B.C. (subsequently affirmed by the Court of Appeal) of the 16th of December, 1927, the title of Mrs. Robinson in the said property was set aside on the ground of duress and the title was vested in the registrar of the Supreme Court as trustee for the plaintiff. The lease from Mrs. Robinson to the defendants contained a proviso that the lessee was not to sublet without leave. The defendants subleased a portion of the premises without leave but no objection was taken by Mrs. Robinson and the rents were collected by her agents. The plaintiff claims the defendants, as lessees, have broken the covenants in the lease as to payment of rent, as to payment of water rates, as to repairing, and that they

Statement

COURT OF APPEAL

1929

Oct. 1.

MATTERN v. WELCH

have sublet portions of the premises without leave. It was held by the trial judge that there had not been a breach of covenant as to payment of rent, but that if he was not right as to this there should be relief against forfeiture.

The appeal was argued at Victoria on the 19th and 20th of June, 1929, before MACDONALD, C.J.B.C., MARTIN and MCPHILLIPS, JJ.A.

Argument

J. E. Bird, for appellant: The defendants sublet portions of the premises without leave and the lease is therefore subject to forfeiture. Under section 2 (14) of the Laws Declaratory Act the Court may grant relief against forfeiture but see *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417; *Abrahams* v. *Mac Fisheries, Ld.* (1925), 2 K.B. 18; *Whipp* v. *Mackey* (1927), I.R. 372; *Coventry* v. *McLean* (1894), 21 A.R. 176; Bell on Landlord and Tenant, p. 453; *McMahon* v. *Coyle* (1903), 5 O.L.R. 618; *Richardson* v. *Evans* (1818), 3 Madd. 218; *Carter* v. *Hibblethwaite* (1856), 5 U.C.C.P. 475; Woodfall's Landlord and Tenant, 22nd Ed., p. 406; *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (1886), 11 App. Cas. 332; *Willmott* v. *Barber* (1880), 15 Ch. D. 96; *Hamilton* v. *Ferne and Kilbir* (1921), 1 W.W.R. 249; *Huntting* v. *MacAdam* (1908), 13 B.C. 426; *Snider* v. *Harper* (1922), 2 W.W.R. 417 at p. 419; *Canadian Pacific Railway* v. *Meadows* (1908), 1 Alta. L.R. 344. A history of the legislation on relief from forfeiture is given in the Yearly Practice, 1929, p. 1599. There is no waiver without knowledge: see *Orpheum Theatrical Co.* v. *Rostein* (1923), 32 B.C. 251. Further as to relief against penalty in case of assigning or subletting without leave see *Rofe* v. *Fuller's Theatres and Vaudeville Ltd.* (1923), 2 W.W.R. 782; *Rex and Provincial Treasurer of Alberta* v. *Canadian Northern Ry. Co.* (1923), 3 W.W.R. 547.

G. Roy Long, for respondents: Our submission is that the relief applies to all branches of covenant. The plaintiff is bound by the lease given by her daughter: see Woodfall's Landlord and Tenant, 22nd Ed., p. 304. They claim two breaches: (1) Water rates; (2) subletting. The water rates were paid by the agents and the sublessees went in with us long before the plaintiff recovered the property. They have waived by conduct

any demand for written consent: see Woodfall's Landlord and Tenant, 22nd Ed., p. 830; *Vigers* v. *Pike* (1842), 8 Cl. & F. 562 at p. 651. We have raised estoppel on our pleadings: see Halsbury's Laws of England, Vol. 13, p. 403, sec. 566. As to the subsequent lessees the parties went into possession, the agents collected the rents and no objection was raised. That the Court can relieve against subleasing see *Russell* v. *Beecham* (1924), 1 K.B. 525; *Royal Trust Co.* v. *Bell* (1909), 12 W.L.R. 546. The assignee of the reversion cannot take advantage of any prior breach.

Argument

Bird, replied.

Cur. adv. vult.

1st October, 1929.

MACDONALD, C.J.B.C.: The action is for possession of a building, following the alleged breach by respondents of a covenant in a lease not to sublet without leave. The lessor, a Mrs. Robinson, was the appellant's daughter to whom the building had been conveyed by her mother, under circumstances which induced the Court, subsequently to the lease, to annul the conveyance and revest the property in the appellant. It was conceded that the lease was nevertheless binding upon the appellant.

Though a feeble effort was made to shew that the appellant, after she had recovered the property, was by her conduct estopped from claiming the forfeiture, I am satisfied that that defence failed.

MACDONALD, C.J.B.C.

The learned trial judge founded his judgment, dismissing the action, on estoppel or waiver, but said that if he were in error on this he would grant relief from the forfeiture. Since there is no question that the covenant was broken the issue is narrowed down to that of estoppel or relief from forfeiture. The facts are that Mrs. Robinson who resided in Spokane, in the State of Washington, authorized a firm of real-estate agents in Vancouver, where the building is situate, to obtain a tenant which resulted in a written lease of the building to the respondents being drawn up and executed by her in Spokane, and which contains the covenant in question. The lease was for a term of three years commencing on the 1st of November, 1926. The respondents shortly after taking possession sublet portions of the

COURT OF APPEAL

1929

Oct. 1.

MATTERN v. WELCH

building to others and continued this practice until the 1st of November, 1928, when the appellant was reinstated in her title to the building, whereupon she, through her solicitors, demanded possession and on refusal brought this action. The respondents set up, *inter alia,* estoppel. They say that the agents who negotiated the lease knew before it was signed that it was respondents' intention to sublet parts of the building, and that no objection was made by them thereto. Mrs. Robinson was not called as a witness and the agents do not claim that they had authority to make terms other than those contained in the lease which she approved by execution of it, or that they communicated to her the fact of their alleged knowledge of respondents' intention to sublet parts of the building. I think they were in no way held out as agents other than to obtain a tenant. There is therefore no evidence that Mrs. Robinson, while she was still the owner of the building was estopped from complaining of the breach of the covenant. She had no knowledge of the subletting, nor did she receive rents from the subtenants.

MACDONALD, C.J.B.C.

The remaining question is that of relief from the forfeiture. In England, under circumstances such as these, no relief would be granted; it would be granted only, if at all, when forfeiture had come about by reason of accident, surprise or mistake., none of which is present in this case. By section 146, subsection (8) of the Law of Property Act, 1925 (15 & 16 Geo. V.), Cap. 20, which is a re-enactment of the same subsection of the Conveyancing Act of 1881, a covenant not to sublet without leave is excluded from the beneficial provisions of that section and left to the equitable doctrines of the Court, and it is quite well settled that equity would not grant relief in circumstances such as these. In this Province we have the Laws Declaratory Act, Cap. 135, R.S.B.C. 1924, Sec. 2, Subsec. (14)—unlike any laws in force in England—giving the Court power to grant relief from all penalties and forfeitures. That subsection has been considered by the Courts of this Province and of some other Provinces in which a similar law is in force and it appears to be accepted that it puts at rest any question of the power of the Court to relieve generally from forfeitures when it might be deemed equitable to do so.

This section has been also before the Privy Council in a case

in which it was not necessary to decide more than that it did not apply to statutory penalties and forfeitures—*Rex and Provincial Treasurer of Alberta* v. *Canadian Northern Ry. Co.* (1923), 3 W.W.R. 547 at p. 554.

But granted that the Court has the power to relieve, upon what evidence and in what circumstances is it to be exercised? I think it is to be exercised as it was wont to be exercised by Courts of Equity, expanded perhaps to include those cases in which it was just to grant relief, though the covenant was not one for the payment of money. Osler, J.A., delivering the judgment of the Court in *Coventry* v. *McLean* (1894), 21 A.R. 176, said that a lessee is not entitled as of right to relief even from a breach of a covenant to pay rent. It is one thing to have the power to relieve; it is quite another to exercise it rightly. It is a power the exercise of which "would be taking a prodigious liberty" with contracts, as Lord Eldon expressed it in *Hill* v. *Barclay* (1811), 18 Ves. 56. How sparingly it ought to be exercised is exemplified by *Barrow* v. *Isaacs & Son* (1891), 1 Q.B. 417. There the Court refused relief from a forfeiture brought about by inadvertence or rather by neglect on the part of a solicitor to peruse the head lease, which contained a covenant not to sublet without leave, with a further one that the lessor would not arbitrarily withhold leave. It appears to me in the present case that there is no excuse whatever for the respondents' breach, unless it be, and that is not a good one, that the renting agent knew, or is said to have known that the respondents intended to sublet parts of the building. Even so, the insertion of the covenant in the lease was quite proper and necessary, since the lessor before giving consent would require to be satisfied that the sub-tenants were not undesirable ones—*Barrow* v. *Isaacs, supra.* The respondents chose to ignore the terms of their lease and have, in my opinion, utterly failed to shew any equitable ground to relief.

MACDONALD, C.J.B.C.

The appellant is therefore entitled to possession and costs here and below.

MARTIN, J.A.: This is an appeal from a judgment of Chief Justice MORRISON, refusing to give the plaintiff possession of certain premises leased to the respondents by her predecessor

MARTIN, J.A.

COURT OF APPEAL

1929

Oct. 1.

MATTERN v. WELCH

MARTIN, J.A.

(in whose shoes she stands) because of certain alleged breaches of covenant, the only one open to serious argument being not to sublet without leave. On the special facts of this case I am of opinion that the learned judge below reached the right conclusion in viewing the matter as one in which relief from forfeiture should in any event be granted, it appearing, *e.g.*, by uncontradicted evidence that at the time the lease was entered into the plaintiff's duly-authorized agents for the property in question agreed expressly that the lessee could sublet and thereafter with knowledge of that subletting continued to accept the rent derived from such sub-tenants, and in such very unusual cirmustances I for one am not prepared to say that the learned judge below erred in holding that on general equitable principles, apart from the statute, he had jurisdiction to relieve from the said covenant, and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. agreed with MARTIN, J.A.

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

Solicitors for appellant: *J. Edward Bird & Co.*
Solicitor for respondents: *G. Roy Long.*

GREGORY, J. (In Chambers)

1929

Oct. 31.

REX v. CHUNG CHUCK

REX v. CHUNG CHUCK

Produce Marketing Act—Conviction by magistrate—"Marketing"—Meaning of — Evidence — Jurisdiction — Appeal — Case stated—B.C. Stats. 1926-27, Cap. 54; 1928, Cap. 39; 1929, Cap. 51, Sec. 23.

On appeal by way of case stated from a conviction by the stipendiary magistrate at New Westminster of unlawfully marketing 30 sacks of potatoes of the 1929 crop contrary to the provisions of the Produce Marketing Act and amending Acts, it was held that there was no evidence of marketing in the County of Westminster within the meaning of the Act.

Section 23 of the amending Act of 1929 provides: "20B. In any prosecution under this Act the burden of proving that a product marketed in an area over which a committee has jurisdiction was not grown or produced within that area, or that the act complained of was not an act of marketing within the meaning of this Act, shall be on the person accused of marketing such product contrary to any provision of this

Act or to any determination, order, or regulation made by that committee."

Held, that this section only throws upon the accused the burden of proving "that the act complained of" is not an act of marketing. The Crown still has to give evidence of the acts of which it complains and if those acts do not indicate marketing within the County of Westminster, the accused is not bound to give evidence of other acts in connection with the matter.

APPEAL by way of case stated from a conviction by the stipendiary magistrate for the County of Westminster under the Produce Marketing Act. The case stated contained the following:

"Chung Chuck was convicted before me for that he 'the said Chung Chuck, of Delta Municipality, on the 18th day of September, A.D. 1929, at Delta Municipality in the County of Westminster in the Province of British Columbia, being a shipper of potatoes grown or produced in that part of the Mainland of the Province of British Columbia lying south of the 53rd parallel of latitude including all islands in the delta of the Fraser River and being within the jurisdiction of the Mainland Potato Committee of Direction, established under section 3 of the Produce Marketing Act and amending Acts, by the Interior Committee, and the said Chung Chuck being then subject to the orders and regulations duly made by the said Mainland Potato Committee of Direction under section 10 of the said Act, on or about the 18th day of September, A.D. 1929, at Delta Municipality, County of Westminster, in the Province of British Columbia, did unlawfully market potatoes grown in that part of British Columbia above described of the crop of 1929 without the written permission of the Mainland Potato Committee of Direction, contrary to the form of statue in such case made and provided, being the said Produce Marketing Act and amending Acts, and the orders and regulations made thereunder by the said Mainland Potato Committee of Direction, to wit, about thirty (30) sacks of potatoes of the crop of the year 1929.

Statement

"He was fined the sum of $300 and in default, imprisonment for three months."

"3. The oral evidence called by the prosecution was given by Archibald Woodbury McLelan and Charles Allen Folwell and is [partly] as follows:

'You [McLelan] are chairman of the Mainland Potato Committee of Direction? Yes.

'This territory is in the County of Westminster? Yes.

'Where is the property which the accused, Chung Chuck, farms? The County of Westminster.

'Specific Regulation No. 7 has been approved by the Interior Committee? Yes.

'Main Street—where? In the City of Vancouver; and I saw a load of potatoes standing beside the curb in front of Jong Hing's wholesale warehouse. I stopped, and got out of my car, and went over to the truck of potatoes; saw the licence, number 34,111, and, on the side of the car, was "Chung Chuck, Potato Grower, Ladner, B.C."

GREGORY, J. (In Chambers)

1929

Oct. 31.

REX v. CHUNG CHUCK

'Yes? And do you know whose licence number it is? Yes.

'Whose is it? Chung Chuck's.

'Yes. I examined the potatoes in the sack, and counted in the neighbourhood of 30 sacks; I could not say exactly the definite number on that large load, but I counted up to 30 sacks. And I went into Jong Hing's store, where there was a number of Chinamen standing round, and I asked Jong Hing if Chung Chuck was there. . . . And I asked Chung Chuck about his load of potatoes, and he told me that he was leaving them on the truck and was waiting for a telephone from Mr. Harvey to see if Mr. Harvey would load them on the car.

'Did you see Chung Chuck again, that day? Yes. Then I went back to Main Street, and drove around; and I saw Chung Chuck driving the—Starting off with the truck, and drove up to Georgia Street—to 210, I think the number was—to Shon Sang's warehouse.

'Now, the potatoes on that truck: what year's crop were they? 1929.

'Did you again count them? Yes.

'Do you know where they were grown and produced? Well, Chung Chuck told me he had just come in from Ladner and was taking them to Mr. Harvey, and he was waiting for confirmation of the order to what car to load them.

'I see. Do you know of any other place where Chung Chuck grows potatoes, other than Ladner? No. The application for his licence gives his address "Ladner B.C., Municipality of Delta, County of Westminster."

'Charles Allan Folwell, sworn.

'Just relate—first of all, you had instructions from Colonel McLelan? I telephoned to our Vancouver office.

Statement

'And got some instructions? I got instructions from Colonel McLelan to go and see a truck load of potatoes, on Main Street, in front of Jong Hing's.

'And as the result of those instructions—? I went up to see them; and I found the truck there in front of Jong Hing's, wholesale produce place.

'Whose truck was it? It was Chung Chuck's truck.

'The accused's truck? Yes.

'Was the truck empty or loaded? Loaded.

'Loaded with—? About three tons of potatoes on it.

'In sacks? In sacks.

'Did you examine the potatoes? I examined through the ends of the potatoes.

'What year's crop were the potatoes? 1929.

'Yes. Now, what did you see, after that? Well, Chung Chuck came out of Jong Hing's at that time. I was standing there talking to him, and he said he had an order from Mr. Harvey to load a car in there, and those potatoes were going to the car.

'Yes, and what did you do? He got in the truck and he drove to Georgia Street East, at 310, and unloaded the potatoes in Shon Sang's warehouse, there.'

"The questions submitted for this Honourable Court are:

"1. Was there evidence that Chung Chuck did commit an act of marketing within the meaning of the Produce Marketing Act as amended as charged?

"2. Was there evidence that such marketing took place within the Municipality of Delta or the County of Westminster?

"3. Were the delegation by the Interior Tree Fruit and Vegetable Committee to A. W. McLelan as Mainland Committee of Direction and the powers delegated legally proven?

"4. Had I jurisdiction as a stipendiary magistrate in and for the County of Westminster to sit and adjudicate upon the said charge?

"5. Is the Produce Marketing Act *intra vires* of the Province of British Columbia?"

Argued before GREGORY, J. in Chambers at Vancouver on the 29th of October, 1929.

H. I. Bird, for appellant.

Harold B. Robertson, K.C., for respondent.

31st October, 1929.

GREGORY, J.: Questions 1 and 2: There was no evidence of marketing within the meaning of the Produce Marketing Act, certainly no evidence of marketing within the County of Westminster. Everything of which there is evidence took place in the County of Vancouver. There is no direct evidence that the accused either grew the potatoes or that he took them to Vancouver, but straining the evidence offered to the limit and beyond the most that could be inferred is that he grew the potatoes within the County of Westminster, put them in his truck and took them to Vancouver intending to dispose of them there. He had a perfect right within the Act to grow them and ship them out of Canada.

Judgment

I can find no words in the definition of "Marketing" in the Act which would cover his position, the nearest to that are the words: "Marketing includes the shipping of a product for sale or for storage and subsequent sale." Shipping in the sense it is used means grammatically, "having shipped," *i.e.,* the act of shipping is completed. I cannot imagine any merchant claiming that he had shipped goods because he had put them on his truck to be taken to a railway station and sent away. The Act is in restraint of common law rights and should not be too liberally construed. It may be that the accused intended to do something prohibited by the Act but the Act makes no pretence of saying that it shall be an offence to have such intention, and speaking generally the mere intention to commit an offence is not punishable.

GREGORY, J. (In Chambers)

1929

Oct. 31.

REX v. CHUNG CHUCK

I do not think that the position of the Crown is helped by the provisions of section 20B for that section only throws upon the accused the burden of proving "that the act complained of" is not an act of marketing. The Crown still has to give evidence of the acts of which it complains and if those acts do not indicate marketing within the County of Westminster, which is only a question of argument, the accused is not bound to give evidence of other acts in connection with the matter.

Judgment

Question 4: No. The magistrate's jurisdiction is limited to adjudicating upon matters arising within the limit of his jurisdiction, in this case the County of Westminster.

Questions 3 and 5: Unnecessary to answer them in view of the answers given to Questions 1, 2 and 4.

MACDONALD, J.

1929

Nov. 20.

CAMPBELL v. COX AND MITCHELL

CAMPBELL v. COX AND MITCHELL.

Survivorship—Presumption—Evidence of death—Onus probandi.

Those who found a right upon a person having survived a particular period, must establish that fact affirmatively by evidence, the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.

M., who had made a will in his wife's favour, committed suicide on the 28th of June, 1928, and on the same day that he committed suicide he killed his wife. The plaintiff seeks to establish her right to M.'s estate as the next of kin of the wife. The evidence disclosed that M. shot his wife fatally and then shot himself three times, the third shot entering his brain and killing him instantly, but there is no direct evidence as to whether his wife survived him.

Held, that the person seeking to establish survivorship has failed and the action is dismissed.

Statement

ACTION to establish the plaintiff's right to the estate of Harry George Mitchell, deceased. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Victoria on the 20th of November, 1929.

Haldane, for plaintiff.
Guy M. Shaw, for defendants.

MACDONALD, J.: The plaintiff brought her action, for the purpose of establishing her right to the estate of Harry George Mitchell, deceased. She sought to establish her right, as being the next of kin of Isabella T. Mitchell, the wife of the said Harry George Mitchell.

It appears that Harry George Mitchell committed suicide on the 28th of June, 1928, but prior thereto, he had made a will in favour of his wife. It also appears that on the same date that he committed suicide, he killed his wife. The question then arises whether the will that he had made in her favour became effective or not, so as to pass his property, or did he die intestate.

In order to determine this question, an issue was directed, as to which of the deceased parties survived the other. This would be the controlling factor.

I have not been assisted by any authorities and am informed by counsel that they have not been able to find any case on all fours, where the circumstances are the same as here. The cases which are referred to, in the text-books, relate to a disaster with attendant death; for example, the foundering of a ship at sea. Then the question arises as to survivorship.

Judgment

Here I have no doubt that the plaintiff must satisfy me that her claim is effectual along the lines I have indicated. She must prove survivorship of the wife, and has accepted such burden.

The facts connected with the murder and suicide I need not outline at any length. It is quite evident that these two parties lived together harmoniously as husband and wife. The only point which might lead one to conclude that the husband had previously determined to take his own life was the fact that he was in bad health and had referred to this in a despondent way. But what induced him to kill his wife is unaccountable. It has been properly termed insanity. There is no suggestion as to any revenge on the part of the husband against his wife. He appears in his dementia to have decided to commit suicide, after killing his wife.

So then the question to be determined is, whether, under the circumstances here shortly outlined, I can come to the conclusion that although the wife was shot first, and a wound inflicted

MACDONALD, J.

1929

Nov. 20.

CAMPBELL v. COX AND MITCHELL

which resulted in death, that such a wound was not of the nature to bring about immediate death, but that the husband's wounds would, any one of them, have resulted in death, and particularly that the wound which he inflicted to his head (which one of the doctors states must have occurred last) would bring about almost instantaneous death. In other words, that the wife, though dying, lingered for a time and survived her husband.

The point that has been concerning me in this matter is, assuming that I give a most favourable construction, if I may use the term, to the evidence of the doctors, as to the time during which the wife may have lived, still how can I decide that the husband, immediately after he had inflicted, what would prove a mortal wound to his wife, committed suicide?

It is contended that this is the most probable conclusion to be reached, but upon what basis should I, in a matter of this moment, concerning the rights of parties to property, follow any such suggestion and adopt it?

It has been submitted that, after the wife was shot, and the husband was still alive, there is evidence which satisfied Meadows, the constable, that her body was dragged from the threshold of the house in towards the couch, and, at any rate, she was found in such a position that I think I can conclude, aside from the evidence of Meadows, that the husband did treat, what he expected would soon be the dead body of his wife, with proper concern and affection.

Judgment

Then, I repeat, am I to conclude that the next movement was an immediate one on his part, of sitting down in a chair and firing one shot into his body—the policeman thinks to reach his heart—and that that having failed the purpose intended, he fired another, and that also having failed, he blew out his brains?

My difficulty is that I should not, without evidence to that effect, conclude that this latter event followed closely, even if the wounds were more speedily fatal to the husband than to the wife.

I am not surprised at counsel not being able to get a case which is similar in its facts to the one here presented. Williams on Executors, 11th Ed., Vol. II., p. 959, dealing with the question of survivorship states that:

"In cases of this kind the question of survivorship is, by the law of England, a matter of evidence merely, and, in the absence of evidence, there

is no rule or conclusion of law on the subject: And [and this is very pertinent as far as this case is concerned] as the onus of proof lies on the representatives of the legatee, they cannot claim the legacy, unless they can produce positive evidence that he was the survivor."

In the same connection, in the case of *Hartshorne* v. *Wilkins* (1866), 6 N.S.R. 276, referring to the leading case of *Underwood* v. *Wing* (1854), 19 Beav. 459, the judgment of Wightman, J. is quoted as follows (p. 287):

" 'The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it as it determines any other fact.' "

I am particularly impressed with the following portion of that judgment:

" 'We may guess, or imagine, or fancy; but the law of England requires evidence, and we are of opinion there is no evidence upon which we can give a judicial opinion that either of the four persons survived the other.' "

Then again in *In re Phene's Trusts* (1870), 5 Chy. App. 139 at p. 152, Sir George Gifford, in rendering the judgment of the Court said, after discussing the cases bearing upon the question, that:

Judgment

"The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail."

So upon this issue, and adopting the words I have just referred to, the only conclusion I can reach is that the plaintiff, seeking to establish the survivorship of the wife, has failed. I should not "guess, or imagine or fancy," I should have proof, which is sufficient, of survivorship. I understand there has been an arrangement as to costs.

Action dismissed.

COURT OF APPEAL

1929

Nov. 26.

REX v. ROSS.

Criminal law—Indictment—Three separate counts in same indictment—Verdict of "guilty" without specifying count—Sentenced for greatest offence—Appeal—Criminal Code, Secs. 300 and 1014 (3) (b).

REX v. ROSS

An accused was indicted on three separate counts in the same indictment, namely, (a) rape; (b) assault with intent to commit rape; and (c) indecent assault. The jury was properly instructed but found the accused guilty without stating to which of the counts the verdict applied and the accused was sentenced by the judge on the assumption that the conviction was one for rape.

Held, on appeal, reversing the decision of MURPHY, J., that while the verdict could be sustained on the least of the three counts and the sentence reduced to one appropriate thereto, the Court can order a new trial and in the circumstances the latter is the better course to adopt.

APPEAL by accused from his conviction at the Spring Assizes at Kamloops on the 1st of June, 1929, on an indictment containing three counts, namely, rape, assault with intent to commit rape, and indecent assault. On the evening of the 16th of March, 1929, after attending a dance at the Masonic Hall at Kamloops, the accused, who was a taxi-driver, took five persons into his car, a girl named Mary Williamson who was 22 years old, sitting in the front seat with him. After leaving the other four at their homes he drove Mary Williamson out on the Vernon road, she protesting and saying she wanted to be taken home. When they had gone about seven miles, he stopped the car and, using force, had connection with her against her will. He then brought her back to Kamloops and on reaching the house where she was employed she immediately told her employer what happened after leaving the dance hall. The accused was convicted and sentenced to five years in the penitentiary with ten lashes.

Statement

The appeal was argued at Vancouver on the 5th and 6th of November, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Stuart Henderson, for appellant: The indictment is made under section 298 of the Criminal Code. There were three

counts, first, that of rape; secondly, assault with intent to commit rape; and thirdly, indecent assault. The jury simply brought in a verdict of guilty. The verdict might apply to any one of the three. There must be a new trial.

Cosgrove, for the Crown: The Court is justified in assuming the verdict applies to the principal offence, otherwise they would have expressly stated the offence of which he was found guilty.

Henderson, replied.

Cur. adv. vult.

26th November, 1929.

MACDONALD, C.J.B.C.: There were three counts in the indictment charging rape, assault with intent to commit rape, and indecent assault. The jury found the prisoner guilty without assigning their verdict to any one or more of the said counts.

In these circumstances one of two courses is open to us, we may order a new trial or may reduce the sentence to fit the least of the charges.

The jury being the tribunal charged with finding the facts the usual course would be to order a new trial, and this course, I think, ought to be followed here. The jury misconceived their duty, and the prisoner should not have been convicted, except upon an intelligible verdict. When there is doubt he is entitled to the benefit of that doubt. In a careful charge the learned judge told them that, but they appear to have given as little attention to that instruction as they have given to the several counts in the indictment. I fear the jury were carried away by the desire to make an example. This judgment, however, is not founded upon that ground. I fully recognize that the question of guilt or innocence was one for the jury to decide for themselves, but whatever may have been the reason for the conclusion to which they came, they have failed to express their verdict in clear terms, and the learned judge sentenced the accused, I think, on the assumption that he had been found guilty of the principal offence.

The verdict and sentence must be set aside and a new trial had.

MARTIN, J.A.: At the last Kamloops Spring Assizes, *coram* Mr. Justice MURPHY, the appellant was indicted on three

COURT OF APPEAL

1929

Nov. 26.

REX v. ROSS

separate counts in the same indictment, *viz.*, rape, assault with intent to rape (which is equivalent to attempt to rape, *vide, Rex* v. *MacIntyre* (1925), 43 Can. C.C. 356; and Criminal Code section 300) and indecent assault. The learned trial judge properly instructed the jury upon the said distinctive counts and no objection has been taken to his charge, but by some unexplained oversight when the jury simply returned a verdict at large of "guilty" they were not asked upon what count they convicted the accused, and hence it is submitted that the verdict must be set aside for uncertainty, and that the learned judge was not justified in dealing with the conviction as one for rape on the first count and imposing a sentence on that sole assumption, as his remarks shew he did, of five years' imprisonment and a whipping.

It is clear that in such a case as the present the verdict, apart from the sentence, can be sustained on the least of the three counts all arising out of the same act substantially. In *Rex* v. *Johnston* (1913), 9 Cr. App. R. 262 at p. 264, it was said:

MARTIN, J.A.

"In our view the offence was either the one or the other. The proper course when we are in doubt is to take the view that the jury meant to find the appellant guilty of the lesser offence. The conviction for obtaining goods by false pretences, and the sentence of three years' penal servitude must be quashed, and the sentence of twelve months' imprisonment with hard labour must remain."

See also *Rex* v. *Lockett* (1914), 2 K.B. 720; and *Rex* v. *Norman* (1915), 1 K.B. 341, the principle of which was applied by our National Supreme Court in *Kelly* v. *Regem* (1916), 54 S.C.R. 220 at p. 262.

It would therefore be open to us to sustain the verdict on the least of the three counts and pass the sentence appropriate thereto did we think the circumstances were such as to warrant our adopting that course in the best interests of public justice. But another course is open to us in that same interest (which was not open to the English Court of Appeal under their limited statute), *viz.*, to direct a new trial and make "such order as justice requires" under subsection (3) (*b*) of section 1014 of the Code—*Rex* v. *Burr* (1906), 13 O.L.R. 485; *Rex* v. *Hubin* (1927), S.C.R. 442; *Stein* v. *Regem* (1928), S.C.R. 553, 558, and if a new trial appears to be the better course to adopt in said circumstances then it should be ordered.

The case is in some respects exceptional because while there is evidence to support a conviction on all the counts the learned judge in repeatedly stressing the fact that the main charge was rape at the same time properly told the jury that a verdict on either of the lesser counts was open to them, nevertheless the matter was finally put to them by the clerk of assize as one offence only, thus:

"*Clerk*: You find the prisoner at the bar guilty of the offence whereof he stands indicted or not guilty?

"Foreman: Guilty.

"*Clerk*: Hearken to the verdict as the Court recordeth it. You find the prisoner at the bar guilty of the offence whereof he stands indicted. This is your verdict and so say you all.

"Foreman: We do."

There is a danger here that the jury may have been misled by this singular instead of plural statement of the offences charged and given to them for adjudication, and this uncertainty is increased by the fact that while the tenor of the charge was, though unexceptional as a matter of law, in support of a conviction for rape yet the evidence disclosed a weak case at best for that offence but a somewhat stronger one for the lesser charges, and therefore it is all the more doubtful what exact offence the jury did really intend to convict the accused of, the whole circumstance being necessarily interwoven as part of the *res gestæ* into the three offences but the degree of culpability differing greatly.

MARTIN, J.A.

It may possibly be that if it could be said, as in *Kelly's* case, *supra*, p. 264, that the evidence to support the count for rape was "so overwhelming in proof . . . that no honest jury could have returned any other verdict," we would, in the circumstances, be justified in taking another view of the matter, but the evidence here falls far short of that safe description. It is to be observed that the counts here are not in the ordinary sense inconsistent but relate to progressive acts in the culmination of the primary offence, *i.e.*, the prisoner may first have indecently assaulted the woman, then attempted to rape her, and finally succeeded, in which case the last offence would include the preceding ones.

After a careful consideration of this difficult matter in all its aspects I am of opinion that "justice requires" to quote the

COURT OF APPEAL

1929

Nov. 26.

REX v. ROSS

MARTIN, J.A.

words of the statute, that another jury of the county should say exactly what, if any, offence this man has committed against this woman, and the more so because the learned judge in passing sentence said:

"Now, it is a shocking thing that out of the five indictments that came before this Court at this sessions, four of them were for serious offences against women. It rather indicates that it is necessary to let the public know the attitude that the law takes with regard to the protection of women. They have to be left in more or less isolated places here in the interior, and if the impression gets abroad that these matters are to be lightly dealt with the consequences will be very serious indeed."

It should, moreover, be noted that the appellant's counsel informed us at the close of the argument that he was prepared to accept a new trial of the whole indictment rather than a reduction of the verdict to the least offence charged therein.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. agreed with MARTIN, J.A.

MACDONALD, J.A.

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

New trial ordered.

Solicitor for appellant: *C. H. Dunbar.*
Solicitors for respondent: *Fulton, Morley & Clark.*

MACDONALD, J.

CONN v. DAVID SPENCER LIMITED.

1929

Dec. 10.

CONN v. DAVID SPENCER LTD.

False imprisonment — Damages—Accusation of shop-lifting—Detained—Goes to room without force and is searched.

The plaintiff had made some purchases in the defendant's departmental store in Vancouver. When about to make a further purchase in the basement, he was tapped on the shoulder by a woman house detective, accused of having stolen a cake of soap and asked to go upstairs to one of the rooms. At first he demurred but he gave way and without any force on the part of the detective he went upstairs with the detective and her assistant. He was searched but no soap being found on him he was allowed to go. In an action for damages for false imprisonment:—

Held, that this constraint, coupled with the subsequent searching, constituted false imprisonment for which the defendant is liable in damages.

ACTION for damages for false imprisonment. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 28th of October, 1929.

C. L. McAlpine, for plaintiff.
Burns, K.C., and *Lundell,* for defendant.

10th December, 1929.

MACDONALD, J.: Plaintiff seeks to recover damages from the defendant for false imprisonment. There is little dispute, as to the facts, though the evidence adduced at the trial differed from the allegations contained in the pleadings. There was no evidence offered by the defence to contradict in any way the story told by the plaintiff, as to what occurred when he was shopping at the defendant's departmental store in Vancouver. Shortly stated, it appeared that the plaintiff had made some purchases, in the self-service department of the store, and was waiting to make a purchase at the pastry counter, when he was tapped on the shoulder by Mrs. Kinser, a house detective and investigator employed by the defendant. He was accused of having stolen a cake of soap and requested by her to leave the basement and go upstairs to one of the rooms. At first he demurred. Mrs. Kinser had been informed, according to the statement of defence, by the assistant as to this petty theft, but as the facts developed this information was incorrect. Plaintiff had not committed any theft, still he thought it advisable, in view of the crowded state of the store, to give way, without any exhibition of force on the part of the detective, so he went upstairs accompanied by both detectives and upon being searched, satisfied the investigating employees that a mistake had occurred. The frame of mind of Mrs. Kinser, the moving spirit in the matter, is shewn in her examination for discovery, where she refers to the discussion that took place between herself and her assistant, in which the latter stated that she had been watching the plaintiff and that she was sure he had a bar of soap in his pocket. The question then arose whether they should go to the trouble of taking the plaintiff and Mrs. Kinser's conclusion was, after the assistant had expressed her certainty as to the theft by plaintiff, that they would take him for investigation, which they

Judgment

MACDONALD, J.

1929

Dec. 10.

CONN v. DAVID SPENCER LTD.

accordingly did in the manner shortly stated, Mrs. Kinser walking beside the plaintiff and her assistant behind. Upon going upstairs to a certain room the door was closed and then Mrs. Kinser asked plaintiff, if he had the bar of soap in his pocket and he again denied having such an article and took out two packages, which on examination by Mrs. Kinser did not contain soap. She enquired further as to his having anything else in his pocket and he was willing to have himself searched, which she proceeded to do and not finding any evidence of soap in his pockets she enquired, what he had done with the bar of soap reported to her as having been stolen. Further conversation took place and the assistant was asked to retire from the room. At the conclusion of the searching, the situation, as plaintiff viewed it, is stated by Mrs. Kinser on examination for discovery to this effect:

"Plaintiff asked if he might go [out of the room] and she said he could."

Her object, in asking her assistant to retire, was discussed and she stated, what was presumably the custom, that "they [meaning her assistants] waited until the case is over outside of my door and in case I should need them."

Judgment

Defendant submits that while the plaintiff was inconvenienced, that he acted voluntarily and was not at any time detained in such a manner or for such a purpose, as would amount to false imprisonment. Aside from the belief, held by the plaintiff that he was detained, until permitted to leave the room, a somewhat similar view of the situation is presented by Mrs. Kinser herself. She was asked whether she was taking the plaintiff into custody, when she took him upstairs and replied that "she was taking him up there to question him" and then admitted that she maintained control over him, until she had so questioned him. She was also asked, as to whether she intended to let the plaintiff out of the room and answered, that she might not have been able to hold him, but she would have done her best to prevent it, when protecting the goods of her employer. My conclusion therefore, under the circumstances, is that, while physical force was not exerted, to compel the plaintiff to leave the basement of the store and go to the room, to remain and be searched, still that the control and detention arising out of a mistake, was inexcusable and unwarranted. Alderson, B. in

Peters v. *Stanway* (1835), 6 Car. & P. 737 refers to a defence, of the plaintiff having acted voluntarily, being the same defence, as here presented, as follows:

"The question as to the verdict will depend, not on whether the plaintiff went vountarily from the defendant's house to the station-house, but whether she volunteered to go in the first instance. There is a great difference between the case of a person who volunteers to go in the first instance, and that of a person who, having a charge made against him, goes voluntarily to meet it. The question therefore is, whether you think the going to the station-house proceeded originally from the plaintiff's own willingness, or from the defendant's making a charge against her; for, if it proceeded from the defendant's making a charge, the plaintiff will not be deprived of her right of action by her having willingly gone to meet the charge."

Then has the plaintiff no redress under such circumstances?

While an arrest did not actually take place, still the plaintiff submitted himself, as it were, into custody and if the party to whom he had thus submitted had been a constable, there would beyond doubt be a false imprisonment. The law on this point is laid down by Eyre, C.J. in *Simpson* v. *Hill* (1795), 1 Esp. 431 as follows:

"If the constable, in consequence of the defendant's [assistant's] charge, had for one moment taken possession of the plaintiff's person, it would be, in point of law, an imprisonment; as, for example, if he had tapped her on the shoulder, and said, 'You are my prisoner'; or if she had submitted herself into his custody, such would be an imprisonment."

Judgment

The taking possession of the person, seems to be the governing factor and here, in the face of the uncontradicted facts, it is contended that there was no such taking possession. In order to determine this point, you have to consider the surrounding circumstances and my opinion is the plaintiff being so accused of theft, by a person in authority, felt that he was compelled to give himself, as it were, into the custody or control of Mrs. Kinser and her assistant. He was required to go in a certain direction as distinguished from going in any other direction. He was compelled to stay for an appreciable period in a certain place. Patterson, J. in *Bird* v. *Jones* (1845), 7 Q.B. 742 at p. 751 in this connection says:

"I have no doubt that, in general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched."

Then further, as to the detention of the plaintiff, I utilize some-

MACDONALD, J.

1929

Dec. 10.

CONN v. DAVID SPENCER LTD.

what similar wording to that employed by Lord Abbott, C.J. in *Pocock* v. *Moore* (1825), Ry. & M. 321 and state that I am of opinion that the plaintiff being charged with a crime, "in order to prevent the necessity of actual force being used" or creating a scene in a crowded store, went with the detective to a particular room (presumably used for that purpose) to be searched. "He was constrained in his freedom of action." *Vide, Warner* v. *Riddiford* (1858), 4 C.B. (N.S.) 180 at p. 187. This constraint, coupled with the subsequent searching, constituted false imprisonment for which the defendant is liable in damages.

Then as to the damages, it is contended on the part of the plaintiff, that while there are no special damages and the plaintiff was not placed in gaol, that the false imprisonment should be visited with heavy damages, because the defendant has pleaded that the plaintiff was guilty of theft. I think this is not the proper conclusion to draw from the statement of defence, in referring to the reason why the detective detained the plaintiff. It appears to me simply to have been inserted, for the purpose of excusing the mistake which occurred. It is an attempt at justification but fails in that respect.

Judgment

While the plaintiff suffered the ignominy of being taken from one part of the store to another, still I do not think that the circumstances injured his character in any way. The defendant, however, should be called upon to pay damages for the actions of its employees. I think a reasonable amount to allow would be $60. Plaintiff is entitled to his costs.

Judgment for plaintiff.

WONG SAM *ET AL.* v. HAMILTON.

MCINTOSH, CO. J.

1929

Dec. 12.

WONG SAM v. HAMILTON

Factories Act—Laundry—Operated on holiday and in prohibited hours—Conviction—Appeal—R.S.B.C. 1924, Cap. 84, Sec. 4 (2).

Each of the appellants are sole owners of their own laundry and operate them on their own behalf without employing any labour. They were convicted on charges under section 4 (2) of the Factories Act, one for operating his laundry on a holiday and the other two operating their respective laundries after the hour of seven o'clock in the afternoon.

Held, on appeal, affirming the conviction by the stipendiary magistrate, that the history of the amendments since the Act of 1920 shews that an owner of a laundry as defined by section 3 (2) who carries on without any employees and works the laundry solely by himself comes within the prohibition of section 4 (2). Said section is not governed by the heading "employees" (inserted in the Act between sections 3 and 4) and the appeal should be dismissed.

APPEAL from a conviction for an offence in contravention of section 4 (2) of the Factories Act. The facts are set out in the reasons for judgment. Argued before MCINTOSH, Co. J. at Duncan on the 16th of October, 1929. Statement

Davie, for appellants.
Bainbridge, for respondent.

12th December, 1929.

MCINTOSH, Co. J.: This is an appeal from a conviction against the appellants by Charles H. Price, stipendiary magistrate in and for the Province of British Columbia, under the provisions of subsection (2) of section 4 of the Factories Act, being Cap. 84, R.S.B.C. 1924, the charges being that Wong Sam (Duncan Laundry) operated a laundry on a holiday, and that the other appellants Wong Chong *et al.* (O.K. Hand Laundry) and Wong Jack *et al.* (Cowichan Laundry) operated laundries after the hour of 7 o'clock in the afternoon. Judgment

As the appellants rest their defence on a point of law, opposing counsel arranged, in order to avoid the necessity of a rehearing of the evidence, to agree upon the facts. The facts as admitted are:

"The appellants are neither employers of labor, nor employees, but operate their laundries as sole owners on their own behalf. As all the

MCINTOSH, CO. J.

1929

Dec. 12.

WONG SAM v. HAMILTON

appellants were called as witnesses for the prosecution and testified to the above effect, no rebuttal was offered. The evidence of the appellants therefore is accepted as conclusive as to the facts, which are admitted for the purpose of determining this appeal."

Counsel for the appellants submits that section 4 of the Factories Act applies only to "employees" and does not include persons who are operating laundries on their own behalf. As the Act is divided into specific headings, and section 4 (under which the prosecution is laid) to section 10 inclusive are collocated under the heading "Employees," it was contended that this section must therefore apply only to such and not to owners, while the prosecution fastened upon the word "operate" in subsection (2) of section 4 as including an owner, regardless of whether he employed labour or not.

It is therefore incumbent upon me to analyze the Act from its original creation by the Legislature through its successive amendments to arrive at a conclusion in regard to the present meaning of its wording and the manifest intention of the Legislature. It is clear that the original Act was intended to apply to employees only and the present prosecution would not then lie, but during its expansion by amendments it was definitely extended in its scope.

Judgment

Subsection (2) of section 4 of the Factories Act provides that, with certain stated exceptions:

"No person shall be employed in, or work in, or operate any laundry to which the provisions of this Act apply on any holiday . . . nor [*inter alia*] except between the hours of seven o'clock in the forenoon and seven o'clock in the afternoon on days other than holidays."

The case at Bar does not come within the stated exceptions. It is therefore necessary to decide whether the section applies to the laundries of the appellants. By the words of the section itself it applies to any laundry to which the provisions of the Factories Act apply and by subsection (2) of section 3 the provisions of this Act apply to

"Every laundry run for profit, whether operated by manual, muscular or mechanical power, or partly by manual or muscular power and partly by mechanical power, and whether or not any person is employed therein."

The facts are admitted. The appellants are the sole owners of their respective laundries which they work or operate in their own behalf and employ no labour at all. The sole question for determination in this appeal is therefore, one of law, whether

or not the provisions of the Factories Act in question apply to the appellants.

Counsel were unable to refer me to a case in our own Courts in which the pertinent sections of the Factories Act were considered.

However, I find that the Act as it stood in 1919 received interpretation in the case of *Rex* v. *Chow Chin* (1920), 2 W.W.R. 997. In that case the present Chief Justice of the Supreme Court of British Columbia, decided that a laundry operated by several persons all working and sharing in the profits equally and all living on the premises and with no others employed, and no one receiving compensation for work other than as aforesaid, is not a factory within the meaning of the Factories Act, and a prosecution for work being done therein after 7 p.m. is not justified under said Act. The *Chow Chin* case was decided upon the Factories Act as it stood in 1919. It then provided (subsection (2) of section 3 as amended by B.C. Stats. 1919, Cap. 27, Sec. 2) as follows:

"(2) Every laundry run for profit, whether operated by manual, muscular, or mechanical power, or partly by manual or muscular power and partly by mechanical power, and whether three or more persons, or less than three persons, or any persons are employed therein, shall be deemed a factory within the meaning of this Act; and the provisions of this Act shall apply to every such laundry; and, except in the case of persons employed only as watchmen or in the work of maintaining heat or steam, no person shall be employed in, or work in, or operate any laundry to which the provisions of this Act apply, except between the hours of seven o'clock in the forenoon and seven o'clock in the afternoon."

Judgment

If the statute had remained as it stood in 1919 it would not under the *Chow Chin* decision apply to appellants. But the Legislature immediately amended subsection (2) of section 3 (B.C. Stats. 1920, Cap. 28, Sec. 2), by striking out the words: "Whether three or more persons, or less than three persons, or any persons are employed" and substituting therefor the following: "Whether or not any person is employed" which phraseology is still retained.

It is important to note too that when the 1920 Act was passed the penalty for a breach of section 3 (2) was provided by section 66 of the then Act (now redrawn as section 67 of the present Act). The Act in 1920 which amended section 3 (2) as above also amended this penal section by substituting the word

MCINTOSH, CO. J.

1929

Dec. 12.

WONG SAM v. HAMILTON

"person" for the word "employer" in the fourth line thereof. B.C. Stats. 1920, Cap. 28, Sec. 3. The penalty for the violation of section 4 (2) is provided in section 66 of the present Act which was first enacted in 1922: B.C. Stats. 1922, Cap. 25, Sec. 5.

Reference to section 3 (2) and section 4 (2) and the penal sections of the Factories Act certainly indicates that the Legislature did not intend section 4 (2) to have the restricted application for which the learned counsel for appellants contends. The history of the amendment following the decision in the *Chow Chin* case leaves no room to doubt that an owner of a laundry as defined by section 3 (2) who carry on without any employees and work the laundry solely themselves come within the prohibition of section 4 (2).

Judgment

The plain meaning of the language used in subsection (2) of section 4 and the fact that the prohibition which it enacts was first enacted in subsection 3 (2) indicates that the Legislature did not intend subsection (2) of section 4 to be governed by the heading "Employees" inserted between section 3 and section 4, as is the contention of counsel for the appellants. The appeal is therefore dismissed and the convictions stand.

As this appeal is of considerable industrial importance and in the nature of a test case on a point of law hitherto uncertain, no costs will be awarded against the appellants, and all moneys paid by them into Court according to the usual practice are hereby ordered paid out to the appellants' solicitor.

Appeal dismissed.

COURT OF APPEAL

1929

Nov. 5, 26.

REX v. BELL

REX v. BELL.

Criminal law—Trial—Evidence—Depositions taken on preliminary hearing—Signed as a whole by magistrate—Evidence of witness who left jurisdiction after preliminary hearing—Allowed to be read on trial—Reasons for judgment on appeal—Criminal Code, Secs. 683 and 999.

On the trial of an accused for burglary the evidence of a witness who left the jurisdiction shortly after giving evidence on the preliminary hearing was allowed to be read under section 999 of the Criminal Code. The depositions as a whole taken on the preliminary hearing were signed by the stipendiary magistrate with the reporter's certificate attached.

COURT OF APPEAL

1929

Nov. 5, 26.

REX v. BELL

Held, on appeal, affirming the decision of MURPHY, J., that all that Parliament requires for verification and authentication of the depositions have been satisfied, the evidence was properly admitted and the appeal should be dismissed.

Per MACDONALD, C.J.B.C.: On a criminal appeal only one judgment can be given except where the question is one of law and the Court decides that more than one judgment may be delivered.

The prisoner was in custody at the time of sentence and was confined in prison for six months prior to the disposition of the appeal.

Held, that the six months already served should be included in the sentence of five years.

APPEAL by accused from his conviction by MURPHY, J. of the 23rd of May, 1929, on a charge of breaking into a jewellery store in New Westminster, and stealing jewellery. He was sentenced to five years' imprisonment. The jewellery store of William Gifford in New Westminster was broken into on Saturday night the 18th of August, 1928, and jewellery to the value of $12,000 was taken away. The accused's apartment in Tacoma was raided by the police on the 1st of February, 1929, and they found a quantity of jewellery. In the month of March following, Gifford visited Tacoma and identified the jewellery as a portion of that stolen from his store. Bell was tried at the May Assizes in New Westminster and found guilty by a jury. On the preliminary hearing before the magistrate in New Westminster one Ghilarducci was called as a witness and gave evidence of certain statements made by the accused to himself in Tacoma as to his connection with the burglary of the jewellery store in New Westminster. After the hearing Ghilarducci left the jurisdiction and the Crown was unable to call him as a witness on the trial. On the trial the Crown was allowed to read Ghilarducci's evidence taken on the preliminary hearing. The depositions as a whole taken on the preliminary hearing were signed by the magistrate with the reporter's certificate attached.

Statement

The appeal was argued at Vancouver on the 4th and 5th of November, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Stuart Henderson, for appellant: The evidence given at the trial is not evidence of theft by Bell, but evidence of receiving stolen goods and there is no case against him. The evidence of

Argument

COURT OF APPEAL

1929

Nov. 5, 26.

REX v. BELL

one Ghilarducci that was taken on the preliminary hearing was allowed to be read on the trial under section 999 of the Code. This was improperly admitted as the certificate of the stenographer was at the end of the whole evidence taken on the hearing and this is not sufficient under section 683 of the Code: see Paley on Summary Convictions, 9th Ed., p. 465. Nothing is presumed to be done rightly in an inferior Court: see Mews's Digest, Vol. 23, p. 753. This man admits he is a bootlegger. The judge in his charge said they might find him guilty of theft or acquit him and the jury found him simply guilty. If Ghilarducci's evidence is eliminated there is no evidence against the accused.

Argument

Lidster, for the Crown: The whole question in the case is whether Ghilarducci's evidence should be admitted. The point raised is where the depositions should be signed and they were signed at the end by the magistrate and the reporter's certificate was attached. That this is sufficient see *Rex* v. *Prasiloski* (1910), 15 B.C. 29; Tremeear's Criminal Code, 4th Ed., p. 878. The case of *Rex* v. *Robert* (*No. 1*) (1910), 17 Can. C.C. 194 is against us but that is the judgment of a single judge. The jewellery in accused's trunk was identified, also two revolvers: see Roscoe's Criminal Evidence, 15th Ed., p. 111. *Rex* v. *Thompson* (1917), 2 K.B. 630.

Henderson, in reply referred to *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537; *Rex* v. *Powell* (1919), 27 B.C. 252; and *Rex* v. *Brooks* (1906), 11 O.L.R. 525.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This being a criminal case, only one judgment can be given except where the question is one of law and the Court decides that more than one judgment may be delivered. This is a question of law and the only thing I desire to say is that while I would have preferred to reserve the last point Mr. *Henderson* made for further consideration yet since all the members of the Court are firmly agreed upon the dismissal of the appeal, I shall not dissent.

MARTIN, J.A.

MARTIN, J.A.: The only remaining point upon which it is necessary to express an opinion, having regard to the rulings already given during the course of the argument, is that which arises under section 999 upon the question of depositions. In

my opinion the present depositions are to be looked at and the ruling of the learned judge in admitting them is to be viewed solely under section 999 and section 683 does not apply to the present case. All that Parliament requires for the verification and authentication of these depositions have been satisfied by the fact that the justice has signed them as it says here:

"Shall be signed by the judge or justice before whom they are said to be taken and shall be read by the prosecution without further proof thereof."

I decline to introduce any other requirements than what Parliament has said are necessary for the admission of the evidence.

MARTIN, J.A.

McPHILLIPS, J.A.: I am entirely of the same view as my brother MARTIN.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree. *Appeal dismissed.*

MACDONALD, J.A.

MOTION to fix the date from which sentence should run. Heard by MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MACDONALD, JJ.A. at Victoria on the 26th of November, 1929.

Statement

Stuart Henderson, for the motion: The prisoner was sentenced to five years' imprisonment on the 16th of May, 1929. He has been in prison since sentence and has served over six months. My submission is that his sentence should commence to run from the date of sentence.

Argument

Cosgrove, for the Crown, referred to section 1910 (2) of the Criminal Code.

The judgment of the Court was delivered by

MACDONALD, C.J.B.C.: I think the application ought to be granted, that the six months he has been in Oakalla should be deducted from the sentence.

The Court is given power to do this, and though we should look at the special circumstances which demand the exercise of that power, in these circumstances at all events he was there confined, not at large, during the six months and that he made his application to this Court by way of appeal within the time granted to him. Therefore it would be just and reasonable that he should be relieved from the extra six months he would have to serve unless we do this. *Motion granted.*

MACDONALD, C.J.B.C.

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & CO. v. BELL-IRVING

MACAULAY, NICOLLS, MAITLAND & COMPANY, LIMITED v. BELL-IRVING.

Sale of land—Principal and agent—Contract of general employment—Introduction of purchaser—Effect of a special listing on a former general employment—Commission—Practice—Argument of counsel—Right of reply.

When a proprietor, with a view to selling his estate, goes to an agent and requests him to find a purchaser naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent the latter will be entitled to his commission although the price paid be less than the sum named at the time the employment was given (MCPHILLIPS, J.A. dissenting).

[Reversed by Supreme Court of Canada].

APPEAL by plaintiffs from the decision of MCDONALD, J. of the 7th of June, 1929, in an action to recover commission on a sale of three certain lots on Granville Street, in the City of Vancouver. Some time prior to January 5th, 1928, the defendant listed the property in question for sale with a real-estate agency, Bell-Irving, Creery & Co. Ltd., in which company he was a large shareholder. On the 5th of January, 1928, said company gave the plaintiff Company which was represented by one R. P. Snyder a letter authorizing him to sell the property for $410,000. Nothing came of this and on March 3rd following when the defendant was away Snyder procured and submitted at the defendant's office an offer from one William Dick to purchase the property for $380,000. This offer was cabled to the defendant who replied that he would defer decision until his arrival but on his arrival when Snyder saw him he fixed his price for the property at $600,000. Snyder tried to get defendant to reduce his price but he would not do so and negotiations then ceased. During the following summer Snyder saw Dick and tried to persuade him to make another offer but no offer was made. In October, Dick, through the firm of Bell-Irving, Creery & Co. Ltd., made an offer of $500,000 for the property and this was accepted. The plaintiff claimed he was entitled to a commission on this sale. The action was dismissed.

Statement

The appeal was argued at Vancouver on the 16th and 17th of

October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & CO. v. BELL-IRVING

Craig, K.C., for appellants: That the contract was one of general employment see *Toulmin* v. *Millar* (1887), 58 L.T. 96; *Prentice* v. *Merrick* (1917), 24 B.C. 432. An agent through whose instrumentality a sale is effected, who is the procuring cause of a sale is entiled to commission: see *Burchell* v. *Gowrie and Blockhouse Collieries Limited* (1910), A.C. 614 at p. 624; *Stratton* v. *Vachon* (1911), 44 S.C.R. 395 at p. 401; *Spenard* v. *Rutledge* (1913), 10 D.L.R. 682 at p. 689. The plaintiff is entitled to commissions although this sale was not effected for six months after his negotiations: see *Lee* v. *O'Brien and Cameron* (1910), 15 B.C. 326. The evidence of the purchaser as to who was the effective cause of the sale is admissible: see *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139. The Court of Appeal are in a better position than the trial judge to draw inferences of fact: see *Barry* v. *Winnipeg Electric Co.* (1926), 2 W.W.R. 791 at p. 793.

Argument

Hogg, for respondent: The purchaser Dick had made an offer of $250,000 through the defendant's firm in 1925. The only offer that Snyder was even able to get Dick to make was $380,000. Six months later Dick increased his offer to the defendant without consulting Snyder which he had a perfect right to do: see *Chadburn* v. *Piuze* (1914), 20 D.L.R. 741. The plaintiff must establish a contract of employment and this he has not done. On the facts the trial judge below has found in our favour.

Craig, in reply: We submit that the general employment continued up to the time of the sale.

[He was stopped.]

MACDONALD, C.J.B.C.: My ruling is that having opened up that subject in your opening argument, that is to say stating that there was the general employment, and that that was followed by a specified time for exclusive listing; you contended that the general employment was not put an end to, but was continued. You opened up that question and you are not entitled now to reply further to Mr. *Hogg* on that.

MACDONALD, C.J.B.C.

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & Co. v. BELL-IRVING

MARTIN, J.A.

MARTIN, J.A.: My opinion is not that at all. I do not think that Mr. *Craig's* submission now interferes with the rule. Mr. *Craig* did not offer any argument on that point. It came out in the course of his argument that that was the situation and then Mr. *Hogg* went into the matter elaborately and he gave reasons in reply to the many questions asked by myself, and my brother GALLIHER as to whether that special superimposed contract, as he put it, had the effect of terminating the prior one. I do not think it is a violation of the rule, but I think it is essential to this case and I wish to hear him.

GALLIHER, J.A.

GALLIHER, J.A.: The way it strikes me is—Mr. *Craig* advanced the argument, that they still continued as agents after a lapse of time, and Mr. *Hogg* in reply took a different position and advanced reasons why that could not be. Now it strikes me if Mr. *Craig* wishes to proceed and point out any flaws in the argument of Mr. *Hogg,* or in answer to Mr. *Hogg* that he would be entitled to do so. There might be something in the argument of Mr. *Hogg* that would require an answer for such and such reasons. If that is the case and Mr. *Craig* can point out such a reason as that is fallacious, it seems to me he should be given an opportunity to do so.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I have always preferred to err, if I have erred at all, in hearing counsel, because I think as a rule counsel will not abuse a privilege accorded to them in argument. And I always think in the interest of justice too strict a rule may defeat the ends of justice.

MACDONALD, J.A.

MACDONALD, J.A.: There is a rule I have been familiar with since I came on the bench and before, as stated by the Chief Justice, where a request is made that request might or might not be entertained.

Craig, replied.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.

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

The evidence convinces me that the plaintiffs were the efficient cause of the sale and that they are entitled to the commission they claim.

MARTIN, J.A.: This case is one for commission arising out of the general employment of an agent on a general listing of certain property for sale and with an additional and collateral short special listing on specially attractive terms which however produced no result. The relevant facts as I regard them are not really, if at all, in dispute and the inference to be drawn from them is as stated. The question therefore is, as Lord Atkinson put it in *Burchell* v. *Gowrie and Blockhouse Collieries, Lim.* (1910), 80 L.J., P.C. 41, 45-6, were the acts of the agent "an efficient cause of the particular sale which in fact took place?" and he goes on to say:

"There was no dispute about the law applicable to the first question. It was admitted that 'if,' in the words of Erle, C.J., in *Green* v. *Bartlett* (1863), 32 L.J., C.P. 261; 14 C.B. (N.S.) 681, 'the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission although the actual sale has not been effected by him.' Or, in the words of the later authorities, the plaintiff must shew that some act of his was the *causa causans* of the sale—*Tribe* v. *Taylor* (1876), 1 C.P.D. 505—or was an efficient cause of the sale—*Millar, Son & Co.* v. *Radford* (1903), 19 T.L.R. 575."

And he further says:

"The answer to the second contention is, that if an agent such as Burchell was brings a person into relation with the principal as an intending purchaser, the agent has done the most effective, and, possibly, the most laborious and expensive part of his work, and that if the principal takes advantage of that work, and behind the back of the agent and unknown to him sells to the purchaser thus brought into touch with him on terms which the agent theretofore advised the principal not to accept, the agent's acts may still well be the effective cause of the sale. There can be no real difference between such a case and those cases where the principal sells to the purchaser introduced by the agent at a price below the limit given to the agent."

And further, p. 47:

"The referee found that 'the power of sale was a continuing power of sale.' By that presumably he meant that the agent's employment was 'a general employment' in the sense in which Lord Watson, in his judgment in *Toulmin* v. *Millar* (1887), 12 App. Cas. 746, uses those words. This means, however, that Burchell's contract was that, should the mine be eventually sold to a purchaser introduced by him, he (Burchell) would be entitled to commission, at the stipulated rate, although the price paid should be less than, or different from, the price named to him as a limit."

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & CO. v. BELL-IRVING

GALLIHER, J.A.

MCPHILLIPS, J.A.

Upon a review of the facts, in my opinion, the only conclusion that, with respect to the learned judge below, can legally be reached is that the agent was "the effective cause of the sale" and is entitled to his commission, and therefore the appeal should be allowed.

GALLIHER, J.A.: I have read the evidence in this case twice and upon that evidence there is no doubt in my mind that Dick was the plaintiffs' prospect for the purchase of this property, that he was brought to the stage of becoming interested to purchase and finally purchasing through the continued efforts of Snyder, a salesman of the plaintiffs, who was the effective cause of the sale.

I have read the reasons for judgment of my brother M. A. MACDONALD, who has gone very fully into the evidence and as my own reasoning is along similar lines I do not feel it necessary to add anything thereto.

MCPHILLIPS, J.A.: I cannot say that it is without any regret that I have come to the conclusion that the appellants cannot succeed in this appeal.

The evidence shews that the appellants were vigilant at all times and may be said to have in some considerable measure directed the attention of the purchaser to the property sold, in fact introduced the purchaser to the respondent. Then a long course of negotiation took place during which time the appellants did have the right to effect a sale at a set figure within a certain limited time but the appellants did not effect a sale. I cannot say upon the facts that there was a general employment. As I view all the evidence the sale made differs in substantial features from that which the appellants were at any time at liberty to sell (*Toulmin* v. *Millar* (1887), 58 L.T. 96). I cannot persuade myself, much as I would like to be persuaded, that at the time of sale it could be said that there was any existing employment to sell (*Antrobus* v. *Wickens* (1865), 4 F. & F. 291; *Millar, Son and Co.* v. *Radford* (1903), 19 T.L.R. 575).

The learned trial judge made the express finding of fact that the appellants failed to establish a contract of employment. I would refer to what Lord Watson said in the House of Lords in *Toulmin* v. *Millar, supra*, at p. 96:

"My Lords: It is impossible to affirm, in general terms, that A. is entitled to a commission if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction became the cause of the sale. In order to found a legal claim to commission, there must not only be a causal, there must also be a contractual relation between the introduction and the ultimate transaction of sale."

Further it is clear upon the evidence that the appellants well knew, save upon one occasion, they were limited as to time and the time expired with no sale—that at no other time was there an exclusive agency to sell. The hazard must have been well known to the appellants and I feel sure it was appreciated that there would always be the risk of some other agent making a sale. And it cannot be said upon the facts that the sale made was in its nature a sale made as the direct result of the intervention of the appellants (*Wilkinson* v. *Martin* (1837), 8 Car. & P. 1; *Burton* v. *Hughes* (1885), 1 T.L.R. 207; *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139; *Green* v. *Bartlett* (1863), 14 C.B. (N.S.) 681).

In a city such as Vancouver—a city of very considerable proportions—there are many real-estate agents, and it is very generally known what properties are for sale, that is inside properties—in the heart of the city—that is a matter of general knowledge and many offices have what is called a listing of properties for sale, it does not mean or carry with it a "contractual relation." No doubt if any real-estate agent should obtain a purchaser who is ready, able and willing to pay the owner's price, the likely result is a sale and in most cases no doubt a commission would be paid to the agent producing the purchaser but even then it could not be said unless there was a previous contractual relation between the agent and the owner that there would necessarily be the legal requirement on the part of the owner to pay a commission—it might be that the agent would be receiving a commission from the purchaser and not looking to the owner for his commission. The question is a close one and it is most important to consider and weigh well all the evidence and particularly the finding of fact as made by the learned trial judge. The concluding words of the judgment of the learned trial judge are these:

"I am satisfied on the authority of all the cases that the plaintiff cannot succeed in this action unless he establishes a contract of employment and that in this he has failed."

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & CO. v. BELL-IRVING

MCPHILLIPS, J.A.

Admittedly there was no contract in writing and likewise, admittedly, there was no oral contract; the case must rest alone upon whether a contract can be implied from all the facts. The learned trial judge has held against this, he had the opportunity which a Court of Appeal has not of seeing the witnesses and hearing the testimony, but we are now asked to come to a contrary conclusion to that arrived at by the learned trial judge. It is true we must not shrink from rehearing the case when there is an appeal (*Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402) but great heed must be given to the learned trial judge's findings of fact, but a Court of Appeal is not really called upon to balance the probabilities. I would refer to what Lord Sumner said in his speech in the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at p. 47.

I am not of opinion that the case is one that warrants the disturbance of the judgment below. I would therefore dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Appellants sought unsuccessfully at the trial to recover $12,750 commission from respondent on the sale of a block on Granville Street, Vancouver, to William Dick, for $500,000. Several real-estate firms were interested in the transaction and the activities of two of them, Bell-Irving, Creery & Co. Ltd. and Edwards & Ames should be dealt with to see if appellant was the sole effective cause of the sale.

Edwards & Ames were respondent's agents to look after collecting rents, etc., with authority also to sell while respondent was interested as a large shareholder in Bell-Irving, Creery & Co. Ltd., who were also authorized to sell. Respondent while willing that a sale should be effected by any one was naturally anxious that the two firms mentioned, with whom he had intimate relations should, if possible, effect it or at least share in the commission. Respondent's desire however has no bearing on the actual contract upon which appellant hopes to succeed but it is important in interpreting the evidence and in viewing it aright. It is back stage activities giving to subsequent conduct its true meaning and significance.

The evidence is not in dispute, not seriously at all events, in its major aspects and as the trial judge "read and reread the

evidence" and interpreted it as best he could we are equally free to do so. It is a question of drawing proper inferences.

Respondent listed it for sale with his agents, Bell-Irving, Creery & Co. Ltd., with authority to place it with other agents. Mr. Williams, manager of the real-estate department of that company upon being asked if he had anything to do with appellants in regard to the property, said:

"Yes, it was listed with them as well as other people."

He refers to a general listing, not the special arrangement for a short period presently referred to. The price, he said, varied from time to time. One Snyder was in the employ of appellants and it is because of his activities the commission is claimed. He testified that Williams told him in December, 1927, that "the property was available for sale and they were offering it at the price of $425,000." Snyder told him that he wished to take it up with several clients and "he [Williams] told me to do that."

Appellants were first in touch with Dick through its employee Oliphant in 1925 receiving an offer from him of $250,000. It was not accepted nor possibly reported to respondent but it shews that appellant negotiated with him at that early date.

On January 5th, 1928, Snyder asked respondent's agents Bell-Irving, Creery & Co. Ltd. for an exclusive listing. It was given to him for ten days in these terms:

"You are authorized to sell the property on Granville St. owned by Mr. H. O. Bell-Irving, consisting of a three storey brick block, for $410,000, net cash, until January 15th, 1928, inc . . . . This property has been advertised, and is offered at a price of $425,000."

The advertisement mentioned the price given to Snyder in December but the ten-day exclusive listing was for $410,000 net. A letter was given to Snyder on the same date, as follows:

"This will confirm our conversation of even date that we do not share in any commission earned by you over and above the $410,000 price on Mr. H. O. Bell-Irving's property on Granville St."

No sale was effected and when the ten days ended the general listing of December, 1927, was in my opinion revived. The special listing was given for a particular purpose that failed. I think, too, on the whole evidence shewing continued activity subsequently without objection by respondent or his agent, Bell-Irving, Creery & Co. Ltd., that the general listing continued. The special listing superseded or ran along with it for a limited

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & Co. v. BELL-IRVING

period. Snyder therefore afterwards was not simply a volunteer carrying messages between respondent or his agent on the one hand and Dick on the other. He was an established agent with property listed for sale on terms originally outlined and if through his efforts the interest of the buyer was aroused and the final sale in fact effected he should be rewarded.

On March 3rd, 1928, Dick submitted an offer to appellant of $380,000, and enclosed a cheque for $5,000 as a deposit or guarantee of good faith. This offer was communicated at once to Mr. Williams of Bell-Irving, Creery & Co. Ltd. with the suggestion that it should be cabled to respondent who was then in England. This was done. Respondent in this cable was told that the offer from Dick came through appellants. He at once replied to Bell-Irving, Creery & Co. Ltd. as follows:

"Thanks wire advise defer decision Granville property till my return."

There was no repudiation of appellants' authority or any intimation that it had ended. The decision as to acceptance or otherwise was simply deferred. Appellants, in view of Dick's statement that he wanted a quick decision, cabled respondent direct after being informed of his reply and received the answer:

MACDONALD, J.A.

"Thanks yours cannot accept pending arrival."

Then after interviewing Dick appellants sent a further cablegram on March 6th in these words:

"Wire received. Have persuaded client await decision your return."

Respondent returned from England about the end of March, 1928, and Snyder had an interview with him. Some time before an adjoining property was sold for $800,000, leading respondent to believe that he should receive a larger figure than the sum mentioned in the general listing of December, 1927, and in the special listing for ten days on January 5th, 1928. He told Snyder the lots should be worth $600,000. Snyder demurred but was told by respondent "that he would not sell for less than $600,000." When asked if he would take less he said "absolutely not." Snyder said, "I will see Mr. Dick and keep after him, but I believe $600,000 would be too high for him." This account of the interview is taken from Snyder's evidence. Respondent in his account said that Snyder pressed upon him the offer of $380,000 but he declined to consider it and upon being asked, "Well, what will you sell it at?" said, as a "casual remark" that "I would be ready to take $600,000, but I didn't

offer it; I did not authorize Macaulay, Nicolls to sell at that or any other price." But to quote him further:

"I said I would be—that I would be ready to accept—that is a different thing from—I didn't authorize him to sell."

To quote further:

"That you would be ready to accept— That was my mental attitude at the time that I would be ready to accept $600,000.

"Yes, from whom? From anybody."

"Real-estate agent or anybody else? From any real-estate agent, always subject to the protection of the two firms who had been identified with the property for so many years in the past."

If after this interview a sale was arranged through Snyder at $600,000 appellants would of course be entitled to commission; or if Snyder secured an offer at a less figure from Dick and respondent accepted it a commission would be earned. He knew Snyder would "keep after him."

As to whether Snyder's only authority after this interview was to get a purchaser at $600,000 (that would be a special listing) or whether a lower offer would be considered, respondent's evidence as to what took place at this interview is more favourable to appellants than Snyder's own evidence at the trial. I find it necessary to quote it fully as inferences must be drawn therefrom. Respondent on discovery said:

"Didn't you know at the time you were dealing with Mr. Snyder that he was still going to try to get an offer that would suit you? Yes, I suppose as a real-estate agent he was. I had no reason to believe otherwise.

"And if he had got an offer which you had seen fit to accept you would have considered that he was entitled to a commission, wouldn't you? Participating with others, yes, as I had told him. He was dealing through Bell-Irving, Creery & Company.

"Well, put it this way: You think he would not have been entitled to the whole of the commission, but you would have been prepared to recognize his claim to some of the commission? If he had made a sale, undoubtedly; most assuredly.

"Now, while you mentioned $600,000, as a matter of fact, you were prepared to consider something under that, weren't you, Mr. Bell-Irving? Oh, that is a difficult question to ask; or it is a difficult question to answer, I should say.

"Well, let me refer you to the note just shewed me a little while ago? I probably would, but I may tell you at once that I naturally wished to deal with the agents who had been identified with the property for many, many years.

"You would have preferred for them to make the sale if they could, no doubt? Yes.

"But I think you shewed me a note, just a short time ago in your book—

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & CO. v. BELL-IRVING

written just a short time after you returned where you were prepared to consider something less than the $600,000 that you had mentioned. Will you just read that? I have a note on March 24th, 1928—is that about the date of it? Written immediately after I returned from England.

"Yes? I told him—also Macaulay's man—that is Snyder—that I declined the offer of $380,000 for the Granville Street property, but that I would consider selling at $600,000—now, that is merely a jotting for my own memory.

"Well, there was another note just shortly after that? Yes, there was another note just shortly after that—March 27th—March 29th, I should say: 'Granville Street property—Mr. Ames after being in touch with the purchasers of Howe's corner said that they preferred to take an option and pay $1,000 for same'—I wanted more cash—'at $450,000.' Now that was a few days after March 29th, $450,000 for my property. 'And he thinks he may probably get up to $475,000.'

"Is that all the note? Yes, that is a private note.

"I am satisfied with your reading of it. But I thought you read me something more there? Yes, I have something else here: It is dated very shortly afterwards—it is dated April 2nd.

"Yes? Now, I may say that this offer from these people of $450,000 did not eventuate in anything at all—that is, it did not result in anything at all. Then here I have a note here: 'Had an interview with Mr. Ames of Edwards & Ames. Told Ames while not giving any firm offer would seriously consider firm offer at $500,000, less commission.'

MACDONALD, J.A.

"That was about the same time that you had the interview with Snyder, wasn't it? Well, that was a little later, that was April the 2nd.

"Well, your note there in regard to what you told Ames would no doubt represent your views at that time, wouldn't it? Yes, yes; oh, yes, yes.

"And it would represent substantially what you told Snyder also, would it not? Oh, well, I told Snyder that I would be ready to take $600,000—that I would be ready to sell at $600,000.

"Yes, I know, but while you mentioned $600,000 you were prepared to—I was ready to—

"*Hogg*: It is a question of what he said to Mr. Synder.

"*Craig*: I will get it. I would rather you would not interrupt. My questions are fair enough, Mr. *Hogg*.

"At the time you had this conversation with Snyder when you say you mentioned $600,000, were you in fact prepared to consider something less than that? Not from an outside firm.

"You don't mean to say, do you, Mr. Bell-Irving, that you would be prepared to consider $500,000 from one firm, but nothing less than $600,000 from another firm? Well, I think the owner of a property has the right to sell through whoever he pleases at any price.

"Yes, no doubt you have. I quite concede that. But if you are dealing with a man at all it seems to me that there is a tremendous difference between the two things and it doesn't look like— I told Snyder I didn't want to see him.

"But isn't it so that at the time you were talking to Snyder you were prepared to consider a lesser offer than $600,000 from Snyder? Well, these notes would rather indicate that that was the case.

"Yes, that is the inference I would draw from them? But I don't say it was the case with Snyder.

"Well, will you deny it was the case with Snyder? What?

"Will you deny it was the case with Snyder that you would not consider anything less than the full $600,000? He made no offer at all, so it is outside the question. His only offer was $380,000.

"I will have to press that, Mr. Bell-Irving. Will you deny that you were not prepared—will you deny that you were prepared to consider an offer from Snyder somewhat less than the $600,000? No, I won't deny it.

"Well, won't you admit it? No.

"Yes, I quite understand it. Now, isn't it so at this conversation with Snyder that you gave Snyder to understand that while you were naming $600,000 as your price that you were in fact prepared to consider some shading of that price? No, I don't think so, I don't think I did. I don't think I gave him very much encouragement at all. That is my recollection.

"But it would have been quite in accordance with your ideas to have told him that, wouldn't it? Can't you let me have that little satisfaction? Well, that is too hypothetical altogether. I think I gave him pretty clearly to understand that $600,000 was my price, but what I kept in the back of my head was a matter for my conscience."

I quote all this evidence because it is not consistent throughout. He at first states that he knew Snyder was going to try to get an offer that would suit him, and if he did he would be entitled to a commission participating with others. From the whole of this evidence the inference should be drawn that while respondent hoped negotiations would so develop that the two agents in whom he was interested would (properly enough) share in the commission preferably by bringing about the sale still he felt Dick's ultimate offer might come through Snyder and it was important to retain his services. If he did not want him to continue he should have said so explicitly; or if his only thought was that he should try to sell at $600,000 and nothing less that too should have been definitely stated. If the offer which he finally accepted of $500,000 had been secured by Snyder instead of one Sanders, later referred to, he would have accepted it and in doing so it would have been in pursuance of the general listing given at the outset, *viz.*, December, 1927 (which was never cancelled), and also in harmony with the interview just detailed.

Snyder by months of effort, in my view, actually induced Dick to buy, or to put it another way, were it not for Snyder's work Dick would not have ultimately purchased through someone else. Appellants cannot be deprived of their commission

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & CO. v. BELL-IRVING

because someone else tried to pluck the fruit when it was ready to fall. This is not to say that respondent did not act fairly and honestly throughout. I think he did. His desire to see the two other agents sell if possible and participate in the commission was legitimate and proper. But that fairness which is conceded, prompts the conclusion in addition to the inferences already drawn from his evidence that he did not send Snyder on an errand to procure $600,000, if possible and nothing less while at the same time Edwards & Ames and Bell-Irving, Creery & Co. Ltd. might sell for a smaller sum. It follows that there was no special listing to Snyder to sell for $600,000 only, and at the same time a general listing to his special agents to sell for any smaller amount respondent might accept. Such a suggestion is inconceivable on the basis that the services of all the agents were retained. If only a special arrangement was made with Snyder on that occasion that would of course end the matter but in view of the *sequitur* mentioned and reading the evidence and also reading between the lines (and that is equally important) I cannot find any such intention. I think the language of Lord Watson in *Toulmin* v. *Millar* (1887), 58 L.T. 96 at p. 97 is of some assistance. He said:

MACDONALD, J.A.

> "When a proprietor, with the view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. The mention of a specific sum prevents the agent from selling for a lower price without the consent of the employer; but it is given merely as the basis of future negotiations, leaving the actual price to be settled in the course of these negotiations."

This is not to say that if the vendor names a price and agrees to pay a commission on that price he must pay it on a smaller sum realized. It is always a question of intention as stated by the late Chief Justice HUNTER in *Bridgman* v. *Hepburn* (1908), 13 B.C. 389 at p. 392:

> "It is in all cases a question of intention, and I quite concede that there might well be a case in which the Court could see from the circumstances surrounding the negotiations that it was the real intention of the parties that the agent should receive a commission whatever the amount realized might be, and that the price given the agent was only a working basis, in other words, that the agreement was, to pay in the event of sale, and not in the event of sale at a specified price."

This language may be applied to the case at Bar.

I turn now to the activities of other agents to see if they crowded appellants out of the picture or if although not wholly doing so they intervened to such an extent that someone, other than appellants actually induced the sale. This requires reference to activities culminating in a sale at $500,000, seven months after Snyder's last interview with respondent. Knowledge of the sale only came to the appellants from Dick the purchaser when he was closing the deal. McPherson of Pemberton & Son was in touch with Dick on different occasions for two years. He said Dick offered him $450,000 and gave him a cheque for $5,000 (Dick denied that he gave him a cheque). He saw respondent but he was not interested. This apparently was early in 1928. He held the cheque a week and returned it to Dick telling him he was unable to effect a sale. Pemberton & Son had it for sale at one time for $412,500, but respondent kept raising the price. Nothing came of his efforts and McPherson from his own testimony evidently felt that he was not a factor in the ultimate sale. He makes no claim and I do not think his intervention is a factor in any way in the inquiry we are engaged in.

MACDONALD, J.A.

Mr. Ames of Edwards & Ames was as stated general agent for respondent to collect rents, with, however, authority to find a purchaser. He saw Dick first in 1926. Dick asked him if respondent would accept $300,000. He replied that he would not. Again in June, 1927, Dick 'phoned to enquire if $350,000 would be acceptable and received the same reply. Again in July, 1928, Ames saw Dick and received an offer of $400,000. This offer was submitted to respondent. Ames admits that all these offers were made upon occasions when Mr. Dick sought him out and of course they did not produce results. He was asked:

"And it all came to nothing? No, as far as I am personally concerned, no."

Like McPherson he does not advance the claim that he was the effective cause of the ultimate sale. No doubt Mr. Dick who, as appellants contend, was brought to the frame of mind to purchase by Snyder's persistence, approached the respondent's well-known agent in the hope that he might do better through him. Dick was boxing the compass in all directions.

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & Co. v. BELL-IRVING

MACDONALD, J.A.

The other active participant—and the only one who, to my mind, deserves special notice—was Mr. Sanders. He was a real-estate salesman with Bell-Irving, Creery & Co. Ltd. for one year, *viz.*, from September 1st, 1927, to September 1st, 1928. His testimony should be studied to see if there is any evidence that he implanted the desire to buy in the mind of Mr. Dick. I cannot find any. He said he got a price on the property and talked it over with Mr. Dick in September, 1927. He asked Dick if he would consider purchasing and he said "Yes, if the price is right." It was submitted as this was before the original general listing to appellants in December, 1927, Dick did not later have to be convinced of the desirability of buying. That may or may not be true, because much earlier, *viz.*, in 1925, he made an offer through appellants' firm. There is a difference however between considering a purchase and being induced to buy. In October, 1927, Sanders, in answer to Dick's enquiries told him it could not be bought for less than $400,000, and he tried to get Dick to make an offer for that amount but he would not do so. Dick told him he gave Snyder a cheque for $5,000 to accompany an offer of $380,000. Sanders told him he did not think it would go through at that figure. Finally Dick asked Sanders what price it could be purchased for, to which Sanders replied that "the only price that I think it could be purchased for is half a million dollars." Dick enquired if $425,000, and later if $450,000 would purchase it, but was told that in Sanders's opinion it would be useless to make these offers. Sanders then left the firm of Bell-Irving, Creery & Co. Ltd. on September 1st, 1928, but continued negotiations with Dick on his own account. In October, 1928, he again saw him when the familiar question was asked by Mr. Dick and half a million again mentioned as the probable price. Dick finally said to him "Go and find out if you can buy that property for half a million dollars." He did so going to the office of Bell-Irving, Creery & Co. Ltd., but respondent had again just left for England. On October 1st, a son of respondent cabled to him to Montreal, *en route* to England:

"Would you consider selling Granville Block half million on terms satisfactory to you, am assured firm offer can be secured if purchaser knows you will accept that price will make no commitments whatever unless you instruct me to do so."

Respondent replied:

"On arrival London prepared consider firm offer Granville Block price named net to me provided participation usual commission Ames Creery basis half cash."

Respondent would not know by whom his son was informed that "an assured firm offer can be secured." It might be from any one of the agents employed but he was prepared to consider it if Edwards & Ames shared in the commission and the sale was on a half cash basis. On October 8th, when he reached England he received the following cable from Bell-Irving, Creery & Co. Ltd.:

"Have William Dick deposit ten thousand dollars following firm offer Granville Street property price half million dollars terms one hundred thousand dollars cash fifty thousand dollars in one year balance of three hundred and fifty thousand on July fifteenth nineteen thirty when mortgage expires stop all your money out in twenty-one months stop commission twelve thousand seven hundred and fifty dollars deductible from the above Ames and ourselves participating stop Ames and ourselves consider this good offer stop William Dick states that his bank if required will advance balance of cash desired by you against agreement for sale at six per cent. stop deferred payments not much more than present revenue please cable reply."

To this respondent replied:

"Decline offer Granville Block but prepared consider basis my telegram third namely half million net to me plus usual commission additional not less than two hundred fifty thousand cash balance six per cent. payable within two years for reply one week."

On 15th October another cable from Bell-Irving, Creery & Co. Ltd. was sent, as follows:

"Dick offers four hundred thousand cash and will assume mortgage you to pay commission please cable reply." (The mortgage was for $100,000)."

To which respondent replied on 16th October, 1928:

"Referring yours today accept offer four hundred thousand cash buyer assuming mortgage title and party-wall agreement as is relieving vendor further responsibility."

The sale went through on this basis. The commission was divided three ways between Sanders, Bell-Irving, Creery & Co. Ltd. and Edwards & Ames. Appellants on hearing of the sale at once demanded payment.

On the foregoing facts and from his own knowledge Mr. Dick the purchaser should be able to disclose the name of the agent who induced him to buy because the question is not through whom he bought but by whom he was induced to purchase. With a general listing the price obtained is immaterial. Mr. Dick

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & CO. v. BELL-IRVING

testified that he was dealing through appellants in July, 1925, when he made an offer for the property. That was the first time he said where anyone got him to the "stage" to make an offer as far as he knew. It will be noted that he speaks of "getting him to a stage to make an offer." Snyder he said took it up in the spring of 1928—it would be a resumption of previous efforts by the same firm—and in March he offered $380,000 through him. Snyder supplied him with information about rentals, etc., upon which he based his offer although he received information from different sources. He was aware that at least four agents had it for sale, but the information he got and figured from as the basis of his offer was from Snyder. Dick's evidence agrees with Snyder's as to respondent's price for a time of $600,000, and as he put it "we simply dropped it for the time being." On the point as to through whose efforts he was "sold" on the deal (a word used to indicate that one is brought to the point of action) his evidence may be quoted:

MACDONALD, J.A.

"We get so many clever fellows selling real estate, you know, that tells you this and tells you that, but you have got to be sold. That is, when it comes to putting up some of the money like that. Snyder handled a big deal for us before, he was very satisfactory, and I figured he knew the game pretty well, but there is a man in the city here, that is not a real-estate man that knows more about the game than any real-estate man I know, and when we have any doubt about anything like that we send out and bring him in.

"But as far as real-estate agents having to do with the transaction, what do you say—was there any other one that was instrumental in making you willing to purchase the property at $500,000? What do you say? Yes. Snyder had a good deal to do with it.

"In addition to what Snyder gave you conferred with the person that you have mentioned, did you? You usually sit down and talk the earning power of the building, expenses, you analyze it, see, and then finally you say, well, it only brings in 3 or 4 per cent. as the case may be, but it is a good location, which is everything, in real estate. That is, you are sole arbiter yourself when it comes to a showdown.

"Oh, certainly, when you make up your mind? Yes."

The other man he refers to was called in not to induce him to buy but to assist in determining if the price was satisfactory. This evidence is not wholly conclusive but he at least makes no reference to the other agents as a factor in causing him to be "sold" on the project. Only Snyder is referred to as one who "had a good deal to do with it." His evidence on this point may be further tested by his reference to the activities of the other

agents. He said he saw Ames in 1926 in reference to it. He sent for him but had no record of making an offer although he thought an offer was made, but in any event, he would not consider that an offer amounted to anything unless accompanied by a cheque. "An offer is not an offer without it—the only thing that talks is a cheque."

As to Sanders he said he saw him in 1927, before he made the offer of $380,000. He discussed several properties with him. He saw him frequently in 1928. Sanders as the representative of Bell-Irving, Creery & Co. Ltd. in which respondent was the largest shareholder would appear to Dick as the *altero ego* of the respondent. It brought him, so to speak, closer to headquarters without affecting the point as to who induced him to buy. It would be natural enough for Dick, who was not concerned with who received the commission, to make an offer through the source which appeared to him to be a more direct one. In fact Snyder testified that he had information that Sanders went to Mr. Dick and asked him:

"Why he was dealing through me [Snyder] for the property that he [Sanders] was with Bell-Irving, Creery & Co. and he could sell him the property for $400,000, which was $25,000 less than I was offering the property for."

Whether that is true or not, I think it is the relation of Bell-Irving, Creery & Co. Ltd. to respondent known to Dick explains his dealing with Sanders. He wanted to get as close as possible to the vendor, offering first $400,000, then a higher figure, and finally $500,000. That is a fair inference from the evidence. The price was constantly changing and circuitous methods might be costly to the purchaser.

Sanders, Dick said, "handled the negotiations" (the phrase is significant) for the deal; in fact, as he put it, he did business with no one else after Snyder's offer was turned down. I think Dick either "sensed" or was told of respondent's natural desire that the property should be sold through, and the commission earned in part, at all events, by Bell-Irving, Creery & Co. Ltd. and felt that he would make better progress in submitting offers through them. Apart from this viewpoint, there was no reason why he should not continue to make his offers on a steadily ascending scale through Snyder. All that was "tactics" and does not solve the riddle as to the inducing cause. I would

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & Co. *v.* BELL-IRVING

MACDONALD, J.A.

gather from Mr. Dick's evidence that he was not a willing witness. He did not want to become involved in a dispute between rival firms over this commission. Keeping this in mind it is all the more significant that he only refers to Snyder by inference at least as having "sold" him on the deal, and as having "a good deal to do with it." He leaves the impression that he might have said more. Sanders, he said, "handled the negotiations." That is true but it conveys a suggestion favourable to appellants, *viz.*, that he closed a deal put under way by someone else. It is not who "handled the negotiations" but who induced the purchase. Add to this Snyder's evidence, *viz.*, that it took him a long time "to develop Mr. Dick's interest in the property," and to "educate him to the value of the property and its potential or future value," pointing with all the evidence to the inference that he brought about the sale. There is at least no evidence that the efforts of anyone else brought it about. I give Dick's evidence the interpretation which I think it should receive particularly in view of the position he assumed. The other agents' efforts were exerted on the respondent to induce him to come down in his price. The willing purchaser was available. The fact that he accepted $500,000 would lead one from the evidence to believe—as the fact was—that it was through Sanders Dick offered that amount. But we are not concerned with the consummation of the sale but with its inception.

I think the natural desire to retain the commission in the family, so to speak, led, perhaps unconsciously, to a failure to appreciate the efforts of Snyder. It is difficult to arrive with certainty at a fixed opinion where several agents are concerned. If confusion is not guarded against at the outset, I think, while the obligation is on both parties, the chief responsibility rested on the employer in this case to clarify the situation. Not having done so we must analyze the evidence (not at all conclusive) as best we can to find in respect to implanting the desire to buy, who officiated at the birth of the idea, not at the christening. That suggests the distinction which I think exists between the activities of Snyder on the one hand and Sanders on the other. The latter's connection is with receiving offers, closing the deal and "handling the negotiations," not with starting it. If Sanders caught the fish he should have done it with his own bait.

I cannot agree with the suggestion that Snyder's chief concern was to work in Dick's interest trying to get respondent to reduce his price rather than persuading Dick to increase his offer. Even if true an agent is at liberty to try to bring the parties together by mutual concession. Nor will appellant lose its rights because of the *modus operandi* adopted by Dick, followed simply to facilitate the sale.

On the whole I think Dick's evidence with all it suggests leads to the inference that it was through Snyder's intervention that the property was sold. If there was a jury that question could not have been withdrawn for lack of evidence. The work of the agent need not be of such a character that it forces one to a positive conclusion. As Keating, J. stated in *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139 at p. 143:

"In ninety-nine cases out of a hundred, the services performed by the house-agent upon these occasions is of the slightest possible kind: it consists for the most part in merely bringing the vendor and the purchaser together, so as to result in a sale. It is often done by a line written or a word spoken."

MACDONALD, J.A.

This case is of some importance in meeting the suggestion that because the price given Snyder was said to be $600,000 at the last interview and it was sold for less he cannot recover. There the vendor wanted to dispose of a leasehold for £2,200. The agent simply gave the ultimate purchaser a card with terms of sale marked thereon. The intending purchaser thought the price too high, and offered not through the agent for sale but to a friend of the vendor, £1,700. Negotiations were broken off and later renewed and ultimately it was sold at that figure. The purchaser was asked at the trial if he would have purchased had he not gone to the house agent's office and procured the card, and he said "I should think not." Dick's whole evidence would suggest a similar reply to the same question. Even independently of this answer it was held that there were facts which would not have been withdrawn from the jury and upon which they might properly find a verdict for the plaintiff. It was suggested as in the case at Bar, that it was sold without the intervention of the plaintiff, but Denman, J. said (p. 144):

"I understand intervention to be something to be made out of facts, which are for the jury and not for the Court. One material question was whether the buyer was influenced in making the purchase by an act done by the agents."

COURT OF APPEAL

1930

Jan. 7.

MACAULAY, NICOLLS, MAITLAND & Co. *v.* BELL-IRVING

MACDONALD, J.A.

That is the question in this case, and either by drawing an inference from the evidence, weighing probabilities or sitting as a jury, I would answer it in the affirmative. It was Snyder's acts that brought Dick into relation with respondent as an intending purchaser, and the sale being made the agent did what he contracted to do. That being so it is not material that the consummation of the sale took place through some other agent; nor is it necessary to find that such other agent intervened for the purpose of depriving appellants of their commission.

All appellants had to do was to procure someone who as a result thereof subsequently became a purchaser. Snyder's work extending over months resulting at one stage in a definite offer was the foundation upon which future negotiations proceeded to a successful issue, and was the *causa causans* of the sale.

I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellants: *J. F. Downs.*

Solicitors for respondents: *Wood, Hogg & Bird.*

EWING v. HUNTER.

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

1929

Dec. 13.

EWING v. HUNTER

Practice—Appeal—Security for costs—Fixing time limit for deposit—Jurisdiction of judge in Chambers.

A judge appealed from may fix the amount of security but cannot limit the time for depositing security. This must be done by application to a judge of the Court of Appeal. Before a motion can be made to the Court of Appeal to dismiss for want of security a time limit for deposit must have been fixed by a judge. An order dismissing an appeal for default in giving security cannot be made in Chambers, but only by the Court.

APPLICATION by respondent for the dismissal of an appeal owing to default in giving security. Notice of appeal had been given for the January sittings, 1930, and on the 28th of November, 1929, an order was made by ELLIS, Co. J., the judge appealed from, fixing the security at $75 and directing it to be given on or before the 5th of December, 1929. The order was not complied with. Heard by MACDONALD, C.J.B.C. in Chambers at Victoria on the 13th of December, 1929. Statement

D. M. Gordon, for respondent: Default has been made under the order of ELLIS, Co. J. and we submit a judge in Chambers has power to dismiss, as such a dismissal would not touch the merits. Your Lordship in *Canada Law Book Co.* v. *St. John* (1923), 32 B.C. 66 seems to have considered that you had such power, though you did not exercise it. There is an express decision in Saskatchewan that a judge in Chambers can dismiss on this ground: see *Parry and Sturrock* v. *Duncan* (1924), 1 W.W.R. 727. This is based on a section which is similar to section 10 of our Court of Appeal Act. Argument

[MACDONALD, C.J.B.C.: What power had the County Court judge to fix a time limit? It has always been my view that the trial judge can only fix the amount of security, that a judge of this Court must fix a time limit, and a motion to dismiss must be made to the Court, as was done in the *Canada Law Book Co.* case.]

The County Court judge seems to have followed the ruling of

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

1929

Dec. 13.

McDONALD, J. in *Olsen* v. *Pearson* (1923), 32 B.C. 517. The inconvenience is great if the respondent cannot know until the Court sits whether he has to meet an appeal on the merits.

The appellant did not appear.

EWING v. HUNTER

Judgment

MACDONALD, C.J.B.C.: The application must be dismissed. I do not think I can follow the Saskatchewan case cited, against views held in this Court for nearly 20 years. Further, the County Court judge, in my opinion, had no power to fix a time limit; and consequently no default has been made by the appellant. I will not, therefore, adjourn this application into Court, since the Court could make no order as matters stand. Nor can I make an order now fixing a time limit as was done in *Canada Law Book Co.* v. *St. John* (1923), 32 B.C. 66 on an application similar to this. There the appellant was represented; here, the appellant has no notice of an application to fix such a limit, so the respondent must be held to his notice. This dismissal will be without prejudice to any further application.

Application dismissed.

ESQUIMALT WATER WORKS COMPANY v. LEEMING.

COURT OF APPEAL

1930

Jan. 7.

ESQUIMALT WATER WORKS CO. v. LEEMING

Taxation—Income—Expropriation of property of company—Stated amount due and payable—Arrangement for deferred payments—Additional annual payments made by reason thereof—Whether capital or income—R.S.B.C. 1924, Cap. 254, Sec. 140.

The City of Victoria under statutory power expropriated the Esquimalt Waterworks system, the price agreed upon being $1,450,000. The City assumed a mortgage of $625,000 and it was arranged that the balance of $825,000 might be paid at any time on giving three months' notice, failing which the sum of $40,000 per annum was to be paid for twelve years (during the currency of the mortgage) and thereafter semi-annual payments of $40,000 to be allotted in part to the Company and in part to a sinking fund. Forty thousand dollars received by the Company in 1927 was assessed as income.

Held, on appeal, affirming the order of the Judge of the Court of Revision, that such annual payments were taxable as income of the Company under the Taxation Act.

APPEAL by the Esquimalt Water Works Company from the order of R. H. Green, Esquire, Judge of the Court of Revision for the Victoria Assessment District of the 1st of March, 1929, on appeal from the assessment made by the Provincial Assessor under the Taxation Act for the year 1927. The Esquimalt Water Works Company which is in liquidation filed a return of income as required under the Taxation Act shewing the gross income to be less than the expense. Attached to this return was a statement shewing that $40,000 had been received from the City of Victoria under the terms of expropriation (see Cap. 69, B.C. Stats. 1925, for terms of expropriation) and in the said statement the Company treated the said sum of $40,000 as being a return of capital. It was held by the Provincial Assessor that the payment should be classed as income and after allowing certain deductions assessed the Company at $35,988, the tax on which was $2,879.04. On appeal to the judge of the Court of Revision, the appeal was dismissed. The further relevant facts are set out in the judgment of MACDONALD, J.A.

Statement

The appeal was argued at Vancouver on the 2nd of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1930

Jan. 7.

ESQUIMALT WATER WORKS CO. v. LEEMING

Maclean, K.C., for appellant: The City by statute was authorized to establish waterworks with power to expropriate. They expropriated the Esquimalt Water Works system and agreed to pay $1,450,000 for it. They assumed a mortgage for $625,000 and agreed to pay the balance of $825,000 on the terms authorized in the notice of expropriation. Under the arrangement, the City could pay the whole amount due at once but if not, $40,000 a year was to be paid in addition. The Company is now wound up, and all payments made for the purchase of the property is in the return of capital and not income: see *Inland Revenue Commissioners* v. *Burrell* (1924), 2 K.B. 52; *Davison* v. *King* (1928), N.I. 1 at p. 11.

Argument

Bullock-Webster, for respondent: This payment of $40,000 per annum is simply interest on the amount that is due the Company. This scheme is a violation of the spirit of the Act: see *Attorney-General* v. *Richmond (Duke) (No. 2)* (1909), 78 L.J., K.B. 998 at p. 1009. "Income" is defined in section 2 of Cap. 254, R.S.B.C. 1924. A company, though not actively engaged in business is not for that reason exempt from taxation, and if it has income, that income is liable to taxation: see *North Pacific Lumber Co., Ltd.* v. *Minister of National Revenue* (1928), Ex. C.R. 68; see also *In re Taxation Act and Anderson Logging Co.* (1924), 34 B.C. 163; *In re Taxation Act and The All Red Line, Ltd.* (1920), 28 B.C. 86 and *Attorney-General of British Columbia* v. *Standard Lumber Co.* (1926), 36 B.C. 481.

Maclean, in reply, referred to *Secretary of State in Council of India* v. *Scoble* (1903), A.C. 299.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.

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

MARTIN, J.A.

MARTIN, J.A.: In my opinion the judgment appealed from takes the correct view of the matter and therefore the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: At the close of the argument I was prepared to give judgment dismissing the appeal. Since then I have gone into the matter and have had the advantage of reading the judg-

ment of my brother M. A. MACDONALD, which confirms me in the view I originally held.

I would dismiss the appeal.

MCPHILLIPS, J.A.: In my opinion the appeal fails; the acquirement of the franchise and properties with an agreed-upon annual payment not to be credited upon the purchase price cannot but be considered as income. That the Company is not functioning matters not, it is equivalent to an annual income determinable when the whole purchase price is paid; when that occurs the purchase price will undoubtedly be capital assets of the Company and the liquidator will have to account to the shareholders of the Company therefor as moneys received by way of the sale of assets of the Company. The scheme of sale is ineffective to accomplish its intended purpose; no doubt, it was as I would interpret it, an endeavour to legally evade income tax. There are cases where a tax may be legally evaded: *vide Simms* v. *Registrar of Probates* (1900), A.C. 323; 69 L.J., P.C. 51. I am not suggesting for a moment that that which was done, *i.e.*, the method of sale, was in its nature an attempt to illegally escape income tax, but to give effect to the contention made at this Bar would be the endorsement of an illegal evasion of income tax. In truth the annual payment not to be credited upon the purchase price of the assets of the Company can only be and necessarily must be deemed to be annual income and taxable as such.

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is an appeal under section 140 of the Taxation Act, R.S.B.C. 1924, Cap. 254, from an order of a judge of the Court of Revision and Appeal for the Victoria assessment district confirming an assessment on the alleged income of appellant Company for 1927, *viz.*, the sum of $40,000. The tax imposed amounted to $2,879.04. Appellant Company, incorporated by Cap. 30, B.C. Stats. 1885, was given power to install a waterworks system with ramifications in a local district. Later the City of Victoria by statute was authorized to establish a waterworks system with power to expropriate. Pursuant thereto it expropriated the Esquimalt Water Works system owned by appellant and agreed to pay $1,450,000 for its fran-

COURT OF APPEAL

1930

Jan. 7.

ESQUIMALT WATER WORKS CO. v. LEEMING

chise rights. Payment was to be made by the assumption of a mortgage for $625,000 and by payment of the balance of $825,000 as provided in a special Act passed to ratify and confirm the expropriation and purchase (The Esquimalt Water Works Company Winding-up Act, 1925, B.C. Stats. 1925, Cap. 69). This balance of $825,000 was payable on the terms outlined in the notice of expropriation previously given to appellant Company and incorporated in the ratifying Act. As therein provided the full amount might have been paid at any time on giving three months' notice; failing which the sum of $40,000 per annum was to be paid to appellant Company for a period of about 12 years (the currency of the mortgage) and thereafter semi-annual payments of $40,000, to be allotted in part to appellant Company and in part to a sinking fund. During this period appellant Company by the ratifying or winding-up Act referred to could not exercise any of its corporate powers except such as were necessary to deal with and dispose of moneys so received and upon full payment it would cease to have corporate existence subject only to power to distribute.

MACDONALD, J.A.

The sum of $40,000 received by appellant for the year 1927 was assessed as income, whereas it contends that it represented the realization of an asset (part of the purchase-price) by a company not carrying on business but rather in the course of being wound up. It is, therefore, it is submitted, not taxable. The point is this: Apart from the mortgage assumed the purchase price was $825,000. It might have been paid in full and of course if so paid would not be taxable as income. By arranging for deferred payments an additional $40,000 per year was payable. If these additional payments were expressed in terms of interest it would approximate five per cent. and if so expressed there would be no question that such interest would be taxable as income. If, however, it is part of the purchase price it is not taxable. Had the agreements provided that the purchase price should be $1,450,000 if paid at once but a larger sum if paid at a later time or times, the additional sums so paid would not be income. It would be capital; part of the purchase price or agreed-upon value of an asset disposed of. I think, however, the actual selling price was $1,450,000 and the additional amounts mentioned (looking to the substance) was in the nature

of interest on deferred payments or a sum received by the liquidator of appellant Company in addition to the fixed price in consideration for the extended time of payment. In proof of this view the $825,000 is referred to as the "agreed principal sum" in section 12 of the Act and the payments of $40,000 as "interest." True section 12 provides an optional method of payment which was not resorted to but it may be looked at as throwing light on how the various payments were regarded. Nor do I think, as contended, that anything turns on the fact that the Company was in process of being wound up. The liquidator took the place of the Company.

Inland Revenue Commissioners v. *Burrell* (1924), 2 K.B. 52; 93 L.J., K.B. 709, does not assist appellant. There in the winding up of a limited company it was held that the undivided profits of former years and of the winding-up year which were distributed among the shareholders was not taxable as income in their hands. The company being in the hands of a liquidator, he had no power as the company formerly had to distribute the profits as dividends but only as part of the property of the company to which the shareholders were entitled on distribution. That is not this case. Here we are dealing with the sale of the assets of a company being wound up to another corporation and it is the moneys so received, not distributed, that is under consideration. The purchase price is the property of the company to be later distributed but if instead of procuring it in full it is arranged to permit all of it or part of it to remain outstanding on payment of certain additional sums these latter amounts are earnings and are received by the liquidator as such. It is the company, through its liquidator, that is being taxed on these amounts, not shareholders to whom distribution was made. These earnings will be later distributed to shareholders and others entitled as part of the assets of the company less the tax imposed on what may be regarded as interest on deferred payments. It will all finally go to shareholders as part of the capital assets of the Company; but, as received by the liquidator from time to time from the purchaser, that part, which in reality must be regarded as earnings, should be treated as income.

MACDONALD, J.A.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *H. H. Shandley.*
Solicitor for respondent: *W. H. Bullock-Webster.*

COURT OF APPEAL

1930

Jan. 7.

ROMANO v. COLUMBIA MOTORS LIMITED.

Bailment—Fire in public garage—Damage to motor-car—Negligence—Cause of fire—Onus on bailee—14 Geo. III., Cap. 78, Sec. 86.

ROMANO v. COLUMBIA MOTORS LTD.

When a motor-car is damaged by fire while stored for hire with a garage company, the onus is on the company to shew that all reasonable care was taken to prevent such damage.

The plaintiff placed his car in the defendant's garage on a monthly charge for storage. A fire broke out in the garage and the cars were removed. On the fire being put out at about eight o'clock in the evening the cars were put back in the garage. The manager of the garage stayed on the premises until about twelve o'clock at night and he then left a watchman in charge. At about a quarter to four in the morning the watchman went away for about fifteen minutes to get an overcoat and on his return the garage was again in a blaze. The plaintiff's car was damaged. An action for damages was dismissed.

Held, on appeal, affirming the decision of NISBET, Co. J. (MACDONALD, C.J.B.C., and MCPHILLIPS, J.A. dissenting), that the learned judge below was right in finding that the defendant had discharged the onus upon it as a bailee for hire to prove that it had used the same degree of care towards the preservation of the goods entrusted to it as a reasonable person would in respect of his own goods.

Statement

APPEAL by plaintiff from the decision of NESBIT, Co. J. of the 26th of June, 1929, in an action to recover $300 for damages to his motor-car. The plaintiff had stored his motor-car on the premises of the defendant at Trail, B.C., during the month of July, 1928. On the evening of the 8th of July a fire broke out on the defendant's premises and the cars that were stored there were all taken out. After the fire was put out the cars were again stored on the premises. In the early morning hours of the following day a fire again broke out in the premises and the cars stored there were badly damaged including that of the plaintiff. The cause or origin of the fire was never ascertained. The first fire was out at about 7.45 p.m., but firemen were about the premises until about midnight. After that the defendant had a watchman there more for the purpose of preventing the tools and equipment from being stolen. At about 3.45 in the morning the watchman went home to get an overcoat and when he came back the place was in flames. The plaintiff claims the

defendant was negligent in putting the car back in the garage after the first fire without providing a competent watchman to guard against further fire and, secondly, that he was liable for the damage caused by the fire unless he can shew by positive and direct evidence that the fire began accidentally the onus being on the defendant to explain the cause of the fire. The action was dismissed.

The appeal was argued at Vancouver on the 4th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Statement

F. Fraser, for appellant: This defendant is a "bailee for hire" and the plaintiff sets up negligence. The fire was due to the absence of the caretaker, one of its employees. The caretaker was put there just as much to watch for fires as for care of goods from theft. The Fire Prevention Act (Imperial) does not release the bailee from the onus of explaining the cause of the fire: see Beven on Negligence, 4th Ed., 919. The watchman says he was away a quarter of an hour and when he came back the garage was in a blaze and the firemen had again arrived on the scene. This is evidence of negligence, for which the defendant is liable: see *Brabant & Co.* v. *King* (1895), 72 L.T. 785; *McKee* v. *Winnipeg* (1928), 3 W.W.R. 561; *Prentice* v. *City of Sault Ste. Marie* (1928), S.C.R. 309.

Argument

Donaghy, K.C., for respondent: The findings by the learned judge below are in our favour and the evidence shews the respondent took all reasonable care to protect the premises: see *Comstock* v. *Ashcroft Estates, Limited* (1916), 23 B.C. 476; *Searle* v. *Laverick* (1874), L.R. 9 Q.B. 122. The plaintiff knew the car was put back after the first fire and he made no protest: see *Fry* v. *Quebec Harbour Commissioners* (1896), 9 Que. S.C. 14, and on appeal 5 Que. Q.B. 340.

Fraser, in reply: On the absence of the watchman see *Joseph Travers & Sons, Limited* v. *Cooper* (1915), 1 K.B. 73.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.

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

The defendant was a bailee for hire and bound to take reason-

COURT OF APPEAL

1930

Jan. 7.

ROMANO v. COLUMBIA MOTORS LTD.

MACDONALD, C.J.B.C.

able care of the bailment. The garage in which the car was stored took fire and the cars in it were taken out. The fire brigade quenched the fire and the plaintiff's car was put back again. The chief of the fire brigade considered that it would be the proper thing to leave the hose attached to the hydrant so that should the fire recur during the night water might be thrown upon it. The defendant left a boy or young man as watchman, but during the night the boy left his post to go for an overcoat and during his absence the fire recurred and injured plaintiff's car. That the defendant anticipated danger is shewn by his leaving a watchman there, and I think it is clear enough that the absence of the watchman when he ought to have been there is responsible for plaintiff's damage. There is no evidence offered of the competency or reliability of the person left as watchman, and therefore I think his negligence must be attributed to the defendant. The appeal should therefore be allowed.

I say nothing of the damages since I am in the minority of the Court.

MARTIN, J.A.: With respect to the general principle of law applicable to this case of a motor-car damaged by fire while stored for hire by a garage company, I adopt the judgment of Lord Justice Scrutton in *Coldman* v. *Hill* (1918), 35 T.L.R. 146, and hold, after a careful consideration of all the evidence before us, that the learned judge below was right in finding that the defendant respondent had discharged the onus upon it as a bailee for hire to prove it (p. 149).

MARTIN, J.A.

" . . . [had used] the same degree of care towards the preservation of the goods entrusted to [it] from injury which might reasonably be expected from a skilled agister or a reasonable man in respect of his own goods . . . ."

The circumstances of the fire that destroyed the car are repeatedly described by the plaintiff's principal witness, Turner, chief of the fire department, to be unprecedented in his 30 years' experience and "most extraordinary," and we would not, in my opinion, be justified in disturbing the conclusion of said fact, but without wholly adopting the reasons given therefor, I would, consequently, dismiss the appeal, and in so doing refer to the similar judgment of Mr. Justice Kelly in *Karn* v. *Ontario*

Garage and Motor Sales Ltd. (1919), 16 O.W.N. 31, wherein most of the leading cases are collected.

GALLIHER, J.A.: The respondent was a bailee for hire. He was not an insurer of the property committed to his care. The obligation cast upon him by the bailment was that he should use all such care to preserve the property placed in his charge as a reasonable man would be expected to do, according to the circumstances and the question really is, did he exercise such care?

As to that I can very well see that there may be different opinions, but after reading every word of the evidence and taking into account the rather unusual circumstances of this case, I find myself in agreement with the inferences drawn by the learned trial judge, at all events to this extent, that I am not prepared to say he could not reasonably draw such inference. With all respect, I think the case of *Wilson* v. *City of Port Coquitlam* (1922), 30 B.C. 449; (1923), S.C.R. 235 has no application.

GALLIHER, J.A.

I would dismiss the appeal.

McPHILLIPS, J.A.: This appeal brings up the question of the liability of a bailee for reward. The plaintiff (appellant) the bailor sued for the damages occasioned to his motor-car through fire. Without going into all the details, a fire had taken place in the garage of the defendant, the bailee, where the motor-car was kept, and at the time of the fire the motor-car was taken out of the garage by the bailee, but later was returned to the garage by the bailee, but unfortunately a second fire broke out during the early morning hours of the following day which later fire did damage to the motor-car of the plaintiff.

This Court considered the question of law that arises in two cases, that are reported, *viz., Pye* v. *McClure* (1915), 21 B.C. 114, which was followed by *Comstock* v. *Ashcroft Estates, Limited* (1916), 23 B.C. 476. In short, the true proposition of law is that the onus is upon the bailee to take all reasonable care of the property left in his charge. Now was that onus in the present case duly discharged? Upon the facts as I view and weigh them, with great respect to the learned trial judge, that onus was not satisfactorily discharged. With the knowledge of

MCPHILLIPS, J.A.

COURT OF APPEAL

1930

Jan. 7.

ROMANO v. COLUMBIA MOTORS LTD.

MCPHILLIPS, J.A.

what had taken place it was, in my opinion, negligence in the defendant (respondent) to replace the car in the garage so soon after the first fire, in that it should have been reasonably apprehended that fire might be smouldering somewhere about the premises and break out anew especially when one considers how inflammable garage buildings are, in many places saturated with oil and highly inflammable. The manager of the defendant left the premises shortly after midnight after arranging for the putting back of the motor-cars and left a man on the premises to look after the tools, equipment and cars. This watchman remained on the premises until the early hours of the morning, without observing any sign of recurring fire, but he absented himself for about fifteen minutes he says, and upon his return the premises were all ablaze. It is a fair assumption that the watchman failed to properly watch the premises and was guilty of negligence in leaving the premises as he did. The suddenness of the fire demonstrates that the original fire had never been completely put out, but was smouldering somewhere in some portion of the building and no proper inspection or watchful care had been taken, which constituted actionable negligence upon the part of the defendant; that is, upon the facts, reasonable care was not taken. The duty rested upon the defendant of negativing the idea of negligence on its part and that in my opinion was not done (*Port Coquitlam* v. *Wilson* (1923), S.C.R. 235, Duff, J. at p. 243, and Mignault, J. at p. 253). In *Joseph Travers & Sons, Limited* v. *Cooper* (1915), 1 K.B. 73, the English Court of Appeal held that the onus lay on the defendant who was in possession of the goods as bailee of shewing that the negligence of his servant in leaving the barge unattended did not cause the loss and that he failed to discharge that onus. In the *Travers* case, Kennedy, L.J., at pp. 90-91, makes some quotations from the speeches of Lord Loreburn, L.C., and Lord Halsbury, in the unreported case of *Morison, Pollexfen & Blair* v. *Walton* (May 10th, 1909).

Lord Loreburn:

"Here is a bailee who, in violation of his contract, omits an important precaution, . . . It is for him to explain the loss himself, and if he cannot satisfy the Court that it occurred from some cause independent of his own wrong-doing he must make that loss good."

Lord Halsbury:

"It appears to me that here there was a bailment made to a particular person, a bailment for hire and reward, and the bailee was bound to shew that he took reasonable and proper care for the due security and proper delivery of that bailment; the proof of that rested upon him."

In my opinion, the appeal should be allowed.

MACDONALD, J.A.: This is an appeal from a judgment of His Honour Judge Nisbet in favour of the defendant (respondent) absolving it from liability for damage to a motor-car partially damaged by fire while in respondent's custody as bailee. The appellant placed his car in respondent's garage paying $5 a month for storage. A fire broke out in the garage on the evening of July 8th and appellant's car, with others, was removed while firemen extinguished the flames. It was brought under control in about half an hour but to guard against a further outbreak two firemen were left with hose ready for action for about two hours thereafter. It was thought at that time to be completely out although the fire chief, still apprehensive, continued to return at intervals until midnight. Respondent's manager stayed around the garage from eight or nine o'clock in the evening, when he first arrived, until midnight. He then had all the cars including appellant's placed back in the garage believing it was safe to do so because, in his opinion, the fire was completely out. He did not ask the fire chief or any fireman about the place to verify this opinion. A watchman was then stationed by respondent's manager on the premises primarily to prevent the theft of tools and equipment but also, as stated in the evidence, incidentally to watch the cars but not because he anticipated another outbreak of fire.

About four o'clock in the morning this watchman left the garage for about fifteen minutes to get an overcoat to keep him warm and while away on this errand a fire again broke out (cause unknown although presumably from the remains of the first fire) and appellant's car was damaged.

The onus was on the respondent at the trial to establish that its manager exercised due care in protecting appellant's property. That is the only point involved. Any question as to the origin of the fire or fires is not material. If he should have known, exercising reasonable forethought, that the fire would likely break out again he acted negligently in placing the car

COURT OF APPEAL

1930

Jan. 7.

ROMANO v. COLUMBIA MOTORS LTD.

back in the garage. On this point, on all the facts, and considering the two alternatives of leaving the car outside on or near the street or inside the garage for the night, I think he acted with reasonable prudence in deciding upon the latter course. Further, as stated, he placed a watchman in charge to remain until morning. He was justified in replacing the car in the garage with the additional protection of a watchman.

If, however, we must regard the watchman's conduct in leaving the premises for fifteen minutes for the purpose indicated as a negligent act, should it be imputed to the respondent; or is the latter's duty discharged when it appoints a competent man to act as watchman? Further, should we assume without evidence that the watchman was competent?

It is not, I think, necessary to decide these points because under the circumstances I do not regard this natural action on the watchman's part as necessarily negligent. We should view an incident of this sort reasonably and the trial judge apparently did so. A prudent man in a similar situation would likely act in the same way when at so late an hour the probability of fire breaking out again was remote. Few too would be about the streets at that hour likely to enter the garage bent upon mischief.

MACDONALD, J.A.

The learned trial judge said:

> "I cannot see that the defendant [respondent] acted in any negligent manner and it appears to me that any reasonable man might very well have acted in the same manner under the same circumstances. The fact that the defendant's own cars, unprotected by insurance, were put back also and damaged probably to a greater extent than the plaintiff's, shews that the defendant's manager was taking the same care of the plaintiff's property as of his own."

He might of course display carelessness in respect to his own property. That would not excuse lack of care in respect to the property of the bailor. But there is a finding that he did not act negligently and it should not be displaced unless we are convinced that it is clearly wrong. While the learned trial judge does not deal specifically with the alleged negligence of the watchman in temporarily leaving the premises he does refer to the incident and we must assume that he did not regard the incident as *per se* an act of negligence. True the facts are not in dispute and we might draw another inference from the incidents

of the night. A trial judge might reasonably hold that respondent's manager should have first carefully searched the premises for traces of fire; consulted the fire chief before placing the cars back in the garage; anticipated a renewal of the fire from the fact that a hose was left ready for use thus shewing that the fire chief was to some extent apprehensive and conclude that it would have been safer to leave the cars outside for the night. If, however, the trial judge chooses, as he did, to draw an inference favourable to the respondent and finds that he discharged the onus resting upon him, a finding that is, on the whole, warranted by the evidence, I would not feel justified in interfering.

The appeal should be dismissed.

Appeal dismissed, Macdonald, C.J.B.C. and McPhillips, J.A. dissenting.

Solicitor for appellant: *Frederick Fraser.*
Solicitor for respondent: *Donald MacDonald.*

BIGRIGG v. WILLIAMS.

Animals—Dogs—Killing of goat—Proof of "previous mischievous propensity" of dog—Liability of owner of dog—Conviction—Appeal to County Court—Court of Appeal—Jurisdiction—R.S.B.C. 1924, Cap. 11, Sec. 19; B.C. Stats. 1926-27, Cap. 64, Sec. 13; R.S.B.C. 1924, Cap. 52, Sec. 6.

The defendant successfully appealed to the County Court from his conviction by the police magistrate at Fernie for an offence against section 13 of the Sheep Protection Act, whereby the plaintiff's goat was so badly injured by the defendant's dog (with the assistance of another person's dog) that it had to be shot.

Held, on appeal, reversing the decision of THOMPSON, Co. J., that it is not necessary for the owner of the injured animal to prove that the dog which inflicted this injury had a previous mischievous propensity, and the judgment below should be set aside and the conviction restored.

Held, further, that as the appellant raised a point of law in the Court below by stating that he relied upon the statute, and the judgment in the Court below turned upon it, the Court of Appeal had therefore jurisdiction to hear the appeal under section 6 (*d*) of the Court of Appeal Act.

COURT OF APPEAL

1930

Jan. 7.

BIGRIGG v. WILLIAMS

APPEAL by plaintiff from the decision of THOMPSON, Co. J. of the 14th of May, 1929, on appeal from a conviction by the stipendiary magistrate at Fernie, B.C., under the Sheep Protection Act. On the 18th of October, 1928, the informant's goat was attacked by two dogs, one belonging to the defendant. The goat was so severely bitten that it had to be shot. It was found by the magistrate that the damage caused by the dogs amounted to $45; the proportion of the damages caused by the defendant's dog being $30, and he ordered that the defendant pay the plaintiff $30. On appeal it was held by the County judge that the party seeking damages must prove, first, that it was the dog in question that inflicted the injury, secondly, that the dog had a previous mischievous propensity to commit the particular act of injury and, thirdly, that the owner knew of such previous propensity; that subsection (2) of section 13 of the Sheep Protection Act does away with necessity of proof of knowledge by the owner, but it was still necessary to prove previous mischievous propensity; that the evidence lacks proof of "previous mischievous propensity" and the appeal should be allowed and the information dismissed.

Statement

The appeal was argued at Vancouver on the 4th of November, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Gill, for appellant.

McTaggart, for respondent, took the preliminary objection that the notice of appeal was entitled "In the Court of Appeal": see *Hepburn* v. *Beattie* (1911), 16 B.C. 209; *Wilson* v. *Henderson* (1914), 19 B.C. 45.

Gill, applied to amend the notice.

Argument

Per curiam: The application to amend is granted.

McTaggart, took the further objection that under section 13, subsection (6) of the Sheep Protection Act appeals are taken as nearly as may be to appeals under the Summary Convictions Act in respect of proceedings therein mentioned, and there is no jurisdiction to hear this appeal.

Gill: The owner may take summary proceedings or cause a County Court summons to be issued.

Argument

Per curiam: Judgment on this objection reserved.

Gill, on the merits: The rule of *scienter* cannot be divided as was done in the Court below: see Halsbury's Laws of England, Vol. 1, p. 372, sec. 813; *Regina* v. *Perrin* (1888), 16 Ont. 446 at p. 448; *Kennedy* v. *McIntosh and Bardsin* (1927), 39 B.C. 161.

McTaggart: The learned judge below has found as a fact that there was no evidence of a "previous mischievous propensity" in the animal and his finding should not be disturbed.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.: I think the appeal must be allowed.

A question was raised as to the jurisdiction of the Court to hear the appeal, it being alleged that no legal point had been raised in the Court below. The plaintiff appeared in person in the Court below and stated that he relied upon the statute. The whole question argued before us turned on that statute, in fact the judgment in the Court below also turned upon it.

The exact meaning of the statute in relation to this subject was considered previously by this Court. The question was whether the question of law had been raised in the Court below. It was clear that it had not been raised by counsel but the judge mentioned the point. It was argued that this was a sufficient raising of the question within the provisions of the Act. In that case we held that the judge referring to the law did not raise it nor intended to raise it. However, here the contrary is true. The decision depended upon the statute and the appellant I think raised it. But whether he did or not it certainly was raised and acted upon by the judge, and I think that was sufficient.

MACDONALD, C.J.B.C.

On the merits I think the defendant is entitled to succeed. There was no evidence of a previous mischievous propensity in the dog, but in my opinion, that does not matter in view of the statute, which takes away the necessity of plaintiff in the first instance proving knowledge of such propensity. We had a similar case and the learned judge properly enough relied upon it, *Kennedy* v. *McIntosh and Bardsin* (1927), 39 B.C. 161, in which we appeared to have held that it was necessary for the

COURT OF APPEAL

1930

Jan. 7.

BIGRIGG v. WILLIAMS

MACDONALD, C.J.B.C.

plaintiff to prove the previous mischievous propensity of the dog. The question now involved was not raised and not considered by the Court. It is true that at common law it was necessary to prove defendant's knowledge of such disposition of the dog and that further the defendant was aware of it. The statute now dispenses with *prima facie* proof of *scienter*. Why therefore should such propensity be proven? The statute says that the owner shall be responsible for the damage done by the dog, and that, I think, is sufficient.

MARTIN, J.A.

MARTIN, J.A.: It is objected, *in limine*, that the plaintiff has no right to appeal to us but, in my opinion, the joint effect of section 13 (6), Cap. 64, of the Sheep Protection Act, 1926-27, and of section 6 (*d*) of the Court of Appeal Act is to give the same right of appeal to the County Court, and to this Court therefrom, in cases under the former Act as exists under the latter, and therefore the appellant on this appeal from the County Court of East Kootenay is entitled to be heard on "any point of law taken or raised on an appeal to the County Court." The respondent, Williams, had successfully appealed to that Court from his conviction by the police magistrate of Fernie for an offence against section 13 of the said Sheep Protection Act whereby the plaintiff's goat was so badly injured by respondent's dog, with the assistance of another person's dog, that it had to be destroyed. The points of law now before us were in fact "taken or raised on the appeal" and therefore our decision in *Grand Trunk Pacific Development Co.* v. *City of Prince Rupert* (1923), 32 B.C. 463 does not apply because the appellant, who conducted his own case before the learned County judge, relied upon the said statute to support his claim and all the questions arise out of the view taken of said statute by the learned judge as set out in his reasons.

No appeal lies upon the facts but no difficulty is experienced on that account because the learned judge expressly finds:

"So far as the facts are concerned I accept the evidence of the informant and his wife."

From their evidence it appears briefly, that the goat, a valuable milch one, had on 18th October, 1928, been attacked by two dogs while she was tethered for grazing in an unfenced lot

belonging to the City of Fernie, and so badly bitten and worried that after a few days she went mad and had to be destroyed as aforesaid; it also appears that the defendant's dog had previously "often molested the goat" as Mrs. Bigrigg describes it, and that she had often warned the defendant about its mischievous conduct which she describes as "chasing after" the goat and "never gave it any peace," and also "going for" it, and though it "defended itself" from such single attacks it was not able to do so against the joint attack on said date of the same dog, assisted by another dog, they biting the goat before and behind, as Mrs. Bigrigg and Chief of Police Anderson describe.

Said section 13 of the Sheep Protection Act declares that:

"(1.) The owner of any sheep, goat, or poultry killed or injured by any dog shall be entitled to recover the damages occasioned thereby from the owner of that dog, by an action for damages brought in any Court of competent jurisdiction, or by summary proceedings before a Justice, on complaint before the Justice, who is hereby authorized to hear and determine the complaint and to proceed thereon in the manner provided by the Summary Convictions Act in respect of proceedings therein mentioned.

"(2.) The aggrieved party may recover in the action or proceeding, whether or not the owner of the dog knew that it was vicious or accustomed to worry sheep, goats, or poultry.

"(3.) and (4.) [provide for apportionment of damages against different owners]."

It is to be observed that the statute positively and generally gives a definite cause of action to an owner not only for the killing but "injuring" of his said animals and poultry by any dog, and hence an action would lie, *e.g.*, if milch goats were so molested or worried by a dog that their valuable milk supply was curtailed or rendered unfit for consumption. To "worry" a goat does not mean only to do so to the death but, as defined in the Oxford Dictionary subj. "worry" 5d. p. 315, includes—"To irritate (an animal) by a repetition of feigned attacks," and an apt illustration, from Dickens, is given of "hissing and worrying an animal [a chained dog] till he was nearly mad." This wide scope of meaning is indeed expressly recognized by the Animals Act, Cap. 11, R.S.B.C. 1924, Sec. 4 (invoked by the learned judge) which deals with dogs "pursuing and worrying or destroying," and "pursuing, worrying or wounding," and "pursuing, worrying, wounding or terrifying" sheep, etc.

It is not, with every respect, possible to support the present

COURT OF APPEAL

1930

Jan. 7.

BIGRIGG v. WILLIAMS

MARTIN, J.A.

decision by our recent judgment in *Kennedy* v. *McIntosh and Bardsin* (1927), 39 B.C. 161, based upon the dissimilar section 19 of the said Animals Act (which we further considered in *Bishop* v. *Liden* (1929), 40 B.C. 556) because that final section of that Act deals simply with the proof of *scienter* of "vicious mischievous nature" or "accustomed to do acts causing injury," which it renders it unnecessary to aver or prove as therein defined and expounded by our said judgment upon its particular facts which are very different from those at Bar. Moreover, under that section it was open to defendant to rebut the presumption of *scienter* (as he successfully did as set out in the three majority judgments of this Court in the *Kennedy* case) but by said subsection (2) of this Sheep Protection Act the question of *scienter* is made entirely irrelevant and hence no evidence can be given thereupon (though it is at common law "the gist of the action," as Lord Chancellor Cranworth pointed out in *Fleeming* v. *Orr* (1855), 2 Macq. H.L. 14, 23), and so decisions under said dissimilar section 19 have no application and are of no real assistance for this reason and the further one that there is no section in the Animals Act conferring a general cause of action comparable to that given by subsection (1) above set out.

The learned judge based his reasons for quashing the conviction upon the ground that though said subsection (2) dispensed with proof of *scienter* yet "it is still necessary to prove the previous mischievous propensity" of the dog. It is unfortunate that his attention was not drawn to the unanimous decision of the Queen's Bench Division of Ontario (*coram* Armour, C.J. and Falconbridge and Street, JJ.) in *Regina* v. *Perrin* (1888), 16 Ont. 446, wherein that very objection was raised against a conviction under section 15 of the Ontario Dog Tax and Sheep Protection Act, R.S.O. 1887, Cap. 314, which, saving its restriction to sheep only, is in essentials identical with our said section 13 (which has been obviously taken from it and the later section 14 of the same Act in R.S.O. 1914, Cap. 246) but the Court said, pp. 448-9:

> "Section 15 then provides that the owner of any sheep or lamb killed or injured by any dog shall be entitled to recover the damage occasioned thereby from the owner or keeper of such dog. This is clearly not confined to damage occasioned by a dog that had a propensity to kill or injure sheep, but extends also to damage occasioned by a dog that has for the first time killed or injured sheep.

"The latter part of this section, it is true, provides that such aggrieved party shall be entitled so to recover on such action or proceedings, whether the owner or keeper of such dog knew or did not know that it was vicious or accustomed to worry sheep; but this provision was wholly superfluous, for it is plain from what precedes this provision that it was intended that the owner or keeper of any dog should be responsible to the owner of any sheep or lamb killed or injured by such dog for the damage occasioned thereby, whether such dog had or had not a propensity to kill or injure sheep, and whether the owner or keeper of such dog knew or did not know of such its propensity. And it cannot be contended that the introduction of this provision into this section raises any implication, against the express words of the Act, of a necessity to establish a propensity in the dog to kill or injure sheep."

MARTIN, J.A.

Since our statute was taken from Ontario as aforesaid after this interpretation by a superior Court of that Province it would require a very clear case of error to warrant our refusal to adopt such interpretation, but as nothing to suggest any error appears herein the judgment appealed from should be set aside and the conviction restored.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: With respect to the preliminary objection that there is no appeal to this Court, I may say, that I cannot distinguish it from all other cases where an appeal is taken, under the Summary Convictions Act and from which there is an appeal to this Court. The statute law it seems to me when studied makes this perfectly clear.

The statute law is precise in its language and the right to recovery of damages is not embarrassed by the requirement to establish previous mischievous propensity. The Sheep Protection Act, Cap. 64, B.C. Stats. 1926-27, Sec. 13, Subsecs. (1) and (2), read as follows: [already set out in the judgment of MARTIN, J.A.].

The language is decisive upon the point that it is no longer necessary to establish as against the owner of the dog that he had knowledge of the previous mischievous propensity of the dog. Recovery may be had in the action or proceeding whether or not the owner of the dog knew it was vicious or accustomed to worry sheep, goats or poultry. It is difficult to see any room for argument in the face of this enactment that any knowledge has to be brought home to the owner of previous mischievous propensity. *Regina* v. *Perrin* (1888), 16 Ont. 446, is an authority upon analogous statute law in the Province of Ontario, namely, Cap.

COURT OF APPEAL

1930

Jan. 7.

BIGRIGG v. WILLIAMS

214, Sec. 15 (1), R.S.O. 1887, in fact in all material parts, the same language as in our own statute. In that connection it is well to remember what Lord Parmoor said in *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704:

"I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agree . . . ."

The statute law considered in the Ontario Court was analogous statute law reading as follows:

"15. (1). The owner of any sheep or lamb killed or injured by any dog shall be entitled to recover the damage occasioned thereby from the owner or keeper of such dog, by an action for damages or by summary proceedings before a Justice of the Peace, on information or complaint before such Justice, who is hereby authorized to hear and determine such complaint, and proceed thereon in the manner provided by The Act respecting Summary Convictions before Justices of the Peace and Appeals to General Sessions, in respect to proceedings therein mentioned; and such aggrieved party shall be entitled so to recover on such action or proceedings, whether the owner or keeper of such dog knew or did not know that it was vicious or accustomed to worry sheep."

MCPHILLIPS, J.A.

It is to be noted that Chief Justice Armour in *Regina* v. *Perrin, supra,* at pp. 448-9, said: [already set out in the judgment of MARTIN, J.A.].

In my opinion and with great respect to the learned trial judge, who held to the contrary, the plaintiff established his case. I would allow the appeal.

MACDONALD, J.A.: On the statute law applicable to the facts I differ, with great respect, from the learned County Court judge. He held that it was necessary to establish "previous mischievous propensity" on the part of the dog that injured the goat. I do not think it is in cases arising under the Sheep Protection Act, B.C. Stats. 1926-27, Cap. 64, Sec. 13. The primary object of the Act is to secure the protection of sheep, goats, etc., from molestation by dogs. It is true that by section 13 (2) it is provided that:

MACDONALD, J.A.

"The aggrieved party may recover in the action or proceeding, whether or not the owner of the dog knew that it was vicious or accustomed to worry sheep, goats or poultry."

This exception being set out in the Act the learned judge was of the opinion that while it is not necessary to shew *scienter* it is

necessary at common law to shew mischievous propensity. I agree, however, with the views of Armour, C.J., in *Regina* v. *Perrin* (1888), 16 Ont. 446 at p. 447, where a somewhat similar Act (R.S.O. 1887, Cap. 214) was considered and construed. Viewing the Act as a whole a somewhat similar clause containing the exception quoted above was treated as superfluous. Section 13 (1) standing by itself, which is the substantive section gives the right to the owner of sheep or goats to recover damages against the owner of a dog that killed or injured them. Turning to section 5, we find that a dog found in the act of pursuing or worrying sheep or goats may be killed. It is not necessary to shew that it had a mischievous propensity. Sections such as this, taken with the plain intendment of the Act, considering too the grievance the Act seeks to remedy leads to the conclusion that it does not follow that because section 13, subsection (2) creates one exception other common law exceptions are necessarily retained. The appeal should be allowed.

MACDONALD, J.A.

It was submitted that there is no right of appeal to this Court. Section 13, subsection (6) reads as follows:

"An appeal against any conviction, apportionment, or order made by a Justice under this section may be had in like manner as nearly as may be to appeals under the Summary Convictions Act in respect of proceedings therein mentioned."

The County Courts Act (R.S.B.C. 1924, Cap. 53, Sec. 116) does not assist the appellant as he is not within it. His right of appeal, if any, is under the Court of Appeal Act (R.S.B.C. 1924, Cap. 52, Sec. 6) and only under subsection (6), when points of law are taken or raised. The appellant herein did "take or raise" a point of law in the County Court. He appeared in person and stated that he relied upon the statute. That is sufficient.

Appeal allowed.

Solicitor for appellant: *J. O. Gill.*

Solicitor for respondent: *F. C. Lawe.*

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

McDERMOTT v. WALKER.

Testator's Family Maintenance Act—Whole estate bequeathed to widow—Petition by married daughter—Interpretation of Act—Order of Court below—Court of Appeal—Power to reverse—R.S.B.C. 1924, Cap. 256, Sec. 3.

Under The Testator's Family Maintenance Act it was not intended to authorize the Courts to make a new will for the testator but to alter it only in so far as it might be necessary for the proper maintenance of the testator's wife, husband or children and it is a question of fact in each case whether or not it was contemplated that an order should be made, subject to this general consideration that the Court must be satisfied that the testator has been guilty of a breach of moral duty which parents owe to the surviving parent and to children for whose maintenance at the time of the testator's death no adequate means of support are available. If the children are as well established in life as the testator in his lifetime the Act should not be applied when the surviving parent is the beneficiary.

If a higher Court is convinced that the judge of first instance did not take a proper view as to the scope of, and the application of the powers conferred by the Act, it may and should interfere. If too, a higher Court is satisfied that the facts of the particular case are such that it was not intended that the powers conferred by the Act should be exercised, it may intervene. In such cases the order made would be based upon a wrong principle. If too, a higher Court is convinced that on all the facts the judgment under appeal is wholly wrong, it should be set aside (McPHILLIPS, J.A. dissenting).

Statement

APPEAL by Ida McDermott, widow of Ambrose McDermott, from the order of MORRISON, C.J.S.C. of the 1st of March, 1929, on the petition of Pearl Walker, daughter of said deceased, for an order for proper maintenance under the Testator's Family Maintenance Act. Ambrose McDermott's first wife, the mother of the petitioner, died in 1914, and he married again in 1924. He died on the 12th of May, 1928, and left surviving him only his widow and the petitioner. By will of the 14th of February, 1924, he left all his estate to his wife and appointed her sole executrix. The estate included life insurance $3,000; personal property $1,300; Crown Point Hotel, Trail, $30,000 and two lots in Vancouver $550, making a total valuation of $34,850. The petitioner is 24 years old. She was married in

1927, her husband being a clerk employed by the Consolidated Mining and Smelting Company at $150 per month. She had no estate of her own. Shortly after the death of Ambrose McDermott, Mrs. McDermott gave the petitioner $1,000 from the estate. On the hearing the petitioner was allowed $6,000, and as $1,000 had already been paid the claimant was entitled to $5,000 more.

The appeal was argued at Vancouver on the 11th of October, 1929, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Statement

C. R. J. Young, for appellant: The widow put all her money into the hotel business and was personally entitled to a large share of it. She also helped materially in running the hotel for many years. The widow claims the deceased was a heavy drinker and the burden of looking after the hotel fell on her. The petitioner is well married and is in no need of assistance. Mrs. McDermott gave her $1,000 gratuitously. That she is not entitled to the order given below see *Brighten* v. *Smith* (1926), 37 B.C. 518; *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 969 and in appeal (1911), A.C. 730; *In re Testator's Family Maintenance Act and Estate of F. Elworthy, Deceased* (1928), 39 B.C. 474; *In re Stigings, Deceased* (1928), 34 B.C. 347.

Argument

Reid, K.C., for respondent: There was other property in addition that the widow had, including two lots in Trail that were put in her name. This is a matter that is in the discretion of the trial judge and he decided the daughter should get $6,000: see *In re Mary Ann McAdam* (1925), 35 B.C. 547.

Young, replied.

Cur. adv. vult.

7th January, 1930.

MARTIN, J.A.

MARTIN, J.A.: By the order appealed from the petitioner (respondent) Mrs. Pearl Walker, the only child of the deceased Ambrose McDermott by his first wife also deceased, obtained an order under the Testator's Family Maintenance Act, R.S.B.C. 1924, Cap. 256, from Chief Justice MORRISON of the Supreme Court that

"The sum of $6,000, less $1,000 already paid to the petitioner by said Ida McDermott, the executrix of the will of the testator Ambrose McDermott,

COURT OF APPEAL

1930

Jan. 7.

MCDERMOTT v. WALKER

deceased, should be allowed to the petitioner out of the said estate for her maintenance and support,"

and the said Ida McDermott, the widow and sole beneficiary under the will of the deceased, who died on the 12th of May, 1928, was ordered to pay to the petitioner the balance, $5,000, of the said amount awarded with interest at 5 per cent. from the 12th of May, 1929, until fully paid and satisfied.

The value for probate of the deceased's estate was, personal property $1,300; and real property $30,550, total, $31,850.00

Deduct the debts of the estate..... 6,832.50

Net balance coming to widow under will..... $25,017.50

She also got under an insurance policy in her favour for $3,000, and has real property of her own, four lots in Trail, one of which she bought herself for $350, and the others her husband bought for $675 and gave to her. No valuation has been made of these lots by any qualified person nor is even the assessed municipal value before us, simply the petitioner's statement on hearsay from her solicitor, but assuming them now to be worth $500 each the total is $2,000, and adding that and the $3,000 insurance to the estate gives the widow at the death of her husband, their combined properties of the capital value (subject to taxes) of $30,000 and from this value must now be further deducted the amount allowed to petitioner $6,000 leaving the widow with the remaining $24,000 to maintain herself. At the rate of 5½ per cent. net to her (which is all that she can expect on the safe investments only that she could venture to make at her age) this will give her an income of $1,320 per annum, or $110 per month, at the age of 54 after an arduous life assisting in the Crown Point Hotel business at Trail, B.C., since 1914, which business, a close perusal of all the evidence clearly establishes, was preserved for prosperous times recently (owing to the rise in value of real estate and getting a beer licence for the hotel) by exertions on her part at least equal to those of her husband whose efficiency was handicapped by his habits as a "pretty heavy drinker" as appears abundantly from evidence offered on behalf of the petitioner herself as well as the respondent, and during the last two years his habits became much worse and for nearly a year prior to his death he had to keep to his bed

MARTIN, J.A.

under the constant care of his wife. His drinking habits also led to confusion and much loss in his accounts and waste of profits as is proved by the evidence of the bookkeeper, Robertson, who made up his income tax returns, the deceased being unable to account for about 50 per cent. of his large profits in 1925-26, the last made up so far. It is a fact of initial importance that at the time the husband purchased, in September, 1914, his first half interest in said hotel he had no money of his own and the first instalment of $1,000 was paid by his wife out of her own money, $1,500, that she had saved up to the time of their marriage on the 27th of July previous; the subsequent payments, save the last, by which he acquired the full interest in the hotel, were made out of the profits of the business; and also in 1926, she paid out of her own savings bank account the sum of $546.30 necessary to save the hotel from being sold for arrears of taxes. It is to the credit of the deceased that he never forgot his wife's invaluable assistance at the beginning of their married life and business enterprise, and there is no reason to doubt the truth of the following paragraph in her affidavit:

"12. That my deceased husband told me on several occasions that as soon as the final payment was made on the hotel property to Mr. Claughton, it was his intention to transfer all the property to myself as he considered that it was because of my paying the first cash payment that he was able to buy the said Crown Point Hotel premises."

After her husband's death the widow in June, 1928, voluntarily gave the petitioner $1,000, and also a set of china dishes.

Such, in brief, is the position of the wife and widow under her husband's will, but the petitioner claims a portion of the estate under said Act the relevant sections of which are:

"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.

"4. The Court may attach such conditions to the order as it thinks fit, or may refuse to make an order in favour of any person whose character or conduct is such as in the opinion of the Court to disentitle him or her to the benefit of an order under this Act.

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

MARTIN, J.A.

"5. In making an order the Court may, if it thinks fit, order that the provision shall consist of a lump sum or a periodical or other payment."

By section 11 it is provided:

"No application shall be heard by the Court at the instance of a party claiming the benefit of this Act unless the application is made within six months from the date of the grant or resealing in the Province of probate of the will."

The claim of the petitioner, in essentials, is that she is the only child of the deceased, is now 24 years of age and was married on the 1st of June, 1927, in Trail, to Henry C. Walker, and at the time of her petition (11th October, 1928) and order thereupon (1st March, 1929) was childless. Before her marriage, after her return from school at New Westminster, she worked four years in a bank at Trail (save for two months in another situation) beginning at a salary of $60 per month, with yearly increases and stayed with her father and step-mother at their hotel having her room free but paying her own table board to the lessee of the above room, and personal expenses, bedding and washing, and she says she assisted "in the conduct of the business by doing clerical and manual duties" but Mrs. McDermott denies this and says she took no interest in the hotel work and only paid her board for two years. At the time of petitioner's marriage her husband, aged 22, was given a lot in Trail by his father on which he built a house and when they left Trail to live in Kimberley, B.C., where they now are, he sold the house and got $774.81 profit out of it and out of this sum they bought a motor-car, second hand, for $625. She places the value of their furniture and effects at about $500, exclusive of wedding presents, and intimates that her husband still owes his father $500 borrowed at the time of the wedding to be repaid "as soon as we are able to do so" but as they made no effort to do so at the time they were in funds to buy the motor-car nor again in June, 1928, when the widow voluntarily made her an admitted present of the said $1,000 that alleged debt need not be seriously considered on this application, particularly seeing that out of the said present her husband also purchased $380 of Big Missouri stock, and the petitioner took a trip to Seattle costing $100 as her statement shews. The widow deposes that the household furniture and effects of the Walkers are worth at least $1,000, exclusive of their motor-car and there is no real doubt that their personal

property including the said shares and car is worth $2,000 at the lowest estimate. The petitioner says in her affidavit:

"29. That after paying our necessary household and incidental expenses of living we are unable to save any money whatsoever and that relief is necessary for us from the estate of the said Ambrose McDermott, deceased."

The widow, on the other hand, swears:

"18. That the petitioner's husband is in charge of the office part of the general store of the Consolidated Mining and Smelting Company of Canada, Limited, at Kimberley, British Columbia, and as such can purchase his supplies from the said store at a considerably reduced price.

"19. That the petitioner has always been very extravagant and selfish, and has never seemed to realize the value of money.

"20. That I have been in the petitioner's home on various occasions and observed that her home was very well furnished and I verily believe that her household furniture and household effects are worth at least $1,000, and I also verily believe that herself and her husband can live very comfortably on $150 per month in Kimberley, B.C."

The petitioner's husband gets a salary of $150 a month in a very large company and there is no suggestion that his is not a permanent employment and one with that reasonable opportunity of advancement to a youthful, healthful and industrious person that my brother M. A. MACDONALD points out in his lucid judgment which I have had the benefit of considering and with which I am in entire accord. And it is to be remembered that while his earning power is increasing with experience that of the widow is rapidly decreasing; indeed it has not even been suggested that after the long strain she underwent she has now any substantial earning power.

MARTIN, J.A.

To capitalize the combined properties of the petitioner and her husband in a way corresponding to that of the widow, and under the order appealed from, they are:

Personal property	$2,000
Award under order	6,000
	$8,000
At 5½ per cent. this give, per annum	440
Salary at $150 per month	1,800
Total	$2,240

This is $920 more per annum than the widow's said income of $1,320 on the same basis, and under all the preceding circum-

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

MARTIN, J.A.

stances at least, or those substantially approaching them, it would be impossible reasonably to say that the deceased has not made a just and equitable disposition of his estate, having regard to the circumstances of all concerned, in which case, as my brother points out, the Act has no application and cannot be invoked to set aside his will.

I have not overlooked the fact that since the order the petitioner has, counsel inform us, given birth to twins, but that fact is not sufficient to change our decision even assuming it can be entertained because as against all classes of claimants who may come forward at various times within the limited period of six months there must be one time of adjudication, *i.e.*, when the will begins to speak upon the death of the testator. It is, moreover, to be observed that it is not explained why the petitioner's husband keeps a motor-car at a cost of at least $25 per month (for interest on capital, depreciation, taxes, insurance, repairs and running expenses) when it is not necessary for his business; such a luxury in their position gives one unfavourable reason at least for her said statement that "we are unable to save any money whatsoever."

I have set out the foregoing leading facts at greater length than usual (but not as a complete recital of all those others in the depositions before us which I have taken into consideration) because they differ so greatly from those in *Allardice* v. *Allardice* (1910), 29 N.Z.L.R. 969; (1911), A.C. 730 (a case much relied upon by the petitioner) that no comparison is possible, as my brother MACDONALD has pointed out.

After a careful consideration of that case, both in the New Zealand Courts and Privy Council, it is, in my opinion, of very little if any real assistance because (in addition to the said great difference in the facts) though the four judges in appeal undertook to lay down individually certain rules and principles to guide themselves in administering the Act, yet upon close examination it becomes apparent that there is no exact definition of, or indeed general agreement upon most of those principles, and, *e.g.*, an important one of them laid down by Edwards, J. (with the general concurrence of Williams, J.) on p. 973 respecting the testator being "guilty of a manifest breach of that moral duty which a just but not a loving husband or father owes

towards his wife or children" is, with respect, unhappily and obscurely stated and is not subscribed to by the two other judges nor is it warranted by our statute. Moreover, and unfortunately, the full text of the New Zealand statute is not to be found in the report nor otherwise before us though the brief extract cited on p. 972 by Edwards, J. shews that there is at least one material difference in the language employed; there (New Zealand) the expression being—"such provision as the Court thinks fit shall be made," but ours, more definite, is "such provision as the Court thinks adequate, just and equitable in the circumstances shall be made . . . "; and there may be other differences which caution requires further information upon and which may account for certain expressions in the New Zealand judgments which we should not accept, in my opinion, as a safe guide to the administration of our statute.

Too much has, with respect, been attempted I think, in the way of laying down rules and principles, so-called, even then admittedly "elastic," to meet domestic circumstances which never can be the same, and when the case came before the Privy Council their Lordships said, p. 734:

"It would serve no useful purpose to again go over the matters of fact so carefully analyzed by the learned judges of the Courts below, or to deal in detail with the circumstances and condition in life of each claimant. These are essentially questions for the discretion of the local Courts who are entrusted with the administration of the Act. They are well acquainted with all the local conditions as to employment, standard of living, and other matters necessary to be borne in mind in adjudicating on questions of this class, and their Lordships would be slow to advise any interference with the discretion founded upon such knowledge. Nor do they see any reason to differ from the learned judges of the Court of Appeal in the general view they take as to the proper scope and application of the powers conferred upon them by the Act."

Unfortunately their Lordships, with all respect, overlooked the fact that the "general view" they thus approved at large is not to be found in the unharmonious decisions they affirmed, so the principles relied upon remain unsatisfactorily indefinite. The most in the way of a guiding rule under our statute that can safely be extracted from them is, in my opinion, that unless the claimant can establish the fact that at the time of the testator's decease he or she is in need of "proper maintenance and support," the statute has no application and cannot be invoked

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

to obtain any share in the estate even though the claimant's just claims upon the bounty of the testator may have been inequitably disregarded. And, furthermore, even if that need is established the Court may still under section 4 refuse to make any order in favour of one whose conduct has disentitled him; or it "may attach such conditions" to the relief it grants "as it thinks fit." Now while the making of any such provision contrary to the terms of the will has the effect of setting it aside *pro tanto* and so defeating the wishes of the testator to that extent (which is precisely what the Legislature intended to do) yet that is a very different thing in principle from an attempt of the Court to remake the will as a whole, which it is conceded cannot be done.

In the discharge of this novel and exceedingly difficult and delicate duty the Court, in the really impossible attempt to put itself in the position of a just testator with full knowledge of all the affairs of his family, is only empowered to make an order which shall be "adequate, just and equitable in the circumstances" (which means all the relevant circumstances of all the parties concerned) as our statute directs, and it is, in my opinion, legally and practically impossible as well as undesirable, to lay down any rules, in addition to that stated above and the plain directions of the statute, to control the exercise of a discretion which must necessarily vary in the case of every family whose affairs are brought before the Court.

MARTIN, J.A.

I do not wish it to be inferred from the foregoing observations that I consider the order made in the *Allardice* case was an inequitable one—on the contrary, it was in the circumstances, if I may be permitted to say so, entirely justified. But though I have no doubt that the Court was justified in that case in altering, in effect, that will *pro tanto* I have likewise no doubt that this Court would not be justified in altering the will before us in any respect, and so the order appealed from should not be allowed to stand. There is no legal obstacle in the way of our reversing it because the depositions are all before us and no *viva voce* evidence was taken by the learned judge below who gave no reasons for simply saying that "I find the *quantum* to be allowed in this case at $6,000 . . . "; it clearly appears that he has, with every respect, proceeded upon a wrong principle in construing the Act as, in effect, one which gives a child a share of

the estate as against the widow where the child has not discharged the onus upon it of proving that it is, in the true and proper sense, in need of "maintenance and support" having regard to her walk in life and all the other circumstances of the case.

It follows therefore, that the appeal should be allowed and the order complained of set aside.

GALLIHER, J.A.: The circumstances in this case do not, in my opinion, bring it within the purview or intent of the Testator's Family Maintenance Act.

GALLIHER, J.A.

Both my brother MARTIN and M. A. MACDONALD, whose reasons for judgment I have read, have gone into the matter very fully and I agree in their conclusions and would allow the appeal.

McPHILLIPS, J.A.: Upon the argument at this Bar it was stated to the Court by counsel that upon the hearing of the question, the argument was wholly devoted to the question of *quantum, i.e.*, what was the proper sum that should be allowed the respondent in pursuance of the statute—the Testator's Family Maintenance Act, and amending Acts. The respondent is the only child of the testator, her father; she is now married with two children (twins), born since the presentation of the petition; her husband is in receipt of a salary of $150 a month. The estate was sworn at $34,850. The testator was a widower for some years and then married the appellant. The testator by his will devised and bequeathed all his estate both real and personal to his wife, the appellant. The material used before the learned judge is quite voluminous, consisting of affidavits and cross-examinations thereon. I am disposed to fully accept the case as presented by the petitioner, and am in entire agreement with the judgment of the learned Chief Justice of the Supreme Court in his allowing to the petitioner out of the estate the sum of $6,000, by way of a lump sum which is permissible under the statute, credit being given for $1,000 which the appellant voluntarily paid to the respondent hoping no doubt, that it would silence the petitioner and that she would not make any further claim under the statute. It is a matter for regret to notice that the

MCPHILLIPS, J.A.

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

appellant although so largely benefiting under the will of her husband in fact obtaining his whole estate, by will, has not hesitated to defame her late husband, and benefactor by swearing that he

> "was very much addicted to drinking and gambling with the result that he squandered considerable of the profits of the hotel business and neglected the management of the business to such an extent that [she was] compelled a considerable portion of the time to superintend and manage the said hotel business in addition to [her] ordinary work about the hotel."

I am pleased to note though, that this was, in my judgment, satisfactorily contradicted by credible evidence. The learned Chief Justice, in my opinion, rightly considered the case a proper one for an allowance as I have previously pointed out. It now becomes necessary consequent upon an appeal having been taken, to rehear the case upon the evidence adduced by both parties in the Court below.

The legislation which has to be construed and applied is legislation first introduced in the Dominion of New Zealand, a sister nation in the British Commonwealth. It is legislation of somewhat revolutionary nature as against the long maintained law of England, that the testator was at full liberty to dispose of his

MCPHILLIPS, J.A.

estate as he thought fit, to even disinherit his children and others having claims upon him and give his estate to strangers. Here that was the course the testator adopted; that is, to the extent of disinheriting his only child, a young married daughter, giving the whole estate to his widow, his second wife, there being no children of the second marriage. I am disposed to believe that there was undue influence in this exercised by the appellant. There is evidence that the testator was under the domination of the appellant and fearful to do anything in favour of his daughter, and what he did do, was always kept from the knowledge of the appellant—that was at the express request of the father to the daughter. It is quite understandable that in the end the testator acting under the coercion of the appellant made a will in the terms he did. Now, however, the Legislature in its wisdom has stepped in, and by a mandatory statute, the Testator's Family Maintenance Act (Cap. 256, R.S.B.C. 1924) the material provisions of the Act are the following, well indicating the new policy of the law: [already set out in the judgment of MARTIN, J.A.].

It has been determined by the learned Chief Justice of the Court below that the testator has not "made adequate provision for the proper maintenance and support" of his only child, in truth no provision at all. Therefore it was the province of the Court below, at its discretion, to make such provision as the Court might think adequate, just and equitable in the circumstances out of the estate. This is mandatory under the statute. An order may be refused only where character or conduct in the opinion of the Court disentitles the person otherwise entitled to the benefit of an order.

In the present case of course there is no evidence whatever admitting of a refusal to make the order. Therefore some order had to be made and the order made commends itself to my judgment in every respect. It would indeed have to be a most extraordinary case where an order has been made by a learned judge exercising his discretion committed to him by statute that it should be disagreed with by a Court of Appeal. Nevertheless, of course, there is an appeal and we must not shrink from doing our duty, but we must give great heed to what the learned judge below has decided in the matter (*Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402).

MCPHILLIPS, J.A.

The appellant contends, in the teeth of the statute, and makes bold to say that the respondent, the sole child of the testator, should receive nothing out of her father's estate. Certainly, there is no lack of hardihood in the appellant, but the law is positive and the Court is not at liberty to legislate by way of the repeal of a remedial statute. In truth, of course, it is not within the province of the Court to legislate although we see at times, as in this case, submissions made to the Court that would have that effect if acceded to. A provision must be made for the respondent, the sole child of the testator. The learned Chief Justice has only followed the law in making this provision. The sole question is, was he right in the order he made? I have no hesitation in saying he was, and the order in my opinion, should be affirmed. There have been a great number of decisions upon legislation of analogous nature to the statute we have here to review, but when doing so it is well to remember what Lord Parmoor said in *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 674 at p. 704:

COURT OF APPEAL

1930

Jan. 7.

MCDERMOTT v. WALKER

"I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agree . . ."

In the leading case of *Allardice* v. *Allardice* (1911), A.C. 730, their Lordships of the Privy Council had to consider analogous legislation from New Zealand. The head-note to that case reads as follows:

"New Zealand Family Protection Act, Part II. (No. 60 of 1908), s. 38 (1.), provides that in cases where any person dies leaving a will without making adequate provision therein for the proper maintenance and support of the testator's wife, husband, or children the Court may, at its discretion, order that such provision as it thinks fit should be made out of the estate of the testator for such wife, husband or children.

"The Court below having exercised its discretion in favour of three married daughters of the testator by a wife who had divorced him, his will disposing of all his estate in favour of his second wife and her children, their Lordships declined to interfere; and approved the general view taken by the Court below as to the proper scope and application of the powers conferred by the Act."

There provision was ordered for the testator's married daughters. In the present case provision has been made by the learned Chief Justice in the Court below for the sole child of the testator, a married daughter.

MCPHILLIPS, J.A.

It has been urged that the husband of the daughter in the present case is in receipt of $150 a month. How far does such a sum go for maintenance and education of children in these days of high cost of living and what would happen if illness or death of the husband takes place? All these matters require attention and no doubt received the attention of the learned Chief Justice. I would refer to what Lord Robson said in the *Allardice* case, in delivering the judgment of their Lordships of the Privy Council, at p. 734. There the learned judge in first instance refused to make an order in favour of the married daughters, but the Court of Appeal made an order and the Privy Council affirmed the order of the Court of Appeal, maintaining the allowance to the married daughters granted by the Court of Appeal:

"Under these circumstances the trial judge, Chapman, J., was of opinion that the claim put forward by the respondents wholly failed. An appeal was thereupon made to the Court of Appeal, who decided that the sum of 360*l.* a year should be paid out of the estate of the testator to one daughter and 40*l.* a year to each of the other two daughters during their lives.

"Their Lordships see no ground upon which it can be said that the Court

of Appeal have not properly exercised the discretion with which they are entrusted. It would serve no useful purpose to go again over the matters of fact so carefully analyzed by the learned judges of the Courts below, or to deal in detail with the circumstances and condition in life of each claimant. These are essentially questions for the discretion of the local Courts who are entrusted with the administration of the Act. They are well acquainted with all the local conditions as to employment, standard of living, and other matters necessary to be borne in mind in adjudicating on questions of this class, and their Lordships would be slow to advise any interference with the discretion founded upon such knowledge. Nor do they see any reason to differ from the learned judges of the Court of Appeal in the general view they take as to the proper scope and application of the powers conferred upon them by the Act."

MCPHILLIPS, J.A.

I have no hesitation in agreeing with the learned Chief Justice and the decision in the Privy Council well indicates that the discretion entrusted to the Court below will not be interfered with when an order has been made in favour of those or any one of those coming within the purview of the statute or to quote the exact words used "their Lordships would be slow to advise any interference with the discretion founded upon such knowledge."

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from the judgment of Chief Justice MORRISON awarding the petitioner Pearl Walker (respondent), on an application brought under the Testator's Family Maintenance Act (R.S.B.C. 1924, Cap. 236) the sum of $6,000 out of the estate of her deceased father Ambrose McDermott. The petitioner's father by a will executed February 14th, 1924, left all his real and personal property of the value of $34,850 to his second wife, Ida McDermott the appellant herein to whom he was married on July 27th, 1914. His first wife, the petitioner's mother, died some years before. At the time of his second marriage the deceased had very little property, if any, but shortly thereafter purchased an interest in a hotel property at Trail for $6,000, finally acquiring the whole interest therein. His wife and beneficiary, this appellant, out of her own funds made the first payment of $1,000 on this purchase. By their combined efforts in running the hotel, coupled with an increase in values of property in Trail due to local development the hotel property at the time of the testator's death was valued at $30,000 and was sold for that amount shortly after his death.

The respondent (formerly Pearl McDermott) was married in

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

MACDONALD, J.A.

June, 1927, when she was 21 years old to H. C. Walker, then aged 23. They reside at Kimberley, where he is employed as a clerk in the offices of the Consolidated Mining & Smelting Company of Canada receiving a salary of $150 per month. He is employed by a company firmly established and depending upon himself his position should be secure and his future prospects reasonably good. He has youth, health and the same opportunities as others in like circumstances to improve his position. They have some personal property—of slight value—a few small investments, a moderate-priced car and live as tenants in a home for which they pay $25 a month.

Shortly after the death of the testator his widow, this appellant, gave to respondent $1,000 out of her late husband's estate as a gift. Whether or not this payment was made, as suggested, to forestall a possible application under this Act is not material. It is a fact to consider in deciding if respondent is entitled to the further sum of $5,000 which can only be received by, in effect, making a new will for the testator, certainly by changing it to a material degree; a will under which, in my opinion, he properly left to appellant his whole estate, consisting almost exclusively of the hotel property referred to, made valuable by their joint efforts, knowing when he did so that his daughter, the respondent, was settled in life and reasonably well provided for in view of her former station, and knowing that for some years before he contributed freely, in view of his circumstances, to the cost of her education and maintenance.

The testator's widow, this appellant, is now 54 years old. Her capacity for work and ability to supplement her income (which can only come from the property acquired by the will) will not be great. She will probably live many years and can only safely maintain herself—apart from possible future earnings—by using the income from the capital sum left her amounting, after all obligations are met, to about $1,800 a year or $150 per month.

Under the order appealed from the sum of $5,000 is transferred from appellant to respondent (not for "maintenance" because respondent is not in straightened circumstances), reducing the former's income and increasing respondent's (through her husband) to that extent. I do not think the Act was

intended to apply to such a case. If it does few testators can regard their testamentary dispositions as final. The provision by will made by heads of families, based on the knowledge they always acquire in an intimate way will be set aside by the Courts, thus depriving them of the power of disposing of their property by will even when fairly exercised. It was not intended to authorize the Courts to make a new will for the testator but to alter it only in so far as it might be necessary for the proper maintenance of the testator's wife, husband or children. I think in most cases the widow should be regarded as having a higher claim than any other dependant. So far as children are concerned it will not promote happy domestic relations if they are encouraged without "adequate, just and equitable" grounds to make applications under this Act. The beneficiary if, as here, a widow, might very well by her will pass the estate on to the children in due course. That is not so likely to happen if wills are attacked successfully or otherwise in the Courts. I hope it will not affect the beneficiary in this case. For her own security she should live on the income and have the principal available for distribution at her death.

MACDONALD, J.A.

This legislation was enacted, as we may gather from its provisions, because in many instances hardship and injustice arose. A husband might disinherit a wife who shared with him the labour of accumulating property and leave it, *e.g.*, to a woman with whom he maintained immoral relations. It is of course not confined to such cases. It is one of many instances that might be cited where testators unjustly deprive those entitled to their consideration from obtaining any or an adequate part of the estate leaving them in such necessitous circumstances that they require "maintenance" having regard to the size of the estate, the amount left and their accustomed manner of living. It is a Family Maintenance Act; not an Act to destroy the free disposition of property by will. It is always a question of fact in each case whether or not it was contemplated that an order should be made, subject to this general consideration that the Court must be satisfied that the testator has been guilty of a breach of that moral duty which parents owe to the surviving parent and to children and it only refers to those for whose maintenance at the time of the testator's death no adequate means of

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

support are available. Discretion is given to apply it where the Court thinks it is just and equitable in the circumstances to exercise the powers conferred. That discretion is not judicially exercised unless the object, intent and spirit of the Act is observed. Although section 3 of the Act may not be happily worded it would not be suggested that an order must be made in all cases where members of a family, adults or minors, are not left anything by a parent's will. If the children are established in life—perhaps better or at least as well established as the testator in his lifetime—the Act should not be applied where the surviving parent is the beneficiary. It is a common practice for a husband to leave all his estate to his wife knowing if the estate is small that in view of her age she will require it and if large that she will ultimately deal fairly with their children. In such a case it would be bending the Act to a purpose never contemplated to apply it on the application of one of the children.

There is nothing unjust or inequitable in the disposition made of his property by the deceased. He would possibly be open to criticism if he gave part of this estate to the respondent although if he did so it would not necessarily call for the intervention of the Court. If a testamentary disposition is just and equitable the Acts does not apply. That fact must be found by the Courts in the circumstances of each case. It might be held to apply if in this case the respondent's husband was crippled or otherwise incapacitated in providing for her support. If in such circumstances a reasonable amount was transferred I would not feel justified in interfering. It is impossible to lay down a defiite general rule except (as Cooper, J. stated in the case presently cited) "in very elastic terms." A variety of facts, seldom similar, must be considered in each case.

MACDONALD, J.A.

Allardice v. *Allardice* (1910), 29 N.Z.L.R. 969, and (1911), A.C. 730, is often referred to and was cited as an authority favourable to the respondent herein. There the estate was much larger, *viz.*, £25,000. The whole estate was left in trust for the sole benefit of a second wife and her six children (only one of the six was legitimate) while daughters by a former marriage, on whose behalf the application was made, were not provided for to any extent. The second wife too with whom he maintained immoral relations before his first wife divorced him had some

property of her own. These daughters by the first marriage, married men "in a humble station of life with very small and precarious incomes" ((1911), A.C. at p. 734). The husband of one earned about £150 a year; the husband of the second daughter £12 a month, while the third daughter's husband was said to earn about £2 per week. The husbands had some additional interests or capital but apparently very little. Their position therefore was not as secure as the respondent's herein. It is legitimate also to consider as I think was done in that case, how the daughters were maintained before their marriage—what they were accustomed to then and had a right to expect in the way of bounty. It is obvious that their husbands with their small incomes could not maintain them in the way they had been accustomed to live. A reasonable order was made, *viz.*, that £60 a year should be allowed to one daughter, and £40 to the other two. I refer in detail to the facts to shew how far it falls short of being an authority for the order made in the case at Bar. Nor must it be forgotten that the mother of these three daughters, the first wife, received a stipulated amount secured to her for life by a decree in divorce proceedings. The order made therefore for the benefit of the daughters did not as in the case at Bar, interfere with the income of their mother or reduce that income. No objection can be taken to the view of Stout, C.J., of the New Zealand Court of Appeal ((1910), 29 N.Z.L.R. 969 at p. 970), where he said

MACDONALD, J.A.

> "The whole circumstances have to be considered. Even in many cases where 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. 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."

Both these enquiries are important in the case at Bar. The respondent does not need maintenance and support in answer to the first enquiry, and as to the second the property the testator left is barely sufficient to provide the beneficiary, who had a paramount claim to his bounty, with a living income.

As to interfering with the discretion exercised, the judgment of the judge who heard the application in *Allardice* v. *Allardice, supra,* refusing to make an order was reversed by the Court of Appeal and the latter decision was sustained by the Judicial

COURT OF APPEAL

1930

Jan. 7.

McDERMOTT v. WALKER

Committee. If a higher Court is convinced that the judge of first instance did not take a proper view as to the scope of, and the application of the powers conferred by, the Act, it may, and should interfere. If, too, a higher Court is satisfied that the facts of the particular case are such that it was not intended that the powers conferred by the Act should be exercised it may intervene. In such cases the order made would be based upon a wrong principle. If, too, a higher Court is convinced that on all the facts the judgment under appeal is clearly wrong it should be set aside. To quote MARTIN, J.A. in *Brighten* v. *Smith* (1926), 37 B.C. 518 at p. 521:

MACDONALD, J.A.

> "The only way that that order can be set aside—the power obviously reposing in the learned judge that made it—is to say that the circumstances which were before him would not warrant the order."

In my judgment, with the greatest deference, I feel that any one or all of these considerations may be applied to the order under review. I would not vary the order by reducing the amount but would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Donald MacDonald.*
Solicitors for respondent: *Reid, Wallbridge & Gibson.*

DIVERS v. BURNETT.

Master and servant—Servant's dismissal—Induced by third party—Right of action against third party—Notice.

When the dismissal of a servant by his employer is brought about by a third party, even when the third party's conduct in the matter is malicious, if it resulted in no legal wrong the servant has no cause of action.

The defendant, who had a general contract, employed the plaintiff on the work but discharged him when the plaintiff used abusive language to the defendant and threatened him. The plaintiff then obtained employment by the hour with a sub-contractor on the same contract. The defendant then, on seeing the plaintiff at work, asked the sub-contractor to dismiss him. Owing to this the plaintiff's employment was discontinued by the sub-contractor who then gave the plaintiff a good certificate of character. In an action for damages it was held there was justification for the defendant's interference with the plaintiff's employment by his sub-contractor and the action was dismissed.

Held, on appeal, affirming the decision of LAMPMAN, Co. J., that there was a violation of a legal right of the plaintiff to carry on his calling as a workman. This violation was committed knowingly and would give rise to a cause of action in case of insufficient justification for interference. On the evidence the trial judge rightly found that there was sufficient justification and the action was properly dismissed.

APPEAL by plaintiff from the decision of LAMPMAN, Co. J. of the 7th of October, 1929, in an action for damages by reason of the malicious interference of the defendant with the contractual relations of the plaintiff with his employer, the Ashcroft Electrical Machinery Company, Ltd., causing the discharge of the plaintiff from his employment. The plaintiff had been working as a day labourer for the defendant who was the general contractor for electric work on the Empress Hotel. The defendant, not being satisfied with the plaintiff's work, discharged him. An altercation then took place between the two men and the plaintiff threatened the defendant by saying he would get even with him. Shortly after the defendant found that the plaintiff was working for his sub-contractor at the hotel and he telephoned the sub-contractor and asked him to have the plaintiff removed from his job. The sub-contractor removed the plaintiff but gave him a certificate of good character when he left. The action was dismissed.

Statement

COURT OF APPEAL

1930

Jan. 7.

DIVERS v. BURNETT

The appeal was argued at Vancouver on the 7th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Edith L. Paterson, for appellant: The respondent interfered with the sub-contractor's liberty of action with the intention of injuring the plaintiff and the plaintiff has a right of action: see *Quinn* v. *Leathem* (1901), A.C. 495; 70 L.J., P.C. 76 at pp. 93-4; *Pratt* v. *British Medical Association* (1919), 1 K.B. 244 at pp. 256-8; *Jasperson* v. *Dominion Tobacco Co.* (1923), A.C. 709 at pp. 712-3; *Lumley* v. *Guy* (1853), 2 El. & Bl. 216; *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1903), 72 L.J., K.B. 893 at p. 902; *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (1902), 2 K.B. 88.

Beckwith, for respondent: In this case there was justification for what the defendant did and it was so found: see Pollock on Torts, 13th Ed., 349-50; *Allen* v. *Flood* (1898), A.C. 1 at p. 151.

Paterson, in reply, referred to *Brimelow* v. *Casson* (1924), 1 Ch. 302.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The only point of importance involved in the appeal is a question of malice, and that seems to me to be immaterial when the malicious act resulted in no unlawful conduct. It is not questioned that the defendant brought about the dismissal of the plaintiff, or to be more accurate, the refusal to continue him in his employment. But the plaintiff had no right to be continued in his employment, and what happened brought about no breach of contract. I think it might fairly be said that the defendant's conduct in the matter was malicious but as it resulted in no legal wrong, plaintiff has no cause of action. That conclusion I think is consistent with the authorities: *Allen* v. *Flood* (1898), A.C. 1.

The appeal should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: Upon the facts of this case the learned judge below has, in my opinion, rightly applied the law and therefore the appeal should be dismissed.

GALLIHER, J.A.: What the respondent did here was a violation of a legal right of the plaintiff to carry on his calling as a workman. That violation was committed knowingly, and would give rise to a cause of action if there was insufficient justification for the interference: Lord Macnaghten in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 510.

We are then down to this—Was there justification for what the respondent did in asking his sub-contractor to dismiss the appellant from working thereby occasioning his dismissal? The learned trial judge has found that there was sufficient justification. The dismissal here was not brought about by fraud or coercion, or threats of violence. A request was made to the sub-contractor for the appellant's dismissal and he was in consequence dismissed.

The respondent's position is this: the appellant had been in my employ on the work for which I was contractor. He had been dismissed by me because his work was unsatisfactory; he attacked me in a vituperative manner and threatened to get even with me and discussed me in a disparaging way with other workmen on the job, and being the principal contractor for the whole work and responsible for its proper completion both as to time and class of work, I honestly deemed it in my own interest that a man whom I had myself dismissed from the work and who was vilifying me and making threats against me, should not be continued in employment in any capacity on the work.

Considering the facts of this case I do not think the learned judge could be said to be clearly wrong in holding that there was justification.

I would dismiss the appeal.

McPHILLIPS, J.A.: This appeal, in my opinion, should stand dismissed. The learned trial judge, His Honour Judge LAMPMAN, found that there was "just cause" for the respondent discontinuing the employment of the appellant.

I might here remark that the case cannot be considered as one where a dismissal took place and that would seem to be common ground. The appellant was employed by the hour and his services could be dispensed with at any time, it not being necessary to have any cause to do so. This is a view of the matter which

COURT OF APPEAL

1930

Jan. 7.

DIVERS v. BURNETT

really ends the case, and it is my view. However, we have heard counsel throughout and the appeal has been well and ably argued, and I have thought that possibly it as well to examine into the merits and consider the points of law raised in a subject-matter that is even yet somewhat obscure; that is, whether persuasion and advice is permissible and where acted upon it does damage to a third person, it being intended by the persuader that action will follow, *i.e.*, that the third person shall no longer be continued in the employment. I am of the view that this can be done and it is not actionable if no unlawful means are used. That the question is not free from doubt, it is only necessary to refer to what appears at p. 347 in Pollock on Torts, 13th Ed., quoted by the learned trial judge:

"On the whole it is submitted, though with diffidence, that, generally speaking, persuasion and advice are free and of common right, but that, when persuasion is acted upon to the damage of a third person, such damage being intended by the persuader or a natural and probable consequence of the act, the persuader is liable to an action at the suit of the person damaged if he has either used unlawful means, such as intimidation (whether open or disguised as persuasion), deceit, or corruption, or procured a criminally punishable or fraudulent act; and that he is also liable, but subject to exceptions in the nature of privilege, if the act procured was a breach of contract or a merely civil wrong not involving breach of the peace or fraud. This would at least give us an intelligible and fairly acceptable rule and it is believed that the latest authoritative opinions tend to support it (*Davies* v. *Thomas* (1920), 2 Ch. 189; 89 L.J., Ch. 338, C.A.; *White* v. *Riley and Wood* (1920), 89 L.J., Ch. 628, (1921), 1 Ch. 1, approving *Hodges* v. *Webb* (1920), 2 Ch. 70; and see *Ware and De Freville* v. *Motor Trade Association* (1921), 3 K.B. 40). No one, however, is more conscious than the writer of the many difficulties attending these questions."

MCPHILLIPS, J.A.

Upon the facts of the present case good grounds existed for the principal contractor (the respondent) telling the sub-contractor, by whom the appellant was employed, "you have got a man working on the job that has been getting very disagreeable and I said I don't want him on the job." It is only necessary to turn to the evidence of the witness Stuart, division freight agent for the Canadian National Railway (an independent witness), to demonstrate the justification for this. Stuart said:

"You say Mr. Divers was bawling Mr. Burnett out; what do you mean by that? Well, he was boisterous in his talk to Mr. Burnett. He was too far away—

"What did he say? I didn't get what he said, I couldn't tell you that.

"He might have been— He might have been saying anything.

"He might have been saying anything—he might have been repeating a

hymn from the hymn book? Well, he might have been as far as I was concerned, I was too far away from him at that time to make out what they were saying. But I did hear him distinctly say to Burnett, when Mr. Burnett got into my car, that he would get him. Now I can swear to that."

The appellant unquestionably made a very pronounced threat. In view of this sworn testimony it is impossible to say that there was not sufficient ground for the respondent to say what he did say to the sub-contractor, and even if it did amount to the bringing about of a breach of contract—which I have already pointed out it did not—it could not be said to constitute an actionable wrong. To continue the appellant in the work might reasonably —bearing in mind what he said—lead to a breach of the peace. In *Allen* v. *Flood* (1898), A.C. 1, it was held that the appellant had violated no legal right of the respondent, done no unlawful act and used no unlawful means in procuring the respondent's dismissal, and that his conduct was therefore not actionable however malicious or bad his motive might be. In the present case upon the facts as developed, how is it possible to say that there was any fraud or unlawful means used by the respondent to bring about the removal of the appellant from the work? I would refer to what Lord Shaw said at p. 167:

MCPHILLIPS, J.A.

"It is further to be observed, distinguishing the case from one in which a contract might have subsisted between the plaintiffs and their employers for a definite period, or for the work, it might be, on a particular ship until the whole was completed (in which case the refusal to continue to give the work would be a breach of contract on the employers' part), that there was here no such breach of contract. The employers' act in dispensing with the services of the plaintiffs at the end of any day was a lawful act on their part. The defendant induced them only to do what they were entitled to do, and, in the absence of any fraud or other unlawful means used to bring this about, the action fails."

I would also refer to what Lord Macnaghten said at p. 151:

"Even if I am wrong in my view of the evidence and the verdict, if the verdict amounts to a finding that Allen's conduct was malicious in every sense of the word, and that he procured the dismissal of Flood and Taylor, that is, that it was his act and conduct alone which caused their dismissal, and if such a verdict were warranted by the evidence, I should still be of opinion that judgment was wrongly entered for the respondents. I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice

COURT OF APPEAL

1930

Jan. 7.

DIVERS v. BURNETT

MCPHILLIPS, J.A.

towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse."

In *Quinn* v. *Leathem* (1901), A.C. 495 at pp. 534-5, Lord Lindley, that master of the law, said:

"As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; the correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances."

It is to be noted Lord Lindley said—"if such interference is justifiable in point of law he has no redress." What is the position of the appellant in respect to this? It is unthinkable that the respondent would let things go on and allow—in so far as he could prevent—a man about the work who had made such a threat against him—to be in daily peril—if for no other reason it was his duty as a good citizen to take every precaution against a happening, which would be a breach of the peace. As Mr. Justice McCardie said in *Pratt* v. *British Medical Association* (1919), 1 K.B. 244 at p. 257, when referring to the excerpt from Lord Lindley's judgment above quoted:

"It states with cogency the right of every man to call upon others to refrain from unlawful interference with his calling, but it does not purport to define 'unlawful interference.'"

I have no hesitation in the present case in arriving at the conclusion that the respondent was not guilty of any unlawful interference with the appellant's calling.

I am therefore of the opinion that the judgment of the learned trial judge should be affirmed and the appeal dismissed.

MACDONALD, J.A.: The plaintiff (appellant) at the trial before His Honour Judge LAMPMAN unsuccessfully sought to recover damages from the respondent for wrongfully interfering with his right to pursue his ordinary calling. He was working with the Ashcroft Machinery Company (a sub-contractor) doing electrical work in some of the rooms at the Empress Hotel, Victoria, for which he was paid at the rate of fifty cents per hour. After working about fifty hours the company's manager —Ashcroft—told appellant that he would have to quit, and his employment was terminated. He could be legally discharged at any time with or without cause but were it not for respondent's interference he would undoubtedly have continued to work for the Ashcroft Machinery Company. Ashcroft's opinion of appellant as a workman is shewn by the following certificate which he gave to him on his discharge:

"To whom it may Concern:

"This is to certify that Mr. Harry Divers was in our employ on the Empress Hotel job, during which time we found him to be a very hard and conscientious worker.

"We can strongly recommend him to anyone desiring his services."

A few days before appellant was working directly under the respondent, the general contractor, and was discharged by him on the 11th of October, 1928, because, as respondent testified, he was not satisfied with his work. An altercation took place and warm words were exchanged. Respondent, on learning that Ashcroft almost immediately engaged appellant to work on the sub-contract, telephoned and asked to have him "removed from his job." It was solely because of this request by respondent that appellant's second employment was terminated. Respondent's reason for requesting Ashcroft to remove him was, to quote his telephone conversation with Ashcroft:

"You have got a man [appellant] working on the job that has been getting very disagreeable, and I don't want him on the job."

Or, as he put it again,

"There was a man on the job [appellant] saying nasty things about me, and I would not stand for it, that that man had to be put off this job."

He also stated that appellant said to him after his discharge by him:

COURT OF APPEAL

1930

Jan. 7.

DIVERS v. BURNETT

"I will get you, or get even with you, or something, either one or the other."

Or, as he put it again:

"I will get even with you. I will show you that I can work around here in spite of you."

Respondent was not consistent in his explanations of his action because he said in cross-examination that he simply asked Ashcroft to discharge him because he was an inefficient man. He meant to imply that it was in his interest as general contractor to have the work speeded up by his sub-contractor. Ashcroft, however, regards him as efficient. Respondent further testified that before he telephoned Ashcroft other workmen reported to him that appellant was using abusive language towards him. The learned trial judge in dealing with the facts stated:

"When the plaintiff [appellant] was informed by the defendant [respondent] that his services as a day labourer were no longer required, he became incensed and as the witnesses said 'bawled out' the defendant—'bawling out' is a term, I think, synonymous with a 'tongue lashing'—and he wound up with the declaration or threat that he would get even with defendant. Subsequently when defendant saw him on his work, in the employ of his sub-contractor, he was perturbed and asked the sub-contractor to remove him. His request was complied with, and hence the action."

MACDONALD, J.A.

I think on the evidence and the judge's findings we should hold that respondent, because of an altercation with appellant after he discharged him and particularly because he said he would "get even with him" and spoke disparagingly to others about him, used his position as general contractor to bring about the termination of his employment with his sub-contractor and had he not done so appellant would have continued in the latter's employ until the work was completed. He could not compel Ashcroft to discharge him but induced him to do so.

On the foregoing facts can an action for damages be maintained? If respondent's interference was unjustified and a wrongful act done intentionally to damage the appellant and actually caused damage an action could be maintained. The only act of appellant which could reasonably support a plea of justification was the threat to "get even with" respondent. If that could be interpreted as, *e.g.*, a threat of sabotage or other injury it would justify interference.

"A violation of a legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual rela-

tions recognized by law if there be no sufficient justification for the interference":

Lord Macnaghten in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 510.

There is no general rule to decide in what cases justification exists. It is left to the Courts to analyze the facts in each particular case. On the other hand the exercise of legal right is not actionable merely because it is prompted by a malicious intention. Lord Macnaghten in the same judgment, at p. 509, summed up the decision in *Allen* v. *Flood* (1898), A.C. 1, by quoting the words of Baron Parke in an earlier decision (*Stevenson* v. *Newnham* (1853), 13 C.B. 297), *viz.*:

"An Act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

If respondent, to satisfy spite, engendered by idle gossip and because of language, while although abusive should only be treated as vituperation, should so act as to deprive appellant of his liberty to pursue his calling he would, I think, be acting with a "bad intent." If too bad intent is established it follows that respondent maliciously induced his sub-contractor to break his contract of employment with appellant. It is no justification to say that appellant was subject to dismissal at any time *a fortiori* where as here his employer was satisfied with his work. The foregoing principles are based, however, on cases where the coercion was applied by a body of men, members of trade unions. Care must be exercised in applying the same doctrine to the acts of an individual. Respondent also has legal rights. He may carry on his own business as seems best to him advising or using persuasion on others with whom he is associated or with whom he has contractual relations to dismiss men if he believes, rightly or wrongly, that he is advancing his own interests in so doing. He may not do so capriciously or selfishly but if he commits no legal wrong against others and causes no injury resulting in pecuniary loss a right of action does not necessarily follow.

MACDONALD, J.A.

"A combination" (said Bowen, L.J., in *Mogul Steamship Company* v. *McGregor, Gow, & Co.* (1889), 23 Q.B.D. 598 at p. 616; on appeal (1892), A.C. 25)

"may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own

COURT OF APPEAL

1930

Jan. 7.

DIVERS v. BURNETT

just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public."

Or again:

"A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing . . . when one man has to defend himself against many combined to do him wrong":

Lord Macnaghten in *Quinn* v. *Leathem, supra,* at p. 511.

I deduce from the cases that appellant's legal right was full freedom to pursue his lawful calling. It follows that all others are subject to the correlative duty of refraining from interfering with the exercise of that right with, however, the following qualification. If it can be shewn that such action was taken to legitimately advance the interests of the one interfering in pursuing his own calling, then he may intervene. In that case he would only be exercising an equal or superior right possessed by himself. In such a case malicious intention will not make any difference. He is exercising a legal right.

MACDONALD, J.A.

Applying these principles to the case at Bar, what follows? We must accept the trial judge's findings of fact if there is evidence to support them. In the first place, respondent discharged appellant from his own employ. He was within his rights in doing so. This led appellant to indulge in vituperative language which might well be ignored but the trial judge finds that he made a threat against the respondent. He might feel—as I do—that it was too vague to be taken seriously but it operated on respondent's mind and led him to believe that it was detrimental to his interests that appellant should be employed on any work for which he, as general contractor, was responsible particularly as he had an interest in seeing it finished as quickly as possible. This might well cause respondent to feel that he was legitimately advancing his own interests in ridding the works of a disturbing element. The trial judge finds the interference was justified. I cannot say he was clearly wrong in doing so. Respondent exercised the ordinary right of persuasion and advice even though it took the form of a command which however his sub-contractor might ignore. Respondent was within his rights in using persuasion to effect his purpose so long as he did not resort to unlawful means such as intimidation or

fraud to overcome resistance to his advice had it been resisted in the first instance. If, too, it should be necessary—and I do not think it is—to have a finding of absence of malice it is inferentially found because the trial judge said:

"I think ninety-nine men out of a hundred would have felt the same way he felt. One does not have a comfortable feeling when he sees a man working on his work if that man has said he will get even with him."

Respondent was prompted to act by appellant's conduct not by malicious motives. While, therefore, he used his paramount position as general contractor to interfere with appellant's legal right to pursue his calling what followed was the result of the exercise of respondent's right to pursue his calling in the way he felt best suited to advance his legitimate interests. And when added to that we have a finding of justifiable interference supported by evidence, there can be no question that appellant's action was rightly dismissed. It will be observed too that the sub-contractor was legally entitled to discharge the appellant with or without cause. That being true the words of Lord Macnaghten in *Allen* v. *Flood* (1898), A.C. 1 at p. 151, are applicable:

"I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse."

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Courtney & Elliott.*
Solicitor for respondent: *H. A. Beckwith.*

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

KATZ *ET UX.* v. CONSOLIDATED MOTOR COMPANY LIMITED AND THOMSON.

Principal and agent—Motor-car dealer—Salesman on commission—Negligence of salesman—Liability of dealer—Duty to stop behind street-car—Contributory negligence—Costs—R.S.B.C. 1924, Cap. 177, Sec. 11—B.C. Stats. 1925, Cap. 8, Sec. 4.

Section 4 of the Contributory Negligence Act provides that "unless the judge otherwise directs, the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage."

Held, that when both parties are found at fault the costs of both parties should be added together and divided in the same proportion in which the joint total damage was divided "unless the judge otherwise directs." The power reserved to the judge to make a special "direction" is intended to meet a case where the statutory direction would work an injustice.

By section 11 of the Motor-vehicles Act "Every person who drives or operates . . . a motor-vehicle going in the same direction as and overtaking a street-car which is stopped or is about to stop for the purpose of discharging or taking on passengers shall also stop the motor-vehicle at a distance of at least ten feet from and in the rear . . . of the street-car. . . ."

Held, that the object of the section was to protect those getting on or off the street-car and even if a driver has no intimation that a street-car ahead of him is about to stop until he is within ten feet from it, he is still bound to stop his car when he becomes aware that the street-car is about to stop.

The defendant Company, dealers in motor-cars, allowed the defendant T. to take out a motor-car for the purpose of demonstrating it to a prospective purchaser, agreeing to pay him a commission if he succeeded in selling it. As he was driving to the place where he was to show the car he negligently ran down and injured the plaintiff.

Held, affirming the decision of MURPHY, J. (GALLIHER, J.A. dissenting), that the relationship of principal and agent existed between T. and the Company; that the finding of the jury that the accident occurred in the course of T.'s employment was justified by the evidence, and the Company was liable for his negligence.

Statement

APPEAL by defendants from the decision of MURPHY, J. of the 18th of June, 1929, in an action for damages for personal injuries caused by the negligent driving of a motor-car belonging to the Consolidated Motor Company Limited by the defendant Thomson. Thomson was a salesman who sold cars on a commis-

sion basis for the defendant Company and the Company allowed him to take cars out for demonstration to proposed customers. On the afternoon of the 23rd of November, 1928, Thomson took a car from the defendant Company for the purpose of showing it to a proposed purchaser. He first went to his own house on 26th Avenue East. At about eight o'clock in the evening he drove from his house westerly towards the city on Broadway and as he was approaching the intersection at Glen Drive he caught up to a street-car travelling westerly on Broadway. The cars stop on the west side of Glen Drive and Thomson proceeded at 25 miles an hour with the intention of passing before the car stopped. Mr. and Mrs. Katz left their house on 14th Avenue East at about a quarter past eight in the evening intending to enter a street-car at the intersection of Broadway and Glen Drive. They walked northerly on Glen Drive and when they came to the southwest corner of the intersection they crossed Broadway in a northwesterly direction Mr. Katz being in front. Mrs. Katz was running and she got across to the north side of the railway tracks about 20 or 30 feet in front of the street-car when she was struck by the defendant Thomson, and severely injured. On the trial the jury assessed the damages at $10,000 but found the plaintiff guilty of contributory negligence and decided that two-thirds of the damages should be borne by the defendants and one-third by the plaintiffs. It was further held that two-thirds of the total taxed costs be borne by the defendants and one-third by the plaintiffs.

Statement

The appeal was argued at Vancouver on the 23rd, 24th and 25th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for appellant Consolidated Motor Company Limited: We submit the relationship of master and servant does not exist here: see *Harris* v. *Howes and Chemical Distributors Ltd.* (1929), 1 W.W.R. 217 at p. 222; *Salo* v. *B.C. Packing Co., Ltd., ib.* 385; *Oregon Fisheries Co.* v. *Elmore Packing Co.* (1914), 138 Pac. 862. We allow him to make sales for which he gets a commission. There is no contract of employment: see *Boyer* v. *Moillet* (1921), 30 B.C. 216; *Consolidated Mining & Smelting Co. of Canada* v. *Murdoch* (1929), S.C.R. 141;

Argument

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

Halparin v. *Bulling* (1914), 20 D.L.R. 598. What Thomson says after the accident does not affect us.

J. M. Macdonald, for appellant Thomson: The plaintiffs were wrong in attempting to run across the street immediately in front of a street-car. Mrs. Katz was guilty of contributory negligence: see *Cook* v. *Grand Trunk R.W. Co.* (1914), 19 D.L.R. 600 at p. 605. On the question of the distribution of costs see *Ansel* v. *Buscombe* (1927), 3 W.W.R. 137; *Harper* v. *McLean* (1928), 39 B.C. 480. As to the difference between a contract of employment and a contract with an independent contractor see *Performing Right Society, Ld.* v. *Mitchell and Booker* (*Palais de Danse*), *Ld.* (1924), 1 K.B. 762.

J. W. deB. Farris, K.C., for respondent: There is a *prima facie* case of employment and the burden is on the defendants. When the accident took place Thomson was in the course of his master's business: see *Duffield* v. *Peers* (1916), 27 O.W.R. 183; *Turcotte* v. *Ryan* (1907), 39 S.C.R. 8; *Smith* v. *General Motor Cab Co.* (1911), 80 L.J., K.B. 839 at p. 842. At the time of the accident Thomson was going to see his customer: see Bowstead on Agency, 7th Ed., 341, art. 101; *The Queen* v. *Walker* (1858), 27 L.J., M.C. 207; *Venables* v. *Smith* (1877), 46 L.J., Q.B. 470 at p. 472. As to misdirection in relation to the Motor-vehicles Act a man's obligation does not cease with the statute. As to the principal being responsible for the acts of the agent see *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259 at p. 265; *Lloyd* v. *Grace, Smith & Co.* (1912), 81 L.J., K.B. 1140 at p. 1147. Thomson was not an independent contractor: see Beven on Negligence, 4th Ed., 718. As to violation of the Motor-vehicles Act see *Hall* v. *Toronto Guelph Express Co.* (1929), 1 D.L.R. 375. On the evidence Mrs. Katz did not run into the defendant's car. On misdirection see *Johnson* v. *Elliott* (1928), 40 B.C. 130. As to costs see *Fred Olsen & Co.* v. *The "Princess Adelaide"* (1929), 41 B.C. 274.

Argument

Craig, replied.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: One of the claims put forward by the plaintiffs is that defendant disregarded the provisions of the

Motor-vehicles Act, R.S.B.C. 1924, Cap. 177, particularly section 11, which provides that:

"Every person who drives or operates on any highway a motor-vehicle going in the same direction as and overtaking a street-car which is stopped, or is about to stop, for the purpose of discharging or taking on passengers, shall also stop the motor-vehicle at a distance of at least ten feet from and in the rear of the passenger exit of the street-car."

The defendant Thomson, the driver of the motor-car did not stop but came on and ran down the plaintiff Fanny Katz, who was waiting to board the street-car. It was argued that the trial judge had misdirected the jury in intimating to them that the defendant was bound to stop ten feet behind the street-car, in the absence of anything to indicate that the car was about to stop until after the motor-car had reached a place less than ten feet from the street-car. It was boldly argued that if there was nothing to indicate that the street-car was about to stop until the motor-car had come within at least ten feet from it, there was no obligation to stop. That is not my interpretation of what the Legislature expressed in said section 11; the object was to protect those getting on or off the street-car. Therefore, if the driver of the motor-car had no intimation that the street-car was about to stop while he was still at least ten feet behind it, he was, I think, still bound to stop his car with all due expedition when he became aware that the car was about to stop here, which he knew.

MACDONALD, C.J.B.C.

There is nothing therefore in the defence that the defendant was not bound to stop but was entitled to go on and pass the street-car, notwithstanding that it had become stationary or was almost stationary for the purpose of taking on or letting off passengers. The defendant knew that the place was a regular stopping place and saw the male plaintiff signalling the car and ought to have governed himself accordingly. This is the only question in the appeal that calls for serious consideration, except that of the disposition of the costs.

The jury assessed the damages at $10,000, and the judge, pursuant to section 4 of the Contributory Negligence Act, Cap. 8, of the statutes of 1925, which reads as follows:

"Unless the judge otherwise directs, the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage."

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

ordered the costs of both parties to be added together and divided in the proportion of two-thirds to the plaintiffs and one-third to the defendants, that being the proportion in which the damages were divided, the jury having found both parties at fault. The other contention with regard to the apportionment of the costs is that they should be apportioned separately, the plaintiffs should get two-thirds of their taxed costs and defendants one-third of their taxed costs. Section 4 is not very clear. It speaks of the "liability for the costs of the parties," not of each of the parties and it is argued that to lump them together and divide them in the way first above suggested would work out very unfairly in a great many cases.

MACDONALD, C.J.B.C.

In my opinion the judgment is right. That, I think, would effect the true intent of the section. On the question of costs, we have decided that the costs were properly apportioned by the Court below.

MARTIN, J.A.: I agree in the dismissal of this appeal, and as to the costs I am of opinion that under section 4 of our Contributory Negligence Act, B.C. Stats. 1925, Cap. 8, *viz.*:

"Unless the judge otherwise directs, the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage."

MARTIN, J.A.

the direction in the judgment below that the apportionment is to be made out of the joint total costs is the correct one, *i.e.*, it corresponds to the apportionment of the joint total damage; this confirms the similar orders made in *Ansel* v. *Buscombe* (1927), 3 W.W.R. 137, and *Harper* v. *McLean* (1928), 39 B.C. 480.

It is to be noted that the power reserved to the judge to make a special "direction" meets a case where the statutory direction would work an injustice.

GALLIHER, J.A.: As I view the case the first and most important question to determine is the relationship that existed between Thomson and the Consolidated Motor Company. Leaving aside for the moment the taking out of the car for demonstration purposes, which I will deal with later, it would appear that what took place between Thomson and the Company amounted to this: Thomson went to the Company which had used cars for sale and said to them, in effect, if I can make a

GALLIHER, J.A.

sale of any of these used cars, will you give me a commission, to which they agreed. Thomson was not obligated by this either to sell or attempt to sell a car. The Company had no control or direction over him at all and only upon his securing a purchaser were the Company obligated to anything. It was simply, if I, Thomson, sell a car, you will pay me a commission—an act which if Thomson performed on his part entitled him to remuneration. I am quite clear there is nothing in that arrangement which would constitute him a servant of the Company. Was he an agent of the Company, in the sense that any torts committed by him during the course of such agency would render the Company liable? Or could he in the true sense be said to be an agent at all? I should think that his position would be rather that of an independent contractor. In a case practically on all fours with the case at Bar, the Court of Appeal of Saskatchewan were unanimous in taking that view: *Harris* v. *Howes and Chemical Distributors Ltd.* (1929), 1 W.W.R. 217. Reference might also be made to the remarks of McCardie, J., in the case of *Performing Right Society, Ld.* v. *Mitchell & Booker (Palais de Danse), Ld.* (1924), 1 K.B. 762 at p. 770.

GALLIHER, J.A.

An example of agency would be where you list your property for sale with some real-estate agent who accepts such listing. In such case I think there would be an implied agreement that the agent would act for the principal. Here there is no understanding either express or implied that he will do so. There is no appointing of Thomson as their agent in the true sense. He goes out to sell not in the capacity of an agent but entirely of his own motion, and freed of any obligation express or implied to do so and not under the direction or control of anyone.

It is urged, however, that as the Company permitted Thomson to take out cars to demonstrate to prospective purchasers and the accident having taken place during one of these demonstrations, that is a feature to consider in fixing their relationship as that of principal and agent. I do not think that is so. If he was not their agent before taking out the car he could only be so afterwards if that very act constituted that relationship.

We have then to consider in what relationship the defendants stood to each other during that demonstration period. It would

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

seem to me their relationship would be that of bailor and bailee. The car was loaned or given to Thomson to enable him the better to carry out his part of the contract should he choose to endeavour to make a sale. I think the situation is little different to that in *Venables* v. *Smith* (1877), 46 L.J., Q.B. 470 (afterwards referred to with approval in the House of Lords in *Smith* v. *General Motor Cab Co.* (1911), 80 L.J., K.B. 839) in which it was held that the relationship between the owner of cabs let out to a driver on hire was that of bailor and bailee but the owner of the cab was nevertheless responsible to third parties by virtue of the provisions of The Hackney Carriage Act, 1843, which declared that *quoad* third parties the driver was deemed to be the servant of the proprietor. We have no such Act and if I am right in thinking that during the period of demonstration or until Thomson returned the car the relationship was that of bailor and bailee and the fact that nothing was charged for use of the car would make no difference, the appellant, the Company, is entitled to succeed. In other words, if the relationship of principal and agent does not obtain before the car is taken out the using of the car does not change the real relationship.

GALLIHER, J.A.

I would allow the appeal of the Consolidated Motor Company, with costs.

As to the defendant Thomson, I do not think I would be justified in interfering with the verdict of the jury. There was evidence upon which they could find negligence.

As to the costs against Thomson, I am agreeing with the disposition as outlined in the judgment of the Court handed in by my brother MARTIN.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I have had the advantage of reading the very carefully prepared opinion of my brother M. A. MACDONALD, and I am free to say that it in a very complete way, both as to the law and facts, well portrays my view in this appeal, and I am in complete agreement therewith. I would therefore sustain the verdict of the jury and dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: A jury awarded damages against both appellants for personal injuries suffered by respondent Fanny Katz, wife of respondent M. E. Katz. In November, 1928,

appellant Thomson, sales agent for his co-appellant, driving (it is alleged negligently) on Broadway in the City of Vancouver on his way to demonstrate a car owned by the appellant Company to an intending purchaser, struck and seriously injured respondent Fanny Katz while she was crossing the street preparing to board a street-car. The jury found that the injured respondent was also guilty of negligence and divided the damages in the proportion of two-thirds to one-third, the latter fraction to be borne by said respondent. Respondent's negligence to the extent found is admitted while both appellants contend that she was wholly to blame.

As to the Company's liability for Thomson's negligence the learned trial judge left it to the jury to say—and they necessarily found affirmatively—whether or not he was acting within the scope of, and in the course of his employment. It is submitted that there was no evidence to support such a finding. Objection was taken to the admission as against appellant Company of Thomson's evidence on examination for discovery. An order was obtained giving liberty to respondents to so use it (saving all just exceptions) and no appeal was taken from that order. The point is not decisive as Thomson gave evidence at the trial, although I think with the order standing the jury would be at liberty to use it if it is just to do so. At all events the jury were not misled in view of the other evidence. As to that relationship Thomson testified at the trial as follows:

MACDONALD, J.A.

"Mr. Thomson, what time of day did you get that car from the Consolidated Motor Company? Well, I couldn't tell you that right off hand, because it was—it must have been—it might have been four, it might have been five, I wouldn't swear definitely.

"In the afternoon? Somewhere round there.

"And was there any one of the Consolidated Motors officials there at the time you got that car? Well, if there was anyone happened to be there, you know, I would just go ahead and get the car and take it out, if it was there. If it wasn't, I would wait until it came in.

"I see, but did you tell anyone where you were going or what you were going to do with the car? Well, I didn't have to, they were tickled to death when I—

"I just want to know whether you did or did not? I beg your pardon?

"Are you on a salary at all? No, just a commission.

"You get a commission? And I get a little change every week, but no salary.

"I see, and do you perform similarly with other motor sale companies here? No, just the Consolidated.

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

"Just that one? Yes.

"I see. Have you any hours of duty? No, I am my own boss, I can go when I like and come when I like.

"That is what you do? Yes."

Cruise, an officer of appellant Company was examined for discovery, and gave this evidence on the same point:

"Are you an officer of the Consolidated Motor Company Limited? I am.

"That is a Provincial company, I suppose? Yes.

"And its business is dealing in autos? Yes.

"It sells autos to the general public? Yes.

"New and second-hand cars? New and used cars.

"In that connection, you employ various salesmen in some capacity to show you and demonstrate cars? Yes.

"Now, these men, I suppose, are expected to take out cars for the purpose of showing and demonstrating? They are.

"You carried on business of that kind on November 23rd, 1928? We did, yes.

"Have you an agent working for you by the name of G. A. Thomson? We had a man that sold used cars from time to time for us by that name, yes.

"And he was selling used cars for you in the month of November, 1928? Yes, he was.

"And in the course of his duties selling cars for you, he was permitted to take out cars for the purpose of demonstrating or showing them around? Yes.

"Now, the car in question is a Hupmobile sedan, B.C. Licence 1-659. Would that make it more clear in your mind as to whether it belonged to your firm? No, that data would not. I am quite prepared to admit he had a car belonging to our firm on that particular night, so far as that is concerned."

MACDONALD, J.A.

The foregoing fully discloses the relationship without reference to the evidence objected to.

Assuming appellant Thomson was negligent is it imputed to his co-appellant? It was submitted that the relationship of master and servant did not exist as that involves control and direction and Thomson was free to do as he wished. Whether it does or not is a question of fact depending upon many factors. While the trial judge referred to the appellant as employer and employee respectively the question of "master and servant" was not submitted to the jury nor was it necessary to do so. There may still be agency.

The judgment of Martin, J.A. of the Saskatchewan Court of Appeal in *Harris* v. *Howes and Chemical Distributors Ltd.* (1929), 1 W.W.R. 217 at p. 218 was referred to. Plaintiff on a bicycle was injured by defendant driving a motor-car while selling goods on commission for his co-defendant as well as for

other parties. It is not clear from the report that the salesman was not driving his own car. It is referred to as "his car." If I am right in this assumption the various parties whose goods he handled would not be liable for his negligence. If, however, the car belonged not to the salesman but to his co-defendant, he would be a bailee thereof using it not as part of his engagement but to store and transport the goods to aid him in carrying out his real employment as a selling agent. The use of the car was incidental. In the case at Bar the use and demonstration of the car was essential; not any car but the car sought to be sold. In the *Harris* case the salesman had an independent occupation carrying it on according to his own methods. That is not this case. Here Thomson in demonstrating the car was "about business" entrusted to him; the other was "about his business" only in selling goods. Nor is it conclusive if it should be found that the relation of master and servant did not exist. Agency as intimated must still be considered. It is impossible to say that Thomson was an independent contractor.

As the question was properly submitted to them in the charge, the jury must have found that Thomson was acting within the scope of and in the course of his employment. The only point is whether or not there was evidence upon which reasonable men could so find. I think the jury had sufficient evidence. Appellant Thomson was engaged to sell cars on commission. To do so he could either take prospective customers to the car or take the car to prospective customers. Cruise an officer of appellant Company said "these men are expected to take out cars for the purpose of showing and demonstrating." Thomson was advancing his co-appellant's interest in doing so. If the latter wished to compel him to sell without demonstrating or driving it was free to do so. He was conforming to the terms of his engagement in taking the car (with which he caused the damage) out on the public streets even although he drove on Broadway of his own choice and to better serve his own interests. If he went off joy-riding or used the car as a taxicab for revenue he would of course be violating the terms of his employment. The appellant Company provided Thomson with the car so that he might procure an order for its sale (*Turcotte* v. *Ryan* (1907), 39 S.C.R. 8). It is not necessary that Thomson should be directed to take

MACDONALD, J.A.

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

out the car or to use it in a certain way to make appellant Company liable. The liability arises for wrongs committed in the course of service for the benefit of the principal, or for the mutual benefit of both. The appellant Company put Thomson in its place to sell cars; to do a certain class of acts which without him or others like him it would do itself. That is agency.

"'He has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of the master to place him in'": *Houldsworth* v. *City of Glasgow Bank* (1880), 5 App. Cas. 317 at p. 326.

He is its agent to sell cars. That is the principal's business. Thomson was doing it for them. All acts done for purposes of sale are in the course of that agency and for the principal's benefit. Bramwell, B. in *The Queen* v. *Walker* (1858), 27 L.J., M.C. 207 at p. 208, in referring to the distinction between principal and agent and master and servant, said:

"It seems to me that the difference between the relations of master and servant and of principal and agent is this: A principal has the right to direct what the agent has to do; but a master has not only that right, but also the right to say how it is to be done."

MACDONALD, J.A.

There is a difference in *"status"* between a servant and an agent. We have no finding as to the former relationship but the evidence discloses the relationship of principal and agent and the finding is attributable to it. That being so the principal is liable for the negligence of its agent in the course of his employment, although the principal did not necessarily direct it and appellant Company is liable for the negligence, if any, of Thomson.

It was submitted that because appellant Thomson first took the car home and had dinner afterwards, at about 8.30 p.m. driving in the same car to see his prospective customer, the accident then occurring, that the principal was not responsible. I cannot think so. He had no fixed hours for work and was still acting in the course of his employment.

Was Thomson negligent? We have only to ascertain if there is enough evidence to enable reasonable men to fasten negligence upon him to the extent found. Broadway runs east and west and is crossed by Glen Drive running north and south. The injured respondent walked to Broadway to board a street-car

going west on that street. Her husband crossed Broadway ahead of her and was waiting for the street-car on the other side, signalling it to stop. The street-car was then two blocks away. His wife followed him having by the husband's evidence "plenty of time to do so." When she got across the street-car was about a block away and as she waited at or near the usual place to board the car, she was struck by Thomson's motor-car. As the street-car approached Thomson was beside it travelling at the same rate of speed but accelerating to pass before it stopped at the point where respondents were to board it. The street-car stopped beyond the intersection of Glen Drive but appellant Thomson drove on nearly hitting the husband as he was walking towards the street-car from the curb, and striking his wife with the left fender. No horn was sounded. The street-car stopped before she was hit. The motorman said he was travelling about 20 miles an hour at this point. He saw the appellant, the husband signalling him to stop, also his wife, as she was "running" in front of the street-car crossing the left track (she had two tracks to cross). He slowed down to give her a chance and she got safely over both tracks. The motorman said that she was about 15 feet ahead of him as she crossed the tracks, and appellant Thomson's car was at that time alongside the vestibule—"maybe a few feet ahead of me." Thomson was driving not more than three or four feet from the street-car, and directly in line with the point where the injured respondent stopped and turned after clearing the tracks. The street-car stopped about 17 feet short of the usual place to give Mrs. Katz a chance to get across. She got across also, by respondent's evidence, before the motor-car arrived at that point. As the motorman said "she was there first but very close." Appellant Thomson was about 10 or 15 feet ahead of the street-car when the collision occurred. It took place about 50 feet west of the westerly side of Glen Drive. The injured respondent was thrown 10 feet west and fell on the street about 20 feet ahead of the point where the street-car stopped. A police officer examined the road for skid marks. He found one, presumably of a right wheel, 40 feet long running off to the right, towards the curb, then a break of 9 feet, and another mark 12 feet long at nearly the same angle. These marks were about opposite the point where the injured respond-

MACDONALD, J.A.

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

ent crossed the tracks. The foregoing evidence was given by respondents' witnesses.

An eye witness for appellant Thomson, walking with his wife on Broadway about half a block away, saw the injured respondent running out of Glen Drive, then crossing Broadway on a north-west angle, still running and when she got across the street-car Thomson was "pretty near up, they weren't half a block away." He said she was about 20 or 30 feet in front of the street-car when she got across the tracks. Again he said, "She just got across the street-car tracks" before the collision; also the motor-car was "just a little ahead of the street-car," when she was crossing the tracks. In a written statement given some time before, he said "the street-car going west was about a half block away from her" when Mrs. Katz ran across. He also stated that he saw a motor-car going 20 to 25 miles an hour and it was alongside the street-car when he first saw it," and when the street-car was about to stop the closed car went on ahead and struck Mrs. Katz." The wife of the last witness said, "Mrs. Katz ran across the tracks at an angle" and "I saw the motor come along and she ran right into the motor-car." Appel-

MACDONALD, J.A.

lant Thomson said:

"Mrs. Katz either must have jumped right out and ran into me, because I didn't see her until she was right off the front of my left fender."

He was then, he said, about five feet past the street-car—its front end. It happened 40 or 45 feet west of the westerly boundary of Glen Drive. He was travelling about 20 to 25 miles an hour. The car had four-wheel brakes in good condition. After the collision he stopped within 12 or 14 feet (the skid marks contradict this). He did not apply his brakes before the collision because he said "the road was perfectly clear." He knew where the street-car usually stops, but it was not at the point of collision. But he knew the car stopped on the west side of Glen Drive. He gave this evidence on discovery:

"As I understand it what you were doing is, you were overtaking the street-car? Yes, overtaking the street-car.

"And your idea was to get ahead of the street-car? Yes."

He was alongside of the street-car at the intersection and appreciated that it might stop. He said he saw respondent M. E. Katz, the husband, but did not see him signalling the street-car, but that if he had, he would not consider that he

should "slow up." When he was examined for discovery he marked the point of collision much nearer to Glen Drive. Since that time he looked over the ground and marked the point on exhibit 4 further west. His evidence was given in a rather truculent manner. It might not impress the jury.

I have detailed the evidence at length because it is necessary to view it as a whole in deciding if the verdict can be supported. There are, as would be expected, conflicting statements. There is evidence to support the view that the injured respondent delayed her crossing unduly so that she had to run not directly but at an angle in front of the street-car, compelling the motorman to stop short of the usual stopping point for her safety or "to give her a chance," and that when she emerged collision was inevitable with the driver of a car who from his relative position with the street-car might have been justified in going forward. There is always danger too, in attempting to board a street-car by crossing close in front of it, while it is in motion. Traffic will likely be encountered on the other side. If this view had been taken by the jury one could not complain. It suggests the need for careful enquiry to see if there is reasonable evidence that appellant Thomson was (not wholly) but more blameworthy (66⅔ per cent.) than the injured respondent. The jury might properly find that Mrs. Katz did not run into the motor-car as Thomson suggested. By her own evidence and that of one at least of appellants' witnesses, the motor-car and street-car were half a block away as she crossed the tracks. Her husband said she was across "a few seconds" before the street-car came along and a vehicle going 20 miles an hour will travel 29 feet in a second. He said: "She was safe enough to come across and wait," while the motorman said: "She was there first, but very close." He was respondents' witness. The jury were at liberty to believe the evidence most favourable to respondents and to find that she emerged into view across the tracks with a reasonable margin of safety to enable a motor-driver coming along on the other side to avoid the accident either by stopping or if that were not possible by swerving to the right as there was 24 feet between the tracks and the curb to manœuvre in. They might also find that appellant Thomson knowing that the street-car would, or would likely stop, not always at a precise point—some

MACDONALD, J.A.

COURT OF APPEAL

1930

Jan. 7.

KATZ v. CONSOLIDATED MOTOR CO.

latitude is allowed—should have his car under control to meet such an emergency. It is perhaps not usual, but yet it sometimes happens that intending passengers cross in front of street-cars. He did not anticipate a situation which he ought to have anticipated. Further, if appellant Thomson's evidence is accepted his view would not be wholly obstructed by the street-car. He should therefore have seen the injured respondent before he was upon her. The motorman saw her before the collision and at that time he could see Thomson's car ahead of him. Thomson was, I think, chiefly intent on getting past the street-car. He did not notice the husband signalling to the motorman to stop. I think motor-drivers in such situations should watch to see if passengers are about to board a street-car and act accordingly.

This brings up another feature. Was Thomson bound by statute to stop behind the street-car? The trial judge read to the jury (and commented upon it) section 11 of the Motor-vehicles Act, R.S.B.C. 1924, Cap. 177. He said:

MACDONALD, J.A.

"... there is a specific provision of the law to which I must draw your attention. It is this: 'Every person who drives or operates on any highway a motor-vehicle going in the same direction as and overtaking a street-car which is stopped, or is about to stop, for the purpose of discharging or taking on passengers shall also stop the motor-vehicle at a distance of at least ten feet from and in the rear of the passenger exit of the street-car or of the rear passenger exit if more than one such exit, and shall keep the motor-vehicle at a standstill until the street-car has been again set in motion and all passengers who have alighted have reached the side of the highway or are otherwise safely clear of the motor-vehicle.' Therefore, anyone who is driving a motor-vehicle in the same direction and overtaking a street-car is bound by law if the street-car has stopped or is about to stop for the purpose of discharging or taking on passengers—if that is the situation, then any person driving a motor-car in the same direction as, and overtaking a street-car, is bound to stop his motor-vehicle at a distance of at least ten feet from the rear passenger exit."

It was submitted that this was misdirection; that the section did not apply to the facts of this case. It was for the jury to find the facts to shew whether it did or did not apply and the trial judge recognized that by using the key phrase to the paragraph, *viz.*, "if that is the situation." Assuming the jury found that Thomson violated the statute this alone on all the facts, doubly so with the other points mentioned would support the verdict. I think the jury were justified in finding—if they did—a breach of this section, and also that there was no misdirec-

tion. It may be that it would be better if this parenthetical phrase (if that is the situation) was amplified but it is correct as it stands and failure to say anything further, if a fault, would be non-direction. The street-car was about to stop to take on passengers. The section does not mean "about to stop" to the knowledge of motor-drivers. If in fact, it is about to stop the Act applies. That is why drivers should be alert to see if any passengers, by signalling or otherwise, intend to get on. There was a light at the corner and if he looked carefully he could have seen respondent M. E. Katz signalling. The motorman saw him. To an almost equal extent it was incumbent on Thomson to see him. A motor-driver cannot evade the statute by rushing forward to pass a car which he knows, or should know, is about to stop unless he can pass the car before (not at the time) it reaches the stopping point; and to do that he must not drive in a reckless fashion attaining a speed too fast for safety on the public streets. Appellant Thomson speeded up either to get to his destination quicker or because he knew there was danger if he did not get fully clear of the street-car. By his own evidence he was only three or four or five feet ahead when the street-car stopped. That does not necessarily mean that there was a clearence of three or four feet between the two vehicles. Further, Thomson gave this evidence:

MACDONALD, J.A.

"As I understand it what you were doing is you were overtaking the street-car? Yes, overtaking the street-car."

It is just to that situation that the section applies, if the street-car is "about to stop." The jury were at liberty to find that appellant Thomson, knowing the impending situation, should have reduced his speed in the last block travelled, to bring his car ten feet behind the rear of the street-car and not having done so violated the section of the Act.

I would, therefore, not disturb the verdict.

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

Solicitor for appellants: *J. M. Macdonald.*
Solicitor for respondents: *A. H. Fleishman.*

PIPE v. HOLLIDAY.

COURT OF APPEAL

1930

Jan. 7.

PIPE v. HOLLIDAY

Motor-vehicles—Bicycle—Right of way—By-law—Validity—R.S.B.C. 1924, Cap. 103, Sec. 19—B.C. Stats. 1925, Cap. 16, Sec. 4—R.S.B.C. 1924, Cap. 177, Sec. 17.

A municipality is by the Municipal Act given power to regulate traffic, this power being definitely limited to regulations other than the rules of the road. A regulation as to the right of way of vehicles at street intersections is a rule of the road and a municipal by-law which lays down a rule as to the right of way at street intersections is *ultra vires*.

Per MACDONALD, C.J.B.C., and MACDONALD, J.A.: One cannot by stopping at an intersection marked by a "stop" abandon all care upon resuming the journey. Care must be exercised at all stages and this accident was caused by what took place after that point was passed. The first requirement of motor-car drivers is to be alert, to keep a sharp look out for possible danger. The object is to put the driver in a position to take steps to meet any emergency suddenly arising.

Per GALLIHER and MCPHILLIPS, JJ.A.: The defendant had the right of way. It was the duty of the plaintiff to avoid vehicles entering the intersection on his right and he was responsible for the accident.

The Court being equally divided the appeal was dismissed.

APPEAL by defendant from the decision of MACDONALD, J. of the 5th of June, 1929, in an action for damages for negligence. The plaintiff, who was seventeen years of age, entered a bicycle race to take place on the 4th of August, 1926, it having been arranged by the Vancouver Exhibition Association, the race starting and finishing on the grounds of the Exhibition Association, and the course being in part over streets, thoroughfares and parks within the City. While the plaintiff was in the race going southerly on Victoria Drive and approaching Eleventh Avenue, the defendant was approaching Victoria Drive from the west on Eleventh Avenue. The defendant came slowly to the intersection nearly stopping, then she proceeded on intending to turn north on Victoria Drive. She ran into the plaintiff just north of the manhole at the centre of the intersection. She states she did not see the plaintiff until just before he ran into her car. The plaintiff was racing on the west side of Victoria Drive. He saw the defendant and turned out towards the centre of the intersection with the intention of passing in front of the automobile, thinking that the defendant would let him pass. The defendant, however, continued on, cutting the

Statement

corner to the north of the manhole and the plaintiff ran into the centre of the left side of the automobile. The bicycle was smashed and the plaintiff was knocked insensible suffering severe injuries, he having to remain in the hospital for one month and at home for two months longer.

The appeal was argued at Vancouver on the 17th and 18th of October, 1929, before MACDONALD, C.J.B.C., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Lennie, K.C., for appellant: The Municipality may regulate traffic by by-law under the Municipal Act, but the power is limited to regulations other than the rules of the road. This by-law providing for stopping on side streets at an intersection is a rule of the road and does not come within the powers granted. Even if the by-law applied, we do not come within it as we were going at less than ten miles an hour: see *Myall* v. *Quick* (1922), 1 W.W.R. 1; *Rex* v. *Knott* (1929), 1 W.W.R. 304.

Argument

J. A. Russell, for respondent: Appellant says the by-law offends against the Highway Act, but the authority for passing the by-law is the Vancouver Incorporation Act. This does not interfere with the Highway Act. The defendant admitted to the plaintiff's mother that she was at fault.

Lennie, in reply: The trial judge was wrong in saying the plaintiff had the right of way: see *Paul* v. *Dines* (1929), 41 B.C. 49.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.: The learned trial judge found both parties negligent and awarded the plaintiff one-half of the damages and one-half of his costs. He founded his judgment that the defendant was negligent on the city by-law purporting to give the plaintiff the right of way at the intersection in question, and he said that the contributing factor in the decision was, who had the right of way? In my opinion the defendant had it; it is so provided in the Highway Act, and while the municipality is by the Municipal Act given power to regulate traffic, this power is definitely limited to regulations other than the rules of the road, and I consider the right of way at intersections to

MACDONALD, C.J.B.C.

COURT OF APPEAL

1930

Jan. 7.

PIPE v. HOLLIDAY

be within the rules of the road. In that respect the by-law of the municipality is *ultra vires.*

But there is some evidence of negligence on defendant's part in other respects which induces me to sustain the judgment. In this respect I agree with the reasons of MACDONALD, J.A., and would dismiss the appeal.

GALLIHER, J.A.: I think that the by-law of the City of Vancouver in so far as it attempted to regulate rules of the road was *ultra vires.*

Section 17 of the Motor-vehicle Act, Cap. 177, R.S.B.C. 1924, in granting powers to municipalities to pass by-laws regulating motor-vehicles specifically excepts rules of the road and rate of speed. The Highway Act, Cap. 103, R.S.B.C. 1924, Sec. 19, deals with the rules of the road as to right of way and under it the defendant in this case would have the right of way.

The learned judge in his reasons for judgment expressed himself to the effect that plaintiff had the right of way and that had this not been so his finding as to the negligence of defendant would have been different, and his judgment is based on that. But notwithstanding that defendant had right of way we still have to consider whether the defendant nevertheless exercised proper care. With right of way in her favour, I take it the learned judge would have found no negligence on defendant's part, but I think it is open to us under the circumstances to draw our own conclusions as to that. The learned trial judge accepts defendant's statement that she looked both ways in entering upon Victoria Drive and did not see the plaintiff on his bicycle until almost at the moment of impact. The evidence convinces me that she could or should have seen the plaintiff when she says she looked. Assuming then that the defendant should have seen the plaintiff either one could have stopped and avoided the accident. The boy says he could have and the defendant says she could have stopped within five feet. Was the defendant then knowing or believing that she had the right of way negligent in not stopping or was she justified in thinking that any traffic to her left which had not entered on the intersection would observe the rule of the road and stop? I am inclined to think she was, and that the unfortunate boy by disobeying the

GALLIHER, J.A.

rule of the road was the real cause of the accident and that negligence should not be imputed to the defendant.

It follows in this view that the appeal should be allowed.

MCPHILLIPS, J.A.: The learned trial judge has given reasons for the conclusion at which he arrived, a careful judgment in review of the evidence adduced at the trial, in truth, upon the facts as found by the learned trial judge the action would undoubtedly have been dismissed had it not been for the Vancouver City By-law, No. 1783, section 18, subsection (13), which attempts—and as I think without statutory authority—to interfere with the statutory rule of the road as contained in the Highway Act (1924). It is clear that the Council of the City of Vancouver was without authority to do this (I will set forth the statute law later). There is express inhibition against by-laws dealing with speed and the rules of the road. Under the Highway Act the defendant had the right of way and approached the intersection from the right at a speed not exceeding ten miles an hour, having slowed down to that speed when approaching the intersection, therefore the defendant was in no way proceeding negligently. What, on the other hand, was the plaintiff doing? Actually racing on a public street in the no inconsiderable City of Vancouver. He was a competitor in a bicycle race at the time of the collision with the defendant's motor-car and speeding along at, no doubt, top speed. He saw the defendant's motor-car approaching the intersection at his right some considerable distance away but his conclusion was that he could safely pass in front, but a moment later thought not. He then swerved to the left evidently keeping up his pace, and that took place which might be expected—the defendant's motor-car proceeding across the intersection and when so doing, and making the turn to proceed in the opposite direction to the plaintiff, the plaintiff crashed into the motor-car. The plaintiff admits he could have stopped. The situation was admittedly not one of the "agony of collision" as the bicycle went a considerable distance in a diagonal direction across the street, and when the impact took place the plaintiff was clearly negligent in that he was upon the wrong side of the road. It is clear to demonstration that the plaintiff, seeing the defendant's motor-car, could have stopped.

MCPHILLIPS, J.A.

COURT OF APPEAL

1930

Jan. 7.

PIPE v. HOLLIDAY

He admits this, yet he recklessly proceeds first thinking he could pass in front of the motor-car, then deciding to go on the left side of the street and in this way pass the on-coming motor-car still keeping up his speed. It was a race—a scandalous thing to be permitted in a city upon a public street, endangering the lives of pedestrians and even those in vehicles. I understand the bicycle race was under the auspices of the Vancouver Exhibition Association and assented to by the City of Vancouver. Think of it—a bicycle race upon a public and well-frequented street! Could it be reasonably expected by the defendant that she had to approach such a condition of affairs? There can be nothing but a negative answer to this.

Further, the defendant was driving her motor-car in a reasonable and proper manner, and had prudently slowed down at the intersection, and was entitled to the right of way. It is true, looking in the direction from which the plaintiff came, she did not see him. This was not unreasonable, the plaintiff was racing and in its general knowledge known to all, that a boy riding a racing bicycle is low down on the machine, and would not present much of a view to one driving a motor-car. Then it is to be remembered that the bicycle was being ridden at a high speed, and would come up quickly and when the defendant looked up on approaching the intersection would not really be visible. It would seem to me to be nothing less than effrontery of the baldest kind to bring suit in respect of a happening of this nature. The plaintiff may well thank Providence that he is alive today, and whilst one cannot but sympathize with the young man for the injuries he received, he was old enough to appreciate the risks he was undertaking in racing as he did through the public streets and it may be well said in passing, that the Exhibition Association and the public authority were certainly remiss in not appreciating the risk to life that would be present in being parties to such reckless conduct.

MCPHILLIPS, J.A.

Now, upon all the facts adduced and put in evidence at the trial, I fail to find one particle of evidence establishing negligence against the defendant in driving her motor-car, certainly nothing which could be said to have been the effective cause of the accident. The negligence was wholly that of the plaintiff in racing as he did along a public street careless of all else but

the desire to win the race. With the admission made by him that he saw the defendant's motor-car, could have stopped, did not, but recklessly rode his bicycle forward and into the motor-car of the defendant and now claims damages, it would certainly be a travesty of justice if upon the recital of the facts as here set forth a right of action exists in the plaintiff, *i.e.*, that the defendant has been guilty of some act of negligence entitling the plaintiff to recover for injuries sustained. It is a patent case of the plaintiff being the author of his own injuries and he is without a right of action against the defendant for all that took place.

I would refer to what the learned trial judge said in his judgment:

"If, on the contrary, the defendant had the right of way, the result that I have reached, as far as negligence is concerned, would have been different. It seems to me the controlling factor in deciding the question of negligence at that point."

It is plain that the learned trial judge proceeded upon the view that the by-law giving the right of way to the plaintiff was the decisive question in the case, and by reason of that the defendant was called upon to give way to the plaintiff and should not have proceeded to cross the street.

The controlling statute law defining the regulation of traffic is set forth in section 19 of the Highway Act, Cap. 103, R.S.B.C. 1924. The section reads as follows:

"19. The person in charge of a vehicle so drawn or propelled upon a highway shall have the right of way over the person in charge of another vehicle approaching from the left upon an intercommunicating highway, and shall give the right of way to the person in charge of another vehicle approaching from the right upon an intercommunicating highway; but the provisions of this section shall not excuse any person from the exercise of proper care at all times."

Then we have the Motor-vehicle Act, Cap. 177, R.S.B.C. 1924, and in section 17 thereof it is made clear that no authority resided in the City of Vancouver to pass the by-law which the learned judge proceeded upon. The section reads as follows:

"17. In addition to the provisions for motor-traffic regulation contained in this Act, the Municipal Council of any municipality in the Province, or the Park Commissioners authorized by statute to make by-laws, may by by-laws, and concurrently with and in addition to the exercise of any powers conferred upon such Municipal Council or Park Commissioners by the Municipal Act or by any other Act of the Legislature, provide and enforce by-laws regulating traffic and motor-vehicles and trailers on highways in every respect, save as to the rules of the road and rate of speed, and, in the

COURT OF APPEAL

1930

Jan. 7.

PIPE v. HOLLIDAY

case of motor-vehicles and trailers not used or plying for hire, save as to licence fees, as such Municipal Council or Park Commissioners may think fit; and no such by-law shall be quashed or set aside or declared ineffectual or void by reason of any informality or by reason of any want of declaration of the power under and by virtue of which the by-law was passed, or on or for or by reason of any ground or matter whatsoever; but every such by-law shall be valid and effectual and shall be enforceable and enforced so as to carry out the intention of the Municipal Council or Park Commissioners passing the by-law as expressed therein."

It will be observed that this legislation is effective in its restrictive provisions as against municipalities subject to the Municipal Act "or by any other Act of the Legislature." I make reference to this as the City of Vancouver is constituted under and by virtue of a Private Act of the Legislature. And it is to be observed that in the by-law here questioned, subsection (13) to section 18 thereof, is in the same terms as section 19 of the Highway Act in respect to the right of way. It reads as follows:

"(13) In approaching the intersection of any street, he shall have the right of way over any person approaching such intersection from the left; and shall give the right of way to any person approaching any such intersection from the right; but the provisions of this subsection shall not excuse any person from the exercise of proper and reasonable care at all times."

MCPHILLIPS, J.A.

This Court considered a little time ago a case which had elements similar to those present here. The plaintiff was driving a motor-car at a high speed, namely, 35 miles an hour, and about to pass an intersecting road entering from the right, out of which the defendant's truck was making its way, the driver of the truck intending to cross the road and turn north, the plaintiff in the motor-car driving south, and 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 the case at Bar the plaintiff swerved to the left crossing the road and attempted to pass in front of the motor-car keeping up his speed but miscalculated and crashed into the motor-car). The learned trial judge held that the defendant did not exercise due care in entering the highway and that he was guilty of negligence. This Court, however, reversed the learned trial judge, being of the opinion 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. I am satisfied that this case, *Paul* v. *Dines* (1929), 41 B.C. 49, is in its reasoning conclusive in the present case. The *ratio decidendi* admits of it being decided in the same way in the present case, particularly in view of the fact that in the case at Bar the plaintiff saw the motor-car and admits he could have stopped. In the case referred to the plaintiff attempted to stop but failed to do so.

MCPHILLIPS, J.A.

I would allow the appeal, my opinion being that the action should have been dismissed.

MACDONALD, J.A.: Damages were placed at $4,000 in respect to injuries received by respondent while engaged in a bicycle race through a collision with a motor-car driven by appellant. The trial judge found both parties equally negligent and judgment in respondent's favour was entered for $2,000. There is no appeal against the finding of 50 per cent. negligence on the part of the respondent and therefore we are only concerned with appellant's submission that respondent was wholly at fault.

Respondent an infant (aged 17 years) was taking part in a bicycle race arranged by the Vancouver Exhibition Association through the public streets of Vancouver (why it should be permitted on comparatively busy streets without having each street intersection guarded is difficult to understand) and as he proceeded along Victoria Drive approaching Eleventh Avenue which intersects it (Eleventh Avenue ends at the intersection) the appellant in a motor-car coming towards Victoria Drive on Eleventh Avenue collided with him, when she was about to make the turn to the left.

MACDONALD, J.A.

The facts were carefully reviewed by the learned trial judge and some features only require consideration.

Apart altogether from the consideration of statutes and by-laws, appellant in my opinion was negligent because although she says she looked both ways on approaching Victoria Drive she did not look effectively. She did not see the boy on the bicycle according to her own evidence until a moment before the collision, although she might have seen him 60 or 70 feet away. Had she looked carefully and exercised care when emerging from Eleventh Avenue on to a main thoroughfare she would have seen

COURT OF APPEAL

1930

Jan. 7.

PIPE v. HOLLIDAY

the boy approaching on his bicycle, and might have taken steps to avoid the accident either by stopping (she could do so in five or six feet taking her evidence as to speed) or by increasing her speed enable the boy to pass behind her. In addition, instead of making a well rounded turn she cut across the corner. She admits that she cut the corner to some extent but the prevailing evidence shews that she cut it to a greater extent than admitted.

In considering appellant's negligence it may be necessary to refer to the respective rights of the parties on the highway. The boy had no higher rights than the driver of any other vehicle because he was engaged in a race. His bicycle was not equipped with brakes. It was a racing machine so constructed that he had not absolute control thereof. However, as he is not appealing this inquiry need not be pursued.

Section 17 of a traffic by-law was quoted against appellant; it reads:

"17. The driver of every vehicle shall, before entering upon or crossing any of the following streets, slow down to not more than ten (10) miles per hour, and at points indicated by a 'Stop' sign erected by the City, come to a full stop at such street intersection, and shall give the right of way to vehicles travelling upon such streets:"

MACDONALD, J.A.

and after naming other streets it mentions "Victoria Drive between Hastings Street and Twelfth Avenue." Eleventh Avenue lies between these two points.

The trial judge found that appellant did slow down to not more than ten miles an hour, although her own evidence was "from ten to twelve," but I would not interfere with this finding. She did not stop but there was no "stop" sign there and I do not think she was required to do so. But the section goes on to say that one in her position "shall give the right of way to vehicles (and that includes bicycles) travelling upon"—among other streets—Victoria Drive. She did not give the respondent the right of way. Was she bound to do so, or does the section apply if there was as here, no "stop" sign at this point? The learned trial judge held, as I understand it, that appellant was obliged to give respondent the right of way. My view is that only follows where there is a "stop" sign at the street intersection. It is not free from ambiguity but I cannot think it was intended that citizens should memorize the provisions of the by-law, or carry a copy with them to know at which one of the many street inter-

sections mentioned they are obliged to stop. The "stop" sign is placed to give that information. I do not think the use of the word "points" alters the meaning. "Points" means "intersections." The respondent therefore did not have the right of way. Appellant was approaching from his right.

It was submitted that if the section means that notwithstanding the absence of a "stop" sign, the respondent had the right of way, it is *ultra vires* because of section 19 of the Highway Act, R.S.B.C. 1924, Cap. 103, as amended by Cap. 16, B.C. Stats. 1925, Sec. 4, giving the right of way to one driving along a highway over one in another vehicle approaching from the left. However, as I view the section of the by-law quoted it is not necessary to consider that point. It is also immaterial because as I pointed out on the undisputed evidence appellant was negligent because of her manner of driving in making the turn after passing the intersection where a "stop" sign, had one existed, would have been placed. The importance of the reference to this section, however, lies in the fact that the learned trial judge after discussing it said:

"If, on the contrary, the defendant [appellant] had the right of way, the result that I have reached, as far as negligence is concerned, would have been different."

MACDONALD, J.A.

and it was submitted that if he took a proper view as to the application of section 17 of the by-law, *viz.*, that it did not give the right of way to respondent he would not have found negligence on the part of the appellant to any degree. This appears to be a proper deduction from the reasons for judgment. I am however compelled to draw another inference and find appellant was negligent although respondent did not have the right of way.

As stated section 17 of the by-law is not applicable on this point, and section 19 of the Highway Act while it gave a superior right to appellant over respondent approaching from the left, goes on to provide that

"the provisions of this section shall not excuse any person from the exercise of proper care at all times."

That would follow in any event. One cannot by stopping at an intersection marked by a "stop" sign abandon all care upon resuming the journey. Care must be exercised at all stages and this accident was caused by what took place after that point was

COURT OF APPEAL

1930

Jan. 7.

PIPE v. HOLLIDAY

MACDONALD, J.A.

passed. The first requirement of motor-car drivers is to be alert; to keep a sharp look out for possible danger. The object is to put the driver in a position to take steps to meet any emergency suddenly arising. Appellant through apathy was quite incapable at the critical time of taking any steps to avoid the accident. Her evidence is not very positive nor yet consistent on this point, but it is clear that she did not see the boy until immediately before the collision and turned the corner, or rather cut across it, just as she might have done if the street was clear of traffic. Had she stopped her car within five or six feet the boy could have passed in front of her car, or on the other hand by a little extra speed she might have got over to the far side of Victoria Drive allowing the boy plenty of room to pass behind her car.

I think the appellant was negligent to the extent found by the learned trial judge, and I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Lennie & McMaster.*
Solicitors for respondent: *Russell, Nicholson & Co.*

REX v. QUONG WONG.

COURT OF APPEAL

1930

Jan. 7.

REX v. QUONG WONG

Criminal law—Charge of being in possession of opium contrary to section 4 of The Opium and Narcotic Drug Act, 1923—Offence committed in November, 1928— Validity of conviction — Habeas corpus — Appeal— Can. Stats. 1923, Cap. 22, Sec. 4—R.S.C. 1927, Cap. 93, Secs. 40 and 42; Cap. 144, Sec. 4.

In 1929 the defendant was convicted on a charge of "unlawfully having in his possession a drug, to wit, opium, contrary to section 4 of The Opium and Narcotic Drug Act, 1923." In 1925 the Act was amended by severing subsection (*d*) of said section 4 into two subsections but no change was made in the wording of the offences. The said Act as amended was carried without change into the Revised Statutes of 1927. On *habeas corpus* proceedings the accused was released.

Held, on appeal, reversing the decision of FISHER, J. that there had been no period since the Act of 1923 in which the act upon which the defendant was convicted did not constitute an offence against all the statutes referred to and the clerical error made in the conviction by adding the figures "1923" to the then existing Act was a mere matter of surplusage which could be disregarded.

APPEAL by the Crown from the order of FISHER, J. of the 28th of July, 1929, on *habeas corpus* proceedings releasing Quong Wong from the controller of Chinese immigration, at Vancouver. Quong Wong was held for deportation pursuant to an order of the Board of Inquiry under the Immigration Act as an alien who had been convicted on the 30th of November, 1928, by the police magistrate of Nelson, B.C., of unlawfully having opium in his possession contrary to section 4 of The Opium and Narcotic Drug Act, 1923. Statement

The appeal was argued at Vancouver on the 10th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Elmore Meredith, for appellant: The accused pleaded guilty to the charge against him and served six months. A few days before his time was up *habeas corpus* proceedings were taken and he was released. The charge was that the accused had committed an offence contrary to section 4 of The Opium and Narcotic Drug Act, 1923. Section 42 of the Immigration Act refers Argument

COURT OF APPEAL

1930

Jan. 7.

REX v. QUONG WONG

to section 40 describing who can be deported and *Rex* v. *Chang Song* (1923), 33 B.C. 176 applies to this case.

Wood, K.C., on the same side: In describing the offence the officer put in 1923, but it is sufficient to allege "unlawful possession of opium": see *Rex* v. *Somers* (1923), 32 B.C. 553; *Rex* v. *Wong Mah* (1921), 66 D.L.R. 517; *Rex* v. *Chow Ben* (1925), 36 B.C. 319; *Rex* v. *On Sing* (1924), 2 W.W.R. 258; *Rex* v. *Jungo Lee* (1926), 37 B.C. 318; *Rex* v. *Gan* (1925), 36 B.C. 125. The cases of *Rex* v. *Soo Gong* (1927), 38 B.C. 321 and *Rex* v. *Chew Deb* (1928), 39 B.C. 559 are distinguishable. We say there is no possible prejudice in this case: see *Reg.* v. *Westley* (1859), 29 L.J., M.C. 35.

Argument

Nicholson, for respondent: There is the one question here only. The charge was under an Act no longer in force. The case of *Rex* v. *Chew Deb* (1928), 39 B.C. 559 applies here; also *Rex* v. *Soo Gong* (1927), 38 B.C. 321 is an authority for us. On the question of repeal see *Michell* v. *Brown* (1858), 1 El. & El. 267 at p. 274.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.: A mistake was made in the proceedings in referring to the offence as having been committed under The Opium and Narcotic Drug Act, 1923, a law which had been repealed but included in the Act of 1929, a revision and consolidation of the old law. The charge was that the defendant had committed an offence contrary to section 4 of The Opium and Narcotic Drug Act, 1923. The re-enactment in the consolidation except the year is in the same language. There is no doubt therefore that the act committed was contrary to law. The only thing that could be urged in favour of the accused was that the mention of 1923 was misleading but the accused had the right to particulars if he desired them. In *Rex* v. *Somers* (1923), 32 B.C. 553, this Court held that it was not necessary to mention the Act provided the acts were alleged to have been unlawful. The only difference between that case and this is that the offence was said to be under the Act of 1923. The figures "1923" are superfluous, and I do not think the accused was misled.

MACDONALD, C.J.B.C.

I would therefore allow the appeal.

MARTIN, J.A.: This is an appeal from an order of Mr. Justice FISHER, made upon *habeas corpus* proceedings, releasing the respondent Quong Wong from the custody of the Controller of Chinese Immigration at Vancouver who held him for deportation pursuant to an order of the Board of Inquiry under the Immigration Act as an alien who had been convicted by the police magistrate of Nelson on 30th November, 1928, of the offence of

"unlawfully having in his possession a drug, to wit, opium, contrary to section 4 of The Opium and Narcotic Drug Act, 1923."

By subsection (*d*) of that section 4 it was made an offence to "have in possession any drug without lawful authority" or to "manufacture, sell, give away or distribute any drug to any person without first obtaining a licence from the Minister." By the amending Act of 1925, Cap. 20, Sec. 3, the offences in said subsection (*d*) were severed into two subsections (*d*) and (*f*) but no change was made in the nature of the offences which remained identical in their legal effect (*cf. Rex* v. *Wong Mah* (1921), 17 Alta. L.R. 363) and they were carried *ipsissimis verbis* into the Revised Statutes of 1927, Cap. 144, Sec. 4 (*d*) and (*f*), the short title of which is "The Opium and Narcotic Drug Act." It is provided by the "Act respecting the Revised Statutes of Canada," 1924, Cap. 65, Sec. 8, that:

"8. The said Revised Statutes shall not be held to operate as new laws, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the said Acts and parts of Acts so repealed, and for which the said Revised Statutes are substituted."

By proclamation (R.S.C. 1927, Vol. I., p. xvii.) the Revised Statutes "came into force and had effect as law" on the 1st of February, 1928, and on that same day certain Acts set out in Schedule "A" (under sections 2 and 5 of said Cap. 65) were repealed including Cap. 22 of the said Act of 1923—Vol. IV., p. 4298, for which the revised section in question had been identically substituted, the consequence of all of which is that at least since the Act of 1923 there has been no period of time in which the transaction upon which Quong Wong was convicted did not constitute the identical offence against all the statutes in question.

In the brief note of his reasons for holding that Quong Wong had not been convicted of a criminal offence the learned judge

COURT OF APPEAL

1930

Jan. 7.

REX v. QUONG WONG

MARTIN, J.A.

appealed from based his decision on the fact that "the Act under which he appears to have been convicted had been repealed" but his attention cannot have been drawn to the continuous effect of the said sections in preventing any gap in legislation before and after the nominal repeal, and this also has been overlooked by Mr. Justice GREGORY in *Rex* v. *Chew Deb* (1928), 39 B.C. 559, which, we are informed, was cited to Mr. Justice FISHER as a precedent in principle though it is, with respect, based upon a misunderstanding of the decision of the Queen's Bench in *Michell* v. *Brown* (1858), 1 El. & El. 267, which however has no real application because there was not then and is not now in England anything comparable with our Parliamentary Revised Statutes with said concomitant legislation; the Queen's Bench had before it a private publication merely, Evans's "Collection of Statutes," pp. 271, 275, having no legislative force. The opening expressions, not cited, of Lord Campbell, C.J., shew that when that case is properly understood it is an authority in support of the appellant and the grave variations between the two statutes there in question, which he indicates, have no parallel in the case at Bar; there has in truth been only a nominal repeal of the relevant part of the Act in question for the express purpose of perpetuating it in a more convenient form.

Under these circumstances it is beyond doubt that the clerical error of adding the date "1923" to the existing Act (Cap. 144) is a mere matter of surplusage and may be disregarded as such within the principle of our decision in *Rex* v. *Jungo Lee* (1926), 37 B.C. 318. Long ago indeed, *In re Boothroyd* (1846), 15 M. & W. 1, it was held by the Court of Exchequer that the misstatement (on conviction) in the title of a vital statute as being of the wrong regnal year (*viz.*, 13 Geo. 3, instead of 17 Geo. 3) was not substantial where there could be no doubt about the statute that was affected, the Court, p. 10, saying that the title "must be read as referring to the 17 Geo. 3, c. 56, and the statement of time treated as a mistake and as surpulsage"; the case at Bar is, as has been shewn, a much stronger one for taking a similar view of the trifling error in question which could not possibly mislead or prejudice any one. And it is opportune to repeat the general observations of the same learned Chief Baron, made twelve years later in the Court of Crown Cases Reserved

(of five judges) in *Reg.* v. *Westley* (1859), 29 L.J., M.C. 35, 39; Bell, C.C. 193, 207-8:

"What I am now about to state is no part of the judgment which I have given, but my own opinion, though I believe it to be the opinion of every member of the Court also:—Where, owing to some insignificant variation, the title of an Act of Parliament is not correctly set forth, but it is stated with so much clearness and sufficient accuracy that there can be no possible doubt in the mind of the judges what is the Act referred to by the title indicated, I for one, notwithstanding the cases that were cited, sitting in this Court as a Court of Appeal, am prepared to hold that the failure to set it out perfectly furnishes no ground of objection; and I am not prepared to apply the doctrine which has been laid down in those cases."

MARTIN, J.A.

It follows that the appeal should be allowed and the order taking Quong Wong from the custody of the controller set aside.

GALLIHER, J.A.: I agree with my brother MARTIN, and would allow this appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. agreed with MARTIN, J.A.

MACDONALD, J.A.

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

Appeal allowed.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitor for respondent: *J. R. Nicholson.*

COURT OF APPEAL

1930

Jan. 7.

REX v. WONG YORK. IN RE JOHNSTON.

REX v. WONG YORK. IN RE JOHNSTON

Criminal law—Certiorari—Conviction—Depositions taken by stenographer—Order for return—Stenographer's refusal to deliver depositions without payment of fees—Whether in "custody or power" of magistrate—R.S.B.C. 1924, Cap. 245.

After summary conviction under a Provincial statute a writ of *certiorari* ordered the magistrate to return into the Supreme Court "all and singular the proceedings at the trial, depositions, orders, records of conviction, warrant, authority or commission, with all things touching the same as fully and perfectly, as they have been made by you and now remain in your custody or power." The deposition had been taken in shorthand at the request of the accused's counsel by an official Court stenographer whose attendance said counsel had obtained, and who was sworn in by the magistrate. The stenographer refused to deliver a transcript of the evidence until paid his fees. The accused refused to pay the fees and the magistrate's return to the writ did not include the depositions. On an application to commit, the magistrate was ordered to return the transcript forthwith without payment of any fees, charges or disbursements.

Held, on appeal, reversing the decision of FISHER, J., that in the circumstances the depositions were not in the "custody or power" of the magistrate and his failure to return them was not a non-compliance with the writ.

APPEAL by H. G. Johnston, Esquire, stipendiary magistrate for the County of Westminster from the decision of FISHER, J. of the 12th of September, 1929 (reported, *ante*, p. 64), whereby it was ordered that the said H. G. Johnston do forthwith after service hereof, without payment of any fees, charges or disbursements, return to the Supreme Court of British Columbia a transcript of the evidence taken in shorthand by Vincent D. Webb, the stenographer duly sworn to report the evidence, duly verified, as provided by section 37 of the Summary Convictions Act at the trial of Wong York on the 31st of July, 1929, and the 3rd and 7th of August, 1929, as set out in said order of the 12th of September, 1929. The magistrate claims that he should not have been required to produce said transcript without payment to him of the disbursements which he would have to make to procure them.

Statement

The appeal was argued at Vancouver on the 1st and 2nd of

October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1930

Jan. 7.

REX v. WONG YORK.

IN RE JOHNSTON

Reid, K.C., for appellant: Wong York was convicted and fined $200, which he paid. The magistrate has been ordered without fees or disbursements to deliver a transcript of the evidence. He must produce only what remains in his custody and power. The depositions are not in his custody or power until paid for and there is nothing in the Act compelling him to pay for them or in the Crown Office Rules. Items 12 and 13 in the Tariff of Fees attached to the Summary Convictions Act applies and a charge can first be made. That depositions are no part of the record see *Rex* v. *Nat Bell Liquors, Ld.* (1922), 2 A.C. 128. On jurisdiction of the magistrate to convict see *Rex* v. *Chin Yow Hing* (1929), 41 B.C. 214 and *Rex* v. *Henderson, ib.* 242. If he wants the depositions he must pay ten cents a folio for them.

Bray, for respondent: The writ says he must return the depositions: see *Rex* v. *Dunn* (1799), 8 Term Rep. 217. He must get the transcript and sign it in accordance with the writ. Tariff Items 12 and 13 at the end of the Summary Convictions Act have nothing to do with *certiorari*. An order irregularly obtained must be obeyed until it is discharged: see Oswald on Contempt of Court, 3rd Ed., 107; *Rex* v. *Battams* (1801), 1 East 298 at p. 305; Short & Mellor's Crown Office Practice, 2nd Ed., 23; *Russell* v. *The East Anglian Railway Company* (1850), 3 Mac. & G. 104 at p. 117. It does not matter how wrongly the writ is issued, it must be obeyed: see *In re Kean* v. *Bird* (1927), 39 B.C. 169; *Royal Typewriter Agency* v. *Perry & Fowler* (1928), 40 B.C. 222. This is a criminal matter and there is no appeal: see *In re McNutt* (1912), 47 S.C.R. 259; *Scott* v. *Scott* (1913), A.C. 417 at p. 482. In effect he is in contempt in not complying with the order: see Halsbury's Laws of England, Vol. 7, p. 308, sec. 652.

Argument

Reid, in reply, referred to *Ashworth* v. *Outram (No. 2)* (1877), 5 Ch. D. 943.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The jurisdiction of this Court to

COURT OF APPEAL

1930

Jan. 7.

REX v. WONG YORK.

IN RE JOHNSTON

MACDONALD, C.J.B.C.

hear the appeal was questioned by respondent's counsel. The objection, I think, is met by section 6 of the Court of Appeal Act. The appeal arises out of a conviction under a Provincial Act not under the Criminal Code.

It is not permissible to contend that the order appealed from was improvidently made. The order cannot be answered by disobedience. It was open to the magistrate to move to vary the writ if he had chosen to do so. *Russell* v. *The East Anglian Railway Company* (1850), 3 Mac. & G. 104. By the writ of *certiorari* the justice, Mr. Harry G. Johnston, was ordered to return into the Supreme Court "all and singular the proceedings at the trial, depositions, orders, records of conviction, warrant, authority or commission, with all things touching the same as fully and perfectly as they have been made by you and now remain in your custody or power, together with our writ," etc.

The only complaint against the return made to this writ is that the magistrate did not include the depositions taken on the trial in it.

At the opening of the trial counsel for the accused demanded that the depositions should be taken in shorthand, but counsel for the prosecution declined to consent to this. The magistrate expressed his readiness to take them in longhand, but this did not satisfy accused's counsel, who left the Courtroom and returned shortly afterwards with an official Court stenographer and asked that he be appointed to take the depositions. The justice acquiesced and the depositions were so taken. When the writ of *certiorari* was served upon the justice neither the notes of evidence in shorthand nor a transcript thereof had been left with him by the stenographer. It appears that the stenographer who claims fees amounting as estimated to $40, declined to part with his notes or to make a transcript until paid his fees. The judgment appealed from orders the justice to make a return of the depositions. The question is, is the justice in default?

In cases of production of documents for inspection, the authorities shew that only documents in possession of the party ordered to produce and those in possession of an agent or like person are within the order. *Taylor* v. *Rundell* (1841), Cr. & Ph. 104; *Murray* v. *Walter* (1839), *ib.* 114, and *Kearsley* v. *Philips* (1882), 10 Q.B.D. 36.

I am of opinion that the stenographer is not an agent of the justice.

By section 37 of the Summary Convictions Act, Cap. 245, it is provided that the depositions may be taken by a stenographer who may be appointed by the justice. In this case it is true the justice appointed the stenographer, but he is not, I think, his agent, but is the person designated by the statute to take the depositions in shorthand when required by the justice. The stenographer appointed was an official Court stenographer, and the justice was therefore not required to sign the transcript of the shorthand notes. The statute is silent in respect of what shall be done with the notes or the transcript, should one be made. The Tariff of Fees attached to the Act, Items 12 and 13, were referred to on the argument as being applicable to the remuneration of the stenographer. But if applicable there is no mention of who shall pay the fees. The stenographer refuses to deposit a transcript of his notes of evidence until he has been paid the fees, and respondent, who called him in, refuses to pay them. The order appealed from in effect would compel the justice to pay them in order to secure the depositions to make his return, as required by the writ. In my opinion the writ does not command the justice to make a return of these depositions or of a transcript thereof. The shorthand notes are the depositions, the transcript being merely a translation of them. If the notes were in the justice's possession or custody he would return them, but not being in his custody he is not commanded to acquire them for the purpose by paying the stenographer's fees. It is the "depositions in your custody or power," not the depositions not in your custody or power but which you may bring into your custody by some act of yours, *i.e.*, payment of $40, that are to be returned.

MACDONALD, C.J.B.C.

The situation has been brought about by defective legislation and can be remedied by effective legislation but not by the Court. While the respondent may suffer from this, he has the remedy in his own hands; he can obtain what he asks for by paying the fees, which in justice he ought to pay and in this way get the depositions into the custody of the justice.

The contention of the respondent is a novel one, that the magistrate must pay out a considerable sum of money because of

COURT OF APPEAL

1930

Jan. 7.

REX v. WONG YORK.

IN RE JOHNSTON

MACDONALD, C.J.B.C.

legislation which enables a stenographer to be used for taking depositions at trials. If that was the intention, and I am certain it was not, the language of the statute should clearly shew that it was the intention, and I should be very loath indeed to hold that on the language above referred to the Legislature intended to impose a monetary burden upon the magistrate. The true interpretation of the writ of *certiorari* is that the magistrate shall make a return of documents in his custody and of those of which he has power to return, and that that language does not require him to obtain the custody of documents not so held.

The order should be set aside.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from an order of Mr. Justice FISHER directing Mr. H. G. Johnston, stipendiary magistrate for the County of Westminster, to return forthwith to the Supreme Court,—

"without payment of any fees, charges or disbursements . . . a transcript of the evidence taken in shorthand by Vincent D. Webb, the stenographer duly sworn to report the evidence, duly verified, as provided by section 37 of the Summary Convictions Act, at the trial of Wong York on the 21st day of July, 1929, and the 3rd and 7th days of August, 1929, wherein the said Wong York was on the said 7th day of August convicted . . . "

of an offence against the Produce Marketing Act, Cap. 54 of 1926-27, B.C. Stats. and amendments.

The order is endorsed under r. 573, with the following notice:

"If you, the within named Harry G. Johnston neglect to obey this order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same order."

Punitive proceedings against a magistrate acting judicially are unusual and should be maintained with corresponding caution. The order was made upon an application to commit the said magistrate for contempt for not having returned the depositions pursuant to a writ of *certiorari* as follows:

"We . . . do command you that you do send forthwith under your seal before Us in the Supreme Court of British Columbia at the Court House at Vancouver, B.C., all and singular the said proceedings at trial, depositions, orders, records of conviction, warrant, authority or commission with all things touching the same, as fully and perfectly as have been made by you, and now remain in your custody or power, together with this Our Writ . . . ."

The magistrate took the position, as set out in his affidavit, that he was not required by law to return the special transcript

which was not in the circumstances in his "custody or power" and that he should not be asked to return it unless the appellant paid the stenographer's fees therefor amounting to $40, at ten cents per folio as authorized by the "Tariff of Fees to be taken by justices of the peace or their clerks" under section 51 of said Summary Convictions Act, Cap. 245. The appellant has paid the fee, appropriate to this case, of $1 under item 12 "For making up the record of conviction or order where the same is ordered to be returned on appeal or on *certiorari*" but he refused to pay the ten cents per folio for the transcript, submitting that it is not included in item 13, *viz.*:

"13. For copy of any other paper connected with any case and the minutes of the same if demanded per fol. of 100 words . . . 10c."

The transcript is clearly not included in the expression "record of conviction" in item 12 because the record of the judgment (conviction) of a Court in the ordinary usage does not include the evidence, *i.e.*, the proof, of the issues raised by the pleadings upon its records but only the adjudication thereupon, and the writ of *certiorari* itself draws the proper distinction between the "proceedings at the trial, depositions, orders, and records of conviction." On the other hand, the expression "any other paper connected with [the] case" is a very wide one and may properly be invoked to include special documents not defined by rule or statute or by established procedure: the word "paper" alone in curial usage has a very varied scope, as our law dictionaries shew, *e.g.*, one meaning, "transcript," given to it in Bouvier, Vol. 2, p. 569, is very appropriate to this case:

"In the Court of King's Bench, in England, the transcript containing the whole of the proceedings filed or delivered between the parties, when the issue joined is an issue in fact, is called the paper-book."

"Transcript" is there rightly used as a copy and exclusive of evidence, and what the stenographer who is specially called in, as here, does is to extend, *i.e.*, transliterate his own particular system of shorthand notes into ordinary longhand so that they may be generally comprehensible in the manner set out in section 70 of the Supreme Court Act, respecting "official stenographers" who are appointed thereunder, and they are officers of that Court as declared by section 66. These notes are the stenographer's own property and in his own custody and power and it is not suggested that anyone can compel him to furnish a transcript

COURT OF APPEAL

1930

Jan. 7.

REX v. WONG YORK.

IN RE JOHNSTON

MARTIN, J.A.

therefrom without paying him beforehand as in the case of official stenographers under said section 70, who after payment must "file an accurate extension and transcript" in the registry of that Court. Unfortunately these provisions of the Supreme Court Act are wanting in the Summary Convictions Act the relevant section 37 of which was taken from the Criminal Code only so recently as 1914 by the Summary Convictions Act, 1914, Cap. 72, Sec. 3, which introduced this new and additional method of taking the evidence only, not the proceedings, but omitted to make any provision for the greatly increased cost thereof as distinguished from the established one carried out by the magistrate and his clerk under his supervision and control under sections 36-7 as to which "constant practice" *cf. Reg.* v. *Bates* (1860), 2 F. & F. 317; and the ruling of the judges noted in (1914), 78 J.P.N. 164, 248. It is to my mind, unwarrantable to impose this special cost of a special person interjected into time-honoured magisterial proceedings for a special purpose in this novel way upon the magistrate who has no control whatever over the notes taken by the third person thus called into his Court and no power to compel him to make and file a transcript without at least being furnished beforehand with the money, or a satisfactory assurance of it, to pay the necessary fees therefor, failing which the stenographer properly refused to furnish, on that sole ground, a transcript herein. It is to be observed that the usual longhand depositions are to be "authenticated" by the justice himself, section 36 (5), but where "the evidence is taken in shorthand" the justice merely "signs" the transcript, section 37 (2), and the authentication of its being "a true report" is by the stenographer.

In the present case, as appears by the magistrate's affidavit, there is no official stenographer attached to his Court and the prosecuting counsel refused to retain one specially and the magistrate announced he would take the evidence in the ordinary way but the accused's counsel wished to have one employed and so obtained the attendance of one who was sworn by the magistrate to take the evidence in shorthand and did so. It is in the actual working out of the Act wrong to say that the magistrate might have refused to allow a stenographer to be sworn and that his power to appoint one *ad hoc* was merely permissive, because

his refusal to allow the evidence to be taken by shorthand by a competent stenographer would justly expose him to adverse comment of a kind that no self-respecting member of the magistracy would invite.

After a careful consideration of the statute in its true historical light there appears to be nothing, upon the undisputed facts, to support the view that the Legislature when introducing this new and additional means of taking evidence intended to impose the heavy, indeed very serious, burden of its use upon the magistrate hearing the charge, but the contrary: to warrant such an unprecedented imposition the clearest language should be required, because the grave result inevitably will be that it will not be possible to get responsible persons to act as magistrates if they have to bear the costs of stenographers themselves and this catastrophe we should not be the means of bringing about unless the statute were intractable. It never occurred, obviously, to this magistrate when, under the new procedure and against his own desire but at the request of the accused, he appointed a stenographer that he was assuming the responsibility to pay his fees, nor would it have occurred to me from my knowledge of the legal history of the statute and the "constant practice" thereunder. Fortunately, however, in the case at Bar no injustice will result because the said old provision in item 13 for "copies of any paper" is wide enough to cover the innovations of the new practice and all the respondent has to do is to furnish the magistrate with the necessary fees for the transcript of the special kind of evidence he insisted upon being taken and it will be furnished him, as is conceded.

MARTIN, J.A.

Since the magistrate therefore, has in fact complied with the writ up to the present to the full legal extent of his "custody or power" the order complained of should not, with respect, have been made against him, and hence it follows that the appeal should be allowed and said order set aside.

GALLIHER, J.A.: I think the magistrate has made return of all documents under the writ of *certiorari* which can be said to be within his custody or power within section 37 of the Summary Convictions Act.

GALLIHER, J.A.

The shorthand notes of the proceedings taken by the stenog-

COURT OF APPEAL

1930

Jan. 7.

REX v. WONG YORK.

IN RE JOHNSTON

GALLIHER, J.A.

rapher at the trial are not within the custody of the magistrate. Are they within his power? The stenographer refuses to furnish the magistrate with a transcript of these notes unless his fees, some $40, are first paid.

When the matter came up for trial there was no stenographer present and the Crown refused to furnish one. The magistrate intimated that he was willing to proceed taking the depositions down in longhand, but counsel for the accused wished to have a stenographer and left the Court-room returning later with a stenographer who was sworn in by the magistrate. Being so sworn in he was of course entitled to act.

It seems to me that it would be an unfortunate and burdensome duty and one which I think was never intended to be cast upon the magistrate by the Legislature, that in all cases (and it might be all) the magistrate were compelled to pay for and furnish transcripts of depositions taken by a stenographer in trials before him. If something is within my power as I view it, within the meaning of the Act, I can lay my hands upon it and execute that power. I do not think a qualitative power is meant which means a further act on my part before that power can be exercised. It seems to me to negative itself.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. agreed with MARTIN, J.A.

MACDONALD, J.A.

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

Appeal allowed.

Solicitors for appellant: *Reid, Wallbridge & Gibson.*
Solicitor for respondent: *H. R. Bray.*

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK AND BERRY.

GREGORY, J.

1929

Dec. 24.

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE CO. OF NEW YORK AND BERRY

Insurance, accident—Automobile driven by insured's daughter—Judgment obtained by plaintiff against her for negligent driving—Defended by insurance company—Action against company—B.C. Stats. 1925, Cap. 20, Sec. 24.

B., the owner of an automobile was insured against loss in the defendant Company. The policy under its terms insured the owner and any person or persons while riding in or legally operating the automobile with the permission of the insured, or of an adult member of the insured's household. An accident occurred when B.'s daughter was driving the car with his permission, and the plaintiff recovered judgment against her for negligent driving, the Insurance Company on the trial taking charge of her defence.

Held, that in an action under section 24 of the Insurance Act, the plaintiff is entitled to recover judgment against the Insurance Company for the amount recovered in the judgment against the insured.

ACTION against defendant Company under section 24 of the Insurance Act to recover the amount of a judgment obtained against Miss Jean Berry for negligently driving her father's automobile, the father having taken out a policy in the defendant Company insuring himself and any person while driving in or legally operating the automobile for private or pleasure purposes with the permission of the insured, or any adult member of the insured's household. The facts are set out in the reasons for judgment. Tried by GREGORY, J. at Vancouver on the 17th of December, 1929. Statement

C. L. McAlpine, for plaintiff.
Alfred Bull, for defendant.

24th December, 1929.

GREGORY, J.: This action is brought against the Insurance Company under section 24 of the Insurance Act, being Cap. 20, B.C. Stats. 1925. There is nothing unusual about the form of the policy, it is like many thousands of others and by its terms purports to insure not only the owner of the motor-car in question, but any person or persons while riding in or legally operat- Judgment

GREGORY, J.

1929

Dec. 24.

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE CO. OF NEW YORK AND BERRY

ing the automobile for private or pleasure purposes, with the permission of the insured, or of an adult member of the insured's household. . . . There can be no doubt that the amount of the insurance premium is measurably increased by reason of the ostensible liability to others than the actual owner of the motor-car named in the policy, *viz.*, the defendant A. E. Berry, who is made a defendant because he refused, no doubt at the request of the Insurance Company, to allow his name to be used as a party plaintiff.

Miss Jean Berry, the daughter of defendant Berry, was, with his permission, legally driving the car when the accident occurred, and the plaintiff has recovered judgment against her for negligent driving.

The defendant Company now defends the action cheifly on the grounds that Miss Jean Berry's loss was not covered by the insurance policy or if it was, it was a gaming contract within the meaning of section 10 of the Insurance Act and so not enforceable by her or any one claiming through her. Such a defence, if good, would be a great surprise to many people driving motor-cars and it is the first time in my experience that an insurance company has raised the question in our Courts. If the defence is good the benefit of section 24 of the Insurance Act is mythical in a great majority of cases apparently falling within it. This defence has no merit and the attitude of the Company throughout is exceedingly difficult to understand. Every judge who has sat in Chambers during the past year knows that the Company has done everything in its power to prevent the plaintiff from ascertaining its name and launching these proceedings.

Judgment

I am afraid I have not fully appreciated the argument of counsel for the defendant Company with reference to the non-compliance by the assured of certain statutory conditions. The only one he has pleaded is that part of condition 8 (3) which prohibits the action being brought against the insurer to recover the amount of a claim under the policy until after the amount of the loss had been ascertained by judgment against the insured. If Miss Jean Berry was insured under the policy, as I think she was, and as the policy itself states (though without naming her) then the plea is disproved for a judgment was recovered

against her by the plaintiff for the loss sustained. Non-compliance with any other condition precedent would have to be pleaded. See Supreme Court Rules, marginal rule 210.

In any case if there has been any technical failure to comply with statutory conditions this is pre-eminently a case I think for granting relief under section 158 of the Act. The Company had immediate knowledge of the accident out of which this and the other action against Miss Berry arose, it immediately took charge of the defence of the action against Miss Berry, it has hindered and delayed the plaintiff in every conceivable way and it is clear beyond dispute that the policy purports to cover the driver of the car (Miss Berry) at the time of the accident. Counsel has referred me to a recent decision of the Court of Appeal in *Barlow* v. *Merchants Casualty Insurance Co.* (1929), and says that that case decided that section 158 only applies where there has been an imperfect compliance with proof of loss.

That case has not yet been reported* and the facts of the case are not set out in the reasons for judgment, so that I am unable to tell whether it has any resemblance to the present case; certainly there is no statement to the effect that section 158 has the limited application above stated, and I do not read the section in that limited sense:

Judgment

"158. 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," etc.

The words "other matter" surely refer to something other than imperfect proof of loss.

As to the defence that the policy is a gaming contract within section 10 of the Insurance Act. The English statute of 1774, 14 Geo. III., c. 48, contains in this respect provisions very similar to our Act, and the objection was fully considered by Roche, J., in *Williams* v. *Baltic Insurance Association of London, Ltd.* (1924), 2 K.B. 282, and decided against the company in confirmation of the award of a board of arbitration consisting of three well-known King's Counsel. That case is very similar to the one before me and the full text of the judgment is most interesting. Mr. Justice Roche refers to the case of *Howard* v. *Lancashire Ins. Co.* (1885), 11 S.C.R. 92, so strongly pressed

* Since reported, 41 B.C. 427.

GREGORY, J.

1929

Dec. 24.

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE CO. OF NEW YORK AND BERRY

upon me by defendant's counsel and his remarks thereon seem to fully explain the actual decision, which was very short, only occupying six lines in the report. In answer to the claim that Miss Berry is not named in the policy as required by section 13 of the Act, it was the business of the Insurance Company to insert the name of the insured in the policy, no one else had any power to do so, and section 8 of the Act provides that:

"No contract shall be rendered void or voidable as against the insured or a beneficiary by reason of any failure on the part of the insurer to comply with any provision of the Act."

It is stated that Miss Jean Berry could not sue upon the policy in her own name and therefore the plaintiff who claims through her cannot sue. I am not at all sure that Miss Berry could not so sue, in fact, I am inclined to think she could, but whether she could or not the plaintiff's right to sue is not entirely dependent upon the wording of the policy or Miss Berry's right to bring an action in her own name. The plaintiff's right to sue is given to her by section 24 of the Insurance Act, and all she has to do is to bring herself within the provisions of that section and shew that she has an unsatisfied judgment against Miss Berry, that Miss Berry is insured, etc. True, plaintiff's claim will be subject to the equities which the Company would have if the judgment against Miss Berry had been satisfied, but the Company by defending the plaintiff's action against Miss Berry has admitted its liability to her. Such defence was "a representation by acts that it would assume any judgment obtained within the limits of the policy." See *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110. It had no right to defend that action except on the assumption that Miss Berry had a good claim against it under the policy of insurance issued by it. By defending that action it has, I think, deprived itself of the right to avail itself of the defences set up herein.

Judgment

There will be judgment for the plaintiff.

Judgment for plaintiff.

ENGLEBLOM AND ERICSON v. BLAKEMAN.

COURT OF APPEAL

1930

Jan. 7.

ENGLEBLOM v. BLAKEMAN

Sale of land—Part payment by cheque—Dishonoured—Consideration—Beer licence included in sale—Transferee not a voter—Illegality—Regulation 28 of Liquor Control Board—R.S.B.C. 1924, Cap. 146, Secs. 72 and 119.

The defendant purchased a lease of the Globe Hotel in the city of Nanaimo from the plaintiffs, including the furniture and fixtures on the premises for $6,000. He 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. The consideration for the $6,000 appeared by the bill of sale and affidavit of *bona fides* to be the goods, chattels, and fixtures in the hotel, but it is admitted by the parties that an assignment of the beer licence attached to the property was an important part of the consideration. Under Regulation No. 28 of the Liquor Control Board a beer licence can only be granted or transferred over 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 plaintiffs were unaware of this and they 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 put a man in charge of the property, but shortly after concluding there would be difficulty as to the transfer of the beer licence he stopped payment of the $3,000 cheque and decided to abandon the property. The plaintiffs then went into possession under the terms of the chattel mortgage and recovered judgment in an action to recover the amount of the cheque.

Held, on appeal, affirming the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the plaintiffs were not aware that the defendant was not qualified to hold a beer licence and did all in their power to transfer the licence to the defendant. The defendant ratified the agreement after he had knowledge of the requirments of the law, but afterwards repented of his bargain and attempted to withdraw from it. In these circumstances the judgment in favour of the plaintiffs should be affirmed.

APPEAL by defendant from the decision of MACDONALD, J. of the 21st of March, 1929 (reported, 41 B.C. 456) in an action to recover $3,000, the amount of a cheque 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 $6,000, and it is admitted that as part of the

Statement

COURT OF APPEAL

1930

Jan. 7.

ENGLEBLOM v. BLAKEMAN

Statement

consideration for the said $6,000 the plaintiffs were to execute a transfer of their beer licence for the said premises. The evidence disclosed that the defendant was well aware before he recorded the bill of sale and executed a chattel mortgage for the balance of the purchase price that there were difficulties which he might encounter in obtaining a licence of this nature in his own name. Both parties knew that beer licences would 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. The defendant at the time of this purchase was neither a voter nor entitled to be registered as a voter, but the plaintiffs were unaware of this. The defendant appeared to be unconcerned as to this and expected that the difficulty would be overcome. After the bill of sale and chattel mortgage had been executed and the $3,000 cheque was delivered, the defendant went from Nanaimo to Vancouver. He then appears to have regretted his bargain and stopped payment of the cheque. Shortly after the defendant engaged one Hubbard to return to Nanaimo to take possession of the premises on his behalf. Hubbard took possession on behalf of the defendant and shortly after the plaintiffs retook possession under the terms of the chattel mortgage and brought this action upon which they recovered judgment.

The appeal was argued at Vancouver on the 31st of October and 1st of November, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Maitland, K.C., for appellant: The main consideration for the sale was the beer licence and that failed. We submit that this was an illegal contract and is void: see *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215; *Sykes* v. *Beadon* (1879), 11 Ch. D. 170; *Corbett* v. *South-Eastern and Chatham Railway* (1906), 75 L.J., Ch. 489; *Cornelius* v. *Phillips* (1917), 87 L.J., K.B. 246; *Mahmoud* v. *Ispahani* (1921), 90 L.J., K.B. 821; *Milne* v. *Peterson* (1924), 3 W.W.R. 957; *Sun Building Society* v. *Western Suburban Building Society* (1921), 91 L.J., Ch. 74; *Anderson, Lim.* v. *Daniel* (1923), 93 L.J., K.B. 97.

Morton, for respondents: The plaintiffs had no knowledge whatever of the defendant being unable to have the beer licence in his name. The law presumes against illegality and the burden is on the defendant when he attempts to set aside a proceeding on the ground of illegality: see *Hire Purchase Furnishing Company* v. *Richens* (1887), 20 Q.B.D. 387 at p. 389. The contract is voidable at the option of the innocent parties: see Pollock on Contracts, 9th Ed., 444; *Clark* v. *Hagar* (1894), 22 S.C.R. 510 at p. 538; *Wough* v. *Morris* (1873), L.R. 8 Q.B. 202; *Brownlee* v. *McIntosh* (1913), 48 S.C.R. 588. Argument

Maitland, replied.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.: The trial judge found that there had been no misrepresentation made by plaintiffs respecting the number of roomers at the hotel, and that the plaintiffs were not aware that defendant was not then qualified to hold a beer licence. Brokers who had conducted the negotiations for sale had explained the law to the defendant and the brokers who made the sale gave a receipt for the deposit in which it was declared that the agreement was subject to the transfer of the lease and the licence. I agree with the trial judge that the defendant had prior to the sale been properly informed of the liquor regulations, and that defendant was not qualified at that time to accept a transfer of the licence. That point had been particularly referred to and the regulation relating to it had been read by the witness Love to the defendant. The plaintiffs did all in their power or offered to do all in their power, to transfer to defendant the right to the licence. The evidence satisfies me that the defendant ratified the agreement after he had knowledge of the requirements of the law. I think he later rued his bargain and attempted to withdraw from it. In the circumstances the defendant cannot succeed, and the judgment should be affirmed. MACDONALD, C.J.B.C.

MARTIN, J.A.: In this action the plaintiffs sued the defendant to recover the amount of a cheque for $3,000 given by the defendant to them on the 4th of January, 1929, but the payment MARTIN, J.A.

COURT OF APPEAL

1930

Jan. 7.

ENGLEBLOM v. BLAKEMAN

of which was stopped by the defendant. The consideration for the cheque is by the statement of claim, paragraph 3, thus set out:

"The said cheque was issued by the defendant to the plaintiffs in part payment of the contents of the Globe Hotel, Nanaimo, B.C., and for other considerations."

The evidence is clear beyond question that the "other considerations" not then disclosed (but which in part appear from paragraphs 3, 6, 8, 13 and 21 of the plaintiffs' reply) included the vital one upon which the whole of the contract depended, *viz.*, that the plaintiffs, being joint proprietors of the hotel, were to assign their beer-parlour licence for said hotel to the defendant, which in the circumstances was a transaction prohibited by the official regulations having the force of a statute under the Government Liquor Act, Cap. 146, R.S.B.C. 1924, because the defendant was a new arrival in this Province having just come to Vancouver from Alberta on the 27th of December previous. By those regulations no one can obtain or properly apply for a beer licence unless he is a registered voter in an electoral district of this Province, or if not actually registered then entitled to be registered, and by regulation No. 28 every applicant for such licence must accompany his application by a statutory declaration proving that he is such a registered voter or entitled so to be.

MARTIN, J.A.

A licence when issued contains, *inter alia,* the following provisions:

"This licence expires at midnight of the 31st day of December, A.D. 19 .

"This licence is not transferable, except with the written consent of the Liquor Control Board and subject to the provisions contained in the regulation.

"The licensee shall not be entitled to any refund of licence fee or to any compensation in the event of this licence being suspended or cancelled by the Liquor Control Board.

"No person shall be employed in any service in connection with the sale, handling, or serving of beer in, on or about the premises in respect of which this licence is granted, unless he is registered or entitled to be registered as a voter in some electoral district of the Province. . . . "

And by regulation 28, Sec. 2, (*b*):

"No beer licence shall be granted or transferred, save to:—

"(1) A person who is registered or entitled to be registered as a voter in some electoral district of the Province: . . ."

By section 70 of the said Liquor Act it is declared:

"Every person who violates any provision of this Act or of the regulations shall be guilty of an offence against this Act, whether otherwise so declared or not."

And the appropriate penalties of fine or imprisonment or both are prescribed by sections that follow.

The beer licence in question was held by the plaintiff Engleblom and on the same day that the cheque sued on was given he executed a document setting forth that

"I do hereby assign, transfer, set over unto James Blakeman, of the said City of Nanaimo, Hotel-keeper, the said beer licence No. 1156, together with all my right, title and interest in and to the said beer licence."

And Engleblom signed but did not send on the same day this notice to the secretary of the Liquor Control Board:

"Please take notice that I have appointed Mr. James Blakeman of the City of Nanaimo, as manager of the Globe Hotel and beer parlour in the said hotel pending the transfer to him of beer licence No. 1156."

This appointment of the defendant as manager was also an act prohibited by the said recited regulations; but it is to be noted that these documents were not in fact sent to the Liquor Board "because the deal was immediately called off by the defendant" as the plaintiffs' counsel informed the Court below.

The vital importance to the transaction of the transfer of the beer licence is well brought out by the plaintiff Engleblom who, upon his examination for discovery about the defendant's enquiries upon the occasion of his visit to Nanaimo to see the hotel, testified as follows:

"You simply sold him the hotel? And you say he did not care what was made or what was not made?

"All he asked me was in regard to the beer parlour business. The rest, he never asked a word about."

And the preliminary deposit receipt for $100 given to the plaintiffs' agent later on that day says that "this deposit is subject to transfer of licence and lease."

It is submitted by Mr. *Maitland* on behalf of the respondent that the plaintiffs' own case discloses a contract prohibited by statute and therefore it is within the principles lately applied by the English Court of Appeal in *Mahmoud* v. *Ispahani* (1921), 2 K.B. 716; 90 L.J., K.B. 821, wherein it was held that under a statutory order (made after the Armistice in June, 1919, under the Defence of the Realm Regulations) which prohibited dealings in linseed oil without a licence from the food controller, a contract respecting such oil was illegal unless both the purchaser and vendor had a licence even though the vendor had obtained one and believed the purchaser had likewise done so.

COURT OF APPEAL

1930

Jan. 7.

ENGLEBLOM v. BLAKEMAN

After considering with care the reasons given by the Lords Justices in that case they, in my opinion, apply precisely to the circumstances of the case at Bar and I see no reason for not adopting them. The following extracts are specially in point, *viz.*, Bankes, L.J., at pp. 823-4:

"In my view, the effect of the Order is that it is a clear and unequivocal declaration by the Legislature, in the public interest, that these particular kinds of contract shall not be entered into. The respondent had a licence; the appellant had not. As I understand the argument derived from the form of the licence, it is that, because the respondent had a licence, he is entitled to come to the Court and say: 'I had a licence, and the defendant cannot be heard to say that he had not a licence.' I cannot assent to that proposition. I do not think there is any authority for it, and if the language of the Order is plain, and prohibits the making of this form of contract, it seems to me that it is always open to a defendant, however shabby it may appear to be, to come into the Court and say: 'The Legislature has prohibited this contract, and therefore it is a matter in which the rule is clear that the Courts will not lend their aid to the enforcement of such a contract.' . . . ."

And Scrutton, L.J., at p. 826:

MARTIN, J.A.

"As I understand, two reasons are given why in this case the Court should enforce this contract. First of all, it is said that the Court will not listen to a man who asked to be protected from his own illegality. In my view the Court is bound, once it knows that the contract is illegal, to take the objection and refuse to enforce the contract, whether its knowledge comes from the statement of the party who was guilty of the illegality, or whether the knowledge comes from outside sources. The Court does not sit here to enforce illegal contracts. It is not an estoppel on the person, but it is for the protection of the public that the Court refuses to enforce such contracts.

"The other point that is put by counsel for the respondent is, that where a contract can be made lawfully or unlawfully, and the defendant, without the knowledge of the plaintiff, elects to do it unlawfully, he cannot plead its illegality. That, in my view, does not apply to a case where the contract sought to be enforced is altogether prohibited, and in this case to contract with a person who had no licence was altogether prohibited. It was not that you might contract with him and chance his getting the licence before you delivered the goods. Such a contract was absolutely prohibited, and, in my view, if that which is prohibited by statute, whether it is done knowingly or unknowingly, is prohibited for the public benefit, the Court must enforce the prohibition even if the person breaking the law relies upon his own illegality."

In the case at Bar there is likewise an express statutory prohibition against "transferring" beer licences "save to a person registered or entitled to be registered as a voter in some electoral district of the Province," and as Scrutton, L.J. points out this

cannot be evaded by contracting with a disqualified person and "chancing his getting the licence before you deliver the goods." The present case is, indeed, in one material respect stronger than the *Mahmoud* case, *i.e.*, the Crown by our statutory provisions is protecting its own property and guarding and maintaining the very great and profitable revenue it derives from the monopoly in the sale of liquor that it has created by the said Government Liquor Act. Here even the "chance" of the purchaser obtaining a licence could not be determined for at least six months at the earliest, *i.e.*, if and when he had become a registered voter, and what is the position of the contracting parties in the meantime? Either there was an immediate "transfer" *de facto* when the note was given and to take effect by immediate possession thereafter, or there was not. If so, the Act was undoubtedly violated and so the parties a few days later, on the 11th of January (after plaintiffs say they for the first time discovered the defendant was a prohibited person), hit upon the scheme to defeat the prohibition by secretly agreeing that the defendant should put a man, one Hubbard, in charge to run the beer parlour as his servant and for his sole profit under Engleblom's said licence until the transfer to defendant was (it was hoped) obtained from the Liquor Board, and under that agreement Hubbard was put in charge and still remains there in that capacity as plaintiff Engleblom admits, and also that he, Engleblom, is still signing the beer sale slips as the regulations require and says he is ready to account to defendant for the profits of the beer parlour thus long and unlawfully misconducted in defiance of the said regulations before and since the plaintiffs resumed possession later in January after defendant's repudiation.

MARTIN, J.A.

On the other hand if the plaintiffs did not *de facto* and legally transfer the licence on the 4th of January, they have not carried out the essential condition for which the cheque was given and so cannot recover thereupon, and they cannot rely upon the said subsequent arrangement to extend the time to obtain the transfer and yet meanwhile run the beer parlour in a sham way because that is prohibited as aforesaid.

In such extraordinary and wholly illegal circumstances it is, to my mind, with every respect, inconceivable that this Court

COURT OF APPEAL

1930

Jan. 7.

ENGLEBLOM v. BLAKEMAN

should declare, as it must if it enforces the contract, the plaintiffs trustees for the defendant and compel them to account to him for profits derived from a business carried on in defiance of the said statutory prohibition and of the rights of the Crown under the said Liquor Act, and no case has been cited that would justify our requiring an officer of this Court to take an account of such nefarious transactions.

It follows that in my opinion the action should have been dismissed as being grounded on a prohibited contract under which in the public interest no claim can be entertained by any Court. The evils that would arise if a contrary course be adopted are set out by Lord Justice Atkin in *Mahmoud's* case, in the following observations, entirely appropriate to the present case (pp. 827-8):

MARTIN, J.A.

"... Once you appreciate the fact that this prohibition is imposed for the public benefit, it is obviously done with the intention that the people who are left in control of these goods shall only be entitled to deal with them, if they are first of all licensed by the proper authority and act in accordance with that licence. It reduces the regulation to an absurdity to say that, notwithstanding such a statutory rule as that, if a man is deceived into believing that his purchaser has got a licence, he may then hand over the goods in question to that lying purchaser free from any restrictions whatever and leave him in control of the goods. The absurdity is made still greater when one appreciates that if two rogues each mutually deceive one another apparently the legislation could be given the go-by altogether, and there would be unrestricted dealings in these particular commodities between such persons with contracts giving enforceable rights between one and the other. I cannot conceive that that can be the law, and, as I say, I think that the express statutory prohibition prevents that state of law arising."

I would, therefore, allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the like opinion to that expressed by my brother the Chief Justice, and it therefore follows that in my opinion the appeal should be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: Respondents were the lessees of the Globe Hotel, Nanaimo, owners of the furniture and fixtures and beer licences. By bill of sale they conveyed their leasehold and chattel interests to appellant for $6,000, receiving $100 as a deposit and a cheque for $3,000 on account, appellant executing a chattel mortgage to secure the balance. On January 2nd,

1925, an agent of respondents gave appellant an *interim* receipt as follows:

"Received of Mr. James Blakeman the sum of One hundred dollars being deposit and part payment on the Globe Hotel situated Main Street, Nanaimo, B.C. The full purchase price being Six Thousand dollars. Payable Three Thousand on completion of deal. The balance of Three Thousand payable at One hundred and fifty dollars per month at 6% interest. This deposit is subject to transfer of licence and lease. It is also understood that Mr. Blakeman pays for 1929 licence."

The sale including an assignment of the lease was completed on January 4th, 1929. In an attempt to transfer the beer licence respondent Engleblom who held it purported to assign it to appellant "together with all my right title and interest in and to the said beer licence." He also signed a letter addressed to the Secretary of the Liquor Control Board as follows:

"Please take notice that I have appointed Mr. James Blakeman of the City of Nanaimo as manager of the Globe Hotel and beer parlour in the said hotel pending the transfer to him of beer licence No. 1156."

The documents completed, appellant issued his cheque for $3,000 but finding within a day or two that as he was not a registered voter in British Columbia and therefore ineligible to hold a beer licence he could not secure it for at least six months, and regarding this as the major (if not the whole) consideration stopped payment of the cheque. Respondents sued for the amount of the cheque, appellant resisting payment on the ground, among others, that the consideration for the purchase wholly failed.

MACDONALD, J.A.

A witness for the respondents who had the hotel listed for sale, testified that about a week before the purchase appellant saw him in reference thereto. He shewed appellant the regulations passed pursuant to section 119 of the Government Liquor Act, R.S.B.C. 1924, Cap. 146, and read to him the sections shewing the necessity of being a voter in order to hold a beer licence. One of these regulations read as follows:

"No beer licence shall be granted or transferred save to—(1) a person who is registered or entitled to be registered as a voter in some electoral district in the Province."

By section 27, subsection (7), beer licences issued are subject to the conditions and restrictions outlined in the Act and the regulations, and by section 70 any one violating the provisions thereof is guilty of an offence. The regulations required the

COURT OF APPEAL

1930

Jan. 7.

ENGLEBLOM v. BLAKEMAN

applicant to state the "electoral district in which the applicant is registered as a voter"; also "if entitled to be registered, but not registered"; to "state facts shewing applicant to be entitled to be registered as a voter." Appellant arrived from Alberta only a few days before the purchase and the Provincial Elections Act requires six months' residence in British Columbia before registration. This requirement as to residence was not disclosed by the regulations read to appellant. He had knowledge however, that unless registered as a voter he could not hold a beer licence and he knew he was not registered.

I think on January 4th when the sale was made respondents thought appellant was a resident of the Province for some time, or at all events, was eligible for registration. The learned trial judge found that they were not aware of the impediment in the way of transfer and that finding should be accepted. He found too that appellant was "well aware before he received the bill of sale, etc., that there were difficulties which he might encounter in obtaining a licence of this nature in his own name."

MACDONALD, J.A.

The appellant, later in January, 1929, placed a man in the hotel to run the dining-room and to overcome the difficulty in connection with the beer licence it was arranged that appellant should operate the beer parlour in the meantime on respondent Engleblom's licence. This was an evasion of the Act but it was not part of the contract to purchase. The regulations contain this clause:

"This licence is not transferable, except with the written consent of the Liquor Control Board and subject to the provisions contained in the regulation."

And a further regulation provides that:

"No person shall be employed in any service in connection with the sale, handling, or serving of beer in, on or about the premises in respect of which this licence is granted, unless he is registered or entitled to be registered as a voter in some electoral district of the Province."

As respondent Engleblom was to remain ostensibly in charge it was thought the difficulty could be surmounted until appellant qualified for a licence. This arrangement involving a recognition of the purchase, was shortly terminated. Appellant repudiated the purchase and respondents thereupon again entered into possession running the hotel and beer parlour, but keeping an account of the receipts and expenditures. In view

of the conclusion I have reached on other grounds it is not necessary to deal with the effect of appellant's intervention in the manner described.

On the foregoing facts it is submitted that the appellant must carry out the contract of purchase and sale. It will be noted that while he could not at once enjoy the full benefits of the contemplated purchase he could at least operate the hotel and six months later procure a licence to sell beer if the Liquor Control Board consented. He would lose the profits from the beer parlour in the meantime. Was it within the contemplation of the parties that in consideration of the purchase appellant should not only have immediate possession but also immediate enjoyment of the profits arising from the operation of the beer parlour? That is one of the decisive elements. The parties did contemplate immediate possession. Appellant was to take charge on the Monday following the 4th of January, 1929.

It was urged that the consideration failed because the appellant could not at once enjoy the profits from the beer parlour. The interim receipt contained the clause "subject of transfer of licence" but that does not necessarily mean an immediate transfer. While the sale of beer might have been the pivotal consideration still when a leasehold interest is transferred together with goodwill, chattels, furniture and fixtures for $6,000 one cannot say that because of postponement of enjoyment of one branch of the business the whole consideration fails. Appellant knew that he was not at once eligible to hold a beer licence and he purchased with that knowledge. That being so he did not contemplate immediate enjoyment of the profits from the sale of beer. It was no doubt contemplated that appellant was purchasing, not for speculation but to engage in the hotel business at Nanaimo. He was formerly a hotel-keeper in Alberta. The mere delay of six months to secure a licence or possibly a little longer is not of such a serious character where a permanent investment of $6,000 is made that it should be regarded as going to the root of the contract.

It was also urged that to permit judgment in respondents' favour to stand is equivalent to enlisting the aid of the Court to carry out an illegal contract. Respondents purported to transfer a beer licence and all right, title and interest therein, whereas

COURT OF APPEAL

1930

Jan. 7.

ENGLEBLOM v. BLAKEMAN

by the regulations having statutory effect licences are not transferable, except with the written consent of the Liquor Control Board. A regulation quoted *ante* also provides against transferring to any one not a voter or entitled to be registered as such. Any one too who violates the Act or regulations is guilty of an offence. What was done however was simply to clear the way or to take the first step to enable appellant to procure the licence and neither the Act nor the regulations prevented respondents from so doing. It was not illegal to execute the transfer as a first step in the procedure although possibly quite unnecessary to do so. It required the consent of the Board to make it effective provided the transferee was qualified to hold a licence. If the transfer must be regarded as an illegal act prohibited by statute then a contract, part of which purports and agrees to do the thing prohibited, is not enforceable. But one must regard the object and intent of the act reasonably. If the respondents thought appellant was eligible to procure a licence the execution of the transfer would at least prevent them from placing obstacles in his way. The appellant armed with the transfer, for what it was worth, could approach the Board for its consent and the Board would know that the prior licensee was not objecting.

MACDONALD, J.A.

Appellant's counsel relied on *Mahmoud* v. *Ispahani* (1921), 90 L.J., K.B. 821. By an order passed under the Defence of the Realm Regulations the purchase and sale of linseed oil was prohibited without a licence from the food controller. The vendor procured a licence and the purchaser told him (falsely) that he also had a licence. The vendor in good faith accepting that statement sold to the purchaser 150 tons of linseed oil. The latter finding it impossible to purchase, or for reasons of his own, refused to accept delivery alleging that the contract was illegal because in fact he had not obtained a licence. Action was brought for damages for refusal to take delivery. The first question that arose was the true construction of the order of the food controller, just as here a similar question arises as to the construction of the transfer coupled with the letter addressed to the secretary of the Liquor Board. The respondents in the case at Bar acted in good faith. So also the vendor in the case considered, but there was an express prohibition against selling

linseed oil to one who had no licence to buy. Violation of the order too was an offence against the Defence of the Realm Regulations. The contract was illegal as there was a declaration by the Legislature that such a contract should not be entered into and the purchaser could take advantage of it however censurable his conduct might be. In the case at Bar the transfer could be followed up and carried out in a lawful manner. True it required the intervention of a third party, the Liquor Control Board and the adoption of certain procedure but while the licence might be finally refused on the ground that appellant was not a fit and proper person to hold it, it would not be refused because of an alleged violation of the Act in executing a transfer. There is no prohibition against adopting a procedure which may or may not lead to the desired result. The purpose of the regulation is not to prevent transfers. The fact that the written consent of the Board is provided for presupposes that a transfer may be submitted for the Board's endorsement. The point raised therefore is not tenable.

MACDONALD, J.A.

I would dismiss the appeal. Respondents properly enough, resumed operation of the hotel as trustees for the purchaser. They must account for profits obtained in the meantime.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondents: *T. P. Morton.*

COURT OF APPEAL

1930

Jan. 7.

Ross v. Fossum

ROSS v. FOSSUM AND TORONTO GENERAL TRUST CORPORATION.

Will—Husband and wife—Separation agreement—Provision for infant son—Will of husband executed later—Provision made for son's support—Whether in substitution of provision in separation agreement.

A separation agreement provided for payment of a certain sum per annum by the husband to the wife for the "support and otherwise" of their child until it should become self-supporting or attain majority, or leave the custody of the wife; the wife agreeing to accept said sum in full settlement of all claims which she then had or might thereafter have for the support and otherwise of the child. The husband's will executed four years later, disposed of all his property and directed his trustees to pay the income of the residue of his estate "towards the maintenance and education of" his child "during his minority." On the petition of the widow it was held that the testator intended to substitute the provision in the will for that of the separation agreement.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MCPHILLIPS, J.A. dissenting), that in the separation agreement the husband made special provision for the "support and otherwise" of the child. With full knowledge of this and without making any reservation, he disposes of all his property by will, directing his trustees to set apart certain income for the maintenance and education of the same child in a manner similar to the provision made by him during his lifetime. The intention to guard against a double provision is manifest in the two instruments read together.

Statement

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 20th of May, 1929, on the petition of Kathleen Ross of the 5th of December, 1928, to determine whether or not she is entitled to receive from the estate of her deceased husband in addition to the benefits to which she is entitled under the last will and testament of the deceased, the annuity of $120 payable under a separation agreement made between her and her husband on the 30th of September, 1921. The will was made on the 23rd of March, 1925. It was held that the provision in the will was made in substitution of the annuity in the separation agreement.

The appeal was argued at Vancouver on the 15th and 16th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Hogg, for appellant: It was held that our debt was satisfied by the provision made in the will. We submit they are both

payable: see *Crichton* v. *Crichton* (1895), 2 Ch. 853. There cannot be satisfaction if the amount given is less than what is provided for in the separation agreement: see *Thynne* v. *Glengall* (1848), 2 H.L. Cas. 131 at p. 153; *Devese* v. *Pontet* (1785), 1 Cox 188 at p. 192; *In re Horlock. Calham* v. *Smith* (1895), 1 Ch. 516; Smith's Equity, 5th Ed., 547; *Charlton* v. *West* (1861), 30 Beav. 124. In the covenant the words used are "support or otherwise" whereas in the will he says "maintenance and education": see *In re Huish*: *Bradshaw* v. *Huish* (1889), 43 Ch. D. 260. Election does not apply to this case.

Argument

Maitland, K.C., for respondent: The presumption is that the testator did not intend to make a double provision. His will did not make any provision for the continuance of the annual payment under the separation agreement so that it must be assumed that the provision in the will for his wife was intended as in substitution: see *Weall* v. *Rice* (1831), 2 Russ. & M. 251.

Hogg, replied.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.: I am satisfied that the plaintiff is not entitled to take under the written agreement with her husband and as well under the will of her husband. The will contains an offer, in my opinion, to give the plaintiff what it bequeaths in lieu of those things contracted for in the agreement. She has an election between them but she cannot have both. In other words, if the agreement had been a prior will, the will would be a substitution.

MACDONALD, C.J.B.C.

The appeal should be dismissed.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed, the learned judge below having reached the right conclusion in the circumstances.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. It is clear to me that the provision in the will is not by way of substitution but in addition to the covenant for payment of $120 per annum under the separation agreement. It is only necessary to weigh the words used in the will—"towards the maintenance and

MCPHILLIPS, J.A.

COURT OF APPEAL

1930

Jan. 7.

ROSS v. FOSSUM

education of my infant son, Thomas Drummond Ross during his minority." The testator rightly appreciated that as his son grew in years a further sum than the $120 per annum would be reasonably necessary to maintain and educate his son, therefore the provision was in addition to and supplementary to that contained in the separation agreement. To construe the will otherwise than in this way would, in my opinion, be to set aside the plain intention of the testator. Further, it is the accomplishment of justice and the carrying out of the testator's plain intention and the intention of the testator must govern. The words "towards the maintenance and education of my infant son" punctuates this conclusion. It would palpably be a failure of justice to construe the will in any other way. The *ratio decidendi* of *Fraser* v. *Fraser* (1923), 32 B.C. 546, a judgment of this Court well supports the view I take in this matter. It is true I took a different view to that of the majority of the Court in *Fraser* v. *Fraser, supra.* There I thought that the provision in the later will, *i.e.,* the codicil, was not by way of addition but in substitution. However, my view did not prevail and on appeal to the Supreme Court of Canada that Court divided three to three. In the result the judgment of this Court stands, and as expressed by the Supreme Court of Canada in another case, where there is an equal division there is, in effect, no decision of that Court, therefore the judgment of this Court is the authoritative judgment and binding upon this Court.

MCPHILLIPS, J.A.

MACDONALD, J.A.: It is apparent from the will that the testator intended to dispose of his whole property, no part of it being reserved to provide for the payment of $120 per annum under a separation agreement formerly executed between him and his wife. That agreement contained this clause:

"And the party of the first part [husband and now the testator] hereby agrees to pay, and the party of the second part [appellant] hereby agrees to accept in full settlement of any and all claims for support and otherwise of the said child, which the party of the second part, or the said child may have or may hereafter have upon the party of the first part, the sum of one hundred and twenty ($120) dollars per annum, payable in equal monthly instalments from and after the 1st day of October, A.D. 1922, until the said child shall become self-supporting or attain majority or leave the custody of the party of the second part or until the death of the said child, whichever condition shall first occur."

MACDONALD, J.A.

By his will executed four years later the testator directed his trustees to collect, sell, call in and convert into money all his real and personal estate, and after payment of debts to pay to his wife Kathleen Ross (appellant) a sum equal to one-third of the amount of the personal estate at the time of his death, the balance of the proceeds on sale and conversion to be held in trust: (1) To pay to his sister Mary Sinclair Ross Fossum (respondent) one-third of the balance from the whole estate; (2) to invest a sum of money equal to one-third of the amount realized from the sale of all the real estate and to pay the income therefrom to his wife Kathleen Ross for life; (3) as to the balance to invest the same and pay the income therefrom "towards the maintenance and education of my infant son, Thomas Drummond Ross during his minority"; (4) residue to the son on attaining the age of twenty-one years or should he die earlier to his next of kin.

The appellant Kathleen Ross submits that she should continue to receive $120 per annum in monthly instalments under the clause referred to in the separation agreement for the purpose therein mentioned, *viz.*, "support and otherwise" of the said child; and that this obligation is not satisfied by the provision made in the will for the same child's maintenance and education as set out in abbreviated form under (3) above. The intention however is clear. The husband on separation anticipated that apart from the settlement on his wife the latter might, after the birth of the child (because the child was not born when the agreement was executed, a recital therein stating "the parties to this agreement are expectant of issue to their said marriage"), make a claim upon him for its support. To guard against it and to settle and agree upon the amount he should contribute for that purpose this clause was inserted. With full knowledge of this provision and without making any reservation he disposes of all his property by will, directing his trustees to set apart certain income for the maintenance and education of the same child in a manner somewhat similar to the provision made by him during his lifetime. The intention to guard

COURT OF APPEAL

1930

Jan. 7.

ROSS v. FOSSUM

against a double provision is manifest in the two instruments read together.

The appeal should be dismissed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Wood, Hogg & Bird.*

Solicitors for respondent: *Maitland & Maitland.*

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

HARRIS v. LINDEBORG *ET AL.*

Mines and minerals—Group of claims—Oral agreement between owner and two miners—Two miners to do assessment work and look after claims for a two-thirds' interest—Subsequent relocation of ground and new claims added to group—New parties become interested—Trusteeship as to proceeds of sale—Statute of Frauds—Laches—R.S.B.C. 1924, Cap. 167, Sec. 19.

H. owned the Jumbo group (three mineral claims) in the Portland Mining Division, that were in good standing until August, 1909. In May, 1908, he entered into a verbal agreement with S. and P. whereby S. and P. were to do the assessment work on these claims, obtain Crown grants, manage and sell them, for which they were to have a two-thirds' interest in the claims. On the way to the claims S. and P. met the two L. Brothers, with whom S. and P. arranged to share their interest in the claims. On arrival they decided to let the Jumbo group run out and they relocated the old claims with adjoining ground staking in all ten claims which they called the Big Missouri group and had them Crown granted in 1916. On September 1st, 1909, an option was given on the group for $95,000 on which a payment was made, when S. wrote H. telling him of this and of the relocation of the properties including other ground from which he estimated that H. was entitled to one-nineteenth of the whole property and he enclosed him his share of the payment made on this basis; and on two further payments on this option being made H. was given his portion on the same basis without protest. This option expired and two further options in 1914 and 1917 respectively of which H. was not advised. Finally in 1925 an option was given for $275,000 and this was taken up. In the meantime S. and P. and one of the L. Brothers had died, and the properties were looked after by the remaining L. and the representatives of the other three. As under the various options about $300,000 was paid, H. brought action to recover one-third of that sum. The plaintiff recovered judgment for the full amount.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. (GALLIHER, J.A. dissenting in part), that the plaintiff's claim is only against S. and P., he having no claim against the L. Brothers, and the three claims in which he was originally interested were increased by the defendants to ten claims. While his share was originally one-third, the parties by course of conduct must be taken to have mutually agreed as shewn by the correspondence that by his receiving one-nineteenth of the whole amount obtained for the property the original agreement would be satisfactorily performed.

Held, further, that so far as the L. Brothers are concerned section 19 of the Mineral Act does not apply because any claim respondent has is against the estates of S. and P. alone. Nor does it apply in respect to a claim against the estate of S. and P. because the agreement with them was not in respect to an interest in mineral claims but to a division of the proceeds of a sale and to a declaration of trusteeship in respect to said proceeds.

Held, further, that the doctrine of *laches* does not apply as the agreement was that S. and P. should keep the claims and buy and sell them, dividing the proceeds and H. was not obliged to act until the sale was completed even although he had reason to believe that the obligation to him was repudiated many years ago.

Held, further, that S. and P. became constructive trustees of the proceeds of sale of their proportions because the old claims in H.'s name were replaced by new claims in the appellants' names. A trusteeship arose by construction of law and the Statute of Frands does not apply.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 11th of June, 1929 (reported, 41 B.C. 262) in an action to recover $100,000 being one-third of the sum received by the defendants on a sale of a group of mineral claims known as the Big Missouri group, situate on the Salmon River in the Portland Canal Mining Division in British Columbia, and consisting of ten mineral claims. In 1904 the plaintiff acquired three mineral claims on the Salmon River known as the Jumbo group, and kept them in good standing until the 9th of August, 1909. In May, 1908, he went to Queen Charlotte Island to work some claims he owned there and he met two men he had known previously, named Hiram Stevenson and James Proudfoot. He entered into a verbal agreement with Stevenson and Proudfoot whereby Stevenson and Proudfoot were to do the assessment work and record same on the Jumbo group and manage the claims, including "handling," "selling," "optioning" and "Crown granting," for which they were to receive two-thirds of all money and profits derived from the claims, and

Statement

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

Statement

Harris to receive a one-third share of all moneys received from said claims, and all other claims grouped therewith. Stevenson and Proudfoot proceeded to this group of claims and on the way met two brothers named Lindeborg. All four decided to work together and Stevenson and Proudfoot agreed to share their interest in the claims with the Lindeborg Brothers. On reaching the property they decided to let Harris's locations expire and the claims were relocated including adjoining ground. They staked ten claims in all and called them the Big Missouri group. The valuable portion of the ground was within the three original claims. In December, 1909, an option was given on the group for $95,000 and Stevenson told Harris of this option by letter, advising him that the claims had been relocated and that Harris's share in the option would be one-nineteenth of the whole. Certain payments were made on this option and payments were sent to Harris of his share on the above basis from what was received. This option ran out and another option was given in 1914 of which Harris was not notified, and in 1916 the claims were Crown granted. In 1917 the claims were again sold under 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 Stevenson and Proudfoot and one of the Lindeborg's had died and the final sale was made by the remaining Lindeborg brother and the representatives of the three deceased partners. Harris then brought action for $100,000 being a one-third share of the moneys received on the sales of the Big Missouri group.

The appeal was argued at Vancouver on the 7th, 8th and 9th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Davis, K.C., for appellants: Stevenson was killed at the Front in 1916. When relocation was made there is no evidence to shew that the Lindeborgs knew of Harris's interest. A complete answer to the plaintiff's claim is section 19 of the Mineral Act. He cannot have any interest unless it is in writing. The case of *Wells* v. *Petty* (1897), 5 B.C. 353 was before the Act and does not apply. The plaintiff has misconceived his action.

R. M. Macdonald, on the same side: My submission is that

the evidence as to the alleged agreement between Harris on the one hand and Stevenson and Proudfoot on the other, does not constitute an agreement. When Stevenson and Proudfoot are both dead and the plaintiff is the only one who can give evidence as to the alleged agreement, the evidence should be looked at with great care and thoroughly sifted: see *In re Garnett*: *Gandy* v. *Macaulay* (1885), 31 Ch. D. 1 at p. 9; *Arnold* v. *Dominion Trust Co.* (1917), 24 B.C. 321; Underhill's Trusts and Trustees, 7th Ed., p. 5; *Camsusa* v. *Coigdarripe* (1904), 13 B.C. 177 at p. 187; *Stimson* v. *Gray* (1929), 98 L.J., Ch. 315 at p. 321. There were only three claims originally but in the new group there were ten. The additional ground staked adds to the obscurity. The administrator of Stevenson's estate had distributed before Harris took any action. He must act promptly: see *Clarke and Chapman* v. *Hart* (1858), 6 H.L. Cas. 633 at p. 655. By Stevenson's and Proudfoot's deaths there is the introduction of new parties: see *Garden Gully United Quartz Mining Company* v. *McLister* (1875), 1 App. Cas. 39 at p. 57; *In re Maddever. Three Towns Banking Company* v. *Maddever* (1884), 27 Ch. D. 523; *Prendergast* v. *Turton* (1841), 1 Y. & C.C.C. 98; *Turner* v. *Trelawny* (1841), 12 Sim. 49.

Argument

Sinnott, for respondent: This case rests largely on the evidence of the plaintiff. The learned Chief Justice below has gone into the case very carefully as his judgment shews, and he has accepted the plaintiff's evidence. The Court, especially in a case of this nature, should not upset the trial judge unless there is very strong ground for doing so. On the question of delay see *Rochefoucauld* v. *Boustead* (1896), 66 L.J., Ch. 74 at p. 80.

Cur. adv. vult.

7th January, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff swears to a certain agreement between himself and James Proudfoot and Hiram Stevenson, relating to what was then known as the Jumbo mineral claim, now known as the Big Missouri, by which Proudfoot and Stevenson were to do assessment on that claim and others which were mentioned but which had expired before the

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

agreement was made; sell or otherwise dispose of the claims and give the plaintiff one-third of the proceeds.

Proudfoot and Stevenson went to the locality and finding the time short within which to do the assessment allowed the Jumbo to expire by effluxion of time. They thereupon caused it to be relocated in the names of Stevenson and one of the Lindeborgs. The Lindeborgs went into the country at about the same time and located mineral claims. The parties arranged that they should group their claims including that of Harris which they had called the Big Missouri, and endeavour to dispose of them in that way. They gave an option to sell the claims at $95,000, whereupon Stevenson wrote to Harris telling him of this and of the relocation of the Jumbo, and saying that his (Harris's) share in the option would be $5,000. He enclosed that proportion of the money paid as a deposit for the option which was received by Harris without any protest or complaint. That option was not taken up and later other options were given and deposits made of which Harris received his share on the basis aforesaid. Finally, a sale was made to a group of purchasers who paid $300,000, and Harris then made a claim for one-third of this sum under his alleged agreement.

MACDONALD, C.J.B.C.

The evidence is not satisfactory with regard to the agreement, and what took place afterwards on and in connection with the claims renders it doubtful as to the rights of the plaintiff. But considering that he accepted moneys on the understanding that he was entitled only to five-ninety-fifths of the purchase-money, I think that is the amount which he is entitled to receive. There was long delay in bringing the action but that is immaterial on the facts of the case.

I would therefore set aside the judgment and order that judgment be entered for the plaintiff for five-ninety-fifths of the $300,000, together with costs of the action. The appellants should have those of the appeal.

MARTIN, J.A.

MARTIN, J.A. agreed with the majority of the Court.

GALLIHER, J.A.

GALLIHER, J.A.: It was intimated at the hearing of this case, and I am still of the opinion, that the plaintiff's action was not maintainable as against the estate of Andrew Lindeborg and as against Dan Lindeborg.

As to the respective estates of Proudfoot and Stevenson, it is, I think, on a different basis.

Either the moneys paid to Harris were in pursuance of some agreement or they were gratuitous. The evidence is, I think, against their being gratuitous. Then they must have been under some agreement. The letter written to Harris by Stevenson, September 27th, 1909 (Exhibit 4), after the bond for $95,000 was given, states that of that amount $5,000 will be his (Harris) share if the deal is completed. This amounts to a one-nineteenth interest. Was that the arrangement between Harris, Stevenson and Proudfoot, made at the meeting in the cabin before they went up to the claims? I do not think it could be, for these reasons. Harris regarded his claim, the Jumbo (afterwards restaked by Stevenson and Daniel Lindeborg as the Big Missouri) as a mine and the nucleus of any group that might be formed. The Big Missouri was included in the option or bond and with it the Tip Top, Rambler, Buena Vista, Province, Jane, Golden Crown, Winner, Kansas and Dauntless. Of these latter claims the evidence discloses only that the Rambler, Buena Vista and Dauntless belonged entirely to the Lindeborgs. There is no evidence as to in whose name the remainder were staked. They may have been staked by the Lindborgs, Stevenson and Proudfoot to make up the group as bonded, but be that as it may, if Harris is right as to the interest he claims, that interest would have to be considered in so far as Proudfoot and Stevenson's interest in the claims bonded extended. This latter was a half-interest according to the evidence of Dan Lindeborg on discovery. There is no explanation of how they fixed Harris's share at one-nineteenth, unless it can be said that was the agreement between Harris, Proudfoot and Stevenson. Let us examine the probability of any such agreement. Harris had great faith in the Jumbo and considered it the key property to any group to be formed in connection with it. It is unreasonable to suppose that he would accept a one-nineteenth interest and give eighteen-nineteenths to Stevenson and Proudfoot, and that proportion should be arrived at at a time when it was not known whether any or what claims should be joined up with the Jumbo if a group should be formed. If one might be allowed to apply one's own knowledge it could only be classed as ridiculous

GALLIHER, J.A.

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

GALLIHER, J.A.

on the face of it. I have no hesitation in saying that no such agreement or understanding was come to before the option. Then, if that was not the agreement, what was the agreement, if any? The learned judge below must have found that the agreement was as Harris stated. I think he was justified in so doing. There is the direct evidence of Harris himself. There is the evidence of Davis, corroborating Harris as to what took place in the shack at the time, and the evidence of Tomkin and other witnesses of conversations with defendants to the effect that they were looking after Harris's interest, that the old man would be protected, that he was a partner, which accumulation convinces me that the agreement with Harris was as he states, or at the very least, that the learned Chief Justice below was justified in making that finding. As against this there is the letter I before referred to in which he was told his share if the $95,000 option went through, would be $5,000 or one-nineteenth (how that was arrived at, I have nothing to guide me) and the fact that he received and accepted certain payments on that basis without protest. Harris says he did write Stevenson pointing out that was not the understanding and what was the true understanding, but he has no copy of such letter nor can any trace of it be found in the papers of Stevenson or Proudfoot, and as his evidence on this is not very satisfactory, we may have to assume that he did not protest by letter. Assuming so (and it might be noted that none of the letters written by those acting for Harris mentions any specific interest) does the fact that he accepted certain payments on the basis as outlined in the letter (Exhibit 4) prevent him from coming forward at this time and proving what is due him on the terms of the true agreement? I think not.

There was a series of options covering a long period of time on some of which certain moneys were paid, on others no moneys paid. On certain of these Harris received payment, on others he did not, till finally a sale was made of the group and it seems to have been taken by the learned judge below and acquiesced in by counsel before us, that in all, on account of the various options $300,000 had been received.

I am in agreement with my brother M. A. MACDONALD that neither section 19 of the Mineral Act, R.S.B.C. 1924, Cap. 167,

nor the doctrine of *laches,* nor the Statute of Frauds applies here, and as he has dealt with these in his reasons for judgment, I will not enlarge upon the matter.

If I am right then in holding that the non-objection to the proportion assigned in Exhibit 4 and the receipt of some payments on that basis does not prevent Harris from coming forward at this time and claiming under the true agreement, the judgment should be that Harris is entitled to a one-third share in one-half of $300,000, being one-third of $150,000, the amount allotted the Proudfoot and Stevenson interests under their agreement with the Lindeborgs. This amount would be $50,000.

MARTIN, J.A.

The appellants succeed in reducing the judgment against them and are entitled to costs.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in complete agreement with the view expressed by my brother the Chief Justice. The evidence well supports the right to sustain the judgment in favour of the respondent to the extent of five ninety-fifths of the purchase-money received upon the sale of the mineral claims in question in the action, *viz.,* five ninety-fifths of $300,000.

The documentary evidence well supports the right in the respondent to succeed to this extent, the Statute of Frauds and section 19 of the Mineral Act being, in my opinion, well and sufficiently complied with.

I would therefore, to the extent above stated affirm the judgment of the learned trial judge.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from the decision of Chief Justice MORRISON finding that the appellants are trustees for respondent of an undivided one-third of all moneys received from the sale under option of certain mineral claims known as the Big Missouri and awarding respondent $100,000, one-third of the amount obtained.

Some years before the agreement sued upon was entered into respondent located and recorded four mineral claims in the Portland Canal district known as the Jumbo group. Only one claim, however, known as the Jumbo, was kept in good standing up to and beyond the date of the agreement, the subject of this action. Respondent claims that in May, 1908, he

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

entered into said agreement (not in writing) with one James Proudfoot and Hiram Stevenson, whereby the two last-named parties were to do all work necessary to keep up assessments and record the work on the ground within the boundaries of what respondent first alleged were four claims (but in reality one), attend to the Crown granting and sale thereof for which Proudfoot and Stevenson and any associates they might bring in should receive two-thirds of the proceeds of any sale, after deducting expenditures, and the respondent one-third. It was further alleged that this oral agreement embraced "all other claims grouped therewith."

I find it a little difficult to support the learned trial judge's finding that this agreement covered additional claims in view of respondent's evidence. He testified as follows:

"Now you haven't said a word there about adding other claims. Was anything said by anybody about that? I don't know as there was anything said about it.

"You don't know what? I don't know just what was said about adding other claims.

"THE COURT: Was there anything said? There might have been said, I don't know, I couldn't say."

MACDONALD, J.A.

That should dispose of the matter in so far as it refers to additional claims afterwards acquired by Proudfoot, Stevenson and their associates. The agreement at best could only include the interest of Proudfoot and Stevenson the sole parties to the contract in additional claims located by them along with other parties. However, in spite of the difficulty presented by the evidence of the respondent I think we must hold that the finding of the learned trial judge should stand to that extent, subject to a qualification later referred to, reducing to some degree the one-third interest claimed by the respondent.

It was alleged that Andrew Lindeborg and Daniel Lindeborg, who had claims in that locality were brought in as associates by agreement with Proudfoot and Stevenson; that the four of them entered into possession of respondent's original claim, and as a matter of policy (not fraudulently) allowed it to lapse on the 8th of August, 1909. The following day Stevenson and Daniel Lindeborg relocated the ground, recording it on the 10th of August, 1909. Daniel Lindeborg is one of the appellants, while Andrew Lindeborg, since deceased, is represented by the

said Daniel Lindeborg as his administrator. Proudfoot and Stevenson are also dead and are represented in this action by Duncan C. Barbrick and Laura McEwan, their respective administrators.

Proudfoot, Stevenson, Daniel and Andrew Lindeborg entered into an agreement without reference to the respondent, to group and consolidate adjoining mineral claims previously owned by them, known as Tip Top, Rambler, Buena Vista, Province, Jane, Golden Crown, Winner and Dauntless, calling the group thus consolidated including the ground covered by the original Jumbo location the Big Missouri. The respondent submits that his original agreement with Proudfoot and Stevenson embraced this enlarged area. It is obvious as intimated that while he might share to the extent of one-third of Proudfoot and Stevenson's interest in the added areas he cannot share in the interests acquired by Daniel and Andrew Lindeborg unless some suggested principle of trusteeship difficult to understand should sweep the interests of the Lindeborgs into the ambit of the original contract. There is no evidence that Proudfoot and Stevenson's agreement with respondent was ever disclosed to Daniel and Andrew Lindeborg before the relocation referred to. Not being parties to the agreement and having no knowledge of it at that time, their interests cannot be affected.

The first-written document throwing light on the agreement is a letter written by Stevenson to respondent on 27th September, 1909, as follows:

"We have made a deal on them claims on Salmon River me and Dan Lindeborg staked the Jumbo in ower names and turned it in with the others we called it the big Missourie we bonded ten claims between Lenderborg and Jim Proudfoot and we don some work on the Missouri after we staked it but count get much of a assay she pretty loe grade ore you no that we don the best we could we give you five thousand dollars if that will be satictorey to you and you will get yours per cent as the payments . . . comes do we got the first payment of one thousand dollars on the 15th Sept. we bonded for ninty five thousand and payments comes every ninty dayes i got fifty three dollars for you as near as i can figer it out on the first payment and if we never get any more you wount i am sending it over with tom McRostie and if he dont see you he will leave it Sandlands. When you get it i wish you would send me a receate. Well Harris Portland Canal is better this summer then then ever we bonded claims on Fish Crick to the same outfit."

A short time before (September 1st, 1909) an option was

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

given by Daniel and Andrew Lindeborg, Proudfoot and Stevenson to one John W. Edgcomb, on the Tip Top, Rambler, Buena Vista, Province, Jane, Golden Crown, Winner, Big Missouri, Kansas and Dauntless mineral claims for $95,000, payable $1,000 on the 15th of September, 1909, followed by some similar and larger payments up to 1912, amounting in all to $95,000. The $53 sent to respondent and the promise of $5,000 altogether would indicate that respondent was to receive either as a gratuity or under the agreement (and in view of the finding below we must regard it as an agreement) $5,000 out of the $95,000 and the $53 remitted representing approximately five-ninety-fifths of the first payment of $1,000. Respondent testified that he replied to this letter protesting that the remittance did not amount to the one-third stipulated for but no such letter was produced. It is doubtful if he ever wrote a letter in the terms referred to because in a further letter from Stevenson (who according to respondent was an honest man) written January 31st, 1910, he says:

MACDONALD, J.A.

"I got a letter from you about a month ago I rote you in September from hear and I gess it must have gon a strae you no the claim you had on Salmon River me and Dan Lenderborg staked it and we Bonded all of ower claims on Salmon River as near as I can figer it out you will get about five thousand dollars out of it and as we get the payments we Put your Share in the Canadian Bank of Commerce hear."

When he says "as near as I can figure it out" he must be referring to an agreement, not, as appellants' counsel submitted to a gratuity. This letter should be treated as a recognition of the agreement and of its terms. It was accepted by respondent without protest and discloses the extent to which he shares in the proceeds of a sale. In 1910, when two further payments of $1,000 each were received under the option two payments were made to respondent of $100 and $184.20. A second option was given in 1914 and a third in 1917 for $165,000, the optionee assigning it to Sir Donald Mann. The sum of $12,000 was received under it. Finally in 1925, the last option was given for $275,000 to the Standard Mines Company, the latter assigning it to the Big Missouri Company, which in turn assigned it to the Buena Vista Mining Company Limited, a British Columbia company. Under it $275,000 was paid to the appellants. Under the various options it is alleged $300,000 was received respondent claiming one-third of that amount.

As already intimated the Lindeborgs were not parties to nor were they identified with, by adoption or otherwise, the agreement entered into by respondent with Proudfoot and Stevenson. An amendment was sought at the close of the trial to allege that subsequently the same agreement was entered into in 1910, when all parties met, *viz.*, respondent, Proudfoot, Stevenson and the two Lindeborgs but the application was abandoned. It was apparently assumed that no matter how many new parties were introduced respondent would still retain his one-third interest in the proceeds of the sale of the whole group of claims. He would retain a third interest, or any lesser interest mutually agreed upon, only in so far as Proudfoot and Stevenson's interests were concerned. Even if the original agreement constituted a partnership and Lindeborgs were aware of it, that would not make them partners. True respondent met Proudfoot, Stevenson and the Lindeborgs on the ground in 1910 and discussed matters with them. As he testified, they "told him he would get his interest on the claims that were relocated," but that would be his interest under the original agreement and would only mean that the interest of Proudfoot and Stevenson in the whole would be reduced to the extent necessary to provide for respondent's claim. In the final sale the estates of Proudfoot and Stevenson received the respondent's share in addition to their own. The respondent testified in respect to this interview:

"I told them [that is the four of them] I still retained my one-third interest according to my first contract with them.

"With Stevenson and Proudfoot? Yes, I never recognized Lindeborg, never seen him, in the contract."

There is no evidence, as already pointed out—in fact the contrary—that Daniel Lindeborg, when he relocated the Jumbo with Stevenson, knew of the existence of this agreement. Indeed up to the time the action was commenced the claim that the Lindeborgs were a party to the agreement or adopted it in any way was not apparently put forward. A son of the respondent writing on his father's behalf to appellant Barbrick administrator of Proudfoot's estate on April 4th, 1922 (Exhibit 21), said:

"I have proof of an agreement between Proudfoot, Mr. Stevens [Stevenson] and my father. . . . Now if the heirs of Mr. Proudfoot and Mr. Stevens [Stevenson] realize a good price for the Big Missouri property why

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

the amount that my father was supposed to receive as his share would be but a trifle."

Nor can it be said that the Lindeborgs stood in the relation of trustee to the respondent. Fraud is not alleged nor proven. When the Jumbo was allowed to lapse and later relocated it was done not to deprive respondent of his rights but because it was considered advisable to do so. If the Lindeborgs knew of this agreement and fraudulently relocated the Jumbo to deprive respondent of his interest under the agreement, conspiring with Proudfoot and Stevenson in so doing they would be constructive trustees in respect to respondent's interest. But fraud is not suggested.

It was submitted on behalf of all the appellants that a complete answer to the respondent's claim is afforded by section 19 of the Mineral Act, now found in R.S.B.C. 1924, Cap. 167, reading as follows:

"No free miner shall be entitled to any interest in any mineral claim which has been located and recorded by any other free miner, unless such interest is specified and set forth in some writing signed by the party so locating such claim."

MACDONALD, J.A.

If there is any liability on the part of the Lindeborgs so far as their interests are concerned, it would only be by virtue of a trusteeship in respect to moneys received by them properly belonging to respondent. Assuming trusteeship, does it follow that respondent as *cestui que trust* has "any interest in" the mineral claims in question or has he merely an interest in the proceeds of a sale? When the Jumbo was relocated by Stevenson and Lindeborg the former was a trustee for respondent in respect to a certain interest. But that is because of the agreement followed by the relocation. So far as the Lindeborgs are concerned the application of section 19 does not arise, because any claim respondent has is against the estate of Proudfoot and Stevenson alone. Nor does it apply in respect to a claim against the estates of Proudfoot and Stevenson because the agreement with them was not in respect to an interest in mineral claims but to a division of the proceeds of a sale and to a declaration of trusteeship in respect to said proceeds.

Appellants replied, too, on the doctrine of *laches* alleging that where, as here, respondent must apply to a Court of Equity to declare a trust or to enforce performance of a contract he must

act promptly and without unreasonable delay. The agreement sued upon was executed 20 years ago. That principle applies to executory contracts or executory interests as distinguished from executed contracts. Where a legal interest exists not requiring the aid of a Court of Equity to declare it or to create it the doctrine is not applicable. In the case of executed interests or contracts although *laches* will not lead to dismissal of the action yet a party by standing by may be held to have waived or abandoned any rights he otherwise possessed (*Clarke* v. *Hart and Chapman* (1858), 6 H.L. Cas. 633 at p. 655).

The doctrine of laches is particularly applicable to suits in respect to mining properties where values fluctuate. One cannot stand by to see if a mining venture will prove successful, intervening if the venture succeeds, and holding off if it does not. The facts however in the case at Bar leave no room for the application either of the doctrine of laches or of waiver. The first payment on the last option for $275,000 was made in 1928, and as the agreement was that appellants (Proudfoot and Stevenson) should keep the claims alive and sell them dividing the proceeds respondent was not obliged to act until the sale was completed even although he had reason to believe that the obligation to him was repudiated many years before. He did not so act as to intimate that he abandoned his claim. Quite the contrary. He had a right to wait until the completion of the sale before starting his action. He then had a legal right asking the Court not to declare it but to order payment of the amount due under the contract.

The Statute of Frauds was also raised as a defence. Whatever might be said as to the application of the statute if the contract sued upon was in respect to an agreement to do work on the original Jumbo claim, add other claims to it, sell them and divide the proceeds, it has no application to the situation which arose when the Jumbo was allowed to lapse and the same ground (with additional areas) was relocated in the names of the appellants. They then became (Proudfoot and Stevenson) constructive trustees of the proceeds of sale of these properties because the old claim in respondent's name was replaced by a new claim or claims in appellants' names. A trusteeship arose by construction of law and the statute does not apply.

COURT OF APPEAL

1930

Jan. 7.

HARRIS v. LINDEBORG

MACDONALD, J.A.

On the whole case I think the respondent is entitled to share in the proceeds of the final sale and in all moneys received under previous options in the ratio of $5,000 for every $95,000 received. The correspondence confirms this view. The respondent has no claim against Daniel Lindeborg and the estate of Andrew Lindeborg. His claim only is against the estate of Proudfoot and Stevenson, sharing with them in the proceeds of the sale of the original Jumbo claim and in Proudfoot and Stevenson's interest in the additional claims. While respondent's share originally was to be one-third the parties by course of conduct must be taken to have mutually agreed as shewn by the correspondence and it may be because other parties were introduced with interests beyond the reach of respondent that by paying him $5,000 out of the $95,000 received under the first option the original agreement would be satisfactorily performed. It was therefore varied to this extent. That is less than one-third of the whole but it was accepted by the parties. Respondent therefore should share in the $300,000 to the extent mentioned. The appeal should be allowed and the judgment varied as indicated.

Appeal allowed in part, Galliher, J.A. dissenting in part.

Solicitors for appellants: *Macdonald & Pepler.*
Solicitor for respondent: *P. J. Sinnott.*

VICTORIA U DRIVE YOURSELF AUTO LIVERY, LIMITED v. WOOD AND WOOD.

COURT OF APPEAL

1930

Jan. 7.

VICTORIA U DRIVE YOURSELF AUTO LIVERY, LTD. v. WOOD

Negligence—Damages—Car hired by boy of sixteen who had a licence—Two companions of nineteen with him holding licences and sharing cost of car—In collision with a pole when driven by one of the companions at an excessive speed—Car wrecked—Liability of boy—Liability of his father—R.S.B.C. 1924, Cap. 177—B.C. Stats. 1926-27, Cap. 44, Secs. 11 and 12; B.C. Stats. 1923, Cap. 114, Sec. 7.

The defendant W., an infant who was sixteen years of age and held a driver's licence, hired a car from the plaintiff Company to go for a drive, taking with him two boys aged nineteen, both holding driver's licences. The boys agreed to share equally in paying for the hire of the car. After the defendant had driven for a time one of his companions took the wheel and while he was driving at an excessive speed he ran into a pole at the side of the road and wrecked the car. The defendant was injured and both his companions were killed. An action for damages to the car against the infant and his father was dismissed.

Held, on appeal, varying the decision of LAMPMAN, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting in part), that as the son was not driving the car at the time of the accident the Act making the father liable for damages caused by the son's driving or operating the car does not apply and the appeal should be dismissed as against him. As to the son he was entrusted with the car and permitted another person to drive it who brought about the accident. This was a wrong for which the plaintiff is entitled to recover damages and the appeal should be allowed as against the son.

Per MARTIN, J.A.: The appeal should be allowed as against both defendants.

Per MCPHILLIPS, J.A.: The appeal should be dismissed as against both defendants.

APPEAL by plaintiff from the decision of LAMPMAN, Co. J. of the 27th of June, 1929, in an action for damages resulting from the negligent driving of an automobile belonging to the plaintiff. On Saturday, the 9th of March, 1929, the defendant, Thomas W. G. Wood, the younger, hired a Plymouth motor-car from the plaintiff Company. The manager of the Company thought that the boy looked small, but when he produced a driver's licence he let him have the car. The boy was in his seventeenth year and was living at home with his parents. On the following day (Sunday) the boy again hired the car, both in the afternoon and in the evening. When starting out in the

Statement

COURT OF APPEAL

1930

Jan. 7.

VICTORIA U DRIVE YOURSELF AUTO LIVERY, LTD. v. WOOD

Statement

evening he took two boys with him, both of them having a driver's licence, and both being about nineteen years old. They went out to where a seaplane had crashed on Hillside and Shelbourne Streets in Victoria. On the way back one of the defendant's companions drove the car and he (defendant) sat in the back seat. They drove up King's Road to Richmond Road. As they were driving along Richmond Road the two companions were sitting in the front seat. The defendant tried to get in between them. They were going at an excessive speed at the time and before the defendant got seated in the front seat the car ran into a pole and was badly wrecked. Both of Wood's companions were killed. It was held by the trial judge that the manager of the plaintiff Company should have known that Wood the younger was under the age of 21 years, and he dismissed the action.

The appeal was argued at Vancouver on the 2nd of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Higgins, K.C., for appellant: Section 11 of the Motor-vehicle Act Amendment Act, 1926-27 was complied with as this boy had a licence, and the two other boys with him had licences. The father is liable under section 12 of the same Act. That one of the other boys was driving does not release the defendants from liability. All three boys were to pay for the car. They hired it jointly: see *Dixon* v. *Grand Trunk R.W. Co.* (1920), 47 O.L.R. 115; *Davey* v. *Chamberlain* (1803), 4 Esp. 229; *Bryant* v. *Pacific Electric Ry. Co.* (1917), 164 Pac. 385. That they are infants makes no difference: see *Walley* v. *Holt* (1876), 35 L.T. 631; *Burnard* v. *Haggis* (1863), 14 C.B. (N.S.) 45.

Fowkes, for respondent: As to section 12 of the 1926-27 Act as amended in 1929, the Act must be construed strictly and the words are "driving and operating." We rely on *O'Reilly* v. *Canada Accident and Fire Assurance Co. Ltd.* (1929), 63 O.L.R. 413. He was not operating the car at the time of the accident and under the Act in force at the time he is not liable.

Higgins, replied.

Cur. adv. vult.

7th January, 1930.

COURT OF APPEAL

1930

Jan. 7.

VICTORIA U DRIVE YOURSELF AUTO LIVERY, LTD. v. WOOD

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I would dismiss the appeal against the father. He is responsible for the physical act of driving by the son. The son was not driving the car at the time of the accident, therefore the Act making the father liable for damages caused by the son's driving or operating the car does not apply to the case.

The action was dismissed as against the son as well. He is not liable on the contract which he made with the plaintiff, being a minor, but he was entrusted with the car and permitted another person to drive it, who being a reckless driver brought about the accident. I think that it was a wrong for which the plaintiff is entitled to recover damages. I would therefore allow the appeal as to the son and direct judgment to be entered against him for the damage done to the car, *viz.*, $945.

MARTIN, J.A.

MARTIN, J.A.: This appeal raises a difficult question under section 12 of the Motor-vehicle Act Amendment Act, 1927, Cap. 44, which though not of its prior full importance, in this Province at least, because of the change made by the Motor-vehicle Act Amendment Act, 1929, Cap. 44, Sec. 7, is still of general interest as regards the meaning of "driving or operating a motor-vehicle" as used in said sections and others of the same Act. The learned judge below held in effect that these two words were synonymous in meaning and related only to a case where the minor was actually at the wheel of the car, *i.e.*, physically driving it and invoked in support of his view the recent decision of the Ontario Appellate Division in *O'Reilly* v. *Canada Accident and Fire Assurance Co. Ltd.* (1929), 63 O.L.R. 413. But with respect, that decision has no real bearing because it is not upon an identical statute but upon a very differently worded clause in an insurance policy wherein the word "operate" alone occurred, and therefore no question could arise as to the meaning to be attached to it when used, as in the statute before us, disjunctively from or in opposition to the word "drive"; and it is in any event to be noted that the Ontario Court based its decision on the "strict and primary sense" of the word "operate" as used in the policy because, as aptly pointed out by Hodgins, J.A., the

COURT OF APPEAL

1930

Jan. 7.

VICTORIA U DRIVE YOURSELF AUTO LIVERY, LTD. v. WOOD

insurance company was setting up an exception to protect it from liability and hence (p. 416):

" . . . the sound rule of construction [is] that those who stipulate for an exception should be limited to the narrowest significance of the words used, which, in this case, is that of the driving or mechanical operation by the individual mentioned—otherwise, as in the case of questions put by insurance companies, 'the ambiguity would be a trap against which the insured would be protected by Courts of law.' "

Mr. Justice Hodgins also said (p. 416):

"I quite agree that the word 'operate' is one of many meanings, ranging from the figurative to the actual. A man may 'operate' a fleet of motors by organizing a system in which he himself never personally drives or operates a single motor. A railway company operates a railway system, in which only engineers manipulate the machinery of a locomotive. Insurance companies in insuring motors assume liability for them when stationary as well as when in motion. But it is the latter situation which is most prolific of accidents and thus more likely to cause a loss which the company must pay."

MARTIN, J.A.

The appellant herein submits that the present use of the words "driving or operating" indicates one of the said "many meanings" of the word "operate" beyond that "narrowest significance" that the Court held should restrict it from being an exception in O'Reilly's policy, and that a reasonable meaning to be given to it under our statute would include the present case where a minor after solely hiring a car from a garage and driving away with it later permitted other persons in the car to physically drive it by taking charge of the wheel and propelling machinery. That submission is, in my opinion, with every respect to contrary views, supported in principle by, *e.g.*, the following cases: *Davey* v. *Chamberlain* (1803), 4 Esp. 229; *Chandler* v. *Broughton* (1832), 2 L.J., Ex. 25; *Du Cros* v. *Lambourne* (1906), 21 Cox, C.C. 311 at p. 315; 76 L.J., K.B. 50 at p. 54; *Bryant* v. *Pacific Electric Ry. Co.* (1917), 164 Pac. 385; *Dixon* v. *Grand Trunk R.W. Co.* (1920), 47 O.L.R. 115; *Samson* v. *Aitchison* (1912), A.C. 844, 849, wherein the Privy Council affirmed *Du Cros* v. *Lambourne; Reichardt* v. *Shard* (1914), 31 T.L.R. 24; *Pratt* v. *Patrick* (1923), 93 L.J., K.B. 174, and *Wheatley* v. *Patrick* (1837), 2 M. & W. 650, wherein Lord Abinger, C.B. said (p. 652):

"The declaration charges that the defendant was possessed of the horse and chaise, and that they were under his direction. The defendant having borrowed them for his own enjoyment, and not to use them for the service of the owner, is very properly charged as in the possession and control of

them. Then the question is, whether, being so in possession of them, and sitting with the driver of them, he may not be charged as actually driving? I think he may."

And in *Du Cros* v. *Lambourne* the King's Bench Division unanimously held that the owner of a motor-car who was sitting in the front seat with the driver, a female friend, whom he permitted to take the wheel, was lawfully convicted under the Motor Car Act, 1903 (3 Edw. 7 c. 36), s. 1, for "driving a motor-car on a public highway recklessly or negligently . . . "; Darling, J. said at pp. 315-16 of 21 Cox, C.C. (the fullest report):

"I am of the same opinion. During the argument I think that for some time one lost sight of the fact that there was only one summons. The only person summoned was the appellant, and he was summoned for driving a motor-car in a manner dangerous to the public. In the sense that he with his own hand was controlling the thing, he was not driving the car himself. But was he aiding or abetting the driving by Miss Godwin in the manner in which she was driving? I think he was. He allowed the person who was driving to drive. That was precisely the same thing as if he did it himself. He had authority and power to interfere, but he did not do so although he knew the car was being driven at an excessive speed. It seems to me that it is a misuse of language to say that he was not driving the motor-car."

MARTIN, J.A.

Furthermore a careful perusal of our Motor-vehicle Act, Cap. 177, R.S.B.C. 1924, and amendments shews that the oft-used expression "driving or operating" is far from being used in a fixed synonymous sense, as is shewn by the fact that the word "driving" only is properly employed when that physical act is being solely dealt with, as in section 36 of Cap. 177, and sometimes the distinction between "driving and operating" is clear beyond plausible argument, as in section 19, and numerous other examples might be cited. In my opinion the primary meaning of the word "operate" as used throughout the Act is that it denotes the permission or direction given by some one in control of the car to another person to perform the physical act of driving it and this view is entirely consistent with the long trend of decisions above cited, several of which indeed go further, but that is sufficient to support the plaintiff's case. To give an illustration: If any person, minor or adult, himself delivers newspapers or bread, or milk to a circle of customers by means of a motor-car or motor-cycle, owned or hired by him, but on falling ill employs some person to make said delivery for

COURT OF APPEAL

1930

Jan. 7.

VICTORIA U DRIVE YOURSELF AUTO LIVERY, LTD. v. WOOD

him by driving his motor-vehicle for that purpose, such an employee would under those circumstances be the physical driver of his car but can it be seriously doubted that the employer himself is also "operating" it by the agency of his servant, and liable accordingly for negligence in its "use or operation" at common law as well as under the special provisions of section 34 of said Cap. 177?

I am unable to take the view that a special or strict canon of construction should be applied to this statute for it is only one more of the many departures from the common law of negligence which has been more altered by statute than any other great division of our field of jurisprudence, *e.g.*, in 1846 *per* Lord Campbell's (Fatal Accidents) Act, and in 1880 by the Employer's Liability Act and these large invasions of the common law were "greatly extended by recent statutes" as Judge Ruegg says in his valuable work upon the Employer's Liability Act, 8th Ed., p. 1, such as by the Workmen's Compensation Act in 1906, etc., and lastly and recently in this Province by the Contributory Negligence Act of 1925. But the early cases upon the Employers' Liability Act shew that from the first the Courts refused to regard it in a narrow or restrictive light; on the contrary, as Field, J. said in *Griffiths* v. *The Earl of Dudley* (1882), 9 Q.B.D. 357 at p. 364:

MARTIN, J.A.

"I think the Court should take a broad view of the construction of the Act, having regard to the intention of the Legislature [*i.e.*, conferring new benefits upon employees]."

This was in accordance with the prior case, of *Moyle* v. *Jenkins* (1881), 8 Q.B.D. 116, wherein Grove, J. said:

"We have not to frame the Act but to interpret it, and we must do so according to the ordinary rules for the interpretation of Acts of Parliament."

And the "ordinary rules" are now clearly laid down by the Legislature of this Province in the Interpretation Act, Cap. 1, R.S.B.C. 1924, Sec. 23 (6) thus:

"Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems contrary to the public good; and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit."

To my mind there is nothing in the present case to justify a narrow departure from this direction.

It follows that the appeal should, in my opinion, be allowed, thus sustaining the action against the father and as to the other defendant, his son, there can be, under the circumstances, no doubt about his liability also, *cf.*, *Burnard* v. *Haggis* (1867), 14 C.B. (N.S.) 45, and cases cited, *e.g.*, in Clerk & Lindsell on Torts, 8th Ed., 41-2, and therefore judgment should be entered against them both.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am clearly of the opinion that the learned trial judge, His Honour Judge Lampman, arrived at the correct conclusion. Upon the wording of the statute alone the respondent, F. Wood, father of the minor respondent, Thomas W. G. Wood, cannot be held liable. The father and son (a minor) are the respondents in this appeal.

Section 12 of the Motor-vehicle Act Amendment Act, 1927, B.C. Stats. 1926-27, Cap. 44, reads as follows:

"So long as a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating a motor-vehicle on any highway; but nothing in this section shall relieve the minor from liability therefor."

It is apparent when it has been found, and rightly in my opinion, by the learned trial judge, that the minor was not driving or operating the motor at the time of the accident, that no liability can be imposed upon the father of the minor. When a statute extends the responsibility that exists under the common law it is not to be presumed that any alteration has been made—otherwise than the Act expressly declares—we must look for language of preciseness and it must not be expanded beyond the ordinary meaning and that meaning in my opinion, does not impose liability except it be that the minor was at the time in the actual physical control of the motor and engaged in driving and operating the motor (*Rex* v. *Bishop of London* (1693), 1 Show. 441 at p. 455; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743 at p. 764). The word "or" if necessary must be read as "and."

MCPHILLIPS, J.A.

COURT OF APPEAL

1930

Jan. 7.

VICTORIA U DRIVE YOURSELF AUTO LIVERY, LTD. v. WOOD

MCPHILLIPS, J.A.

The learned trial judge has found that the minor was not driving nor was he operating the motor-car at the time of the accident, when the motor was in collision with a pole on the highway. Then as to the liability of the infant defendant, the appellant cannot convert an action founded upon a contract into a tort so as to charge the minor defendant. The motor-car was hired under a contract in writing, and one term of the contract is:

"4. Make good all damages, breakages and injuries happening to the same until returned by paying Victoria U Drive Yourself Auto Livery the amount required to restore it to the same good order and condition in which it now is and in case it cannot be so restored the loss in value."

The contract was put in evidence in the present case by the appellant, being the contract of the minor defendant, and the action must be deemed to be founded upon a contract (*Jennings* v. *Rundall* (1799), 8 Term Rep. 335; 101 E.R. 1419). In *Earle* v. *Kingscote* (1900), 1 Ch. 203, Byrne, J., at p. 208, said:

"Although an infant is liable for a tort, yet an action grounded on contract cannot be changed into an action of tort. Thus an infant has been held not liable for overriding a horse which he had hired."

and the learned judge (Byrne, J.) cited *Jennings* v. *Rundall*, *supra*. It is evident that no cause of action has been established against the infant defendant in the present case.

I would therefore affirm the judgment of the learned trial judge and dismiss the appeal, as against both of the defendants (respondents).

MACDONALD, J.A.

MACDONALD, J.A.: The respondent, Thomas W. G. Wood, sixteen years of age, hired a car from appellant Company to go for a drive taking two other boys with him aged nineteen. The three boys agreed to share equally in paying for the hire of the car although the contract was signed by Wood only. The car, through reckless driving, was wrecked and Wood's two companions killed. All three took turns in driving but at the time of the accident one of the boys killed was at the wheel. Appellant Company sued the infant Wood and also his father, respondent W. G. Wood, for damages to the car, submitting that the father was liable under section 12 of the Motor-vehicle Act Amendment Act, 1927, Cap. 44, reading as follows:

"So long as a minor is living with or as a member of the family of his parent or guardian, the parent or guardian shall be civilly liable for loss or damage sustained by any person through the negligence or improper conduct of the minor in driving or operating a motor-vehicle on any highway; but nothing in this section shall relieve the minor from liability therefor."

The learned trial judge dismissed the action as against both respondents. As to the son his infancy does not protect him from a claim for damages in tort. Further although not driving the car when the accident occurred he is liable because of the joint control and possession exercised by all three occupants of the car (*Hammer* v. *Hammer and Luthmer* (1929), [41 B.C. 55]; 3 D.L.R. 273; *Dixon* v. *Grand Trunk R.W. Co.* (1920), 47 O.L.R. 115; *Davey* v. *Chamberlain* (1803), 4 Esp. 229).

But the respondent W. G. Wood, the father, is not liable under the section quoted. His liability is purely statutory. He is only liable for the negligent conduct of the minor in "driving or operating" the car. One sitting beside the driver or in the back seat is not operating the machine. To operate in the sense contemplated by the statute is to run it.

I confess there is much to be said for the contrary view expressed by my brother MARTIN. As the car was in the joint control of the three boys each of them would be liable for the misconduct or negligence of the one actually driving (*Davey* v. *Chamberlain, supra*). The son who engaged the car on behalf of all three "allowed the person who was driving to drive. That was precisely the same thing as if he did it himself" (Darling, J., in *Du Cros* v. *Lambourne* (1906), 70 J.P. 525 at p. 527). That is true *qua* injuries received by a plaintiff through negligent driving as against the occupants of the car. That is because of joint control and the power in the occupants to interfere with the man at the wheel, and if possible, prevent an accident. We are dealing however with a statutory liability imposed upon a third party, *viz.*, the father. He cannot interfere to prevent the michief at the moment of danger. Such a statute imposing an onerous liability on a third party should not receive a strained interpretation. Nor should it be held that because one not at the wheel may in law be regarded as the driver for reasons well understood this interpretation should be given to the words "driving or operating" in the statute where the same legal prin-

COURT OF APPEAL

1930

Jan. 7.

VICTORIA U DRIVE YOURSELF AUTO LIVERY AUTO LIVERY, LTD. v. WOOD

ciples do not apply. I prefer the views expressed by the Appellate Division in *O'Reilly* v. *Canada Accident and Fire Assurance Co. Ltd.* (1929), 63 O.L.R. 413, where a somewhat similar clause in an insurance policy was strictly interpreted, the term "operating" being construed in its strict and primary sense. I think, too, there is internal evidence in the clause itself, *viz.*, "the negligence or improper conduct of the minor in driving or operating" to indicate that the Legislature intended the words "driving and operating" to be limited to the ordinary and natural meaning usually ascribed to them, *viz.*, a physical or mechanical act.

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

Solicitor for appellant: *Frank Higgins.*
Solicitor for respondents: *Crease & Crease.*

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

PATTERSON v. VULCAN IRON WORKS.

Company—Surrender of shares—Agreement as to—Validity—Reduction of capital—Trafficking in shares—Lapse of time.

The plaintiff incorporated the defendant Company for the purpose of taking over the assets and business of certain boiler works of which he was the principal owner. Some time after the business was taken over by the Company the original agreement as to the transfer of the assets and business of the boiler works was modified by an agreement whereby the Company agreed to assume the liabilities of said business and issue to the plaintiff 55 fully paid-up shares of the Company in consideration of the transfer of the assets of said works. Later it was discovered that the liabilities of the plaintiff's business substantially equalled the value of the assets and a compromise agreement was entered into whereby he surrendered his shares to the Company and agreed to take in lieu thereof whatever the shareholders of the Company should vote him. An action brought more than 20 years after the last transaction to recover his shares under the original agreement was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the compromise agreement was within the power of the Company and did not

bring about a real reduction of capital or constitute a purchase by the Company of its own shares or prejudice creditors.

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 11th of July, 1929, in an action to restore him as holder of 251 shares in the defendant Company. The plaintiff, who was an experienced engineer, had managed the business of the Vulcan Boiler Works, he and one Turner being the sole owners. In June, 1907, he incorporated the Vulcan Iron Works, Limited with a capital of $50,000 (500 shares of $100 each) to take over the Vulcan Boiler Works. One J. E. Bird was appointed trustee for the Company and the plaintiff entered into an agreement with the trustee fixing the value of the assets and business of the Vulcan Boiler Works at $30,000, the whole concern to be taken over by the Company by paying the plaintiff $5,000 cash and 250 fully paid-up shares of the Company. The business was taken over by the Company and the plaintiff was made president and managed the business. Shortly after it was discovered that Turner had an interest in the Vulcan Iron Works, doubts arose amongst the directors and shareholders as to the value of the old business and they were pressed by creditors. After a number of meetings it was agreed that the plaintiff should take $10,500 and pay Turner's share from this amount, Patterson agreeing to take 55 shares in the Company as his portion of this amount. The affairs of the Company continued to get worse and further disputes arose as to the value of the old concern and finally in May, 1908, the plaintiff agreed to give up the management of the Company and surrender the shares he had received, but he was to receive in lieu thereof whatever the shareholders voted him. The Company then continued under a new management but the shareholders never voted anything for the plaintiff in lieu of the stock he had given up. The Company afterwards prospered and the plaintiff brought this action in February, 1929.

Statement

The appeal was argued at Vancouver on the 25th to the 29th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: This action charges the direc-

Argument

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

tors of fraud and conspiracy and their action in taking away the plaintiff's shares was *ultra vires*. The Company had no power to cancel the shares on the share register. That a surrender of shares is unlawful see *Bellerby* v. *Rowland & Marwood's Steamship Company, Limited* (1902), 2 Ch. 14; *Hopkinson* v. *Mortimer, Harley & Co., Limited* (1917), 1 Ch. 646 at p. 653; *Alberta Rolling Mills Co.* v. *Christie* (1919), 58 S.C.R. 208. This being an action to establish a legal right there is no bar by laches or other equitable defences: see *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; *Chadwick* v. *Manning* (1896), A.C. 231; *White* v. *Sandon* (1904), 10 B.C. 361; *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425 at p. 448; *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607.

Argument

J. W. deB. Farris, K.C., for respondent: There is power in the Courts to say the transaction cannot stand as the assets he transferred to the Company had no value whatsoever. The cases submitted support this proposition by analogy: see *Rowell* v. *John Rowell & Son, Lim.* (1912), 81 L.J., Ch. 759 at p. 764. You can do by mutual agreement what the Company has power to do: see *Livingstone* v. *Temperance Colonization Society* (1890), 17 A.R. 379 at p. 383. The Court should consider Patterson's attitude at the time of the transaction over 20 years ago. In fact the liabilities exceeded the assets and there was no consideration for giving him shares. Twenty years having elapsed his rights have expired, whether legal or equitable. *Bellerby* v. *Rowland & Marwood's Steamship Company, Limited* (1902), 2 Ch. 14, was decided on the ground that the forfeiture was *ultra vires*. See also *Clarke and Chapman* v. *Hart* (1858), 6 H.L. Cas. 633. This is not a trafficking in shares: see *In re Denver Hotel Co.* (1893), 62 L.J., Ch. 450 at p. 455; *British and American Trustee and Finance Corporation* v. *Couper* (1894), 63 L.J., Ch. 425 at p. 433. Assuming it was *ultra vires* to accept a surrender of the shares, the plaintiff by his own conduct disentitled himself to relief and 20 years have elapsed: see *Jones* v. *North Vancouver Land and Improvement Company* (1910), A.C. 317 at pp. 328-9; *Prendergast* v. *Turton* (1843), 13 L.J., Ch. 268.

MacInnes, in reply, referred to Palmer's Company Precedents, 13th Ed., 61.

COURT OF APPEAL

1930

Jan. 7.

Cur. adv. vult.

7th January, 1930.

PATTERSON v. VULCAN IRON WORKS

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

MARTIN, J.A.: This appeal should, in my opinion, be dismissed on the main ground, to which I confine myself, *viz.*, that, in brief, on the special facts before us (too voluminous for convenient and accurate recital) what happened here was not a real reduction of capital, as distinguished from forfeiture, but, on the authorities cited a valid surrender of the shares without prejudice to the Company's assets or creditors pursuant to a *bona fide* settlement of conflicting claims and interests then in sharp dispute, and hence the invoked sections of the Companies Act, R.S.B.C. 1897, Cap. 44, do not apply.

MARTIN, J.A.

While I have come to this conclusion I feel impelled to guard myself by saying that I cannot, with respect, adopt in general the reasons given by the learned judge below, *e.g.*, the important statement that the plaintiff did not fully meet the final call upon his stock, was admitted by counsel to be an error; and also that the matter can at all be viewed in the light of a fraudulent conspiracy because that aspect of it was specifically abandoned at the trial as the appeal book shews at pp. 54, 72.

MCPHILLIPS, J.A.: It is with regret that I find myself constrained upon a full review of this appeal, to hold that no case has been made out for the allowance of the appeal. I cannot part with the case though without expressing my deep sympathy for the appellant, and I am impelled to express the extra-judicial view that it is a case where some material consideration should go to the appellant from and out of the coffers of the Company to one who was the founder of a business which has become an exceedingly prosperous one.

MCPHILLIPS, J.A.

I would dismiss the appeal.

MACDONALD, J.A.: The appellant prior to June, 1907, was the owner (with a partner) of the Vulcan Boiler Works. In that year the business was incorporated as respondent Company

MACDONALD, J.A.

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

with a capital of $50,000 (500 shares of $100 each. On June 12th, 1907, an agreement was executed between appellant (who was treated as sole owner of the Vulcan Boiler Works) and J. Edward Bird as trustee providing that in consideration of $30,000 payable $5,000 in cash (to purchase the interest of one Turner, later mentioned) and $25,000 in 250 paid-up shares for appellant, the latter would transfer to the trustee in trust for the proposed company the assets of the Vulcan Boiler Works and the land on which the plant was erected. It was on appellant's representations as to value that the consideration was placed at $30,000.

The Company was incorporated in June, 1907, one of its objects being (to quote the memorandum):

"To acquire the assets of the business known as the Vulcan Boiler Works, and to pay for the same either in money or shares of the company or partly in money and partly in shares; to carry on the manufacture of iron, and steel"

and kindred activities, etc.

By the articles the directors were to carry the preliminary agreement into effect with, however,

"full power nevertheless to agree to any modifications of the terms of such agreement either before or after the execution thereof."

MACDONALD, J.A.

This, taken with the extract quoted from the memorandum, is important. The Company had power also by its articles by special resolution to reduce the capital

"by paying off capital or cancelling capital which has been lost or is unrepresented by available assets, or reducing the liability on the shares or otherwise, as may seem expedient, and capital may be paid off upon the footing that it may be called up again or otherwise."

At the first organization meeting of shareholders appellant was appointed a director, and at a meeting of directors was made president. It was also agreed by resolution that the terms of the contract between appellant and Bird should be carried out and shares allotted in accordance therewith. That resolution was not implemented however because difficulties with creditors arose and in addition the Company could not pay the sum of $5,000 for Turner's interest. At a meeting of shareholders on 9th July, 1907, it was resolved that the respondent Company should take hold of the business of the Vulcan Boiler Works on the 1st of August, 1907; that all accounts and adjustments should be made to that date and that an inventory and statement

of its assets and liabilities should be prepared in the meantime. At a meeting of the directors on the same date it was resolved that a proper conveyance should be made to respondent Company, stock issued to appellant as provided for and that the Company's funds as received might be used to perfect title. At a meeting of shareholders on 9th August, 1907, a statement of "resources and liabilities" received in the meantime was adopted and the time for taking over the business postponed to 1st September, 1907.

About this time hitherto unknown outstanding accounts and liabilities came to the surface. Turner was a partner in the old business and at a directors' meeting on October 4th, 1907, in order to purchase his interest the Company's solicitor was authorized to negotiate a loan of $2,500 to be used to pay off Turner on condition that he took $4,000 in stock and $1,000 in cash (pursuant to an agreement with him) the balance to be used "to put the matters of account of the Vulcan Boiler Works in proper shape to take over such business the same not to be taken over until satisfactory to the solicitors and any two of the directors."

On the 21st of October, 1907, an extension agreement for six months was executed with creditors of the Vulcan Boiler Works by appellant and Turner on the one hand and Trustees on behalf of the creditors on the other. I refer to it to show the liabilities that had to be met, quite unknown when the preliminary agreement before incorporation was signed. At a meeting of the directors on January 6th, 1908, the appellant and another director were appointed to negotiate with the trustee for the creditors for the best terms obtainable, so that the plant and property might be taken over by the Company. At the same time it was resolved that a call of 25 per cent. on unpaid stock subscriptions (several additional shareholders were now interested) should be made to have money available to carry out any arrangement which might be made with creditors.

On January 13th, 1908, an agreement was entered into between appellant, respondent Company, trustees and creditors setting out terms of settlement. Under it respondent Company assumed all liabilities and as the original situation entirely

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

changed by reason of creditors' claims, this agreement recited that:

"And whereas the said party of the first part [appellant] has agreed to sell all his estate, right, or title, and interest in the Vulcan Boiler Works, its plant, machinery, assets, real estate, and effects of every kind, and to take at the present worth thereof as shewn by an inventory to be taken to the satisfaction of the said company, the said company to assume the liabilities of the said Vulcan Boiler Works, and to indemnify and save the trustees harmless and pay the liability of the Vulcan Boiler Works to the trustees and creditors, as hereinafter mentioned."

It provided that respondent Company should execute a mortgage to trustees on its plant, property and machinery to secure these claims.

On 24th January, 1908, an agreement was entered into between appellant and respondent Company, as follows:

"Whereas the party of the first part was with one Alfred H. Turner the owner of the Vulcan Boiler Works of New Westminster.

"And Whereas the company has agreed after carefully checking figures and statements of the Vulcan Boiler Works to take over the said business at Ten thousand five hundred ($10,500) dollars.

"And Whereas it has been arranged that Five thousand ($5,000) dollars of this shall go to Alfred H. Turner in full of his share.

"Witnesseth that in consideration of Five thousand five hundred ($5,500) dollars in stock payable to D. C. Patterson fully paid up of the Vulcan Iron Works, Limited, deliverable forthwith on demand, the said D. C. Patterson doth hereby assign, transfer and set over unto the said company all the assets of the Vulcan Boiler Works at New Westminster subject to existing liabilities including debt to Peter Gray amounting to One hundred and forty-four ($144) dollars, to be assumed by the said company.

MACDONALD, J.A.

"And the said company hereby covenants and agrees on behalf of itself, its successors and assigns, to indemnify and save harmless the said party of the first part of and from all liability in connection with the business heretofore known as the Vulcan Boiler Works, and to assume and pay the liabilities according to a certain agreement bearing date the 13th day of January instant, made between the said D. C. Patterson, and various creditors and the company."

It will be noted that the original consideration of 250 fully paid shares for appellant was by his own agreement abrogated and instead $5,500 in stock or 55 paid-up shares were accepted by him on the basis that the true value of the assets of the Vulcan Boiler Works was not $30,000 but $10,500 of which Turner was entitled to $5,000 ($4,000 in stock and $1,000 in cash). This settlement was based upon information obtained as to the value of assets and the extent of liabilities. It was filed with the registrar of joint-stock companies on 27th Jan-

uary, 1908. A directors' meeting on 27th January, 1908, confirmed this settlement and it was resolved "that stock be issued to Patterson and Turner pursuant to agreement." A share certificate for 55 fully paid-up shares was issued for appellant but apparently it was not handed to him. At all events we now have the consideration of 55 shares substituted for the original consideration of 250 shares because of the agreement as to values and the assumption of appellant's liabilities.

This however did not end the difficulties encountered.

At a meeting of shareholders on the 25th of April, 1908, at which appellant was present (as he was at all meetings) further trouble arose. The following extract from the minutes discloses the latest effort made to reach finality:

"Minutes of previous shareholders' meetings were read and approved on the understanding that any words relative to accuracy of statement then submitted be deleted. . . .

"As it appeared from statement of March 31st that there was not any such surplus as was shewn by statement of Jan. 1st on which the company made an allotment of $9,500 [*i.e.*, $5,500 to appellant and $4,000 to Turner] stock, an agreement was entered into, on the motion of Mr. Cunningham, sec. by Mr. Johnston and signed by Mr. Patterson, to re-adjust Mr. Patterson's stock and allot stock for the correct balance, there being allowance of $2,000 for goodwill, Mr. Patterson to accept stock he is entitled to under these conditions and the company agrees to give Mr. Patterson stock on the basis of such re-adjustment. Two weeks were allowed Mr. Patterson to investigate and adjust same with the company. And if adjustment cannot be arrived at by consent then it shall be referred to two arbitrators, one to be chosen by the company and one by Mr. Patterson and they to have a right to choose a referee, the award of said arbitrators to be final. The aforesaid agreement was signed on behalf of the company by Mr. Patterson and Mr. Runcie."

Mr. Bird in evidence outlines the situation at that time. I do not quote it as I adopt with few exceptions, the narration of facts outlined in the judgment of the learned trial judge.

On the same date (April 25th, 1908) an agreement was entered into between respondent Company and appellant in these words:

"Whereas on the taking over of the Vulcan Boiler Works the company made certain allotment of stock amounting to $9,500 [$4,000 to Turner and $5,500 to appellant] for the business of the said Vulcan Boiler Works and whereas it appears that there was not any such surplus, as shewn by statement this day submitted dated March 31, 1908, in said business and the said company has requested the party of the second part [appellant] to re-adjust his accounts and stock and has agreed to allot stock for the correct balance, even allowing $2,000 for goodwill.

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

"Witnesseth that in consideration of the premises the said Patterson agrees to return his stock allotment and to re-adjust the said matters and take in stock what he is entitled under these conditions and the said company agrees to give said Patterson stock on the basis of such readjustment.

"And it is agreed, that two weeks shall be allowed the said Patterson to investigate and adjust same with the company on the taking of new statements and accounts and if such adjustment cannot be arrived at by consent then that it shall be referred to two arbitrators one to be chosen by the company and one by the said Patterson and they to have a right to choose a referee, the award of the said arbitrators to be final."

Then on May 9th, 1908, a meeting of shareholders was convened (appellant leaving the meeting of his own accord) at which

"The minutes of meeting of April 25 were read and approved . . . . The president [Mr. Cunningham] suggested that a committee of three, consisting of Mr. Bird, Mr. Richardson and himself be appointed to meet Messrs. Patterson and Turner *re* readjustment of stock presently held by them, and report to meeting to be held on Saturday, May 16."

On May 19th, 1908, the shareholders severally signed an offer for sale by way of option to appellant of all their stock in respondent Company agreeing to keep the offer open for three months for acceptance. Then on the following day (May 20th, 1908) the same shareholders met (appellant and Turner also present) and an extract from the minutes shews that

MACDONALD, J.A.

"An agreement was entered into and signed by D. C. Patterson surrendering his stock certificate for $5,500 stock in the Vulcan Iron Works Ltd., and to take in lieu of such whatever the Vulcan Iron Works shareholders voted him. Mr. Patterson empowered the secretary of the company to sign surrender of such certificate as his attorney. The foregoing arrangement was come to in pursuance of agreement of the 25th of April, 1908, and in consideration of signed option, as enumerated below for 3 months this day received."

On the same date appellant signed the following document:

"I now surrender my stock certificate for $5,500 stock in the Vulcan Iron Works Ltd. and agree to take in lieu thereof whatever the shareholders vote me and I empower the secretary as my attorney to sign surrender of such certificate. This is given in pursuance of agreement 25 April, 1908, and in consideration of option this day received."

And finally we have directors' meeting on December 8th, 1908, from which it appears that

"Mr. Bird moved cancellation of D. C. Patterson's stock certificate. Mr. Richardson seconded as per agreement of May 20th, 1908."

On the foregoing facts and records, supplemented by the evidence, the sole question is whether or not appellant was legally deprived of his shares by cancellation, surrender or other-

wise. He submits that he is still the owner of the shares originally contracted for, not on equitable but on legal grounds, and seeks a declaration accordingly. The action as disclosed by the pleadings was based largely upon fraud but that was abandoned at the trial. The bare question of law remains.

It was submitted that the surrender and cancellation involved a reduction of capital and that can only be accomplished with the sanction of the Court. That is true unless the so-called gratuitous surrender did not reduce the real capital. The Act applicable at the time may be found in R.S.B.C. 1897, Cap. 44, Sec. 71, etc. The procedure there outlined was not followed. Capital might be reduced or diminished by expenditures in a direction reasonably incidental to the powers of the Company. Respondent is not within that principle. The paid-up capital must be kept intact available for creditors as the fund out of which their claims may be paid. That fund consists of cash received for the shares or its equivalent in plant, machinery and property. In this case, however, assets in the latter form did not in reality exist, it was fictitious capital. Appellant represented that the assets were worth $30,000; later he agreed that a fair value would be $10,500, and finally that the liabilities equalled or exceeded the value of the assets. Cases arise where capital my be reduced without prejudice to creditors and it was to enable this to be done that the rule against reduction was relaxed, safeguarding the right however by stringent provisions that must be followed. If therefore what took place was the ordinary reduction of capital it was not effectively brought about. It may be effected without the sanction of the Court by the forfeiture of shares for non-payment of calls pursuant to the articles. Forfeiture is not treated as a reduction of capital. But this method can not be relied upon. The articles were not followed. They apply only on failure to pay calls or instalments and appellant's shares were fully paid. Nor can it be said that what took place was in the nature of a forfeiture. Suppose, however, that a shareholder cannot pay for his shares; or that he received shares on the mistaken view that he did pay for them, can an adjustment be made between the Company and the shareholder by the surrender of the shares? Jessell, M.R. in *In re Dronfield Silkstone Coal Company* (1880), 17 Ch. D. 76 at p. 84, quotes James, L.J., who said:

MACDONALD, J.A.

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

"'We have been referred to several cases in which a power to accept surrenders of shares, and the more common case of a power to declare a forfeiture of shares and to deal with those forfeited, have been held to be good. I am reported to have said in one, *Teasdale's Case* (1873), 9 Chy. App. 54, that the power to purchase shares would be good. I am not quite sure whether that was not too wide a deduction from the cases to which I was then referring, and certainly it was not necessary for the decision of the case. But, however that may be, when the company deals with an individual shareholder, and does what appears to be right under the circumstances, namely, to accept the surrender from the shareholder who cannot pay, and to release him from further liability, that might be good, although incidentally, and to a small extent it may be said to diminish the capital.'"

MACDONALD, J.A.

The ordinary case of reduction of capital occurs when, *e.g.*, capital is reduced say from $100,000, divided into 1,000 shares of $100 each to $50,000 divided into 500 shares of $100 each effecting it by cancelling the present liability and reducing the nominal amount of each share; or again where one class of fully paid-up shares are surrendered and other shares in exchange credited as paid up. The case at Bar differs from any others I have found and I think calls for different treatment. There was a surrender of shares which did not involve any payment out of the funds of respondent Company. If appellant was paid a certain sum or any tangible consideration for the surrender it would be in the nature of a purchase by the Company of its own shares and therefore objectionable (*Trevor* v. *Whitworth* (1887), 12 App. Cas. 409 at p. 418). I cannot find, however, on a reasonable construction of the agreements and option given that there was any consideration. He agreed to surrender the shares while the Company on its part was to issue to him, not any stipulated consideration but the amount of stock, if any, which it might afterwards think he was entitled to. There was therefore no purchase by the Company. The shares were not acquired by way of forfeiture because the conditions upon which forfeiture might take place did not exist. But as Lord Herschell said at p. 418, *supra*:

"There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield & Co.* [(1880)], 17 Ch. D. 76: 'It is not for me to say what the limits of surrender are which are allowable under the Act, because each case as it arises must be decided upon its own merits.'"

In *Rowell* v. *John Rowell & Son, Lim.* (1912), 81 L.J., Ch.

759 at p. 762, Warrington, J. said that the question as to the power to accept surrenders still remains a subject of decision.

What took place was an acceptance of surrender and a cancellation of shares without prejudice to creditors appellant ceasing to be a member. Profiting and trafficking in shares was not the purpose (nor yet the act). If this was the ordinary surrender of paid-up shares and they were not to be reissued that would involve a reduction of capital. But if there is a surrender of shares issued as fully paid on the false basis that there was consideration and the shareholder and company mutually agree that the shares were in fact not paid for the consideration never having existed, the *status quo ante* may be restored by the parties. The Company were not parting with any of its assets. They were not in reality paid-up shares. No sum of money nor the equivalent of money was paid for them. Upon mutual discovery of that fact all parties agree to their cancellation.

The question is, Was such an adjustment or compromise within the power of the Company? And may that question be determined without offending the principles laid down in many cases cited dealing with reduction of capital and trafficking in shares? I think it can. I have already pointed out that one of the objects of the Company as shewn by its memorandum of association was to acquire the assets of the Vulcan Boiler Works and to pay for them in money or shares or partly in money and partly in shares. In the formative state of the Company it is carrying out that expressed object so long as it is dealing with the question of purchasing and paying for the assets of the Vulcan Boiler Works. That was the sole question dealt with throughout these negotiations and it was one of the main purposes for which the Company was formed. It was in respect thereto that an agreement was finally arrived at. Three stages were passed through before this phase of the Company's powers were exhausted. First an issue of 250 shares in payment of supposed assets. Then when assets were found to be insufficient to pay for 250 shares the agreement in respect thereto was set aside and 55 shares were, if not delivered (they did not leave the Company) agreed upon as fair payment; and finally when it was found that creditors' claims were so large that if appellant secured 55 shares it would be without consideration, by mutual

MACDONALD, J.A.

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

MACDONALD, J.A.

agreement, they are surrendered and cancelled. I have also pointed out that by the articles power was given to modify the terms of the original agreement. It was not going beyond the memorandum to take that power in the articles. Each successive modification of the agreement was therefore authorized. Until a finality was reached on this point the respondent Company was acting within its powers in carrying out one of the objects for which it was formed, *viz.*, to acquire the assets of the Vulcan Boiler Works and to issue shares of equivalent value involving the *sequitur* that if there were in reality no assets and the Company had to be started (as it was) by independent means, such as directors raising capital by bank guarantees then no shares would be issued to the appellant. All parties agree to this course. There are resolutions and agreements covering every phase of what were really preliminary steps to the formation of the Company as a going concern. There was no reduction of real capital; no purchasing by the Company of its own shares, no prejudice to creditors (they were fully protected) simply an effort finally successful to carry out one of the objects of the Company, *viz.*, to acquire assets and issue equivalent shares for equivalent value. Disputes arose and until settled the Company was engaged in acquiring the assets of the Vulcan Boiler Works and arranging to protect the creditors. I think the Company incidentally thereto had power to compromise, settle and adjust with appellant. If they found that by misrepresentation shares were wrongly issued and the appellant refused to compromise the Company could, I think (as it was argued) secure rescission by action in the Courts. It is said that on rescission there must be *restitutio in integrum* but that may be waived. Appellant could agree that instead of being put back in his original position with liabilities to meet he would compromise by accepting relief from that liability. If that could be accomplished by action, it may be by settlement and compromise. I do not think, however, we are forced to base our conclusion on this supposition that such an action could be maintained. The Company was acting within its expressed powers. I am inclined to think, too, apart from those powers, the Company had authority to do what it did "as an incident of its existence." It was a compromise or settlement of a *bona fide*

dispute with a shareholder. That compromise agreement was entered into on April 25th, 1908, and its *bona fides* is attested by the evidence. A compromise may be made with a shareholder "where the dispute concerns the *validity of the contract to take shares* [the italics are mine] or the validity of the holding," then "shares may be cancelled by way of compromise when it would otherwise be illegal" (Maclennan, J.A., in *Livingstone* v. *Temperance Colonization Society* (1890), 17 A.R. 379 at p. 383). Appellant's contract to take shares was invalid or voidable for want of consideration. It was on the basis of the truth of appellant's representations that the shares were given and on the basis of his admission or assent to the true facts that they were cancelled. He was holding shares mistakenly given for a consideration that did not exist. If a Company was incorporated to acquire two properties thought to belong to B. for stipulated shares for each parcel and it was discovered that B. did not own one of the parcels the contract for shares in respect thereto would not be enforceable and a dispute arising it could be compromised. There is no difference in principle if title to the parcel was in B.'s name but it was afterwards found to be encumbered with liabilities exceeding its value. A compromise of this nature could not be made if the dispute was about a different subject-matter. To quote Maclennan, J.A. further at pp. 383-4:

MACDONALD, J.A.

> "If the surrender or cancellation of shares be not within the ordinary powers of the company, they cannot be surrendered or cancelled as part of an agreement for the compromise of a dispute, not about the subscription, or the right to, or the validity of the shares themselves, but about some other matter."

Reference may also be made to *In re Scottish Petroleum Co.* (1882), 51 L.J., Ch. 841, referred to by my brother MARTIN during argument.

Bellerby v. *Rowland & Marwood's Steamship Company, Limited* (1902), 2 Ch. 14 was relied upon by appellant. There the intention was that the surrendered shares (it was thought advisable for each shareholder to surrender a certain number of shares to meet a loss) should become vested in the company and that the directors should be relieved of liability for £1 per share at that time unpaid. Then later when the company became more prosperous it was thought advisable to restore them. Action was brought for a declaration that the original surrender was

COURT OF APPEAL

1930

Jan. 7.

PATTERSON v. VULCAN IRON WORKS

invalid and to have the agreements authorizing it set aside. The surrendered shares had not been reissued. The judgment is based upon the answer to the enquiry as to whether the transaction was really one of purchase by the Company of its own shares because since *Trevor* v. *Whitworth, supra,* a company cannot do so unless by way of reduction of capital with the sanction of the Court. It was thought because there was consideration, *viz., the* release from payment of £1 per share it ought to be considered as a sale and purchase rather than a surrender. If appellant surrendered his shares in return for a sum paid by the Company it would be a sale and objectionable.

The question of laches was raised against appellant. If the respondent Company is within the principles advanced by appellant's counsel it cannot escape on this point because the equitable doctrine arising out of laches indicating acquiescence in the existing state of things would not apply. He bases his submission not on equitable principles but on the ground that in law appellant never ceased to be the owner of the shares. The circumstances under which one is precluded from exercising a legal right is considered in *Willmott* v. *Barber* (1880), 25 Ch. D. 96 at pp. 105 and 106, and Duff, J. reviewed it in *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425 at p. 451 *et seq.* Briefly one is not deprived of a legal right by acquiescence unless conduct is such that it would be fraudulent to set up those rights. However, as I view the case at Bar, as one where a compromise agreement was effected for the settlement of disputes touching the validity of shares, equitable principles do apply, and, because of the facts outlined in the judgment of the learned trial judge which with one or two immaterial exceptions are correct I would not permit the appellant to maintain this action. The appellant's only right at the time was to arbitrate as to the value of his interest, if any. Upon the proper construction of that agreement he could only procure an arbitration within a reasonable time. That right is now gone. It would be unfortunate if after twenty years' silence by one who was a party to every step taken, now that the Company is flourishing because of the efforts of others where appellant not only did not contribute to that condition but on the contrary was relieved of liabilities, should be permitted to make a serious

MACDONALD, J.A.

inroad on the holdings, *e.g.*, of the respondent Agnes Lee Baeschlin, who was not a shareholder at the time and was therefore entirely disassociated from the proceedings now complained of.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *W. H. Patterson.*
Solicitors for respondent: *Congdon, Campbell & Meredith.*

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK AND BERRY. (No. 2).

Practice—Costs—Appendix "N"—Proviso in last clause of letter press—Application of.

The last clause of the letter press in Appendix "N" of the Rules of Court provides that "In all other actions and proceedings there shall be taxable the amount set out opposite each respective tariff item in column 2. Provided, however, that for special cause the Court or judge may at any time at or after trial and before the bill of costs has been taxed, order the costs to be taxed under column 1, 3 or 4."

Held, that the proviso is limited in its application to actions and proceedings other than those for liquidated amounts, etc., as set out in the opening paragraph of Appendix "N."

APPLICATION by plaintiff to have costs taxed under columns 3 or 4 of Appendix "N." Heard by GREGORY, J. in Chambers at Vancouver on the 13th of January, 1930. Statement

C. L. McAlpine, for the application.
Alfred Bull, for defendant Company.
G. Roy Long, for defendant Berry.

24th January, 1930.

GREGORY, J.: This is an application by the plaintiff to have the costs taxed under column 3 or 4 of Appendix "N." Judgment

GREGORY, J. (In Chambers)

1930

Jan. 24.

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE CO. OF NEW YORK AND BERRY

Judgment

It is admitted that without an order the costs must be taxed under column 2, as the amount sued for is a liquidated sum in excess of $3,000 but does not exceed $10,000. The application is made under the proviso, being the last clause of the letter press in Appendix "N" on p. 245 of the Rules of Court; the difficulty arises through the interpretation of that proviso. The defendant contends that the proviso is limited in its application to actions and proceedings other than those for liquidated amounts, etc., as set out in the opening paragraph of Appendix "N," while the plaintiff contends that it has a general application to all actions. In my opinion the defendants' interpretation is the correct one. The proviso is a clause only of the final paragraph, and not a separate paragraph, as one would expect if it was to have a general application to all actions.

It is well known that when Appendix "N" was made in its present form it was with the intention of enabling litigants to form some idea of the costs of any proposed action and to reduce to a reasonable sum the costs of all actions and proceedings. This object would to a large extent be nullified, if in every case the trial judge could direct that the costs should be taxed on a higher scale than that prescribed by the rules. In order to effect the object aimed at the framers of the Appendix "N" divided all actions and proceedings into two classes. First those described in the opening paragraph, and second, "all other actions" and proceedings not included in the first division. In actions falling within the first division the governing column was ascertained by the amount involved; and in the second division, column 2 applied irrespective of the amount involved, but subject to the proviso already mentioned and this, no doubt, was done because of the difficulty of doing justice in the matter of costs in such actions as would fall in the second division.

To give the clause the interpretation contended for by the plaintiff there would be this anomaly that if the present plaintiff's action had fallen within column 1, there would be no provision for taxing the costs under column 2, but it could be advanced to columns 3 or 4, while on the other hand though falling within column 2 it could, for special cause, be directed by the judge to be taxed under column 1.

It helps one to interpret the rule, I think, when it is realized

GREGORY, J. (In Chambers)

1930

Jan. 24.

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE CO. OF NEW YORK AND BERRY

that column 2 is not only the appropriate column for actions in the second division, but is also the appropriate column for actions in the first division when the amount involved is between $3,000 and $10,000.

The face value of the policy is $5,000, and the plaintiff's judgment must be limited to that amount together with costs of the action.

The plaintiff is entitled to her costs too against the defendant Berry, so far as the same have been increased by adding him as a defendant and such costs will also be taxed under column 2 of Appendix "N."

Application dismissed.

OBERG v. MERCHANTS CASUALTY INSURANCE CO.

MORRISON, C.J.S.C.

1930

Jan. 22.

OBERG v. MERCHANTS CASUALTY INSURANCE CO.

Insurance, automobile—Accident—Judgment against insured for negligence —Indemnity—Statutory conditions—Non-observance of—Lack of co-operation with insurers.

Where a policy of insurance on an automobile contains a statutory condition that in case of any claim made on account of any accident, the insured shall promptly give notice to the insurer of the claim and shall not interfere in any negotiations for settlement or in any legal proceedings, but shall co-operate with the insurer in the defence of any action, and in an action against the insured by a passenger in his automobile, the insurer is not recognized or consulted, the insured cannot recover from the insurer the amount of the judgment recovered by the passenger.

The logic of the legislation requiring the observance of the statutory conditions set out in the Insurance Act is to give the full conduct of the defence to the insurer to the end that the insurer may be satsified that there is no collusion or other element lacking *bona fides*.

ACTION against an insurance company for indemnity in respect of a judgment obtained against the insured and alternatively for relief against forfeiture. Tried by MORRISON, C.J.S.C. at Vancouver on the 14th and 17th of January, 1930. Statement

Reid, K.C., and *J. A. Grimmett*, for plaintiff.
Alfred Bull, for defendant.

22nd January, 1930.

MORRISON, C.J.S.C.: The plaintiff insured his automobile with the defendant Company. The policy contained the "statu- Judgment

MORRISON, C.J.S.C.

1930

Jan. 22.

OBERG v. MERCHANTS CASUALTY INSURANCE CO.

tory conditions" set out in section 154 of the Insurance Act, being Cap. 20, B.C. Stats. 1925. Under the rubric "Accidents to the persons and property of others" is condition 8, subsections (1), (2) and (3) of which provide:

"(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 proceeding, 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.

"(3) No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements are complied with and 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, and no such action shall lie in either event unless brought within one year thereafter."

Judgment

Condition 9 sets forth with particularity what the insured has to do when seeking to claim for damage to the vehicle insured. It is not necessary to consider this "condition" as the claim for damage to the car has been adjusted.

On April 1st, 1928, the plaintiff Oberg when proceeding at night along Kingsway, having alongside him in the front seat a guest, Miss Nelson, the car collided with a motor-truck which was parked by the curb. It was wrecked and Miss Nelson was somewhat seriously injured. On the 12th of September, 1928, she issued a writ against Oberg claiming damages. Oberg was represented by his own solicitor and the suit proceeded as far as examination for discovery when, without objection by Oberg, the action was discontinued without leave. The statutory conditions, subsections (1), (2) and (3) of condition 8, *supra,* had not been complied with. Indeed Oberg's solicitor declined to recognize the defendant Company in the matter. A fresh action was then commenced on the 21st of January, 1929, between the same parties and for the same cause of action. Oberg defended and his solicitor had the conduct of the defence throughout. The trial took place on April 16th, 1929, and Miss Nelson obtained

judgment against Oberg for $1,500 and costs, being for damages arising from the collision aforesaid. Oberg thereupon launched the present action seeking indemnity in respect of the aforesaid judgment and alternatively relief against forfeiture. At the trial the contest centred around the submission of the plaintiff that the plaintiff endeavoured or in fact did comply with those conditions and that the defendant repudiated all liability under the policy and declined to have anything to do with the case, at the times material to the issues herein.

As to that, the first part of his claim, I find that there was a non-compliance with the plain material statutory subsections (1), (2) and (3) of condition 8. It was not a question of mistake or misunderstanding on the part of Oberg's solicitor. The trend of the correspondence between him and the defendant's solicitor and the insurance adjuster Howard shews clearly that Oberg's solicitor, doubtless, actuated by a laudable though perhaps a mistaken desire the better to promote his client's interest, was reluctant to relinquish control of the suit and to hand over the papers therein to the defendant's solicitor and he said so. In addition to the correspondence the evidence of Mr. *Housser,* Mr. *Molson* and Mr. Howard throws the preponderance of the testimony against that on behalf of the plaintiff and far outweighs it. On this aspect of the case I am not unmindful of Oberg's evidence on discovery put in on behalf of the defendant. The plaintiff's solicitor would not at the material times go farther than to express his willingness to have the assistance of the defendant in his defence to the second action by Nelson against Oberg. The frequency with which cases occur where the guest or passenger, as she is called in this action, is suing the host makes it all the more necessary to have the full conduct of the matter at all stages in the hands of the insurer to the end that if the claim is a fair and meritorious one it may be adjusted and, if not, that it may be contested. The policy in question contained terms which are clearly expressed to be conditions precedent to liability and the insured must be taken to know that those conditions are enforceable and the insurer has the right to expect the insured to comply with them before he is called upon to meet the claim. Those conditions in the policy are taken from the statute and are deemed to be reasonable. The

Judgment

MORRISON, C.J.S.C.

1930

Jan. 22.

OBERG v. MERCHANTS CASUALTY INSURANCE CO.

insured must also be reasonable in his conduct when seeking to obtain his compensation. Reasonableness is the test, which the Courts apply. Lord Kenyon, Ch. J., in *Worsley* v. *Wood* (1796), 6 Term Rep. 710 at p. 718 said:

> "We are called upon in this action to give effect to a contract made between these parties; and if from the terms of it we discover that they intended that the procuring of the certificate by the assured should precede their right to recover, and that it has not been procured, we are bound to give judgment in favour of the defendant [the Phœnix Company]. . . . These insurance companies, who enter into very extensive contracts of this kind, are liable (as we but too frequently see in courts of justice) to great frauds and impositions; common prudence therefore suggests to them the propriety of taking all possible care to protect them from frauds when they make these contracts."

There is no evidence upon which to base the plea of waiver or confirmation in this case. The plaintiff in the alternative seeks relief against forfeiture and relies upon section 158 of the said Insurance Act. That section is 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."

Judgment

In my opinion that section does not apply to the facts of the present case. There was here an emphatic intended non-compliance—it may be under a misapprehension on the plaintiff or his solicitor's part as to the ultimate intention of the Company and not created by anything the Company did; but the consequences of that misapprehension, if such there were, cannot now be sought to be visited upon the defendant. Whatever *locus pœnitentiæ* there may be invoked in other forms of insurance, it appears to me that it should not be available in the circumstances of this case. The logic of the legislation requiring the observance of the statutory conditions set out in the Insurance Act is to give the full conduct of the defence to the insurer to the end that the insurer may be satisfied that there is no collusion or other element lacking *bona fides*, otherwise in many cases the insurers would be at the mercy of a third party where their own interests are materially at stake.

The action is dismissed.

Action dismissed.

REX v. SUTHERLAND.

MACDONALD, J. (In Chambers)

1930

Jan. 15.

REX v. SUTHERLAND

Municipal corporation — By-laws—Licence as a "manufacturer"—Licence as a "printer or publisher"—By-law No. 1954, City of Vancouver.

The defendant, who carries on his business in the City of Vancouver, procures the material required for his business, *i.e.*, paper, ink, glue, etc., from manufacturing houses or wholesalers and with the aid of printing machinery and labour, makes and produces letterheads, envelopes, stationery, books, etc., to the order of individual customers.

Held, that he is not entitled to be licensed as a "manufacturer" but should procure a licence as a "printer or publisher" under the Companies, Trades and Business Licence By-law.

APPEAL by the Licence Inspector of the City of Vancouver from the dismissal by a deputy police magistrate of a charge against Robb Sutherland under the Companies, Trades and Business Licence By-Law (No. 1954 of the City of Vancouver). The facts are set out in the reasons for judgment. Argued before MACDONALD, J. in Chambers at Vancouver on the 10th of January, 1930. Statement

Manson, K.C., for appellant.
McCrossan, K.C., for City of Vancouver.

15th January, 1930.

MACDONALD, J.: The appellant, Charles Jones, Licence Inspector of the City of Vancouver, being dissatisfied with the dismissal, by one of the deputy police magistrates, of a charge laid by him against Robb Sutherland under the Companies, Trades and Business Licence By-Law (No. 1954 of the City of Vancouver) applied for and obtained a case stated, under the provisions of section 89 of the Summary Convictions Act of the Province, the opinion of the Court being sought, as to whether or no, the determination, by the magistrate, of the charge was erroneous in point of law. Judgment

It appears that said appellant, on behalf of the City, contended that Sutherland should have applied for and obtained a licence as a "printer" under said by-law 1954; while Sutherland contended, that although he was a "printer," still, that he was

MACDONALD, J. (In Chambers)

1930

Jan. 15.

REX v. SUTHERLAND

entitled to obtain a licence as a "manufacturer." He made a formal application for that purpose, but it was refused and the appellant then laid the charge referred to. It was admittedly a test case, to determine whether "printers and publishers," who were specifically referred to in the by-law, had a right to assert that they were "manufacturers" and thus pay a lesser licence fee to the City. The difference, for instance, as to said Sutherland would be $35, as compared with $15. If this contention were upheld, it would apply as well to a number of other trades or occupations, referred to in the by-law, and lessen the licence fees payable by them. For example, boat-builders, blacksmiths, dressmakers, machine-shop proprietors, machine and foundry men, painters, paper-hangers, shipbuilders, undertakers and publishers might obtain such benefit. It would also affect the classification of many of the trades, occupations, callings, businesses and undertakings referred to in section 5 of said by-law. The object of such classification, apparently being to impose the licence fees in an equitable manner, gauged by the number of employees. Without further discussion, the importance of this test case thus becomes quite apparent, as affecting a large number of licensees.

Judgment

The first question which might be properly considered is whether Sutherland, being admittedly a printer, has a right to select another and more general trade as his occupation or calling and seek to be licensed thereunder. In different trades and callings there must necessarily, in many instances, be an overlapping to some extent in their work and occupation. If the power exists in the City Council to license a specific occupation, which may form part of a more general one, should it not prevail? For example, leaving aside the question as to whether a printer or publisher may not also be a manufacturer, it could not well be contended that a boat-builder is not a manufacturer. Should he then come under the more general trade, with a lesser licence, or would the more specific trade apply with a higher licence fee? This emphasizes the importance of the situation, to which I have referred.

The initial impression, that would prevail in one's mind is, that a printer, granting the power to license, would come under the provisions of a by-law in which he is specifically mentioned.

I think a contrary view untenable unless it be held, not only that a printer is a "manufacturer" and thus, *ipso facto,* coming within the purview of the legislation, limiting the amount of licence fee, payable by a manufacturer; but also that he is not amenable to the by-law, as a printer.

In 1921, the City of Vancouver obtained a revision, consolidation and amendment of its Acts of Incorporation. The Act was termed the "Vancouver Incorporation Act, 1921," and by section 163 "the Council may from time to time pass, alter and repeal by-laws." After objects are outlined in the subsections of section 163 as coming within its ambit, a number of trades, businesses and occupations are specifically referred to, and then, what has been termed an "omnibus" clause follows, *viz.*:

"(123.) For licensing or taxing and regulating every person in the city following or carrying on any profession, trade, business, occupation, or calling not hereinbefore enumerated, or who performs any work or furnishes any material for any purpose: . . . ."

"Printers and publishers" as well as many other trades and occupations, had not been previously enumerated and dealt with. It was not contended, and in fact was admitted, that the Council had, at the time, power to license, tax and regulate, *inter alia,* printers, but it was submitted that subsequent legislation, in 1928, destroyed such power and had the effect of controlling the amount of licence fees payable by printers, as being manufacturers. In other words, that the then existing right to pass by-laws became affected, as to printers, and that any by-law subsequently passed would be subject to and should comply with the provisions of such legislation. The Act was termed the Vancouver Incorporation Act, 1921, Amendment Act, 1928. Section 8 is as follows:

Judgment

"(1.) Section 163 of said chapter 55 is amended by adding thereto the following as subsections (126*a*) and (126*b*):—

"(126*a*.) For licensing any person, firm, or corporation carrying on within the city the business of a manufacturer, not to exceed the amount of one hundred dollars per annum; provided that in no case shall the amount of any licence fee so imposed exceed the rate of three dollars per person per annum engaged or employed in any such business:"

In 1928 the power already existed under said subsection (123) (the omnibus clause) to license any trade, not thereinbefore enumerated. Why then legislate as to such a general trade as a "manufacturer"? Was it intended to take the place, where applicable, of the power already exercisable? It is sought,

MACDONALD, J. (In Chambers)

1930

Jan. 15.

REX v. SUTHERLAND

as I have mentioned, to apply it in this case, as affecting printers and the question arises, whether it should be so applied?

In the first place, the City contends that a printer is not a "manufacturer" and that in any event it had already power conferred in 1926, by an amending Act (1926-27, Cap. 87) which enabled it by by-law to so define a "manufacturer," that it would remove any doubt as to what constituted a "manufacturer." Section 5 of this Act is as follows:

"5. Section 163 of said chapter 55 is amended by adding thereto the following as subsection (141*a*):

"(141*a*.) For defining and classifying businesses, trades, callings, and occupations, and classifying persons carrying on any business or following any trade, occupation, or calling within any of the provisions of this Act, and for empowering and authorizing the Council to differentiate and discriminate, according to such classification or classifications as may be designated in any by-law in that behalf, between such persons or classes of persons and between such businesses or classes of businesses, trades, occupations, or callings in respect of the amount of the licence fee or fees which may be imposed thereon under any of the provisions of this Act."

This provision was utilized by the City Council and said by-law 1954 passed on the 2nd of January, 1929. This by-law was a compilation and fully dealt with the complicated proposition of licensing different trades, occupations and callings. It was apparently carefully prepared and not only were definitions supplied, but various businesses, trades, callings and occupations were grouped and classified. I think the statute intended that the Council should have this extensive power, the purpose being, not only to define and classify but also to differentiate and discriminate, if it saw fit. It was, however, contended that under the power given, for defining, that the City Council exceeded its powers. Particularly as to manufacturers, it was submitted that the definition was not authorized. It reads as follows:

Judgment

"(o) 'Manufacturer' shall mean and include every person who carries on the business of manufacturing any commodity or commodities within the City, and whose sole business consists of manufacturing such commodity or commodities, and who exclusively deals in or sells such commodity or commodities only to wholesale or retail dealers or to other manufacturers or contractors."

This definition of a "manufacturer" was, however, repealed by by-law No. 1975, passed on the 6th of May, 1929, and repeated with the following additional words:

"But the same shall not be deemed to mean or include any person specifically designated, classified or referred to in subsections 1 to 50, and subsections 52 to 54 (both inclusive), of section 5 of this by-law, and who are subject to a specific licence fee under such specific designation or classification."

It was thus placed beyond question, that a manufacturer was not to include a printer or publisher, referred to in subsection (34) of section 5 of said by-law 1954. He was subject to a specific licence fee with proper classification. This definition was subject to exhaustive criticism by counsel for the respondent. There was also a suggestion that it was unreasonable, but I do not think so. In any event the City had safeguarded its position in passing by-laws, where its good faith was not attacked, by following the Ontario Municipal Act as follows:

Section 339 of Vancouver Incorporation Act, 1921.

"Any by-law passed by the Council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them."

In considering the definition of "manufacturer" there were some instances cited where, it was submitted, it might lead to an absurdity or an injustice. It might have been more aptly worded, in some respects, but giving it a reasonable construction I think it suffices to properly implement the power, conferred by the Legislature. It was a reasonable exercise of the right possessed by the Council to thus define such a general trade as a manufacturer.

"By-laws and resolutions of public corporations ought to be benevolently interpreted by the Courts and supported, if possible": *Vide* head-note in *The City of Montreal* v. *Tremblay* (1906), 15 Que. K.B. 425.

Judgment

Then there is a presumption in favour of the validity of a by-law. *Vide Dickson* v. *Kearney* (1888), 14 S.C.R. 743 and other cases cited in Meredith & Wilkinson's Municipal Manual, at p. 273. The one in question is intended to deal with such a purely local matter as the licensing of different trades, businesses and occupations in the City. "A Court should always endeavour to give a reasonable effect to a by-law": *vide Esquimalt Water Works Co.* v. *Victoria* (1904), 10 B.C. 193 at p. 195. Compare MARTIN, J., S.C. in appeal at p. 197 where, after referring to the judgment quashing a portion of a by-law on the ground that it was "insensible and meaningless," said, that "this is a conclusion, only open to us when it has been found impossible to attach any reasonable meaning to it."

Reasonable doubts as to the validity of an ordinance (by-law) will be resolved in its favour: 43 C.J. p. 570 and cases there cited.

A number of authorities were cited by both the City and the

MACDONALD, J. (In Chambers)

1930

Jan. 15.

REX v. SUTHERLAND

respondent, as to whether or no a "printer" was a "manufacturer." They however depend upon the facts of each particular case and while they might be of some assistance in determining such matter, still it should be borne in mind, that the facts were different and the question to be decided was not the same, as here presented. Take for instance, the case of *Dominion Press* v. *Minister of Customs and Excise* (1928), A.C. 340, which was strongly urged by the respondent, as deciding that, although primarily a printer, still, he was also a manufacturer and thus comes within the provisions of section 8 of the Vancouver Incorporation Act, 1921, Amendment Act, 1928. There a printing company upon a large scale was, through the nature of its business and mode of carrying on, treated as a manufacturer and producer. As an authority in this case it loses its weight, when you consider the stress, laid upon the fact in the judgment, that the company was a "producer." The head-note refers to the transaction of the company, as being sales by a producer, within certain taxation enactments. Then the City seeks support for its position on this question by some authorities, for example: *King* v. *Grain Printers Ltd.* (1925), 3 D.L.R. 291 and *Clay* v. *Yates* (1856), 25 L.J., Ex. 237. These and other cases cited by the City are, however, in the same category, as those referred to by the respondent. I was not afforded any clear authority for the proposition that a "printer" could be properly termed a "manufacturer" and should be so licensed. It appears to be a strained definition as ordinarily a printer would be associated in your mind with work done than with materials provided and manufactured. Forming the best judgment which I am able, in so doubtful a matter, I do not think that a printer would be properly called a manufacturer. However, any hesitation or doubt in this connection, is immaterial, in view of the conclusion, which I have reached, that the City properly exercised, by by-law, its power to define a "manufacturer" and that the respondent Sutherland, upon the facts stated and admitted, does not come within the terms of the definition. He is not a manufacturer but is a printer and should be so licensed. It follows that the question, submitted for the opinion of the Court, should be answered in the negative. The matter is remitted to the magistrate to be further dealt with. Appellant is entitled to his costs.

Judgment

Appeal allowed.

REX v. NIP GAR *ALIAS* JANG SHEE.

COURT OF APPEAL

1930

Jan. 8.

REX v. NIP GAR

Criminal law—Sale of opium—Conviction—First offence—Maximum penalty imposed—Revision of sentence—Powers of Court of Appeal.

The accused was convicted of selling a tin of opium, and was sentenced to the maximum penalty of seven years' imprisonment and fined $1,000. She was a Chinese woman of over 50 years of age and had never been charged of any offence before. On appeal from sentence:—

Held, affirming the decision of McDONALD, J. (MACDONALD, C.J.B.C. dissenting), that having regard to the serious nature of this offence and the calamity to the public welfare that this traffic causes, the justice of this case does not require the Court to interfere with the sentence.

APPEAL by accused from a conviction by McDONALD, J. on the 17th of October, 1930, on a charge of selling opium. The accused is over 50 years of age and this is the first charge that has ever been laid against her. She worked in a chop suey house in Vancouver. The chief witness against her was a Chinaman who acted as a stool-pigeon. He took marked money from the police and after seeing accused he produced a tin of opium he said he bought from her and she was found with the marked money on her person. Her defence was that the stool-pigeon owed her money and paid her back with the marked money and she denied having ever sold opium to any person. She was found guilty and sentenced to seven years' imprisonment and fined $1,000.

Statement

The appeal was argued at Victoria on the 8th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Nicholson, for the accused: On the question of sentence this was the first charge that was ever laid against her, and she is a woman of over 50 years of age. We submit the sentence is too severe and should be reduced: see *Rex* v. *Moscovitch* (1924), 18 Cr. App. R. 37; *Rex* v. *Adams* (1921), 36 Can. C.C. 180.

Argument

George Black, for the Crown, referred to *Rex* v. *Zimmerman* (1925), 37 B.C. 277.

8th January, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The Legislature has fixed the maxi-

COURT OF APPEAL

1930

Jan. 8.

REX v. NIP GAR

MACDONALD, C.J.B.C.

mum penalty at seven years and a fine. That, of course, is intended to be imposed, I think, when there has been a very gross offence committed, where there has been wholesale business carried on in drugs. We felt that in the case of *Rex* v. *Lim Gim* (1928), 39 B.C. 457 when we increased the sentence from four years to seven. In that case the evidence shews that he was carrying on business on a very large scale, although it was the first time he had been apprehended and prosecuted; but he had carried on the business not only in Vancouver, but extended it even to the Atlantic Coast. Therefore we considered that an example should be made of him.

But this, in my minority opinion, is a different case. This woman was engaged by her employer, and while he has been acquitted, it may very well be that he was the real offender, and I see no reason why the maximum should be levied against her, any more than against a great many others, who have been let off by sentences of 25 months—two years. It does not strike me that this is a case for the imposition of the maximum sentence.

The opinion of the Court, however, is that the appeal against sentence should be dismissed.

MARTIN, J.A.

MARTIN, J.A.: In my opinion this sentence should not be interfered with, carrying out the principles we laid down in *Rex* v. *Zimmerman* (1925), 37 B.C. 277. The conviction is not for having goods in possession, but for the much more serious crime of selling and distributing, and I notice in the list handed to us, of sentences imposed at the Assizes, that there are three cases there of infractions of this statute. Of course, as regards men offenders, they are liable to be whipped, and that is a very serious punishment. This is, therefore, the maximum as regards women, but not against men.

Having regard to the serious nature of this offence and the calamity to the public welfare that this traffic causes, the difficulty of tracking down the offenders, who are very astute, working as they do behind the scenes, it would require a very exceptional case to satisfy me that we should in offences of this sort interfere with a sentence imposed by a judge as experienced as the learned judge appealed from is in criminal affairs in that particular locality. Therefore, carrying out the principles we

COURT OF APPEAL

1930

Jan. 8.

REX v. NIP GAR

laid down in *Rex* v. *Zimmerman* (1925), 37 B.C. 277, I think the justice of this case does not require us to interfere with the sentence.

GALLIHER, J.A.: I would not interfere with the sentence.

MCPHILLIPS, J.A.: I am of the same opinion.

MACDONALD, J.A.: I agree.

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

BIGGAR v. BIGGAR.

MORRISON, C.J.S.C.

1930

Jan. 14.

BIGGAR v. BIGGAR

International law—Decree of divorce in foreign Court—Domicil—Jurisdiction—Validity of divorce in British Columbia.

The petitioner and respondent, both born in British Columbia, were married in the City of Vancouver in 1917. In the fall of 1923 the respondent went to Portland, Oregon, and after remaining there a few weeks went to Los Angeles, California, where he remained until January, 1925. Late in 1924 he commenced divorce proceedings in Portland and a decree of divorce was granted him in April, 1925. He then returned to Vancouver and in April, 1926, he, with another woman, went to Bellingham in the State of Washington, where they went through a form of marriage before a magistrate and returned to Vancouver. The petitioner filed her petition herein in May, 1929. The law of the State of Oregon requires that the plaintiff in a divorce action must have been a resident and inhabitant of the State of Oregon one year next prior to the commencement of the suit and the Supreme Court of the State has defined domicil, residence and inhabitance as synonymous in relation to divorce proceedings.

Held, on the evidence, that the respondent did not renounce his British Columbia domicil, he was not in the ordinary meaning of the words a "resident" or "inhabitant" of the State of Oregon and did not acquire a domicil there. Domicil being the governing factor, there was no jurisdiction in the Courts of the State of Oregon to grant a decree of divorce, and the petitioner herein should be granted a decree absolute.

Statement

PETITION by a wife for divorce. The facts are set out in the reasons for judgment. Heard by MORRISON, C.J.S.C. at Vancouver on the 11th of December, 1929.

MORRISON, C.J.S.C.

1930

Jan. 14.

BIGGAR v. BIGGAR

G. Roy Long, for petitioner.
Alfred Bull, for respondent.

14th January, 1930.

MORRISON, C.J.S.C.: Both the petitioner and respondent were born in British Columbia and I find that during all the time material to the issue herein they were domiciled in British Columbia. The respondent's father was born, so it is alleged, in the State of Maine. The evidence as to this is most skimpy and not to me conclusive. He came to Canada quite early and was married in Manitoba, afterwards moving to British Columbia where the respondent was born in 1894. As to whether he was originally or at all an American citizen is left, to my mind, in doubt. The evidence on the point lacks sufficient force to get beyond the realm of conjecture. The respondent's father may actually have been British born and had taken up his residence in Maine, a State bordering on Canada. Even had he been originally an American citizen it is hardly likely he would not have become a British subject during his long residence in Canada in order to avail himself of the privilege of a Canadian citizen. The respondent's mother, a widow, now lives in Vancouver and has lived here for many years. She has living in British Columbia a married daughter and another son who appears to be an incurable invalid. The respondent lived before his marriage at home with his mother. Some time in 1916 during the Great War the respondent registered at the American Consulate in Vancouver as an American citizen. He proceeded to Seattle and was called in the first draft in 1917, but was discharged on October 14th, 1917, as being physically deficient. He thereupon returned to Vancouver where he was married to the petitioner and then secured employment in Coughlan's shipyards as fitter's helper, doing ordinary labour which he now says, perhaps inadvertently, was heavy work. He and his wife continued to live together until, owing to domestic infelicity, they drew apart, he living with his mother, who seemed at all times to be reluctant to have him away from her, and she with her father and mother. He occasionally visited her to see the children. There are three children born of this marriage. In September, 1923, he left for Portland, Oregon, as he says, with the intention of remaining there. He had before leaving

Judgment

Vancouver been engaged as curb broker and had made some sort of alleged arrangement with a concern known as the National Commercial Company of Portland. The brief period that he was in Portland in the fall of 1923 he lived with a friend who, without delay, inserted his name in one of the directories of that city. This is one of the grounds now advanced as evidence of his Oregon domicil. After remaining a few weeks he went on to Los Angeles where he states he continued in business and remained until January 10th, 1925. Late in 1924 he caused divorce proceedings to be launched in Portland. On April 9th, 1925, the decree was granted and then he returned to Vancouver and rejoined his mother. He became engaged in Vancouver to be married, and in April, 1926, he and his fiancee visited Bellingham, U.S.A., just across the border, and there went through a form of marriage before a magistrate, immediately returning to Vancouver where he now lives with the wife of this last marriage and their infant child. The petitioner on the 27th of May, 1929, filed her petition herein to which the respondent appeared and put in his answer in which however it is stated he had been married to the second wife in Vancouver, B.C., and he gave evidence at the hearing upon which I have based the above brief narrative.

Judgment

When he launched divorce proceedings in Oregon his wife was, in a substitutional manner, served with the material exhibited herein. Counsel appeared for her to ensure to her the custody of the three children of their marriage. A commission to take evidence in Portland was issued out of this Court in the present suit. To the return is attached certain exhibits from which it appears that, before the petition in the suit for divorce in Portland launched by the respondent was heard, certain "stipulations," as they are called in that jurisdiction, and a "compromise" of sorts were made and arrived at by the respective counsel as to the question of alimony and custody of the children, but the phraseology was guarded. These documents purported not to touch the question of divorce which was left to be dealt with at the hearing of the petition. A record of those proceedings between counsel appears to have been made, what would here be termed, a Rule of Court and was accepted by the trial judge as sufficient upon which to base his final decree for divorce. This

MORRISON, C.J.S.C.

1930

Jan. 14.

BIGGAR v. BIGGAR

circumstance is put forward in the respondent's answer as an attornment to the jurisdiction of the Oregon Court and is pleaded now by way of a species of estoppel. The wife did not appear at the hearing.

The governing factor is domicil. If there is a *bona fide* domicil in the country where the proceedings for divorce were taken, those proceedings ought to govern the matter and are valid and effectual—Collins, M.R. in *Bater* v. *Bater* (1906), P. 209.

Two questions arise in this case—First, did the respondent renounce his British Columbia domicil? And second, if so, did he acquire a permanent *bona fide* domicil in Oregon? In determining such questions it is the conduct of the party which is the chief matter to be kept in mind and not his expressions of intention.

As to his expressions of intention of changing his domicil as deposed to by him, I find the respondent is not a witness of truth. I cannot but think, as a matter of pointed comment, that at the crucial period of our national life in 1916 that whilst he was attempting for the first time to assert his alleged true nationality and allegiance, he married a young wife by whom he has had three children, and after so attempting to change what I find to have been his true nationality and allegiance, he was found back in Canada after a short time employed as a labourer at heavy work—immune from being drafted into the American Army on the one hand or into the Canadian Army on the ground of his alleged American citizenship. Did his answer rest there, there is nothing in it inconsistent with his having later acquired an Oregon domicil. I find, however, that he never renounced his British Columbia domicil and did not acquire a *bona fide* domicil in Oregon. He was not in the ordinary meaning of these words either a "resident" or an "inhabitant" of Oregon. There existed every fundamental reason which one would expect to appeal to any man of regulated virtue or conscience or domestic loyalty why he should remain in the country of his birth, the home of his wife and infant children, the home of his mother and her family, in fact his only home and not to proceed to a foreign country where he had no impelling motive of relatives, friends or property interests—

Judgment

from which country he immediately returned upon securing as he thought and intended that relief from his marriage tie which was the real and sole reason for his temporary sojourn. His deception in the Courts of Oregon goes to the root of their jurisdiction—a deception which had it been disclosed I am sure that the learned judge of that Court would not have felt bound to grant the decree of divorce. *Bater* v. *Bater, supra,* p. 218.

The evidence, as elicited from Biggar's attorney in Portland, as to what constitutes domicil in Oregon, is as follows:

"What is the law of the State of Oregon as to residence or domicil of the petitioner in order to give the Court jurisdiction? The law of the State of Oregon requires that plaintiff must have been a resident and inhabitant of the State of Oregon one year next prior to the commencement of the suit and the statute of the State of Oregon on that subject is as follows: 'S. 509. RESIDENCE OF PLAINTIFF IN SUIT FOR DISSOLUTION. In a suit for the dissolution of the marriage contract, the plaintiff therein must be an inhabitant of the State at the commencement of the suit, and for one year prior thereto; which residence shall be sufficient to give the Court jurisdiction, without regard to the place where the marriage was solemnized, or the cause of suit arose. (L. 1862, p. 124, S. 493; L. 1864; D.S. 493; L. 1865, p. 39; H.S. 497; B. & C. S. 509.)'

"On the hearing of this petition was the question of residence gone into in the evidence? It was.

"Under the law of the State of Oregon is there any distinction between domicil and residence? Neither one of those terms is used in our statute. The statute says that the plaintiff must be an inhabitant of the State for more than a year prior to the commencement of the suit, but our Supreme Court has defined domicil, residence, and inhabitance as syonymous as it affects divorce proceedings."

Judgment

If it is right to say that in Oregon "residence," "inhabitance" and "domicil" are synonymous then "residence" would be equivalent in effect to our word domicil—permanently residing in a permanent home in the State. However, apart from that I am not at all satisfied with what I suppose is put forward as expert evidence as to the law of Oregon on the question of domicil. The only evidence is that of the attorney for Biggar in the suit in which he appeared for him and given on his examination before a Commissioner for taking the evidence on commission. The questions put to him were so framed that the thoughtless answers appeared to fortify the point sought to be made. I can only imagine the effect of such leading questions by counsel when examining his own witness, had the examina-

MORRISON, C.J.S.C.

1930

Jan. 14.

BIGGAR v. BIGGAR

tion taken place in Court on a matter going to the very root of the jurisdiction of the Court, to realize the prompt intervention of the judge. To me the evidence of Mr. Hamaker, with deference, is valueless on the question of domicil. Mr. *Bull* for the respondent submits that the decree obtained as above is in effect a judgment *in rem* whilst it stands unimpeached, falling within the principle referred to by Collins, M.R. in *Bater* v. *Bater, supra,* at pp. 227-8. The learned Master of the Rolls was then dealing with the question of suppression by the petitioner of a matter which had it come before the judge in the foreign Court would have disentitled the party to relief. The judgment of the President and of the Master of the Rolls and the other learned judges of the Court are based upon the assumption that the Court of New York had jurisdiction, but were misled as to the previous adultery of the petitioner in England. Properly enough the decree could not be impeached on the ground of fraudulent suppression once it had been made absolute. Both the parties had a *bona fide* New York domicil. It was this phase of the case and with this principle that the President of the Divorce Division, from whom the appeal was taken, had dealt at the hearing. In the course of his judgment, which was the subject of appeal before the Court of Appeal, and in answer to counsel's submission based upon certain cases cited in argument, he says, at p. 218:

Judgment

> "But I think when those cases are examined that the collusion or fraud which was being referred to was in every case . . . collusion or fraud relating to that which went to the root of the matter, namely the jurisdiction of the Court. In other words as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so induced the Court to grant a decree. The collusion or fraud in these cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicil."

Counsel for the respondent advanced the appeal *ad misericordiam* that the child of his second marriage will be compromised by an adverse decree in this case. As against that plea must be placed the position in which the respondent has sought to place his lawful wife—that in one country she is a lawful wife and in another she is not, placing deliberately his legitimate children under the imputation of their mother being an adulteress. Under the circumstances of this case it would be a

reproach upon our juridical system if our Courts were impotent to render relief.

There will be a decree absolute with costs and custody of the children.

Decree absolute.

HALL v. GEIGER.

Practice—Pleading—Libel—Plea of publication—No application for particulars—Amendment of pleadings—Jurisdiction.

An action for libel was dismissed on the ground that the statement of claim disclosed no cause of action. The statement of claim contained an allegation of publication without stating to whom the libel was published. No particulars were asked for by the defence and on the trial evidence was tendered of publication to the defendant's stenographer and it was allowed in without objection.

Held, on appeal, reversing the decision of MCDONALD, J., that as no particulars were asked for, and evidence of publication to the stenographer was allowed in without objection, the appeal should be allowed.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 25th of June, 1929, in an action for damages for libel. On the 5th of April, 1929, the defendant wrote a letter to the plaintiff in which the following words appeared:

"To reverse the situation, if you had the evidence that I now hold concerning your actions which have transpired in several different places in the City of Vancouver, I do not doubt but that you would be seriously thinking that someone might be charged with criminal proceedings or conspiracy. . . . It is not necessary to plant anything on you. The evidence that I have speaks for itself."

Statement

There was an allegation of publication in the statement of claim but no allegation as to whom the libel was published. No particulars were asked for by the defence and on the trial evidence was tendered of publication to the stenographer to whom the defendant dictated the letter and was allowed in without objection.

The appeal was argued at Victoria on the 15th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1930

Jan. 15.

HALL v. GEIGER

Argument

Miss *Paterson,* for appellant: We submit that there was an application to amend, but assuming there was no such application, the statement of claim contains an allegation of publication and that is sufficient: see Odgers on Libel and Slander, 6th Ed., 509-10. If the defendant wanted particulars he should have applied for them but this was not done: see *Hewson* v. *Cleeve* (1904), 2 I.R. 536; Halsbury's Laws of England, Vol. 18, pp. 656-7; *Bradbury* v. *Cooper* (1883), 12 Q.B.D. 94; *Roselle* v. *Buchanan* (1886), 16 Q.B.D. 656; *Davey* v. *Bentinck* (1893), 1 Q.B. 185; Annual Practice, 1930, p. 339. There is the distinction from cases where application for particulars is made: see *British Legal, &c., Assurance Co.* v. *Sheffield* (1911), 1 I.R. 69; *Russell* v. *Stubbs, Limited* (1913), 2 K.B. 200, n.

Coulter, for respondent: Our amendment was to be for a plea of justification: see Odgers on Pleading and Practice, 9th Ed., 183. That there is not a proper allegation of publication see *Davey* v. *Bentinck* (1893), 1 Q.B. 185.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think we must allow the appeal. It is a most unfortunate case; the trouble all arose over the absence in the statement of claim of an allegation as to whom the libel was published to. I do not by any means say that such an allegation was necessary; there is an allegation of publication. And where no particulars were asked for, I think the plaintiff was entitled to give evidence of publication to a particular person. And the cases cited to us, apart from the opinions of some text-writers, are all on that ground. But apart from that altogether, when the evidence was tendered, of publication to the stenographer, the particular person, there was no objection taken to it by the defendant; it went in without objection. And, in that case, there is no obligation on our part to order a new trial. The Court assumes that where no objection is taken to evidence, it is not regarded as of any prejudice to the defendant, the person who might have taken the objection.

Then there is another question, that as to the amendment asked for by the defendant. He did say that he wished to make an amendment, and in the first instance the learned judge said

he would make no amendments—he said he thought he had been too lenient in the past, and that he would not make amendments at the trial; and then at the end of the case, the learned judge referred to this, and said he would then listen to an application, but defendant's counsel said he would not ask for it then. It is hardly consistent with the course which this Court pursues now to say that there should be a new trial, and leave to amend, particularly as the defendant has not cross-appealed against the refusal to amend; I do not think the Court of its own motion should grant a new trial for that purpose. If objection had been taken to the evidence of publication to the stenographer, the particulars could have been given at once—in fact it was not necessary then, because they were disclosed by the evidence. The evidence was then before the Court, and nothing could be added to what had already been heard.

MACDONALD, C.J.B.C.

In these circumstances I think the appeal must be allowed.

MARTIN, J.A.: I agree. I also share the opinion of my learned brother as to the unfortunate condition that the case has got into; it arises from a misconception on the part of the learned counsel for the defendant (respondent) as to the proper course to adopt when he considered, at the opening of the trial, that the statement of claim was defective. He was not in a position, in view of his own pleading, to take the objection at large that the statement of claim disclosed no cause of action (tantamount to what was formerly a demurrer *ore tenus*) because that could not be properly done without due notification to the other side. It might be that the statement of claim was defective, in view of the practice, supported by high authority, and the form set out in Bullen & Leake—and there is other authority to support that—but how far defective I refrain from considering because that matter has not been gone into, and we did not hear the argument of the respondent's counsel on that point, because it is unnecessary, owing to the circumstances recited by the Chief Justice. The evidence was allowed to go in without any objection at a crucial time in the trial, and finally, after repeated statements, which unquestionably were of a discouraging nature, to say the least of it, on the part of the learned trial judge that he would not hear of any amendment

MARTIN, J.A.

COURT OF APPEAL

1930

Jan. 15.

HALL v. GEIGER

MARTIN, J.A.

whatever (upon what legal ground he said that, with all respect, I do not know), nevertheless, he did, at the eleventh hour, change his mind and give permission to both counsel to make such amendments as they might be disposed to make, and at that time, the crucial time in the case for the defendant, his counsel said he had no application to make and relied on his original preliminary objection to the statement of claim, which, of course, at that time had gone by the board, even assuming that originally it was one of weight. Under these circumstances, which I must say are to be regretted, it is imposible for us to do anything other than to allow the appeal.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be allowed. It is somewhat idle at this time, after a trial has been had, and evidence introduced, which may or may not conform to the pleadings, to have it pressed in the Court of Appeal that there has been a mistrial and there ought to be a new trial. As Lord Parker of Waddington said in the House of Lords, in *Banbury* v. *Bank of Montreal* (1918), A.C. 626, the practice has become one of calling witnesses and introducing evidence disregarding the pleadings. It is idle now to say the pleadings did not cover that which was tried. The whole question is, what was the course of the trial? And the evidence was introduced by the plaintiff that publication was made to this lady, the stenographer, and no objection was taken when that evidence was led and introduced. If the objection had then been made and pressed, technically an amendment of course should have been made. It is impossible now to press any such point.

Further it is a question of prejudice or no prejudice, as my brother the Chief Justice has just stated. And what prejudice was there to the defendant when it was proved that it was to the stenographer that the publication was made? It was set forth in the pleadings that there was publication. It was established at the trial that it was to the stenographer that the publication was made. And, in passing, let me say this, it did not shew much diligence on the part of the defendant upon this point, that he was suffering any disadvantage in not knowing the

person to whom publication was made; he never even took the step to find this out by demanding particulars or examining the plaintiff for discovery. And if this whole appeal should be determined on the question of the non-statement of the name of the person to whom the publication was made, it would be monstrous. Here there has been all the solemnity of a trial, and in the Court of Appeal a point of this kind is pressed. Further, when the learned judge, at a certain stage of the trial said, "I am prepared to grant both sides an amendment," then the learned counsel for the defendant said "No, if the statement of claim remains as it is I am content, I do not want an amendment." No amendments were made and the counsel for the defendant accepted the risk—that it might be held in appeal that no amendment was necessary considering the course of the trial. Unquestionably the defendant suffered no prejudice owing to the statement of claim not containing the name of the person to whom publication was made. I venture to say this, if the learned counsel for the defendant had said, I wish to plead justification, the learned counsel for the plaintiff would have been ready at once to say, Yes, I am quite agreeable. And I venture to say, also, that the verdict instead of being a couple of hundred dollars might have been a thousand or more. So that I can see no prejudice in this case. We have to look beyond and above questions of pleading. When the parties proceed to trial and the subject-matter of the issue is dealt with, and evidence led by both parties directed to the issue, which was the case here, the defendant suffered no prejudice—in any case the defendant elected to proceed without amendment. The judgment of the learned judge should be reversed and judgment go for the plaintiff with $250 damages, the amount he would have allowed had he not taken the contrary view.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

MACDONALD, C.J.B.C.: The appeal is allowed; and judgment should be entered for the $250, as given by the learned trial judge.

MACDONALD, C.J.B.C.

Appeal allowed.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitor for respondent: *H. S. Coulter.*

MCDONALD, J. (In Chambers)

1930

Jan. 20.

REX v. VAN BROTHERS LIMITED.

Criminal law—Intoxicating liquors—Unlawful sale by servant—Liability of master—R.S.B.C. 1924, Cap. 146.

REX v. VAN BROTHERS LIMITED

In the case of a sale of liquor in violation of the Government Liquor Act by a servant while acting within the general scope of his employment, the master is liable to conviction therefor even where the sale was made by the servant contrary to the master's express instructions.

APPEAL by way of case stated from a conviction by George R. McQueen, Esquire, deputy police magistrate on a charge of a sale of liquor in violation of the Government Liquor Act. The case stated is as follows:

"1. An information was preferred on the 18th of September, A.D. 1929, by the respondent against the appellant, under the provisions of the Government Liquor Act, 'for that Van Brothers Limited, the appellant, on September 12th, 1929, at the City of Vancouver, in the Province of British Columbia, did unlawfully sell intoxicating liquor, contrary to the form of the statute in such case made and provided.'

"2. On the 5th of December, A.D. 1929, I convicted the appellant upon the said information.

"3. Upon the hearing of the said information it was proved before me:

"(a) The appellant is a body corporate carrying on the business in the City of Vancouver, as a manufacturer of and wholesale dealer in, cider, and other soft drinks.

Statement

"(b) The appellant employed one Elmer Broderick, driver, to take orders for cider, etc., deliver the same and collect payment upon delivery thereof.

"(c) The appellant Company had control over the driver in the employ of the said Company, and had given express instructions to such driver, not to take anything out of the plant without the manager or the shipper being there to check him out.

"(d) In the course of his employment, on the 12th of September, A.D. 1929, the driver received an order from one Mrs. Todd, who conducts a soft-drink stand at 20 Powell Street, City of Vancouver, for one barrel of hard apple cider and three barrels of sweet apple cider. The driver returned to the appellant Company's plant, helped himself to four barrels of cider, without having them checked out by the manager or shipper of the appellant Company; he then delivered the four barrels to the said Mrs. Todd, and upon delivery collected payment for the same, giving a receipt for payment on behalf of the appellant Company.

"(e) Forthwith upon delivery of the said four barrels of cider by the driver to said Mrs. Todd, one of such barrels was taken by a police officer for analysis to John F. C. B. Vance, city analyst, and the proper official for that purpose.

"(f) The said John F. C. B. Vance analyzed the contents of said barrel of cider and found same to contain 2.28 per cent. of alcohol by weight.

"(g) In taking the cider in question away from the appellant Company's plant, without having it checked out to him by the manager or the shipper, the driver acted contrary to the express instructions and orders of his employer, the appellant.

"(h) In taking the order for the cider from Mrs. Todd, in delivering cider and in collecting payment therefor, the driver acted within the general scope of his employment, and he sold cider to Mrs. Todd for and on behalf of the appellant Company.

"(i) One barrel of the cider, sold and delivered to Mrs. Todd, contained 2.28 per cent. of alcohol by weight.

"The question submitted for the opinion of this Honourable Court is whether, upon the above statement of facts, I came to a correct determination in point of law, in convicting the appellant as foresaid, and, if not, what should be done in the premises?" Statement

Argued before McDONALD, J. in Chambers at Vancouver on the 18th of January, 1930.

Nicholson, for accused, referred to *Rex* v. *Westminster Brewery Limited* (1921), 29 B.C. 321; *Boyle* v. *Smith* (1906), 1 K.B. 432 and *Rex* v. *Busy Bee Wine and Spirits Importers* (1921), 36 Can. C.C. 93.

W. M. McKay, for the Crown, referred to *Houghton* v. *Mundy* (1910), 74 J.P. 377; *Elder* v. *British Auckland Co-operative Society, Ltd.* (1917), 81 J.P. 202; *Brown* v. *Foot* (1892), 56 J.P. 581; *Warrington* v. *Windhill Industrial Co-operative Society, Limited* (1918), 82 J.P. 149; *Jones* v. *Hartley, ib.* 291; *Rex* v. *Russill* (1913), 22 Can. C.C. 131. As to the Government Liquor Act being a prohibition statute see *Rex* v. *McDonald* (1927), 38 B.C. 298 and *Rex* v. *McKenzie* (1921), 29 B.C. 531. Argument

20th January, 1930.

McDONALD, J.: This is a case stated by George R. McQueen, Esquire, deputy police magistrate.

The appellant Company was convicted for having sold intoxicating liquor in contravention of the Government Liquor Act. The appellant was engaged in the business of manufacturing and selling cider and soft drinks, not being permitted to sell any beverage with an alcoholic content of more than 1 per cent. One Broderick was employed by the Company to attend at retail stores and take orders for the delivery of cider; to return to the Judgment

MCDONALD, J. (In Chambers)

1930

Jan. 20.

REX v. VAN BROTHERS LIMITED

master's premises with the orders and then to make deliveries after the beverage to be delivered had been tested by the officer in charge for that purpose. These daily tests were essential as the alcoholic content of cider changes from hour to hour. Broderick had been expressly instructed to deliver no cider until the proper official had tested it and handed it over for delivery. On the occasion in question Broderick took an order for four barrels of cider. He returned to the plant and took, contrary to his instructions, four barrels of cider without having them tested and checked out by the proper officer. He delivered the cider and received payment therefor. It was shortly discovered by the police that one barrel of cider contained 2.28 per cent. alcohol by weight. The magistrate has expressly found that in taking the order for the cider, in delivering the cider and in collecting payment therefor the driver acted "within the general scope of his employment," though, as stated above, in contravention of his express instructions. On these findings of fact the Company was convicted. The question is whether or not the Company ought to be convicted for the act of its servant done under the circumstances stated.

Judgment

Counsel thoroughly discussed the cases which apply and I have analyzed these cases and although inconsistencies do appear nevertheless I think throughout all the cases where the facts are fully stated the real question by which every decision can be tested is this: Was it found as a fact that the servant was acting within the general scope of his employment? It is true that the answer to that question does not always appear plainly set forth in the report but I think all of the convictions in question in the various cases must stand or fall according to the answer to that question. The strongest case for the appellant appears to be *Rex* v. *Westminster Brewery, Limited* (1921), 29 B.C. 321, a decision of MORRISON, J., now the learned Chief Justice of this Court. If the findings of fact in that case were identical with those in the present case I should follow it without hesitation even although it does not appear from the report that the leading cases upon the question had been cited to the Court. A careful analysis of the findings of fact in that case discloses that there is no finding whatever, that the servant who delivered the beer in question was acting "within the general scope of his employ-

ment." Upon the other hand in the case of *Boyle* v. *Smith* (1906), 1 K.B. 432 the law is clearly stated by Lawrance, J. that although the conviction on the facts in that case could not stand yet the law was as stated by his Lordship

"that if the drayman was acting within the general scope of his employment in selling beer, it would be no answer for the master to say that he had expressly forbidden him to do so."

I have not been able to find in any of the cases anything which would lead to the conclusion that the law is otherwise than as here stated and it follows that the magistrate's question should be answered in the affirmative.

I have not overlooked Mr. *Nicholson's* argument that the distinction to be drawn in the present case is that what Broderick delivered was not cider at all but intoxicating liquor and that in doing so he did something in contravention of his instructions but also something which the Company itself was forbidden by law to do. I think the distinction is too thin for after all Broderick did take an order to deliver cider and he did deliver an article which did not cease to be cider even though its alcoholic content is too high.

Judgment

Conviction sustained.

MCDONALD, J.

1930

Jan. 24.

W. J. ALBUTT & CO., LTD. v. RIDDELL

W. J. ALBUTT & CO., LIMITED v. RIDDELL.

Automobile—Sale of—Conditional Sales Act—Sale "in the ordinary course of business"—Exchange of motor-cars between retail dealers—Conversion—R.S.B.C. 1924, Cap. 44, Sec. 4.

Two retail dealers entered into an arrangement whereby an exchange was made of a certain car from the stock of one for a certain car from the stock of the other, the difference in value between the cars to be paid in cash. The cars were delivered and each paid the other by cheque for the full value of car received.

Held, not to be a sale "in the ordinary course of his business" within the meaning of section 4 of the Conditional Sales Act.

Statement

ACTION for damages for conversion of an automobile. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 23rd of January, 1930.

J. A. MacInnes, for plaintiff.

W. J. Whiteside, K.C., and *Selkirk*, for defendant.

24th January, 1930.

Judgment

McDONALD, J.: In the latter part of May, 1927, Diana-Moon Motor Sales Limited, being distributors of Moon cars, entered into negotiations with Pacific Motors, Limited, for the sale to the latter of some motor-cars. The Pacific Company not being financially able to effect the purchase arranged with the plaintiff that the latter should pay to Diana-Moon Company the price of two cars which would thereupon be delivered to the Pacific Company. The plaintiff being engaged in the "financing" of retail automobile dealers completed the arrangement and paid to the Diana-Moon Company the price of two cars, one of which was the car in question in this action. The car in question was delivered to the Pacific Company on or about 7th June, 1927, and a conditional sales agreement was taken by the plaintiff from the Pacific Company for the price of the car. This agreement was duly registered on 15th June, 1927. The plaintiff knew that the Pacific Company was a retail dealer in cars and expected that the car in question would be sold in the ordinary course of business.

Almost immediately after obtaining possession of the car the Pacific Company entered into an agreement with Fulwell Motors, Limited under the following circumstances: Mr. Swanson of the Pacific Company had a conversation with Mr. Fulwell of the Fulwell Company (which latter Company was also a retail dealer in motor-cars) whereby it was arranged that if one of them happened to have a customer for a certain type of car and had not the same in his possession he might obtain such car from the other who would deliver over another car which would be satisfactory. It appears that two or three transactions of this kind had been consummated. At the time in question the Pacific Company had a customer for a Moon "Sedan" but not for a Moon "Coach" (which the car in question is) and Swanson and Fulwell agreed that the Pacific Company should take over the sedan and the Fulwell Company should take over the coach and that the Pacific Company should pay to the Fulwell Company the difference in value, *viz.*, $300. The cars were accordingly delivered and, according to the evidence of Fulwell, each gave to the other a cheque for the full value of the respective cars. The Pacific Company's cheque, however, was dishonoured at the Bank whereupon the Fulwell Company stopped payment of its cheque. It appears that later the Fulwell Company obtained payment of the $300 from the Pacific Company.

Judgment

On the 13th of June the Fulwell Company being in possession of the coach applied to the defendant for a loan and obtained a loan of some $900 which was secured by a chattel mortgage upon the coach from the Fulwell Company to the defendant. Default having been made in payment of the chattel mortgage defendant seized and sold the car and is now sued for damages for conversion. It appears that the value of the car is somewhere between $1,500 and $1,600.

Obviously the question for decision is whether or not the Fulwell Company received from the Pacific Company a good title to the car and, after consideration of the authorities and statutes cited by counsel, I have concluded that that question must be answered in the negative. It seems to me that the whole case turns upon the construction of section 4 of the Conditional Sales Act being R.S.B.C. 1924, Cap. 44 which section reads as follows:

MCDONALD, J.

1930

Jan. 24.

W. J. ALBUTT & CO., LTD. v. RIDDELL

"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."

To paraphrase what was said by Mr. Justice Orde in *Dulmage* v. *Bankers Financial Corporation Limited* (1922), 51 O.L.R. 433 at p. 437, the plaintiff did all it could under the law to protect its ownership and unless some statutory provision comes to the relief of the Fulwell Company the maxim *caveat emptor* applies. Hence, unless the Fulwell Company can shew that it purchased from the Pacific Company, who sold in the ordinary course of its business, then the Fulwell Company obtained no title. In the first place it is contended that this was not a sale but a barter or trade. There is much to be said for this view and I am inclined to the opinion that it was not a sale. Fulwell in giving evidence stated that he was aware of the law as contained in section 4 and it would not be difficult to draw the inference that he and Swanson effected the change of cheques simply to cover the transaction and make that appear to be a sale which was in fact an exchange. Whether this be so or not, however, it seems to me that Mr. *MacInnes's* contention is unassailable when he says that in any event this was not a sale in the ordinary course of business. A retailer does not in the ordinary course of business buy from a competing retailer; nor does a retailer in the ordinary course of business exchange with a competing retailer a portion of his stock for a portion of the stock of the latter. After all one must in considering the statute examine into the purpose for which it was passed and it does seem fairly clear that this section was intended to protect the ordinary every-day man on the street who goes into a retail-dealer's premises, looks over his stock and purchases in the ordinary way. The section was not intended to cover an extraordinary transaction such as the one in question.

Judgment

The contention of Mr. *Whiteside* that there was in fact no sale at all by the plaintiff to the Pacific Company I think is untenable. Both on the evidence and upon the documents I think there was a sale and that the conditional sales agreement was taken as security for the purchase price. It follows that there will be judgment for the plaintiff.

MCDONALD, J.

1930

Jan. 24.

W. J. ALBUTT & CO., LTD. v. RIDDELL

Counsel did not argue the question of damages but it seems clear that the amount of damages is the value of the car. The amount sued for is $1,500 and there will be judgment for that amount.

Judgment for plaintiff.

COFFIN AND O'FLYNN v. THE "PROTOCO."

MARTIN, LO.J.A.

1930

Jan. 27.

COFFIN v. THE "PROTOCO"

Admiralty law—Seaman's wages—Sum claimed less than $200—Jurisdiction—R.S.C. 1927, Cap. 186, Sec. 349.

An action by two seamen for wages, the sums claimed being less than $200, was dismissed on objection taken to the jurisdiction of the Court, founded on section 349 of the Canada Shipping Act.

ACTION by two seamen to recover wages. Tried by MARTIN, Lo. J.A. at Vancouver on the 11th of December, 1929.

Ginn, for plaintiffs.
D. J. McAlpine, for defendant.

27th January, 1930.

MARTIN, Lo. J.A.: This case, to recover the wages of two seamen, though small in amount has nevertheless occasioned me much reflection, but after a careful consideration of it I can only reach, not without reluctance, the conclusion that the objection taken to the jurisdiction of this Court, founded on section 349 of the Canada Shipping Act, Cap. 186, R.S.C. 1927, respecting the recovery of wages under $200 (as explained in *Cowan* v. *St. Alice* (1915), 21 B.C. 540; *Kouame* v. *Steamship Maplecourt and Owners* (1921), 21 Ex. C.R. 226; and *Ostrom* v. *The Miyako* (1924), 34 B.C. 4) must prevail and therefore the claims must be dismissed on that ground alone. Though there is

Judgment

MARTIN, L.J.A.

1930

Jan. 27.

COFFIN v. THE "PROTOCO"

Judgment

unquestionably a certain substantial balance due to each of these men, which should have been paid to them long ago, I shall not go into particulars thereof because, failing a settlement, it is still open to the seamen to invoke the assistance of the summary proceedings before the special tribunals designated by section 344 of the said Act, and therefore I do not wish to create embarrassment by premature expressions. I do feel justified, however, in saying, in aid of an understanding to prevent further litigation, that it is clearly established that no final settlement was reached at the meeting in the solicitor's office on Monday, May 20th, 1929, as set up by defendant, and also that O'Flynn on the 15th of May unjustifiably refused to serve on the vessel on the West Coast of Vancouver Island.

The action therefore will be dismissed but in the special circumstances without costs.

Action dismissed.

BOURGOIN v. BOURGOIN AND WHEWAY.

FISHER, J.

1930

Jan. 30.

BOURGOIN v. BOURGOIN

Husband and wife—Divorce—Wife unsuccessful defendant—Her right to costs—Intervener's costs—Costs against co-respondent—R.S.B.C. 1924, Cap. 70, Sec. 35—Divorce Rules 91-93.

Where a wife is defendant in a divorce action, although unsuccessful, she is entitled to her costs if her defence has been fairly and reasonably conducted; her costs are not to be limited to the amount paid into Court or secured by her husband pursuant to the Divorce Rules, but should be ascertained on taxation between party and party on the usual scale.

The intervener was given costs against the respondent and it was ordered that the respondent's costs should not be paid without the intervener's costs against her being provided for.

The petitioner was given costs against the co-respondent it being found on the evidence that even if the co-respondent did not know that the respondent was married, he had the means of knowledge or was careless as to whether she was or not.

APPLICATION as to the disposition of the costs in divorce proceedings where the wife was unsuccessful. Heard by FISHER, J. at Vancouver on the 10th of January, 1930. Statement

Maitland, K.C., and *J. H. MacLeod,* for petitioner.
Hogg, and *Mayall,* for respondent.

30th January, 1930.

FISHER, J.: In this matter the respondent (wife) has been found guilty of adultery but Mr. *Hogg* of counsel for her contends that she should nevertheless be given the usual costs. The question of a wife being unsuccessful and still being allowed her costs was dealt with in *Vernon* v. *Vernon* (1914), 6 W.W.R. 1047 where reference is made to the following statement in *Flower* v. *Flower* (1873), L.R. 3 P. & D. 132 at p. 133: Judgment

"It is plain that the Court is not absolutely bound to give the wife her costs, but it would only be justified in refusing them in cases where it appeared that the attorney had done something wrong, or that he had instituted proceedings without reasonable ground, that is, where he had the means of seeing before instituting the suit that it was one which ought not to be instituted. When such a case arises I will disallow the wife's costs, and thus cause the punishment to fall on the attorney."

In the present case I would hold that the defence has been

FISHER, J.

1930

Jan. 30.

BOURGOIN v. BOURGOIN

fairly and reasonably conducted and her solicitor and counsel should be paid their costs. Mr. *Maitland* of counsel for the petitioner, however, refers to our Divorce Rules 91-93 and strenuously insists that the wife's costs are limited to the amount paid into Court or secured by the husband pursuant to said rules. In reply counsel for the respondent relies upon section 35 of our Divorce and Matrimonial Causes Act reading in part as follows:

"The Court on the hearing of any suit proceeding or petition under this Act . . . may make such order as to costs as to such Court may seem just."

The following authorities, *inter alia,* are also relied on: *Robertson* v. *Robertson* (1881), 6 P.D. 119; *Franklin* v. *Franklin and Minshall* (1921), P. 407 at p. 410 and *Hornby* v. *Hornby* (1929), 4 D.L.R. 406.

In the *Robertson* case it was decided that the costs of the wife payable by the husband are not limited to the amount paid into Court or secured by the husband for that purpose. There are previous decisions, however, to the contrary and attention is called to the fact that in England at the time of the *Robertson* decision there was a special rule (No. 159). *Hornby* v. *Hornby* (1929), 4 D.L.R. 406 also referred to is a decision in Saskatchewan where there would appear to be a special rule on the matter. A comparison of the statutory provisions and rules therefore becomes imperative. In *Palmer* v. *Palmer and Stockley* (1914), 83 L.J., P. 58 at p. 60 Sir Samuel Evans speaks of the discretion

Judgment

"which is vested in, and exercisable by this Court since its institution, formerly under section 51 of the Divorce Act, 1857, up to its repeal by the Statute Law Revision Act, 1892 (55 & 56 Vict., c. 19), and since under the Judicature Acts, or particularly under rule 159 of the Divorce Rules."

This Divorce rule 159 expressly provided that no costs should be allowed to an unsuccessful wife as against the husband except such as should be applied for and ordered to be allowed at the time of the hearing or trial and it might be noted that Rayden on Divorce, 2nd Ed., p. 293 says this rule was repealed by the new Divorce Rules which contain no equivalent provision. Though we have no rule similar to said rule 159 our Divorce Rules 91, 92 and 93 are similar to English Divorce Rules 158, 199 and 201 with the reference to rule 159 contained in English

rule 201 eliminated in our rule 93. Said rules 158, 199 and 201 were in force in 1881. See Browne on Divorce, 4th Ed., pp. 544, 545 and 552, and *Kemp-Welch* v. *Kemp-Welch* (1910), 79 L.J., P. 92 at p. 93.

Section 35 of our Act is similar to section 51 of the said Divorce Act, 1857. As pointed out, said section 51 was repealed in 1892 by the Statute Law Revision Act but such repeal would not affect the question of costs in our Courts nor would the rules and regulations of an English Court be in force here: see *Davy* v. *Davy* (1921), 30 B.C. 365 at p. 367.

It would appear, therefore, that in 1881 when the *Robertson* case was decided the statutory provisions and the Divorce Rules in England were similar to what we have at present with the exception of rule 159, which would not seem to have been interpreted in the *Robertson* case as giving but rather as limiting the power given to the Court *re* the wife's costs as the rule seems to have been invoked in favour of the husband rather than the wife. (See also *Somerville* v. *Somerville and Webb* (1867), 36 L.J., P. & M. 87).

In view of the *Robertson* decision therefore being under similar statutory provisions and rules (with the exception stated having only the effect suggested) I would hold that the same principle should apply here and the wife should have her costs as against the petitioner not limited as to any part thereof to a previous estimate but such costs as are ascertained on taxation to be the proper costs to allow in a strict taxation as between party and party on the usual scale which I would not change in this case. Judgment

As to the costs of the intervener, I would allow her costs against the respondent fixed at $100. It might be said that certain expressions used in the cases referred to above indicate that the wife's costs should go direct to her solicitor but I do not think such expressions should be so strictly interpreted as to prevent an order in this case that the respondent's costs should not be paid without the intervener's costs against the respondent as aforesaid being provided for. Order accordingly.

As to allowing the petitioner's costs against the co-respondent, the principle seems to be that the liability of the co-respondent is to be determined with regard to the facts of the particular

FISHER, J.

1930

Jan. 30.

BOURGOIN v. BOURGOIN

Judgment

case. Here there was some evidence that the co-respondent did not know the respondent was a married woman but my conclusion is that he either knew or had the means of knowledge or was careless whether the woman with whom he committed adultery was married or not so that he cannot count on immunity from costs. *Smith* v. *Smith and Reed* (1922), P. 1. The petitioner will, therefore, have his costs against the co-respondent including those which he has to pay the respondent.

Order accordingly.

MURPHY, J. (In Chambers)

1930

Feb. 4.

MITCHELL v. COAST PAPER CO. LTD.

Practice—Service of writ on defendant's solicitors—Solicitor's undertaking to appear—Default judgment—Affidavit of service—Sufficiency of—Marginal rules 48 and 102.

MITCHELL v. COAST PAPER CO. LTD.

Where a solicitor accepts service of a writ of summons and undertakes to appear but fails to do so, the plaintiff is not in a position to enter default judgment.

An affidavit of service of a writ of summons recited that defendant was served "by leaving a true copy of the same with the defendant's solicitor, who thereupon accepted service of the said writ of summons."

Held, not to be sufficient as it did not state that "defendant's solicitor undertook in writing to accept service."

APPLICATION to set aside a judgment signed in default of appearance. Service of a specially endorsed writ was made on defendant's solicitor on the 18th of January, 1930, when he gave in the usual form in writing an acceptance and his undertaking to appear. Judgment in default of appearance was entered on the 27th of January. The defendant then applied to set aside the judgment. Heard by MURPHY, J. in Chambers at Vancouver on the 3rd of February, 1930.

Statement

MacGill, for the application: The judgment is irregularly entered and should be set aside *ex debito justitiæ*: see *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764 at pp. 768-9. Marginal rule 48 says: "No service of writ shall be required where the

Argument

defendant, by his solicitor, undertakes in writing to accept service, and enters an appearance." The Ontario rule does not contain the words "and enters an appearance." But this substitute for service must be perfected by entry of appearance, thus precluding a judgment in default of appearance. The affidavit required by marginal rule 102 is indispensable. This must shew service or substituted service on the defendant. The terms of the rule are precise and there are no means of departing from them: see *Ford* v. *Miescke* (1885), 16 Q.B.D. 57; also *Crane & Sons* v. *Wallis* (1915), 2 I.R. 411. As to the solicitor's undertaking see *Phipps* v. *Groves* (1923), 3 W.W.R. 780, where Clarry, M.C. distinguishes *In re Kerly, Son & Verden* (1901), 1 Ch. 467. On default of solicitor's undertaking to appear the plaintiff's remedies are: (1) Summons to shew cause; or (2) attachment: see Chitty's King's Bench Forms, 15th Ed., p. 97, note (*k*); also Yearly Practice, 1930, pp. 54 and 127.

Argument

McLorg, for plaintiff, relied on *Sterling Loan & Securities Co.* v. *Clancy et al.* (1917), 2 W.W.R. 61, and *In re Kerly, Son & Verden* (1901), 1 Ch. 467.

4th February, 1930.

MURPHY, J.: Application to set aside a judgment signed in default of appearance. Marginal rule 102 requires the filing of an affidavit of service or of notice in lieu of service as a condition precedent to signing a default judgment. The affidavit filed herein states that the defendant was served "by leaving a true copy of the same with the defendant's solicitor *James Henry MacGill* who thereupon accepted service of the said writ of summons." Clearly this is not the usual affidavit of service. Plaintiff endeavours to support it as sufficient by relying on marginal rule 48. But even if that rule could be relied upon, the affidavit filed does not bring the case at Bar within it, for the affidavit does not state that the defendant's solicitor undertook in writing to accept service. In addition, I agree with the reasoning of Clarry, M.C. in *Phipps* v. *Groves* (1923), 3 W.W.R. 780. He there to my mind properly distinguishes the case of *In re Kerly, Son & Verden* (1901), 1 Ch. 467 relied upon in *Sterling Loan & Securities Co.* v. *Clancy* (1917), 2 W.W.R. 61 from the case before him which latter case is on all

Judgment

MURPHY, J.

1930

Feb. 4.

MITCHELL v. COAST PAPER CO. LTD.

fours with the one at Bar. It is further to be noted that the *Sterling* case was a motion for judgment not one resting on a default judgment. The judgment here is set aside with costs of application to defendant in any event.

Application granted.

COURT OF APPEAL

1930

Feb. 7.

McDERMOTT v. WALKER. (No. 2).

Practice—Testator's Family Maintenance Act—Costs of proceedings under —Whether payable out of the estate—"Good cause"—Marginal rules 976 and 989a—R.S.B.C. 1924, Cap. 256; Cap. 52, Sec. 28.

McDERMOTT v. WALKER

A testator who was survived by his second wife, and a daughter by his first wife, left all his estate to his widow. On petition by the daughter for a portion of the estate under the Testator's Family Maintenance Act an order was made that she be allowed a certain sum, but the order was set aside on appeal and it was held that the widow was entitled to the whole estate in accordance with the will.

A motion to the Court of Appeal by the petitioner that the costs be paid out of the estate was dismissed.

Statement

MOTION to the Court of Appeal to review the settlement of judgment delivered on the 7th of January, 1930 (see *ante*, p. 184), as to the disposition of costs. Heard at Victoria on the 7th of February, 1930, by MARTIN, GALLIHER and MACDONALD, JJ.A.

Argument

Gibson, for the motion: We were successful in the Court below but the appeal to this Court was allowed. Where a claim is *bona fide* and made on reasonable grounds a Court of Equity will order the costs to be paid out of the estate. The Court may direct this to be done under marginal rule 989a: see also *In re Estate of Hugh Ferguson, Deceased* (1929), 41 B.C. 269.

C. R. J. Young, contra: Under marginal rule 976 costs follow the event unless for good cause, and no reason has been shewn why the general rule should not be followed. There is no oppression or misconduct so there is no "good cause." He must shew

some ground why we should be deprived of costs: see *James Thomson & Sons* v. *Denny* (1917), 25 B.C. 29 at p. 33.

The judgment of the Court was delivered by

MARTIN, J.A.: This is a motion to review the settlement by the registrar of the minutes of the judgment we pronounced herein on the 7th of January last, the registrar having approved a clause directing the unsuccessful respondent to pay the costs here and below to the successful appellant, and it is submitted that the costs of all parties should be paid out of the estate on some suggested analogy between proceedings under the Testator's Family Maintenance Act, Cap. 256, R.S.B.C. 1924 and those within the provisoes of Supreme Court Rule 976, and section 28 of the Court of Appeal Act; but it is not suggested that there is any "good cause" for the costs not "following the event" in favour of the successful appellant, or that the four exceptions set out in said section 28 apply hereto.

There is not, in our opinion, any real analogy as above suggested, because under the Testator's Family Maintenance Act no "executor, administrator, trustee or mortgagee" has a place therein, the proceedings being directed not to implement a will but to deprive the beneficiary of property derived thereunder. In the present case, to order costs to be paid out of the estate would simply mean that they would be paid by the widow, the sole beneficiary, despite the fact that the proceedings launched by the respondent to get a portion of the estate had, we have decided, no just foundation. Moreover, it would, in general, be an unfortunate encouragement to litigation if unsuccessful claimants entertained the hope that even if their claim proved to be baseless yet the beneficiary under the will would be saddled with the costs thereof.

Judgment

It follows that the registrar was right in settling the minutes as he did in accordance with the ordinary practice of costs following the event in the absence of "good cause" for an extraordinary disposition thereof under said rule and statute, and therefore the motion is dismissed with costs.

Motion dismissed.

COURT OF APPEAL

1930

Feb. 11.

GOLDIE v. COLQUHOUN.

Courts—Jurisdiction—Action brought in Supreme Court—Application to remit to County Court—R.S.B.C. 1924, Cap. 53, Sec. 73.

GOLDIE v. COLQUHOUN

The object of section 73 of the County Courts Act is to keep claims founded on contracts, which do not exceed the jurisdiction, within the local jurisdiction of the County Courts and under the term "good cause" the plaintiff must shew that there are extraordinary circumstances justifying the retention of the case in the Supreme Court.

APPEAL by defendant from the order of MORRISON, C.J.S.C. of the 8th of November, 1929, dismissing an application for an order that this action be tried in the County Court at Vancouver. The plaintiff's claim was for $789.10 being balance of principal and interest due under a covenant in a deed dated the 28th of January, 1929.

Statement

The appeal was argued at Victoria on the 10th and 11th of February, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

D. S. Tait (*C. H. Tait,* with him), for appellant: The action is for $789.10, and is within the jurisdiction of the County Court. The application is under section 73 of the County Courts Act. We say a point of law is not a "good cause" for refusing to remit the case to the County Court. There is an English case, *Ginner* v. *King* (1890), 34 Sol. Jo. 294, in which an application such as this was refused as a point of law was likely to arise but that is based on the English statute and does not apply here. There is no discretion. "Good cause" is a question of fact. There is nothing in this case except conflict of testimony.

Argument

Heisterman, for respondent: There is a point of law arising here the defendant claiming the plaintiff, contrary to agreement, interfered with his banking arrangements with his banker and the case referred to applies: see also Yearly Practice, 1930, p. 1775.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appeal should be allowed and the order made for remitting the case to the County Court as the proper Court.

COURT OF APPEAL

1930

Feb. 11.

GOLDIE v. COLQUHOUN

MARTIN, J.A.: This being an important question, I think it desirable to make these brief observations on section 73 of the County Courts Act, R.S.B.C. 1924, Cap. 53, *viz.*, that the design of it is obviously to keep claims, founded on contracts, which do not exceed the jurisdiction of the County Courts, within the local jurisdiction of those Courts, and that if cases which could have been brought in the County Court are brought in the higher (Supreme) Court the Legislature intends that they should be remitted to the County Court, the language being that "on the hearing of the application [to that end] the judge shall, unless there is good cause to the contrary, order the action to be tried accordingly."

Now "good cause" of course means something that would bring the case out of the ordinary, because if the case is one of ordinary difficulty, either in fact or in law, or in both, then the object of the statute should be carried out, and it is the judge's duty, as imperatively declared by the statute, to make the order of remission. Therefore it becomes necessary for the plaintiff to shew that there are extraordinary circumstances justifying its retention in the Supreme Court before the judge can refrain from making the order.

MARTIN, J.A.

I shall not attempt to define what "good cause" might include, because that varies inevitably with the varying circumstances, but I shall only now say that at least in cases like the present, where the only material before us is the pleadings and upon them nothing outside the ordinary appears then it is quite apparent that, whatever might be done in other circumstances, a judge of the Supreme Court, upon said application, would not, with respect, be justified in retaining such an action in that Court, but should remit it, as the statute contemplates, to the proper jurisdiction of the local Courts which are presided over so well by the many able County judges of this Province.

GALLIHER and MACDONALD, JJ.A. would allow the appeal.

GALLIHER, J.A.

MACDONALD, J.A.

Appeal allowed.

Solicitor for appellant: *Thomas E. Wilson.*
Solicitor for respondent: *A. H. Douglas.*

MORRISON, C.J.S.C. (In Chambers)

1930

Feb. 17.

OVERN v. STRAND

OVERN v. STRAND *ET AL.*

Practice — Costs — Taxation — Joint defendants — Judgment — Judgment against defendants with costs—Liability of each defendant—No apportionment unless provided for in judgment.

In an action of tort, the plaintiff recovered judgment against four defendants, and the formal judgment provided "That the defendants do pay to the plaintiff her costs of this action, such payment to be made forthwith after taxation." On appeal from the taxing officer who segregated and apportioned the costs as against the respective defendants on the basis of costs occasioned by the separate defences:—

Held, that a judgment awarding costs in the terms quoted herein would leave no jurisdiction in the taxing officer to make any segregation or apportionment whatever as between the several defendants. Any such segregation or apportionment should be provided for by the terms of the judgment.

IN an action for damages in tort a jury brought in a verdict for $11,000 against four defendants and judgment was entered accordingly. The formal judgment provided for costs in the following terms:

"(4) That the defendants do pay to the plaintiff her costs of this action, such payment to be made forthwith after taxation."

On taxation the registrar taxed the whole costs of the action of the plaintiff at $2,107.80 and thereupon, at the instance of the defendant, Hudson's Bay Company, the registrar segregated and apportioned the above costs as against the respective defendants on the basis of costs occasioned by the separate defences. This was done on the authority of *Stumm* v. *Dixon* (1888-9), 22 Q.B.D. 99 and 529; *Merchants Bank* v. *Houston* (1900), 7 B.C. 352; *Hobson* v. *Sir W. C. Leng & Co.* (1914), 3 K.B. 1245. The result of such segregation and apportionment of costs by the registrar was to render all of the defendants jointly liable for $1,731.30 of the whole bill and the defendants other than the Hudson's Bay Company liable for the balance in varying sums. The Hudson's Bay Company appealed from the apportionment so made by the registrar, concluding that several of the allowances (amongst others, counsel fee at trial) should have been further reduced as against them. The plaintiff cross-

Statement

appealed from the taxation on the ground that under the terms of the judgment awarding costs as above quoted the registrar had no jurisdiction to make any segregation or apportionment of costs at all as between the respective defendants, but should have certified the full bill against them all. Argued before MORRISON, C.J.S.C. in Chambers at Vancouver on the 17th of February, 1930.

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

MORRISON, C.J.S.C.: The appeal by the Hudson's Bay Company is dismissed and the plaintiff's cross-appeal is allowed. While *Stumm* v. *Dixon* (1888-9), 22 Q.B.D. 99 and 529 and *Hobson* v. *Sir W. C. Leng & Co.* (1914), 3 K.B. 1245 laid down the rule applicable in the construction and interpretation of judgments in the King's Bench in England, it was clearly pointed out in the reasons for judgment in *Hobson* v. *Sir W. C. Leng & Co.* (1914), 3 K.B. 1245 that there was a radically different rule in the Chancery Division. In the English Chancery Division a judgment awarding costs in the terms quoted herein would leave no jurisdiction in the taxing officer to make any segregation or apportionment whatever as between the several defendants. Any such segregation or apportionment should have been provided for by the terms of the judgment. Judgment

The Laws Declaratory Act, R.S.B.C. 1924, Cap. 133, Sec. 2, Subsec. (34), adopts the equity rule in preference to the common law rule in all cases where in the same matter there is any variance between the rule in equity and that of common law. Marginal rule 977 introduced into the Supreme Court Rules of 1925 provides that directions as to costs, when there is a variation from the ordinary, shall be set out in the formal judgment. *Merchants Bank* v. *Houston* (1900), 7 B.C. 352 is therefore no longer applicable in British Columbia.

Appeal dismissed and cross-appeal allowed.

COURT OF APPEAL

1930

March 4.

REX v. LEE KIM, MAH POY, HENRY CHAN, CHARLIE SAM.

Criminal law—In possession of opium—Four defendants tried together—Application at end of Crown's case for discharge of one—Refused—Stool-pigeon—Opium in hands of police used for decoy purposes—R.S.C. 1927, Cap. 42, Secs. 166, 195 and 199; Cap. 144, Sec. 4 (d).

REX v. LEE KIM et al.

Where parties are indicted jointly it is in the discretion of the judge or magistrate to keep all parties together until the end of the trial and a motion to dismiss as to one of the accused at the end of the Crown's case may be refused.

A quantity of opium in the importation of which the accused were supposed to be parties, came into the hands of a stool-pigeon who handed it to the police. The police gave it back to the stool-pigeon to be used for decoying the defendants. On the contention of the defence that the opium became the property of the Crown, and the defendants in obtaining possession from the Crown were not in illegal possession of it:—

Held, that in so obtaining the opium the defendants were in illegal possession thereof.

Reg. v. *Villensky* (1892), 2 Q.B. 597 distinguished.

APPEAL by defendants from their conviction by Police Magistrate Shaw at Vancouver on the 28th of October, 1929, on a charge of being in possession of opium. The four accused, who lived in Victoria, went to Vancouver on the 27th of August, 1929, and immediately the accused Henry Chan went to see one Kostoff, a Russian, who kept a place where Chinamen resorted to for drink and night amusements. He told Kostoff to get a boat and go to the steamship Empress lying at a Canadian Pacific Railway wharf; that he would see a light at a port-hole and under the port-hole a string would be hanging; that he should attach a small parcel (which Henry Chan gave him) to the string and after it was hauled up, the string would again be lowered with a parcel containing opium. Henry Chan gave Kostoff $10 to hire a boat. Kostoff, who was in the employ of the police acting as a stool-pigeon, went with a policeman in a police boat, located the lighted porthole, found the string hanging from it and they attached the parcel to it (supposed to contain money) and on its being hauled up, the string was later let

Statement

down with 44 tins of opium in the parcel attached thereto. Kostoff took the opium to room 107 in the Dunsmuir Hotel. Next morning Kostoff with Henry Chan, Lee Kim and Mah Poy went to the Vancouver Hotel in a car driven by Mah Poy. The Chinamen went to room 158, leaving the Russian in the car and shortly after came out, Charlie Sam being with them. They all got in the car (with the exception of Mah Poy) and went to the Dunsmuir Hotel and on going to room 107 Kostoff gave Charlie Sam a parcel containing opium. The police (who were in the next room listening) then arrested Charlie Sam at the door of room 107. From the conversations that took place in the car between Kostoff and Lee Kim it appeared that Lee Kim was chiefly interested in the opium taken off the Empress. After Charlie Sam's arrest the police went to room 115 in the same hotel where they arrested Mah Poy. A suit-case with bottles of soda-water in it was all that was found in the room.

Statement

The appeal was argued at Victoria on the 20th to the 23rd of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant Mah Poy: Assuming the evidence of Kostoff, who was a stool-pigeon, was true, there is no evidence justifying the conviction of Mah Poy. He was with the other three men and that is all that there is against him. There is not a word in the appeal book to shew that he knew anything about the opium.

Moresby, K.C., for appellant Charlie Sam: Charlie Sam received a parcel containing opium but he was not in unlawful possession. This opium was seized by the police and under section 195 of the Customs Act was forfeited and became the property of the Crown. Kostoff from the time the opium was taken was in the employ of the officers of the Crown: see also sections 166 and 199 of the Customs Act. The charge is under section 4 (*d*) of The Opium and Narcotic Drug Act. On resumption of possession see Russell on Crimes and Misdemeanours, 8th Ed., 1379-80; *Reg.* v. *Villensky* (1892), 2 Q.B. 597; *Dolan's Case* (1855), Dears. C.C. 436; *Reg.* v. *Hancock and Baker* (1878), 14 Cox, C.C. 119; *Reg.* v. *Schmidt* (1866), L.R. 1 C.C. 15. There is no evidence that Charlie Sam knew the parcel contained opium.

Argument

COURT OF APPEAL

1930

March 4.

REX v. LEE KIM *et al.*

Castillou, for appellant Henry Chan: This case comes within *Rex* v. *Berdino* (1924), 34 B.C. 142 at p. 149. Henry Chan was convicted on the evidence of the Russian alone. That there should be corroboration see *Rex* v. *Sands* (1915), 25 Can. C.C. 116 at p. 117.

Stuart Henderson, for appellant Lee Kim: The police took the opium to the wharf. They were *particeps criminis* and their evidence should be corroborated. Time and place must be added to every material fact in an indictment: see *Rex* v. *Austin* (1724), 8 Mod. 309; *Rex* v. *Hollond* (1794), 5 Term Rep. 607 at p. 608; *Reg.* v. *O'Connor* (1843), 5 Q.B. 16; *Smith* v. *Moody* (1903), 1 K.B. 56; *Reg.* v. *King* (1843), 13 L.J., M.C. 43; *Reg.* v. *Martin, ib.* 45; *Reg.* v. *St. George* (1855), 4 El. & Bl. 520; *Reg.* v. *Totness* (1849), 11 Q.B. 80. The provisions of section 781 of the Code were not complied with: see *Rex* v. *Walsh and Lamont* (1904), 8 Can. C.C. 101. On the question of jurisdiction see *Martin* v. *Mackonochie* (1878), 3 Q.B.D. 730 at p. 775. As to amendment see *Qun* v. *Regem* (1924), 4 D.L.R. 182; *Rex* v. *Yeaman* (1924), 33 B.C. 390; *Rex* v. *Gill* (1908), 14 Can. C.C. 294; *Rex* v. *Loftus* (1926), 59 O.L.R. 65.

Argument

W. M. McKay, for the Crown (argument confined to Mah Poy): He was continually with the other three accused. When in the automobile he could hear the conversation between Kostoff and the others in regard to the opium. This is proof of his connection with the smuggling of this opium and is corroboration of Kostoff's evidence.

Farris, in reply: What Charlie Sam said is not evidence against Mah Poy and as to the use of Lee Kim's evidence in this regard see *Rex* v. *James Paul* (1920), 2 K.B. 183.

Wood, K.C., for the Crown: The words "City of Vancouver" were left out of the charge but after accused elected, the magistrate became seized of the case and there was jurisdiction: see *Rex* v. *Soanes* (1927), 33 O.W.N. 207; *Rex* v. *James* (1915), 25 Can. C.C. 23; *Rex* v. *Roop* (1924), 42 Can. C.C. 344 at p. 345; *Rex* v. *Iaci* (1924), 33 B.C. 501; *Rex* v. *Thompson* (1914), 2 K.B. 99; *Rex* v. *Barnes* (1911), 19 Can. C.C. 465. It is not now necessary that an accused must plead himself: see *Rex* v. *Tresegne* (1926), 58 O.L.R. 634; *Rex* v. *Graf* (1909),

19 O.L.R. 238 at p. 242; *Rex* v. *McLeod* (1906), 39 N.S.R. 108. That they were in unlawful possession see *Rex* v. *Chandler* (1913), 1 K.B. 125. That a document found in Lee Kim's room is admissible in evidence see *Reg.* v. *Bernard* (1858), 1 F. & F. 240.

Henderson, in reply, referred to *Rex* v. *Thompson* (1913), 9 Cr. App. R. 252; *Reg.* v. *Heane* (1864), 9 Cox, C.C. 433; *Mayor, &c., of London* v. *Cox* (1866), L.R. 2 H.L. 239 at pp. 260-1. The maxim *omnia præsumuntur rite esse acta* does not apply to inferior Courts.

Argument

Cur. adv. vult.

On the 4th of March, 1930, the judgment of the Court was delivered by

MACDONALD, C.J.B.C.: The four defendants were convicted of having opium in their possession contrary to the provisions of The Opium and Narcotic Drug Act, 1929. The evidence is largely circumstantial, but I think the commission of the crime has been sufficiently proved to sustain the verdict of the jury. The principal contention made by the defendants were, first, by the appellant Mah Poy, that at the close of the Crown's case there was no evidence against him upon which a conviction could be supported; that he had made a motion to be dismissed, which motion was refused. He complains of the refusal and says he was entitled to have the charge against him dismissed.

Judgment

The accused were indicted jointly and the magistrate refused the motion at that stage of the trial. Before the close of the trial, however, some evidence was brought out from the other defendants or their witnesses which effectually connected Mah Poy with the offence, and led to his conviction as well as that of the other defendants. Where parties are indicted jointly I think it is in the discretion of the judge or magistrate to keep all parties together until the end of the trial, and if that be so then the motion to dismiss Mah Poy at the end of the Crown's case was properly refused: *Reg.* v. *Hambly et al.* (1859), 16 U.C.Q.B. 617; *Reg.* v. *Dixon* (*No. 2*) (1897), 3 Can. C.C. 220.

The next contention was that the drugs were the property of

COURT OF APPEAL

1930

March 4.

REX v. LEE KIM *et al.*

the Crown, and were used by the police for the purpose of decoying the defendants and therefore the defendants' possession of them was duly authorized. This contention was supported if at all, by the line of cases which brought about the passage of section 403 of the Code, but I see a very clear distinction between those cases and the present one. There the stolen goods had been recovered and then used by the police to capture the receiver. The receiver could only be guilty if he had received stolen goods and the goods in question in these cases were not stolen goods, they had been recovered and again become the property of the true owner.

The next contention was that the magistrate had no jurisdiction to try the case. It appears that when the appellants came before him for preliminary inquiry the charge was duly read and interpreted to them. He then put to them the question as to how they would be tried and they elected to be tried by him summarily. It was contended that he ought to have reduced the charge to writing, and have had it read over to the appellants at the time of their election, but it seems to me that this is quite unnecessary where, as here, the whole proceeding was one transaction and the charge as read to them was the charge on which they were to be tried, and having pleaded not guilty they elected to be tried summarily. The provisions of the Code were sufficiently carried out.

Judgment

I think, therefore, that the trial was a proper one and that the convictions should be sustained.

The appellants were sentenced to two years' imprisonment and fined $300 each. From this sentence the Crown appealed, with leave. The appeal only applies to three of the accused, the three other than Charlie Sam, who appears to have been regarded as the tool of the others. On the hearing of the appeal counsel for the Crown abandoned it in relation to Mah Poy, so that the only two concerned in this appeal are Lee Kim and Henry Chan. We have had to consider the question of sentence in the case of *Rex* v. *Lim Gim* (1928), 39 B.C. 457, where we increased the sentence of imprisonment from four years to seven, and doubled the fine. That case was an extreme case where we thought that the evidence clearly shewed that the prisoner was dealing in narcotic drugs in a very large way and

COURT OF APPEAL

1930

March 4.

REX v. LEE KIM et al.

that his business was a very great menace to the public. In the present case the appellants had 44 tins of opium, and while I think that that is one that should be dealt with more severely than the ordinary case of possession for a man's own use or in very small quantities, yet the present case is not that case, and it is not as heinous as was the case against Lim Gim. The Court, I think, was intended to use its powers of interference with sentences in the interests of uniformity, and I think if we were not to increase the sentences of these men such uniformity would not be had and justice would not be done. I would therefore increase the term of imprisonment of Lee Kim and of Henry Chan to five years each, and their fines to the sum of $1,000 each.

Judgment

The appeal from the conviction is dismissed.

Appeal dismissed.

REX v. HENRY CHOW.

COURT OF APPEAL

1930

March 4.

REX v. HENRY CHOW

Criminal law—Charge of being in possession of cocaine and morphine—Jury—Conviction—Exhibits marked for identification only—Not marked as exhibits—Sentence—Appeal.

The accused was convicted on a charge of unlawfully having cocaine and morphine in his possession. On the trial certain material exhibits were marked for identification only and were not put in and marked as part of the evidence.

Held, on appeal, affirming the decision of MCDONALD, J., that although strictly the exhibits ought to have been put in, nevertheless, they were before the Court and jury and were considered by the jury in arriving at a verdict. No miscarriage of justice occurred and the appeal should be dismissed.

APPEAL by accused from his conviction by MCDONALD, J. and a jury at the Vancouver, 1929, Fall Assizes, on a charge of having morphine and cocaine in his possession.

Statement

The appeal was argued at Victoria on the 9th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1930

March 4.

REX v. HENRY CHOW

Argument

Stuart Henderson, for appellant: The exhibits in this case were marked for identification only, but were never put in evidence. This is fatal to the case as on being marked for identification they had a material effect on the jury. The sentence was too severe and should be reduced.

George Black, for the Crown: A view was taken of the *locus in quo* which was very important and with the evidence of the police was sufficient to justify a conviction.

Henderson, in reply, referred to *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100 at p. 111. *Cur. adv. vult.*

On the 4th of March, 1930, the judgment of the Court was delivered by

Judgment

MACDONALD, C.J.B.C.: The only submission which deserves consideration is that respecting certain exhibits which were marked for identification only, and when proved were not again marked as part of the evidence. I do not, however, regard that as fatal to the conviction. The practice of needlessly marking documents for identification ought not to be encouraged; it is seldom necessary to do so, and they ought to be proved in the usual way. This case may be considered an exceptional one, and though strictly the exhibits ought to have been put in as such, in this case nevertheless they were before the Court and jury and were no doubt considered by the jury in arriving at their verdict. No miscarriage of justice has therefore occurred and the appeal should be dismissed.

With respect to the appeal from sentence, I think it is too severe, having regard to the nature of the appellant's offence; it would be difficult to say that he was carrying on business on the same scale as was carried on by Lim Gim (1928), 39 B.C. 457 wherein there were also other weighty circumstances. The offence here was the having of a small quantity of opium in possession. The sentence is the most severe so far as imprisonment is concerned, permitted by the Act. The most severe sentences should be imposed only in extreme cases. I would therefore reduce the sentence to five years, the fine to remain as now. The conviction being a second one we would not remit the lashes.

Appeal dismissed.

REX v. SUTHERLAND.

COURT OF APPEAL

1930

March 4.

REX v. SUTHERLAND

Municipal corporation—Licensing of trades and business—By-laws—Job-printer—Whether manufacturer—B.C. Stats. 1921 (Second Session), Cap. 55, Secs. 163, Subsecs. (126a) and (141a), 332 and 339—By-law No. 1954 of the City of Vancouver.

A job-printer must take out a licence as a "printer or publisher" and pay therefor the amount provided for licences to printers or publishers as provided for by By-law No. 1954 of the City of Vancouver and is not entitled to be licensed as a "manufacturer" under said by-law.

Decision of MACDONALD, J. affirmed.

APPEAL by defendant from the decision of MACDONALD, J. of the 15th of January, 1930 (reported, *ante*, p. 321) on appeal by way of case stated from the dismissal by George R. McQueen, Esquire, deputy police magistrate in Vancouver of an information that the defendant Robb Sutherland at the City of Vancouver between the 1st and 11th of September, 1929, did unlawfully carry on the business of a printer without having procured a licence in respect thereof contrary to the provisions of by-law No. 1954 of said city. The following is the case stated:

"The facts are as follows:

"(1) The said Robb Sutherland is a job-printer, carrying on business at 1004 West Pender Street, in the City of Vancouver, in the Province of British Columbia.

Statement

"(2) He procures the materials required for his business, namely, paper, ink, glue, etc., from manufacturing houses or from wholesalers, and from these materials, with the aid of printing machinery and labour, makes and produces letterheads, envelopes, stationery, books, etc., to the order of individual customers.

"(3) The persons per annum engaged or employed by the said Robb Sutherland in the operation of his job-printing plant (inclusive of himself) number five.

"(4) After extended conversations as between the said Robb Sutherland and the said Charles Jones, the said Robb Sutherland, on the 20th day of June, A.D. 1929, made a formal application on the form prescribed by the licence department of the City of Vancouver, for a licence as a manufacturer, and he tendered with the said application the sum of $15 in Dominion of Canada notes, being the sum of $3 per person per annum engaged or employed in the business of the said Robb Sutherland, the said sum being computed on the basis fixed in Schedule 'A' of the Companies, Trades and Licence By-law of the City of Vancouver, being City of Vancouver By-law No. 1954.

COURT OF APPEAL

1930

March 4.

REX v. SUTHERLAND

"(5) The formal application for a manufacturer's licence, made on the 20th day of June, A.D. 1929, by the said Robb Sutherland, was refused by the said Charles Jones, licence inspector of the City of Vancouver, on the ground that the said Robb Sutherland was not entitled to a manufacturer's licence by reason of the fact that he was not a 'manufacturer' within the meaning given to the word 'manufacturer' by City of Vancouver by-law No. 1954 aforesaid, as amended by City of Vancouver By-law No. 1975, Sec. 1.

"(6) The said licence inspector contended that the said Robb Sutherland should take out and procure from the City a licence as a 'printer or publisher,' by virtue of City of Vancouver By-law No. 1954, Sec. 5 (34), and should pay therefor the licence fee prescribed by City of Vancouver By-law No. 1954, Sec. 6, and under Schedule 'A' of the said by-law, namely, the amount of $35.

"(7) The aforementioned information was thereupon laid by the said licence inspector.

"Upon the hearing of the said information, the following statutory provisions were cited, namely: Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (Second Session), Sec. 2 (8); Sec. 163, Subsecs. (126a), (141a); R.S.B.C. 1924, Cap. 84, Sec. 2 (1); Schedule 'A,' (section 2).

"Vancouver City By-law No. 1954 (passed 2nd January, A.D. 1929).

"'Sec. 2. In the construction and for the purposes of this by-law, the following words and terms shall have the meanings hereby assigned to them, unless repugnant to the context hereof:—

"'(o) "Manufacturer" shall mean and include every person who carries on the business of manufacturing any commodity or commodities within the City, and whose sole business consists of manufacturing such commodity or commodities, and who exclusively deals in or sells such commodity or commodities only to wholesale or retail dealers or to other manufacturers or contractors, who resell such commodity or commodities. But the same shall not be deemed to mean or include any person specifically designated, classified or referred to in subsections (1) to (50) and subsections (52) to (54) (both inclusive) of section 5 of this by-law, and who are subject to a specific licence fee under such specific designation or classification.'

Statement

"(See Vancouver City By-law No. 1975, passed 6th May, A.D. 1929.)

"'Sec. 3. Every person carrying on, maintaining, owning or operating within the City any of the several trades, occupations, callings, businesses or undertakings or things set forth in section 5 and Schedule "A" of this by-law, and more particularly described therein, shall procure a licence therefor, or in respect thereof, from the City for each place or branch of business operated by him within the City, and shall pay therefor the sum or sums specified in said Schedule "A" herein in respect thereof, which sum or sums shall be in all cases paid in advance.

"'Sec. 5. The following persons shall take out and procure from the City a licence in respect of any of the several trades, occupations, callings, businesses, undertakings, or things following:—

"'(34) Every person carrying on the business of a printer or publisher.

"'(51) Every person carrying on the business of a manufacturer.

"'Sec. 6. For the purpose of this by-law, the various businesses, trades, occupations, or callings hereinafter specified or mentioned as included in groups 1, 2, 3 and 4 of this section are hereby subdivided, designated, classi-

fied and graded as hereinafter set forth, and the licence fee to be paid by every person respectively carrying on any business, trade, occupation or calling included in any of the said groups 1, 2, 3 and 4, shall be as respectively set out in Schedule "A" of this by-law.

" 'Number of persons ordinarily employed, engaged, kept or occupied in carrying on the business, trade, occupation, or calling to be licensed (including an individual licensee, members of the firm, or partnership, and managers, clerks, salesmen, accountants, drivers, employees, teachers or servants):

" 'Group 1	Class	Number of Employees
" 'Printers or publishers	"C"	5 to 6 inclusive

" 'Schedule 'A'—Companies.

" 'Manufacturers—$3 per person engaged or employed in any such business (provided such fee shall not exceed the sum of $100 per annum).

" 'Group 1—

" 'Printers or Publishers.

" 'Class 'C'—$35 per annum.'

"Upon the foregoing facts I dismissed the information.

"The question submitted for the opinion of this Honourable Court is whether upon the above statement of facts I came to a correct determination in point of law, in dismissing the information as against the said Robb Sutherland, and, if not, what should be done in the premises?"

Statement

The appeal was argued at Victoria on the 6th of February, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

Manson, K.C., for appellant: With raw material the defendant through machinery and labour makes everything that a job-printer gets out. The City has not the power to segregate the different manufacturing industries. "For defining and classifying business" are the words they rely on: see *Jonmenjoy Coondoo* v. *Watson* (1884), 9 App. Cas. 561 at p. 569. The respondent is a "manufacturer" and the statute must be construed in its primary and natural sense: see *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767 at p. 778; *Bentley* v. *Rotherham and Kimberworth Local Board of Health* (1876), 4 Ch. D. 588 at p. 592; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., pp. 269 and 343. The words "manufacturer" and "factory" are defined in the statute and a printer's plant is a "factory": see *Minister of Customs and Excise* v. *The Dominion Press Ltd.* (1927), S.C.R. 583 at p. 586; 38 C.J. p. 986, art. 53.

Argument

McCrossan, K.C., for respondent: Subsection (141*a*) of section 163 of the Vancouver Incorporation Act is the author-

COURT OF APPEAL

1930

March 4.

REX v. SUTHERLAND

ization for the by-law. He is a job-printer and not a manufacturer: see *Clay* v. *Yates* (1856), 1 H. & N. 73; *Dominion Press* v. *Minister of Customs and Excise* (1928), A.C. 340; *The King* v. *Crain Printers Ltd.* (1925), 3 D.L.R. 291; *Lee* v. *Griffin* (1861), 1 B. & S. 272; *Parker* v. *Great Western Railway Co.* (1856), 6 El. & Bl. 77 at p. 109. The Factories Act does not apply at all. Sections 332 and 339 of the Vancouver Incorporation Act apply here.

Argument

Manson, in reply: He makes a distinction between *"en masse"* production and the small producer but this does not apply to "manufacturer." There is no power to pass this by-law.

Cur. adv. vult.

4th March, 1930.

MACDONALD, C.J.B.C.

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

MARTIN, J.A.

MARTIN, J.A.: This appeal has been well and fully argued and it really comes down to the question as to whether or no the City of Vancouver had the statutory power to pass subsection (o) of section 1 of its Companies, Trades and Business Licence By-law No. 1954, passed 2nd January, 1929. That subsection (o) purports to define the expression "manufacturer" for licensing purposes within the corporate limits and it confines that definition to "every person"

> "whose sole business consists of manufacturing such commodity or commodities, and who exclusively deals in or sells such commodity or commodities only to wholesale or retail dealers or to other manufacturers or contractors."

Reliance is placed by the City upon subsection (141*a*), Cap. 87 of the Vancouver Incorporation Act, 1921, Amendment Act, 1926, which enacts that the City may pass by-laws

> "For defining and classifying businesses, trades, callings, and occupations, and classifying persons carrying on any business or following any trade, occupation, or calling within any of the provisions of this Act, and for empowering and authorizing the Council to differentiate and discriminate, according to such classification or classifications as may be designated in any by-law in that behalf, between such persons or classes of persons and between such businesses or classes of businesses, trades, occupations, or callings in respect of the amount of the licence fee or fees which may be imposed thereon under any of the provisions of this Act."

This is very wide and arbitrary language and designedly made so, doubtless, to meet a difficult question of civic legisla-

tion and it is to be noted that the various subsection in the successive statutes relevant to the question are all parts of the same section 163 under the title (in the preceding section) of "Powers Exercisable by the Council" and hence should be read together to ascertain their true intent and meaning under the varying circumstances that will be encountered in the practical application of the council's powers to the general public interest.

After careful consideration of the matter from the appellant's standpoint, ably presented by Mr. *Manson*, I find myself unable to say that the learned judge below has taken a wrong view of the application of the by-law to the difficult question of mixed callings, *e.g.*, manufacturing and retail stationers, or jewellers, or the appellant's business wherein the two elements of manufacturer and retailer are doubtless to be found, and unless we are prepared to go the length of holding (and I am not) that the general powers of definition and classification conferred by said subsection (141*a*) must be excluded by the effect of section 8 (1) of Cap. 58, 1928, as entirely inapplicable to the present circumstances, then the appeal should be dismissed, which in my opinion is the only course open to us to adopt, there being no question about the council's having *bona fide* exercised its powers.

MARTIN, J.A.

GALLIHER, J.A.: I agree in the conclusion reached by the learned trial judge, who has dealt at length with the matter, and would dismiss the appeal.

GALLIHER, J.A.

MACDONALD, J.A.: The appellant contends that he is a "manufacturer" and only obliged to procure and pay for a manufacturer's licence, while respondent (Council of the City of Vancouver) submits that it may define and classify him as a "printer" and as such compel him to pay a higher licence fee as provided for by its by-law.

MACDONALD, J.A.

The Vancouver Incorporation Act, 1921 (Cap. 55), enacted section 163, subsection (141) that:

"The Council may from time to time pass, alter, and repeal by-laws for the following purposes:—

"(141.) for fixing or specifying the amount of the licence fee or fees, or tax or taxes, or charge to be paid for every licence required under any by-law passed under this section where not otherwise specially provided for."

COURT OF APPEAL

1930

March 4.

REX
v.
SUTHERLAND

By chapter 87 of the statutes of 1926-27, the foregoing section was amended by adding thereto the following as subsection

"(141*a*.) For defining and classifying businesses, trades, callings and occupations, and classifying persons carrying on any business or following any trade, occupation, or calling within any of the provisions of this Act, and for empowering and authorizing the Council to differentiate and discriminate, according to such classification or classifications as may be designated in any by-law in that behalf, between such persons or classes of persons and between such businesses or classes of businesses, trades, occupations, or callings in respect of the amount of the licence fee or fees which may be imposed thereon under any of the provisions of this Act."

Later by the statutes of 1928, Cap. 58, Sec. 8 (1) the original section 163 was further amended by adding subsection (126*a*) as follows:

"For licensing any person, firm, or corporation carrying on within the city the business of a manufacturer, not to exceed the amount of one hundred dollars per annum; provided that in no case shall the amount of any licence fee so imposed exceed the rate of three dollars per person per annum engaged or employed in any such business."

Under the powers conferred by its statutory charter the Municipal Council passed a by-law in 1929, the material sections being as follows:

"Sec. 2. In the construction and for the purposes of this by-law, the following words and terms shall have the meanings hereby assigned to them, unless repugnant to the context thereof:—

MACDONALD, J.A.

"(o) 'Manufacturer' shall mean and include every person who carries on the business of manufacturing any commodity or commodities within the city, and whose sole business consists of manufacturing such commodity or commodities, and who exclusively deals in or sells such commodity or commodities only to wholesale or retail dealers or to other manufacturers or contractors, who resell such commodity or commodities. But the same shall not be deemed to mean or include any person specifically designated, classified or referred to in subsections (1) to (50) and subsections (52) to (54) (both inclusive) of section 5 of this by-law, and who are subject to a specific licence fee under such specific designation or classification."

Other material sections of a by-law follow:

"Sec. 3. Every person carrying on, maintaining, owning or operating within the city any of the several trades, occupations, callings, businesses or undertakings or things set forth in section 5 and Schedule 'A' of this by-law, and more particularly described therein, shall procure a licence therefor, or in respect thereof, from the city for each place or branch of business operated by him within the city, and shall pay therefor the sum or sums specified in said Schedule 'A' herein in respect thereof, which sum or sums shall be in all cases paid in advance.

"Sec. 5. The following persons shall take out and procure from the city a licence in respect of any of the several trades, occupations, callings, businesses, undertakings, or things following:—

"(34). Every person carrying on the business of a printer or publisher.
"(51) Every person carrying on the business of a manufacturer."

By Schedule "A" the licence fee payable by manufacturers is $3 per person employed not to exceed a total of $100. The fee for printers or publishers is as stated a little higher.

Based upon the foregoing statutes and by-laws, appellant submits that the Municipality has authority only to demand the smaller fee because he is in fact a "manufacturer." The Municipality contends that it is within its legal rights in "defining and classifying" appellant's business as that of a printer. The learned judge whose decision is under review accepted the latter view. If, in fact, appellant is a "manufacturer" he must succeed unless notwithstanding that he may and should be so defined the Municipality may under subsection (141*a*) of the Act quoted "define and classify" him as a printer.

I refer also to the Factories Act, Cap. 84, R.S.B.C. 1924, relied upon in one aspect by appellant's counsel. Section 2 thereof defines "factory" as follows:

"(*a.*) Any building, workshop, structure, or premises of the description mentioned in Schedule 'A' in which three or more persons are employed, together with such other buildings, workshops, structures, or premises as the Lieutenant-Governor in Council from time to time adds to the said Schedule."

Then in Schedule A referred to in section 2 a list of "factories" is given one of the list being "Printing and publishing establishments."

These sections of the Factories Act are pertinent because by section 2, subsection (8) of the Vancouver Incorporation Act, 1921, it is provided that:

"'Factory' when used in this Act shall have the same meaning as defined in the Factories Act."

It was submitted that one who operates a "factory" is a "manufacturer" and that the Vancouver Incorporation Act of 1921 adopts the definition of the word "factory" contained in the Factories Act and by that Act "printing and publishing establishments" are factories. This argument cannot be pressed too far. It concerns the definition of a specific word and that word (factory) is not found in the parts of the Vancouver Incorporation Act, 1921, under review. However, apart from this feature on the stated facts, appellant is, strictly speaking, a

COURT OF APPEAL

1930

March 4.

REX v. SUTHERLAND

"manufacturer" although he may also be properly called a "job-printer." The admitted facts set out that

"(2) He procures the materials required for his business, namely, paper, ink, glue, etc., from manufacturing houses or from wholesalers, and from these materials, with the aid of printing machinery and labour, makes and produces letterheads, envelopes, stationery, books, etc., to the order of individual customers."

It is of some significance that the admitted facts also state that

"The said Robb Sutherland is a job-printer carrying on business at 1004 West Pender Street, in the City of Vancouver,"

describing him, as the man in the street would describe him—not as a manufacturer—but as a printer. Appellant "manufactures" (*manu facere*—to make by hand) letterheads, stationery, books, etc., from certain material, yet colloquially he would be described as a printer.

Murray in the Oxford Dictionary defines "Manufacture" as "The action or process of making articles or material (in modern use, on a large scale) by the application of physical labour or mechanical power."

MACDONALD, J.A.

The author inserts the words in brackets for, I think, significant reasons. He recognizes that there is a conception of the word "manufacturer" in modern speech confining it to individuals, firms or corporations turning out in large volume articles finished or partly finished for the trade, or for public consumption and that a single individual (*e.g.*, a shoemaker) employing it may be several assistants may accurately be classified as a "shoemaker" rather than as a manufacturer although he turns the raw material into a finished product. If, therefore, there is not large scale production, at least to a reasonable degree, the man or men engaged in various occupations are properly described as artisans. I think we must assume that the Legislature used the word in its modern signification recognizing this conventional distinction. True appellant in the course of time may acquire a plant and attain a production (he now employs five men) where he should properly be described as a "manufacturer." If it is objected that this view lacks certainty; that there is no definite dividing line the answer is that it is a question of *bona fides* in applying the Act and the powers of taxation conferred thereby. Again a modern conception of a manufacturer is one who on a reasonably large scale turns out a

finished or partly finished product by the application of labour or mechanical power for general use. He has not a known customer for every article produced. The finished products are delivered to traders or agents to sell in a general way. The appellant herein produces an article on the order of an individual, firm or corporation, the latter furnishing the specifications and often the mental effort required in designing the article ordered. They procure an artisan to make or "manufacture" (I do not wish to avoid the word) a specified article. But no one regards the workman as a manufacturer. He is described by the trade he follows. If we are convinced therefore that the Legislature had in view the modern application of the word; the fine dividing line between the work of an artisan and that of a manufacturer; the dual character of many occupations and the colloquial use of words, we have an explanation of subsection (141*a*) in the Act of 1926-27, permitting respondent by by-law to "define and classify." I agree that the words "defining and classifying" must be read together, with however due weight given to each word.

MACDONALD, J.A.

"The words of a statute, when there is a doubt about their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained. It is not because the words of a statute, or the words of any document, read in one sense will cover the case, that that is the right sense. Grammatically, they may cover it; but, whenever a statute or document is to be construed, it must be construed not according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used, unless there is something which renders it necessary to read them in a sense which is not their ordinary sense in the English language as so applied":

Maxwell on Statutes, 7th Ed., 46.

It is true that the words "defining and classifying" might be given effect to, as contended, by classifying manufacturing establishments in different groups where some common feature appertains to all in that group imposing different taxation on each. That view, however, presupposes that appellant is a manufacturer and cannot be otherwise regarded. If he is solely a manufacturer it is neither a definition nor yet a classification to say (under a power to define and classify) that he is not a

COURT OF APPEAL

1930

March 4.

REX v. SUTHERLAND

MACDONALD, J.A.

manufacturer. A bootmaker could not be classified as a watchmaker, nor the latter as a boat-builder. But that view ignores not only the modern conception of a manufacturer but also the dual aspects of many occupations.

It was submitted that the Legislature in enacting (126*a*) in 1928 meant to encourage manufacturing by limiting the tax and to classify a "manufacturer" as a "printer" and thus extract a higher tax is to frustrate that intention. I do not think that view is wholly sound. Doubtless a limit was placed with that object in view but within reasonable limits the Act was also designed to enable the Municipality to procure a revenue. True, by subsection (141) of section 163 in the original Act the right is given to fix the amount of licence fees by by-law "where not otherwise specially provided for," and the case of "manufacturer" was specially provided for by subsection (126*a*) in the 1928 amendment. But subsection (141*a*) of the 1926-27 statute confers the power of "defining and classifying" all businesses, trades, callings and occupations "within any of the provisions of this Act." "Manufacturers" are within its provisions and the general words used (businesses, trades, callings and occupations) are sufficiently broad to cover the business of the appellant. I think the Legislature realized, if not the impossibility, at least the futility of attempting a definition of the word "manufacturer" and left to the municipality the power to classify and define, acting *bona fide* and within reasonable limits. By-laws are benevolently interpreted by the Courts and supported if possible. To carry out what was, I think, the intention of the Legislature, respondent by by-law defined and restricted the word "manufacturer" to those who manufactured commodities and sold them to wholesale or retail dealers or to other manufacturers or contractors who resell. While this definition may be open to criticism, still, having regard to the modern view as to the meaning of the word and the difficulties in the way of a precise definition, it was, I think, reasonable to define and classify in this way leaving the smaller dealers who trade directly with the public to be described as artisans in the fashion invariably used in general conversation. On the whole, therefore, while not without full appreciation of the viewpoint so ably presented by counsel for the appellant, I cannot give

effect to his contention more particularly in view of section 339 of the original Act of 1921, providing that,—

"Any by-law passed by the Council in the exercise of any of the powers conferred by and in accordance with this Act, and in good faith, shall not be open to question, or be quashed, set aside, or declared invalid, either wholly or partly, on account of the unreasonableness or supposed unreasonableness of its provisions or any of them."

True it must be "in accordance with this Act." I think, however, there was no departure in this regard. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Williams, Manson & Gonzales.*
Solicitors for respondent: *McKay, Orr & Vaughan.*

REX v. LOO YIP YEN.

Criminal law—Summary conviction—Act referred to therein repealed—Habeas corpus—Certiorari—Criminal Code, Secs. 749, 754 and 1124—R.S.C. 1927, Cap. 144, Sec. 4 (d).

On *habeas corpus* proceedings with *certiorari* in aid, the warrant of commitment filed in the return disclosed that accused was convicted of having in his possession a drug, to wit: Opium, contrary to section 4 (*d*) of The Opium and Narcotic Drug Act and he was sentenced to the common gaol for six months with a fine of $200, and imprisonment for two months in default of payment. The conviction upon which the warrant of commitment was based described the Act as being "The Opium and Narcotic Drug Act, 1923." This statute had been repealed at the time the offence was alleged to have been committed.

Held, that section 1124 of the Criminal Code requires the judge before whom the question of invalidity is raised to pursue the depositions and determine as to the guilt of the person seeking redress, and if he is satisfied that the offence actually alleged in the conviction has been committed, such conviction should not be held invalid. Being satisfied after reading the depositions that the accused had committed the offence alleged, the conviction should be amended by striking out the figures "1923," confirmed as amended, and the release of the applicant refused.

APPLICATION for a writ of *habeas corpus* with *certiorari* in aid. The facts are set out in the reasons for judgment. Statement

MACDONALD, J. (In Chambers)

1929

Dec. 31.

REX v. LOO YIP YEN

Heard by MACDONALD, J. in Chambers at Vancouver on the 17th of December, 1929.

L. H. Jackson, for accused.
Cosgrove, for the Attorney-General.
Jackson, K.C., for R. C. M. Police.

31st December, 1929.

MACDONALD, J.: Lee Yip Yen seeks by *habeas corpus* proceedings, with *certiorari* in aid thereof, to obtain release from imprisonment. It appears by the warrant of commitment, filed on the return, that he was convicted on the 31st of May, 1929, of having in his possession a drug To Wit: Opium, contrary to section 4 (*d*) of The Opium and Narcotic Drug Act and sentenced to the common gaol for six months, with a fine of $200 and imprisonment for two months in default of payment in the meantime. While the warrant of commitment was valid on its face, the conviction, upon which it was based, described the Act as being "The Opium and Narcotic Drug Act, 1923." The statute bearing this name had been repealed, at the time when the offence was alleged to have been committed. It was contended that the conviction was thus invalid. The same point had come before FISHER, J. in *Rex* v. *Sing Lee* (not reported) and the discharge of the prisoner obtained on that ground. Then upon the immigration authorities proceeding and rearresting Sing Lee, he was again released under *habeas corpus* proceedings and it being then a civil matter the order for discharge was appealed and the case is now awaiting judgment. Under these circumstances, at the close of the argument herein, I deemed it advisable to reserve judgment. It has since been urged, that the judgment in the Court of Appeal might not necessarily be binding upon me upon this application, even if the appeal were allowed, as it would be a judgment in a civil and not a criminal matter. The distinction is drawn in *Rex* v. *Jungo Lee* (1926), 37 B.C. 318, where the warrant for deportation failed to accurately describe The Opium and Narcotic Drug Act. MARTIN, J.A., at p. 320, after stating that it would be an unwarranted straining of the law to hold in the circumstances there mentioned, that a mere omission in the recital in a warrant, of the

Judgment

date of a statute, upon which a conviction was based, would invalidate the warrant, said:

"These applications are of a special kind and we have already held them to be civil and not criminal in their nature. In civil matters a reference to statutes is often not required to be exact. . . ."

I felt impressed with this contention and considering the nature of the application think it better to deal with the matter, without waiting for the result in the appeal.

Should I follow then the decision rendered by FISHER, J. in the *Rex* v. *Sing Lee* case? It is not reported, but I have had the benefit of perusing the appeal book, referring to the second application and it appears to me that the only point decided was that both the conviction and warrant of commitment were invalid as they purported to imprison the offender under an Act which had been repealed. The misstatement as to the statute was the addition of the figures "1923," thus giving the name of a repealed statute. There is nothing to shew that the provisions of section 1124 of the Code were considered in that case nor that there were any depositions available for consideration if such a course had been adopted.

Here the attack is made upon the conviction along the lines indicated and the depositions are available, so that I may consider the guilt or otherwise of the accused person under any law in force at the time when the alleged offence is stated to have occurred. Even if the reference to a repealed statute invalidates a conviction, then section 1124 in my opinion, requires that the judge before whom the question of invalidity is raised, to peruse the depositions and determine the guilt of the person seeking redress. If he is satisfied that the offence, actually alleged in the conviction, has been committed or if the depositions shew "it is an offence of the nature described" then such conviction should not be held invalid. In this connection Osler, J.A., in *Reg.* v. *Murdock* (1900), 4 Can. C.C. 82 at pp. 90-1, in rendering the judgment of the Court of Appeal, after deciding that a conviction was erroneous, referred to the power of amendment lately given by the Criminal Code as follows:

Judgment

"The effect of these two sections of the Code, however, now is that, if satisfied upon a perusal of depositions that an offence of the nature described in the conviction has been committed, the Court may hear and determine the charge upon the merits as disclosed by the depositions

MACDONALD, J. (In Chambers)

1929

Dec. 31.

REX v. LOO YIP YEN

retuned in the *certiorari*, and may vary, confirm, reverse or modify the decision of the justice or may make such other order as they think just, and may by such order exercise any power which the justice might have exercised; and the conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by the justice, or it may be enforced by the process of the Court itself."

He stated that such power was more extensive than formerly and quoted the words of the section conferring such jurisdiction, in dealing with a conviction brought up on *certiorari* and as being conferred by Can. Stat. 1890, Cap. 37, Sec. 27.

Middleton, J. in *Rex* v. *Demetrio* (*No. 2*) (1912), 20 Can. C.C. 318 refers to the intention of section 1124 being that if guilt be proved the accused person is not to escape through error . . . of the magistrate.

Rex v. *Meikleham* (1905), 10 Can. C.C. 382 shews the extent and manner in which the section has been applied in Ontario.

Then Rinfret, J., in *Ex parte Henderson* (1929), 52 Can. C.C. 95, along the same lines, in referring to applications for release said:

"The writ of *habeas corpus* is a prerogative process available when 'there is a deprivation of personal liberty without legal justification': Halsbury's Laws of England, Vol. 10, p. 48, sec. 104. Courts should not permit the use of this great writ to free criminals on mere technicalities. It is the spirit of our criminal laws and more particularly of our law on summary convictions that defects and informalities be corrected so as 'to prevent a denial of justice' (Criminal Code, Secs. 723, 753, 754, 1120, 1124, 1125 and 1129)."

Judgment

Many cases might be cited in which section 1124 has been applied but I will only refer to that of *Rex* v. *Milaker* (1923), 40 Can. C.C. 287 at p. 291 in whch it was decided that if the conviction be bad on its face, the power of amendment depends on the Court's opinion, obtained from the evidence. Such application of the section is not strictly speaking an appeal, but rather a trial *de novo* upon the evidence afforded by the record. In my opinion the section should not be applied unless the Court is satisfied of the guilt of the accused beyond a reasonable doubt. It is, in that sense, a trial *de novo* and the burden of proof as to guilt rests upon the prosecution.

Then should I, upon a perusal of the depositions, "be satisfied that an offence of the nature described in the conviction . . . has been committed." Loo Yip Yen was charged with having opium in his possession. He was defended by counsel who cross-examined the witnesses for the Crown. He was well aware of

the facts, which were alleged as constituting the offence. He pleaded not guilty in the first instance but subsequently altered his plea to that of guilty. His imprisonment was the minimum allowed by the statute, but the reference made in the conviction to the statute, creating the offence, was not strictly correct. The year "1923" was added after describing the statute and such figures had been incorporated in the nomenclature to a statute which had been repealed. It was an oversight, which to my mind has no bearing upon the guilt or otherwise of the accused. Upon considering the depositions coupled with the admission of the accused to that effect I have no hesitation in holding that he was guilty of an infraction of The Opium and Narcotic Drug Act and the conviction is thus not invalid. I have, however, where guilt is established "the like powers in all respects to deal with a case as seems just," as if the offence were appealable and I had been trying the same under section 749 of the Code. I may apply the powers conferred by section 754 of the Code. Adopting this course and having no doubt as to the guilt of the accused, so admitted, under the statute law in force at the time dealing with narcotic and opium offences, I think it advisable to amend the conviction, by striking out the figures "1923" and confirm the conviction, so amended, as well as the warrant of commitment returned to the Court. The release of the applicant is refused. Order accordingly.

Judgment

Application dismissed.

COURT OF APPEAL

1930

Jan. 30.

W. L. MORGAN FUEL CO. LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO.

W. L. MORGAN FUEL COMPANY LIMITED v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LMITED.

Negligence—Collision—Damages—Right of way—Finding of trial judge—B.C. Stats. 1925, Cap. 8.

On the 26th of December at about 5.15 o'clock in the evening a motor-car of the plaintiff Company was dumping a load of wood into its woodyard on the north side of Bay Street in the City of Victoria, the truck standing at right angles to the curb with the engine and forepart of the truck across the north street-car track when a street-car of the defendant Company going west, collided with and damaged the truck. There was an arc light 28 feet west of the truck and the truck's headlights faced across to the south side of the road. It was found on the trial that the drivers of both street-car and truck were negligent but the driver of the street-car was mainly responsible and the damages were apportioned, four-fifths to be paid by the defendant and one-fifth by the plaintiff.

Held, on appeal, varying the decision of LAMPMAN, Co. J. (*per* GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.), that the apportionment of the damages should be four-fifths to be paid by the plaintiff and one-fifth by the defendant.

Per MACDONALD, C.J.B.C.: That the damages should be divided equally between the parties.

Per MARTIN, J.A.: That the appeal should be dismissed.

Statement

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 19th of August, 1929, in an action for damages for negligence. The plaintiff owns a woodyard abutting on Bay Street in the City of Victoria where said street traverses the north shore of Rock Bay, and access for dumping wood into the woodyard is from the north side of Bay Street. The tracks of the street railway are about twelve feet from the curb at this point. There is an arc light about 28 feet west of the spot where the dumping takes place. On the 26th of December, 1928, at about 5.15 in the evening a truck belonging to the plaintiff was dumping a load of wood into its woodyard from Bay Street, the front of the truck being across the north track of the defendant Company when a west-bound street-car collided with the truck. The front lights of the truck were shining across to the south side of the road. The plaintiff claimed the resulting damage to the truck amounted to $950. It was held

on the trial that both parties were guilty of negligence but that the driver of the street-car was mainly responsible and the learned judge apportioned the damages by ordering that the defendant pay four-fifths thereof and the plaintiff one-fifth.

The appeal was argued at Victoria on the 28th and 30th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for appellant: We have the right of way and the truck should not have been left standing where it was. Our lights shone for 20 feet and the driver of the street-car saw the truck when he was 20 feet away but could not stop in time to avoid collision: see *Atwood* v. *Lubotina* (1928), 40 B.C. 446. He had a right to assume the road was clear when he saw no lights.

Maclean, K.C., for respondent: The finding of the trial judge should not be disturbed in this case: see *McCoy* v. *Trethewey* (1929), 41 B.C. 295. The motorman was responsible for the accident. An arc light was close by and it is apparent that if he had been looking he would have seen the truck long before getting within 20 feet of it: see *Engel* v. *Toronto Transportation Commission* (1926), 59 O.L.R. 514 at p. 518; *Dent* v. *Usher* (1929), 64 O.L.R. 323; *Walker* v. *B.C. Electric Ry. Co.* (1926), 36 B.C. 338. On the question of right of way see *Leech* v. *The City of Lethbridge* (1921), 62 S.C.R. 123; Salmond on Torts, 7th Ed., p. 41.

Argument

Robertson, replied.

MACDONALD, C.J.B.C.: The evidence in this case is to a certain extent conflicting upon the essential points. The evidence of the defendant is that the motorman could not see the truck, that there was a shadow from the light which hid it. On the other hand, there is the evidence of the two men who saw it from Rock Bay Avenue 600 feet away. It is true they did not see it at the very moment, but they saw it a little later, I think an hour or two later in the evening; and as it would be getting darker of course that would militate against their seeing it, but they say they could see it over 600 feet away.

MACDONALD, C.J.B.C.

The learned judge, balancing these two positions, has found that the motorman ought to have seen it, if he had been taking

COURT OF APPEAL

1930

Jan. 30.

W. L. MORGAN FUEL CO. LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO.

proper care, and look-out, he would have seen the motor-truck there. And one can hardly understand how it could be otherwise. The arc light was 28 feet from the truck, high up, of course, as those arc lights are. And one can hardly understand the motorman approaching from the east with the truck between him and the light not having seen it if he had been paying attention. Now having arrived at that finding, of course, the learned judge decided accordingly. And there is no ground for our reversing that finding that I can see. Even if it is doubtful, the learned judge having decided between these different witnesses, we ought to accept his opinion unless we are clearly convinced that he was wrong. I am not clearly convinced that he was not right.

The only other question is that of the division of damages. He gave the plaintiff four-fifths and the defendant one-fifth of the damages, under the Contributory Negligence statute. The plaintiff was undoubtedly guilty of negligence, and the defendant was guilty of negligence. It is difficult to say that one was guilty of greater negligence than the other. And that being so, of course the damages should be divided equally. And in this case I think that is the conclusion that I am bound to come to, that the damages should have been divided equally between the two parties.

MACDONALD, C.J.B.C.

MARTIN, J.A.: In this case I agree with what my learned brother has said, that it is impossible for us to disturb the finding of the learned judge below that the motorneer on the tram-car did not keep a proper look-out, and the result of that was a main cause of the accident. Such being the case I find it quite impossible to disturb the learned judge's apportionment of the damages under the Contributory Negligence Act. Because, if the finding of the learned judge is correct, as I think it is, in regard to the look-out, then this case really falls exactly within the principle enunciated in *Davies* v. *Mann*, nearly 100 years ago in (1842), 10 M. & W. 546 (approved by the House of Lords in *Radley* v. *London and North-Western Railway Co.* (1876), 1 App. Cas. 754) wherein a distinguished Court, composed of Chief Baron Abinger, Baron Parke, Baron Gurney and Baron Rolfe, unanimously decided that where a donkey had

MARTIN, J.A.

been turned by its owner into a highway with both feet fettered, that although it was clear that such an act was wrongful yet the act of the defendant in running over the ass in the highway with his waggon and team of horses could not be excused, because though the owner of the ass did a negligent act in putting the fettered ass in the highway yet the driver of the waggon seeing the ass could not be excused for having run over it on coming down a slight descent at a "smartish pace"; and therefore, the owner of the ass was entitled to recover in full despite his original negligence.

Now what is the distinction in principle between that case and this? None that I can see. Because here it is clearly established that the driver of the tramcar saw or could have seen a long way off the stationary truck ahead of him and overhanging his rails. And when you hold that he should have seen, you are exactly in the same position as if he had seen. Having then got the situation that the driver of this car was in such a position that he should have seen this truck clearly—as two other witnesses say they did see it clearly at a distance of 628 feet—then on what principle is he to be excused because he did not look as it was his prime duty to do, and then stopped his tramcar which he had ample time to do? And it must be realized, with regard to keeping a look-out on tramcars, that it is even more essential, as being more inevitable in its disastrous consequences, for a person in charge of a car not to fail in keeping a look-out, because he being kept to the rigid rails on a certain line of tracks is unable to deviate from his course, as an ordinary motor-car can, in order to avoid a collision; and therefore I say, again, it is most essential that he should see precisely where he is going, because of his duty to his passengers as well as to others. And following that out I think Mr. *Maclean's* submission is right that in this particular case the learned judge would have been entitled to find that the defendant Company is solely responsible for this damage because it had not only the first but the last opportunity of avoiding it. But having taken upon himself to say that the damage was contributed to by the plaintiff himself to some degree, which he apportioned at the rate of one-fifth to four-fifths, in the making of that apportionment, as recently pointed out by the House of Lords, and referred to in the case

COURT OF APPEAL

1930

Jan. 30.

W. L. MORGAN FUEL CO. LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO.

of *Fred Olsen & Co.* v. *The "Princess Adelaide"* (1929), [41 B.C. 274]; 2 W.W.R. 629, 635, the judge performed a very difficult duty, one which the Court interferes with very reluctantly. Therefore I am very reluctant to interfere in this case because, applying the said principle of *Davies* v. *Mann,* which never has been questioned or varied in any respect up to this moment, it is impossible for us in the legal sense to interfere with the judgment appealed from.

In coming to this conclusion I draw attention to a most recent case upon this subject, of *Cooper* v. *Swadling,* in the Court of Appeal, reported last month in 46 T.L.R. 73, where there is a very illuminating judgment by that very eminent jurist, Lord Justice Scrutton, which well merits consideration. At the outset he begins his judgment by remarking on what a source of trouble these cases of collisions are, saying:

MARTIN, J.A.

"This is a rather troublesome case, and it is a case of some importance, because so much of the litigation at the present moment is concerned with running-down cases between motor-cars and motor-cycles, or motor-cars and pedestrians, or motor-cars and motor-cars. As I said during the argument, I am informed that at the present Liverpool Assizes out of 52 civil cases 42 are running-down cases, and it is, therefore, very important that the judges who try these cases should have some standard direction to conform to and to put before the juries, who are the ultimate tribunal to decide."

It was bearing these observations in mind that I have endeavoured to arrive at the principle that should be applied in the determination of this appeal.

GALLIHER, J.A.

GALLIHER, J.A.: In this case I think I cannot interfere in the finding of the learned judge as to negligence on behalf of both parties. There is some evidence on which the learned judge could find that the defendant was to a certain extent negligent. But where I differ with the learned judge, with all respect, is in regard to the apportionment of the damages to each. What have we in this case? We have the plaintiff deliberately placing an obstruction, namely, its truck, in a position where, if a street-car comes along, it is liable to be hit. Now he does that, as it says, because it wanted to dump some slabs that it was drawing to its woodyard down there, and in order to do so it backed its truck up but it could not clear the street-railway track. Well, that is all very well for it to take that position; but my view of the man who takes that position is this, he simply says, Well, I

am going to put my truck on your track in this dangerous position, and it is up to you to look out that you do not run into it, and if you do run into it I am going to get damages from you. Of course, I am not forgetting for a moment the doctrine that the defendant, notwithstanding the plaintiff does place it in that position, is liable if it is negligent in approaching the truck. Now it would have taken very little to have avoided—to have enabled the driver of the truck to back his truck up, so that it would have been off the track altogether. The plaintiff does not see fit, from carelessness or economy or whatever it may be, to so fix the ground where it is dumping there, so that the truck could back up where it is in no danger of being struck by the street-car. It is the original offender. And in my opinion there is not any excuse for it not having done what I have suggested it could do and in which case there would have been no accident at all.

GALLIHER, J.A.

Now in such a position as this, my view of how the damages should have been apportioned by the learned judge, is one-fifth to the plaintiff and four-fifths to the defendant.

McPHILLIPS, J.A.: I may say that I was disposed to allow this appeal *in toto*. However, deferring to what my brother GALLIHER has said, I have come to the conclusion that the apportionment should be as he has indicated.

This case is certainly one almost unparalleled, as far as I can see, in the books. We have at half-past five at night, a dark and wet night, the plaintiff having the effrontery to place his truck, a heavy truck, in such a position that it was bound to be struck by the street-cars in, you might almost say, the centre, or nearly so, of the City of Victoria; and with considerable vehicular traffic passing and repassing. The lives of the passengers in the street-cars were at stake.

MCPHILLIPS, J.A.

We have passengers in this street-car who observed the circumstances at the time, one a sailor accustomed to look-out duties. He swears that he was looking ahead and did not see this truck. And I think there was another witness that testified to the same effect.

Then apart from the negligent placing of the truck there was a breach of the by-law which reads as follows:

"No person in charge, control or in possession of any vehicle shall allow or permit such vehicle to stand or remain stationary on that portion of any

COURT OF APPEAL

1930

Jan. 30.

W. L. MORGAN FUEL CO. LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO.

MCPHILLIPS, J.A.

street along which street-car tracks are laid, not being within the business district, unless within twelve inches (12") of and parallel with the curb."

The motorman had good reason to believe that the law would be obeyed. I grant if he could have observed or reasonably should have observed this truck, he would be negligent. When it is said the motorneer gives no explanation, I fail to see the force of this; the motorneer gives the very best possible explanation—he did not see the truck. And others agree with him that the truck was non-observable. With respect to the men some 600 feet away who after the accident say they saw the truck, certain things have to be borne in mind; first, the truck when it was placed as it was, was on an incline, and very little of the truck was observable, so to speak, and the wheels of the truck were not upon the steel rails, but a portion of the truck extended over the street-car track, and as my brother GALLIHER has said the street-car would necessarily strike it; the impact threw the truck around, presenting a different view. Now I am not prepared to say that after the impact it was less observable or more observable, but in the ordinary course of things, I would think it would be more observable. The testimony of witnesses who say that they saw the truck 600 feet away is not evidence pertinent to the question we have to determine here at all, and it is easy to be wise after the event.

The truck was left under these circumstances over the street-railway track, and the driver of the truck goes about the business of unloading the truck, unmindful of the fact that street-cars are going to and fro; he puts no one to keep a look-out; he puts up no light—which is called for by statute—but pursues his way, and says "Oh, you on the street-car ought to have seen the obstacle that I placed there, and if you did not see it you should have seen it," or words to that effect. I am not so confident of the light that is thrown by these arc lights, one of which was near by. It would seem from the argument advanced that some magic is attachable to an arc light. I will undertake to say what the man on the street knows, and that is this, that these arc lights are very inefficient in most cases, and here we have a dark and wet night. One hangs on the street opposite my residence; half of the time or nearly so it is out. And further, it gives out very little light when alight. There is testimony here that there

was a shadow thrown. Why should that be disbelieved? I think that is quite in keeping with the truth. Again I say, one has extreme effrontery to bring an action founded upon the admitted facts of this case, and come into the Court of Appeal and say that he should be given four-fifths of the damage his truck sustained; that the British Columbia Electric Railway Company must out of its coffers pay practically for a new truck.

Now my brother MARTIN refers to the very celebrated case of *Davies* v. *Mann* (1842), 10 M. & W. 546. They were judges of the long ago, and we are judges of the present. We have equal power and right to declare the law. It is true under our jurisprudence we pay attention to precedents. But that distinguished jurist Lord Shaw in the Privy Council said that "the law must adapt itself to the changing condition of trade and society." And I would take the liberty to add railway, street railway and automobile traffic of the present day. There were no street-cars in the time of *Davies* v. *Mann*. The citizens of the country are entitled to protection in these days of the Lightning Express, and street-car traffic. The Street Railway Company must keep to its schedule or the people will not be able to keep their appointments or get to their work. I am satisfied, with great respect to the learned trial judge, that upon the evidence in this case there is such a preponderance of negligence upon the part of the plaintiff, that I would have been disposed to have allowed the appeal *in toto*. I do find myself, though, in the position that the trial judge has found negligence on both sides. The extent of the division of liability, though, is in my opinion wholly wrong; the proportions should be reversed. As I said at the outset, I defer to my brother GALLIHER'S view in that respect; I would say that the damages should be divided four-fifths to the defendant and one-fifth to the plaintiff.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I think we must say in view of the judgment below that if the motorman had been keeping a careful look-out he would have seen this trespasser on the track. On the other hand, I think it was a misconception of the true situation, and clearly wrong, to say that the motorman was mainly at fault. This Fuel Company for its own convenience, to enable it to carry on its business, makes use of the appellant's track from

MACDONALD, J.A.

COURT OF APPEAL

1930

Jan. 30.

W. L. MORGAN FUEL CO. LTD. v. BRITISH COLUMBIA ELECTRIC RY. CO.

which to discharge wood. Now I think a trespasser who invites trouble in that way should largely take the consequences of his own acts. Conduct of that sort denotes foolhardy negligence of a serious character. It does not follow that the motorman was not obliged to take care. But these considerations have an important bearing on the division that ought to be made of the damages. It was really placing a dangerous obstruction on the track without protection, and might lead to serious consequences. That original negligence was far more serious than the momentary lapse of the motorman in not seeing the truck sooner in a light which so far as the evidence shews may not have been very clear.

MACDONALD, J.A.

I therefore agree that the judgment should be varied and that four-fifths of the damages should be awarded against the respondent and one-fifth against the appellant.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The judgment of the Court is that the plaintiff gets one-fifth of the damages assessed by the learned judge, and the defendant four-fifths.

Robertson: Of course I suppose the costs follow the event. We have succeeded in the most important part of the whole thing.

MCPHILLIPS, J.A.: We gave judgment the other day, Mr. *Robertson,* on that point (*Katz* v. *Consolidated Motor Co.* (1930) [*ante,* p. 214]).

MACDONALD, C.J.B.C.: There are the costs of the Court below. The costs of this Court would follow the event; but the costs in the Court below must be apportioned. And the question is whether they shall be apportioned in the way the damages are apportioned, or in some other way.

MCPHILLIPS, J.A.: It would be in accordance with the ratio of damages. That was the decision of this Court just the other day.

Appeal allowed in part, Martin, J.A. dissenting.

Solicitors for appellant: *Heisterman & Tait.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

LESLIE *ET UX.* v. CLARK AND BUZZA LIMITED AND BUZZA.

COURT OF APPEAL

1930

Jan. 7.

LESLIE v. CLARK AND BUZZA LTD.

Negligence—Death of child—Action by father—Child attempts to board an auto-truck when in motion—Falls under wheel—Damages—Assessed by jury.

As an empty truck was passing a school where there were a number of boys on the sidewalk, the boys called to the driver asking for a ride, to which he replied "come on." After five or six had got on the truck, two getting on the seat and the others standing on the running-board, he told the others (including plaintiffs' boy, who was six years old) to stand back as the car was full. The boys stepped back and the driver started the truck. As he did so the plaintiffs' boy ran forward, and as there was no room on the running-board he grasped a trip cross-bar on the right side of the truck that ran between the running-board and the back wheel. As the speed of the truck increased he was unable to hold on and falling to the ground was run over by the rear wheel and killed. A jury found the driver guilty of negligence and assessed the damages at $1,000, for which judgment was entered.

Held, on appeal, affirming the decision of McDONALD, J., that the boy was not a trespasser as he was included in the general invitation to get on the truck and negligence should not be imputed to a child of six years of age. On the evidence the jury properly found that the driver was negligent and the appeal should be dismissed.

APPEAL by defendants from the decision of McDONALD, J. and the verdict of a jury in an action for damages for negligence resulting in the death of the plaintiffs' child, a boy of six years. A truck driven by an employee of the defendant Company, he also being a defendant, was proceeding along a highway after having deposited a load. He met a number of school children and they asked him for a ride. He assented to this and they commenced to clamber up on to the car, some on the driver's seat and several on the running-board on the right side of the car. The deceased boy, not finding a place to sit or stand, grabbed a rod which extended along the right side of the truck, between the running-board and the rear wheel. He kept his hold on the rod but as the speed of the truck increased he found it harder to hang on and eventually lost his hold and fell, the rear wheel passing over his body and killing him. The driver states that when the car was full he told those children who had not boarded the car, including the deceased, to get back, as

Statement

COURT OF APPEAL

1930

Jan. 7.

LESLIE v. CLARK AND BUZZA LTD.

there was room for no more and the last he saw of them was when they stepped back at his bidding, but when the car started again the deceased again came on and took hold of the rod as aforesaid. The jury found the driver guilty of negligence and assessed the damages at $1,000.

The appeal was argued at Vancouver on the 14th and 15th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Reid, K.C., for appellant: The driver told the boy to get back when the truck was full and there was no more room. He saw the boy get back as he was told, and the driver then started his car. It was after he started that the boy again ran after the truck and took hold of the rod at the side, as there was no room for him anywhere else. The driver could not be expected to foresee this action on the part of the boy, as he was then driving and looking ahead. It was entirely the boy's fault. He was trespassing in attempting to get on the truck: see *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358 at p. 369; *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361. Contributory negligence does not apply to a child of tender years: see *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150; *Winnipeg Electric Ry. Co.* v. *Wald* (1909), 41 S.C.R. 431 at p. 439; *Hardy* v. *Central London Railway Company* (1920), 3 K.B. 459 at p. 466; *Pinkas and Pinkas* v. *Canadian Pacific Ry. Co.* (1928), 1 W.W.R. 321 at p. 322; Salmond on Torts, 7th Ed. 39, (4); *Schwartz* v. *Winnipeg Electric Ry. Co.* (1913), 27 Man. L.R. 483; *Howard* v. *The King* (1924), E.C.R. 143. The damages awarded may be reduced by this Court: see Court of Appeal Rules, r. 7; *Piper* v. *Hill* (1922), 53 O.L.R. 233; *Barnett* v. *Cohen* (1921), 2 K.B. 461.

Lefeaux, for respondents: The boy was not a trespasser on the highway: see *Acadia Coal Co. Ltd.* v. *MacNeil* (1927), S.C.R. 497; *Ricketts* v. *Village of Markdale* (1900), 31 Ont. 610. The truck in this case was negligently put in motion: see *Harrold* v. *Watney* (1898), 2 K.B. 320 at p. 322; *Lynch* v. *Nurdin* (1841), 1 Q.B. 29 at p. 36. We say the boy was an invitee.

As to the value of the child to the parents see *Piper* v. *Hill*

(1922), 53 O.L.R. 233; *Barnett* v. *Cohen* (1921), 90 L.J., K.B. 1307; *Reilly* v. *Greenfield Coal and Brick Co., Limited* (1909), S.C. 1328.

Reid, replied. *Cur. adv. vult.*

7th January, 1930.

MACDONALD, C.J.B.C.: I think the defendants are liable for damages for the death of the plaintiffs' child.

There is conflicting evidence but on the whole it discloses negligence on the part of the driver of the truck. He was good-natured in inviting the children to have a ride, but he failed to take care to avoid injuring the child and the defendants must suffer the consequences. The jury found in the plaintiffs' favour for $1,000, and I see no reason to question it either on the facts or at law.

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

GALLIHER, J.A.: I agree that the directions of the learned trial judge to the jury on the question of law was correct.

The findings of the jury on the facts were, I think, justified by the evidence. The driver was doing a very dangerous thing in either inviting or permitting any of the boys to get upon the running-board of the truck. It was a negligent and dangerous act.

With regard to the amount of damages awarded, while the evidence is not very satisfactory on that point, it was for the jury to say and I cannot hold it so unreasonable as to cause me to interfere.

I would dismiss the appeal.

MCPHILLIPS, J.A.: The action was one brought by the parents of a young boy six years of age, who was unfortunately killed by reason of being run over by a truck upon a public highway.

The evidence is somewhat voluminous and it is a case of rival evidence as to whether the young boy was, under the circumstances a trespasser or not and also, as to whether there was negligence at all on the part of the defendants (appellants) and the further question as to whether there was or could be said to be by reason of his tender years, contributory negligence in the young boy.

COURT OF APPEAL

1930

Jan. 7.

LESLIE v. CLARK AND BUZZA LTD.

I have carefully studied the evidence and whilst at times I felt that it was a narrow point as to whether a sustainable action at law was present, I have finally come to the conclusion notwithstanding the very able and persuasive argument of Mr. *R. L. Reid,* the learned counsel for the appellants, that the jury were well entitled to find the verdict they did—that was, a general verdict for the plaintiffs (respondents) assessing the damages at $1,000 to be equally divided between the father and the mother.

In that a general verdict has been found all the necessary issues must be held to be found in favour of the plaintiffs. This, of course, presupposes that there is evidence to support the finding and in that I agree. There is ample evidence which if believed would well warrant the verdict and in view of the verdict naturally it was believed. I do not propose to in detail refer to the points of evidence. I will content myself by stating what I consider the evidence in general establishes, and that may be stated in the following way.

MCPHILLIPS, J.A.

The truck was being driven on the highway by an employee of the Company—one of the defendants—the driver also being sued in the action. At a certain point on the highway when the truck was returning after depositing a load the truck then being empty, school children were met with. The driver had gone to the school the children were coming from and he knew some of them. The children asked for a ride and the driver assented to this. They commenced to clamber up, taking their places some on the driver's seat, and some on the foot-board on each side of the driver's seat. Upon the right-hand side the whole foot-board was occupied and had thereon the twin brother of the deceased boy, and it would appear that he, although not finding a place to sit or stand upon, grabbed a rod which extended along the truck just in front of the rear wheels, and was keeping up in this way with the truck, hoping, I would suppose, to clamber up and get some foothold somewhere. In the end he fell, no doubt owing to the acceleration of speed of the truck, was run over and killed. There is a contradiction of fact at this point. The evidence led by the defendants would go to establish that the driver told the boys for whom there was no room upon the truck, that they must desist from attempts to get on and further that the little boy

who was killed had, after this warning, gone as far from the truck as to the side ditch of the road. However that is not the case established by the plaintiffs' evidence; their case is that the driver negligently and carelessly continued to drive the truck forward without advising himself of the exact condition of affairs, in truth, did not look out and assure himself of the condition of things; if he had, he would have seen the little boy where he undoubtedly was, and the precarious situation in which he was. The truck was so constructed that the driver had only a view to the rear directly back of him, and he could not acquaint himself of the condition of things on the ground, especially a little boy being there close up and hanging on to the rod as he was. Then there was this further factor, the truck was a left-hand drive and the driver was on the left with some of the boys on the seat beside him, all of which brought about an obstruction of view to the right where the boy was. The driver could only have been sure of conditions and as to the safety of any of the children he had given an invitation to by getting down from the truck or going out to the right of his seat, and looking back, and the jury undoubtedly found as they were entitled to find, that the driver was negligent in this, and did not act as a reasonable man should have, in view of the circumstances. That is the reasonable care which the situation of things required for the safety of the children who were about or might still come about the truck after his invitation to them. No limitation was stated as to what number of boys would be taken up, and naturally all attempted to get on and that was something he ought reasonably to have apprehended. Further, there was the situation of the little boy who was killed being divided from his twin brother who was standing upon the footboard of the truck and being carried away from him. Now if it could be said that the little boy was a trespasser in holding on to the rod of the truck, and endeavouring to clamber upon the truck, that would end the case. I would not so hold. In my opinion the little boy was in the position of an invitee and I would further hold that no contributory negligence can be imputed to him on account of his tender years, being only six years of age, and what he did in view of all the surrounding circumstances, was only what could have been naturally

MCPHILLIPS, J.A.

COURT OF APPEAL

1930

Jan. 7.

LESLIE v. CLARK AND BUZZA LTD.

expected; it is impossible to expect mature judgment in a child, particularly after the invitation extended, the allurement of the moving truck with his friends aboard and above all his little twin brother; natural instincts impelled him to keep with his brother. There has been a very recent pronouncement of the law, that arises here, in the House of Lords, a decision which is, of course, binding upon this Court, *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358. In that case it was held that the boy was a trespasser and went on the colliery premises at his own risk, and that the company owed him no duty to protect him from injury, but that case was based upon facts very dissimilar to the facts in the present case. The colliery officials, at times, warned children out of the field, but their warnings were disregarded. The wheels of a haulage system was the direct cause of the accident, and a boy of four years of age was killed. There was, of course, nothing in the nature of an invitation in that case. The unfortunate little boy upon the facts of the present case, was an invitee, not a trespasser, and the defendants were in duty bound to protect him from injury. In the case last referred to, (1929), A.C. at p. 371, we find Viscount Dunedin reported as saying:

MCPHILLIPS, J.A.

"The trespasser is he who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to."

That is not the present case. Here there was an invitation and no revocation of it established or conduct which would bring it home to the little boy that he was to keep clear of or off the truck—further, there was negligence in any case in driving the truck with the little boy where he was, and evidence was given by a number of witnesses of the accident that they shouted to the driver and endeavoured to attract his attention to the danger the little boy was in, and I have no doubt the jury fully believed that he heard these warnings, or should have heard them, but that he negligently drove on without satisfying himself that he was endangering life. It may also be said, under the circumstances of the case, that the little boy was a licensee, and at pp. 376-7, Viscount Dunedin further said:

"To take concrete instances: the learned judges in *Hardy's* case ((1920), 3 K.B. 459), the moving staircase, say explicitly that, if they could have held the children to be licensees, they would have held the defendants liable; yet an adult would have found no allurement in playing with the strap. In the present case, had the child been a licensee I would have held the defenders liable; *secus* if the complainer had been an adult. But if the person is a trespasser, then the only duty the proprietor has towards him is not maliciously to injure him; he may not shoot him; he may not

set a spring gun, for that is just to arrange to shoot him without personally firing the shot. Other illustrations of what he may not do might be found, but they all come under the same head—injury either directly malicious or an acting so reckless as to be tantamount to malicious acting."

Here there was allurement to the little boy in holding on to the rod and running by the side of the truck. I would also refer to what Lord Robson said at pp. 370-1, in delivering the judgment of the Privy Council, in *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361, where he dealt with the question of who is a trespasser:

"There is sometimes difficulty, however, in deciding when a man is really a trespasser. That is a question of fact, and in the present case it has been decided against the plaintiff by a jury properly directed.

"Again, even if he be a trespasser, a question may arise as to whether or not the injury was due to some wilful act of the owner of the land involving something worse than the absence of reasonable care. An instance of this occurred where an owner placed a horse he knew to be savage in a field which he knew to be used by persons as a short cut on their way to a railway station: *Lowery* v. *Walker* (1910), 1 K.B. 173; (1911), A.C. 10. In cases of that character there is a wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care.

"When these qualifications are borne in mind, the cases pressed by the respondent on the Courts below present little difficulty. Thus, in *Harris* v. *Perry* (1903), 2 K.B. 219, the plaintiff was on the train in response to an invitation by a superintendent, who represented the defendant, and under those circumstances a previous verbal prohibition by the defendant was held not sufficient to justify the plaintiff in being treated as a trespasser.

MCPHILLIPS, J.A.

"In *Lowery* v. *Walker* (1910), 1 K.B. 173 the Court of Appeal (Vaughan Williams and Kennedy, L.JJ.) held that the plaintiff, being a trespasser, could not recover, and though their judgment was reversed in the House of Lords, it was only on the ground that on a proper construction of the findings of the County Court judge the plaintiff ought not to be treated as a trespasser. Otherwise, as Lord Halsbury says ((1911), A.C. 10), 'the word "trespasser" would have carried the learned counsel for the defendant all the way he wants to get.'"

In the present case it must be held, and the evidence supports it, that the little boy was not a trespasser. That the doctrine of contributory negligence does not apply to children of tender age was dealt with by the Supreme Court of Canada in *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150. In that case a tradesman's teamster sent out to deliver parcels went to his supper before completing the delivery. He afterwards started to finish his work and in doing so ran over and injured a child and the *Merritt* case was followed in *Winnipeg Electric Ry. Co.* v. *Wald* (1909), 41 S.C.R. 431, and Mr. Justice Idington at p. 439, said:

"The learned trial judge evidently had in view, in dealing with the facts presented to him, the law as laid down by this Court in the case of *Merritt* v. *Hepenstal* [(1925)], 25 S.C.R. 150 at page 152, when the Court through the then Chief Justice, Sir Henry Strong, adopted the law as laid down in

COURT OF APPEAL

1930

Jan. 7.

LESLIE v. CLARK AND BUZZA LTD.

Gardner v. *Grace* [(1858)], 1 F. & F. 359, by Channell, B. as follows: 'The cases shew that the doctrine of contributory negligence does not apply to an infant of tender age. To disentitle the plaintiff to recover it must be shewn that the injury was occasioned entirely by his own ngligence.'"

As to the *quantum* of damages, I cannot see anything to be quarrelled with—they are quite moderate in amount.

I would dismiss the appeal.

MACDONALD, J.A.: This is an appeal from the verdict of a jury awarding respondents (father and mother) $500 each against appellants in an action arising out of the death of their son, a boy aged six and one-half years. The child was run over by a truck owned by appellants Clark and Buzza Limited, and driven by appellant William M. Buzza (a boy 20 years old) acting in the course of his employment.

The driver of the truck was passing a school where a number of boys were standing on the sidewalk. He claimed that the boys called out to him asking for a ride and he replied, "Yes, come on." One of respondents' witnesses, however, a young brother of the deceased testified that the driver shouted to the boys to "come on" and we should assume that the jury believed him. The invitation therefore to board the truck came from the driver to the boys. It was an invitation at large and included the deceased.

The driver testified that after a number—four or five—boarded the car, one or two sitting on the seat and the others standing on the running-board he warned two other boys (one the deceased) to stand back as the truck was full. The boy according to the driver's evidence stepped back five or six feet to the ditch and he then started the car in the belief that the child was out of the way with no intention of climbing aboard. Deceased therefore, it was submitted, without the driver's knowledge, after being warned ran towards the truck and tried to get on the running-board. It was fully occupied and he clung to a trip cross-bar with his feet either touching the ground or dangling near it. The car started up, the boy going along with it in the manner indicated struggling unsuccessfully to get a foothold. After proceeding a short distance he was forced to release his hold, fell to the ground and was run over by a rear wheel killing him almost at once.

MACDONALD, J.A.

On his own evidence the driver acted thoughtlessly. It was the impulsive act of a young man prompted by generosity but fraught with dangerous consequences. It was a foolhardy act to permit much less to invite, a group of boys to scramble aboard

a truck, not inside, but on the running-board and fender.

The true facts (as the jury must have found) were disclosed by respondents' witnesses. The driver of another truck coming along a short distance behind and two men with him had a good view of what took place. He said five boys—another witness said six—were on the right-hand side of the truck (where deceased was), four of them on the running-board, and one on the fender. They were crowded on a running-board only four or five feet long. As one witness put it:

"There was so many on there was no room for any more to get on, on the running board it was full."

In addition two boys (one the deceased) just before the truck started were standing by trying to get on. When the truck started the driver behind saw the deceased run along the side of the truck and grasp the trip-bar. It was not true therefore that he stepped back five or six feet to the ditch. He was at the side of the truck when it started. Another witness stated "he was there at the side of the car all the time from the start." This driver coming along behind, noticing the dangerous position of the boy, honked his horn while the two men with him shouted to the truck driver ahead. The evidence also shews that two other workmen standing nearby on the sidewalk shouted, apparently ineffectually, to the driver to stop. It is difficult to understand why he did not hear these frantic calls. One witness said "I don't see how he couldn't have heard it," but it may be that the noise of his truck travelling first in low and then in second gear, prevented it.

MACDONALD, J.A.

On these facts it is not difficult to support the jury's verdict. The jury would be justified in rejecting the appellant's evidence that he warned the boy not to get on the running-board. There was no contradiction of his evidence in this respect, but it is obvious that part of his statement in the same connection was incorrect, if respondents' witnesses are to be believed. He said he warned deceased and the boy heeded the warning by retreating five or six feet. The evidence of respondents' witnesses clearly shews that the boy did not go back to the ditch and the jury knowing that part of the driver's statement on this point was unbelievable could reject the whole of it. The deceased, therefore, was included in the general invitation to all the boys to board the truck. Appellant knew or should have known that there was not room on the running-board for all of them. It should be regarded as negligence on the part of any truck driver to invite even one boy to ride in this perilous position. It was a place of danger.

COURT OF APPEAL

1930

Jan. 7.

LESLIE v. CLARK AND BUZZA LTD.

The appellants can only escape liability, if at all, by shewing that the boy was a trespasser, and that therefore they would only be liable if the driver acted wilfully or at least with a reckless disregard of the child's safety. Cases are not unknown where damages were recovered for injuries to a child trespassing on property to which it was attracted by childish fancy. But we do not have to consider that question. He was not a trespasser. He was included in the general invitation and was therefore there with more than the leave and licence of the driver. It was incumbent upon the driver to take reasonable care for his safety.

The jury were not asked to find whether or not the child was guilty of contributory negligence. They were correctly informed that

"a child of tender years is not in the same position as an adult because he cannot reason and he has not got the same judgment, and even although he was told by his parents, as he was, to keep away from trucks, children forget and they are not called upon to exercise the same judgment, and reasoning powers that adults are."

The jury was told that whether the child was negligent or not, if the driver was negligent respondents were entitled to recover. Whether or not contributory negligence can be imputed to a child, or whether it depends upon varying degrees of age and intelligence, so that dependent upon age it might be material to know whether the conduct of the infant fell short of the standard one should expect, or whether the true rule is (as I believe) that suggested by Salmond in his work on Torts, 7th Ed., at p. 39, *viz.*:

MACDONALD, J.A.

"It is sufficient if he shews as much care as a person of that kind may reasonably be expected to shew; and he will not lose his remedy merely because a person of full capacity might by using greater care or skill have avoided the accident."

I am satisfied that in the case at Bar negligence should not be imputed to this six-year-old child and the trial judge rightly excluded the question of contributory negligence.

It was submitted that the damages were excessive. The evidence as to reasonable expectation of pecuniary benefit from the continuance of the boy's life was meagre, but we intimated, I think rightly, at the hearing, that as there was some evidence on this point to go to the jury we should not interfere on this ground.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *J. M. Macdonald.*
Solicitor for respondents: *W. W. Lefeaux.*

THE KING v. BRITISH COLUMBIA FIR AND CEDAR LUMBER COMPANY, LTD.

MACDONALD, J.

1930

Jan. 9.

THE KING v. BRITISH COLUMBIA FIR AND CEDAR LUMBER CO.

Income tax—Fire insurance—Use and occupancy insurance—Moneys received after fire—Whether taxable—Definition of "income"—R.S.B.C. 1924, Cap. 254, Sec. 2.

The defendant Company, manufacturers and dealers in lumber products, insured with 17 fire-insurance companies against loss and damage to its plant and property by fire. It also insured with the same companies against loss or damage which might be sustained in the event of its plant being shut down and business suspended in consequence of fire and damage. The last mentioned commonly known as "use and occupancy insurance" was effected by the defendant under policies to the amount of $60,000 in respect of loss of "net profits" and $84,000 in respect of "fixed charges." The plant and premises of the defendant were destroyed by fire and by adjustment with the insurance companies under the policies the defendant was paid $43,000 for loss of "net profits" and $52,427.50 in respect of "fixed charges."

Held, that the moneys so received are "income" within the Taxation Act and subject to taxation.

ACTION to recover certain sums alleged to be due and payable by the defendant for taxes upon its personal property and income. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 12th of September, 1929. Statement

Geo. A. Grant, for plaintiff.
Locke, for defendant.

9th January, 1930.

MACDONALD, J.: Plaintiff seeks to recover $8,750.68, alleged to be due and payable by the defendant, for taxes upon its personal property and income. Defendant claims to be entitled to a substantial set-off or allowance.

Just prior to the trial, the parties, through their counsel, in order to save expense, and obviate the necessity of taking evidence, adopted the commendable course of agreeing upon facts and making certain admissions. The result was that the issues were narrowed and counsel submitted, that there was really only Judgment

MACDONALD, J.

1930

Jan. 9.

THE KING v. BRITISH COLUMBIA FIR AND CEDAR LUMBER CO.

one point to be considered at the trial and which required determination.

It appears that the defendant has, since 1921, been carrying on its business as manufacturers and dealers in lumber products, at the City of Vancouver, saving an interruption caused by fire. In the year 1923 it insured with 17 fire-insurance companies, against loss and damage to its plant and property by fire, and also insured with the same companies against loss or damage, which might be sustained in the event of its plant being shut down and business suspended, in consequence of fire and damage. The insurance last mentioned is commonly known as "use and occupancy insurance." It was effected by the defendant under such policies to the total amount of $60,000 in respect of loss of "net profits" and $84,000 in respect of "fixed charges." The plant and premises of the defendant were destroyed by fire in August, 1923, and by adjustment with the insurance companies under the last-mentioned policies, the defendant was paid $43,000 for loss of "net profits" and $52,427.90 in respect of "fixed charges," making a total thus paid by the insurance companies to the defendant of $95,427.90.

Judgment

It was admitted that the defendant had, without taking legal advice upon the question as to whether these insurance moneys were taxable or not, included in its "return" for the year 1923, the sum of $41,293.20 of such moneys, and in the year 1924 had similarly included the sum of $33,706.80. The defendant, without at the time questioning its liability, voluntarily paid income tax on these amounts and the allowance or set-off is now sought in respect of such payments.

It was not contended on the part of the plaintiff that the defendant was thus debarred from being repaid or allowed as a set-off or credit the income tax so paid. The plaintiff, during the argument, apparently conceded, that if the defendant was not liable to pay such taxes that it was not entitled to retain the moneys so paid, but should credit them on other taxes admittedly payable. A difficulty, however, arises under the pleadings, as it is alleged in the 12th paragraph of the statement of defence, that such returns and payment of taxes by the defendant was under the "mistaken belief" that liability for taxation existed under the Taxation Act. In other words, it was a mistake of law, as

distinguished from a mistake of facts. Then was it intended, notwithstanding the state of the pleadings, that such mistake in law should not affect the question of liability or operate as an answer to defendant's claim? The proposition, that moneys paid under a mistake of law are not recoverable, is referred to in Kerr on Fraud and Mistake, 6th Ed., p. 581, as follows:

"As a general rule it is well established in equity as well as at law, that money paid under a mistake of law, with full knowledge of the facts, is not recoverable, and that even a promise to pay, upon a supposed liability, and in ignorance of the law, will bind the party (*Bilbie* v. *Lumley* [(1802)], 2 East 469; 6 R.R. 479; *Brisbane* v. *Dacres* [(1813)], 5 Taunt. 143; 14 R.R. 718; *Drewry* v. *Barnes* [(1826)], 3 Russ. 94; *Bate* v. *Hooper* [(1855)], 5 De G. M. & G. 338; *Stafford* v. *Stafford* [(1857)], 1 De G. & J. 193; 118 R.R. 86; *Saltmarsh* v. *Barrett* [(1862)], 31 L.J., Ch. 783; *Rogers* v. *Ingham* [(1876)], 3 Ch. D. 351; 46 L.J., Ch. 322; *In re Hulkes* [(1886)], 33 Ch. D. 552; 55 L.J., Ch. 846. Where money had been paid for many years without deducting the land-tax, no deduction was afterwards allowed out of the subsequent payments: *Nicholls* v. *Leeson* [(1747)], 3 Atk. 573. So, also, where an executor had paid interest for seventeen years without deducting the property-tax, it was held he could not afterwards deduct out of the future interest due the amount of property-tax on such precedent payments: *Currie* v. *Goold* [(1817)], 2 Madd. 163; 53 R.R. 33."

Judgment

Compare *Colwood Park Association Limited* v. *Corporation of Oak Bay* (1928), 40 B.C. 233; (1928), 2 W.W.R. 593 following *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265. In the latter case Osler, J.A., delivering the judgment of the Court, referred to the decisions and fully discussed the law bearing upon the subject.

As the pleadings and admission of fact stand I cannot well ignore the legal position thus created. I think, if it be so intended, that the agreement and admissions of counsel should go further and clearly state, that it is agreed on the part of the plaintiff, that the maxim is not applicable or, if applicable, is not intended to be raised as an answer to the defendant's claim to a set-off or allowance. I think it well, however, to stop at this point and not proceed with my reasons for judgment. I deem it advisable to notify counsel, to appear and present their views upon the situation thus presented.

Counsel in due course appeared and the discussion which ensued is available should occasion arise. Counsel for the defendant, in concluding his remarks and referring to the set-off

MACDONALD, J.

1930

Jan. 9.

THE KING v. BRITISH COLUMBIA FIR AND CEDAR LUMBER CO.

Judgment

of the amount, sought to be allowed as a credit, said, that it should be

"fairly agreed that it might be allowed—that if we had paid the money by mistake—if we had paid the money, when we were not liable, we would receive credit for it. But I can see the difficulty that your Lordship raises, that even though it is a matter of agreement between us, your Lordship, delivering judgment on a case where there is a point of law involved, might be taken to be deciding that money paid under a mistake of law could be recovered."

After a considerable lapse of time the pleadings have been materially amended. It would have been more satisfactory, if such pleadings had more clearly outlined the position and indicated the sole issue sought to be determined between the parties.

Considering, however, the discussion and view of counsel, as shortly outlined, I think I may now assume that the plaintiff abandons and does not raise as a defence to the alleged set-off, the ground that it constitutes money voluntarily paid by the defendant to the plaintiff under a mistake of law and so is not recoverable. In other words, it is conceded by the plaintiff and agreed, that if such payment of taxes arose through a mistake in law, then the plaintiff will give credit therefor by way of set-off, as against taxes admittedly due to the plaintiff. I thought it well that this aspect of the case should be clearly stated, aside from the conclusion I might reach upon the main point sought to be decided.

Then to resume consideration of the question, as to whether or no the moneys so paid were properly imposed and payable as taxes upon the income of the defendant. This involves the determination as to whether the moneys received from the insurance companies in lieu of net profits and upon which such taxes were paid, come within the definition of "income" in the Taxation Act (R.S.B.C. 1924, Cap. 254). By section 2 of the Act,—

"'Income' includes the gross amount earned, derived, accrued, or received from any source whatsoever, the product of capital, labour, industry, or skill; and includes all wages, salaries, emoluments, and annuities accrued due from any source whatsoever . . . and includes all income, revenue, rent, interest, or profits arising, received, gained, acquired, or accrued due from bonds, notes, stocks, debentures, or shares . . . or from real and personal property, or from money lent, deposited, or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business or profession of any kind whatsoever."

In construing this definition in a taxing Act, the principle to

be followed is that stated by Lord Blackburn, in *Coltness Iron Company* v. *Black* (1881), 6 App. Cas. 315 at p. 330 and—

"No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him, but when that intention is sufficiently shewn it is, I think, vain to speculate on what would be the fairest and most equitable mode of levying that tax. The object of those framing a Taxing Act is to grant to Her Majesty a revenue; no doubt they would prefer if it were possible to raise that revenue equally from all, and, as that cannot be done, to raise it from those on whom the tax falls with as little trouble and annoyance and as equally as can be contrived; and when any enactments for the purpose can bear two interpretations, it is reasonable to put that construction on them which would produce these effects."

When such intention is sufficiently shewn, one should also bear in mind, that the charge contained in a taxing Act should be expressed in clear and unambiguous language and that the construction of the Act should generally be resolved in favour of the taxpayer in cases of doubt. Along these lines Lord Cairns in *Partington* v. *The Attorney-General* (1869), L.R. 4 H.L. 100 at p. 122 appeared to indicate, that special principles were applicable in the construction of taxing Acts as follows:

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

Judgment

And in the case of *Cox* v. *Rabbits* (1878), 3 App. Cas. 473 at p. 478 he said:

"A taxing Act must be construed strictly; you must find words to impose the tax and if words are not found which impose the tax it is not to be imposed."

The intention of the Taxation Act and the property and persons that would be subject to taxation thereunder is indicated in such Act as follows:

"4. (1.) To the extent and in the manner provided in this Act, and for the raising of a revenue for Provincial purposes:—

"(a.) All property within the Province, and all output and income of every person resident in the Province, and the property within the Province and the output produced and income earned within the Province of persons not resident in the Province shall be liable to taxation. . . . ."

Such being the intention of the Act and the defendant as a

MACDONALD, J.

1930

Jan. 9.

THE KING v. BRITISH COLUMBIA FIR AND CEDAR LUMBER CO.

Judgment

corporation coming within the definition of "person," should the moneys thus received by the defendant escape taxation, as not being either property or income? Was the defendant wrong in utilizing the proper schedule for that purpose in making its returns, and treating these moneys as profits earned in its business? I have not had an opportunity of seeing the books of the defendant, but from the manner of its returns, it can be reasonably assumed that such insurance moneys were not entered as a "windfall," but properly credited as profits. They could not be treated as capital as they form a portion of the receipts by the defendant for those years. They constituted profits which the defendant had secured to itself, by precautionary measures, in the event of the capital investment, in the shape of its plant and premises, lying dormant, through destruction by fire. "They were profits" based upon and "arising from property" of such a nature as to obtain the insurance. If defendant has not such capital assets, coupled with its business, it could not by insurance have secured such profits. Notwithstanding these circumstances, defendant contends that the moneys thus received are not "income" within the definition of the taxing Act and not taxable. In support of this contention the case of *Glenboig Union Fireclay Co.* v. *Inland Revenue* (1921), 12 S.C. 400; (1922), S.C.(H.L.), 112 was cited. It does not, however, lend support to the defendant. Short extracts might be made from the judgment which would give assistance, but considering the case as a whole, it is apparent that the point to be decided was, as to whether certain moneys paid by the Caledonia Railway Company for compensation, constituted profits or capital. If the former, then they had been properly included by the Glenboig Company in its returns for the year 1913, being one of the two pre-war years, upon the average of which, the pre-war standards of profits were to be ascertained, and form the basis for excess profits duty. It was to the interest of the appellants in that case to shew that the profits of such pre-war years were large, so that the excess profits taxable would thus be lessened. They made their returns accordingly and paid income tax thereon. The inland revenue commissioners, however, contended the sums, so paid as compensation, were not profits, although they had accepted and retained income tax upon them upon the footing that they were

profits. The commissioners held that the compensation thus paid was in lieu of a portion of fixed assets of the Glenboig Company. That it was to replace a capital loss and not a profit arising from trade or business of the Company. The Company was dissatisfied and a case stated was submitted for the opinion of the Court of Sessions and the finding of the commissioners confirmed. In that Court the Lord President (Clyde), at pp. 406-7, said:

"It is, I think, a fallacy to suppose that the 'profits arising from the trade or business' of the Company, or the 'annual profits or gains arising or accruing' therefrom—which are the proper subjects both of excess profits duty and of income-tax—are identifiable with sums received as compensation in respect that parts of the Company's trading assets are, by the force of the railway legislation, struck with sterility and rendered permanently incapable of profitable employment. We know nothing of how the Company dealt with the value of its leasehold property in its books, or in framing its balance sheets. But *prima facie* the sterilization of parts of them seems to me to imply a capital loss, and the payment of compensation to repair the injury to the Company's undertaking which flowed from that sterilization seems to me to be a restoration of capital. . . . It is a consideration or substitute, not for profits earned or capable of being earned, but for profits irretrievably lost and incapable of being ever earned. The taxing Acts deal with profits made, not with profits lost—with actual, not with hypothetical profits—and it is by the words of the taxing Acts that we are bound. As paid to and received by, the Company, the compensation was the equivalent of a destroyed portion of one of its fixed assets; I do not think it was a profit which arose from the Company's trade or business at all."

Judgment

While a portion of this citation might, if read in a certain way, lend support to the defendant's contention, still a close perusal indicates that the essential question was whether or no the compensation represented capital assets or profits, which arose from the Company's business. On appeal to the House of Lords the judgment of the Court of Sessions was affirmed. The view taken by their Lordships, in thus deciding the appeal, may be shortly outlined, in a portion of the judgment of Lord Wrenbury at p. 116:

"The matter may be regarded from another point of view. The right to work the area in which the working was to be abandoned was part of the capital asset consisting of the right to work the whole area demised. Had the abandonment extended to the whole area all subsequent profit by working would of course have been impossible; but it would be impossible to contend that the compensation would be other than capital. It was the price paid for sterilizing the asset from which otherwise profit might have been obtained."

MACDONALD, J.

1930

Jan. 9.

THE KING v. BRITISH COLUMBIA FIR AND CEDAR LUMBER CO.

Then as to the difference between a sterilization or destruction of a portion of the capital assets of the taxpayer and compensation being received therefor, and the case of a taxpayer receiving compensation, on account of assets not being available to produce profits, through their destruction, I am referred to a decision in Vol. 3 of United States Board of Tax Appeal Reports at p. 283—*Re The International Boiler Works Co.* There Sternhagen, J., in delivering the judgment of the Court, stated that the taxpayer contended that moneys that it received for "use-and-occupancy" insurance were not income "because the proceeds of such insurance are in their nature not income." It was submitted that the moneys were merely a replacement of a property right, thus in effect a return of capital. This view, however, did not prevail with the Court and the object of the insurance was discussed somewhat at length. It was pointed out that there were two species of insurance, that is one for the loss of materials and buildings, and another for the loss of net profits, through a business being prevented, by the destruction of the plant. The following portion of the judgment is pertinent to the issue:

Judgment

"Such profits (so insured) had they not been lost, unquestionably would have been gross income and there is no reason why an amount received in substitution for net profits should be any more excluded from taxes, than if received directly in the conduct of the business."

This reasoning appears sound and applicable to the present case.

Lord Salvesen in the *Glenboig* case dissented from the other judges. He considered the compensation paid as being income and not capital. Notwithstanding this fact I think I might well, in coming to a conclusion that the insurance moneys were taxable, adopt, and apply with changes, a portion of his judgment at p. 414, as follows:

"If his profits are less by reason of outside interference [loss by fire] and he is compensated for the loss of profits caused by such interference, the compensation is just part of his revenue, for his capital account is not thereby in any way affected."

The defendant, by adequately protecting itself, received profits which were properly assessed and taxes duly paid. Differing from the conclusion of Lord Cullen in the *Glenboig* case, at p. 417, I think the "sum so paid can be regarded as a fruit

or earning of the business, or an ingredient in the profits thereof." In my opinion the taxes so paid are not repayable by the plaintiff by way of set-off to the defendant. It follows that the amount due by the defendant for taxes is only a matter of calculation. If the parties cannot agree it may be determined when the order for judgment is being settled. Plaintiff is entitled to costs.

R. P. CLARK & COMPANY (VICTORIA) LIMITED v. ROBINSON.

Stock exchange—Contract—Sale of shares—Delay in obtaining certificate—Breach by buyer—Fall in value of stock after order for shares.

The defendant went to the plaintiffs' office on the 14th of May, 1929, when it was agreed that the broker would sell him 55 shares of The Calgary and Edmonton Corporation Limited at a certain price, the broker stating that they were their own shares, and he warned the defendant there might be considerable delay in delivering certificates for the shares owing to the circumstances of the Company. The defendant at the same time signed an order for the shares on a stock exchange form. At the end of July the plaintiffs received the share certificates when the defendant was advised of this by telephone and he said he would call at the office. Shortly after the manager of the stock department in the plaintiff Company called on the defendant and advised him of the receipt of the certificates when the defendant said he would call at the office and settle. The defendant did not go to the plaintiffs' office and later he told the plaintiffs he would not take the stock. After the 14th of May the market value of the stock fell steadily. The plaintiffs recovered judgment for the difference between the contract price of the shares and the market price at the time of the breach of the contract.

Held, on appeal, affirming the decision of LAMPMAN, Co. J. (GALLIHER, J.A. dissenting), that although there had been delay in delivering the certificates the defendant waived any objection on this ground by his conduct in the first week in September when he agreed to go to the plaintiffs' office and take the shares and pay for them.

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 5th of December, 1929, in an action to recover the pur-

Statement

COURT OF APPEAL

1930

Feb. 4.

R. P. CLARK & CO. (VICTORIA) LTD. v. ROBINSON

chase price of 55 shares in The Calgary and Edmonton Corporation Limited. On the 14th of May, 1929, the defendant put in an order in writing to the plaintiffs as follows:

"Subject to the rules, regulations and customs of the Exchange in which this order is executed, and any rules, regulations and requirements of its board of directors, and all amendments that may be made thereto, buy for my account and risk 55 C. & E. Corp. @ 12 if, as and when issued.

"S. Robinson."

The share certificates were not received until the end of July when the defendant was notified by telephone that they were ready for delivery to him upon payment of the purchase price, and he replied that he would call at the office. Later the manager of the stock department of the plaintiff Company reminded the defendant that the stock was in the office and ready for delivery and he said he would call and settle but he did not do so and the plaintiff Company again reminded him on two or three occasions. Eventually he advised the plaintiff Company that he would not take the stock and refused to pay for it.

Statement

The appeal was argued at Victoria on the 3rd and 4th of February, 1930, before MACDONALD, C.J.B.C., GALLIHER and MACDONALD, JJ.A.

O'Halloran, for appellant: Robinson said he would take the stock if certificate was delivered within two weeks. Fraser, the manager of the stock department in the plaintiff Company denies this. The order was given on the 14th of May and they did not receive the stock certificate until the end of July. He refused to take the stock on the ground of delay. Buying stock and delivery are synonymous: see Anson on Contracts, 17th Ed., 344; *Hochster* v. *De La Tour* (1853), 2 El. & Bl. 678; *Frost* v. *Knight* (1872), L.R. 7 Ex. 111 at p. 112. On discharge from the contract by failure of performance see Anson on Contracts, 17th Ed., 349; *Morton* v. *Lamb* (1797), 7 Term Rep. 125; *Rawson* v. *Johnson* (1801), 1 East 203; *Callonel* v. *Briggs* (1703), 1 Salk. 112; 91 E.R. 104; *Clarkson* v. *Snider* (1885), 10 Ont. 561 at p. 572. The taking of a buying order constituted a new contract: see *Stead* v. *Dawber* (1839), 10 A. & E. 57; *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58 at p. 64; Addison on Contracts, 11th Ed., 171. There was no certificate to Robinson that they had these shares for him: see

Argument

Buchan v. *Newell* (1913), 15 D.L.R. 437 at p. 441. If he is a broker and not a principal then his right of action is only for indemnity: see Bullen & Leake's Precedents of Pleadings, 8th Ed., 315; *Armstrong* v. *Jackson* (1917), 86 L.J., K.B. 1375 at p. 1376. When Fraser went to see Robinson he did not take the share certificate with him. Not having done so is a fair indication that he did not have them: see *Union Corporation* v. *Charrington* (1902), 8 Com. Cas. 99; *Fletcher* v. *Marshall* (1846), 15 M. & W. 755; *Bordenave* v. *Gregory* (1804), 5 East 107; *Hardwick* v. *Lea* (1847), 8 L.T. Jo. 387; *De Waal* v. *Adler* (1886), 56 L.J., P.C. 25.

Carew Martin, for respondents: The transaction is not subject to any rules as the stock was not listed. The learned judge accepted the evidence of the respondent. The evidence that the stock was to be delivered in two weeks was not accepted. The verbal arrangement between the parties was the real transaction as was found and the written order does not apply as both parties agreed: see Halsbury's Laws of England, Vol. 27, p. 230, sec. 456; *The Stock and Share Auction and Advance Company* v. *Galmoye* (1887), 3 T.L.R. 808 at p. 810; *Re W. Wreford, Deceased—Carmichael* v. *Rudkin* (1897), 13 T.L.R. 153. On the question of damages see *Jamal* v. *Moolla Dawood, Sons & Co.* (1916), 1 A.C. 175. On the question of tender the cases cited by appellant are subject to the rules and do not apply.

Argument

O'Halloran, replied.

MACDONALD, C.J.B.C.: I think the appeal must be dismissed. It is a very unfortunate case. It is very unfortunate that brokers should not conduct their business and give more attention to details than was done in this case; but the evidence is that the parties met, and the broker agreed to sell to the appellant 55 shares at a certain price, and stated that they were their own shares. It is true there was a note drawn up at the same time, a sort of purchase note, which could not apply to these shares, because the shares at that time were not on the exchange at all, and the form used was the stock exchange form. The learned judge held that there was a verbal agreement, and he decided that he would accept Fraser's evidence, the respondent's evidence, and would reject the evidence of the appellant; and

MACDONALD, C.J.B.C.

COURT OF APPEAL

1930

Feb. 4.

R. P. CLARK & CO. (VICTORIA) LTD. v. ROBINSON

accepting the respondent's evidence he could come, of course, to only one conclusion, namely, that there was a binding agreement to purchase between these two principals. He also is justified on that evidence in finding that the appellant had been warned that there might be considerable delay, owing to the circumstances of the Company.

Now it also appears that on the first week of September Fraser called at the appellant's office and told him that he had the shares, and asked him to come up to the office and get them. Now the appellant, instead of repudiating and saying You are too late, you did not supply these shares in a reasonable time, said I will come up on Monday. That evidence was accepted by the learned judge. Instead of going up on Monday, he stayed away, and has refused ever since to pay for his shares, thereby committing a breach of his agreement. Even if there had been delay, I think appellant has waived that by his conduct in the first week in September, when he agreed to go up to the office and take the shares and pay for them.

MACDONALD, C.J.B.C.

In these circumstances it would be utterly impossible for us to set aside the findings of the trial judge, and to give effect to the appeal. I would, therefore, dismiss it.

GALLIHER, J.A.: I would allow the appeal. On the point that this was the agreement between them, be that as it may, when we consider the nature of the transaction, the fluctuating value of the shares from day to day and from week to week, then I am satisfied, with all respect to the learned trial judge, that there had been an unreasonable delay in furnishing these shares. Moreover, apparently they had the shares at a time when they could have given them to the purchaser, and instead of doing so, they turned them over to somebody else. One does not enter into stock transactions, where stocks are rising and falling, as they are doing all the time from day to day, with the idea that they are not going to get their shares for two and a half or three months, as in this case. Upon that ground alone, I would allow the appeal.

GALLIHER, J.A.

MACDONALD, J.A.

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

only add that from my reading of the evidence I think that the respondents dealt with their customers in rotation.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Walls & Sedger.*
Solicitors for respondents: *White & Martin.*

COURT OF APPEAL
1930
Feb. 4.
R. P. CLARK & Co. (VICTORIA) LTD. *v.* ROBINSON

IN RE PARSHALLE. KUNHARDT v. COX AND QUAILE.

COURT OF APPEAL
1930
Feb. 11.
KUNHARDT *v.* COX

Estate—Devolution—Descent and distribution—Inheritance by relatives of half-blood—Property ancestral—"Ancestor"—R.S.B.C. 1924, Cap. 5, Sec. 126—Meaning of section.

Under section 126 of the Administration Act "Relatives of the half-blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance." On originating summons for an interpretation of said section where ancestral real estate was in question it was held that the proviso beginning with the words "in which case" applied only when the rival claimants were "in the same degree" of relationship and the property was awarded to claimants who represented the half-blood of the intestate but had none of the blood of the ancestor.

Held, on appeal, reversing the decision of HUNTER, C.J.B.C. (MARTIN, J.A. dissenting), that the proviso excludes, unqualifiedly, those who are not of the blood of the ancestor from inheritance and the appeal should be allowed.

Per GALLIHER and MACDONALD, JJ.A.: "Ancestor" within the meaning of said section is the person from whom the estate in question is derived. He need not be a progenitor of the successor or lineal ancestor so long as he really preceded in the estate, and may be brother, aunt, uncle, nephew or cousin.

APPEAL by plaintiff from the order of HUNTER, C.J.B.C. of the 11th of January, 1929, upon an originating summons issued upon the application of Cornelia Pugsley Shaw who

COURT OF APPEAL

1930

Feb. 11.

KUNHARDT v. COX

Statement

claims to be the sole surviving cousin of Grace May Parshalle, deceased, against Rupert Leslie Cox, administrator of the estate of said deceased. Grace May Parshalle died intestate in California on the 27th of January, 1925. Letters of administration to her estate were issued in Victoria to Rupert Leslie Cox in respect to the estate in this Province of $230,930 gross, less debts of $61,643, the real estate being valued at $210,814 and the personality at $20,056. One William Henry Oliver died in September, 1900, leaving a will and bequeathing all his property to his mother Isabella Parshalle and his half-sister and executrix Grace May Parshalle but the mother predeceased Oliver so that the whole estate fell to Grace Parshalle. Grace Parshalle was the daughter of James C. Parshalle by his wife Isabella already referred to, the latter being the daughter of one John Pugsley. Isabella Parshalle was twice married, first to William Oliver by whom she had one son, the said William Henry Oliver and again to James C. Parshalle by whom she had one daughter, the said Grace May Parshalle, the intestate herein. James C. Parshalle was also married twice. Before his marriage to Isabella Oliver he was married to one Hannah Clark and by her had several children, three of whom have living descendants, the nearest relative to the intestate herein (Grace May Parshalle), on her mother's side, being the plaintiff Cornelia Pugsley Shaw, daughter of Robert Pugsley who was a brother of Isabella Pugsley. The nearest relatives on the father's side are of the fourth degree for the purpose of distribution of the personalty, one of whom is John Wallace Quaile, a great-grandson of James C. Parshalle and Hannah Clark. The plaintiff Cornelia Pugsley Shaw is of the fourth degree of relationship from the said intestate through her mother Isabella and the said John Wallace Quaile is of the fourth degree of relationship from the said intestate through her father James C. Parshalle and there are various relatives living of the fifth, sixth and seventh degree on both father's and mother's side. The plaintiff Cornelia Pugsley Shaw died on the 3rd of April, 1929, and by order of the 1st of August, 1929, Kingsley Kunhardt, her executor, was substituted as plaintiff in this action. It was held by HUNTER, C.J.B.C. that the descendants of James Parshalle (paternal) who were living at

the death of the deceased intestate were entitled to all the lands of the intestate and were in a nearer degree of relationship to her for the purpose of inheritance than any of the other parties interested and were not excluded by the latter part of section 126 of the Administration Act.

The appeal was argued at Vancouver on the 3rd and 4th of October, 1929, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. D. Crease, for appellant: The learned Chief Justice decided in favour of the paternal relations, following *In re Smith's Estate* (1901), 63 Pac. 729 and *In re Belshaw's Estate* (1923), 212 Pac. 13. We claim through the grandfather. As to the word "ancestor" see *Earl of Zetland* v. *Lord Advocate* (1878), 3 App. Cas. 505 at p. 518. The estate was devised to intestate by her half-brother Oliver, he being a son of intestate's mother by her first husband: see *Simpson* v. *Hall* (1818), 4 Ser. & R. 337; *Parr* v. *Bankhart* (1853), 22 Pa. St. 291; *Bevan* v. *Taylor* (1821), 7 Ser. & R. 397 at p. 404. On the effect of the source of intestate's title see 18 C.J. p. 835, sec. 59; Armour on Real Property, 2nd Ed., 415.

Jackson, K.C., on the same side, referred to 27 A. & E. Encycl. of L., 2nd Ed., p. 297.

Argument

Maunsell, for respondents: A portion of the property did not come to intestate from Oliver. We are a nearer degree of relationship than the appellant. As to the interpretation of section 126 we contend there is not an exclusion by the section but only a postponement: see *In re Smith's Estate* (1901), 63 Pac. 729 followed by *In re Belshaw's Estate* (1923), 212 Pac. 13. We are one degree nearer in relationship than the appellant. The proviso is in regard to the main enacting section and is limited to "in the same degree": see *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274 at pp. 283-4. As to the word "unless" see *Wilson* v. *Smith* (1764), 3 Burr. 1550 at p. 1556. "Unless" means the same as "except." We are descendants of the father of the intestate, whereas they are dscendants of the grandparents. We are therefore of the nearer degree: see Armour on Devolution, 245; Pollock & Maitland's History of English Law, 2nd Ed., Vol. II., p. 296. We are

COURT OF APPEAL

1930

Feb. 11.

KUNHARDT v. COX

descendants of the father through the brother: see Blackstone's Commentaries, Book 2 (Lewis's Ed.), 225; *Grieves* v. *Rawley* (1852), 10 Hare 61 at p. 63. The intestate did not take by devise, descent or gift but took the legal estate as mortgagee.

O'Halloran, on the same side, referred to *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274 at p. 284 and *Rex* v. *Dibdin* (1910), P. 57 at p. 125.

Crease, replied.

Cur. adv. vult.

11th February, 1930.

MACDONALD, C.J.B.C.: It is admitted in the statement of facts that both claimants are of the same degree of relationship to the intestate for the purposes of distribution of personalty. The appellant is the representative of the blood of the ancestor, the respondent represents the half-blood of the intestate but has none of the blood of the ancestor. The learned judge decided the case relying on American decisions on a similar statute. The American decisions are not uniform and they do not appear to me to be in accordance with our law. The case is governed by the Administration Act, R.S.B.C. 1924, Cap. 5, and that Act, dealing with the half-blood, by section 126, provides as follows:

MACDONALD, C.J.A.

"Relatives of the half-blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance."

It does not appear to me that there is anything equivocal about that section. The exception excludes those who are not of the blood of the ancestor from inheritance, unqualifiedly. The ancestor in this case was one W. H. Oliver, the half-blood of the intestate, and the appellant is a niece of the intestate on the Oliver side of the house. The claimants on the other side of the house are not related in blood to Oliver, and therefore, in my opinion, are excluded, to use the terms of section 126, from inheriting the property of the intestate which came to her on the part of her mother's relatives.

I would therefore allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: After a careful consideration of all the

authorities cited on the first question raised by this appeal, and now alone before us, I can only reach the conclusion, with every respect for the contrary opinion of my learned brothers, that I am unable to say that the learned judge below did not take a correct view of the difficult matter fortified as he was by two unanimous judgments of Appellate Courts of California in *In re Smith's Estate* (1901), 63 Pac. 729 and *In re Belshaw's Estate* (1923), 212 Pac. 13, wherein nine judges took the same view of a statute which is in all essentials identical with our own. While it is true that some other Courts in three of the States of the American Union (to whose opinions resort was had in default of any in point, we are advised, in our British Commonwealth) have not on general principles adopted that view, though some have done so, *e.g.,* Michigan and Indiana, yet the particular statutes upon which they founded their conclusions are not before us, and hence it would be unsafe in their absence to determine the point on such uncertainty, and none of them even attempts such an able analysis of the statute as is to be found in the said California judgments which newly enlighten its proper construction: moreover, *e.g.,* in one of the Pennsylvania judgments relied upon, *Simpson* v. *Hall* (1818), 4 Ser. & R. 337, only two judges concurred, the Chief Justice expressing no opinion, which is in marked contrast to the said unusual unanimity in the Courts of California.

MARTIN, J.A.

In my opinion, therefore, the first question should be decided in favour of the respondent with the result that the dismissal of the whole appeal should follow.

GALLIHER, J.A.: When ancestral property is in question, as here, I interpret the proviso in section 126 as excluding those who are not of the blood of the ancestor.

As my brother M. A. MACDONALD puts it in his reasons for judgment, in which I concur, "It is the nature of the property (ancestral) not the degree of relationship of claimants that is the sole *sine qua non.*"

GALLIHER, J.A.

I would allow the appeal.

MCPHILLIPS, J.A. would allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: On the 15th of September, 1900, one

MACDONALD, J.A.

COURT OF APPEAL

1930

Feb. 11.

KUNHARDT v. COX

MACDONALD, J.A.

William Henry Oliver died leaving a will (probate of which was issued out of the Victoria Registry in 1901 to Grace Parshalle as the sole executrix) devising and bequeathing all his property to his mother, Isabella Parshalle, and his step-sister and executrix Grace Parshalle. The mother predeceased Oliver so that the whole estate devolved upon Grace Parshalle.

The said devisee, Grace Parshalle, died intestate at San Diego, California, on January 27th, 1925, and letters of administration to her estate were issued out of the Victoria Registry to the defendant Cox as official administrator, in respect to an estate in this Province of a net value of $169,287.38. It is with this estate that we are concerned in these proceedings.

Grace Parshalle was the daughter of James C. Parshalle by his wife Isabella already referred to, the latter being a daughter of one John Pugsley. Isabella Parshalle was twice married, first to William Oliver, by whom she had one son, the said William Henry Oliver, and again to James C. Parshalle by whom she had one child, the said Grace Parshalle, the intestate herein. James C. Parshalle was also married twice. Before his marriage to Isabella Oliver he married one Hannah Clark and by her had several children, three of whom have living descendants. The nearest relative to the present intestate Grace Parshalle, on her mother's side is the plaintiff, Cornelia Pugsley Shaw, daughter of Robert Pugsley who was a brother of Isabella Pugsley. Her executor is Kingsley Kunhardt. The nearest relatives on her father's side are of the fourth degree for the purposes of distribution of personalty, one of whom is John Wallace B. Quaile, the great-grandson of James C. Parshalle and Hannah Clark. The plaintiff, Cornelia Pugsley Shaw, is of the fourth degree of relationship from the said intestate through her mother Isabella and the said John Wallace B. Quaile is of the fourth degree of relationship from the said intestate through her father, James C. Parshalle, and there are various relatives living of the fifth, sixth and seventh degree on both the father's and mother's side, some of whom are defendants.

The late Chief Justice who heard the application decided that the descendants of James Parshalle (paternal) who were living at the death of the deceased intestate were entitled to all the lands of the intestate and were in a nearer degree of rela-

tionship to her for the purposes of inheritance than any of the other parties interested and were not excluded by the latter part of section 126 of the Administration Act (as in force at the death of the intestate) from succession to said lands.

There is a further provision in the order appealed from which may be the subject of further argument dependent upon the disposition of this appeal but it need not be considered at this stage.

The following questions of law were submitted for determination:

"(1) What interest respectively do descendants of James Carlisle Parshalle, father of the deceased intestate, and of brothers and sisters of Isabella Pugsley, the mother of the deceased intestate, take in the lands of the deceased intestate?

"(2) Does section 126 of the Administration Act exclude the said paternal relatives from succession to any of the lands of the deceased intestate, and, if so, from what lands?"

In the conclusion I have reached it is only necessary to consider the second question as from an answer thereto in the affirmative the rights, if any, of the respective classes represented in this application can be determined.

MACDONALD, J.A.

The contest is between John Wallace B. Qaile on behalf of himself and all others claiming to be heirs at law *ex parte paterna* of the deceased intestate and Cornelia Pugsley Shaw on behalf of herself and all others claiming to be heirs at law *ex parte materna* of the same intestate. The claimants on the maternal side, nearest of kin and others more remote, claim the real estate to the exclusion of the paternal claimants.

The intestate, Grace Parshalle, was unmarried. There are no lineal descendants to consider. Neither her father nor mother was living at her death. We are therefore only dealing with the rights of collaterals. As stated, William Henry Oliver was a half-brother of the intestate. The intestate was the only issue of her mother's second husband James Parshalle. As stated also James Parshalle married twice, first to Hannah Clark and the many descendants of that marriage represent the paternal side. To find collaterals on the mother's side we have to go back to the intestate's grandfather, John Pugsley. Here we find the maternal pedigree. He had several children, one Isabella, mother of the intestate and Robert who was father of

COURT OF APPEAL

1930

Feb. 11.

KUNHARDT v. COX

Cornelia Pugsley Shaw. William Henry Oliver, however, is the source of all the real estate with which we are concerned. He was a half-brother and devised it by will to his half-sister, Grace Parshalle, the present intestate. The Oliver devise is important by reason of section 126 of the Act referred to. The contest therefore is between the heirs of James Parshalle, father of the intestate, and Isabella, mother of intestate.

Section 126 reads as follows:

"Relatives of the half-blood shall inherit equally with those of the whole blood in the same degree, and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance."

The whole blood (that is where we have kinsmen descended not only from the same ancestor but from the same couple of ancestors) is on the maternal side; the half-blood on the paternal. Section 126 (first part thereof) is the only authority permitting relatives of the half-blood to inherit equally with those of the whole blood in the same degree. In applying the latter part of the section it is apparent that William Henry Oliver from whom the intestate received the real estate in question was an "ancestor." The transmitting ancestor is the person from whom the estate in question is derived. He need not be a progenitor of the successor or lineal ancestor so long as he really preceded in the estate and may be brother, aunt, uncle, nephew or cousin. The late Chief Justice awarded the real estate to the claimants *ex parte materna* holding that the proviso in section 126 only applied when the rival claimants were "in the same degree" of relationship. The decision depends wholly upon the interpretation of this section. We were told that it is a general clause appearing in similar legislation in other Provinces of Canada and to a like effect in many of the States of the American Union but it has not been (we were also advised) judicially interpreted in this country although considered in the American Courts. The appellant relies on the proviso in the latter part of the section beginning with the word "unless." These lands all came by devise from the ancestor William Henry Oliver, the son of the mother of the intestate by her first marriage. William Henry Oliver and the intestate were brother and sister of the

MACDONALD, J.A.

half-blood having the same mother but not the same father. The paternal claimants, were it not for section 126, would not participate at common law. The late Chief Justice followed *In re Smith's Estate* (1901), 63 Pac. 729, wherein construing a similar section in the civil code of the State of California, it was held that the last part of the clause beginning with the word "unless" applied only to the class described in the first part, *viz.*, to kindred in the same degree; and that kindred of the half-blood were not excluded until after failure of all kindred of the intestate who had the blood of the ancestor. This interpretation appears to me to be contrary to the natural and logical meaning of the section. It must be construed according to the generally regarded meaning of the actual words used unencumbered by additional phrases uncalled for by the context. But the soundness of this American decision was pressed upon us strongly in argument and in justice to the forceful plea made and the views of an eminent judge, the late Chief Justice, the wording and proper interpretation of the section should be carefully scrutinized. After considering, however, the submissions made; the state of the law before the Act; the history of the legislation; the Inheritance Act of 1833, and the common and canon law, I am satisfied that it is solely a question of the logical interpretation of the words employed, plus, this consideration, that as at common and canon law claimants of the half-blood were excluded, a statute introducing an alteration favourable to that class cannot be carried further than the ordinary reading of the statute warrants.

MACDONALD, J.A.

In *In re Belshaw's Estate* (1923), 212 Pac. 13, where the decision in *In re Smith's Estate* was followed, it is pointed out that the same question arose in other States under statutes of similar import and in a majority of the decisions the Courts have construed the exception referred to as excluding all kindred of the half-blood not of the blood of the ancestor. There are, therefore, conflicting decisions in the American Courts, the majority appearing to favour the contention of the appellant.

The proviso in section 126 deals with a case such as we have here where the inheritance came to the intestate by devise from an ancestor. That is the subject-matter dealt with by the proviso. Having that fact established what follows? "All those

COURT OF APPEAL

1930

Feb. 11.

KUNHARDT v. COX

not of the blood of such ancestor shall be excluded." It is a little difficult to add to that clause the suggestion that it operates only between kinsmen of the same degree. The words "in the same degree" are used in the first part of the section to shew when relatives of the whole or the half-blood participate equally. Can these words be imported into a proviso dealing with a new condition? The proviso should have been drafted differently had that been the intention. In fact a free translation of the section to carry out the views advanced by the respondents requires additional words which when inserted alters the obvious meaning of the original words employed. The section thus transposed with the necessary additions inserted in brackets, to give effect to the respondents' views would read as follows:

"Relatives of the half-blood shall inherit equally with those of the whole blood in the same degree and the descendants of such relatives [in the same degree] shall inherit in the same manner as the descendants of the whole blood [in the same degree] unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors; in which case [*i.e.*, where there are relatives of the whole blood and the half-blood in the same degree and where there is ancestral property] all those [of the same degree] who are not of the blood of such ancestors shall be excluded from such inheritance."

MACDONALD, J.A.

I confess there is in part some ground for such a translation. It is, however, overloaded in one particular. Two conditions are attached to the words "in which case" whereas only one is stated, in the clause itself, *viz.*, to put it briefly, where it is ancestral property. It is the nature of the property (ancestral) not the degree of relationship of claimants that is the sole *sine qua non*. To hold otherwise is to attach two stipulations to a phrase where one only was intended.

We were referred to Armour on Real Property, 2nd Ed., 415. While that learned author does not discuss the section, inferentially he interprets it by dividing its component parts into sentences for greater clarity without apparently finding it necessary to add the additional phrases suggested by the respondents. If, too, one examines other sections of our Administration Act it would appear that it was the intention of the Legislature to preserve the policy of the common law that property only goes to those of the blood of the purchaser or ancestor. They are a preferred line of descent. Section 126 affords the only relief

from the rigour of the common law in permitting the half-blood to participate. It should not therefore be extended beyond the natural construction of the words employed. If a further extension was contemplated it should have been incorporated in the section. I find, therefore, that section 126 excludes the paternal relatives from succession to any of the lands of the deceased and would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellant: *Crease & Crease.*
Solicitor for respondents: *C. H. O'Halloran.*

VIVIAN v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Railway—Negligence—Car stopping suddenly without warning—Obstruction on track—Passenger injured by falling—Proof of negligence—Onus.

A car of the defendant Company, travelling at night, was suddenly stopped as the motorman saw a railway-tie lying across the track in front of him. A passenger standing in the back vestibule was thrown off her balance and falling in the body of the car was severely injured. A number of old ties had been piled at intervals along the right of way about five feet from the track and the tie on the track was about eleven feet away from one of these piles. In an action for damages it was held that the defendant had not satisfied the onus that was upon it of shewing that it was not due to its negligence that the tie got on the track and judgment was given for the plaintiff.

Held, on appeal, affirming the decision of GREGORY, J. (MCPHILLIPS and MACDONALD, JJ.A. dissenting), that the plaintiff being injured by the sudden stopping of the car established a *prima facie* case and the burden was on the defendant not only to shew that the car was reasonably so stopped but that it was not because of its negligence that the obstruction was there, and the trial judge could not be said to have been wrong in concluding that this onus had not been satisfied.

APPEAL by defendant from the decision of GREGORY, J. of the 22nd of November, 1929, in an action for damages for negligence. The plaintiff got on to a car of the defendant

Statement

COURT OF APPEAL

1930

March 4.

VIVIAN v. B.C. ELECTRIC RY. CO.

Statement

Company and waited in the rear vestibule to get a transfer from the conductor. The car started moving but after proceeding a short distance it stopped suddenly with a jerk and threw the plaintiff off her feet from the vestibule into the body of the car and she suffered injury. It was about 10.30 at night and the motorman made the sudden stop because there suddenly appeared an object on the track in front which turned out to be an old railway-tie that belonged to the Company. Some time previously the Company's employees, in putting in new ties had piled the old ties at intervals on the right of way about five feet from the track and one of these piles was near the spot where the tie was on the track.

The appeal was argued at Victoria on the 10th and 13th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: The old ties were piled at intervals a sufficient distance from the track to insure safety. It was impossible for a tie to reach the track without human agency and the tie in question was lying across the track over eleven feet from the pile. Respondent says we did not explain why the tie was on the track but all we have to shew is that we were not responsible for its being there: see *Rickards* v. *Lothian* (1913), A.C. 263. If the chances are equal as to putting the tie on the track we are entitled to the benefit. As to the law of *res ipsa loquitur* see *Thomas* v. *The Rhymney Railway Company* (1871), 40 L.J., Q.B. 89 at p. 95; *Wing* v. *London General Omnibus Co.* (1909), 78 L.J., K.B. 1063 at p. 1069; *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1925), 95 L.J., K.B. 237 at p. 241; *Briggs* v. *Oliver* (1866), 4 H. & C. 403; *Alliance Insurance Co.* v. *Winnipeg Electric Ry.* (1921), 2 W.W.R. 816; *Christie* v. *Landels* (1922), 65 D.L.R. 446 at p. 448 and on appeal (1923), S.C.R. 39 at pp. 43-9. "How the tie got there" is not what we have to shew, but the Court below so decided following *Flannery* v. *Waterford and Limerick Railway Co.* (1877), Ir. R. 11 C.L. 30 at p. 36; *Angus* v. *London, Tilbury, and Southend Railway Company* (1906), 22 T.L.R. 222.

L. H. Jackson, for respondent: On the question of light the

judgment was in our favour: see *Vancouver Ice and Cold Storage Co.* v. *B.C. Electric Ry. Co.* (1927), 38 B.C. 234; *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg Ry. Co.* (1928), 1 W.W.R. 857. The burden of proof is on the defendant as to the obstruction on the track: see *Flannery* v. *Waterford and Limerick Railway Co.* (1877), Ir. R. 11 C.L. 30 at pp. 34-5; *Czech* v. *General Steam Navigation Company* (1867), L.R. 3 C.P. 14; *Swansea Vale (Owners)* v. *Rice* (1912), A.C. 238; *Metropolitan Railway* v. *Delaney* (1921), 90 L.J., K.B. 721.

Farris, replied.

Cur. adv. vult.

4th March, 1930.

MACDONALD, C.J.B.C.: On the crucial question of onus of proof, there is, I think, no distinction between this case and *Angus* v. *London, Tilbury, and Southend Railway Company* (1906), 22 T.L.R. 222.

Plaintiff was injured by the sudden stopping of defendant's car, in which she was riding, brought about by the discovery by the driver of the car of an obstruction on the track ahead. Now when the tramcar was suddenly stopped it was a good answer to say that it was necessarily so stopped because of an obstruction, but the case above cited shews that the onus is not "cast back" on the plaintiff but remains with the defendant to shew that the obstruction on the track was not there by reason of their fault. Now the learned judge says that it got there by the negligence of the Company. The evidence shews that the Company had piled, some time before the accident, old used railway-ties about five feet from the rails, and that the tie which caused the obstruction was one of these. I can imagine that if that pile of ties had fallen down towards the railway track one of the ties might very well be thrown upon the track. Therefore the question of the condition of the *situs* at the time of the occurrence, or just after the occurrence, is of supreme importance. Now there is no evidence at all upon this question. The defendants who knew of the accident the time it occurred, have either not had an inspection made of the condition of the pile at the time and after the accident, or if they did have such inspection made, have given no evidence of it. Now it was the defendant's duty

COURT OF APPEAL

1930

March 4.

VIVIAN v. B.C. ELECTRIC RY. CO.

MACDONALD, C.J.B.C.

to shew that the tie was not there by its fault, and I think in doing that it was not sufficient to shew that none of its servants so far as could be ascertained had been there, and ask the judge to draw the inference that some stranger must have done so, but I think it was the defendant's duty to shew that the condition of the pile would disclose that it did not get on the track from the falling of the pile of ties. Therefore the learned judge was justified in finding that the defendant had not satisfied the onus upon it of shewing that it was without fault. In these circumstances I think the appeal must be dismissed.

MARTIN, J.A.

MARTIN, J.A. agreed with GALLIHER, J.A.

GALLIHER, J.A.: The plaintiff was a passenger on the defendant Company's railway running from Kitsilano Beach into the City of Vancouver, intending to transfer at Davie Street in said city. She was the only passenger at the time and was standing in the rear of the car getting her transfer from the conductor. The car started up and after proceeding a short distance, stopped suddenly with a jerk, throwing her from where she was standing in the vestibule into the body of the car, causing her injury.

The plaintiff gave evidence to this effect, thus establishing a *prima facie* case of negligence against the defendant Company. Unless rebutted that was evidence of negligence.

GALLIHER, J.A.

The defendant met this by shewing that the motorman observing a short distance ahead an object on the track which turned out to be one of their railway ties, was obliged to bring the car to a stop in the way above described to avoid running into the object with the possibility of more serious consequences ensuing.

But their obligation did not end there, *per* Lord Loreburn, L.C. in *Angus* v. *London, Tilbury and Southend Railway Company* (1906), 22 T.L.R. 222 at p. 223. In his, the Lord Chancellor's, opinion,—

> "The defendants had to prove that they were blameless in respect of the cause of the accident. They had to shew both that they acted reasonably and properly in suddenly stopping the train, and also that the cause which led to the necessity of stopping the train was not brought about by any negligence upon their part. He did not agree with the contention that, upon the defendants' proving the first of the two propositions, the burden of proving negligence was shifted back on to the plaintiff."

Lords Justices Vaughan Williams and Stirling agreed.

The defendant then proceeded to discharge the second burden, which was then upon it, *viz.*, that the tie did not get upon the track through any negligence of its.

The facts are these: The Company from time to time as necessity demands, takes up old and partially worn ties and piles them parallel with the track. In some instances, as here, the pile from which in some manner the tie got on the track, and which I think is properly located by the defendant, might remain for some considerable time before being burned or carted away. The pile was placed parallel with the track some five feet from the rail on the right of way and between three and four feet high. This particular pile sometime between the night of the accident, 9th December, 1928, and the date of the trial, 12th November, 1929, had been burnt or removed. So that when a view was taken on the ground only marks of where the pile had lain could be used as a guide. There is no evidence as to when this was done. There is no evidence that an examination of the *locus* was made by the defendant immediately after the accident, or before burning or removal, and while this is not a determining factor it might have been of material assistance to the Court in coming to its conclusion if such had been made.

Evidence was adduced by the defendant that these piles of ties if five feet away from the rail, as this was sworn to be, would be safe, also from measurements taken in a diagonal line from the nearest end of the marks in the ground where the ties had been, to where the tie was found on the track was eleven and a-half feet, and they argue from this that the tie could not have fallen from the pile and reached where it was. The defendant's suggestion is that people in the neighbourhood who had access to the place in question sometimes carried away ties for firewood and in that way it may have been inadvertently dropped as it was found with its end slightly on the track. This tie apparently was not on the track some 12 minutes before when the car preceding this one passed over the spot—and this is not without weight in defendant's favour—but if the theory that it reached the track by falling from the pile is also consistent, it could easily have taken place within that time. I think this

COURT OF APPEAL

1930

March 4.

VIVIAN v. B.C. ELECTRIC RY. CO.

branch of the case is now down to which of the two inferences is the more reasonable to draw.

In Beven on Negligence, 4th Ed., Vol. I., p. 127, this proposition is stated:

> "Where there are two inferences equally consistent with the facts proved, one of them cannot reasonably be drawn to the prejudice of the other. The plaintiff, therefore, fails. Where though either of two inferences might be drawn, one involving negligence is more reasonable or likely than the other, then the case cannot be taken away from the jury"—

citing *Flannery* v. *Waterford and Limerick Railway Co.* (1877), Ir. R. 11 C.L. 30, where the question is dealt with by Chief Baron Palles at pp. 36-7.

Certain facts were before the learned trial judge and as it could not be established as an actual fact how the tie got on the track, all the learned judge could do was to draw inferences from those facts and as he found for the plaintiff, I think he must have assumed that the more reasonable probability was that the tie fell from the pile and in that way got on the track.

Exception was taken that the learned judge misdirected himself in his oral reasons for judgment, where he says:

> "And the burden is upon the Company, I think, to shew how it got there."

I think that was a slip for he corrects himself later on:

GALLIHER, J.A.

> "It is their duty to shew it was not their negligence"

(referring to how the tie got on the track).

Evidently the learned judge must have thought that the onus cast upon the defendants had not been satisfied and I am not prepared to say his conclusion was wrong.

I might say that it is possible for the tie, if falling from the pile, to have reached the point where found, considering the height of the pile and its proximity to the track, depending on how it fell and what it struck against in falling. Moreover, the witness who removed the tie from the track might easily have been mistaken as to three or four feet in identifying its exact location after the lapse of time that ensued.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should succeed. The respondent in the appeal did not discharge the duty that was upon her, *viz.*, that there was negligence upon the part of the appellant—the Railway Company—which was

the proximate cause of the damages for personal injuries sustained by the respondent owing to the sudden stoppage of the street-car to avoid an obstruction on the track. The obstruction upon the track was a railway-tie lying across the track. The claim made on the part of the respondent was that the headlight upon the car was not sufficient and that the onus was upon the appellant to account for the tie being where it was, which onus was not discharged by the appellant. Undoubtedly there was the obstruction but by whose hand was it placed across the track? The evidence shews that at a very short time before —a matter of some minutes only—a street-car passed over the track at the point in question and there was no obstruction then. It is true there was evidence adduced to shew that there was a pile of ties near to the railway track but the evidence, in my opinion, is so conclusive that it cannot be reasonably inferred that the tie could have fallen from that pile of ties considering the distance at which the pile of ties was away from the track and any such view is an impossible one. The only inference possible under the circumstances is that the tie was inadvertently dropped on the track or was placed upon the track by some malicious person.

MCPHILLIPS, J.A.

Now as to the law bearing upon the case I would first refer to *Rickards* v. *Lothian* (1913), A.C. 263. That was the case of a malicious act of a third person against which precautions would have been inoperative. It was held that there was no liability in the absence of a finding that the defendant either instigated it or that he ought to have foreseen and provided against it. It was a case of the overflow of water from a lavatory upon an upper floor. In the present case nothing was established in the way of shewing that there was an absence of reasonable precautions upon the part of the Railway Company. As to the headlight the evidence shews that the headlight was the usual and customary one upon city street-cars. *Winnipeg, Selkirk & Lake Winnipeg R. Co.* v. *Pronek* (1929), S.C.R. 314 is an authority which supports the holding that the headlight was efficient, being a headlight in general use—see Smith, J., at p. 337. The public have access to the right of way upon city street-car lines and there is always possibility that some obstruction may accidentally come upon the tracks or be maliciously

COURT OF APPEAL
1930
March 4.

VIVIAN
v.
B.C. ELECTRIC RY. CO.

placed there. In my opinion, no evidence was adduced shewing any lack of reasonable precautions in the present case. And when the obstruction was seen it became necessary to at once apply the brakes and the car was stopped before the obstruction was reached. Unfortunately, as a consequence of the quick stoppage of the car the respondent, who was standing at the time and about to deposit her fare in the box, was thrown against the seats of the car and suffered injuries. It was the case of inevitable accident. The stopping of the car was essential for the preservation of the lives of persons in the car. There was no evidence that the operator of the car in applying the brakes acted in any negligent manner—he did that which was his duty in view of the circumstances. In the *Rickards* case Lord Moulton, at p. 282, said, referring to the liability of a landlord or occupier:

> "Although he is bound to exercise all reasonable care, he is not responsible for damage not due to his own default, whether that damage be caused by inevitable accident or the wrongful acts of third persons."

MCPHILLIPS, J.A.

To render the appellant liable here some negligence of the Company must be established, as Kelly, C.B. said in *Thomas* v. *The Rhymney Railway Company* (1871), 40 L.J., Q.B. 89 at p. 95:

> "I ought perhaps to add that the Court must not be considered to hold that if the mischief complained of has arisen from the act of a stranger—as for instance, if any mischievous person had thrown a log of wood across the railway, or had done an act causing danger to a train passing along it—that an action would be maintainable against the Company."

(*Englehart* v. *Farrant & Co.* (1897), 1 Q.B. 240, 243; *McDowall* v. *Great Western Railway* (1903), 2 K.B. 331; *Hanson* v. *Lancashire & Yorkshire Ry. Co.* (1872), 20 W.R. 297; *Patchell* v. *Irish North Western Railway Co.* (1871), Ir. R. 6 C.L. 117).

This is not a case where *res ipsa loquitur* can be said to apply—here we have a city street railway and the tracks may be passed over by the public and there is free and must be free access at all times to and over the tracks—see Scrutton, L.J., in *Britannia Hygienic Laundry Co.* v. *Thornycroft & Co.* (1925), 95 L.J., K.B. 237 at p. 241 (Beven on Negligence, 4th Ed., Vol. I., pp. 122, 128). Upon the whole case, I do not find that there was any breach of duty upon the Railway Company estab-

lished, that onus being upon the respondent and being of that view I would allow the appeal.

MACDONALD, J.A.: Appellant complains of a judgment against it for damages for personal injuries based upon the following facts: The respondent upon boarding a car and while depositing her fare was thrown down and injured because the motorman stopped the car abrutly to avoid hitting a railroad-tie which he noticed lying on the track about a car length away. It was dark at the time. How the tie got upon the track is not known. It was not there eight minutes before as other cars passed safely over the line. There were several piles of discarded ties along the right of way, placed there by appellant's workmen and the tie on the track evidently came in some manner from one of these piles situated at least more than five feet away from the nearest rail, as shewn by indications on the ground. It was suggested that the pile collapsed owing to vibration of the ground caused by passing cars, one of them rolling on to the track; or on the other hand, that some stranger carried it from the pile and either deliberately placed it or carelessly permitted it to drop on the rails. There was evidence that people living in that vicinity sometimes carried away old ties for firewood. Perhaps an attempt was made to haul two or more in one load and one was allowed to drop while being carried across the track. If that occurred the party concerned might not have noticed that when it dropped one end of it extended slightly over the rail.

The learned trial judge could not find how the tie got on the track. It is difficult although not impossible to believe from the contour of the ground that the pile collapsed, one tie rolling as suggested close enough to the track to be caught by the lower step of the car and thrown directly behind the car and partly on to the rail; and almost equally difficult to believe that any one would drop it on the rail unless accidentally. Yet the inference that the latter event occurred is at least equal in weight to the other suggestion. However as the learned trial judge with the assistance of a view of the ground could not find how it occurred I think we must leave that finding as it stands and determine the legal questions involved on that basis.

COURT OF APPEAL

1930

March 4.

VIVIAN v. B.C. ELECTRIC RY. CO.

MACDONALD, J.A.

Counsel for appellant conceded that proof of the jolt caused by the sudden stoppage of the car, raised a *prima facie* case of negligence against it. That is true. If the case rested at that point respondent would succeed. The onus was then on appellant to rebut that presumption and to shew that in view of the situation confronting the motorman he acted reasonably in stopping as he did and that it was not because of appellant's negligence that he had to stop the car in the manner described. To satisfy this burden it is not enough for appellant to establish that a tie was on the track; it must shew that it was not because of its negligence that the tie got there. That is not to say however that appellant fails to discharge the burden upon it unless it shews how the tie got there. It is enough to shew that however it may have got there it was not by reason of appellant's negligence. The appellant must also shew that the motorman only stopped the car in the manner that the exigencies of the situation called for. Appellant claims that it discharged this burden upon it by shewing—and it did—that the car was not travelling at an excessive speed and that it was equipped with the ordinary headlight used in city streets, enabling the motorman to see far enough ahead to stop in a reasonable manner for usual and ordinary purposes. There is no obligation to carry a light so strong that an unusual obstruction such as this could be seen at a greater distance. Strong headlights such as used on interurban cars are not suitable for city traffic. Appellant also established that its method of piling ties along the right of way was reasonably safe and prudent and that it could not reasonably be anticipated that one or more of them would, without the intervention of a stranger, fall upon the track. A careful examination of the ground ten minutes before the accident would not lead a prudent man to think that any precautions should be taken or that the pile should be moved further away. Having established these facts by evidence, appellant submits that it discharged the burden upon it and that the judgment against it should be reversed.

The learned trial judge apparently felt that the burden was on appellant to shew "how that tie got there," and because it did not adduce evidence to enable him to make a finding favourable to it on this point he thought the respondent should succeed.

This, with deference, as already indicated, is not, in my opinion, the true view. He also said it was appellant's duty "to shew it was not their negligence." That is true after the *prima facie* case of negligence was established by respondent. In finding however that appellant did not discharge the burden resting upon it he stated that he was "influenced too by the fact that the Company knew of the accident the next morning and apparently took no steps to find out at once how it [the tie] got there and should have done so." There is some justification for this observation. The accident was reported immediately and one would have thought that an official of the Company would have been dispatched to the scene of the accident to see if from appearances on the ground—such as a disturbed pile—any connection could be traced between the tie on the track and the pile at the side of the track. If one were disposed to be uncharitable it might be suggested that an official did examine the ground and finding indications unfavourable to appellant conveniently forgot all about it. An examination the next morning would shew if the pile collapsed through vibration or otherwise, and if so whether or not in tumbling down one might have reached, if not the nearest rail, yet close enough to it to come into contact as already suggested with the lower step of the street-car as it hurried along. We must, however, be guided by the evidence and not by speculations which do not amount to reasonable inferences from known facts and assume as the learned trial judge found, that no examination was made the day after the accident. To say that it should have been done, while proper criticism, cannot be assigned as an act of negligence. Based upon the finding that no examination of the ground was made after the accident, we must judge whether or not appellant discharged the burden upon it of disproving negligence by what it did or omitted to do before not after the accident occurred.

I do not think the doctrine of *res ipsa loquitor* applies. While the pile of ties was placed there by appellant it was not entirely under its control. They were derelict ties left to be burnt on the ground or carried away by others for firewood without objection. It cannot be said that in the ordinary course the tie could get on the track without negligence on appellant's part and that therefore negligence should be presumed. It might happen

COURT OF APPEAL

1930

March 4.

VIVIAN v. B.C. ELECTRIC RY. CO.

in several ways and the mere fact of movement in some manner dos not imply negligence.

It is true that the respondent has the benefit of the finding of the learned trial judge, but it is to my mind based in several respects upon a misconception of the true situation. I would not interfere if an examination of the reasons for judgment disclose a finding of failure by appellant to rebut a *prima facie* case of negligence based upon proper principles and known facts coupled with reasonable conjectures and inferences fairly deducible from the known facts. Examining the reasons in this light the learned trial judge finds that "the lights were not good." If he refers to the street lights that is not an element. But he also apparently criticized the light on the car. I have already commented on that feature. It was the usual and ordinary light. He does not find that the car was travelling too fast. To quote from the reasons:

"There is nothing to shew that the car was going at any speed other than its ordinary speed along there."

MACDONALD, J.A.

He seems to suggest at another point that with the light as it was the speed should be so controlled that the motorman could stop the car less abruptly on seeing the obstruction but with the reference to speed just quoted I cannot perceive a finding of negligence by inference or otherwise in this observation. True as it turned out the motorman might have stopped without a violent jolt, but as he thought the object on the track might have been a man it cannot be said that he acted negligently in this respect. The only remaining possible finding of failure to rebut negligence in the reasons for judgment—and it was I think the controlling factor in the mind of the learned trial judge—is that appellant failed to shew how the tie got on the track. I have already indicated that this is a misconception of the burden upon appellant. It follows therefore in my opinion, with the greatest deference, that because appellant established that it was travelling at a reasonable rate of speed; that it was equipped with proper lights; that the ties were piled in the ordinary way at a safe distance from the rails; that no reasonable man viewing the situation before the accident would regard the pile as unsafe, it discharged the burden upon it. It is not compelled to enter the region of metaphysics where uncertain conclusions

are drawn to assist in rebutting the presumption. It need only shew that it adopted reasonable standards of prudent conduct.

The presumption being rebutted the respondent fails unless on the whole case negligence is disclosed.

"'It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also shew with reasonable certainty what particular precaution should have been taken'":

Beven on Negligence, 4th Ed., Vol. I., p. 138.

The respondent fails to meet the test and the appeal should be allowed.

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

Solicitor for appellant: *V. Laursen.*
Solicitor for respondent: *L. H. Jackson.*

REX v. SULLIVAN.

Criminal law—Club—Incorporated—Common gaming-house—Place "kept for gain"—Games of cards played—Rake-off—Steward in charge—Paid a salary only—Criminal Code, Secs. 69, 226, 229 (2), 985 and 986.

The accused was steward of a club duly incorporated with a constitution and by-laws. Members paid an entrance fee of 50 cents and a semi-annual fee of 50 cents. Only members were allowed in. The club was provided with a reading-room and a lunch-counter where members could buy meals, soft drinks, tobacco and cigars. The members played poker, solo and bridge, paid for the cards and were charged 15 cents each, every half hour while playing. The steward collected this money from the players and paid it all into the revenue of the club. The accused was convicted of unlawfully keeping a common gaming-house.

Held, on appeal, affirming the conviction, that an assessment was made on the card players to help the finances of the club thereby making it a common gaming-house and although the accused received nothing but his salary as steward he came within the provisions of section 69 of the Criminal Code and was properly convicted.

COURT OF APPEAL

1930

March 4.

REX v. SULLIVAN

Statement

APPEAL by accused from his conviction by police magistrate Shaw in the City of Vancouver on the 3rd of September, 1929, on a charge of keeping a common gaming-house at 112 Hastings Street in the City of Vancouver. The premises are known as the Metropolitan Club. It is incorporated. No one is allowed in but members who pay 50 cents entrance fee and 50 cents every six months. The accused had been a steward in the club for over three years at a salary. He collected from the card players and the money so collected went into the general funds of the club. He received nothing himself except his salary. Those who played cards whether poker, solo or bridge paid for the cards and 15 cents per player every half hour. The club was provided with a reading-room supplied with the current daily papers and periodicals for the use of the members and a lunch-counter where members could purchase meals, soft drinks, tobacco and cigars.

The appeal was argued at Victoria on the 8th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Adam Smith Johnston, for appellant: This is a charge under section 226 of the Criminal Code and there is no finding of fact below that this was a common gaming-house "kept for gain." This is a genuine club where the public are excluded. Only members are allowed in with the exception of visitors who are allowed in under certain rules. The defendant is a steward who gets a certain salary. The amount paid for cards is kept in the general revenue of the club and the steward merely collects for the club and is not personally interested in the sums paid: see *Rex* v. *Riley* (1916), 23 B.C. 192; *Rex* v. *Cherry and Long* (1924), 2 W.W.R. 667.

W. M. McKay, for the Crown: On the warrant we invoke sections 985 and 986 of the Code. Twenty-seven packs of cards and a large quantity of chips were found on the premises. The accused, who says he was a steward, comes under section 229 (2) of the Code: see *Rex* v. *Donovan* (1921), 15 Sask. L.R. 22. The magistrate found this was a sham club: see *Rex* v. *The Trainmen's Club* (1926), 20 Sask. L.R. 461; *Rex* v. *Radinsky*

(1929), 41 B.C. 317. All that is necessary is a finding that the place was kept for gambling: see *Reg.* v. *Brady* (1896), 10 Que. S.C. 539; *Rex* v. *Ham* (1918), 25 B.C. 237; *Rex* v. *Long Kee* (1918), 26 B.C. 78.

Johnston, replied.

Cur. adv. vult.

On the 4th of March, 1930, the judgment of the Court was delivered by

MACDONALD, C.J.B.C.: It may be that the appellant is carrying on his activities under cover of a fictitious club, but the evidence falls short of proving it. The club was duly incorporated, and, while playing of cards appears to be one of its principal social functions, yet meals were served and some show of providing reading matter for the members was made.

The appellant was shewn to have been one of the stewards at a salary from the club. Strict account was kept of all receipts and disbursements; no persons other than members were admitted, and those playing when the police entered were shewn at once to be members of the club. Two tables of poker were in progress at the time of the raid, and it was admitted that an assessment was made by the club on the players to help the finances. There was no attempt to conceal the *modus operandi.* The appellant swore that he received nothing but his salary as steward. I think, however, that section 69 of the Code is applicable to the appellant, since it is apparent that the club was a common gaming-house. The appellant therefore was properly convicted of being a keeper under that section, he is in the same category as a keeper, and therefore the conviction should be sustained.

Judgment

Appeal dismissed.

Solicitor for appellant: *Adam Smith Johnston.*
Solicitor for respondent: *O. C. Bass.*

MURPHY, J. (In Chambers)

1930

Feb. 17.

MACKEE v. SOLLOWAY, MILLS & CO. LIMITED.

Garnishment—Before judgment—Stock-broker—Action by customer—Claim for debt—Application to set aside.

MACKEE v. SOLLOWAY, MILLS & CO.

The plaintiff engaged the defendants as stock-brokers to deal in stocks on his behalf. He deposited with them stocks and shares to be held as collateral to his account or to be sold when so ordered by him. He also handed over money to be used by them in purchasing stocks and shares as ordered by himself. The plaintiff claims that the defendants instead of using his collateral as agreed, sold it for their own account and retained the proceeds. Further, the plaintiff claims he handed money to the defendants to purchase stocks and bonds which purchases were never made.

Held, that both claims set up by the plaintiff sustain a garnishee summons issued before judgment and an application to set it aside was dismissed.

Statement

APPLICATION to set aside a garnishee summons. Heard by MURPHY, J. in Chambers at Vancouver on the 11th of February, 1930.

Sugarman, for plaintiff.
Sloan, for defendants.

17th February, 1930.

Judgment

MURPHY, J.: Application to set aside a garnishee summons. Plaintiff engaged defendants, who are stock-brokers, to deal on his behalf in stocks and shares on the Stock Exchange. The relationship between them is therefore that of principal and agent. Plaintiff deposited with defendants certain stocks and shares to be held as collateral to his account with defendants or to be sold when so ordered by him. In addition he handed over sums of money to defendants to be used by them in purchasing stocks and shares as ordered by plaintiff. Plaintiff rests his claim on three grounds: First, breach of contract on the part of defendants in not giving him proper advice as he alleges they had contracted to do. This claim is one for unliquidated damages and cannot be made the basis for attachment proceedings. *McIntyre* v. *Gibson* (1908), 8 W.L.R. 202. But plaintiff also claims (a) that defendants instead of using his collateral, as the contract between them provided, sold it for their own account

and retained the proceeds. If defendants did this an actual debt from them to plaintiff immediately came into existence. Plaintiff has fixed the amount of such debt. If defendants (assuming plaintiff's allegation to be true as to their dealings with his collateral) accept plaintiff's figures nothing further remains to be done to ascertain the actual amount of the debt. If defendants dispute plaintiff's figures an account must be taken. In either case such a claim is a good foundation for attachment proceedings. *Alexander* v. *Thompson* (1908), 8 W.L.R. 659.

Plaintiff further claims (b) that he handed sums of money to defendants to purchase stocks and bonds which purchases were never made. If this is so, an actual debt due from defendants to plaintiff came into existence for the moneys held by them at any rate from the moment plaintiff demanded the return of his funds and the issue of a writ would be such a demand. Plaintiff may, in addition, have a claim for damages as a result of breach of contract which would be an unliquidated demand but if he has that in no way alters the position that an actual debt exists for the amount of money given by him to defendants. The claims which plaintiff sets up and which I have referred to under headings (a) and (b) are, in my opinion, claims which sustain the garnishee summons issued herein for they aggregate more than the amount paid into Court. The application is dismissed with costs to plaintiff in any event.

Judgment

Application dismissed.

FISHER, J.

1930

Feb. 20.

MACKEY v. MACKEY

MACKEY v. MACKEY AND MAGUR. (No. 2).

Judgment—Decree for judicial separation with costs—Execution issued for costs returned nulla bona—Subsequent decree for alimony—Conveyance by husband—Fraudulent Conveyances Act—Right of plaintiff to invoke —R.S.B.C. 1924, Cap. 96.

A decree of judicial separation with costs was granted a wife on the 7th of November, 1928. Upon the costs being taxed execution was issued and returned *nulla bona* on the 25th of February, 1929. In the same proceedings she obtained a decree for permanent alimony on the 23rd of January, 1929, none of which was paid. On the 26th of November, 1928, and before the above costs were taxed, the husband conveyed property to the defendant Magur.

Held, that the first decree was a judgment of the Supreme Court and the wife was a creditor, entitled to invoke the provisions of the Fraudulent Conveyances Act.

Statement

ACTION for a declaration setting aside a conveyance of certain property made by the plaintiff's husband, the defendant George Mackey, on the 26th of November, 1928, to his co-defendant William Magur, as fraudulent and void under the Fraudulent Conveyances Act. Tried by FISHER, J. at Vancouver on the 4th of February, 1930.

Fleishman, for plaintiff.
Fillmore, for defendant Magur.

20th February, 1930.

Judgment

FISHER, J.: In this action the plaintiff seeks, *inter alia,* a declaration setting aside a conveyance of certain property made by her husband, the defendant George Mackey, on November 26th, 1928, to his co-defendant William Magur as fraudulent and void under the Fraudulent Conveyances Act, R.S.B.C. 1924, Cap. 96. At a time prior to the date of the said conveyance, *viz.,* on the 7th of November, 1928, the plaintiff had obtained in proceedings taken in the Supreme Court of British Columbia in Divorce and Matrimonial Causes a decree for judicial separation from the said George Mackey, and for payment of her costs which were subsequently taxed and allowed at the sum of $549.70 and, no part of such costs having been

paid, execution was issued therefor on the 22nd of February, 1929, and a return *nulla bona* made on the 25th of February, 1929. In the meantime by a decree of the Court made 23rd January, 1929, in the same proceedings it was ordered that the said defendant Mackey should pay to the plaintiff the sum of $90 per month permanent alimony, none of which has been paid. Following the case of *Francis* v. *Wilkerson* (1917), 25 B.C. 132, I would hold that the decree dated November 7th, 1928, was a judgment of the Supreme Court so that on the date of the said conveyance the plaintiff had a judgment for her costs to be taxed and an action pending for alimony. Under such circumstances I would also hold that the plaintiff was a creditor entitled to invoke the provisions of our Fraudulent Conveyances Act or what is commonly known as the Statute of Elizabeth. See also *Freeman* v. *Pope* (1869), 39 L.J., Ch. 148.

The question therefore arises whether the transaction impeached herein was a *bona fide* one for valuable consideration without any fraud or collusion or notice thereof. In their evidence the two defendants say that there was a sale of the property with an option to the vendor to buy the property back within a year and the right to lease it in the meantime. They say the sale included certain furniture in addition to the lands and premises occupied as a home by the plaintiff and the defendant husband before they separated. The conveyance in question dated the 26th of November purports to cover only the real estate but the lease of the same date covers also the furniture which the defendants now say was repurchased by the defendant Mackey.

Judgment

The consideration in the said conveyance is set out as $6,700, receipt of which by the grantor is acknowledged. There was an existing mortgage securing the sum of $3,000 with interest which mortgage apparently was to be assumed by the grantee and the defendants do not say that the balance was paid to the grantor at the time of the execution of the deed but claim that it was part of the arrangement between them that the balance was to be paid within a certain time with an option as aforesaid to the defendant Mackey (vendor) to buy back the property within a year and in the meantime to have a lease of same. Under such circumstances, if it had been a *bona fide* transaction,

FISHER, J.

1930

Feb. 20.

MACKEY v. MACKEY

Judgment

one would have expected an agreement to have been drawn up setting out exactly the terms of payment and of the option and of the lease but instead we have an absolute conveyance executed and a lease given at least several days before any instalment of the purchase price was paid by the grantee according to his own account of the matter. The defendant Mackey (vendor) still continued in possession of the premises after the conveyance paying rent and receiving further instalments of the purchase-money according to the story of the defendants. No accounts of the payments made were kept; no vouchers given or taken by either party unless I accept the statement of the defendant purchaser (which I do not) that he had given a note for $1,500 on which the payments made by him were endorsed and the note finally torn up. The account given by the defendant Magur of the various payments made by the one defendant to the other, by which, according to him, the real estate was paid for by him the defendant Magur, and the rental paid and the furniture repurchased by the defendant Mackey, is inconsistent with the account given by the other defendant Mackey which is also in parts inconsistent with itself. Neither account is clear or satisfactory. The alleged vendor continued in possession and used the property as his own and the natural inference from the evidence is that he assumed to sell or take part in the selling of same. In my opinion there is sufficient evidence to prove the unreality of the transfer and to prove that the defendant Magur knew the real intent and that the transaction was to be really for the other defendant's benefit at the expense of the plaintiff as I find it impossible to believe that the defendant Magur was not aware of all the circumstances and the real reason for making the unusual arrangement with regard to the real estate and the furniture. My conclusion is that the interest of the defendant Mackey in the property was not conveyed to the defendant William Magur upon good consideration or *bona fide* but that the conveyance was a voluntary and fraudulent one made with the intention of protecting the property transferred from the existing judgment and the anticipated further judgment of the plaintiff and that both defendants were knowingly parties to the fraudulent scheme. Notwithstanding the evidence given as to the interest of the defendant Mackey in a mine or mining ven-

ture which might well be called hazardous I am satisfied that the conveyance denuded Mackey of all his property and so rendered him insolvent thereafter. The action debt or relief of the plaintiff was hindered, delayed and defrauded by the said conveyance made while the Court proceedings against the said defendant Mackey were pending as aforesaid.

Some time after the execution of the said conveyance, *viz.*, on the 20th of December, 1928, the defendant, William Magur, mortgaged the property to one Margaret Proudfoot Watson for the sum of $1,700 and on the same date $200 would appear to have been paid to the defendant Mackey by or on behalf of the defendant Magur and, although this amount was paid some two days before the proceeds of the mortgage were received by or for Mr. Magur, I am satisfied that it was paid after the execution of the mortgage and in anticipation of the mortgage moneys being received. I am satisfied also that the other moneys which would appear by documentary evidence to have been paid by William Magur either to George Mackey or on account of charges against the said property were paid either out of or on account of the said mortgage moneys having been received by the said William Magur.

Judgment

There will be an order declaring the conveyance fraudulent and void as against the plaintiff with all consequential relief as the plaintiff is entitled to have the property made available for payment of her judgments to the same extent as it would have been if there had been no conveyance and no second mortgage and to the extent to which the rights of the second mortgagee prevent that being so, to that extent the plaintiff should have judgment for damages against the defendant, William Magur. If necessary further directions can be given.

Judgment accordingly with costs.

Judgment for plaintiff.

MURPHY, J. (In Chambers)

1930

Feb. 21.

MOORE v. NYLAND: MCPHERSON, GARNISHEE.

Garnishment—Moneys payable by garnishee under agreement for sale—Saskatchewan Act and English Rules of Court distinguishable—R.S.B.C. 1924, Cap. 17, Secs. 3 and 4.

MOORE v. NYLAND

Claims and demands arising out of trusts or contract where such claims and demands could be made available under equitable execution are attachable under the Attachment of Debts Act, and moneys payable under agreement for sale can be reached by execution if it is shewn that defendant has a good title, and that the garnishee is certain to obtain a good title when he shall have completed payment of the purchase-money.

MOTION for an order that the garnishee pay into Court the amounts appearing due from the garnishee to the defendant or so much thereof as is sufficient to satisfy the plaintiff's claim. Heard by MURPHY, J. in Chambers at Vancouver on the 19th of February, 1930.

Statement

Jeremy, for plaintiff.
Wyness, for defendant.

20th February, 1930.

MURPHY, J.: Motion by plaintiff for an order that the garnishee pay into Court the amounts appearing due from the garnishee to defendant as and when the sums become payable or so much thereof as will be sufficient to satisfy the judgment which plaintiff expects to recover against defendant in these proceedings. I am asked to treat the motion as the determination of an issue and the following facts are admitted: 1. The garnishing order was issued on January 4th, 1930; 2. and was served on the garnishee January 7th, 1930; 3. The garnishee is the purchaser from the defendant under agreement for sale of lot seventeen (17) block ten (10) district lot seven hundred and twenty-seven (727) group one (1) New Westminster District, for two thousand ($2,000) dollars, dated December 16th, 1929, payable as follows: Cash $68, $1,000 by the assumption of a certain mortgage and the balance $932 payable $26 on January 15th, 1930, and $26 on the 16th of each month thereafter, the monthly payments to be inclusive of interest at seven

Judgment

(7) per cent. 4. The agreement for sale contains the usual covenants for title when all payments have been made. 5. The agreement is conditional on payments being made by the purchaser (garnishee) for taxes, insurance, etc. 6. Title has never been tendered.

The garnishee contends that no order should be made but that the order *nisi* should be discharged because title has not been tendered. Numerous cases in the English and Saskatchewan Reports were cited but, as pointed out in *Hankey & Co. Ltd.* v. *Vernon* (1926), 1 W.W.R. 375 and *Lanning, Fawcett & Wilson Ltd.* v. *Klinkhammer* (1916), 23 B.C. 84, these are not applicable because the British Columbia Attachment of Debts Act differs essentially from the English Rule of Court and from the Saskatchewan statute. Our Act makes attachable claims and demands arising out of trusts or contract where such claims and demands could be made available under equitable execution. The moneys payable under the agreement for sale can I think be reached by equitable execution if it is shewn that defendant has a good title and that the garnishee is certain to obtain a good title when he shall have completed payment of the purchase-money. These are facts either to be agreed upon or to be tried out on the present issue. *Boyd & Elgie* v. *Kersey* (1927), 38 B.C. 342. As pointed out in the *Klinkhammer* case, *supra,* our statute finds its origin in Manitoba legislation and gives much broader attachment rights than either English or Saskatchewan legislation. In *Smith* v. *Van Buren* (1907), 17 Man. L.R. 49, moneys payable under an agreement for sale were held liable to attachment. In *Barsi* v. *Farcas* (1924), 1 W.W.R. 707 at p. 712, a Saskatchewan case, Lamont, J.A. refers to *Smith* v. *Van Buren* and states the report does not shew whether or not the vendor had exhibited a good title. In view of the wording of sections 3 and 4 of the Attachment of Debts Act and of the decision in the *Boyd* case, *supra,* the proper course would seem to be to direct that this matter come on for further hearing to determine the further facts necessary to be ascertained and it is so ordered. Costs reserved until the matter is finally determined.

Judgment

Order accordingly.

HOWAY, CO. J.

1930

Feb. 21.

BLANCHARD v. VAUGHAN.

Negligence—Unguarded excavation on private property—No fence on street line—Plaintiff wanders from street in darkness—Falls in excavation—Trespass—R.S.B.C. 1924, Cap. 260.

BLANCHARD v. VAUGHAN

The defendant owned a property at the corner of Fort Street and First Avenue in the Village of Hope, B.C. There was a fence along Fort Street but no fence on First Avenue. There was an unguarded excavation on the property intended for the basement of a house, about two feet from the line of Fort Street and about twenty feet from the line of First Avenue. On a dark and foggy night the plaintiff, who was a stranger in Hope, was walking to his home. He missed his way on First Avenue where there was no sidewalk, fell into the excavation and was injured.

Held, that as there was no fence, the plaintiff in straying upon defendant's land was not a trespasser, and there was a duty upon the defendant not to maintain a trap such as this excavation. The plaintiff is therefore entitled to recover.

Statement

ACTION for damages suffered by the plaintiff upon falling into an unguarded excavation on the defendant's property at the Village of Hope, British Columbia. The facts are set out in the reasons for judgment. Tried by HOWAY, Co. J. at Hope on the 26th of October, 1929.

J. H. MacGill, for plaintiff.
Ewen, for defendant.

21st February, 1930.

Judgment

HOWAY, Co. J.: This is an action for damages suffered by the plaintiff by falling into an unguarded excavation upon the property of the defendant at Hope.

The undisputed facts are that on a dark and foggy night, the plaintiff who was a stranger in Hope was walking to his home and in so doing, missed his way and fell into the excavation. This excavation was near the corner of Fort Street and First Avenue, in the Village of Hope. It was on the property when the defendant purchased it. It was intended to have been the concrete basement of a house, that has never been built. On one side (Fort Street) where it was within two feet or thereabouts of the street line, a bit of fencing consisting of two or three

parallel bars extending along the street line for a distance of twenty feet or so, protected it and prevented a person using that street from inadvertently falling into it. But otherwise there was no protection of any kind. The excavation was some five feet deep, and on the First Avenue side from which the plaintiff approached it, was some eighteen or twenty feet from the street line.

The question is: Was it negligence on the defendant's part to leave the unguarded excavation? Alternatively, was this unguarded excavation within such a short distance of a highway, a nuisance?

Since the trial, I have given this case a great deal of consideration, and have twice asked counsel to submit argument to me on various points. I have also made some considerable examination of the authorities outside of those submitted.

Considered from the point of nuisance, the test appears to be whether the excavation renders the highway unsafe to those who use it with ordinary care. Is the excavation so near to the highway as to interfere with the ordinary user of the same by the public? Or, again, is the excavation substantially adjoining the highway: is it sufficiently near the highway to be dangerous? (Beven on Negligence, 4th Ed., Vol. 1, p. 544). Upon this question of fact, I hold that the excavation was so close as to render the highway unsafe for use with ordinary care.

Judgment

I have had the advantage of a view of the premises and that has influenced me in arriving at this conclusion. No person could tell on a dark night when he reached the line of defendant's property on First Avenue, for the land is level and there is no sidewalk on that side, the street is but little travelled, and except in the centre is grass-grown, and that grass continues right to the excavation. There is nothing to indicate the corner of the two streets.

If, however, the action is looked at as one of negligence, I am of opinion nevertheless that it succeeds. In considering it from this point of view, care must be taken in applying the decisions of the English Courts. In *Blyth* v. *Topham* (1607), 1 Roll. Abr. 88; Cro. Jac. 158, the plaintiff was held not entitled to recover for his horse which had strayed upon a common and fallen into a pit dug by the defendant, for the reason that as

HOWAY, CO. J.

1930

Feb. 21.

BLANCHARD v. VAUGHAN

"he shews not any right why his mare should be in the said common, the digging of the pit is lawful against him." And from that time downward it has been held that except in cases of reckless disregard of ordinary humanity, "a man trespasses at his own risk": *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361 at p. 370.

The question, however, is: Was the plaintiff a trespasser? At common law the crossing of the lines of a person's property is a trespass, but in British Columbia the Trespass Act, R.S.B.C. 1924, Cap. 260, Sec. 4, provides:

"Any person found inside enclosed land without the consent of the owner, lessee, or occupier thereof shall be deemed a trespasser."

Section 6 goes on to say "Whosoever commits any trespass by entering or being upon any enclosed land," after notification not to do so shall be liable to a penalty. Now, though inartistically expressed, the meaning of this section is that if the land is not "enclosed land" as defined in the Act—that is land protected by a lawful fence—a person who walks or strays upon it is not a trespasser. And this is in accordance with section 14 which declares that no trespass shall be deemed to have been committed by animals that stray into lands unprotected by a lawful fence. The plaintiff therefore in straying upon the defendant's land was not a trespasser, and the defendant was therefore under a duty to him not to maintain a trap such as this excavation. The breach of that duty is negligence: *cf.* *Baldrey* v. *Fenton* (1914), 6 W.W.R. 1441; *McLean* v. *Rudd* (1908), 1 Alta. L.R. 505 at pp. 508-9.

Judgment

As to the damages, I allow:

Hospital bill	$113.75
Doctor's bill	25.00
Ambulance charge	10.00
Two fares, Vancouver and return	7.00
	$155.75
General damages	150.00
	$305.75 and costs.

Judgment for plaintiff.

CLARK v. McKENZIE.

COURT OF APPEAL

1930

March 4.

CLARK v. McKENZIE

Trespass—Damages—Injunction—Encroachment of building on plaintiff's land—Mistake—Damages in lieu of injunction.

Plaintiff and defendant owned adjoining lots each with a frontage of 25 feet. The defendant built a two-story building on his lot and about eighteen years later the plaintiff found that the building encroached on his lot three and one-quarter inches at the front and diminishing to two inches at the rear end. The evidence disclosed that the removal of the building from the plaintiff's lot would cost about $1,500, and the value of the plaintiff's lot was about $1,000. Upon the plaintiff bringing an action for damages for trespass and for a mandatory injunction for removal of the building the defendant paid into Court $50 in satisfaction of the plaintiff's claim. On the trial it was held that the plaintiff should have accepted the $50 as adequate compensation.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that in the circumstances compensation in damages in lieu of a mandatory injunction is the proper remedy.

Gross v. *Wright* (1923), S.C.R. 214 distinguished.

APPEAL by plaintiff from the decision of MACDONALD, J. of the 23rd of October, 1929 (reported, *ante*, p. 71), in an action for damages for trespass and for a mandatory injunction compelling the defendant to remove that portion of his building which is upon the plaintiff's lands. The plaintiff owned lot 26 in block 237, district lot 526, in the City of Vancouver. The defendant owned the adjoining lot number 25. The defendant erected a two-story building on his lot about 18 years prior to the commencement of this action and in the spring of 1929 the plaintiff for the first time advised the defendant's husband that the building on lot No. 25 encroached on his lot by three and one-quarter inches at the front of the lot and two inches at the back of the lot. Prior to action the defendant offered the plaintiff $50 as compensation for the encroachment, and after the action was commenced the defendant paid into Court the sum of $50 in full satisfaction of the plaintiff's claim. Statement

The appeal was argued at Victoria on the 15th and 16th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1930

March 4.

CLARK v. MCKENZIE

Edith L. Paterson, for appellant: The encroachment on our lot was three and one-quarter inches at the front diminishing to the lesser width of two inches at the back. This is an action for trespass and an injunction is the appropriate remedy when the trespass is continuous. There is a distinction between an action of nuisance and one of trespass. The cases followed by the learned judge below are all actions for nuisance and do not apply: see *Colls* v. *Home and Colonial Stores, Limited* (1904), A.C. 179 at p. 193; *Slack* v. *Leeds Industrial Co-operative Society, Ld.* (1923), 1 Ch. 431 at pp. 461-2 and on appeal (1924), A.C. 851 at p. 860; *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. 287. We rely on the case of *Gross* v. *Wright* (1923), S.C.R. 214: see also *Stollmeyer* v. *Trinidad Lake Petroleum Co.* (1918), 87 L.J., P.C. 77.

Gillespie, for respondent: The English statutes prior to November the 15th, 1858, are in force here. Lord Cairns's Act passed in June, 1858, applies here. This Act gives discretion to the judge to give damages where it would be oppressive to grant an injunction. If the wrongful act is unintentional and without knowledge the Act applies. In *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. 287, the Act is particularly referred to: see also *Delorme* v. *Cusson* (1897), 28 S.C.R. 66; *Rileys* v. *Mayor, Aldermen, and Burgesses of Halifax* (1907), 97 L.T. 278; *Pettey* v. *Parsons* (1914), 1 Ch. 704 at p. 722 and on appeal (1914), 2 Ch. 653. In the case of *Leeds Industrial Co-operative Society, Ld.* v. *Slack* (1924), A.C. 851 it was held that damages could be awarded instead of injunction: see also Kerr on Injunctions, 6th Ed., pp. 40-1; *Isenberg* v. *East India House Estate Company* (1863), 3 De G. J. & S. 263 at p. 271. It will cost $1,500 to tear the wall down and the plaintiff's lot is worth less than $1,000: see Salmond on Torts, 7th Ed., 195.

Argument

Paterson, in reply, referred to *Woodhouse* v. *Newry Navigation Co.* (1898), 1 I.R. 161 at p. 174 and *Corporation of Hastings* v. *Ivall* (1874), L.R. 19 Eq. 558 at p. 585.

Cur. adv. vult.

4th March, 1930.

COURT OF APPEAL

1930

March 4.

CLARK v. MCKENZIE

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The action is for trespass and for a mandatory injunction.

The defendant's house was inadvertently built encroaching on the adjoining land of the plaintiff by three and a quarter inches at the front and diminishing to a lesser width at the back of the house. The evidence shews that it would cost $1,500 to remove the house from the plaintiff's land. The learned judge was in doubt as to the plaintiff's title which was in the nature of an option to purchase, but he preferred to dispose of the case on another ground, compensation. The value of the land taken by the encroachment, based on the price agreed to be paid for the whole lot by the plaintiff, would not exceed $15. The defendant offered before action to pay $50, which was refused, and $500 was demanded by the plaintiff. The $50 was paid into Court. By the judgment appealed from that amount was awarded to the plaintiff and the action was dismissed with costs. In *Gross's* case, in the Supreme Court of Canada, the trespass was wilful. It was not so here.

I would dismiss the appeal.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned trial judge in his disposition of this case. I think it a very proper case in which to award damages.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This was an action in trespass there being an encroachment upon the lands of the appellant, being a Vancouver city lot on Fourth Avenue, lot 26 in block 237, district lot 526. The building of the respondent on lot 25 adjoining encroaches and extends over the land of the appellant three and one-quarter inches on the Fourth Avenue frontage and continuing along the line of lot 26 until at the rear of the lot the encroachment is reduced to two inches. The leading case in Canada upon the law as affecting the situation is *Gross* v. *Wright* (1923), S.C.R. 214, reversing a decision of this Court (*Gross* v. *Wright* (1922), 31 B.C. 270). In my opinion the learned trial judge, with great respect, erred in awarding dam-

COURT OF APPEAL

1930

March 4.

CLARK v. MCKENZIE

ages rather than a mandatory injunction to restrain continuation of the trespass. That was the order eventually made in the case of *Gross* v. *Wright, supra.* I would particularly call attention to what Duff, J. said at p. 183 and what Anglin, J. (now Chief Justice of Canada), said at p. 187. In *Woodhouse* v. *Newry Navigation Co.* (1898), 1 I.R. 161, a case referred to by Anglin, J., Holmes, L.J., at p. 174, said:

"The plea of acquiescence having failed, the defendants urge that the injunction will be of little advantage to the plaintiffs, and that the cost and trouble which it will impose on the defendants will be out of all proportion to any benefit that will follow from it. In this I am disposed to agree; but it is no legal ground for refusing the relief asked. If it were, persons in the position of the defendants would be able to acquire rights of property by wrong-doing, and to carry out a compulsory purchase not only without, but in opposition to, statutory authority."

The facts shew that the appellant had plans prepared to erect a building on lot 26 and a survey made when the encroachment was discovered.

I would refer to pp. 194-5 of Salmond on Torts, 7th Ed.:

MCPHILLIPS, J.A.

"7. It is only in very exceptional circumstances that the Court will depart from this general rule of restraining an injury by injunction, and compel a plaintiff to accept pecuniary satisfaction for his wrongs, instead of securing for him the specific fulfilment of his rights. 'Ever since Lord Cairns' Act,' says Lindley, L.J., in the leading case of *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. pp. 315, 316, 'the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts, or, in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong-doer is able and willing to pay for the injury he may inflict. . . . Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer by way of example to trivial and occasional nuisances; cases in which the plaintiff has shewn that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief.'"

Here we have not the case of a trivial nuisance, it is the deprivation for all time of an area of land which is considerable when interior space is considered and when today with the era of high buildings present (and one is under construction in the City of Vancouver of over 20 stories), it is a most serious thing indeed to invade another's property and appropriate it

for all time with the payment only of $50—a most inadequate sum—and, with great respect to the learned trial judge, the damages allowed were not ascertained upon any true principle. Nothing was allowed for compulsory taking and the deprivation in the future of the area encroached upon and the value of that deprivation. In my opinion—without saying more on this point—the damages allowed are wholly inadequate. I, however, am of the opinion that it was not a case for damages but one for a mandatory injunction. In *Gross* v. *Wright, supra,* Duff, J., at p. 227, said:

"Being myself far from satisfied that damages would afford adequate reparation . . . ."

This language can well be applied to the present case. In *Gross* v. *Wright* the wall was a brick one. Here the building is frame and with little real expense, as compared with a brick wall, a mandatory injunction could reasonably have been made. I would refer to what Anglin, J. said at p. 232:

"Under these circumstances, although the expense to which the defendant will be put may be considerably greater than any actual benefit the plaintiff may derive, the plaintiff insisting on the relief of a mandatory injunction to restrain continuation of the trespass is in my opinion entitled to it. *Woodhouse* v. *Newry Navigation Co.* (1898), 1 I.R. 161 at pp. 173, 174."

MCPHILLIPS, J.A.

In conclusion my opinion is that the case of *Gross* v. *Wright, supra,* is an exposition of the law which is binding upon this Court and the facts of this case compel the application of the law as set forth therein and this case was one where a mandatory injunction should have issued. It was not a case for damages in lieu of an injunction, and in any case, the damages were assessed upon a wrong principle and palpably inadequate. It is not the law that land may be taken unlawfully, as was the case here, and when complained against the wrong-doer can calmly come forward and pay into Court the absurdly insufficient sum paid in here, *viz.,* $50, and in this manner, without statutory authority, expropriate the land against the will of the owner thereof. It is not too imaginative to say—the man on the street can well say it—that land upon Fourth Avenue in the City of Vancouver will be land in the centre of a vast city before many years elapse and with the practice of erecting buildings of great height (in New York, I think, one is under construction of nearly 1,000 feet in

COURT OF APPEAL

1930

March 4.

CLARK v. MCKENZIE

MCPHILLIPS, J.A.

height) the land taken, the subject-matter of this action, is not in its nature small or trivial—it is a most substantial area of land and if damages were to be admitted to be allowed in lieu of an injunction they must be adequate, which they are not. When I refer to Fourth Avenue as likely to become the centre of the city in the near future it is only necessary to remember that the civic committee working upon the question—as to where the city centre should be—are reported to have favoured a point immediately opposite to Fourth Avenue, across False Creek, and at a point where the Burrard Bridge is now to be built. I have made reference to what may be said to be common knowledge. For doing so I have the highest authority—*In re Price Bros. and Company and the Board of Commerce of Canada* (1920), 60 S.C.R. 265. At p. 279, Anglin, J. (now Chief Justice of Canada) said:

"The common knowledge possessed by every man on the street, of which Courts of justice cannot divest themselves, ..."

Being of the opinion that a mandatory injunction was the proper remedy, and should have been the judgment of the learned trial judge below, I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Appellant and respondent own adjoining lots, one vacant, the other (respondent's) with a building erected thereon. The walls of said building encroach upon appellant's lot (three and one-quarter inches at the front diminishing to two inches) and he sought unsuccessfully at the trial to obtain a mandatory injunction to compel the removal of that part of the wall and building resting upon it. The sum of $50 was paid into Court in satisfaction of appellant's claim and the learned trial judge found that was sufficient. He refused to issue a mandatory injunction. Appellant submits that if he is compelled to accept damages or compensation only, it would mean the enforced expropriation of his property. Without going into the evidence as to value, if damages is the appropriate remedy the amount tendered was quite sufficient.

By Lord Cairns's Act (21 & 22 Vict., Cap. 27, Sec. 2), passed in June, 1858, the Court was empowered to award damages in cases where the Court of Chancery had jurisdiction to entertain an application for an injunction against the commis-

sion or continuance of any wrongful act "if it shall think fit either in addition to or in substitution for such injunction." It does not follow, therefore, that an injunction, which might be oppressive to one of the parties and not an overriding necessity for the other, must issue in cases of this sort. Cases we were referred to dealing with interference in the nature of a trespass with ancient lights where the dominant owner claimed the right to all the light that passed through his windows for 20 years, are not of much assistance in this case. In such cases the interests affected are not necessarily confined to the parties to the litigation. An injunction to restrain the erection of a building cutting off to some extent the light previously enjoyed by existing owners might retard new construction and development in cities in a manner prejudicial to the general interests. The viewpoint is somewhat different where we have to consider an encroachment of a building on an adjoining lot. However, even in respect to ancient lights the rule is, since *Colls* v. *Home and Colonial Stores, Limited* (1904), A.C. 179, to grant damages rather than an injunction unless the injury cannot fairly be compensated in damages; or unless the defendant acted in an arbitrary manner. Oppressive injunctions will not be granted where the injury to legal rights is small and capable of being estimated in money.

MACDONALD, J.A.

Counsel for appellant relied on *Gross* v. *Wright* (1923), S.C.R. 214, as authority for the submission that a mandatory injunction should issue. Two adjoining owners on Hastings Street, Vancouver, entered into an agreement for the erection of a party-wall by defendant 24 inches in thickness throughout, one half of it to rest on each lot. The defendant built it in accordance with the agreement up to the first story but narrowed it on his own side by four inches on the second and third stories, keeping the wall on plaintiff's side perpendicular. The plaintiff discovered that "a trick was played upon him" after several years had elapsed and sued for and obtained a mandatory injunction to compel defendant to pull down that part of the wall not constructed in accordance with the agreement. Defendant by his act not only secured additional space in his own building but also made it difficult, if not impossible, for the

COURT OF APPEAL

1930

March 4.

CLARK v. MCKENZIE

plaintiff to add to the wall by further construction when it might become necessary to carry it higher. It was because of the elements in that case that a mandatory injunction was granted and it is not an authority applicable to the case at Bar. Mr. Justice Duff pointed out that "the conduct of the respondent was tortuous." He had authority to enter the adjacent lot to build a wall, one half of it on one side of the line and one half on the other, but when he used that authority for a purpose not authorzied he became a trespasser. It was "a violation of good faith." Mr. Justice Anglin (now Chief Justice) said at p. 230:

"The evidence satisfies me that the departure from the agreement was intentional and deliberate and was made for the purpose of securing to the defendant such additional space as he would thus obtain and probably also in order to save him a portion of the cost of constructing a party-wall of 24 inches in thickness from top to bottom. . . . This case seems to present an instance of wanton disregard of a plaintiff's rights and perhaps also of an attempt to steal a march on him."

His Lordship quotes and applies the language of Lord Selborne, L.C. in *Goodson* v. *Richardson* (1874), 9 Chy. App. 221 at pp. 224-5:

MACDONALD, J.A.

"I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction."

These opinions, coupled with the view that it would be almost impossible to estimate the damages, disclose the basis of that decision. It could only be applied to the case at Bar if respondent deliberately encroached upon appellant's lot when erecting a building on her own, in the hope that it would not be detected and that she might thereby secure possession of a part of appellant's lot. The respondent purchased after the building was erected and only knew of the encroachment when appellant made his claim, not in the first instance for the removal of the building, but for $500 damages. It is a small lot in an outlying part of the city and worth about $1,000. Compensation in damages may readily be computed and it is the appropriate remedy. To compel removal would, it is estimated, cost $1,500. That is more than the value of the lot. There is therefore ample

warrant to exercise the discretion permitted and to award such a sum to appellant as will compensate him in damages.

I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitor for respondent: *W. D. Gillespie.*

COURT OF APPEAL
1930
March 4.
CLARK v. MCKENZIE

ROMAN v. MOTORCAR LOAN COMPANY LIMITED AND BURNS.

COURT OF APPEAL
1930
March 4.
ROMAN v. MOTORCAR LOAN CO.

Bailiffs—Motor-car—Conditional sale agreement—Default—Seizure of car—Trespass and assault by bailiff—Liability of principal—Bailiff independent contractor.

The plaintiff being in default on his payments on the purchase of a motor-car under a conditional sale agreement, the defendant Company authorized the defendant B., who was a licensed bailiff, to seize the motor-car. While making the seizure B. broke open the door of the plaintiff's garage and assaulted the plaintiff who was endeavouring to hold his motor-car. The plaintiff recovered damages against both defendants.

Held, on appeal, reversing the decision of RUGGLES, Co. J. (MCPHILLIPS, J.A. dissenting), that the bailiff was an independent contractor and the Company was not liable.

APPEAL by defendant Motorcar Loan Company Limited from the decision of RUGGLES, Co. J., of the 4th of November, 1929, in an action for damages for injuries sustained from an assault on the plaintiff by the defendant Burns. The defendant Motor-car Loan Company Limited sold the plaintiff a Chevrolet motor-car on the 12th of November, 1927, under a conditional sale agreement. The plaintiff being in default in his payments, on the 22nd of April, 1929, the Motorcar Loan Company Limited employed the defendant G. W. Burns as its bailiff to repossess the said motor-car and under a warrant from the Motorcar Loan Company Limited, Burns proceeded to the plaintiff's farm near New Westminster, broke open the plaint-

Statement

COURT OF APPEAL

1930

March 4.

ROMAN v. MOTORCAR LOAN CO.

iff's garage, and took the car out. When it was out of the garage the plaintiff tried to attach a chain to the car to hold it and when so engaged, Burns kicked him breaking one of his ribs. The plaintiff recovered judgment against both defendants for $1,000.

The appeal was argued at Victoria on the 27th and 28th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Wood, K.C., for appellant: Burns seized the car under a warrant from the Motorcar Company and the plaintiff complains that Burns assaulted him and broke into the garage. We submit that the defendant Company is not liable for the actions of the bailiff: see *Richards* v. *West Middlesex Waterworks Company* (1885), 15 Q.B.D. 660; Halsbury's Laws of England, Vol 13, p. 204, sec. 408; Addison's Law of Torts, 8th Ed., 123; *Lewis* v. *Read* (1845), 13 M. & W. 834; *Ritchie* v. *Snider* (1914), 28 W.L.R. 735; *Goldberg* v. *Rose* (1914), 19 D.L.R. 703; *Zarr* v. *Confederation Life* (1915), 8 W.W.R. 365; *Farry* v. *Great Northern Railway Co.* (1898), 2 I.R. 352; *Dyer* v. *Munday* (1895), 1 Q.B. 742. The case of *Jennings* v. *Canadian Northern Ry. Co.* (1925) 35 B.C. 16 can be distinguished as in that case the attack was made by a servant of the company: see Underhill on Torts, 10th Ed., 623; *Hounsome* v. *Vancouver Power Co.* (1913), 18 B.C. 81; (1914), 49 S.C.R. 430. On the question of exemplary damages see Halsbury's Laws of England, Vol. 10, p. 306, sec. 566; *Smith* v. *Streatfeild* (1913), 3 K.B. 764; Mayne on Damages, 10th Ed., 40; *Clark* v. *Newsam* (1847), 1 Ex. 131; *Carmichael* v. *Waterford and Limerick Railway* (1849), 13 I.L.R. 313; *Black* v. *North British Railway Co.* (1908), S.C. 444 at pp. 453-4. As to a new trial see *Parker* v. *Cathcart* (1866), 17 Ir. C.L.R. 778; *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at p. 724; *Knight* v. *Egerton* (1852), 7 Ex. 407. That the damages should be reduced see *Carty* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 3; *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280.

Argument

St. John, for respondent: As to damages, the amount recovered was not excessive for the trespass alone: see *Merest* v.

Harvey (1814), 5 Taunt. 442. As to agency, Burns was not an independent contractor: see Halsbury's Laws of England, Vol. 1, p. 147, sec. 327. He was an agent: see Bowstead on Agency, 7th Ed., 86. The warrant itself says he is authorized to do certain things. In the cases he referred to, the bailiff went outside the scope of his authority, but see *Poland* v. *John Parr & Sons* (1927), 1 K.B. 236 at p. 242. As to liability of principal and agent see *Ferguson* v. *Roblin* (1888), 17 Ont. 167; *Miller* v. *Strohmenger* (1887), 4 T.L.R. 133; *Damiens* v. *Modern Society (Limited)* (1910), 27 T.L.R. 164. No exemplary damages were awarded: see Mayne on Damages, 10th Ed., 39; *Citizens' Life Assurance Company* v. *Brown* (1904), A.C. 423.

Argument

Wood, in reply, referred to *Taylor* v. *B.C. Electric Ry. Co.* (1912), 1 W.W.R. 486; Bowstead on Agency, 7th Ed., 85.

Cur. adv. vult.

4th March, 1930.

MACDONALD, C.J.B.C.: The Motorcar Loan Company Limited held a conditional sale agreement against a motor-car which was in the plaintiff's possession. G. W. Burns carried on business, *inter alia,* as a bailiff. The Motorcar Loan Company employed him to make a seizure of the car and in the course of that seizure Burns broke open the plaintiff's garage and took the car out and subsequently assaulted the plaintiff. It was for damages for these acts that this action was brought. On a trial with a jury, judgment was given in favour of the plaintiff. The Motorcar Loan Company Limited have appealed, but Burns has not.

MACDONALD, C.J.B.C.

Appellant's contention is that they were not responsible for Burns's illegal acts; that he was neither their servant nor their agent, but an independent contractor and therefore they are not responsible for his trespass and assault. I think that contention is well founded. A case which is applicable in principle is *Milligan* v. *Wedge* (1840), 12 A. & E. 737, where a butcher bought a bullock and employed a licensed drover to drive it home for him and the drover allowed the bullock to get away, whereupon it entered the plaintiff's shop and did damage. It

COURT OF APPEAL

1930

March 4.

ROMAN v. MOTORCAR LOAN CO.

was held by the Court of Appeal that the butcher was not liable. Another case which throws some light on the relationship between an employer and broker is *Draper* v. *Thompson* (1829), 4 Car. & P. 84. That was an action brought by the bailiff against his employer for indemnity for damages which he had been obliged to pay to the person distrained. The damage was occasioned by the bailiff's own servants and the Court held that he could not succeed.

There appears to be two grounds upon which the appellant claims relief; that Burns was an independent contractor, and secondly, that he was unauthorized to commit the offence complained off. It is clear from the cases that where the bailiff commits irregularities merely, his employer may be responsible, but where he commits an illegal act not authorized he is himself responsible but not his employer.

MACDONALD, C.J.B.C.

I think, therefore, the appeal should succeed.

MARTIN, J.A. I agree that on the facts before us the defendant Company is not responsible for the inexcusable assault committed by the licensed bailiff it employed to seize and take possession of the motor-car pursuant to the warrant it gave to the bailiff to that intent. The principle governing the present case is, in my opinion, indistinguishable from that laid down by the King's Bench in *Milligan* v. *Wedge* (1840), 10 L.J., Q.B. 19 (wherein is to be found the best report of the case) and this citation from the judgment of Lord Denman, C.J., p. 21, is in point:

MARTIN, J.A.

"The other distinction suggested by my brother Littledale in *Laugher* v. *Pointer* [(1826), 5 B. & C. 547], namely, between a party employing his own servant, and employing a person holding a distinct and independent business, appears to me good and sound. Here the defendant, being himself, we may suppose, ignorant of driving, employs a drover, a person properly qualified for that particular work; the drover undertakes the employment, and he furnishes a servant; the drover is, in my opinion, the party liable."

And Coleridge, J., said, p. 22:

"The true test is to ascertain the relation between the party charged and him who does the act. Unless it is that of master and servant, the former is not responsible. In this case, I make no distinction between the drover and the drover's servant. But the relation between the defendant, and Ind, the drover, was not that of master and servant. He made a contract with the drover as others do; and the drover so contracting is to be

considered as the person doing the act. The defendant then is not responsible."

This decision has not only not been questioned, but has been affirmed by the Court of Crown Cases Reserved in *Reg.* v. *Hey* (1849), 2 Car. & K. 985, and the distinction between it and the case where the person is employed to do work "which was dangerous or was likely to be dangerous if proper precautions were not taken" is well pointed out in *Pinn* v. *Rew* (1916), 32 T.L.R. 451.

GALLIHER, J.A.: In my opinion the bailiff cannot be said to be the servant of the company. I think his position is that of an independent contractor and as such in the circumstances of this case, the company cannot be held liable—Halsbury's Laws of England, Vol. 21, p. 471, sec. 794. See also Addison on Torts, 8th Ed., 133.

GALLIHER, J.A.

I would allow the appeal.

MCPHILLIPS, J.A.: In my opinion the appeal fails. *Jennings* v. *Canadian Northern Ry. Co.* (1925), 35 B.C. 16, is determinative of this appeal being a decision of this Court. Appellate Courts must follow their own decisions save where the ultimate Court of Appeal determines otherwise. Here we have a most brutal and unprovoked assault made upon the respondent by the servant or agent of the appellant corporation acting under a written warrant from the appellant in the terms following:

[After setting out the warrant the learned judge continued.]

It was in the execution of this warrant and at the very time of the taking of the motor-car that the assault was made, the respondent suffering serious personal injuries at the hands of the bailiff of the appellant and there is evidence that the bailiff was intoxicated at the time—at the very time when he was executing the warrant. Corporations can only act by their officers or agents and here it was the agent duly appointed by the corporation that committed the assault. In Foa on Landlord and Tenant, 6th Ed., p. 593:

MCPHILLIPS, J.A.

"The effect of the above statute is thus seen to be that of narrowing the selection of bailiff to persons of a particular kind; but inasmuch as the landlord still retains the right of selection within the prescribed limits, it is conceived that the statute does not make the bailiff a mere officer of the Court, so as to relieve the landlord of liability in respect of those of the

COURT OF APPEAL

1930

March 4.

ROMAN v. MOTORCAR LOAN CO.

bailiff's acts (as to this, see pp. 629, 633, 634, *post*) for which before the statute he would have been liable (*Cf. Martin* v. *Temperley* [(1843)], 4 Q.B. 298)."

Then at p. 630, note (*x*), we find this statement:

"It is thought that a bailiff cannot properly be regarded as an 'independent contractor,' so as to exempt the landlord from liability for what are sometimes called his 'casual' or 'collateral' acts of negligence: see Addison on Torts, p. 321 (8th Ed.)."

On p. 321 (Addison on Torts) we find this language:

"It seems that this statute has not placed the certified bailiff in the position of an independent contractor so as to exempt the landlord from liability for his casual acts of negligence; but that the landlord remains liable as a principal is for the acts and defaults of an ordinary agent in the scope of his employment. (*g*) The opinion of the profession seems to be that the position of the certified bailiff is more analogous to that of the waterman in *Martin* v. *Temperley* [(1843)], 4 Q.B. 298; 12 L.J., Q.B. 129; than to that of the drover in *Milligan* v. *Wedge* [(1840)], 12 A. & E. 737; 10 L.J., Q.B. 19."

The contention put forward at this Bar by counsel for the appellant is that the bailiff in acting under the warrant was an independent contractor. I must express the most pronounced dissent to any such argument. Here the bailiff was the servant or agent of the appellant as the conductor was in *Jennings* v. *Canadian Northern Ry. Co., supra,* deputed to do a certain act and at the very moment of the doing of it committed the assault. I would refer to the head-note in the *Jennings* case, as it quite graphically portrays the decision in that case and it is, in my opinion, an analogous case and conclusive on the point. It reads as follows:

MCPHILLIPS, J.A.

"A railway company is liable for the injury caused by the wanton and violent conduct of its conductor while in performance of an act within the scope of his employment. The plaintiff, a coloured man, was a passenger on a train of the defendant Company. The conductor while collecting tickets passed the plaintiff, who was asleep. The plaintiff awakening called to the conductor that he had not collected his ticket. The conductor went back and as he was taking the ticket with one hand he struck the plaintiff a violent blow with the other. An action for damages against the Company was dismissed. *Held*, on appeal, reversing the decision of GREGORY, J. (MACDONALD, C.J.A. dissenting), that the evidence supports the view that the assault was committed at the very moment when he was performing a lawful act in the due course of his employment and the Company is liable."

I cannot see any necessity to further pursue the matter. I am bound by our own decision. In my opinion, the learned County Court judge, sitting with a jury, rightly entered judg-

ment upon the verdict of the jury in favour of the respondent, *i.e.*, the judgment should be affirmed and the appeal dismissed.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Wood, Hogg & Bird.*
Solicitors for respondent: *St. John, Dixon & Turner.*

COURT OF APPEAL
1930
March 4.
ROMAN v. MOTORCAR LOAN CO.

VATER v. STYLES.

COURT OF APPEAL
1930
March 4.
VATER v. STYLES

Practice—Garnishment—Money payable on insurance policy—Not unconditional—R.S.B.C. 1924, Cap. 17, Sec. 3.

The plaintiff recovered judgment against the defendant for $189.65. The defendant's employer carried a group policy of insurance in an insurance company for the benefit of its employees providing for total and permanent disability benefits. The defendant became disabled and was entitled to five yearly instalments of $214 each, provided he was still alive and disabled when the instalments came due. One payment was due on the 3rd of November, 1929. The plaintiff obtained an order attaching moneys alleged to be due and payable to the defendant by the insurance company and served the order on the garnishee on the 3rd of August, 1929. On the 3rd of November following the insurance company paid $189.65 into Court. On the application of the defendant the attaching order was set aside.

Held, on appeal, affirming the decision of BARKER, Co. J., that where conditions may arise which would either prevent payment or vest the amount in another the moneys are not attachable.

APPEAL by plaintiff from an order of BARKER, Co. J. of the 13th of December, 1929, setting aside a garnishee order taken out by the plaintiff against the Metropolitan Life Insurance Company. The plaintiff recovered judgment against the defendant for $189.65 and obtained an order from the registrar attaching moneys alleged to be due and payable to the defendant from the Metropolitan Life Insurance Company. The order was served on the garnishee on the 7th of August, 1929, in respect to a sum of $214 which was payable to the defendant under certain conditions on the 3rd of November, 1929. On

Statement

COURT OF APPEAL

1930

March 4.

VATER v. STYLES

Statement

the 3rd of November, 1929, the garnishee paid into Court $189.65. The defendant's employer carried with the Metropolitan Life Insurance Company a group policy of insurance for the benefit of its employees providing for total and permanent disability benefits. In 1921, the defendant became totally disabled and was entitled to receive from the insurance company five yearly instalments of $214 each. The instalment in question was payable on the 3rd of November, 1929, but was only payable if he was still disabled and still alive. If he died the instalment was payable to his beneficiary and if he recovered it would not be payable at all.

The appeal was argued at Victoria on the 30th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Cunliffe, for appellant: The amount was payable by the garnishee under certain conditions but the conditions did not arise and the money was paid into Court. This is not a ground for not attaching the debt: see *Sparks* v. *Younge* (1858), 8 Ir. C.L.R. 251 at p. 259; *Nash* v. *Pease* (1878), 47 L.J., Q.B. 766.

E. C. McIntyre, for respondent: The question is whether the debt is due conditionally or unconditionally. The money was payable under the policy conditionally: see *Faas* v. *McManus* (1929), 3 W.W.R. 598; *Barsi* v. *Farcas* (1924), 1 W.W.R. 707; *Brookler* v. *Security National Ins. Co.* (1915), 8 W.W.R. 861; *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154; Annual Practice, 1930, p. 807; *Gray* v. *Hoffar* (1896), 5 B.C. 56.

Cunliffe, replied.

Cur. adv. vult.

4th March, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The garnishee was premature. The appeal should be dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal should be

dismissed. The order under appeal made by His Honour Judge BARKER setting aside and vacating the garnishee order was rightly made in that upon the facts it was not established that there was an existent debt due or accruing due at the time of the issuance of the garnishee order. The fact that there was payment into Court of the money sought to be attached cannot affect the position of the respondent. The party supporting the garnishee order, and here it is the appellant, must make out his case under the statute. It is clear to demonstration that certain future events, if occurring, would result in the moneys sought to be attached not being payable. The payment into Court being made at a time when none of the events had occurred cannot cure the situation as the turning point always is, Was there, at the time of the issuance of the garnishee order, a debt due and owing or accruing due within the purview of the statute? I would refer to the judgment of Killam, C.J., in *Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man. L.R. 154 at pp. 159 to 165, where that very distinguished judge considered all the points argued at this Bar and the order there was one setting aside the garnishee order. The situation there was as here, the money was not at the time of the issuance of the garnishee order, absolutely due and payable but dependent upon a condition. At p. 164, Killiam, C.J., said:

MCPHILLIPS, J.A.

"It seems to me that there is in these definitions no justification for describing a liability which is not absolute, but is dependent upon a condition which may or may not be fulfilled, as 'owing.' The word seems naturally to import absolute liability. . . . *Howell* v. *Metropolitan District Railway Co.* (1881), 19 Ch. D. 509."

The condition in the policy of insurance in the present case reads:

"Such instalment payments will be made only during the continuance of such disability."

The disability would always have to be established. There is also the further condition:

"In the event of the death of the employee during the period of total and permanent disability, any instalments remaining unpaid shall be computed at three and one-half per centum per annum and paid in one sum or in instalments, to the designated beneficiary. In the event of the recovery of the employee from such disability before all instalments shall have been paid payment of such instalments on account of such employee shall cease. Insurance on the life of such employee shall then be revived but shall be

COURT OF APPEAL

1930

March 4.

VATER v. STYLES

limited in amount to the commuted value at three and one-half per centum per annum of the instalments then remaining unpaid."

It will be seen that if death should intervene—then payment would be made to the named beneficiary in the policy, *viz.*, Hanna M. Elgie. I would refer to what Hyndman, J.A., said in *Faas* v. *McManus* (1929), 3 W.W.R. 598 at pp. 600-1:

"In *Donohoe* v. *Hull Bros. & Co.* (1895), 24 S.C.R. 683, at 688, Sedgewick, J. said:

" 'Now one elementary principle runs through all these cases, *viz.*, to enable a judgment creditor to obtain an order compelling a third person (the garnishee) to pay to him a debt which he would otherwise have to pay the judgment debtor, the debtor must be in a position to maintain an action for it against the garnishee, and the debt must be of such a character that it would vest in the debtor's assignee or trustee in bankruptcy if he became insolvent.'

"Had the summons issued after registration of the transfer and a clear title in the purchaser shewing that the transaction had been finally concluded subject only to payment of the purchase-money or the balance thereof remaining, it might possibly be said that it then became a present actionable debt, but until that time arrived it was conditional only as the affidavit of Faas states.

MCPHILLIPS, J.A.

"Validity of the garnishee summons and proceedings much depend upon the conditions existing at the time of their issue not as of a subsequent date. It is a well-settled rule that a garnishee proceeding is an extraordinary remedy and all conditions precedent must be substantially and even strictly complied with.

"My opinion being that the purchase-money at the time of the garnishee summons not being a present debt unconditionally due or accruing due, the summons should not have issued and, therefore, ought to be set aside and vacated."

The garnishee order should be set aside and the money in Court should be paid out to the respondent.

MACDONALD, J.A.

MACDONALD, J.A.: The plaintiff recovered judgment against the defendant for $189.65, for groceries supplied and obtained from the registrar an order attaching moneys alleged to be due and payable to defendant by the Metropolitan Life Insurance Company. The order was served on the garnishee on 7th August, 1929, in respect to a sum of $214 which would be due and payable to the defendant under certain conditions on the 3rd of November, 1929. The garnishee waited until after November 3rd and as it would then, in the ordinary course, be obliged to pay defendant $214.20, it paid into Court under the garnishee order the sum of $189.65, forwarding the balance to the defendant. The defendant applied successfully to the judge of the County Court to vacate the attaching order on the ground that when served no moneys were "owing, payable or accruing

due" by the insurance company to him within the meaning of section 3 of the Attachment of Debts Act, R.S.B.C. 1924, Cap. 17. From that order plaintiff appeals.

The defendant's employer carried with the Metropolitan Life Insurance Company a group policy of insurance for the benefit of employees, including defendant. It provided for total and permanent disability benefits. In 1928 the defendant became totally disabled and unfit for employment and because of this disability was entitled to receive from the insurance company five yearly instalments of $214 each; the instalment in question being due, as stated, on 3rd November, 1929. This sum would only be payable to the defendant however, if he was (1) still disabled, and (2) alive. If he died before that date, by the terms of the policy it would be payable to his wife as beneficiary. If his physical disability disappeared before November 3rd, he would not receive it. To quote from the policy, "such instalment payments will be made only during the continuance of such disability." If the Act contemplates moneys that must inevitably accrue due on that date the plaintiff cannot hold this order. Appellant submitted that the possibility of future occurrences that might provide a defence against the recovery of the instalment—a condition which might not arise at all—was no ground for refusing to attach the amount, and he referred to *Sparks* v. *Young* (1858), 8 Ir. C.L.R. 251. I do not think, however, that a sum of money, which on November 3rd might be legally due and owing to defendant's wife or through recovery from disability might not be payable at all, is "owing, payable and accuring due to the defendant." True, upon his disability, the obligation was created but upon his recovery if that occurred within the time referred to it would disappear. It is a conditional obligation and as such not attachable. An accruing debt is one not yet payable but still an existing obligation. That cannot be said where conditions may arise which would either prevent payment or vest the amount in another. *Barsi* v. *Farcas* (1924), 1 W.W.R. 707. It is dependent upon conditions which may not be fulfilled *(Lake of Woods Milling Co.* v. *Collin* (1900), 13 Man.L.R. 154).

MACDONALD, J.A.

I would dismiss the appeal. *Appeal dismissed.*

Solicitor for appellant: *F. S. Cunliffe.*

Solicitor for respondent: *E. C. McIntyre.*

COURT OF APPEAL

1930

March 4.

DAVENPORT v. MCNIVEN

DAVENPORT v. McNIVEN *ET AL.*

Male Minimum Wage Act—Licentiates of pharmacy—Wages—Complaint to Board — Refusal of Board to act — "Occupation" — Interpretation— Appeal—R.S.B.C. 1924, Cap. 193, Sec. 8—B.C. Stats. 1929, Cap. 43, Secs. 4 and 17.

Section 17 of the Male Minimum Wage Act provides that "This Act shall apply to all 'occupations' other than those of farm-labourers, fruit-pickers, fruit-packers, fruit and vegetable canners, and domestic servants."

Licentiates of pharmacy laid a complaint under section 4 of said Act to the chairman of the Board that the wages paid them in such occupation were insufficient for the services rendered and that the Board conduct an inquiry into the circumstances surrounding their employment. The Board refused, concluding that the Act did not apply to licentiates of pharmacy. An application for a prerogative writ of *mandamus* directed to the Board commanding them to conduct an inquiry pursuant to the provisions of the Act was refused.

Held, on appeal, reversing the decision of MURPHY, J., that said section 17 of the Act provides for a number of exceptions, and the Legislature had in their minds those who should and those who should not come within the scope of the statute by using the word "occupations" in its widest sense, and the Board should hear and determine the questions raised in the complaint.

Statement

APPEAL by plaintiff from the order of MURPHY, J. of the 28th of October, 1929 (reported, *ante*, p. 101), whereby he discharged the order *nisi* made herein on the 7th of October, 1929, at the instance of the plaintiff calling on the Male Minimum Wage Board to conduct an inquiry pursuant to the Male Minimum Wage Act into circumstances surrounding the employment of employees engaged in the occupation of druggists, in the Province of British Columbia. A written complaint under section 4 of said Act signed by a number of licentiates of pharmacy employed as druggists had been sent on the 20th of September, 1929, to the chairman of the Male Minimum Wage Board complaining that the wages paid them as employees in such occupation are insufficient or inadequate for the services rendered and an investigation should be held under said Act. The Board refused to hear the complaint holding that licentiates of pharmacy did not come within the provisions of the Act.

COURT OF APPEAL

1930

March 4.

DAVENPORT v. MCNIVEN

The appeal was argued at Victoria on the 31st of January, and 3rd of February, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

Davey, for appellant: It was held that licentiates of pharmacy came under "profession" and not "occupation." The word "occupation" is not a technical word and should be construed in its ordinary meaning: see Maxwell on the Interpretation of Statutes, 7th Ed., p. 2; *Vestry of St. John, Hampstead* v. *Cotton* (1886), 12 App. Cas. 1; Murray's Oxford Dictionary, Vol. 7, p. 46; *Tuton* v. *Sanoner* (1858), 3 H. & N. 280 at p. 282. A proper definition of the word is "the principal business of one's life": see *Barron* v. *Potter* (1915), 3 K.B. 593 at p. 612; *H.B. Co.* v. *Hazlett* (1896), 4 B.C. 450 at p. 453; Halsbury's Laws of England, Vol. 27, p. 151, sec. 284. The definition of "wages" shews the Legislature intended it to include "salaries": see also *The Parish of Clapham* v. *The Parish of St. Pancras* (1860), 29 L.J., M.C. 141.

Argument

Wood, K.C., for respondent: Statutes encroaching on the rights of the subject and imposing burdens must be strictly construed: see Maxwell on the Interpretation of Statutes, 7th Ed., 245; *Boyer* v. *Moillet* (1921), 30 B.C. 216 at p. 220. These men are "licentiates" in pharmacy and they come under the head of "profession." The Hours of Work Act, 1923, R.S.B.C. 1924, Cap. 107 has no application to "profession" and that Act is in the same category as this one. It is a companion statute: see Halsbury's Laws of England, Vol. 27, p. 132, sec. 235. The board is not fitted to fix salaries for men in professional occupations. Section 43 of the Pharmacy Act applies not only to chemists but to doctors, dentists, veterinary surgeons and others.

Davey, replied.

Cur. adv. vult.

4th March, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The neat question is as to whether or not licentiate pharmacists, who are employed by pharmacists or druggists, come within the provisions of the Male Minimum Wage Act. The Male Minimum Wage Board were petitioned

COURT OF APPEAL

1930

March 4.

DAVENPORT v. MCNIVEN

under the Act to fix a minimum wage for such employees. The Board held that such did not come within the provision of the Act, and declined to entertain the petition. This action is to compel the Board by mandatory order to do so. On appeal to a judge the action of the Board was affirmed, the learned judge thinking that this class of employees were professional men and not within the intent of the Act. Petitioners now appeal on the question of law involved. I think they are right. The Act enables the petition to be presented by at least ten employees complaining that their remuneration in their said occupation is insufficient. The Board is authorized by the Act on a properly presented petition to make an order fixing a minimum wage to be paid by the employer in the occupations covered by the statute. It was not argued that the Board had discretion in a proper case to refuse to adjudicate. It was argued that the appellant's occupation does not come within that word as used in the statute. It is a word of very broad meaning, and is not, I think, a technical one but must be given its natural and popular meaning. In popular language, in reply to the question, "What is your occupation?" it, I think, may be answered with propriety—"Barrister, Medical Doctor or Pharmacist," or any other designation applicable to the calling of the interrogated person, which he follows.

MACDONALD, C.J.B.C.

There is nothing to be found in the Act to indicate that the word "occupations" is not broad enough to include that of pharmacist. The word "employer" is defined in the Act, to include every person, etc., having control or direction of or responsible directly or indirectly for the wages of any employee; and "employee" is defined to be any adult male person who is in receipt or entitled to any compensation for labour or services in any occupation to which this Act applies. These definitions answer the contention that the statute applies only to manual labour. It includes any occupation and the term "wages" is defined to include any compensation for labour or services.

The governing intention of the Act is to assist those serving for remuneration. It is a remedial Act and should receive that wide and liberal interpretation which the Interpretation Act declares such Acts ought to receive. But apart from this, the

Legislature has indicated the scope of the Act by providing exceptions to it. Section 17 provides a number of exceptions. The Legislators therefore had in their minds those who should and those who should not be within its scope, and I think they used the word "occupations" in its widest sense.

I would allow the appeal, and direct the issue of a mandatory order to the Board to hear and determine the question raised in the petition.

MARTIN, J.A.: I agree in the allowance of this appeal on the ground that the complainants *prima facie* come within the very wide scope of "all occupations" dealt with by section 17 of the statute, *viz.:*

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

And "employee" and "employer" are thus defined in section 2:—

"'Employee' means any adult male person who is in receipt of or entitled to any compensation for labour or services performed for another in any occupation to which this Act applies:

"'Employer' includes every person, firm, or corporation, agent, manager, representative, contractor, sub-contractor, or principal, or other persons having control or direction of, or responsible, directly or indirectly, for the wages of, any employee:"

The complainants are licentiates of pharmacy whose "labour" and "services" are "employed as druggists" by certain persons or companies, as their complaint in writing to the Minimum Wage Board sets out, and that "the wages paid to us as employees in such occupation as druggists are insufficient or inadequate for the services rendered by us . . ."; and they asked for "an inquiry into the circumstances surrounding the employment" as provided by section 4 of the said Act, preparatory to the making of a minimum wage order pursuant thereto, but this inquiry the Board refused to make on the ground that the employment of the complainants was not an "occupation" to which the Act applies, and an application for a *mandamus* to compel the Board to conduct an inquiry was refused by the learned judge appealed from because he thought the calling of a licentiate of pharmacy under section 8 of the Pharmacy Act, Cap. 193, R.S.B.C. 1924, was a "profession" and not an

MARTIN, J.A.

COURT OF APPEAL

1930

March 4.

DAVENPORT v. MCNIVEN

"occupation" within the meaning of said section 17. With every respect, however, that is not really the point because even in the case of a professional man who is a member of one of the three universally recognized historic learned professions, *i.e.*, law, divinity, and medicine, he might, *e.g.*, in the case of a barrister or solicitor or M.D. either practice on his own behalf in the time honoured orthodox professional way, in which case he would not be within the Act as he was not an "employee" but his own master, or he might become the officer and servant of a civic corporation, such as city solicitor, or counsel, or medical health officer, or of any other corporation, such as a title or life insurance, or general trust, or railway company, as a member of its staff, in which case he would come within the definitions of "employee" and "occupation" above cited, because he was giving his "services" to his employer in return for his "compensation" or "wages," which by said section 2, includes "any compensation for labour or services measured by time, piece or otherwise."

MARTIN, J.A.

As it appears from the evidence before us that in the City of Victoria alone there are 15 licentiates of pharmacy employed as such by other persons for a wage or salary, and approximately 241 of them employed in that occupation throughout this Province. Under such circumstances, even if it could be said that the occupation of chemists and druggists as carried on in this Province is a profession and that its licentiates are properly speaking professional men yet that does not exclude such licentiates as are within the said definitions of "employee" and "employer," from the operation of the Act, because they do not come within the exceptions set out in section 17, and hence at least a case has been made out by the complainants for the Board to "conduct an inquiry" as said section 4 directs.

As so much reliance has been placed upon said section 8 of the Pharmacy Act in which reference is made to "the profession of a chemist and druggist," it must not be overlooked that in many sections of the same Act, under the fasciculus "Regulations governing Business of Pharmacy" that occupation is described as "carrying on business" and similar commercial expressions are to be found in sections 19, 20, 21, and 22, and in section 42, and "keeping shop" in sections 24, 39, and 44;

and there is also in section 43 a striking distinction drawn between selling goods to a person "legally authorized to carry on the business of an apothecary chemist or druggist, or the profession of a doctor of medicine, physician or surgeon," etc., which significant distinction seems to have escaped observation, though in the view I take of the matter, under the present circumstances at least, the question of the meaning of the much abused word "profession" *(vide, e.g.,* Vancouver Incorporation Act, 1921, B.C. Stats. 1921 (second session), Cap. 55, Sec. 163, Subsec. (122) is really beside the mark.

It is only necessary to add, with respect to statutory encroachments upon common law rights, that in view of our local statute and authorities recently cited by me in *Victoria U Drive Yourself Auto Livery, Ltd.* v. *Wood* (1930) [*ante,* p. 291]; 1 W.W.R. 522, 634, the former rule of interpretation has been curtailed and the remedial intentions of the Legislature must now be effectuated in the spirit declared by the statute; and it is to be noted that in no respect has "freedom of contract" at common law in the relations between master and servant been more deliberately invaded than by our Workmen's Compensation Act, Cap. 278, R.S.B.C. 1924, and yet was there ever any doubt about the spirit in which that statute ought to be interpreted?

MARTIN, J.A.

It follows that the appeal should be allowed.

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

GALLIHER, J.A.

MACDONALD, J.A.: Appeal from the decision of Mr. Justice MURPHY refusing to issue a writ of *mandamus* directed to members of the Minimum Wage Board commanding it to hold an inquiry under the Male Minimum Wage Act, B.C. Stats. 1929, Cap. 43, into the circumstances surrounding the employment of, and the wages paid to licentiates of pharmacy employed in drug stores. The Board held that the Act did not apply to qualified drug clerks and its contention was upheld in the Court below. Section 17 governs:

MACDONALD, J.A.

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

It was held that licentiates of pharmacy follow a professional

COURT OF APPEAL

1930

March 4.

DAVENPORT v. MCNIVEN

calling and that the word "occupations" does not cover that class. The word, however, embraces professional pursuits. Professional men follow their own special "occupation." The point is, did the Legislature employ the word "occupations" in its ordinary sense or with a more restricted meaning? It is difficult to place a restricted meaning on the word. It is not susceptible to it.

Are licentiates of pharmacy professional men? The generally accepted meaning of professional work is labour in which knowledge of some branch of science and learning is employed in the practice of an art involving a liberal education. True the druggist's art is treated as a profession in the Pharmacy Act, R.S.B.C. 1924, Cap. 193, Sec. 8, and the examinations and studies pursued before receiving a licence point to a professional *status*. But whether or not in modern speech they belong to the professional class, or whether if so described, the licentiates step outside the professional fold when they engage to work for wages or salary for another need not, as I view it, be considered. It is not material in reaching a decision in this case.

MACDONALD, J.A.

The Legislature used a word in section 17 (occupations) broad enough to embrace all classes, and the fact that in the same section it excludes from the operation of the Act farm-labourers, fruit-pickers, etc., indicates that exceptions were taken care of by specific words which while embracing five or six classes do not extend, as it might, to professional men or to drug clerks. The Legislature applied its mind to enumerating exceptions. It is now virtually suggested that the Court should legislate by adding to that list. There is another section (6) giving the Board power to grant exemptions from the operation of the Act in certain cases but it is not broad enough to cover the class of employees under consideration. Nowhere therefore are licentiates of pharmacy excepted from the benefits of the Act. It is also significant that the definition of "employee" and "employer" in section 2 is broad enough to cover licentiates of pharmacy who receive compensation for "labour or services." The employer is defined as a "firm or corporation, etc., responsible for the wages of any employee," and "wages" are defined as compensation for "services" as well as

labour. The word "services" is usually associated with activities of a professional nature.

As to whether the word "occupations" includes drug clerks, there can be little doubt. "Occupation" is that in which one is engaged—one's employment, business. It is "the principal business of one's life; vocation; calling; trade, the business which a man follows to procure a living or obtain wealth" (Webster's Dictionary). It may be a mechanical or mercantile employment, or "the exercising of any business or office" (Murray's Oxford Dictionary). A professional man is not occupationless.

With a word therefore unambiguous, and a section containing exceptions which do not include professional men or drug clerks, appellant has the advantage of the rule of interpretation that while statutes are to be interpreted "according to the intent of them that made it," yet if the words are unambiguous their interpretation in their natural and ordinary sense best declares the intention of Parliament. There is this further observation; where the words are susceptible of another meaning, even then, there should be no departure from the ordinary use "unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature." Or to put it another way, quoting Jervis, C.J., in *Mattison* v. *Hart* (1854), 23 L.J., C.P. 108, 114:

"We ought . . . to give to an Act of Parliament the plain, fair, literal meaning of its words, where we do not see from its scope that such meaning would be inconsistent, or would lead to manifest injustice."

(Maxwell on the Interpretation of Statutes, 7th Ed., pp. 2 and 3.)

It is only within the ambit of these exceptions that respondent can hope to succeed. If a manifest injustice follows the language may have to be modified to harmonize with a general intention gathered from the whole Act and the object it had in view; subject to this—that the language must be capable of that modification. If it is not it is for the Legislature to interfere.

Respondent submits, as found by the learned judge that where, as here, the common law right of freedom of contract is

COURT OF APPEAL

1930

March 4.

DAVENPORT v. MCNIVEN

interfered with "it is a sound and well-established canon of construction of statutes that such a right is not to be held to be taken away except by express words or necessary intendment": MACDONALD, C.J.A., in *Boyer* v. *Moillet* (1921), 30 B.C. 216 at p. 220. Or as it is put by Maxwell, 7th Ed., p. 245:

> "Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons, and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt. It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged so to construe it."

This canon of construction may be pressed too far and it is subject to a qualification referred to by my brother MARTIN in *Victoria U Drive Yourself Auto Livery, Ltd.* v. *Wood* (1930), [*ante,* 291 at p. 296]; 1 W.W.R. 522, where he refers to *Griffiths* v. *The Earl of Dudley* (1882), 9 Q.B.D. 357, and our Interpretation Act, R.S.B.C. 1924, Cap. 1, Sec. 1 (6). Where, as here, there is an invasion of the common law pursuant to a settled policy, passed too as a result of the growth of a modern viewpoint on questions of policy affecting employees, a broad (or at all events a fair) interpretation should be given to the language used in such remedial legislation. We should not therefore look for a restricted meaning of words because of an invasion of common law rights in cases of this character, but rather by scrutinizing the Act itself see if, from the context, the scope of the legislation and the object in view it did exclude, and was intended to exclude licentiates of pharmacy who are wage-earners.

MACDONALD, J.A.

Some support for this restricted use may be found in the Act. It is a "Minimum Wage Act," and "minimum wage" means "the amount of wages fixed by the Board," whereas the compensation earned by licentiates of pharmacy may be dignified with the word "salary," the term "wages" being confined to remuneration received by workmen in industrial pursuits. This view, however, loses much of its force when wages are defined in the Act as "compensation for labour or services." The word "services" as already stated, is appropriate to work

of a professional nature; indeed peculiarly appropriate to it. If "wages" was not defined as "compensation for labour or services" and was used without that extended definition, it would, I think, take the restricted meaning given in Murray's Oxford Dictionary, Vol. X., Part II., *viz.*:

"The amount paid periodically, especially by the day or week or month, for the labour or service of a workman or servant."

He points out that it was formally used to include the salary or fee paid to persons of official or professional *status,* but is now restricted in the way indicated.

It was submitted that the Hours of Work Act, 1923, R.S.B.C. 1924, Cap. 107, is a companion Act to the one under review and as it is confined to industrial undertakings so should the Male Minimum Wage Act be so regarded. The two statutes, however, although having some common objects, as, *e.g.,* preventing labour exploitation, are not altogether in *pari materia.* One deals primarily with limiting the hours of labour; the other with compensation for that labour. The subject-matter is different. It is conceivable, and probable, that in relation to hours of work, the Legislature had in mind conditions in industrial plants where considerations of health and comfort were involved; but that in respect to an Act concerning wages there is no reason why it should be limited to any particular class of wage-earners. I am not at all sure that on principle it follows that the Legislature would not think of providing for a minimum wage for licentiates of pharmacy who are not proprietors, but are employed by another. If there are good reasons for excluding them, the Legislature should do it; not the Courts.

Another submission was, and it is referred to in the judgment under review, that the Act was not intended to apply to services of this sort because the Board cannot value it; that it is often given either gratuitously or for little monetary return in the early stages of a career and that as it would not be fair or practicable (so it was alleged) to specify a minimum wage in such cases the Act could not be intended to apply to that particular class. That is only another way of saying, that in some respects the Act may prove to be unworkable. That result often arises from legislation either hastily or even carefully enacted.

COURT OF APPEAL

1930

March 4.

DAVENPORT v. MCNIVEN

MACDONALD, J.A.

Its full application is not foreseen. That situation when and if it arises calls for amendment by the authority that created it. The Courts should not under the guise of interpretation depart from the ordinary canons of construction and virtually amend an Act of Parliament. There is, in any event, no conclusive reason disclosed by the Act itself for assuming that the Legislature, having entered the field did not intend to regulate the remuneration paid to licentiates of pharmacy working for a wage. Parliament may not foresee the result of every word employed but within the rules of interpretation outlined, effect must be given to every part of the Act even if it involves hardship, a result that does not necessarily follow in this case.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *H. W. Davey.*

Solicitor for respondents Minimum Wage Board: *W. H. M. Haldane.*

Solicitors for respondent Cochrane: *Crease & Crease.*

Solicitors for respondents Cunningham *et al.*: *Wood, Hogg & Bird.*

REX v. SCHMIDT AND EDLUNG.

COURT OF APPEAL

1930

April 15.

REX v. SCHMIDT AND EDLUNG

Criminal law — Theft — Automobile — Offence charged proved — Right of magistrate to convict of minor offence—Criminal Code, Secs. 285 (3), 347 and 377.

Where the accused are charged with the theft of an automobile contrary to section 347 of the Criminal Code, it is the duty of the magistrate to convict when he finds the offence is proved and it is not legally open to him to refuse to convict under said section and to convict instead of the minor offence set out in section 285 (3) of the Criminal Code.

APPEAL by accused from their conviction by H. C. Shaw, Esquire, police magistrate at Vancouver, on the 31st of January, 1930, for the theft of an automobile contrary to section 347 of the Criminal Code. Statement

The appeal was argued at Vancouver on the 8th of April, 1930, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Murdock, for appellants: Accused took the car on New Year's Eve for a joy-ride never intending to steal it. It was after half-past ten in the evening when it was taken and it was found at four o'clock in the morning. The charge was for stealing under section 347 of the Code, but the evidence shews the charge should have been under section 285 (3) which is a minor offence: see *Hirschman* v. *Beal* (1916), 28 Can. C.C. 319. Argument

W. M. McKay, for the Crown: The evidence shews that a theft of the automobile was committed within the meaning of section 347 of the Code and the magistrate properly convicted them.

Murdock, replied. *Cur. adv. vult.*

On the 15th of April, 1930, the judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal from the conviction of both appellants by the police magistrate of Vancouver for the theft of an automobile (on or about the 1st of January, 1930) contrary to section 347 of the Criminal Code, followed, pursuant to section 377, by the imposition of a minimum penalty of one year's imprisonment. But it is submitted that the evidence Judgment

COURT OF APPEAL

1930

April 15.

REX v. SCHMIDT AND EDLUNG

disclosed an offence not against that section but one against section 285 (3) *viz.:*

"Every one who takes or causes to be taken from a garage, stable, stand or other building or place, any automobile or motor-car with intent to operate or drive or use or cause or permit the same to be operated or driven or used without the consent of the owner shall be liable, on summary conviction, to a fine not exceeding five hundred dollars and costs or to imprisonment for any term not exceeding twelve months or to both fine and imprisonment."

A comparison of this section with that one (347) defining theft shews that they deal with distinct offences (*Hirschman* v. *Beal* (1916), 38 O.L.R. 40), and that while the essential elements of the major one, theft, include all the elements necessary to secure a conviction under 285, yet an offender may be convicted of the minor one under the latter section without being liable under the former; *e.g.* subsection (3) may be violated even though the "taking" of the car was not done "fraudulently and without colour of right," and one effect of section (3) is to make what would otherwise be a civil trespass a criminal offence in the case of "any automobile or motor-car."

Obviously, however, when the circumstances are such that a theft of such articles has been committed within the meaning of section 347 it is the duty of the officers of the Crown to lay and prosecute a charge of that higher description, and for the magistrate to convict, if the evidence supports it, *Rex* v. *Louie Yee* (1929), 24 Alta. L.R. 16, and it is submitted by the Crown counsel that in the present case that course was properly adopted and that all the elements of theft are to be found in the evidence upon which the police magistrate founded his conviction; and it is to be noted that even under the old and narrower common law definition of theft the intention of the accused to return horses, illegally taken for a journey, to the owner was "a question for the jury"—*Rex.* v. *Philipps* (1801), 2 East, P.C. 662; and *cf. Rex* v. *Vanbuskirk, Poirier* (1921), 48 N.B.R. 297.

Judgment

This submission has necessitated our careful examination of the evidence with the result that, in our opinion, there was sufficient before the magistrate from which he was justified in drawing the inferences necessary to support the conviction of both appellants for theft, and therefore it becomes unnecessary to consider the other questions which would have become relevant had we reached another conclusion.

Appeal dismissed.

THE B.C. LIQUOR COMPANY LIMITED v. CONSOLIDATED EXPORTERS CORPORATION LIMITED *ET AL.*

COURT OF APPEAL

1930

March 4.

B.C. LIQUOR CO. LTD. *v.* CONSOLIDATED EXPORTERS CORPORATION LTD.

Practice—Pleading—Statement of claim—Allegations of fraud and conspiracy—Particulars — Fiduciary relationship — Discovery—Postponement of giving particulars until after discovery.

In a case where the plaintiff may reasonably be supposed to be ignorant of, and the defendant to be aware of, the particulars of its claim, and the relationship between the parties, if not fiduciary, is akin to it, the Court will order the defendant to make discovery before requiring the plaintiff to deliver particulars of its allegations.

APPEAL by plaintiff from two orders of MACDONALD, J. of the 8th of January, 1930, dismissing applications that the statement of claim be struck out and the action dismissed by reason of the failure of the plaintiff to comply with an order of the 16th of December, 1929, for particulars or in the alternative that further and better particulars be given, and ordering that the defendants be required to make discovery only in respect of the allegations in the statement of claim whereof the plaintiff has furnished particulars either in the statement of claim or in the particulars delivered pursuant to said order.

Statement

The appeal was argued at Victoria on the 5th of February, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MACDONALD, JJ.A.

Sloan, for appellant: The order limited our discovery to what we had already given particulars of and we are appealing from this order. There are three cases in which the plaintiff will not be compelled to give particulars of general allegations of fraud, misrepresentation or pleas of like nature until he has examined the defendant for discovery: (a) Where there is a fiduciary relationship between the parties or a relationship analogous thereto; (b) where specific instances of fraud have been pleaded in addition to the general plea of fraud and (c) where under the circumstances of the case the Court decrees it just that discovery should precede particulars. In 1922 the

Argument

COURT OF APPEAL

1930

March 4.

B.C. LIQUOR CO. LTD. v. CONSOLIDATED EXPORTERS CORPORATION LTD.

Consolidated Exporters was incorporated and the other defendant Companies transferred their assets to the Consolidated. In December, 1924, some of the directors of the Consolidated incorporated the United Distillers Limited and have transferred business and profits to that company that rightly belonged to the Consolidated Exporters to the loss of the minority shareholders of the Consolidated Exporters and the plaintiff. That we should be allowed full discovery see *Leitch* v. *Abbott* (1886), 55 L.J., Ch. 460 at pp. 462-3. The defendants were in a fiduciary relationship with the shareholders: see Palmer's Company Law, 13th Ed., pp. 180-182; *Sachs* v. *Spielman* (1887), 57 L.J., Ch. 658; *Zierenberg* v. *Labouchere* (1893), 63 L.J., Q.B. 89 at p. 93; *Waynes Merthyr Co.* v. *D. Radford & Co.* (1895), 65 L.J., Ch. 140 at p. 141; *Townsend* v. *Northern Crown Bank* (1909), 19 O.L.R. 489; *Fairbairn* v. *Sage* (1925), 56 O.L.R. 462 at p. 466.

Argument

Mayers, K.C., for respondents: He received a privilege and indulgence by the order and this Court cannot well give more. As to fiduciary relationship there is only one of the defendants that is in the Consolidated Exporters at all. A company is not a trustee for shareholders nor are shareholders trustees for shareholders. On fiduciary relationship see *Vatcher* v. *Paull* (1915), A.C. 372 at p. 381; *In re Wrightson. Wrightson* v. *Cooke* (1908), 1 Ch. 789; *Briton Medical, &c., Life Association* v. *Britannia Fire Association & Whinney* (1888), 59 L.T. 888.

Meredith, for the Consolidated Exporters Corporation Limited: We submit that there is no fiduciary relationship and they are therefore not entitled to further discovery.

Sloan, in reply, referred to *Whyte* v. *Ahrens* (1884), 54 L.J., Ch. 145.

Cur. adv. vult.

4th March, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The defendants obtained, on 16th December, an order for the delivery of particulars therein specified. Particulars were subsequently furnished which were not satisfactory, and the defendants applied to the same learned judge for further and better particulars, thereupon the order appealed from was made dismissing the application and declar-

ing that the defendants, other than defendant the Consolidated Exporters Corporation Limited, should be required to make discovery only of allegations in the statement of claim, of which the plaintiff had furnished particulars in the same or in those already delivered. The learned judge gave the defendants leave to apply again for further particulars after discovery and he gave the plaintiff leave to apply for further discovery after examination.

The order of 16th December was made before defence pleaded and for the purposes of pleading. Many general allegations of fraud were made in the statement of claim, of which defendants were *prima facie* entitled to particulars.

It would have been much better to have followed the established practice and to have either ordered particulars or on the application of the parties have expanded the motion to include one as well for discovery and enlarged the application for particulars until that was given.

The effect of the order appealed from is to refuse further particulars tentatively, and to suggest discovery with leave in both instances to renew the application. That course, I think, would lead to a want of finality.

MACDONALD, C.J.B.C.

I would therefore set aside the whole order and direct that the application for particulars be enlarged until discovery shall have been made, whereupon the motion for particulars may be proceeded with in the Court below.

When the plaintiff alleges fraud *prima facie* it ought to particularize, but the Courts are careful to avoid making an order which might preclude him from proceeding when there is evidence that the defendants themselves are the sole depositaries of the particulars asked for. The order appealed from is, with respect, futile, because, if it orders discovery, it confines that to those matters of which particulars have already been given and are not wanted, and does not permit the plaintiff to enquire into the matters in respect to which it requires the information which would enable it to answer the demand for particulars, and may find it in the sole possession of the defendants who are demanding them.

MARTIN, J.A.

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

COURT OF APPEAL

1930

March 4.

B.C. LIQUOR CO. LTD. v. CONSOLIDATED EXPORTERS CORPORATION LTD.

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

MACDONALD, J.A.: If a fiduciary relationship exists between plaintiff and defendants, the Court, on demand by the latter for particulars, if of opinion that because of such relationship the facts are generally known only to the defendants; or that they have means of knowledge not accessible to the plaintiff may require defendants to make discovery before particulars are given (*Zierenberg* v. *Labouchere* (1893), 63 L.J., Q.B. 89). But the rule is not confined to cases where that relationship exists. See *Townsend* v. *Northern Crown Bank* (1909), 19 O.L.R. 489. Meredith, C.J., at p. 490 quotes with approval, Chitty, J., who in *Waynes Merthyr Company* v. *D. Radford & Co.* (1896), 1 Ch. 29 at p. 35, said:

"There is no hard and fast rule as to the class of cases in which particulars should precede discovery or discovery be ordered before particulars; but the judge must exercise a reasonable discretion in every case after carefully looking at all the facts, and taking into account any special circumstances."

MACDONALD, J.A.

The case from which this quotation is made is instructive as applied to the one at Bar. The charge against the defendants was fraudulent misrepresentation. Two particular instances of fraud were alleged and also other instances given in a general way. Chitty, J., points out that there is no rule deducible from *Zierenberg* v. *Labouchere, supra,* that particulars, except where there is a fiduciary relationship should precede discovery (p. 34).

The judgment of Cotton, L.J. in the Court of Appeal in *Leitch* v. *Abbott* (1886), 55 L.J., Ch. 460 at p. 462, is instructive. He said:

"But no doubt Lord Justice Fry did in that case [*Whyte* v. *Ahrens* (1884), 54 L.J., Ch. 145] think that fraud being alleged by the plaintiff, particulars of the fraud ought to have been given before he could be entitled to discovery. Is that the effect of Order XIX, rule 6? There is here a general allegation of fraud, and the plaintiff wants the discovery [as in the case at Bar] to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings; but to say that he must give details of the fraud in the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. I do not think that that case applies here, for there is a statement of the *nature of the fraud* alleged."

(The italics are mine. I think the nature of the alleged fraud is disclosed in the statement of claim under consideration.)

To resume:

"The plaintiff may hereafter have to condescend to particulars, but, in my opinion, it would be wrong to say that he is not now entitled to have this discovery because he has not given full details of the fraud which he alleges. . . . He wants the discovery in order to enable him to give those details and to establish his right to relief at the trial."

I think, too, in the case at Bar, "the plaintiff may reasonably be supposed to be ignorant of, and the defendant to be aware of, the particulars of its claim *(Millar* v. *Harper* (1888), 57 L.J., Ch. 1091).

This is a case where the discretion of the Court to grant discovery at this stage should be exercised. The relationship if not fiduciary is akin to it.

The order under appeal should be varied as asked, and the appeal allowed. It would be valueless to limit that discovery to the allegations in that part of the statement of claim concerning which appellant has already given particulars.

Appeal allowed.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*

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

Solicitors for respondents other than Consolidated Exporters: *Mayers, Locke, Lane & Thomson.*

COURT OF APPEAL

1930

March 4.

McMORDIE v. FORD.

Fire Marshal Act—Moving-picture theatre—Alterations ordered by fire marshal—Moving Pictures Act—Regulations—Cost of alteration as between owner and lessee—R.S.B.C. 1924, Cap. 91, Sec. 17; Cap. 178.

McMORDIE v. FORD

A moving-picture theatre in Prince Rupert, owned by the defendant was leased to the plaintiff, it having been operated for a number of years previously. The fire marshal ordered that certain alterations be made to reduce the fire risk. The owner refused to make the alterations so the lessee made the alterations and recovered judgment against the owner for the cost thereof.

Held, on appeal, affirming the decision of FISHER, J. (except a small item as to alteration of seats), that under section 17 (3) of the Fire Marshal Act the owner of a moving-picture theatre is liable to the lessee for the cost of alterations made by the latter in order to comply with the order of the fire marshal.

Per MACDONALD, J.A.: The Fire Marshal Act and the Moving Pictures Act in so far as they apply to fire hazards in moving-picture theatres were intended to be complementary.

APPEAL by defendant from the decision of FISHER, J. of the 20th of July, 1929, in an action to recover $2,289.54, being the partial cost of complying with an order of the assistant fire marshal in Prince Rupert pursuant to the Fire Marshal Act and for an injunction restraining the defendant from distraining on the goods and chattels of the plaintiff. The plaintiff is lessee of lots 3 and 4, block 22, Prince Rupert. He was ordered by the fire marshal to make certain alterations to reduce fire risk and recovered judgment in an action charging the cost thereof to the defendant.

Statement

The appeal was argued at Victoria on the 9th and 10th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

Gonzales, for appellant: There is no dispute as to the rent or cost of repairs but we say the alterations were ordered pursuant to the regulations under the Moving Pictures Act and not under the Fire Marshal Act. It was held there was an implied warranty that the building was fit for operation as a moving-picture theatre. We say first, there is no implied warranty;

Argument

COURT OF APPEAL

1930

March 4.

McMORDIE v. FORD

secondly, under the Fire Marshal Act there is no jurisdiction to make regulations or to order that any regulations be complied with; thirdly, if there is jurisdiction under the Fire Marshal Act the fire marshal was acting under the moving-picture regulations and fourthly the fire marshal made no order. The plaintiff made the alterations in order to get a licence; the Moving Pictures Act governs and in regard to theatres it is a fire Act in itself. In any event the cost of taking up and replacing the seats after the platform was repaired should not be imposed on us.

Argument

J. W. deB. Farris, K.C., for respondent: The fire marshal has jurisdiction in respect to theatres under the Fire Marshal Act. The statute has regard to the hazard to be remedied. It was found there was an implied warranty that the building was fit for exhibiting moving pictures: see *Hall* v. *Lund* (1863), 1 H. & C. 676; *Marsden* v. *Edward Heyes, Ld.* (1927), 2 K.B. 1. The question of cost of replacing the seats has not been raised in the appeal.

Gonzales, replied.

Cur. adv. vult.

4th March, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The only fault I think, in the judgment appealed from is in allowing the plaintiff the cost of taking out the seats and replacing them after the platform had been enlarged so as to permit of compliance with the fire marshal's order. The amount is not clearly specified but if the parties cannot agree it should be referred to the registrar to find it. With this variation the appeal should be dismissed. I think the fire marshal was acting under the Fire Marshal Act and not under the Moving Pictures Act.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: There is one small item of $288, in respect of which I am not wholly in agreement with the learned trial judge. I would only have allowed the cost of work done in connection with the widening of the spaces between the seats as required under the fire marshal's order, but no cost for placing and fastening the seats, taking them up and replacing

COURT OF APPEAL

1930

March 4.

MCMORDIE v. FORD

and refastening. Though this point was not specifically taken in the notice of appeal it was mentioned before us and as it seems to me it is obviously one upon which the plaintiff should not recover, other than as indicated above, I think the Court should so deal with it. This, however, not to affect the question of costs which should follow the event in the appeal.

The parties, I think, can easily agree as to the segregation of the amount. If not, a reference may be had to the registrar.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the judgment of my brother, the Chief Justice, dismissing the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The respondent, lessee of lots 3 and 4, block 22, Prince Rupert, upon which was erected a theatre operated as such for many years made certain alterations ordered or recommended by the fire marshal to reduce a fire risk and sought successfully at the trial to charge the cost thereof to the lessor, the appellant herein. If the fire marshal ordered the alterations pursuant to the Fire Marshal Act, Cap. 91, R.S.B.C. 1924, Sec. 17 the judgment should not be disturbed as subsection (3) thereof provides that:

"The cost of complying with any order shall, in the absence of any agreement to the contrary, [and there was no agreement] be borne by the owner, [the appellant] and where by reason of the default of the owner [and appellant though requested declined to make the alterations] the occupier pays the cost he shall have a right of action or set-off against the owner for all costs actually and necessarily incurred or paid by him in complying with the order."

If on the other hand the alterations were made on the order or request of the fire marshal pursuant, not to the Fire Marshal Act but to the Moving Pictures Act, Cap. 178, R.S.B.C. 1924, and the regulations passed thereunder the owner (appellant) can not be charged with the cost thereof and his appeal should be allowed.

The Moving Pictures Act was first enacted in 1914 (B.C. Stats. Cap. 75) and the Fire Marshal Act in 1921 (B.C. Stats. Cap. 15). In the latter Act the interpretation of the words "public building" where employed include theatres as well as other buildings (except a dwelling-house) while in the former Act moving-picture theatres alone are dealt with.

The Moving Pictures Act was passed primarily, not to mini-

mize fire hazards, but to regulate and control the exhibition of pictures with an official censor as chief official. The "fire marshal" was not referred to in the original Act. This official was brought into being by the Fire Marshal Act enacted seven years later. He was given wide powers including the supervision of theatres as well as other buildings.

One of the regulations passed under the Moving Pictures Act (that Act gave authority to pass regulations governing the safety of moving-picture theatres) was as follows:

"38. (*b*) No licence for the operation of a moving-picture theatre in any building shall be issued by the censor until the theatre has been approved by the Fire Marshal and a certificate of his approval has been filed with the censor."

This regulation came into effect in 1926. The respondent who took possession under the lease on September 1st, 1928, applied a few days before to the censor of moving pictures for a licence to operate. The latter, pursuant to the regulation referred to asked the fire marshal to inspect the premises. He, or his assistant did so and on September 1st, 1928, addressed a letter to the appellant's agent in which he "advised" that certain specified alterations should be made to guard against the danger of fire adding that "when these things are done there will be no fear of a licence not being issued." On the same day presumably after communicating with the fire marshal in Vancouver by wire, he wrote to appellant's agent again as follows:

"Having inspected the Westholme Theatre, Prince Rupert, B.C., and having advised the Fire Marshal of the result of the inspection I have received the following in reply:

"'W. A. Oswald, care Chief D. H. McDonald,

"'Prince Rupert, B.C.

"'Must insist that Westholme Theatre be brought up to standard before opening. stop. Have no authority to set aside regulations. stop. Remember Barnes.

"'(signed) J. A. Thomas,

"'Fire Marshal.'

"Kindly accept this as notice to bring the Westholme Theatre up to standard as required by the regulations and as ordered by Mr. Thomas's wire. I am also handing you a copy of the regulations.

"(sgd.) W. A. Oswald,

"Assist. Fire Marshal."

The owner's agent took the ground that the lessee (respondent) should at his own expense comply with this request. The

COURT OF APPEAL

1930

March 4.

McMORDIE v. FORD

lessee demurred but made the alterations upon the refusal of the appellant to do so. He now invokes said section 17, subsection (2) of the Fire Marshal Act, and seeks to charge the expense thereof to the owner. The learned trial judge found that he was entitled to do so.

If as respondent contends the marshal acted under the Fire Marshal Act his authority is contained in section 17, the relevant parts reading as follows:

"17. (1.) Upon complaint of any person interested or, if deemed advisable, without any complaint, the Fire Marshal may at all reasonable hours enter into and upon any building or premises anywhere in the Province for the purpose of inspecting the same and ascertaining whether:—

"(*d.*) any special fire hazard exists in or about the building or premises.

"(2.) After an inspection the Fire Marshal may in writing order that within a reasonable time, to be fixed by the order:—

"(*d.*) . . . . the owner or occupier shall remove or take proper precautions against the special fire hazard; and the owner or occupier, as the case may be, shall after receipt of the order comply therewith."

Then follows the clause quoted providing that if the owner makes default the lessee may do so at his cost.

MACDONALD, J.A.

It is of some importance to notice that by an amendment to the Fire Marshal Act in 1928 (B.C. Stats. Cap. 14) the original section empowering the Lieutenant-Governor in Council to make regulations to carry cut its purposes, was amended by section 3 by adding the following clause:

"(*e.*) Making regulations, similar or different in different localities or with reference to different classes of buildings or to different conditions, and notwithstanding any general or special Act to the contrary, governing the location, construction, occupancy, ventilation, and safety of community halls, hospitals, nurses' homes, orphanages, nursing homes, children's homes, apartment-houses, public garages, churches, theatres other than moving-picture threatres, office buildings, public halls, and such other buildings and places of a public or semi-public nature as the Lieutenant-Governor in Council may designate for the purposes of this clause."

It does not follow that it was intended that the Fire Marshal Act should not apply to the reduction of fire hazards in moving-picture theatres. The administrative functions of the fire marshal are not restricted. For that special purpose in so far as that class of theatre is concerned, the regulations passed pursuant to the Moving Pictures Act were regarded as sufficient, said regulations being applied on the initiative of the censor with the aid however of the fire marshal acting under the Fire Marshal Act. There is no reason why, if the two Acts were

designed to fit into and to supplement one another that such a purpose should not be given effect to. Regulations relating to moving-picture theatres are not provided for by the Fire Marshal Act Amendment Act of 1928, because covering regulations exist under another Act which it was intended to utilize. The object and scope of the Fire Marshal Act is such that it might, if sufficiently indicated, utilize regulations passed not only under the Moving Pictures Act but also any other Act dealing with cognate matters. The two Acts in so far as they apply to fire hazards in moving-picture theatres were intended to be complementary. That is shewn by the fact that the regulations quoted passed under the Moving Pictures Act compels the censor to call in the fire marshal appointed by another Act before a licence to operate may be issued. It follows therefore that if the parts of section 17 of the Fire Marshal Act quoted above are broad enough to cover the specific acts of the Fire Marshal in this case he was acting under his own parent Act using, not authority, but machinery provided for in other legislation.

MACDONALD, J.A.

It was submitted that the fire marshal did not act under section 17 because subsection (1) (*d*) contemplates an "existing hazard" and as the hazard in the case at Bar could only arise if, and when the theatre was operated as a moving-picture theatre there was therefore no existing hazard. I think that is an over-refinement. The lessee it is true might elect to use the premises for some other purpose, *e.g.*, as a concert hall and if he did no hazard would arise or "exist" requiring the alterations ordered. This clause in view of the serious mischief the Act was designed to remedy should be construed broadly to carry out the purpose in view. The building was to be used by respondent as a moving-picture theatre. He applied for a licence. It was so used for 18 years. True there would be no actual hazard until operation commenced but that is not decisive. One might equally well submit that the proprietor of a moving-picture theatre operated, as counsel suggested, for the first three nights in a week, could say to the fire marshal who, let us say, ordered alterations on Thursday, that there was then no existing hazard. Literally the hazard would not arise until the theatre resumed operations the following week. If, how-

COURT OF APPEAL

1930

March 4.

McMORDIE v. FORD

ever, such an interpretation must be given to the clause referred to the fire marshal would have to deliver his order at the moment a picture was displayed interrupting the performance for that purpose. That is not a reasonable construction.

It was also suggested that the letters addressed to the owner's agent (one of them quoted in full) do not contain an order as required by subsection (2) (*a*) of section 17. The words are "may in writing order." The word "ordered" is used in the letter quoted but even if omitted I would construe the letters as orders. One must have regard to the relative position and obligations of the parties concerned in interpreting the language used. An official might, through courtesy, refrain from using the arbitrary word and yet the ordering hand, though gloved, would be there. As to the further requirement that the work should be done "within a reasonable time to be fixed by the order," the same observations apply. It was to be done before a licence could be obtained. That was fixing a time. Meticulous observance of directory words is not necessary.

MACDONALD, J.A.

It was further argued by appellant's counsel that this was an ordinary lease of lots 3 and 4 in Prince Rupert; that respondent was at liberty to use it for any purpose—not necessarily as a moving-picture house, but if he did so and decided to operate it as it had been in the past, he must make alterations at his own expense. I think, however, in applying the Act the lease may be construed in the light of the state of the premises at the time of the demise. There was no departure from the user contemplated. In fact, when respondent applied for a licence the intention to use it as a moving-picture house was indicated. That brought the statute in respect to fire hazards into play.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Williams, Manson & Gonzales.*
Solicitor for respondent: *E. F. Jones.*

LAWSON v. INTERIOR FRUIT COMMITTEE.

MURPHY, J.

1930

March 11.

LAWSON v. INTERIOR FRUIT COMMITTEE

Constitutional law—Produce Marketing Act—Expenses of operation—Levy imposed by section 10 (k) thereof—Whether levy a tax—B.C. Stats. 1926-27, Cap. 54, Sec. 10 (k); 1928, Cap. 39, Sec. 5.

Section 10, subsection (*k*) of the Produce Marketing Act provides that the Committee of Direction shall have power for the purpose of defraying the expenses of operation to impose levies on any product marketed.

Held, that a levy authorized by said section is not a tax and therefore cannot be held invalid on the ground that it is an indirect taxation.

ACTION for a declaration that the plaintiff is under no obligation to obtain a licence from the Interior Fruit Committee to pay its levies or otherwise observe rules, regulations and orders passed by it or comply with its demands under the authority of the Produce Marketing Act; for an injunction restraining the defendant from collecting licence fees, levies or otherwise restraining the plaintiff from marketing his fruit, vegetables and other produce grown by him and for a declaration that the Produce Marketing Act is *ultra vires* of the Legislature of the Province of British Columbia and for damages. Tried by MURPHY, J. at Vancouver on the 6th of March, 1930.

Statement

Wood, K.C., C. F. R. Pincott and *O'Halloran*, for plaintiff.
Harold B. Robertson, K.C., and *Norris*, for defendants.

11th March, 1930.

MURPHY, J.: The only point open to me for consideration, and not decided at the hearing, is whether or not subsection *(k)* of section 10 is *ultra vires*. I agree that this point has not been passed upon by the Court of Appeal. It is argued that said subsection *(k)* imposed indirect taxation by the Province at one remove. It must be remembered that indirect taxation imposed by a Provincial Legislature is *ultra vires* not because the B.N.A. Act prohibits but because it does not authorize such taxation. If, therefore, the levy imposed by said subsection *(k)* is not a tax then the indirect taxation decisions have no

Judgment

MURPHY, J.

1930

March 11.

LAWSON v. INTERIOR FRUIT COMMITTEE

application. My opinion is that it is not a tax. I have not been referred to any decisions by any Court either in England or the Dominion in which the essential characteristics of a tax are set out nor have I been able to find any such decision in the limited time at my disposal. Counsel intimated at the trial that a speedy decision was desirable inasmuch as the object of this litigation is to obtain a review before a higher tribunal of previous decisions by the British Columbia Courts on the constitutionality of the Act in question. The essential characteristics of a tax are, however, set out in 37 Cyc. 708-10 as follows:

> "The essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority, in the exercise of the taxing power, the contribution being of a proportionate character, and payable in money, and imposed, levied, and collected for the purpose of raising revenue, to be used for public or governmental purposes, and not as payment for some special privilege granted or service rendered. Taxes and taxation are therefore distinguishable from various other contributions, charges, or burdens paid or imposed for particular purposes or under particular powers or functions of the government. Whether a particular contribution, charge, or burden is to be regarded as a tax depends upon its real nature in view of these essential characteristics, and if it is in its nature a tax it is not material that it may be called by a different name, and conversely if it is not in its nature a tax it is not material that it may have been so called."

Judgment

The levy authorized by said subsection *(k)* is made "for the purpose of defraying the expenses of operation" of the Act. The true pith and substance of the subsection is not to raise revenue to be used for public or governmental purposes. No evidence was given that any part of said levy reached or could reach directly or indirectly the public coffers. It seems clear from the wording of subsection *(k)* that it could not. On the other hand said subsection (*k*) shews that such levy is to be used for services rendered to the parties by whom it is paid. The money is to be expended so as to secure to such persons a better price for their product than they would otherwise receive. Such, at any rate, would seem from a perusal of the Act to be the view of the Legislature. The fact that some persons so levied upon do not agree is irrelevant since decisions binding on me have laid down that on this aspect the Act is *intra vires* of the Legislature. I would, therefore, hold that said levy is not

a tax in the sense that would make the indirect taxation decisions applicable to the case at Bar.

If subsection *(k)* is to be held *intra vires,* however, authority for enacting it must be found amongst the powers conferred upon the Provincial Legislature by the B.N.A. Act—*Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96; *Dobie* v. *The Temporalities Board* (1882), *ib.* 136. Since the Act under consideration in its main features has been held to be *intra vires* and since a perusal of it shews that funds must be made available for carrying out its provisions it would seem to follow that said subsection *(k)* which provides funds solely for that purpose is validly enacted unless it invades the exclusive legislative field of the Dominion. I have dealt with the only ground raised before me in support of this contention.

Judgment

In addition to the authority given to the Legislature by headings 13 and 16 of section 92 of the B.N.A. Act I think said subsection *(k)* can, in the absence of any legislation by the Dominion, be supported under section 95 of said Act. *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65.

The action is dismissed.

Action dismissed.

FISHER, J.

1930

March 17.

IN RE LIM COOIE FOO

IN RE LIM COOIE FOO.

Immigration—Chinese Immigration Act—Domicil acquired in Canada—Deportation—Illegality of previous deportation—R.S.C. 1927, Cap. 95, Sec. 8 (o).

A person of Chinese origin cannot be deported from Canada under section 8 (*o*) of the Chinese Immigration Act on the ground that he was previously deported from Canada unless such deportation was in accordance with the law of Canada.

Statement

APPLICATION for a writ of *habeas corpus*. Lim Cooie Foo came to Canada in 1907 to join his father when he was 17 years old and remained until 1910, when he returned to China where he remained 11 years and then returned to Canada and remained for a further period of one year. During all this time he retained a substantial financial interest in the firm of Gim Lee Yuen Company of Vancouver. In 1928, he left China destined for Trinidad and on endeavouring to enter Canada at that time he was rejected on the ground that he was ticketed through to Trinidad. In January of this year he again applied for admission to Canada but was detained by the immigration officials and on the 6th of January, 1930, an order was issued by the controller of Chinese immigration for his deportation. Heard by FISHER, J. in Chambers, at Vancouver on the 5th of March, 1930.

Argument

Marsden, for the application: It has been found that Lim Cooie Foo acquired Canadian domicil by virtue of his residence in Canada from 1907 to 1910 and that he still has Canadian domicil. As to section 8 (*o*) of the Chinese Immigration Act the words must be given a reasonable construction, namely, "deported in accordance with the law of the country": see *Boon* v. *Howard* (1874), L.R. 9 C.P. 277 at p. 308. He retained his Canadian domicil in 1928 and therefore could not be legally deported. His rights were violated and he was not deported in 1928 in accordance with the law of the country. As the validity of the present deportation order depends on his deportation in 1928 in accordance with the law of this country and he was not then validly deported there is no power to make the present deportation order.

Elmore Meredith, contra: A properly constituted board of inquiry under the Immigration Act has directed the deportation of the applicant. The proceedings are regular on the face of them. The warrant itself is a valid warrant directing the deportation for the reasons, *inter alia,* that the applicant had previously been deported. The proceedings and warrant being valid on their face, the Court has no power to interfere with the warrant. The proceedings in this matter are civil and the Court is bound by the statute 56 Geo. III. In the case of *Rex* v. *Chow Tong* (1924), 34 B.C. 12, it was held that the warrant being valid on its face the Court could not go behind the warrant except to enquire into the truth of any statements of fact made in the warrant.

Argument

17th March, 1930.

FISHER, J.: In this matter I have already held that the applicant, Lim Cooie Foo, had acquired Canadian domicil having come to Canada in 1907 as a young man of 17 years of age and having remained here till 1910 with the intention, as I infer (and I think it is a natural inference) of making his permanent home and establishing himself as a merchant in Canada. Although it is quite apparent that Lim Cooie Foo has been back and forth to China and remained there for long periods since his first arrival in Canada, I came to the conclusion that such in itself was not sufficient proof of a change of domicil when he had apparently all the while been engaged in the ordinary activities of a general merchant having financial interests here and swears that he still has his domicil in Canada. It seems, however, that Lim Cooie Foo in 1928, while on his way from China to Trinidad, asked for permission to enter or stay over in Canada and such permission was refused and he was returned to China. In January of this year he again applied for admission to Canada. Even though I have held that the applicant should be considered as having a Canadian domicil at the time of his application for admission to Canada in 1928 it is nevertheless submitted, on behalf of the controller of Chinese immigration at the Port of Vancouver, that Lim Cooie Foo, is rightly held by him for deportation as he was at the time of his application in 1928 "ordered deported" and so cannot now be permitted to enter Canada owing to the pro-

Judgment

FISHER, J.

1930

March 17.

IN RE LIM COOIE FOO

visions of section 8 (*o*) of the Chinese Immigration Act which are invoked, said section 8 (*o*) reading as follows:

"No person of Chinese origin or descent unless he is a Canadian citizen within the meaning of the Immigration Act shall be permitted to enter or land in Canada, or having entered or landed in Canada shall be permitted to remain therein, who belongs to any of the following classes, hereinafter called 'prohibited classes':— . . . .

"(*o*) Persons who have been deported from Canada, or the United States, or any other country, for any cause whatsoever."

It is apparent from the proceedings taken before the controller on the last inquiry that the applicant was deported in 1928 only in the sense that he had attempted to enter Canada from China and had been refused permission and returned to whence he came but it is contended on behalf of the controller that this is conclusive under said section 8 (*o*). Upon first consideration of the matter I was inclined to think that no person of Chinese origin or descent was intended to be excluded by said section merely on the ground of his having been previously so rejected for, if so, it seemed to me this would mean that, if such a person had first attempted to enter another country with more restrictive regulations than ours, as to admission, and had been rejected and consequently returned to China, he would be forever excluded under section 8 (*o*) as one who had been deported from another country and therefore the immigration laws of another country would be controlling immigration into Canada. Upon further consideration, however, I have come to the conclusion that the word "deportation" is so defined in the Act and the word "deported" so used therein that it must be assumed that section 8 (*o*) may exclude as "persons who have been deported" even those who I otherwise would have thought should be considered as being persons who had only been "rejected" as defined in section 2 of the Chinese Immigration Act. With respect to such "rejected" or "deported" persons, however, I cannot come to the conclusion that they can be deemed to be excluded by the section merely on the ground of previous "deportation" unless such "deportation" has been in accordance with the law of the country. In view of my finding of fact that Lim Cooie Foo still retained his Canadian domicil in 1928 his "deportation" was not in accordance with the law of the country and I hold, therefore, that his application should be granted.

Judgment

Application granted.

COLEMAN v. INTERIOR TREE FRUIT & VEGETABLE COMMITTEE OF DIRECTION.

COURT OF APPEAL

1930

Jan. 14.

COLEMAN v. INTERIOR TREE FRUIT & VEGETABLE COMMITTEE OF DIRECTION

Practice—Appeal—Taking benefit under judgment below—Loss of right of appeal—B.C. Stats. 1926-27, Cap. 54.

C. appealed to the judge of the County Court at Yale from the suspension of his licence under the Produce Marketing Act by the Interior Tree Fruit & Vegetable Committee of Direction. At the same time an action was pending in said County Court brought by the Interior Tree Fruit & Vegetable Committee of Direction against C. for $42.77 being the balance due for levies imposed on products marketed by C. under said Act. An order was made annulling the suspension of the licence but only on the undertaking of counsel for C. that the levy of $42.77 be paid into the County Court, the order not to be issued until the undertaking was carried out. C. paid the money into Court in accordance with the undertaking. Counsel for the Interior Tree Fruit & Vegetable Committee of Direction then took this money out of Court under the County Court Rules and gave notice of acceptance thereof in satisfaction of the levies. On appeal by the Interior Tree Fruit & Vegetable Committee of Direction from the order annulling the suspension of the licence:—

Held, on preliminary objection (McPHILLIPS and MACDONALD, JJ.A. dissenting), that while the arrangement as to payment into Court of the $42.77 was not included in the formal order appealed from, it is clear from the proceedings that it formed part of it. The appellant took advantage of this by taking the money out of Court and is thereby precluded from the right of appeal.

APPEAL by defendant from the decision of BROWN, Co. J. of the 24th of August, 1929, on an appeal by plaintiff against the suspension of his licence by said Committee under the Produce Marketing Act. Early in July, 1929, plaintiff applied to said defendant for a licence to ship fruit and vegetables in car-load lots under protest and without prejudice to his rights in contending that said Act was *ultra vires* of the local Legislature. On the 25th of July he received notice that his licence was issued but delivery was withheld pending a satisfactory reply to a letter to him asking for outstanding levies alleged to be due to the amount of $42.77 before August 1st, 1929. These levies were for shipments made by plaintiff out of the Province. Plaintiff replied he was willing to place this sum in

Statement

COURT OF APPEAL

1930

Jan. 14.

COLEMAN v. INTERIOR TREE FRUIT & VEGETABLE COMMITTEE OF DIRECTION

escrow in a bank pending the decision of an appeal to the Privy Council of a similar case with respect to the validity of the Act. The defendant refused this offer and shortly after commenced proceedings in the County Court of Yale against plaintiff for $42.77 for levies and on the 16th of August, 1929, plaintiff received a letter from the defendant stating that his licence was suspended. Plaintiff appealed to the judge of the County Court of Yale against the suspension of his licence under the Act. The learned judge annulled the suspension of the licence but did so only on the undertaking of counsel for plaintiff to pay into Court the amount of the levies and costs claimed by defendant in the action brought against him. In accordance with this order the plaintiff by his solicitor paid $53.77 into Court. On the 20th of September, 1929, plaintiff's solicitor received notice from the defendant's solicitor of the acceptance of the sum paid into Court in satisfaction of the levies, and the defendant's solicitor took the money out of Court in settlement of that action.

Statement

The appeal was argued at Victoria on the 14th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for appellant.

O'Halloran, for respondent, took the preliminary objection that the appellant had taken a benefit from the order appealed from and it no longer had the right of appeal: see *Reid* v. *Galbraith* (1927), 38 B.C. 287; *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1929), 31 B.C. 432; *Wolfson* v. *Oldfield* (1912), 2 D.L.R. 110; *Rex* v. *Lynn* (1910), 19 Can. C.C. 129 at p. 140.

Argument

Robertson: We did not take the money out under any order or undertaking but in pursuance of the County Court Rules, and had no bearing on the judgment appealed from. If we are to be precluded from our appeal the Court must find that we have approbated and reprobated some provision of the order of the Court. Merely taking money out of Court under the Rules cannot be so applied.

O'Halloran, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think the preliminary objection

must be sustained. While the arrangement with respect to the $42 is not included in the formal order appealed from, it is quite clear from the proceedings that it formed part of it and ought to have been included. Mr. *Norris* asked, when he found how the judge was intending to decide the question, that this undertaking should be given, and it was given, the money was paid into Court, and he took advantage of that by taking the money out. It would be impossible at this time to put the parties back in their original position. Therefore I think the appellant is precluded from appealing.

On the question of whether or not, but for this undertaking, the Committee would be justified in suspending his licence, we are not called upon to consider on the merits. It is rather unfortunate that the learned judge did not decide the matter affirmatively without reference to anything of the above kind. It was not a discretion he was called upon to exercise, it was a question of law, a question of right, and he should have kept out of anything such as that appearing on the record.

MACDONALD, C.J.B.C.

But had he arrived at a decision as to whether the Committee had any right to suspend a member where he has failed to obey a lawful order, I do not believe the judge would make the order in question. I think the Committee had, in the circumstances, the right to suspend the respondent's licence, but by their conduct at the time of the appeal they put an end to the dispute or default for which the suspension was made.

MARTIN, J.A.: I agree, and will add a few words as this is a most exceptional case.

My opinion is based on the unanimous judgment of this Court in *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1922), 31 B.C. 432 and *Reid* v. *Galbraith* (1927), 38 B.C. 287. In the *Atlas* case the principle laid down is this: "The whole thing is, that if you propose to bring an appeal from a judgment, you must be careful not to take benefits under that judgment" for if you do, no appeal will be entertained. Here a remarkable thing happened. On the 8th of August the appellant Committee sued the respondent Coleman for fees levied under the Act in question (Cap. 54 of 1926) and while that action was pending, on the 14th of August, suspended his licence. He appealed from

MARTIN, J.A.

COURT OF APPEAL

1930

Jan. 14.

COLEMAN v. INTERIOR TREE FRUIT & VEGETABLE COMMITTEE OF DIRECTION

MARTIN, J.A.

that decision to the County Court judge on the 17th of August, under section 11 of the Act and at the end of the hearing the learned judge gave judgment in his favour as follows:

"In this case the appeal will be allowed under all the circumstances, and the facts are not in dispute. I find the action of the Committee of Direction unreasonable and arbitrary. The order suspending the licence will be annulled. The licence is to be reinstated from the date of suspension. Costs of this appeal to the appellant."

Now that was an adjudication simply and fully in favour of the present respondent, and he thereupon was immediately entitled to the full fruits of his victory, *i.e.*, to the reinstatement of his licence. But an astonishing thing happened. Counsel for that Committee asked the learned judge to impose a restrictive term upon the right which he had just declared which would not permit this successful litigant to have his licence handed to him then and there, but to put an embargo upon it, as it were, and make a term and condition of his declared absolute right that he should pay the amount of the levies into Court. Now that term, of course, was a great benefit to the appellant as its counsel himself stated in his reasons on pages 68 and 69 of the appeal book. Mr. *Pincott,* the respondent's counsel, objected to it at once saying:

"If Your Honour made an order to pay the money into Court, our defence is taken away in Kelowna."

But, nevertheless, on page after page of the record counsel for the Committee urged upon the learned judge that he should require this term to be given. He repeats that he seeks as a term of this order that an undertaking is to be given, and finally, at pages 70 and 71, the learned judge conceded it (unfortunately, with respect), after considerable doubt and being almost goaded into it, and fixed this term upon respondent's right to have this certificate reinstated, which means his livelihood; and then the judge asks counsel what note he should write down? (The learned judge was properly cautious and wanted to protect himself). On the learned judge, I say, asking counsel who wanted this benefit: "What note shall I make?" the answer was:

"*Norris*: On undertaking of Mr. *C. F. R. Pincott.*

"*Pincott*: With the denial of liability.

"*Norris*: That the amount should be paid into Court."

Mr. Pincott says:

"I am particularly busy this coming week, and I would like that undertaking to stand for ten days."

And the Court makes the following note:

"On an undertaking of counsel for the appellant that the levy in question $42.77, will be paid into the County Court, at Kelowna."

Mr. *Pincott,* to guard himself, again says:

"With a denial of liability."

"THE COURT: Yes.

"*Pincott*: Within ten days.

"THE COURT: Yes, ten days. Of course, this is August yet. Within ten days, the formal order annulling suspension to be taken out."

In other words, the judge refused to give him the right he then and there declared he was entitled to, and would not allow the order to be issued until the undertaking had been accomplished. On the 3rd of September the levy was paid in, and thereafter, upon the 7th of September the order held in suspension was entered.

MARTIN, J.A.

Words really fail me to express my opinion, when it is suggested that after benefits of that kind have been taken that the terms self-imposed by the counsel for the appellant should be disturbed and that after payment has been made, and counsel who had asked for that term to be imposed, takes the money out of Court, and serves a notice of acceptance in pursuance of the statutory rule upon which the action was concluded. In such a state of affairs it would be superfluous for me to say anything further.

GALLIHER, J.A.: I must say I have found considerable difficulty in coming to a conclusion in this case, and at one time I felt inclined against the respondent, but I rather think the better view is the view that has been taken by the Chief Justice and my brother MARTIN, and for the reason given, and experiencing some difficulty myself, and accepting that as the better view, I would also agree with the conclusion they have reached.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would disallow the preliminary objection. In my opinion the learned judge was adjudicating in a tribunal of appeal, independent of the County Court action. The reinstatement of the licence was made in a tribunal which was not the County Court at all; the learned judge was sitting

COURT OF APPEAL

1930

Jan. 14.

COLEMAN v. INTERIOR TREE FRUIT & VEGETABLE COMMITTEE OF DIRECTION

in appeal under the provisions for appeal in the Produce Marketing Act as amended by the Produce Marketing Act Amendment Act, 1929, Sec. 15. The learned judge made the order of reinstatement of the licence upon the ground that the cancellation was "harsh and arbitrary under the circumstances." He was then sitting, not in the County Court, but in a distinct tribunal of appeal under this particular statute, having no relation whatever to the County Court. It is a mere coincidence that there happened to be an action pending in the County Court at the time for the recovery of this sum $42.77. That was a suit for money payable for a licence under the statute. The undertaking was given in the County Court, not in the Court of Appeal constituted by the statute. No reference was made, and rightly, to the undertaking in the order reinstating the licence. And in so far as the undertaking is concerned, it was applicable only to the County Court action, and could not have relation to the appeal, where the learned judge was sitting, as I have pointed out, in a distinct tribunal, reviewing the action of the Committee acting under the statute.

MCPHILLIPS, J.A.

How can it be said that the County Court action had any relation to that hearing in appeal? The tribunal of appeal was created by the Legislature to do a certain and distinct thing, review the action of the Committee, and had no relation, and could have no relation to a suit brought in the County Court.

The Committee was entitled to an appeal to the County Court judge, and exercised this right; and the question was whether the Committee was right in cancelling the licence. The statute has relation to the carrying on of a large industry in this country.

Therefore, in my opinion, the preliminary objection is not well taken, and is without merit; and, further, in the public interest it is most important that at the earliest moment the powers of the Committee should be settled as affecting a large industry of this country. The Court of Appeal is entitled to pass upon any point of law; and in my opinion, in the public interest, the appeal should be heard, and not be denied upon a preliminary objection which is not only without merit or force, but is absolutely untenable from every point of view. The

appeal, in my opinion, should be heard, and the motion dismissed.

MACDONALD, J.A.: With deference I differ from the majority of the Court.

Amplifying what I stated in oral reasons, I would point out that two independent courses were open to the Committee, *viz.*, to suspend the licence (an executive act) and to bring action in the County Court to recover the levies. The Committee might pursue one or both courses. They differed in substance and character. The first action was purely disciplinary; the second, debt-collecting. An appeal from the Committee's disciplinary action was taken to the County Court judge. It is that appeal we are concerned with. On that appeal there was only one issue involved, *viz.*, had or had not the Committee the legal right to suspend the licence? Any other question would be irrelevant. The order allowing the appeal could only cover the single issue involved, and it was so drawn up. After His Honour announced his decision, however, the suggestion was made by counsel that the moneys involved in the County Court action should be paid into Court, and an undertaking was given to do so, the entry of the order being deferred until this took place. Notice of acceptance of this payment was given, and because of that, it is submitted that a benefit was taken under the order allowing the appeal from the executive act of the Committee in suspending the licence, thus barring a further appeal to this Court from that order. This collateral matter was not, nor could it be, part of the order under review. It was *de hors* the issue involved. It cannot be said that the action referred to and relied upon as the acceptance of a benefit, was part of the order, either in fact or by inference. It could not be part of an order deciding the narrow issue as to whether or not the Committee had the power to suspend the licence. The collection of levies was a separate proceeding, and a payment into Court would be part of that independent action in the County Court; nor could any discussion or undertaking in respect to a different matter, the subject of a separate action, be made part of the order dealing with the issue involved. It could not, either, be made relevant by discussing it. It cannot be said, therefore, that any benefit was

COURT OF APPEAL

1930

Jan. 14.

COLEMAN v. INTERIOR TREE FRUIT & VEGETABLE COMMITTEE OF DIRECTION

taken under an order which could only deal with, and by its terms was confined to, the legality of the Committee's executive act.

Preliminary objection sustained, McPhillips and Macdonald, JJ.A. dissenting.

Solicitor for appellant: *T. G. Norris.*
Solicitor for respondent: *C. F. R. Pincott.*

MURPHY, J. (In Chambers)

1930

Feb. 20.

DAVIES v. MILLS

DAVIES v. MILLS.

Elections—Municipal—Petition—Security for costs not given—Effect of—R.S.B.C. 1924, Cap. 75, Sec. 98, Subsec. (3).

Although an application to dismiss an election petition under the Municipal Elections Act on the ground that no security for costs had been given was refused, the petition cannot be proceeded with until security for costs is given pursuant to section 98, subsection (3) of said Act.

Statement

APPLICATION by respondent to dismiss an election petition under the Municipal Elections Act on the ground that no security for costs had been given by the petitioner under section 98(3) of the Act. Heard by MURPHY, J. in Chambers at Vancouver on the 19th and 20th of February, 1930.

Burton, for the petitioner.
Reid, K.C., for respondent.

Judgment

MURPHY, J.: Notwithstanding that security has not been given, I am nevertheless of the opinion that under the decision in *In re Slocan Municipal Election* (1902), 9 B.C. 113, I cannot hold that the petition is a nullity. The petition, however, cannot be proceeded with unless and until security for costs is given pursuant to said subsection. Unless the parties can agree as to the amount of security to be deposited, I will hear argument on this point.

STROUD v. DESBRISAY AND COLGAN.

COURT OF APPEAL

1930

March 17.

STROUD v. DESBRISAY AND COLGAN

Damages—Quantum of—Jury—Personal injuries—Permanent disfigurement—Appeal for larger amount—New trial.

A Court of Appeal will not increase the amount of damages awarded by a trial judge on the verdict of a jury unless it appears that the jury has failed to consider some element of damage which should have been considered.

APPEAL by plaintiff Stroud from the decision of FISHER, J. of the 23rd of October, 1929, and the verdict of a jury, in an action for damages for negligence. On the 12th of August, 1929, the plaintiff was sitting in the front seat with the defendant Colgan who was driving his car northerly on the Cariboo Road near the 74 Mile House at about 9.30 in the morning. The defendant DesBrisay was at the same time driving his car southerly on said road. The cars collided and the plaintiff Stroud received cuts about the face leaving permanent scars. Her nose was broken and she lost several teeth. The jury answered questions and found both defendants guilty of negligence in not taking sufficient care when passing, and assessed $403.63 special damages and $250 general damages for Mrs. Stroud. She appealed on the ground that the jury having found the defendants negligent the general damages should be larger considering the permanent disfigurement she has suffered as a result of the accident. The defendants cross-appealed.

Statement

The appeal was argued at Vancouver on the 12th, 13th and 14th of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

J. W. deB. Farris, K.C. (*Marsden,* with him), for appellant: The jury found negligence on the part of both defendants and only gave $250 general damages. They should have awarded damages to Mrs. Stroud commensurate to compensate her for the actual injuries and the pain and suffering which she sustained. The scars on her face are permanent. She is badly disfigured for life. The damages should be very materially increased. We are entitled to a new trial.

Argument

COURT OF APPEAL

1930

March 17.

STROUD v. DESBRISAY AND COLGAN

Alfred Bull, for respondent DesBrisay: The jury considered all the elements of damage: see *Phillips* v. *London and South Western Railway Co.* (1879), 5 Q.B.D. 78; *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250 at p. 255; *Ryan* v. *Canadian Pacific Ry. Co.* (1919), 2 W.W.R. 368 at p. 374; *McNicol* v. *P. Burns & Co., Ltd.* (1919), 3 W.W.R. 621 at p. 626; *Watts* v. *Corporation of District of Burnaby* (1929), 41 B.C. 282 at pp. 288-9; *Day* v. *Canadian Pacific Ry. Co.* (1922), 30 B.C. 532; *Farquharson* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 280; *Cossette* v. *Dun* (1890), 18 S.C.R. 222.

Argument

McPhee, for respondent Colgan: There is not sufficient evidence for the verdict when Mrs. Stroud was a gratuitous passenger.

Marsden, in reply: There are 22 feet of road where the collision took place. Two hundred and fifty dollars for general damages is in the circumstances absurd: see *Howard* v. *Henderson* (1929), 41 B.C. 441; *Pat* v. *Illinois Publishing & Printing Co.* (1929), 3 D.L.R. 376 at p. 378. She was unconscious for half of one day.

Cur. adv. vult.

17th March, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): In the case of *Macnamara* and the other plaintiff v. *DesBrisay and Colgan*, we think that the verdict ought not to be disturbed, either in the main appeal of the plaintiff or in either of the two cross-appeals. It is conceded very frankly that the charge to the jury is not objectionable, that the learned judge brought to their attention all the factors which they ought to consider in coming to their verdict. There was conflicting evidence—evidence on each side—which it is the peculiar province of a jury to consider and believe or disbelieve. We must assume they did that; there is nothing to indicate that they did not consider the case very carefully, and no evidence that they were under any misapprehension about it, or that they neglected any of the factors which go to make up the damages. They were responsible, of course, for the amount of damages, and it is not for an Appellate Court to take upon itself to vary a verdict when there is no legal wrong

apparent that would justify such a course; therefore, the main appeal must be dismissed.

The same is true of the two cross-appeals. There was evidence on both sides, the jury were not misled by the charge, nor did they appear to have been misled in the consideration of the case. They apparently considered all the factors which they ought to have considered, and have come to their decision; therefore, the cross-appeals, that of DesBrisay and that of Colgan, should be dismissed with costs.

MARTIN, J.A. (oral): I agree in the dismissal of the appeal and of the cross-appeal, and will only add that there have been so many decisions in this Court on the question of interfering with the assessment of damages that I would not say anything further on that point were it not for the fact that in this case there is an unusual element, *i.e.*, one of the grounds, if not the principal ground, upon which we are invited to order a new trial, to increase the damages, is that the plaintiff has suffered such injuries to her face as should have warranted the jury in giving her larger damages, considerably larger damages, than they did. The said unusual element, in particular, is that in order to settle that point the learned counsel for the plaintiff invited her, accompanied by her medical adviser as a witness, to face the jury and have pointed out to them by that medical witness the scars that she relies upon as a ground for obtaining more substantial damages on that head. The jury, after having seen the plaintiff before them in those special circumstances, have appraised the damages. Now it is perfectly apparent that thereby an element was introduced into the case, equivalent to a view, in fact, of a very particular kind, which does not and cannot appear upon this record at all, and how is it possible for us to say that a jury, after seeing that woman and having these scars, or alleged scars, pointed out to them, in this particular way, made a wrong estimate of the injuries that resulted to her because of their alleged existence? For that reason, therefore, I think that it would be particularly unjustifiable for us to interfere with this assessment of damages, the direction of the learned judge thereupon being admittedly correct.

MARTIN, J.A.

COURT OF APPEAL

1930

March 17.

STROUD v. DESBRISAY AND COLGAN

I only need refer to one case, which has not been mentioned during the argument, and that is our own recent decision in *Middleton* v. *McMillan* which is reported in (1929), 1 D.L.R. 977, where we held, in dismissing an appeal to increase damages, that it was clear that the *quantum* of damages should not be disturbed on appeal unless it is clear that the trial judge overlooked some element of damage. That decision of our Court was followed recently by the decision of the Appellate Court of Saskatchewan in *Pat* v. *Illinois Publishing & Printing Co.* (1929), 2 W.W.R. 14. And perhaps I should also refer to two other recent cases of this Court, that is to say our decision in *Hodgkinson* v. *Martyn* (1928), 40 B.C. 434, and *Day* v. *Canadian Pacific Ry. Co.* (1922), 30 B.C. 532, where the governing principles are collected. The *Middleton* case and the *Pat* case

MARTIN, J.A.

are important in this respect, *viz.*, they shew that the principle for increasing damages is the same as that for decreasing them. It is true that in certain cases, *e.g.*, in the *Martyn* case, the situation may be such that the assessment of the damages is so large, or so small, as of itself, *ex facie*, to entitle the Court to draw the inference that some element has entered into the jury's (or judge's) consideration which should not have been present: there is also a marked illustration of this in a very recent case in the English Court of Appeal, *Tolley* v. *J. S. Fry and Sons, Limited*, wherein Lord Justice Scrutton adopts the same view, as reported in the current number of 46 T.L.R. [(1929)] 108.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I am of the opinion that the appeal and cross-appeal fail. In arriving at this conclusion, it is only necessary to give attention to the particular facts of the case. It cannot be gainsaid that there is in the case conflicting evidence—rival evidence (*Ruddy* v. *Toronto Eastern Railway* (1917), 86 L.J., P.C. 95, 96). Then we see a case peculiarly fit to go to a jury; and the case is unique in this respect, that no exception has been taken to the direction of the learned judge to the jury. This is a difficult case, really. It is a tribute to Mr. Justice FISHER, the learned trial judge, that counsel on both sides felt that the charge to the jury was without exception.

That being the case, the jury were properly charged upon the facts and upon the law, and having taken the matter into consideration arrived at a verdict which, I might say, was somewhat startling to me, though, as to the amount of the general damages, that is, that the damages were not as much as I would expect. At the same time, there is this feature in the case, that all the elements of damage were carefully made known and brought to the attention of the jury, and that being the case, we cannot be unmindful of the fact that all those elements of damage must have received the consideration of the jury. The damages for shock might be very considerable. However, when we see, as my brother MARTIN has pointed out, that the physician and the lady appeared before the jury this feature of the case cannot be overlooked. The jury had an opportunity of seeing the witness, hearing what the physician—her physician—said, and observing the marks of the injury. It is difficult to come to a different conclusion as to *quantum* to that allowed by the jury.

Now, the principle upon which juries may assess damages was carefully considered by their Lordships of the Privy Council, in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299, and particularly at p. 309; and without reading all that Lord Moulton said, there is this that might well be read:

MCPHILLIPS, J.A.

> "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 Courts of Appeal have not the advantage of seeing the witnesses."

Then, reverting to the question of conflicting evidence, or rival evidence, I would refer to what Lord Sumner said in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at p. 47:

> "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."

Now, Mr. *Bull* very ably presented the probabilities to us, but I do not think it could be said that the probabilities are at all only one way. Then on this point, I would also refer to what Mr. Justice Duff said in *McPhee* v. *Esquimalt and Nanaimo*

COURT OF APPEAL

1930

March 17.

STROUD v. DESBRISAY AND COLGAN

MCPHILLIPS, J.A.

Rway. Co. (1913), 49 S.C.R. 43 at p. 53, where he was considering the question of the power of this Court to enter judgment *non obstanti veridicto*. He dealt with that somewhat particularly, and he arrived at the same conclusion as the Court of Appeal in England. Mr. Justice Duff said:

"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 p. 161; and *Skeate* v. *Slaters (Limited)* (1914), 30 T.L.R. 290."

In truth, the case must be such that there can only be one answer. I am not prepared to say at all that there could only be one answer and that in favour of the defendants in this case. I think that there was evidence on which the jury could reasonably find the verdict which they did. Therefore, I am of the opinion the appeal and cross-appeal should be dismissed.

Appeal and cross-appeal dismissed.

Solicitor for appellant: *P. S. Marsden.*

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

Solicitor for respondent Colgan: *R. J. Richards.*

SOLLOWAY, MILLS & CO. LIMITED v. FRAWLEY *ET AL.*

MORRISON, C.J.S.C.

1930

March 19.

SOLLOWAY, MILLS & Co. *v.* FRAWLEY

Criminal law—Search warrants—One issued in one Province for execution in another—A second issued in aid of prosecution in another Province —Territorial division—Criminal Code, Sec. 629.

The plaintiffs were charged in the Province of Alberta with conspiracy to defraud. Acting under two search warrants, one issued in Alberta and backed for execution in British Columbia by a local magistrate, the other based on the same charge but issued by a justice of the peace in Vancouver, the defendants under instructions from the Attorney-General of Alberta, threatened to take into their custody certain books and documents of the plaintiffs alleged to be in possession of the plaintiffs' employees in Vancouver, intending to take them to the Province of Alberta. The plaintiffs obtained an *interim* injunction restraining the defendants from executing the warrants. On an application to dissolve the injunction:—

Held, that where there are any provisions in the Code dealing with search warrants they appear to be directed to the arrest of persons and to search for and seizure of the *res* the subject-matter of the charge. Here the authorities in Alberta are endeavouring to secure evidence to support the charge of conspiracy and to search in another Province and take documents out of the jurisdiction that may have no bearing on the charge. It is to be expected that if there be such a sanction it would be given in the most plain and unambiguous and specific manner. The Code does not go that far. The jurisdiction of the Courts of the Province is limited to the Province and the justice's jurisdiction is limited to restricted territorial divisions within the Province. The warrant issued in Alberta and backed in Vancouver is invalid. The warrant issued by the local justice is based upon information in respect of a crime alleged to have been committed in Alberta and directs the property seized to be brought before the justice issuing the warrant or some other justice of the same territorial division to be dealt with by him according to law. There is no provision in the Code authorizing the justice to transmit the property seized to Alberta and the warrant is invalid. The application to dissolve the injunction is dismissed.

APPLICATION to dissolve an injunction. The facts are set out in the head-note and reasons for judgment. Heard by MORRISON, C.J.S.C. at Vancouver on the 5th and 7th of March, 1930. Statement

Locke, for the application.

J. W. deB. Farris, K.C., and *Sloan, contra.*

MORRISON, C.J.S.C.

1930

March 19.

SOLLOWAY, MILLS & Co. v. FRAWLEY

19th March, 1930.

MORRISON, C.J.S.C.: The plaintiffs are charged, in the Province of Alberta, with conspiracy to defraud. On the 3rd of March, the defendants representing or acting under instructions from the Attorney-General of Alberta, threatened to take into their custody certain books and documents of the plaintiffs, then alleged to be in the possession of plaintiffs' employees in Vancouver, intending to take them from the Province of British Columbia to the Province of Alberta. The defendants were acting under the authority of two search warrants, one of which had been issued in Alberta and backed for execution in British Columbia by a local magistrate. The other based upon the same charge but issued by a justice of the peace in Vancouver.

The grounds advanced for the warrants were that one Kenneth Morrison of Calgary, after investigating records of the plaintiffs in Calgary and Toronto, believed that the documents sought under the warrants would afford evidence to substantiate the charge of conspiracy to defraud. They were intercepted in their efforts to execute these warrants by the injunction now sought to be dissolved. The warrants purported to be issued pursuant to section 629 of the Criminal Code. It falls to determine whether subsection (2) of section 629 gives the magistrates authority to do what was done in this instance. That brings me to consider the meaning of the words "territorial division." I shall refer briefly to those parts of the Code which as it appears to me have any bearing on the point. The Code is divided into Parts from I. to XXV. Many of them contain their own interpretation clauses.

Judgment

Subsection (10) of section 2 of the Code interpreting certain words and phrases defines "district, county or place" as including any division of any Province of Canada for purposes relative to the administration of justice in the matter to which the context applies. Subsection (39) of section 2 defines "territorial division" as including any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies.

Part XII. of the Code, in which section 629 is found, deals with special procedure and powers relating to such offences as

those against Imperial statutes; carrying weapons, intoxicating liquors; seizure of wines; prize-fights. Following up the sections dealing with matters under the above headings comes section 629, setting out the procedure as to search warrants, based upon charges to which I think the context in Part XII. applies. The particularity with which the offences are dealt with as much as the procedure to be followed leaves nothing to intendment or guess work. The first part of this paragraph directs that the "thing" seized shall be returned to the justice of the same territorial division, etc. Part XV. contains another interpretation section, *viz.*, 705, in which district or county is defined, as is also "territorial division," which means "district, county, union of counties, township, city, town, parish or other judicial division or place."

In section 656, dealing with offences committed on the seas, the expression "any justice for any territorial division in which any person charged with . . . any such offence, etc., may issue his warrant." "Justice"of course, means a justice of the peace with limited territorial jurisdiction.

Judgment

Section 662 has to do with backing of warrants in any part of Canada for the arrest of a person charged with an offence. Section 713 provides for the issuing of a warrant to procure the attendance of a witness who may be beyond the territorial division of the justice, which obviously means within the Province in which the justice's bailiwick lies.

Throughout the Code where there are any provisions dealing with search warrants they appear to be directed to the arrest of persons and to search for and seizure of the *res* the subject-matter of the charge such as forged documents or stolen property, or liquor or narcotic drugs as the case may be. In this case the authorities in Alberta are endeavouring by the means complained of by the plaintiffs to secure evidence to support the charge of conspiracy, laid some two months ago, and to search in another Province and take documents out of the jurisdiction of the Courts of this Province, which documents may have no bearing on the charge. It is difficult to recall any act which would tend to a serious breach of the peace more than an attempt to enter a man's premises and forcibly to

MORRISON, C.J.S.C.

1930

March 19.

SOLLOWAY, MILLS & Co. v. FRAWLEY

remove property with a view to incriminate him, as was done here, even if done under legal sanction. It is therefore to be expected that if there be such a sanction it would be given in the most plain and unambiguous and specific manner. Otherwise the determination of such an important question is turned into a species of problem play and the Courts are left to guess what Parliament intended. I do not think the Code goes that far. The jurisdiction of the Courts of the Province is limited to the Province. The justice's jurisdiction is limited to restricted territorial divisions within the Province. When that jurisdiction is sought to be extended it is stated clearly.

The material upon which the warrants were granted falls short of those required by the Code. It is not sufficient to take the statement of one laying an information. He must set out, and the justice must hear some cogent substantial evidence upon which the informant bases his belief. It is paying too high a measure of tribute to credulity for magistrates to issue search warrants on such off-hand phraseology as appears on the material before me. I therefore think that the warrant issued in Alberta and backed in Vancouver is invalid. The warrant issued by the local justice is based upon an information in respect of a crime alleged to have been committed in Alberta. It directs that the property of the plaintiffs seized be brought before the justice issuing the warrant or some other justice of the same territorial division to be by him dealt with according to law. There is no provision in the Code authorizing the justice to transmit the property seized to Alberta. I think the warrant is invalid.

Judgment

I am satisfied that if the injunction is dissolved the defendants will seek to enter and seize the plaintiffs' property, which if attempted may lead to a breach of the peace. Counsel undertake that until further order all papers and documents now in the custody or under the control of the plaintiffs in their Vancouver office be safeguarded against abstraction, alteration or mutilation.

The application to dissolve the injunction is refused.

Application refused.

REX v. WISER AND McCREIGHT.

MACDONALD, J.

1930

March 19.

REX v. WISER AND McCREIGHT

Criminal law—Persons jointly indicted—When entitled to separate trials.

Persons jointly indicted should, by general rule, be jointly tried; but where in any particular instance this would work an injustice the presiding judge should, on due cause being shewn, permit a severance, and allow separate trials.

APPLICATION for separate trials of two accused jointly indicted. Heard by MACDONALD, J. at Vancouver on the 19th of March, 1930. Statement

J. A. Russell, for accused: We rely on *Rex* v. *Murray and Mahoney* (1916), 27 Can. C.C. 247; (1917), 1 W.W.R. 404. It would appear from the depositions that it would be contrary to justice to have the two accused tried together.

MACDONALD, J.: Mr. *MacNeill,* can you shew me any good reason why the remarks of Osler, J. in *Rex* v. *Martin* (1905), 3 Can. C.C. 371 at p. 383, where he refers to the case of *Reg.* v. *Weir* (*No. 4*) (1899), 3 Can. C.C. 351 should not be applied? Read it. You see my difficulty, the jury is in the Court-room. I do not want to read it out aloud, I simply refer to the case. Argument

A. H. MacNeill, K.C., for the Crown: The necessary protection can be given, by proper direction, even with a joint trial: see Tremeear's Criminal Code, 4th Ed., pp. 1181-2. The matter is one entirely in the discretion of the trial judge.

MACDONALD, J.: I feel it would be inadvisable for me to give the reasons in detail, why I have come to the conclusion to sever the trials, in view of the fact that the jury that may be called are within sound of my voice, but I might put it shortly that I apply the third paragraph to the head-note of *Rex* v. *Murray and Mahoney* (1917), 1 W.W.R. 404. I think that should fully cover the ground. Order made for separate trial. It is for you to elect, Mr. *MacNeill,* which trial you wish to proceed with. Judgment

Application granted.

MCDONALD, J.

1930

March 19.

KERR v. STEPHEN.

Negligence—Motor-vehicles—Car driven by member of party—Injury to another member—Damages—Liability of driver.

KERR v. STEPHEN

The plaintiff, who was one of a family party of five on a motor-car trip, was injured owing to the negligence of her brother who was driving the car which was owned by her step-father. The plaintiff knew nothing about the operation of a car, never had control of it, and trusted solely to her brother to do the driving.

Held, as she had nothing to do with the operation of the car and could not be identified with her brother's negligence, she was entitled to recover.

Statement

ACTION for damages owing to the defendant's negligence. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 18th of March, 1930.

G. W. Scott, for plaintiff.

Tobin, and *A. N. Robertson*, for defendant.

19th March, 1930.

Judgment

MCDONALD, J.: The plaintiff, a married woman, sues her brother for damages suffered by her as the result of his negligence in driving a motor-car in which she was riding. The car was owned by the plaintiff's step-father with whom and her mother and her unmarried sister and the defendant she had lived until her marriage in November, 1927. Since that time she has resided with her husband in the house next door to that occupied by her family. Upon the lot occupied by her and her husband is a garage in which the car in question was stored. The step-father seldom drove the car. The unmarried sister drove only once or twice. Neither the plaintiff nor her mother drove at all so that practically on every occasion when the car was taken out it was driven by the defendant. On March 10th, 1929, being a Sunday, the mother and the sister, Kathleen, suggested that all should go for a drive; the defendant went to get the car ready while Kathleen went to ask the plaintiff and her husband to join the family in the outing. As they proceeded along the road it was decided to drive to Lulu Island though there is no evidence as to who made the proposal. As they were

proceeding south on Pine Street they came to the B.C. Electric Railway crossing and the defendant, though having slowed down, proceeded upon the track without stopping; the car was struck and upset by an inter-urban tram-car; the mother was killed and the plaintiff suffered injuries, the most serious of which was a fracture of the pelvis. The plaintiff, her sister and the defendant were called and all stated that they had not heard the whistle of the tram-car (though I find as a fact that the whistle was blown) and none of them heard or saw the tram-car until it was too late to avoid the accident. In addition to the usual railway crossing sign there was in the middle of the street and on the surface the "stop sign" commonly used in the city of Vancouver. In these circumstances, as intimated during the argument, I hold that the defendant's negligence was the proximate cause of the accident.

It is contended, however, that nevertheless the plaintiff cannot succeed for the reason that she was engaged upon a "joint adventure" with her brother the defendant; that it was a family party, each member of which possessed an equal right to control the car and its operation. Mr. *Tobin* discussed the various cases following *The Bernina (2)* (1887), 12 P.D. 58; 56 L.J., P. 17, and relied particularly upon the decision of the late Chief Justice Meredith in *Dixon* v. *Grand Trunk R.W. Co.* (1920), 47 O.L.R. 115; 51 D.L.R. 576.

Judgment

Having examined the various cases cited I am of opinion that the contention of Mr. *Scott,* counsel for the plaintiff, must be sustained for the reason that the facts in the *Dixon* case, *supra,* do not correspond with those in the present case. There, a number of men being desirous of taking a drive in a motor-car deputed one of their number to hire a car and to drive the party. It was held as a fact that the driver was the agent of his companions and that all were therefore in control of the car and were so identified with the actual driver as to disentitle them to recover from the third party. The present case is different, and I think falls within the language of Chief Justice Meredith where he says at p. 578 of the report, that he would have agreed with the trial judge, who had given judgment for the plaintiff, had the trial judge and jury been right in stating

MCDONALD, J.

1930

March 19.

KERR v. STEPHEN

Judgment

the facts to be (as I hold them to be in the present case) that the plaintiff

"'never had control' of the motor-car, 'was not capable of taking control, knowing nothing about the operation of a motor-car, and trusted solely to [the driver] to do the driving.'"

Further, it seems almost impossible to distinguish this case from *Hammer* v. *Hammer and Luthmer* (1929), 41 B.C. 55; (1929) 2 W.W.R. 130, where a mother, being an invitee, was held entitled to recover against her daughter in circumstances not dissimilar to the present.

The plaintiff suffered special damages in the sum of approximately $900. She was unable to work for about 12 weeks and still suffers and will for some time suffer from pain and shock. I think $1,500 is a fair amount to allow for damages in all.

Judgment for plaintiff.

FISHER, J. (In Chambers)

1930

March 19.

REX v. WONG CHEUN BEN

REX v. WONG CHEUN BEN.

Criminal law — Trial — County Court Judge's Criminal Court — Criminal Code, Sec. 827—Non-compliance with—Jurisdiction—Habeas corpus.

The County Court Judge's Criminal Court, though a Court of Record, is not a superior Court, having general jurisdiction over the offence charged, but is a Court having limited jurisdiction in which the charge is triable only after all conditions precedent to the exercise of its jurisdiction are fulfilled. Where therefore, on a trial before the County Court Judge's Criminal Court the statement required by section 827 of the Criminal Code to be made to the accused on his arraignment or election is not made, the Court acquires no jurisdiction to hear the case or convict the accused, and if so convicted he is entitled to apply for his discharge on *habeas corpus*.

Statement

APPLICATION by accused for his discharge under *habeas corpus* proceedings. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 12th of March, 1930.

Nicholson, for the application.
Wood, K.C., for the Crown.

19th March, 1930.

FISHER, J. (In Chambers)

1930

March 19.

REX v. WONG CHEUN BEN

FISHER, J.: This is an application on behalf of one Wong Cheun Ben for his discharge under *habeas corpus* proceedings upon the ground briefly set out in pars. 4 and 5 of his affidavit as follows:

"That although a conviction was entered against me on the 15th day of July, 1929, in the County Court Judge's Criminal Court of the County of Westminster, His Honour Judge Frederic W. HOWAY, presiding, the said Court had no jurisdiction to enter and record the said conviction, and the said Record of Conviction is without jurisdiction and void, because as appears from the record of proceedings in the said Court, which record is now produced and shewn to me and marked Exhibit 'B' to this my affidavit, I was not told by the presiding judge after being charged with the offence referred to in the said record 'that I had the option to be tried forthwith before a judge without the intervention of a jury, or to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction,' and consequently the said County Court Judge's Criminal Court never acquired jurisdiction to hear the case or to convict or sentence me.

"That the said Record of Conviction and Record of Proceedings at the trial disclose a conviction and commitment without the jurisdiction on the part of the person making and signing the same, in that they shew that the provisions of section 827 of the Criminal Code of Canada were not complied with."

Judgment

Counsel on behalf of the Crown relies on *Rex* v. *Martin* (1927), 60 O.L.R. 577, and makes the return suggested in the judgment of Chief Justice Robinson, therein referred to, in the case of *Reg.* v. *Crabbe* (1853), 11 U.C.Q.B. 447, where delivering the judgment of the Court he says:

"We cannot properly grant the *habeas corpus* to bring up a prisoner who is under sentence upon a conviction for larceny at the Quarter Sessions; and if we should grant the writ, the sheriff or gaoler would do right to return that the prisoner is in his custody in execution of a sentence upon conviction before the Quarter Sessions, and not bring up the prisoner. If there has been anything wrong in the proceedings below, still there can be no *certiorari* after judgment; the only course is by writ of error."

In *Rex* v. *Martin, supra,* Middleton, J.A., after citing from said judgment as above set out goes on to say as follows (p. 579):

"The law is reviewed with approval in the very elaborate judgment of the Supreme Court in the case of *In re Sproule* (1886), 12 S.C.R. 140.

"All this establishes that, apart from statutory provisions, where any person has been convicted by any Court of competent jurisdiction, the common law writ of *habeas corpus* is not a means by which he can obtain any relief from any miscarriage in the course of the proceedings leading up to his conviction and sentence. He must rely upon such proceedings as

FISHER, J. (In Chambers)

1930

March 19.

REX v. WONG CHEUN BEN

were open to him in former days, by way of error, and in more recent times by way of appeal."

From this statement of the law by Middleton, J.A. it would appear to me that the principle referred to as established is based on the assumption that the applicant for *habeas corpus* has been convicted by a Court of competent jurisdiction. This would also appear from the judgment of Strong, J. in the case of *In re Sproule, supra,* where at pp. 204-5 he says:

"When there has been a conviction for a criminal offence by a superior Court of record having general jurisdiction over that offence the objection that the Court ought not in that particular case to have exercised its jurisdiction or that there was some fatal defect in its proceedings is one conclusively for a Court of error, in other words the judgment of the Court is *res judicata* as to questions of jurisdiction as well as to all other objections. If a Court having no jurisdiction over the offence charged should so far exceed its authority as to entertain a criminal prosecution, there the proceeding, being one beyond its general jurisdiction, is wholly void and the prisoner so illegally dealt with may be entitled to be discharged on a writ of *habeas corpus*. This distinction, may, I think, be well illustrated by a case which I put during the argument, of a recorder's Court or a Court of Quarter Sessions having no jurisdiction either at common law or by statute to try a prisoner for murder, trying and sentencing one on such a charge, for such a proceeding would be beyond the general jurisdiction of the Court."

Judgment

See also judgment of Ritchie, C.J. in same case at p. 197 where he refers with approval to the words of Lord Denman, C.J. in *Brenan's Case* (1847), 10 Q.B. 492 at p. 502; 16 L.J., Q.B. 289, as follows:

"'We think, however, that, the Court having competent jurisdiction to try and punish the offence, and the sentence being unreversed, we cannot assume that it is invalid or not warranted by law, or require the authority of the Court to pass the sentence to be set out, by the gaoler upon the return. We are bound to assume, *prima facie,* that the unreversed sentence of a Court of competent jurisdiction is correct; otherwise we should, in effect, be constituting ourselves a Court of Appeal without power to reverse the judgment.'"

At p. 193 Ritchie, C.J. also says:

"In this case my learned brother has cited numerous authorities to shew that he had the right to go behind the record, but he frankly admits that the cases he has relied on all have reference to the records and proceedings of inferior Courts. He has not been able to find a case of the record of a superior Court contradicted, or its validity impugned, by extrinsic evidence. And I venture humbly, and with all respect, to suggest that the difficulty in this case has arisen from a misapprehension of what can, and what cannot, be done under a writ of *habeas corpus*, but more especially from not duly appreciating the distinction between the validity and force of records of Courts of inferior, and of Courts of superior, jurisdiction, but treating

records of superior and inferior Courts as being of the same force and effect."

It would appear to me from the Criminal Code, R.S.C. 1927, Cap. 36, Secs. 823-4-5-7, that the County Court Judge's Criminal Court, though a Court of Record, is not a superior Court having general jurisdiction over the offence charged but is a Court having limited jurisdiction in which the charge was triable only after all conditions precedent to the exercise of its jurisdiction were fulfilled. See also *Rex* v. *Wong Sack Joe* (1929), 41 B.C. 254. The judgment of the Court in *Rex* v. *Goldberg* (1919) 29 Que. K.B. 47; 33 Can. C.C. 320, is relied upon by the Crown but it is also apparent from the report of this case (see pp. 327 and 329) that such judgment was based upon the assumption that the Court convicting had power to try the accused. In the present case the convicting Court had no jurisdiction to try the accused unless the provisions of said section 827 were complied with. The jurisdiction is not conceded and the applicant seeks to prove a want of jurisdiction *dehors* the record. In this connection, if I may be permitted to do so, I would refer to my own reasons for judgment in the case of *Rex* v. *Gustafson* (1929) [*ante,* p. 58], 3 W.W.R. 209, and authorities there referred to. In my opinion this is also a case where extrinsic evidence is receivable to shew a want of jurisdiction. From the material then before me it becomes apparent that the provisions of said section 827 were not complied with in that the necessary words were not addressed to the accused on his arraignment or election and therefore the said County Court Judge's Criminal Court never acquired jurisdiction to hear the case or convict the accused as the conditions precedent to the exercise of its jurisdiction were not fulfilled. The acquiescence of counsel does not affect the matter: see *Rex* v. *Yeaman* (1924) 33 B.C. 390; (1924), 2 W.W.R. 452 at pp. 453-4; (1924), 2 D.L.R. 1116.

Judgment

I would, therefore, maintain the writ and order the discharge of the prisoner for, considering the fact that the applicant has practically served the full term of imprisonment imposed, I would not make any order for his further detention as was requested by the Crown under section 1120.

Application granted.

COURT OF APPEAL

1930

March 31.

SOLLOWAY, MILLS & CO. v. FRAWLEY

SOLLOWAY, MILLS & CO. LIMITED v. FRAWLEY *ET AL.*

Criminal law—Search warrants—One issued in Alberta for execution in British Columbia—Another issued in British Columbia with relation to a charge in Alberta—Criminal Code, Secs. 629 and 631.

A charge was laid in Calgary, Alberta, against the plaintiffs for unlawful conspiracy to affect the public market price of stocks and shares by fraudulent means and contrary to the provisions of the Criminal Code. A search warrant was issued in Calgary and later backed by a police magistrate in the City of Vancouver for execution in Vancouver and a second search warrant was issued by the same police magistrate in Vancouver in respect of the proceedings in Calgary for execution in Vancouver. An order was made restraining the defendants from entering on the plaintiffs' premises in Vancouver for the purpose of seizing certain books, papers and documents and the defendants' motion to set aside the order was refused.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that both warrants were issued in accordance with the law and can be lawfully executed in this Province.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 19th of March, 1930 (reported, *ante*, p. 513), dismissing a motion to set aside an order made by him on the 3rd of March, 1930, restraining the defendants from entering upon the plaintiff Company's business premises in Vancouver for the purpose of seizing certain documents pursuant to two search warrants, one being issued by a police magistrate at Calgary, Alberta, on the 1st of March, 1930, and later backed by a police magistrate in Vancouver for execution in this Province, the other being issued by a justice of the peace in Vancouver on the 3rd of March, 1930.

Statement

The appeal was argued at Vancouver on the 25th and 26th of March, 1930, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Locke, for appellants: There are five criminal charges pending against the plaintiffs at Calgary and in the affidavit of Frawley a search warrant was issued at Calgary under subsection (2) of section 629 of the Code and backed by a magistrate in Vancouver, a second warrant being issued in

Argument

Vancouver. That the warrant issued in Calgary and backed here is regular see the judgment of Middleton, J. in *Solloway, Mills & Co. Ltd.* v. *Williams* (1930), 38 O.W.N. 29. As to the warrant issued here a justice in British Columbia may issue a warrant under section 629 (*a*): see *Rex* v. *Solloway* (1930), 38 O.W.N. 66. There is no jurisdiction to interfere with the administration of criminal justice by injunction; their proper course is by *certiorari*: see *Mayor, &c. of York* v. *Pilkington* (1742), 2 Atk. 302; *Lord Montague* v. *Dudman* (1751), 2 Ves. Sen. 396; *Kerr* v. *Corporation of Preston* (1876), 6 Ch. D. 463 at p. 467; *Saull* v. *Browne* (1874), 10 Chy. App. 64 at p. 66; *In re Briton Medical and General Life Assurance Association* (1886), 32 Ch. D. 503; *Thorneloe* v. *Skoines* (1873), L.R. 16 Eq. 126; *Carr* v. *Morice, ib.* 125; Kerr on Injunctions, 6th Ed., 629. Argument

J. W. deB. Farris, K.C., for respondents: An aggrieved person may sue an officer of the Crown to restrain a threatened act: see *Nireaha Tamaki* v. *Baker* (1901), 70 L.J., P.C. 66 at p. 72; *Grand Junction Waterworks* v. *Hampton Urban Council* (1898), 67 L.J., Ch. 603; *Hedley* v. *Bates* (1880), 13 Ch. D. 498; *Stannard* v. *Vestry of Saint Giles, Camberwell* (1882), 20 Ch. D. 190. As to the construction of the statute see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 501; Maxwell on Statutes, 7th Ed., 252; *Place* v. *Rawtenstall Corporation* (1916), 86 L.J., K.B. 90; *Brightman and Company (Limited)* v. *Tate* (1919), 35 T.L.R. 209.

Locke, replied.

Cur. adv. vult.

On the 31st of March, 1930, the judgment of the Court was delivered by

MARTIN, J.A.: This is an appeal from an order of MORRISON, C.J.S.C. dismissing the appellants' (defendants') motion to set aside an order made by him on the 3rd of March last restraining the defendants from entering upon the plaintiff Company's business premises in Vancouver for the purpose of seizing certain business books, papers, and documents of the plaintiffs pursuant to the tenor of two distinct search warrants, Judgment

COURT OF APPEAL

1930

March 31.

SOLLOWAY, MILLS & CO. v. FRAWLEY

the first being issued at Calgary, Alberta, on the 1st of March by a police magistrate for that Province, and later duly backed (in Vancouver) for execution in this Province by a police magistrate thereof; and the second being issued in Vancouver on the 3rd of March by the same British Columbia justice of the peace for the whole Province upon application to him for the original exercise of his own powers under section 629 of the Criminal Code, *viz.:*

"629. Any justice who is satisfied by information upon oath in form 1, that there is reasonable ground for believing that there is in any building, receptacle or place,—

"(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed; or,

"(*b*) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or,

"(*c*) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant;

may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be dealt with according to law.

"2. If the building, receptacle, or place in which such thing as aforesaid is reputed to be is in some other county or territorial division, the justice may nevertheless issue his warrant in like form modified according to the circumstances, and such warrant may be executed in such other county or territorial division upon being endorsed by some justice of that county or territorial division, such endorsement to be in form 2A, or to the like effect."

Judgment

Both of the warrants comply with the statutory form and recite that they are issued out of and in respect to the unlawful conspiracy of Isaac William Cannon Solloway "with Harvey M. Mills, Harold Hendrickson, and L. L. Masson, and divers other persons, by . . . . fraudulent means, to affect the public market price of stocks and shares, contrary to the provisions of the Criminal Code of Canada, ...", thus bringing the matter within subsection (*b*) of said section 629, and they conclude with the same direction to enter "into the said premises and to search for the said things and to bring the same before me or some other justice."

It is objected that the said warrants were issued without jurisdiction in the premises; no objection is taken to the

sufficiency of the material upon which they are founded or otherwise, and we are informed by plaintiff's counsel that the claim for damages endorsed on the writ is abandoned, leaving only the claim for an injunction remaining, and by consent of both counsel this appeal is to be regarded as one in which we are requested to give a final judgment in the action.

The two warrants involve different considerations because in backing the first, Alberta, one the British Columbia magistrate acted in a purely ministerial capacity—*Jones* v. *Grace, Rodgers and Norrie* (1889), 17 Ont. 681, 689; whereas in issuing the second he acted judicially—*Hope* v. *Evered* (1886), 16 Cox, C.C. 112; and *Rex* v. *Kehr* (1906), 11 O.L.R. 517. These search warrants are designed, as Frawley's affidavit of 5th March sets out, to obtain evidence in support of criminal charges arising out of gaming in stocks pending in Calgary under the criminal code, and also at common law, against Mills and Solloway personally, and we are informed that since then the accused have been committed for trial.

These proceedings are "ancillary to a prosecution" in their nature, as the Privy Council said in *The King* v. *Townsend* (*No. 4*) (1907), 12 Can. C.C. 509, 520, and hence, bearing in mind that the administration of the criminal law in Canada is a National duty the provisions of the National Criminal Code must be regarded in that light and there is only a slight resemblance between the former very limited scope of search warrants in England when the leading case of *Entick* v. *Carrington* (1765), 19 St. Tri. 1030, was decided (holding that they could only be issued for stolen goods) and the present long list of statutes authorizing their use set out, *e.g.*, in Stone's Justices' Manual, 59th Ed., p. 166, and the contrast in Canada is very marked even between the cases set out in The Criminal Procedure Act, Cap. 174, R.S.C. 1886, and the various provisions of the present Code (section 98 and those in Part XII., *sub. tit.* "Special Procedure and Powers") authorizing their use in ways entirely opposed to common law principles; but which have become necessary to cope with crime. So late as 1860 at least it was held by the Court of Exchequer in *Wyatt* v. *White* (1860), 24 J.P. 197, 242, that the application for a search warrant for stolen goods involved an application for a warrant

Judgment

COURT OF APPEAL

1930

March 31.

SOLLOWAY, MILLS & CO. v. FRAWLEY

to arrest and that the magistrate "would issue as of course a warrant with this double aspect," a procedure differing greatly from his present jurisdiction under section 629, which confers special inquisitorial and precautionary powers unknown to the common law.

In the case of a magistrate who is merely exercising a ministerial duty ancillary, as here, to a charge pending before a magistrate in another part of Canada it is difficult to apprehend that Parliament had any intention of restricting the use of such magisterial powers to the arbitrary political and geographical limits of Provinces and Territories which are constantly changing in the history of our country; the former North-West Territories have largely become Provinces and there is also the Yukon Territory and the present great North-West Territories to which the Code also applies by section 9 thereof, as well as to the Provinces, in so far as not inconsistent with their respective special Acts, but otherwise it "shall extend to and be in force throughout Canada." Under such wide and varied geographical circumstances the use of the expression "some other county or territorial division" in section 629 (2) is an appropriate one to include a case where a magistrate of one "territorial division," say the Yukon Territory or Manitoba Province, may issue his warrant with the intention of having it backed by a magistrate of another "territorial division," say the North-West Territories or Alberta Province. The expression "territorial division" alone in the first paragraph of section 629 is appropriately comprehensive to include a "judicial division" consisting of a territory or a Province, as the case may be, and the use of the words "other county or territorial division" in the 2nd section aptly carry out the same idea and expand its application from the old "county" system, well defined and understood and existing in certain older Provinces, to the newer and comprehensive "territorial division" which obviously includes the great political divisions of Territories and Provinces as well as portions thereof, if so defined and restricted, which is strikingly illustrated by the official "Atlas of Canada" published by the Department of Interior, Maps 3 and 4 of which under the title "Canada Territorial Divisions" display all Canada in its Provinces and Territories as we regard

Judgment

them. There is nothing in the definition of "territorial division" in the interpretation section 2 (39) of the Code, having regard to the context, which conflicts with this view; it simply states what that expression does, but not solely, include, *viz.:*

"(39) 'territorial division' includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies."

This supports our prior reasoning and indeed the expression "other judicial division" is a most comprehensive one and would include, *ex facie,* a Province or Territory over all of which a magistrate exercised judicial powers, as do both the magistrates who granted the search warrants herein.

In this opinion we are happily fortified by the decision just delivered (26th of March) of the appellate Second Divisional Court of Ontario in *Rex* v. *Solloway* [38 O.W.N. 66], and after having had an opportunity of considering the reasons of the learned Justices of Appeal from this aspect of the case we are entirely in accord with them that there is nothing to indicate that the intention of section 629 is to restrict the powers of magistrates, who are the officers of the Crown "throughout Canada" (*Re Vancini* (1904), 34 S.C.R. 621; *Rex* v. *LeBell*: *Ex parte Farris* (1910), 39 N.B.R. 468, 475; and *Rex* v. *Wipper* (1904), 34 N.S.R. 202) in the administration of its criminal justice, to those cases alone which they have jurisdiction to try in their own "territorial divisions" whatever the extent thereof may be. Such a narrow curtailment of their national powers, largely depriving them of their distinctive and most useful and essential jurisdiction ancillary to offences committed in other territorial jurisdictions "throughout Canada," is contrary to the spirit, as well as the letter, of the criminal law as a National enactment and would only be justified by clear and precise language, which is wholly wanting, and it is to be observed that when Parliament intended to restrict locally the jurisdiction of a magistrate in issuing such warrants it found no difficulty in making its intention clear as in the special provisions of section 637 respecting unlawful detention of precious metals.

Judgment

It follows that, in our opinion, the first (Alberta) warrant was properly backed by the British Columbia magistrate and therefore may be lawfully executed in this Province.

COURT OF APPEAL

1930

March 31.

SOLLOWAY, MILLS & CO. v. FRAWLEY

Judgment

Turning then to the second (British Columbia) warrant, the granting of which was a judicial act, much of the foregoing reasoning applies thereto, but an additional objection was raised by respondent's counsel, *viz.*, that the first subsection of section 629 requires the things seized to be carried "before the justice issuing the warrant, or some other justice for the same territorial division, to be by him dealt with according to law," and it is submitted that what such dealing with them according to law means is only to be found by resorting to section 631 which provides that:

"631. When any such thing is seized and brought before a justice, he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial.

"2. If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise."

It is further submitted that "till the conclusion of the investigation" means one held by the justice himself within his own trial jurisdiction, and not an investigation pending before any other Court of any other Province or Territory of Canada. This submission, however, is really answered by our preceding observations in support of our view that the jurisdiction exercised herein is not a trial one but inquisitorial and ancillary to another trial in which the criminal machinery of Canada is to be regarded as a whole, and not in pieces. And it is further to be observed that it would, *e.g.*, also be dealing with the things seized "according to law" if the justice to whom they were carried were subpœnæd to bring them before some other tribunal in Canada as evidence in support of a charge pending before it; once the things seized were safely in *custodia legis* in the person of the magistrate to whom they were carried no good reason is apparent why they should not be taken to any part of Canada in that safest of custodies in the furtherance of national justice.

Therefore we are of opinion that this second warrant also may lawfully be executed and on that ground also the injunction should be set aside.

This view of the matter renders it unnecessary for us to

COURT OF APPEAL

1930

March 31.

SOLLOWAY, MILLS & CO. v. FRAWLEY

consider the other questions raised, and so we shall only record our ruling, made during the argument, that the making of the *interim* order upon an affidavit not already filed in the registry as ordinarily required by rule 535, but made in an intended action before writ actually issued, is in accordance with the long-established practice in this Province in case of urgency where the registry is closed, which practice is the same as set out in Kerr on Injunctions, 6th Ed., 629.

Judgment

It only remains, pursuant to said consent, to direct that the appeal should be allowed and the action dismissed.

Appeal allowed.

Solicitor for appellants: *C. H. Locke.*

Solicitors for respondents: *Farris, Farris, Stultz & Sloan.*

BLYGH v. SOLLOWAY, MILLS & CO. LIMITED.

MURPHY, J. (In Chambers)

1930

Feb. 17.

COURT OF APPEAL

April 7.

BLYGH v. SOLLOWAY, MILLS & CO. LTD.

Practice—Statement of claim—Demand for particulars—Whether plaintiff first entitled to discovery—Discretion of judge—Interference on appeal.

In an action based upon the alleged improper conduct of the defendant Company, a firm of brokers, in their dealings with the plaintiff as their customer in respect of her stock exchange operations in the shares of certain mining companies, an order was made postponing the defendant's application for further and better particulars of certain paragraphs of the statement of claim until after the defendant had made discovery.

Held, on appeal, affirming the order of MURPHY, J. that in applications of this kind no general rule can be laid down, as each case depends upon its own circumstances and is decided on its own merits, the Court would not therefore be justified in interfering with the exercise of the discretion that the judge below has given effect to by his order.

Russell v. *Stubbs, Limited* (1913), 2 K.B. 200, n. applied.

Statement

APPEAL by defendants from the order of MURPHY, J. of the 17th of February, 1930, adjourning an application heard by him in Chambers at Vancouver on the 10th of February, 1930, for further and better particulars of paragraphs 10 and 11 of the statement of claim until after the plaintiff has had discovery

MURPHY, J. (In Chambers)
1930
Feb. 17.

from the defendants. The facts are set out in the judgment of the learned trial judge.

Sloan, for the application.
Hamilton Read, contra.

COURT OF APPEAL
April 7.

17th Februray, 1930.

BLYGH v. SOLLOWAY, MILLS & CO. LTD.

MURPHY, J.: So far as the application for delivery of particulars of paragraph 11 of the statement of claim before discovery is concerned this case is on all fours with the case of *Leitch* v. *Abbott* (1886), 31 Ch. D. 374. The complaint alleged in said paragraph 11 is not based on the special contract as to giving advice set out in paragraph 3 of the statement of claim. It rests on the allegation that the relationship of principal and agent existed between the parties and that defendants failed to carry out the terms of such agency. It was not suggested in argument that this relationship did not exist. That is the ground for the decision in *Leitch* v. *Abbott, supra,* as I read the case, *i.e.,* that where such relationship exists and a breach thereof is pleaded plaintiff is entitled to discovery concerning such breach and particulars thereof will not be ordered until after such discovery.

MURPHY, J.

As to paragraph 10 the case is somewhat different since that paragraph does plead the special contract as to giving advice set out in paragraph 3. But the setting up of said special contract is merely an additional feature to the relationship of principal and agent previously asserted in the statement of claim which relationship, as I understand the matter, is not denied by defendants. In my opinion on the authority of the *Leitch* case plaintiff is entitled to discovery before being ordered to deliver particulars once the relationship of principal and agent and a breach thereof are asserted—at any rate where that relationship cannot be seriously controverted. It cannot I think be seriously urged that if defendants really did what plaintiff alleges in said paragraph 10 plaintiff would not have a *prima facie* cause of action against them because of the relation of principal and agent existing between them as alleged in other paragraphs of the statement of claim apart altogether from the special contract as to giving advice set out in paragraph 3.

The application is adjourned until after plaintiff has had

discovery. If necessary it may then be spoken to again. Plaintiff is to have costs of attendance in Chambers to oppose this application. Other costs to be reserved until the further hearing or if none such occurs then to be reserved to be dealt with at the trial.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 3rd of April, 1930, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sloan, for appellants: That we are entitled to particulars of paragraphs 10 and 11 of the statement of claim before discovery see *The Great Western Colliery Company* v. *Tucker* (1874), 43 L.J., Ch. 518; *In re Leigh's Estate, Rowcliffe* v. *Leigh* (1877), 6 Ch. D. 256; marginal rule 362; *Parker* v. *Wells* (1881), 18 Ch. D. 477. The decision below was founded on *Leitch* v. *Abbott* (1886), 31 Ch. D. 374. Our submission is, the question of damages should be left until liability is determined: see *Elkin* v. *Clarke* (1873), 21 W.R. 447; *Harnam Singh* v. *Kapoor Singh* (1927), 39 B.C. 485; *Schreiber* v. *Heymann* (1894), 63 L.J., Q.B. 749.

Edith L. Paterson, for respondent: Paragraph 10 of the statement of claim pleads breach of contract and the ordinary duty of an agent to principal. The particulars asked for are largely in the hands of the defendants and not in ours. We are entitled to discovery in order to get the information asked for: see *Millar* v. *Harper* (1888), 38 Ch. D. 110; *Whyte* v. *Ahrens* (1884), 26 Ch. D. 717 at p. 718. In the case of principal and agent they have a *prima facie* right to discovery: see *Sachs* v. *Spielman* (1887), 37 Ch. D. 295; *Waynes Merthyr Company* v. *D. Radford & Co.* (1896), 1 Ch. 29; *B.C. Liquor Co. Ltd.* v. *Consolidated Exporters Corporation Ltd.* (1930), [*ante,* p. 481]; *Alberta Wheat Pool* v. *Nahajowicz* (1930), 1 W.W.R. 483; *Garesche* v. *Garesche* (1896), 4 B.C. 444.

Argument

Sloan, in reply: The case of *B.C. Liquor Co. Ltd* v. *Consolidated Exporters Corporation Ltd.* is distinguishable as there was a fiduciary relationship in that case.

Cur. adv. vult.

MURPHY, J. (In Chambers)

1930

Feb. 17.

COURT OF APPEAL

April 7.

BLYGH v. SOLLOWAY, MILLS & CO. LTD.

7th April, 1930.

MARTIN, J.A. (oral): In this case we are all of opinion that the appeal should be dismissed. It is one from an order postponing the defendant's application for further and better particulars of paragraphs 10 and 11 of the statement of claim until after the defendant has made discovery.

The action is based upon the alleged improper conduct of the defendant Company, a firm of stock-brokers, in their dealings with the plaintiff as their customer in respect of her stock-exchange operations in the shares of certain mining companies, and the allegations, if supported by evidence, will disclose in general a case of fraud very similar to that in *Leitch* v. *Abbott* (1886), 31 Ch.D. 374. In addition to this cause of action, there is a further one set up in paragraph 10 (in addition to the other cause of action also therein alleged) founded upon defendants' negligence to give the plaintiff that proper advice respecting her operations which she affirms they contracted to give, but this cause of action, while in one way distinct from, is so interwoven with the other that the evidence upon both would in practice be difficult to sever.

MARTIN, J.A.

In applications of this kind the rule is properly set out, after reviewing the cases, in the leading books of practice, *i.e.*, the Yearly Practice, 1930, p. 287, and the Annual Practice, 1930, p. 345, *viz.*, that no general rule can be laid down and each case depends upon its own circumstances and will be decided upon its own merits. From very early times that, in effect, has been the practice, not only of the old Divisional Court but also of the old Full Court, as laid down in *Garesche* v. *Garesche* (1896), 4 B.C. 444 at p. 449, decided by Chief Justice DAVIE and Mr. Justice MCCREIGHT, and followed by myself so long ago as 1898 in *Beauchamp* v. *Muirhead*, 6 B.C. 418, wherein I adopted the well-known judgment of Lord Justice Bowen in *Millar* v. *Harper* (1888), 38 Ch. D. 110 at p. 112. Quite recently, on the first day of this term, in the case of the *B.C. Liquor Co. Ltd.* v. *Consolidated Exporters Corporation Ltd.* [*ante*, p. 481], we decided that discovery should be granted before requiring particulars, and though we did in that particular case interfere with the discretion of the learned judge it was because of the

exceptional circumstances and certain peculiarities in the order contrary to the practice from any aspect.

The general rule that we have for so long adopted in the Courts of this Province, as referred to in said cases (and I might also add a judgment to the same effect by the late Chief Justice HUNTER in the *Alaska Packers Association* v. *Spencer* (1902), 9 B.C. 473, and there are other cases which it is unnecessary to mention for I am only shewing the long continuity of our practice) has been to a striking degree fortified by a remarkable decision of the House of Lords in *Russell* v. *Stubbs, Limited* (1913), 2 K.B. 200, in a note appended to the case of *Barham* v. *Huntingfield (Lord) ib.* 193, and in that case the Earl of Halsbury made certain observations which are peculiarly in point and are those which we had in mind when this matter was discussed the other day although we were unable for the moment to put our hand upon the decision. An exceptionally distinguished Bench took part in that case which was one of considerable importance and I shall read the language because it is so short and so much to the point:

MARTIN, J.A.

"My Lords, I am of the same opinion, and I do not want to add anything to what the Lord Chancellor has said beyond this, that what we are dealing with here are questions preliminary to a trial, and I for myself rather deprecate any sort of iron rule which prevents a learned judge doing what he may think to be justice in a particular case by any set of rules which are supposed to have been agreed to. That which is within his discretion and which is essentially a matter applicable to the particular case in hand must be looked to by him. It has been looked to by the very learned judges whose judgment we have before us on this occasion, and I for myself certainly should not think of interfering with the discretion they have exercised."

Those observations were made in a case of the same nature as the present, and after considering the matter very fully, we feel that under our own practice, the same in substance as laid down by the House of Lords, we would not in this case be justified in interfering with the exercise of the discretion that the learned judge below has given effect to by his order.

Our judgment, therefore, is that the appeal be dismissed.

GALLIHER, J.A. (oral): I have nothing to add to what my brother MARTIN has very clearly put forward.

GALLIHER, J.A.

MURPHY, J. (In Chambers)

1930

Feb. 17.

COURT OF APPEAL

April 7.

BLYGH v. SOLLOWAY, MILLS & CO. LTD.

McPHILLIPS J.A. (oral): I am in entire agreement with what my brother MARTIN has said.

Appeal dismissed.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *Hamilton Read & Paterson.*

FISHER, J. (In Chambers)

1930

March 21.

REX v. BRANDOLINI.

REX v. BRANDOLINI.

Criminal law—Sale of intoxicating liquor—Previous conviction—Plea of guilty to subsequent charge—Then for first time charge of previous conviction read to accused—Case stated—R.S.B.C. 1924, Cap. 245, Sec. 89; Cap. 146, Sec. 93.

On a charge under section 93 of the Government Liquor Act where the person accused is also charged with a previous conviction, the magistrate trying the case should first read to the accused only that portion of the information dealing with the subsequent offence and should adjudicate thereon before asking the accused whether he was previously convicted; further he should not read the whole information himself until he has decided as to the innocence or guilt of the accused on the subsequent offence.

Rex v. *Shatford* (1917), 51 N.S.R. 322 distinguished.

Statement

APPEAL by way of case stated from a conviction by J. A. Findlay, Esquire, deputy police magistrate at Vancouver, on a charge of selling intoxicating liquor and that he had been previously convicted for unlawfully keeping intoxicating liquor for sale. The facts are set out in the reasons for judgment. Argued before FISHER, J. in Chambers at Vancouver on the 6th of March, 1930.

Branca, for appellant.
Orr, for the Crown.

21st March, 1930.

Judgment

FISHER, J.: This is a case stated by J. A. Findlay, Esquire, deputy police magistrate for Vancouver, for the opinion of the

Court in pursuance of section 89 of the Summary Convictions Act as follows:

"G. Brandolini appeared before me on the 22nd day of November, A.D. 1929, to answer to the information charging him that he did on the 15th day of November, A.D. 1929, in the City of Vancouver sell intoxicating liquor, contrary to the form in such case made and provided, and further that he the said G. Brandolini of the City of Vancouver was previously convicted at the City of Vancouver by J. A. Findlay, Esquire, deputy police magistrate on the 10th day of October, A.D. 1929, for that the said G. Brandolini at the said City of Vancouver between the 6th day of August, A.D. 1929, and the 31st day of August, A.D. 1929, did unlawfully keep intoxicating liquor for sale.

"The portion of the charge dealing with the subsequent offence, that is, the selling of liquor on the 15th day of November, A.D. 1929, was dealt with by me first and the accused pleaded guilty to the said charge. Then for the first time I caused to be read to the accused that portion of the information containing the following words:

" 'And further that you the said G. Brandolini of the City of Vancouver was previously convicted at the City of Vancouver by J. A. Findlay, Esquire, deputy polic magistrate on the 10th day of October, 1929, for that he the said G. Brandolini at the said City of Vancouver between the 6th day of August, A.D. 1929, and the 31st day of August, A.D. 1929, did unlawfully keep intoxicating liquor for sale.'

"And I then put to the accused the following question:

" 'Were you so convicted?' and the accused by his counsel said 'I have nothing to say on behalf of the accused.' Judgment

"I then proceeded to enquire into the previous conviction and received in evidence the certificate of previous conviction and the further evidence of two police officers identifying the accused in the present charge as being the one mentioned in the certificate of conviction aforesaid, then I found the said G. Brandolini was so previously convicted as charged and sentenced him to six (6) months in the common gaol at Oakalla.

"The question submitted for the opinion of this Honourable Court is, Was I right in only reading to the accused in the first instance the portion of the information dealing with the subsequent offence and making my adjudication thereon before stating to him the particulars of his previous conviction and asking him if he had been so previously convicted?"

The case as stated involves the interpretation of section 93 (*a*) of the Government Liquor Act which reads as follows:

"The proceedings upon any information for an offence against any of the provisions of this Act, in a case where a previous conviction or convictions are charged, shall be as follows:—

"(*a.*) The Justice shall in the first instance enquire concerning such subsequent offence only, and if the accused is found guilty thereof he shall then, and not before, be asked whether he was so previously convicted as alleged in the information, and if he answers that he was so previously convicted he shall be sentenced accordingly; but if he denies that he was

FISHER, J. (In Chambers)

1930

March 21.

REX v. BRANDOLINI

so previously convicted or does not answer such question, the Justice shall then enquire concerning such previous conviction or convictions:"

In endeavouring to interpret the section it seems to me that one should begin by remembering that in such a prosecution two rules are so fundamental to our ideas of a fair trial where one is charged with a second offence that, unless the statute law clearly indicates otherwise, which it does not seem to me to do, it should be assumed that the legislation contemplated that both of these rules should be observed in the procedure to be followed on the trial of a person so charged with an offence alleged to be a second offence and that the accused should have the right to insist upon the observance of these two rules, *viz.:*

(1) That the Court in coming to a conclusion, as to the innocence or guilt of the accused as to the subsequent offence, should not be exposed to any bias that might arise from any knowledge of a previous conviction being alleged. (2) That the accused should know before pleading that he is charged with a second offence or with committing an offence after a previous conviction for which the penalty is more severe.

Judgment

In *Rex* v. *Shatford* (1917), 38 D.L.R. 366, referred to by counsel, it was decided by the Supreme Court of Nova Scotia that:

"On a charge of a second offence under the N.S. Temperance Act, it is proper for the magistrate at the commencement of trial to read over the whole information to the accused although by sec. 44 he is required to enquire in the first instance concerning the subsequent offence and on a finding of guilt thereof 'and not before' enquire concerning the previous conviction."

At pp. 369-70, Harris, J. says:

"The third question raised was that the conviction was bad because the magistrate had at the beginning of the trial read the whole information—including the part which alleged a prior conviction—to the accused and asked him to plead to it, which he had done. Under sec. 44 of the Nova Scotia Temperance Act, where a previous conviction is alleged, it is provided that 'the magistrate shall in the first instance enquire concerning such subsequent offence only, and, if accused is found guilty thereof, he shall then, and not before, enquire concerning such previous conviction or convictions as alleged in the information. In this case the magistrate, after the accused had pleaded to the whole information, proceeded to try the subsequent offence, and, after the accused was found guilty thereof, and not before, he proceeded to enquire concerning the previous conviction. I am of opinion that the reading of the whole information was the proper course and that the provisions of sec. 44 were not thereby violated. What the Act says is that the magistrate shall enquire concerning the subsequent offence

first. This clearly refers to the trial and examination of witnesses and not to the arraignment of the accused. The case of *Faulkner* v. *The King* (1905), 2 K.B. 76, was cited, but there the statute provided that in the first instance the prisoner should be arraigned upon so much only of the indictment as charges the subsequent offence. The accused was arraigned upon the whole indictment, *i.e.*, upon both charges at one sitting of the Court, and the trial was adjourned until the next term, when he was not freshly arraigned, but was given in charge to the jury upon the count charging the subsequent offence only. The conviction was quashed, but the decision turned on the words of the statute, which specifically stated that the offender should be arraigned only for the subsequent offence. The case of *Reg.* v. *Fox* [(1866)], 10 Cox, C.C. 502, turned on the same statute and *Rex* v. *Nurse* [(1904)], 8 Can. C.C. 173, 7 O.L.R. 418, was a case where the magistrate had improperly admitted evidence of the previous conviction before the determination of the defendant's guilt upon the charge of the subsequent offence, thus directly contravening the provisions of the Act. None of these cases applies here, where, as I understand sec. 44, its provisions were not contravened."

At pp. 371-2, Longley, J. says:

"The third ground on which the conviction is sought to be set aside is:—'Because the said justices, on the trial of the said Shalto Shatford, contravened the provisions of sec. 44 of the Nova Scotia Temperance Act by enquiring concerning the previous conviction alleged in the information before enquiring in the first instance concerning the subsequent offence first mentioned in the information:' In other words, the defendant thinks that in the present case the magistrate should not have enquired of him whether he had been guilty of the first offence when arraigning him to answer for the second. The defendant relied upon English cases which are tried by jury, and in which, therefore, it is not proper to ask the prisoner to plead guilty to the two charges, the first and the second, and the Court decided in one case to which he referred that the two being included in the charge, it was impossible to hold the conviction. This is scarcely applicable to the case here which is governed by a statute which contains no provision of a similar character, and I hold in this the party has a perfect right to be advised by the magistrate as to whether he is going to be tried for the offence of a first conviction or of a second conviction for which imprisonment may be the result."

Judgment

If the decision of the Court in *Rex* v. *Shatford, supra,* is to be followed it would mean that the first rule, which has been referred to above as fundamental, is violated but the second rule observed. If the words of our section were exactly the same I would be inclined to follow such decision though, with all due respect, I think it goes too far but, as was stated by MACDONALD, J. in *Rex* v. *Maliska* (1919) 27 B.C. 111 at p. 115 one is impressed with the desirability of decisions, in *quasi*-criminal matters, being consistent throughout Canada in determining the effect of similar statutory provisions.

FISHER, J. (In Chambers)
1930
March 21.
REX v. BRANDOLINI

It seems to me, however, that there is a difference, though it may appear to be slight, between the section of the Nova Scotia Act and our own section which, it will be noted, clearly states that, if the accused is found guilty thereof (*i.e.*, of the subsequent offence) he shall then and not before, be asked, whether he was so previously convicted. As the decision referred to is, therefore, not upon an identical statute I feel that I may come to my own conclusion as to the meaning to be given to our legislation without breach of the rule as to the desirability of uniformity of decision.

Reference has been made by counsel to the judgments in *Rex* v. *Maliska, supra,* where, at pp. 117-8, MACDONALD, C.J.A. says:

"I wish to add this, that my decision does not go to the length of saying that it was improper to include in the information the statement that there had been a previous conviction. It may be proper and necessary to do that. So that in that respect, perhaps, my learned brother MCPHILLIPS and I are not quite in accord. I mention it only that it shall not be understood that I think such a statement is not necessary or proper. It is only necessary to decide here that it is not improper to plead the prior conviction in the information. It is unnecessary to decide more here, and as far as I am concerned I go no further."

Judgment

At p. 120, MCPHILLIPS, J.A. says:

"The only other observation I wish to make is that, with great deference to all contrary opinion, I think it would be highly inconvenient to have to necessarily set out in the information that there was a previous conviction —it might not then be known but be later developed."

Even though the information should include the statement that there has been a previous conviction I understand that the procedure followed in the Court from which the case stated comes is, or can be, such that the magistrate trying the case does not have any knowledge of a previous conviction being alleged until he comes to have to ask the accused if he has been previously convicted. Thus the first rule which I have referred to, as essential to a fair trial, can be observed while it is obvious that its observance is impossible under the procedure apparently approved of by the Court in the *Shatford* case.

As to the other right of the accused, *viz.*, that he should receive notice before pleading that he is charged with a second or subsequent offence, it is apparent that this notice he receives when he is either shewn the original or served with a copy of

FISHER, J. (In Chambers)

1930

March 21.

REX v. BRANDOLINI

the warrant or summons, pursuant to the provisions of the Summary Convictions Act, being chapter 245, R.S.B.C. 1924. Thus it would seem to me as though the rights of the accused in such a prosecution as the one in question herein can only be safeguarded if the procedure adopted by the magistrate in this case continues to be followed and, as I have already suggested, I think the legislation should be interpreted as providing for such procedure unless it is clearly to the contrary. In view of the *Shatford* decision it might seem so at first but upon further consideration of the matter I have come to the conclusion that the section means that the magistrate trying the case should not read to the accused (or himself) the whole information where the information alleges a previous conviction. In my opinion the magistrate in the present case was right in the procedure adopted by him.

Judgment

I would therefore answer the question asked in the affirmative.

Conviction sustained.

REX v. KIZO FURUZAWA.

MACDONALD, J.

1930

March 24.

REX v. KIZO FURUZAWA

Criminal law—Trial—Witnesses absent from Canada—Steamer's crew—Depositions on preliminary hearing—Evidence of absence—Use of on trial—Criminal Code, Sec. 999.

On an application for use on the trial of depositions taken on the preliminary hearing of certain witnesses alleged to have left Vancouver as part of the crew of a Japanese steamer bound for the Orient:—

Held, that as there were names on the crew list similar to the names of the witnesses and in view of the regulations governing the landing of Japanese sailors and other circumstances there was sufficient to shew the identity of said members of the crew with said witnesses and to justify the inference that the witnesses were absent from Canada.

APPLICATION by the Crown under section 999 of the Criminal Code to allow depositions of certain witnesses taken at the preliminary investigation to be used as evidence on the trial. Heard by MACDONALD, J. at Vancouver on the 24th of March, 1930.

Judgment

MACDONALD, J.

1930

March 24.

REX v. KIZO FURUZAWA

A. H. MacNeill, K.C., for the Crown.
Fletcher, for defendant.

MACDONALD, J.: The Crown seeks to apply the provisions of section 999 of the Criminal Code, R.S.C. 1927, Cap. 36, submitting that it has complied with all the essentials contained in that section, as to allowing the depositions of certain witnesses, taken at the preliminary investigation, to be now used as evidence at the trial. As to a trial including a grand jury *vide* Lord Campbell in *Reg.* v. *Clements* (1851), 20 L.J., M.C. 193 at p. 194. Compare *Reg.* v. *Gerrans* (1876), 13 Cox, C.C. 158. I find that the depositions sought to be introduced, purport to be signed by the justice, before whom the same appear to have been taken. There is the further evidence by the stenographer, as to the depositions having been so taken and the evidence of the interpreter, at the preliminary investigation, as to the evidence having been interpreted, so that the accused person had an opportunity of knowing what was being adduced. Then there was the further essential complied with, that the accused was represented by counsel, who was given full opportunity of cross-examining the witnesses and availed himself of that right. The only remaining question for me to decide is as to whether such depositions should be allowed, dependent upon the absence of the witnesses from Canada at this time.

Judgment

Shortly put, the point I have to determine is whether the witnesses left upon the Japanese boat Ryujin Maru on February 1st and have not since returned to Canada. If I find that all these witnesses, whose evidence is sought to be utilized, were on the ship on that date and that such ship cleared from Vancouver for the Orient, then I have not much difficulty in deciding, that they are now absent from Canada, especially in view of the impossibility, without the use of æroplanes, for any of these Japanese witnesses to return in the meantime to Canada. It should, in the words of the statute, be an easy task for me to "reasonably infer" that they are absent from Canada. The decision then turns upon whether or no, as I have already intimated, these witnesses were upon the boat, when it threw off its moorings at Lapointe Pier on the evening of February 1st last. I have no hesitation in so deciding as to the captain, chief

officer and chief engineer, as they were personally known to Rosini, the manager of the local company, agents for the ship, and were seen on board by Rosini immediately before sailing. So I have come to the conclusion as to these three witnesses that their evidence should be allowed as disclosed in the depositions. As to the two firemen and an oil-man, they were not personally known to such manager, nor was any witness called by the Crown who had a personal knowledge of such witnesses. Their names appear on the crew list as arriving in Vancouver, or, putting it another way, names similar to the names borne by the witnesses, whose evidence is sought to be introduced, appeared on such list. Should I accept such similarity of names without any evidence to the contrary, as being sufficient to shew identity of names with identity of persons? *Vide Rex* v. *Batson* (1906), 12 Can. C.C. 62; *Hamber* v. *Roberts* (1849), 7 C.B. 861. I think I am quite justified in so doing, especially, as is intimated in Phipson on Evidence, where the names are not common names. There are cases cited where proof of identity was required in an action, because the name sought to be identified was the name of Jones, but here I find a similarity and as far as I know they may be very uncommon names in Japan. Now, I have to take into account, in coming to a conclusion in the matter of these three witnesses, the question of regulations, also the matter of a Japanese sailor coming into this port, and how he is treated, as far as being allowed off the ship; then the record which is kept by the Japanese Government of their sailors all over the world. Should I not then come to a conclusion that these names apply to these sailors and that they were on that ship? I could only conclude they were not on the ship at time of sailing, by assuming, that an infraction of the law took place on their part. There is a principle, it is true, applied more generally in civil cases, that all things are presumed to be done legally until the contrary be shewn. *Vide* on this point Lindley, J. in *Reg.* v. *Stewart* (1876), 13 Cox, C.C. 296 at p. 297. The ship had its full quota of a crew in sailing except the accused and deceased. So I repeat in order to hold that these three names do not apply to the three witnesses, I would have to assume that three or some of them deserted from the ship and that some other person or persons were sub-

Judgment

MACDONALD, J.

1930

March 24.

REX v. KIZO FURUZAWA

Judgment

stituted, or for some ulterior purpose after the ship was under way in some manner they came back to Canada. I have already remarked that cablegrams passing between Vancouver and Japan would not of themselves be received as evidence, but they shew the efforts on the part of the authorities to reach these witnesses or find their whereabouts. I think it is fair and proper for me to assume that Japanese sailors forming part of the crew of a ship in the latter part of January would still be on that ship at any rate until it reached Japan. That ship is now, according to the evidence of the agent of the shipping company in Vancouver, somewhere in the Orient.

Taking all these matters into consideration and bearing in mind the wording of section 999 that if certain facts are proved then I am only required to reasonably infer the absence, I think I am pursuing a proper course in concluding that these witnesses, including the officers referred to, are now absent from Canada; and that their depositions should be allowed to be read at the trial, under section 999 of the Code.

Application granted.

HOLT v. HOLMES & WILSON LIMITED AND THOMSON.

MCDONALD, J.

1930

March 24.

HOLT v. HOLMES & WILSON LTD.

Negligence—Motor-truck—One defendant successful, the other unsuccessful —Costs—Marginal rule 976.

Where a plaintiff sues two defendants and succeeds against one but not the other, there is no jurisdiction in the Court to order that there be added to his costs against the unsuccessful defendant the costs which he has to pay to the successful defendant although he was justified in suing both.

Green v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75 applied.

ACTION for damages for negligence. The plaintiff succeeded against one defendant but the action was dismissed as against the other defendant. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 20th of March, 1930.

Statement

Ghent Davis, for plaintiff.
Shakespeare, for defendants.

24th March, 1930.

MCDONALD, J.: The plaintiff, as executrix of the estate of her deceased husband, sued on behalf of herself and her two daughters for damages suffered by reason of the death of her husband caused, as is alleged, by the negligence of the defendants. The deceased came to his death by reason of being run over by a motor-truck, the property of the defendant Thomson, while it was being driven by an employee of the defendant Company. Various particulars of negligence were set up: the two contentions which were pressed being, that the driver of the car did not keep a proper look-out and that the truck was improperly equipped and dangerous to the knowledge of the defendants in that the frame of the windshield obstructed the vision of the driver. At the close of the plaintiff's case counsel for the defendant Thomson moved for a non-suit which motion succeeded for the reason that I thought the case fell within the decision in *Caledonian Railway Co.* v. *Mulholland or Warwick*

Judgment

MCDONALD, J.

1930

March 24.

HOLT v. HOLMES & WILSON LTD.

(1898), A.C. 216, the facts being that the defendant Thomson, being the owner of the truck, had made an arrangement whereby the defendant Company should have the use of it upon certain terms; it being admitted that while so being used the truck was in the sole possession and within the sole control of the defendant Company.

The case proceeded against the defendant Company and in answer to a question the jury found that the defendant Company was guilty of negligence consisting of "lack of visibility from the driver's seat and car not being adequately equipped with fenders and bumper, the body overhang being unprotected." Damages are assessed at $5,000 for which amount the plaintiff recovers judgment against the defendant Company with costs.

The plaintiff now claims to be entitled to add to her costs which she recovers against the unsuccessful defendant those costs which she is obliged to pay to the successful defendant and relies upon the decision of the Court of Appeal in *Besterman* v. *British Motor Cab Company, Limited* (1914), 3 K.B. 181. If our rule of practice were in the same terms as that in force in England when that decision was given I should feel obliged to hold that the facts of this case are so similar to the facts therein that the order contended for by the plaintiff ought to be made. My difficulty, however, is that our rule is entirely different from the English rule. The English rule, Order LXV., r. 1, provides as follows:

Judgment

"Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court, . . . shall be in the discretion of the Court or judge:"

It was held by the Court of Appeal in a considered judgment that under that rule and section 5 of the Judicature Act (which by the way is not in force in British Columbia) there was a discretion in the Court to say whether or not under the particular circumstances of the case the plaintiff, being in doubt as to which defendant he ought to sue, was justified in suing both defendants. If it be held that he was so justified then he would be entitled to add to his costs against the unsuccessful defendant those costs which he is obliged to pay to the successful defendant.

Our corresponding rule, Order LXV., r. 1, reads as follows: "Subject to the provisions of these Rules, the costs of and incident to all proceedings in the Court . . . shall follow the event, unless the Court or judge shall, for good cause, otherwise order:"

Our Court, therefore, does not possess the wide discretion as to costs which is possessed by the Court in England. In 1915 when our rule then in force was in identical terms with its present form, the late Mr. Justice CLEMENT considered this question in *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75. Though the latter case was decided over a year after the *Besterman* case no reference is made to the *Besterman* case although the learned judge wrote a considered judgment. The reason I think is that by reason of the terms of our rule the English decisions are inapplicable to our practice. Mr. Justice CLEMENT held that he had no jurisdiction to make the order contended for by the plaintiff in the *Green* case and I think I am bound to reach a like conclusion in the present case.

Judgment

In the result, therefore, judgment will be entered against the defendant Company for $5,000 with costs and the action will be dismissed as against the defendant Thomson with costs.

Order accordingly.

MACDONALD, J.

1930

March 27.

REX v. KIZO FURUZAWA. (No. 2).

Criminal law—Offence committed by foreigner—On ship moored at pier in Burrard Inlet—Leave of Governor-General—Criminal Code, Sec. 591—Applicability.

REX v. FURUZAWA

Section 591 of the Criminal Code does not apply to an offence committed on a ship moored at Lapointe Pier in Burrard Inlet.

Even where the section applies, the leave of the Governor-General is effective if obtained before the committal of the accused for trial.

Statement

APPLICATION to withdraw case from the jury on the ground that the Crown had not complied with the provisions of section 591 of the Criminal Code. Heard by MACDONALD, J. at Vancouver on the 27th of March, 1930.

A. H. MacNeill, K.C., for the Crown.
Fletcher, for defendant.

Judgment

MACDONALD, J.: I think it well to now dispose of the application made by counsel for the accused, to withdraw the case from the jury, on the ground that the Crown has not complied with the provisions of section 591 of the Criminal Code, R.S.C. 1927, Cap. 36, which reads as follows:

"Proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within the jurisdiction of the Admiralty of England, shall not be instituted in any Court in Canada except with the leave of the Governor-General and on his certificate that it is expedient that such proceedings should be instituted."

Before dealing with the point, as to whether the section has been complied with or not, I wish to say a word or two with respect to the applicability of the section to the facts here presented. It is only intended to cover cases where the trial is being held of a person who is not a subject of His Majesty, and the offence is alleged to have occurred within the jurisdiction of the Admiralty of England. This offence is stated to have taken place, and beyond doubt did take place, on a Japanese ship while it was moored at Lapointe Pier in Burrard Inlet, and within the County of Vancouver. It was decided in the

case of *Rex* v. *Schwab* (1907), 12 Can. C.C. 539, that an offence committed within the Halifax Harbour did not come within the provisions of section 591. I have perused that case, and also the decisions therein referred to, and feel quite satisfied that, if I were required to do so, I would hold that the jurisdiction referred to in section 591 does not extend to this case. In other words, that an offence, even though it be by a person not a British subject on a boat which is not under the British flag, in our harbour, can be prosecuted by the authorities, irrespective of the said section 591, on the ground that such harbour is within the County of Vancouver. The same point was taken in the case of *Rex* v. *Johanson and Lewis,* 31 B.C. 211; (1922), 2 W.W.R. 1105. In that case the master and owner of a boat and the engineer were convicted of resisting an officer in the execution of his duty, outside Burrard Inlet in the Straits of Georgia. There was an appeal in the form of a case stated from His Honour Judge CAYLEY and, the matter coming before the Court of Appeal, the Chief Justice considered the question as to whether or no the Straits of Georgia, at the place where the resistance took place, came within the provisions of section 591 of the Criminal Code; and, if I may be permitted to say so, with some doubt, he came to the conclusion that the section was applicable. He referred to Hall's International Law, 7th Ed., pp. 158-9, as giving a definition of what might be considered the open sea, as distinguished from property within the jurisdiction of the State or County:

Judgment

"It seems to be generally thought that straits are subject to the same rule as the open sea; so that when they are more than six miles wide the space in the centre which lies outside the limit of a marine league is free, and that when they are less than six miles wide they are wholly within the territory of the state or states to which their shores belong."

Applying that definition to the facts here present, Burrard Inlet from Lapointe Pier to North Vancouver does not come within the six miles referred to. There is an old rule applied, that when you are within inland waters, forming an arm of the sea, and can see from side to side, that such body of water is considered to be within the limits of the county. The Chief Justice decided that the proceedings had not been properly instituted, as the place where the occurrence took place was within the juris-

MACDONALD, J.

1930

March 27.

REX v. FURUZAWA

diction referred to in the section of the Code. He held that the "leave" of the Governor-General was sufficient if it were obtained before the commitment for trial of the accused person. Here the written leave and requisite certificate were admittedly, according to date, and in fact, obtained before the committal took place.

Reverting again to this question of jurisdiction, I have taken more time, perhaps, than the circumstances might seem to warrant, but it is an important matter. Mr. Justice MARTIN in his judgment, dealt with the matter, not upon the ground to which I have referred, but as far as the question of jurisdiction is concerned very carefully reserved his opinion, saying as follows, after he had decided that the conviction was unwarranted (p. 219):

Judgment

"Such being my opinion, it is not necessary to give an answer to the first question as to the jurisdiction of the Admiralty under section 591, and the more I reflect upon it, the more am I inclined not to express an opinion thereupon till the difficult and important question it raises is more fully debated."

In this connection, he added that the authorities cited were of little, if any, assistance, as they were cases "wherein the matters complained of admittedly occurred within ports or harbours within the body of a county, or inland bays or gulfs *inter fauces terræ.*" Then Mr. Justice MCPHILLIPS, in a dissenting judgment, cited a number of cases as to jurisdiction and held that upon the facts the offence was committed in interior waters, off the mouth of Vancouver Harbour, and not off the coast of British Columbia. So considering that case, coupled with the ones to which I have referred, I have come to the conclusion that the section is not applicable. Even if the section were applicable, the decision of the Chief Justice in the *Johanson* case, *supra,* is effective, and as the consent was obtained before committal took place, the trial in this respect is regular.

Application dismissed.

AMERICAN SEAMLESS TUBE CORPORATION *ET AL.* v. GOWARD.

MURPHY, J.

1930

April 10.

AMERICAN SEAMLESS TUBE CORPORATION *v.* GOWARD

Company law—Shareholder in California company—Agreement to purchase treasury shares—Shares of another person registered in his name—Discovered after action brought by creditors of company—Repudiation—California law—Whether applicable in British Columbia—Estoppel.

Through an agent for a California company in Victoria, the defendant applied for shares in the company. He understood he was to receive treasury shares but the shares he received were shares owned by another person. The defendant's name was entered on the company's register of shareholders to his knowledge and he received dividends and contributed funds to assist in rehabilitating the company but it was not until after this action was brought that he learned that he had not received treasury shares. He then repudiated ownership. In the action the creditors of the company sought in accordance with the law of California to fix the defendant with a liability for its debts in proportion to the amount of his shares.

Held, that in the case of an *ex juris* defendant sought to be made liable to creditors under the California law, the Court will first enquire whether or not such defendant must be taken by implied authority to have contracted with the plaintiffs (creditors of the corporation) to be liable individually for a portion of the debt due them. This must be decided according to the law of British Columbia and under it the defendant never became a shareholder as no contract making him such ever came into existence, and his conduct did not estop him from denying that he was a shareholder. Moreover, the same result would follow even if the case were decided according to the law of California.

ACTION in which creditors of the plaintiff Company (California) sought to fix the defendant, an alleged shareholder therein, with liability according to the law of California for a proportionate part of its debts. An agent of the plaintiff Company was sent to Victoria to sell shares and through him the defendant sent the Company an application for shares. After this action was commenced the defendant discovered that the shares received by him, and in respect to which he was registered as a shareholder, were not treasury shares but had been owned by one Ahlburg. Tried by MURPHY, J. at Victoria on the 10th and 11th of December, 1929. Statement

Maclean, K.C., for plaintiffs.

J. W. de B. Farris, K.C., and *R. M. Macdonald*, for defendant.

MURPHY, J.

1930

April 10.

AMERICAN SEAMLESS TUBE CORPORATION v. GOWARD

10th April, 1930.

MURPHY, J.: I find that defendant intended to purchase from the Ahlburg Gasoline Corporation, a company incorporated under the laws of California (hereinafter called the Corporation), a certain number of its shares owned by it in its own right, *i.e.*, treasury shares. What he in fact received were not treasury shares but shares in the Corporation owned by one Ahlburg. The question to be decided is whether in these circumstances he is a shareholder in the Corporation so as to render him liable to the creditors of the Corporation for a proportion of the debts of the Corporation dependent upon the amount of his share holdings as enacted by the law of California.

It is argued on behalf of plaintiffs that the case must be decided solely on the law of California and *Allen* v. *Standard Trusts Co.* (1919), 3 W.W.R. 974, affirmed on appeal (1920), 3 W.W.R. 990, is cited as authority. In that case, however, no question arose as to whether or not defendant was a shareholder. He had applied for shares in a Minnesota Corporation and had received what he applied for.

Judgment

Risdon Iron and Locomotive Works v. *Furness* (1906), 1 K.B. 49 shews that in the case of an *ex juris* defendant sought to be made liable to creditors under the California law, British Courts will first enquire whether or not such defendant "must be taken by implied authority to have contracted with the plaintiffs [California creditors of the Corporation] to be liable individually for a portion of the debt due to them." The case further shews that such enquiry will be made without reference to the California law. It was there held despite the express provision to the contrary in the California constitution that a shareholder in a British limited liability company was not liable to California creditors although the British company was incorporated for the purpose of, *inter alia*, carrying on business in California and did in fact do so. In my opinion, therefore, this Court must determine according to the law of British Columbia whether or not the defendant herein must be taken by implied authority to have contracted with plaintiffs to pay the whole or a part of their claim. On the facts in evidence the only entity to which such implied authority could have been given is

the Corporation and the only reason for holding that such implied authority was in fact given to the Corporation is the allegation that defendant is a shareholder in the Corporation.

In my view, applying the law of British Columbia to the facts as found, he never was a shareholder in the Corporation because no contract making him such ever came into existence. I leave the question of estoppel for discussion hereafter and merely note in passing that estoppel even if made out would not make defendant a shareholder. It would operate only to prevent him from denying in certain specific instances that he was a shareholder.

"There is no difference, [in law] . . . between a contract to take shares and any other contract":
Nicol's Case (1885), 29 Ch. D. 421, and see *The Magog Textile & Print Co.* v. *Price* (1887), 14 S.C.R. 664 at p. 671; *Beck's Case* (1874), 43 L.J., Ch. 531; *In re Railway Time-tables Publishing Co.; Ex parte Sandys* (1889), 58 L.J., Ch. 504 at p. 510; *McCraken* v. *McIntyre* (1877), 1 S.C.R. 479 and *Re Lake Ontario Navigation Co.* (1909), 20 O.L.R. 191.

If accordingly the ordinary principles of contract are applied to the facts as found then no contract whereby defendant became a shareholder ever came into existence. He did not get what he bargained for. He did not receive what he did get from the only legal entity with whom he intended to contract. Therefore no contract binding him resulted. *Raffles* v. *Wickelhaus* (1864), 2 H. & C. 906; *Boulton* v. *Jones* (1857), 2 H. & N. 564; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459.

Judgment

In so far, therefore, as it is sought to fix liability on defendant on the ground that he is a shareholder in the Corporation by contract I conclude the action fails. But it is contended that defendant is estopped from denying that he is a shareholder in the Corporation because of his conduct.

Defendant knew he was on the Corporation's register as a shareholder. He received dividends. When the Corporation got into difficulties he with others sent an agent to assist in rehabilitating it if possible. This agent was provided with some funds to be used for that purpose. Defendant contributed a portion of these funds. This agent did in fact give such assistance as he could to rehabilitate the Corporation and passed on

MURPHY, J.

1930

April 10.

AMERICAN SEAMLESS TUBE CORPORATION v. GOWARD

the funds with which he had been provided to the proper California authorities to be used for that purpose. These are the facts relied upon as constituting the estoppel. Defendant only became aware of the true facts in reference to the shares he was supposed to have acquired after the commencement of these proceedings. Thereupon he immediately repudiated ownership. If the law of British Columbia is to be applied plaintiffs' contention based on estoppel must I think also fail.

No evidence was adduced that plaintiffs gave credit to the Corporation or in any way acted to their detriment because they were induced by the acts of defendant to believe he was a shareholder of the Corporation. Under such circumstances estoppel would not arise under British Columbia law. Halsbury's Laws of England, Vol. 13, p. 383, sec. 541, and authorities there cited.

For these reasons I would dismiss the action. But if I am in error and if as the plaintiffs contend the case must be decided according to the law of California only, in my opinion, on the evidence before me, the same result would follow.

Judgment

According to the evidence entry on the register that a person is a shareholder is only *prima facie* evidence of the fact. Richards, p. 31, citing *Shean* v. *Cook* (1919), 179 Pac. 185. The liability herein sued upon is by California law regarded as contractual.

"By force of the statute if the corporation incurs a debt within the jurisdiction the stockholder is a party to and joins in the contract in the proportion of his shares": California Jurisprudence, p. 992, sec. 375. But this is by reason of his being a stockholder. If he is not a stockholder then no such liability arises and on the evidence in the case at Bar, leaving aside for the moment the question of estoppel, he can only be a stockholder as the result of a contract made by him. If he bargains for treasury shares and does not get them then he cannot be compelled to accept from others any stock that has been subscribed for and issued to others as fulfilment of his contract. California Jurisprudence, p. 763, sec. 169, and Montgomery's evidence.

It is true that the case relied upon is one to recover money paid on stock subscription and not a creditor's action such as the

one at Bar. Plaintiffs' counsel therefore argues that it does not apply. But amongst other points therein decided the case does determine that according to California law a contract for treasury shares cannot be satisfied by offering shares in the same Corporation which are not treasury shares. That point is in issue here if California law is to govern and if I am right in holding that under that law a stockholder's liability is contractual and consequently dependent on the agency of the corporation which agency in turn depends on whether he is a stockholder or not.

Further, on the proven facts, the defendant could not under uncontroverted California law become the purchaser of shares direct from the Corporation, *i.e.*, treasury shares which is the only transaction he ever intended to enter into, because it is admitted by plaintiffs that no shares were issued to him by the Corporation under the permit which it is a condition precedent under California law the Corporation must have and with the terms of which it must comply to clothe it with capacity to sell treasury shares to anyone.

Any dealing with its shares by the Corporation in contravention of those stipulations is void (Montgomery's evidence and cases cited by him).

Judgment

I would therefore hold that defendant on the proven facts never was a stockholder in the Corporation under the law of California because no contract ever came into existence constituting him such.

It is further to be noted that none of the experts in California law who gave testimony could cite a case in which a stockholder has been held liable in that jurisdiction in a creditor's action where it was proven that he was a stockholder under a contract voidable for fraud.

As stated, my view is that here there never was a contract but if this is erroneous then the action would still fail, if it is to be decided solely on California law since there is no proof on the record that it would succeed in the California Courts. Curious results would follow if the liability contended for existed despite fraud. Not only would the defrauded defendant have his liability increased because of the fraud, not only would the

MURPHY, J.

1930

April 10.

AMERICAN SEAMLESS TUBE CORPORATION v. GOWARD

person guilty of fraud be relieved of any liability imposed upon him because of the ownership of the shares he fraudulently disposed of after the date of such disposal but the guilty party could in some cases actually sue the defrauded defendant to recover money which had been paid to him by said defendant. The case at Bar is an instance. Ahlburg sold defendant his own shares when he knew (or in any event he knows now) that defendant intended to purchase treasury shares. The evidence is that Ahlburg handed over defendant's money to the Corporation in such a way as to make him (Ahlburg) a creditor of the Company for the amount paid by defendant for Ahlburg's shares. Under the law as contended for by plaintiffs it would seem that the defendant would have no defence if Ahlburg now brought a creditor's action against him to recover this money. However, I need not pursue the matter further because of the views already expressed.

The only remaining point is that of estoppel. Plaintiff's counsel did not rely on this as requiring to be dealt with on the basis of California law. In fact his position was that estoppel is part of the law of evidence and accordingly only British Columbia law is applicable. However that may be the evidence discloses that under California law estoppel could not arise in this case unless defendant knew all the facts about the shares standing in his name and unless the creditor knew of his existence as a shareholder and gave credit relying on that fact (see Montgomery's evidence).

Judgment

Plaintiff's counsel cited the following language from *Shean* v. *Cook, supra,* at p. 188:

> "'The test of liability, therefore, seems to be the fact of being a record shareholder, knowledge of the fact, and some act in approval or ratification of it.'"

In that case, however, an unauthorized contract for shares had been made on defendant's behalf. The language cited if the facts to which it is directed are kept in mind merely sets out what tests are to be regarded as conclusive of the ratification of an unauthorized contract.

The Court was not dealing with the question of a void contract. The action is dismissed with costs.

Action dismissed.

VANCOUVER MILLING & GRAIN CO. LTD. v. PERKINS AND McLEOD.

HOWAY, CO. J.

1930

April 23.

VANCOUVER MILLING & GRAIN CO. LTD. v. PERKINS AND McLEOD

Principal and agent—Action for goods sold and delivered—Commenced against agent—Principal subsequently added as party defendant—Liability of principal—Evidence—Election.

P., acting as an agent, purchased food for M.'s poultry farm from the plaintiff with whom he kept a running account upon which from time to time he made payments. The plaintiff brought action against P. for the balance of the account but before entering judgment obtained an order adding M. as a party defendant.

Held, that the agent not having been sued on to judgment, the plaintiff may pursue the principal. As, however, he cannot get judgment against both, he may, upon filing discontinuance against P., obtain judgment against M. for the amount claimed.

ACTION to recover balance due for goods sold and delivered. The defendant McLeod had a poultry farm and from the year 1926, until July, 1928, when this action was brought, the defendant Perkins as Mrs. McLeod's agent purchased feed from the plaintiff. Payments were made on account from time to time and when action was commenced the account stood at $698. The local manager of the plaintiff Company visited the farm in July, 1928, with a view to obtaining security for the amount owing and he then learned that Perkins was merely acting as agent for Mrs. McLeod. The action was first brought against Perkins only, but shortly after, by order of HOWAY, Co. J., Mrs. McLeod was added as a party defendant. Perkins did not enter a dispute note but judgment was not entered against him. Mrs. McLeod defended the action. She admitted that Perkins was acting as her agent until March, 1928, when it was alleged she sold the poultry to Perkins. At that time there was nothing due to the plaintiff. After March, 1928, Perkins purchased feed from the plaintiff to the amount of $698, but, Mrs. McLeod alleged for his own poultry, and on his own credit. The trial judge held that no such sale had been made and that the poultry were at all times the property of McLeod. It was held on the trial that the plaintiff knew in July, 1928, that Perkins was acting as agent for Mrs. McLeod, but counsel were given an opportunity to submit arguments as to whether or not the plaintiff by its conduct had elected to look to Perkins only for

Statement

HOWAY, CO. J.

1930

April 23.

VANCOUVER MILLING & GRAIN CO. LTD. v. PERKINS AND MCLEOD

the balance due on the account. Tried by HOWAY, Co. J. at New Westminster on the 5th of April, 1930.

Kent, for plaintiff: The position of the defendants was not fully disclosed until Mrs. McLeod was examined for discovery after she had been made a party defendant. As to election see *Calder* v. *Dobell* (1871), L.R. 6 C.P. 486. Starting action against Perkins only is not conclusive proof of election: see *Curtis* v. *Williamson* (1874), L.R. 10 Q.B. 57; *Priestley* v. *Fernie* (1865), 34 L.J., Ex. 172; *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 at p. 514; *Morel Brothers & Co. Limited* v. *Westmorland (Earl of)* (1904), A.C. 11 at p. 14; *Partington* v. *Hawthorne* (1888), 52 J.P. 807; *Paterson* v. *Gandasequi* (1812), 15 East 62; *Campbell* v. *Hicks* (1858), 28 L.J., Ex. 70; *Davison* v. *Donaldson* (1882), 9 Q.B.D. 623; *Heald* v. *Kenworthy* (1855), 10 Ex. 739; *Smethurst* v. *Mitchell* (1859), 28 L.J., Q.B. 241. The question of election should have been raised in the dispute note and the onus is on the defendant.

Argument

Petapiece, for defendant McLeod: When the plaintiff's manager went to the defendant's farm and demanded security he knew of the relations between the parties and a year later started action against Perkins alone. This led the defendant McLeod to believe they looked to Perkins for payment and she then allowed Perkins to sell the poultry. Her position was thereby prejudiced: see *Wyatt* v. *The Marquis of Hertford* (1802), 3 East 147; *French* v. *Howie* (1906), 2 K.B. 674.

23rd April, 1930.

HOWAY, Co. J.: At the trial I disposed of the question of fact and found that at the time when this account was incurred the defendant McLeod was the owner of the poultry for which the feed was bought by her agent Perkins. I found that before action was brought against Perkins, the plaintiff knew that the defendant McLeod, later added as a defendant by order, was such principal, and I left for argument the question whether the plaintiff's conduct constituted an election.

Judgment

There is no evidence of any prejudice to the defendant McLeod from the plaintiff's conduct. The sale of the chickens as suggested ground fails entirely.

HOWAY, CO. J.

1930

April 23.

VANCOUVER MILLING & GRAIN CO. LTD. v. PERKINS AND MCLEOD

Upon full consideration, I am satisfied that the principle laid down, or rather, clearly enunciated by Lord Cairns in *Kendall* v. *Hamilton* (1879), 4 App. Cas. 504 at p. 514, and by Bramwell, B. in *Priestley* v. *Fernie* (1865), 34 L.J., Ex. 172, applies.

The agent not having been sued on to judgment, the plaintiff may pursue the principal; but, of course, as there pointed out, cannot have judgment against both.

Upon the plaintiff filing discontinuance as against the defendant Perkins, it will be entitled to judgment against the defendant McLeod for $698 the amount sued for herein, and costs.

Judgment

No costs to the defendant Perkins, whose evidence and that of his co-defendant was, in my opinion, quite false, as I stated at the trial.

Judgment in above terms against defendant McLeod for $698 and costs.

Judgment for plaintiff.

REX v. ROWAN.

MURPHY, J. (In Chambers)

1930

April 29.

REX v. ROWAN

Intoxicating liquors—Unlawful sale—Previous conviction—Procedure as to enquiry into—Evidence by affidavit—Admissibility—Habeas corpus—R.S.B.C. 1924, Cap. 146, Sec. 93 (a).

Section 93 (*a*) of the Government Liquor Act is peremptory as to the stage of proceedings at which the enquiry as to former offences should be made, and where the magistrate had improperly admitted evidence of a previous conviction before the determination of the defendant's guilt upon the charge for which he was being tried, the conviction was quashed.

Rex v. *Nurse* (1904), 7 O.L.R. 418 applied.

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by MURPHY, J. in Chambers at Victoria on the 25th of April, 1930.

Statement

Stuart Henderson, for the application.
Moresby, K.C., for the Crown.

29th April, 1930.

MURPHY, J.: Application for *habeas corpus*.

Applicant has been sentenced to gaol for six months for unlawfully selling liquor, he having been previously convicted

Judgment

MURPHY, J. (In Chambers)

1930

April 29.

REX v. ROWAN

of a similar offence. He files an affidavit that before the magistrate found him guilty, the magistrate enquired whether or not he was the same person who was previously convicted of a similar offence. An affidavit to the same effect is made by his wife. Affidavits in reply are filed by the magistrate and the stenographer who took down the evidence at the trial. If these affidavits directly contradicted the affidavits of applicant and his wife I would unhesitatingly accept them and dismiss this application. But they do not. It is quite compatible with their correctness that what applicant swears occurred at the trial did actually occur, but was inadvertently not recorded by the stenographer. The transcript as verified in fact points to this conclusion. This being so and the liberty of the subject being involved I feel bound to accept applicant's account as correct. It is not disputed that affidavits are admissible in proof of such an allegation as it goes to the root of the jurisdiction of the magistrate.

Rex v. *Nurse* (1904), 8 Can. C.C. 173, on an identically worded statute as the B.C. Liquor Act is a direct authority that the provisions thereof are mandatory and that if the magistrate acts in contravention of them the conviction must be quashed. It is argued that this case is overruled by *Rex* v. *Coote* (1910), 22 O.L.R. 269, but a careful perusal of the judgments will I think shew that this is not so. In the interval between the two decisions the Ontario Act had been amended by striking out the words "and not before." Because of this the *Nurse* decision was held in the *Coote* case not to be in point. These words are, however, still in our Act.

Judgment

In the judgment in the *Coote* case it is stated that on a statute so worded there had existed a difference of judicial opinion as to whether or not departure therefrom was fatal to a conviction and this is given as a probable cause for the amendment. A perusal of the cases cited to shew this situation leads me to be of the same opinion as that expressed by McGee, J. in the *Coote* case that the weight of authority as of argument is in favour of holding that the section is peremptory as to the stage of proceedings at which the enquiry as to former offences should be made. In any event where there is doubt on the authorities as to what should be the true construction such doubt in my opinion should be resolved in favour of the liberty of the subject. The conviction is quashed. Protection granted to magistrate.

Conviction quashed.

APPENDIX.

Case reported in this volume appealed to the Supreme Court of Canada:

DOBIE v. CANADIAN PACIFIC RAILWAY COMPANY (p. 30).—Reversed by Supreme Court of Canada, 11th June, 1930. See (1930), 3 D.L.R. 856.

Case reported in 41 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

CANADA MORNING NEWS COMPANY LIMITED v. THOMPSON *et al.* (p. 24).—Reversed by Supreme Court of Canada, 4th February, 1930. See (1930), S.C.R. 338; (1930), 2 D.L.R. 833.

INDEX.

stated—R.S.B.C. 1924, Cap. 245, Sec. 89; Cap. 146, Sec. 93.] On a charge under section 93 of the Government Liquor Act where the person accused is also charged with a previous conviction, the magistrate trying the case should first read to the accused only that portion of the information dealing with the subsequent offence and should adjudicate thereon before asking the accused whether he was previously convicted; further he should not read the whole information himself until he has decided as to the innocence or guilt of the accused on the subsequent offence. *Rex* v. *Shatford* (1917), 51 N.S.R. 322 distinguished. REX v. BRANDOLINI. - - - - - - **536**

12.——*Sale of opium—Conviction—First offence—Maximum penalty imposed—Revision of sentence—Powers of Court of Appeal.*] The accused was convicted of selling a tin of opium, and was sentenced to the maximum penalty of seven years' imprisonment and fined $1,000. She was a Chinese woman of over 50 years of age and had never been charged of any offence before. On appeal from sentence:—*Held*, affirming the decision of MCDONALD, J. (MACDONALD, C.J.B.C. dissenting), that having regard to the serious nature of this offence and the calamity to the public welfare that this traffic causes, the justice of this case does not require the Court to interfere with the sentence. REX v. NIP GAR *alias* JANG SHEE. - **327**

13.——*Search warrants—One issued in one Province for execution in another—A second issued in aid of prosecution in another Province — Territorial division — Criminal Code, Sec. 629.*] The plaintiffs were charged in the Province of Alberta with conspiracy to defraud. Acting under two search warrants, one issued in Alberta and backed for execution in British Columbia by a local magistrate, the other based on the same charge but issued by a justice of the peace in Vancouver, the defendants under instructions from the Attorney-General of Alberta, threatened to take into their custody certain books and documents of the plaintiffs alleged to be in possession of the plaintiffs' employees in Vancouver, intending to take them to the Province of Alberta. The plaintiffs obtained an *interim* injunction restraining the defendants from executing the warrants. On an application to dissolve the injunction:—*Held*, that where there are any provisions in the Code dealing with search warrants they appear to be directed to the arrest of persons and to search for and seizure of the *res* the subject-matter of the charge.

Here the authorities in Alberta are endeavouring to secure evidence to support the charge of conspiracy and to search in another Province and take documents out of the jurisdiction that may have no bearing on the charge. It is to be expected that if there be such a sanction it would be given in the most plain and unambiguous and specific manner. The Code does not go that far. The jurisdiction of the Courts of the Province is limited to the Province and the justice's jurisdiction is limited to restricted territorial divisions within the Province. The warrant issued in Alberta and backed in Vancouver is invalid. The warrant issued by the local justice is based upon information in respect of a crime alleged to have been committed in Alberta and directs the property seized to be brought before the justice issuing the warrant or some other justice of the same territorial division to be dealt with by him according to law. There is no provision in the Code authorizing the justice to transmit the property seized to Alberta and the warrant is invalid. The application to dissolve the injunction is dismissed. [Reversed on appeal]. SOLLOWAY, MILLS & Co. LIMITED v. FRAWLEY *et al.* - - - - - - - - **513, 524**

14.——*Summary conviction—Act referred to therein repealed—Habeas corpus—Certiorari—Criminal Code, Secs. 749, 754 and 1124—R.S.C. 1927, Cap. 144, Sec. 4 (d).*] On *habeas corpus* proceedings with *certiorari* in aid, the warrant of commitment filed in the return disclosed that accused was convicted of having in his possession a drug, to wit: Opium, contrary to section 4 (*d*) of The Opium and Narcotic Drug Act and he was sentenced to the common gaol for six months with a fine of $200, and imprisonment for two months in default of payment. The conviction upon which the warrant of commitment was based described the Act as being "The Opium and Narcotic Drug Act, 1923." This statute had been repealed at the time the offence was alleged to have been committed. *Held*, that section 1124 of the Criminal Code requires the judge before whom the question of invalidity is raised to pursue the depositions and determine as to the guilt of the person seeking redress, and if he is satisfied that the offence actually alleged in the conviction has been committed, such conviction should not be held invalid. Being satisfied after reading the depositions that the accused had committed the offence alleged, the conviction should be amended by striking out the figures "1923," confirmed as amended, and the release of the

NEGLIGENCE—*Continued.*

5.——*Death of child—Action by father—Child attempts to board an auto-truck when in motion—Falls under wheel—Damages—Assessed by jury.*] As an empty truck was passing a school where there were a number of boys on the sidewalk, the boys called to the driver asking for a ride, to which he replied "come on." After five or six had got on the truck, two getting on the seat and the others standing on the running-board, he told the others (including plaintiffs' boy, who was six years old) to stand back as the car was full. The boys stepped back and the driver started the truck. As he did so the plaintiffs' boy ran forward, and as there was no room on the running-board he grasped a trip cross-bar on the right side of the truck that ran between the running-board and the back wheel. As the speed of the truck increased he was unable to hold on and falling to the ground was run over by the rear wheel and killed. A jury found the driver guilty of negligence and assessed the damages at $1,000, for which judgment was entered. *Held*, on appeal, affirming the decision of MCDONALD, J., that the boy was not a trespasser as he was included in the general invitation to get on the truck and negligence should not be imputed to a child of six years of age. On the evidence the jury properly found that the driver was negligent and the appeal should be dismissed. LESLIE *et ux.* v. CLARK AND BUZZA LIMITED AND BUZZA. - **391**

6.——*Motor-vehicles — Car driven by member of party—Injury to another member — Damages — Liability of driver.*] The plaintiff, who was one of a family party of five on a motor-car trip, was injured owing to the negligence of her brother who was driving the car which was owned by her step-father. The plaintiff knew nothing about the operation of a car, never had control of it, and trusted solely to her brother to do the driving. *Held*, as she had nothing to do with the operation of the car and could not be identified with her brother's negligence, she was entitled to recover. KERR v. STEPHEN. - - - **518**

7.——*Motor-truck—One defendant successful, the other unsuccessful—Costs—Marginal rule 976.*] Where a plaintiff sues two defendants and succeeds against one but not the other, there is no jurisdiction in the Court to order that there be added to his costs against the unsuccessful defendant the costs which he has to pay to the successful defendant although he was justified in suing both. *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75 applied. HOLT v. HOLMES & WILSON LIMITED AND THOMSON. - **545**

9.——*Railway company—Permanent injury through falling from platform of moving train—Platforms enclosed by vestibules—Evidence of side doors of vestibule being left open—R.S.C. 1906, Cap. 37, Sec. 282—Can. Stats. 1917, Cap. 37, Sec. 10.*] The plaintiff, when nine years old, was travelling west as a passenger on a transcontinental train of the defendant. A vestibule enclosed the platforms between the car in which the plaintiff was travelling and the one in the rear. The boy, with a companion, had been getting off at stations for exercise and as the train slowed down nearing Piapot Station in Alberta they went out on the platform intending to get off but the train only slowed down to pick up messages and after reaching the station started to accelerate speed again without stopping. The plaintiff claims that on reaching the rear door of his car the train gave a sudden jerk forward and the door at the end of the car struck him throwing him down the steps, the side door in the vestibule having been left open. He grabbed the hand-rails but as the train gained speed he was unable to hold on and fell upon the track below losing both legs. Twenty minutes before the accident a trainman passed through the vestibule. He saw the boys there and ordered them back into their car. He stated the side doors of the vestibule were shut and in this he was corroborated by another trainman who passed through about the same time. The action was commenced over nine years after the accident. The jury after answering questions gave a verdict for the plaintiff for $10,000. On defendant's application for judgment it was held that there was no negligence in law established by the evidence or found by the jury; further, that the action was barred by section 282 of the Railway Act, 1906. *Held*, on appeal, affirming the decision of MORRISON, J. (MARTIN and MACDONALD, JJ.A. dissenting), that the plaintiff has failed to satisfy the onus of proof which rested upon him of shewing negligence or want of care on the part of the defendant. *Per* MACDONALD, C.J.B.C. and GALLIHER, J.A.: This was a vestibule car, the steps of which were protected by trap-doors, and although the

PRACTICE—*Continued.*

In an action in the County Court to recover a balance due on the construction of a dwelling-house, the defendant counterclaimed for the cost of completing the house. The plaintiff filed no reply to the counterclaim and the action proceeded, the issue raised on the counterclaim being fought out on the trial. Judgment was given for the plaintiff's claim without any mention of the counterclaim. The defendant gave notice of appeal and then on motion of the plaintiff, before the trial judge, the plaintiff was granted leave to file a reply to the counterclaim and the judgment was amended by adding thereto the dismissal of the counterclaim. *Held*, on appeal, affirming the decision of NISBET, Co. J. (MCPHILLIPS, J.A. dissenting), that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C.: That when judgment was entered the judge had no power to reopen it. He was *functus officio*. The original judgment as entered should stand. *Per* MARTIN, J.A.: The judge had power to make the amendment under both the statute and the rules, and the appeal should be dismissed. *Per* GALLIHER, J.A.: The question of the counterclaim was gone into as well as that of the claim and the decision in favour of the plaintiff involves the consideration of the counterclaim. The principle laid down in *Scott* v. *Fernie* (1904), 11 B.C. 91 applies, and the appeal should be dismissed. *Per* MACDONALD, J.A.: On what took place in the course of the trial the appeal should be dismissed without reference to the order that was made after notice of appeal was given. QUINSTROM v. PETERSON. - - **81**

8.——*Ex parte injunction—Appearance of defendant—Not made known to judge—Motion to dissolve—Costs.*] If a defendant has entered an appearance in an action, the plaintiff, on applying for an *ex parte* injunction, should inform the judge of that fact, otherwise, the defendant, on a motion to dissolve, is entitled to his costs in any event. MACKEY v. MACKEY AND MAGUR. - - - - - - - - - **63**

9.——*Garnishment — Money payable on insurance policy — Not unconditional — R.S.B.C. 1924, Cap. 17, Sec. 3.*] The plaintiff recovered judgment against the defendant for $189.65. The defendant's employer carried a group policy of insurance in an insurance company for the benefit of its employees providing for total and permanent disability benefits. The defendant became disabled and was entitled to five yearly instalments of $214 each, provided he was still alive and disabled when the instalments came due. One payment was due on the 3rd of November, 1929. The plaintiff obtained an order attaching moneys alleged to be due and payable to the defendant by the insurance company and served the order on the garnishee on the 3rd of August, 1929. On the 3rd of November following the insurance company paid $189.65 into Court. On the application of the defendant the attaching order was set aside. *Held*, on appeal, affirming the decision of BARKER, Co. J., that where conditions may arise which would either prevent payment or vest the amount in another the moneys are not attachable. VATER v. STYLES. - - - - - - **463**

10.——*Pleading—Libel—Plea of publication — No application for particulars — Amendment of pleadings — Jurisdiction.*] An action for libel was dismissed on the ground that the statement of claim disclosed no cause of action. The statement of claim contained an allegation of publication without stating to whom the libel was published. No particulars were asked for by the defence and on the trial evidence was tendered of publication to the defendant's stenographer and it was allowed in without objection. *Held*, on appeal, reversing the decision of MCDONALD, J., that as no particulars were asked for, and evidence of publication to the stenographer was allowed in without objection, the appeal should be allowed. HALL v. GEIGER. - - - - **335**

11.——*Pleading — Statement of claim—Allegations of fraud and conspiracy—Particulars—Fiduciary relationship—Discovery—Postponement of giving particulars until after discovery.*] In a case where the plaintiff may reasonably be supposed to be ignorant of, and the defendant to be aware of, the particulars of its claim, and the relationship between the parties, if not fiduciary, is akin to it, the Court will order the defendant to make discovery before requiring the plaintiff to deliver particulars of its allegations. THE B.C. LIQUOR COMPANY LIMITED v. CONSOLIDATED EXPORTERS CORPORATION LIMITED *et al.* - - **481**

12.——*Service of writ on defendant's solicitors—Solicitor's undertaking to appear—Default judgment—Affidavit of service—Sufficiency of—Marginal rules 48 and 102.*] Where a solicitor accepts service of a writ of summons and undertakes to appear but fails to do so, the plaintiff is not in a position to enter default judgment. An affidavit of service of a writ of summons recited that

STATUTES—*Continued.*

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