THE BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

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JUDGES

OF THE

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

During the period of this Volume.

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

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RULE OF COURT

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, under the authority of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and all other powers thereunto enabling, Rule 8 of Order LXV. of the "Supreme Court Rules, 1925," be amended by adding thereto the following words:—

"Provided that in taxations as between solicitor and client costs shall be allowed on the scale as set forth in Appendix M, with such further allowances as the taxing officer or, in the case of an appeal from taxation, as the Judge or the Court shall consider proper."

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., October 14th, 1930.

RULE OF COURT

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, under authority of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and all other powers thereunto enabling, Rule 1 of Order XI. of the "Supreme Court Rules, 1925," be amended by adding the following clause thereto:—

"(*i*) The action is brought by or on behalf of the Crown to recover moneys owing for taxes or other debts due to the Crown."

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., January 21st, 1931.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

CANARY *ET AL.* v. VESTED ESTATES LIMITED.

MORRISON, C.J.S.C. (In Chambers)

1930

April 5.

CANARY v. VESTED ESTATES LTD.

Practice—Discovery—Former director and solicitor of defendant—Employed to negotiate terms as to a lease — Agent or servant — Subject to examination.

B., a former director and present solicitor of the defendant Company with A., a real estate agent, were instructed by the president of said Company to negotiate with the plaintiffs in regard to the surrender of the plaintiffs' current lease on the defendant's premises. B. and A. came to terms with the plaintiffs and on the terms being reduced to writing by B. were submitted by B. to the plaintiffs who signed them. B. took the document away ostensibly for the purpose of having the defendant sign it but it disappeared as far as the plaintiffs are concerned as they never saw it again nor were they given a copy of it.

Held, that the law as to privilege cannot be applied to the facts as disclosed and B., as agent or servant of the defendant Company, is subject to examination for discovery.

APPLICATION to examine *W. F. Brougham* for discovery, a former director and solicitor of the defendant Company. The facts are set out in the reasons for judgment. Heard by MORRISON, C.J.S.C. in Chambers at Vancouver on the 20th of February, 1930. Statement

MORRISON, C.J.S.C. (In Chambers)

1930

April 5.

CANARY v. VESTED ESTATES LTD.

J. A. MacInnes, for the application.
Montgomery, contra.

5th April, 1930.

MORRISON, C.J.S.C.: This is an application to examine Mr. *W. F. Brougham* for discovery. Mr. *Brougham,* a solicitor by profession, had been a director of the defendant Company before the events material to the issues in this action and acted betimes as solicitor for the defendant. He is identified as such with the defendant and has his chambers in the premises of the defendant Company. On the occasion in question he was employed, together with Mr. A. E. Austin, a real-estate agent, by Mr. Harry F. Reifel, president and manager of the defendant Company, to negotiate with the plaintiff with regard to the surrender of the plaintiff's current lease. An arrangement was arrived at after inspection of the new premises and the terms were reduced to writing by Mr. *Brougham* and signed by the plaintiffs. Mr. *Brougham* was entrusted with and took away this document for the purpose of having the defendant sign it as, it is alleged, it agreed to do. The plaintiffs have not seen it since nor was a copy given them. The result seems to have been an attempt by the defendant to withdraw from the alleged agreement, in effect taking the ground that no agreement had been entered into in writing. The plaintiffs have brought this action claiming damages for breach. Mr. *Brougham* appears on the record as solicitor for the defendant. From the material filed it appears that the form of the agreement was composed by Mr. *Brougham* and the defence, to which Mr. *Brougham's* name is attached, alleges numerous defects therein of which he now seeks to take advantage on behalf of the defendant, as enumerated in the particulars. Discovery of this document has not been made and is now sought. The president of the defendant Company, who has been examined, can throw no light on the matter. The plaintiffs allege that Mr. *Brougham* is in possession of knowledge as to the existence of the agreement and as to its whereabouts. Mr. *Brougham* declines to answer the question put to him relevant to this aspect of the case and it is submitted on behalf of the defendant that he acted solely in his capacity as solicitor and not as a servant or agent of the Company and he claims privilege. "The unre-

Judgment

stricted communication between parties and their professional advisers has been considered to be of such importance as to make it advisable to protect it even by the concealment of matter without the discovery of which the truth cannot be ascertained. This protection applies only to communication with a legal professional agent and persons acting for him or under his direction. The privilege is that of the client and not of the adviser." The law as to privilege, thus put compendiously, cannot be applied to the facts as disclosed on the material herein. Mr. *Brougham* and Mr. Austin acted for both the plaintiffs and the defendant in making an estimate as to the value and appropriateness of the new premises for the plaintiffs' business. With the exception of what happened when *Brougham* brought the agreement to be signed by the proper official on behalf of the defendant, and as to whether the defendant signed it or not, and what *Brougham* did with it after leaving the plaintiffs all the other events relevant to the issues took place between the parties together with Mr. *Brougham* and Mr. Austin. The fact that a person is by profession a solicitor and is entrusted with and performs duties which can be, and usually are, performed by an official, servant or agent of a company does not render him immune from examination on discovery if he performs those duties. In this particular transaction I am inclined to believe that the defendant Company is advised to take refuge behind one who in reality was an agent or servant engaged for this particular negotiation along with his associate Austin. He was not clothed for this particular transaction with the professional duties of a solicitor by the defendant. Mr. *Brougham,* as agent or servant *ad hoc* of the defendant, being in possession of knowledge which is relevant to the issues herein and which is necessary for the proper and final determination of the matters in dispute, I think, must submit to be examined as applied for.

Judgment

The character of the particular work performed and in respect of which examination is sought, is to be looked at. The plaintiffs had the right to examine the opposite party who cannot evade the consequences by substituting another to transact the particular business, a full knowledge of which he himself should possess. If he deem it advisable for reasons best known to him-

MORRISON, C.J.S.C. (In Chambers)

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April 5.

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self to engage an official, agent or servant for the purpose and to turn his back upon what happens then that person is examinable. Otherwise in many cases the rule would be rendered futile and the course of justice diverted.

Application granted.

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1930

April 9.

KERSCHNER v. THE CONVENTION OF BAPTIST CHURCHES OF BRITISH COLUMBIA

KERSCHNER AND BANTON v. THE CONVENTION OF BAPTIST CHURCHES OF BRITISH COLUMBIA.

Mortgage—Church property—Paid by outside parties—Assignment of mortgage taken—Whether mortgage discharged — Intention of parties—Priority.

The South Hill Baptist Church in the course of building, borrowed moneys from the Royal Bank of Canada, the loans being secured by collateral given by one G. a member of the church. When the loan reached $12,000, the church gave a mortgage for this sum on its property to G. who later assigned the mortgage to the bank. In the meantime other debts arose to a number of people including the plaintiffs for labour and material supplied in connection with the building of the church. These debts were unsecured. The church then being unable to carry on applied to the defendants (a body covering British Columbia) for financial assistance, and the defendants, with moneys received from The Baptist Union of Western Canada (a larger body of the Baptist Church covering the Western Provinces), $3,000 borrowed from one M. and $1,000 advanced by G. arranged a compromise with the unsecured creditors who all (with the exception of the plaintiff) agreed to accept 25 cents on the dollar for their claims and they at the same time persuaded the bank to accept $7,781.07 in full settlement of its claim. The bank then gave an assignment of the mortgage to the defendants which was duly registered. The plaintiffs obtained judgment against the church. This action for a declaration that the mortgage held by the bank was paid off and discharged and no longer a valid and subsisting mortgage was dismissed.

Held, on appeal, affirming the decision of GREGORY, J. (MARTIN and GALLIHER, JJ.A. dissenting), that where a third party pays off a mortgage and takes an assignment of the mortgage the presumption is that he does not intend to discharge it but to keep it alive for his own benefit, and where the plaintiff alleges that the mortgage is discharged it is for him to shew an intention to wipe it out. In this the appellant has failed and the appeal should be dismissed.

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APPEAL by plaintiffs from the decision of GREGORY, J. of the 29th of November, 1929. The facts are that one Dobson who had done certain work in connection with the South Hill Baptist Church in Vancouver recovered judgment against the church for $2,349.34 in 1922, and he assigned the judgment to the plaintiffs in 1929. The church acquired two lots in 1912, and on proceeding to build the church borrowed moneys from the Royal Bank of Canada. When the amount borrowed from the bank reached $12,000, the advances were stopped. One, Doctor Goostrey, who was a member of the church, became responsible to the bank for the moneys loaned and the church gave him a mortgage for $12,000 on the church property. Later Doctor Goostrey assigned the mortgage to the bank and it was duly registered. In 1920, the defendants came to the assistance of the church and with certain moneys advanced to them by the Baptist Union of Western Canada certain moneys of their own $3,000 obtained by loan from one Menzies and $1,000 obtained from Doctor Goostrey they arranged a compromise with the unsecured creditors of the church who (with the exception of the plaintiffs) agreed to accept 25 cents on the dollar as payment in full for their claims and then paid the bank $7,781.07 as payment in full of the debt to the bank and the bank then assigned the mortgage to the defendants. The plaintiffs claim that when the bank was paid the liability of the church under the mortgage was paid with the exception of the $3,000 loaned by Menzies; that this loan was reduced to $1,700, and with this exception their judgment had priority.

Statement

The appeal was argued at Victoria on the 16th and 17th of January, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for appellants: We say that when the payments were made to the bank they were made to discharge the liability except the $3,000 borrowed from Menzies and in taking an assignment of the mortgage the defendants were acting as agents for the church. They never expected the church to pay the mortgage. They gave money, they never made loans. Menzies's loan is now reduced to $1,750. The evidence shews the money

Argument

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was paid as a discharge of the mortgage for the benefit of the church, and the defendants knew of the whole transaction. The Court may make a declaration although no other relief is sought.

G. Roy Long, for respondents: The evidence shews this was a loan. That it was the intention of the parties to keep the mortgage alive see *Thorne* v. *Cann* (1895), A.C. 11 at p. 19; *Whiteley* v. *Delaney* (1914), A.C. 132 at p. 151. We are subrogated to the rights of the bank and have a prior charge of $12,000: see Halsbury's Laws of England, Vol. 21, p. 176, sec. 331; *Anonymous* (1707), 1 Salk. 155; *Butler* v. *Rice* (1910), 2 Ch. 277 at p. 282; *Brown* v. *McLean* (1889), 18 Ont. 533; Coote on Mortgages, 9th Ed., 1450. The mortgagor is not a party to the action.

Argument

Craig, in reply: We have before the Court the only party against whom we want relief. We are not seeking relief against the church: see *Blair v. Dice* (1924), 34 B.C. 323. There was only a $7,781.07 debt to the bank when the defendants came in.

Cur. adv. vult.

9th April, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The respondents are the Convention of Baptist Churches of British Columbia, formerly known as the Board of Baptist Missions of British Columbia. The South Hill Baptist Church being heavily indebted appealed to the respondents for assistance, who received a certain sum of money from a large Baptist organization in Winnipeg, and were given entire discretion to use it in any way they saw fit for the relief of said church. It appears that one, Dr. Goostrey, had made himself liable for a large part of the church's indebtedness to a bank and when pressed for payment obtained from the church a mortgage on the real property including the church building to secure him therefor. This mortgage he afterwards transferred to the bank as security for the money he had borrowed from it. There were in addition a number of unsecured creditors of the South Hill Baptist Church. The respondents procured reductions in these debts from all except the plaintiff or his predecessors in title. They paid off these creditors for sums amounting to 25 per cent. of their claims. They negotiated with the bank also

and obtained a reduction of the bank's claim, Dr. Goostrey joining with them in reducing his claim by $1,000. They thereupon paid off the bank and on their solicitor's advice took an assignment of the said mortgage to themselves. They borrowed on the security of this mortgage a sum of money from one Menzies, which also went towards paying off the bank. The plaintiff who refused to reduce his claim, thereafter obtained judgment against the South Hill Church and had it registered so as to form an incumbrance upon their land and he now brings this action for a declaration that the Goostrey mortgage was paid and satisfied so that what otherwise would have been a second encumbrance is now entitled to first place. There is a great deal of evidence of different persons connected with the church, and with the respondents, leading up to the circumstances above mentioned, but I think when it is all considered this conclusion is amply justified, namely, that the respondents purchased the said mortgage from the bank and have thereby become the first encumbrancers upon the church property.

The learned trial judge, if I understand his judgment aright, thought that the plaintiff had no *status* to attack the mortgage. With respect, I cannot agree. I think as a second encumbrancer he had a right to attack any prior encumbrancer, but in my opinion, he has failed to make out a case for the declaration which he desires. I find the evidence referred to supports the idea that when it came to the final transaction with respect to the mortgage the respondents had made up their minds in effect, to buy the mortgage. Their motives may have been, and probably were, to protect the church property from the second encumbrancer, but that I think, does not affect their legal rights, nor even the morality of the transaction. They succeeded in their efforts and I do not see that the plaintiffs have any ground of complaint. They have not been deprived of any right, legal or equitable. It is true that if the mortgage has been paid off and discharged their position would be very much improved, but the respondents were under no obligation or duty to assist them to obtain their debt. Their course in the matter was a strictly business one and is not open to criticism or complaint. Anything that may have been, or may hereafter be paid in

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reduction of this mortgage, for instance, paid to Menzies by the South Hill Baptist Church will enure to the benefit of the plaintiffs by improving their position. There has been no standing in their way of realizing upon their security.

It has been said that the respondents were trustees of the moneys they received from the Winnipeg benefactors, and had no right to invest it in their own name or for their own benefit. That is a matter which I think is not relevant to this action. They were given absolute discretion to use the money for the protection of the church and they have done so up to the present time. If the church is entitled to any of the money as *cestui qui trust*, the time to assert its title to it has not yet arisen, and in any case the plaintiffs are not entitled to bring an action or to claim the benefits of the moneys.

The appeal should therefore be dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: It is scarcely right to say that the money which came from the Forward Movement from Winnipeg was the money of the defendants to do with as they saw fit. It was, rather, money they received impressed with a trust to be applied, speaking generally, for the benefit of the Baptist Churches in British Columbia needing assistance. As to how these trust moneys were to be allotted and applied, the defendants were the sole judges. They might apportion it all to one church or distribute it among a number of churches and in varying amounts.

For the purpose of relieving and assisting the South Hill Church, which was in trouble financially, and whose property was burdened by a mortgage of some $12,000, a certain amount of these Forward Movement funds were allotted. Certain reductions were made by the Royal Bank of Canada, the holders of the mortgage. Dr. Francis Goostrey made a donation of $1,000 and a further sum of $3,000 was raised on mortgage to one John Menzies. By these means sufficient moneys were available to pay off the original mortgage and these moneys were paid in to the Royal Bank of Canada. When the moneys were paid in the defendants took an assignment of the mortgage

instead of a release of same. That assignment could be taken for one of two purposes, or for both. It could be taken so that the mortgage might stand registered against the property and so prevent the plaintiff realizing on his judgment, which was for a debt due for materials which went into construction of the church, or for the purpose of protecting Menzies, who loaned the $3,000 in his security. I think it probably was for both.

The defendants frankly admit the first of these and I think the second was also in their mind. Assuming this to have been the intention of the defendants when they took the assignment of the mortgage, there is another intention which I think we must consider and which I think is decisive of this case and that is whether the moneys, outside the $3,000 the proceeds of the Menzies mortgage, were made to the South Hill Church as a gift or as a loan.

The reduction by the bank was by way of a gift, so was Dr. Goostrey's $1,000, and these sums went into the hands of the defendants not by way of a gift to them but a gift to the church to help relieve the situation and meet the mortgage indebtedness. The amount allocated from the Forward Movement fund was for the same purpose of assisting and relieving the church.

The defendants are taking the position that this was a loan to the church and the only piece of evidence that in my opinion, supports that contention is the assignment of the mortgage. They themselves say the church will not be called upon to pay it and their conduct throughout as embodied in their minutes of meetings, year books, annual reports and meetings, as well as statements made by members of the Board to others, all indicate that the intention of the defendants was that the moneys should be a gift instead of a loan and moreover, it is more consistent with the aims and objects of the Forward Movement Organization and the other organizations that it should be so.

It is said the South Hill Church have never asked for a release of this mortgage. Granted. It is to its interest financially that it should not as it stands in the way of the plaintiffs realizing what is not disputed is a just debt. If then the moneys paid into the bank to liquidate the mortgage was a gift to the church, which in my opinion it was for the reasons I have given, when

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GALLIHER, J.A.

that was applied the mortgage was dead and the church was entitled to a discharge of same and the defendants by taking an assignment under these circumstances cannot revive same. Further, I do not think under the circumstances of this case, it could be treated as a purchase of the mortgage.

There is, in my opinion, no question of the *status* of the plaintiffs to bring this action. I would therefore allow the appeal and declare that the plaintiffs are entitled to a charge on the property of the South Hill Church against which his judgment is registered, subject only to the balance due upon the Menzies mortgage which he is willing to assume and pay off.

Costs follow the event.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It is evident that the learned trial judge, Mr. Justice GREGORY gave patient and careful attention to this somewhat involved case, a case which, after careful study, is manifestly clear. I know of no authority that would admit of the declaration of the Court that a specialty security should be delivered up to be cancelled save where it was established to have been wholly paid and that in effect is the startling proposition that has been argued at this Bar. That the Baptist Church authorities have ever had in their mind the benevolent idea that they would do so cannot be implemented by the Court into a decree from the Court that the security should be released and the mortgage be delivered up to be cancelled. In my opinion there can be but one answer to the very careful and able argument of Mr. *Craig*—benevolent intention that may or not be carried out (and circumstances even might change rendering it not only inequitable but impolitic in the interests of the Baptist Church to extend such benevolence) cannot be expanded into the requirement that a specialty security should be released and wholly dischargd. There is no authority that would entitle a Court to so hold. The present case was one eminently fitting to be disposed of by the learned trial judge and I am satisfied that the learned judge arrived at the proper conclusion. I would refer to what Lord Sumner said in his speech in the House of Lords in *"Hontestroom" (Owners)* v. *"Sagaporack" (Owners)* (1926), 95 L.J., P. 153 at p. 154.

"None the less, not to have seen the witnesses puts appellate judges in a

permanent position of disadvantage as against the trial judge, and, unless it can be shewn that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."

It cannot be said that the learned judge in any way contravened the principle so graphically set forth by Lord Sumner. On the contrary, in my opinion, he proceeded rightly.

I would dismiss the appeal.

MACDONALD, J.A.: The appellants (plaintiffs in the action) are judgment creditors of the South Hill Baptist Church in the sum of $2,342.34. They cannot realize because of a mortgage for $12,000 on the same property now held by respondents and they ask for a declaration that it was paid off and discharged either wholly or at all events to the extent of several thousand dollars. Originally the South Hill Baptist Church, in 1914, executed this mortgage in favour of one, Dr. Goostrey, as mortgagee; he assigned it to the Royal Bank of Canada and for the consideration of $7,791.07 the bank assigned it to respondents. Respondents having obtained $3,000 from one Menzies to assist in purchasing this mortgage from the bank, assigned it to him by way of security only. Respondents submit that it is a valid and subsisting mortgage in its hands against the South Hill Baptist Church subject to its charge to Menzies and if so appellants' judgment is unenforceable. The appellants submit that respondents have no intention of enforcing their security; that they have not collected even the interest and hold the mortgage with the consent or at all events without objection by the South Hill Baptist Church only for the purpose of protecting the church property against appellants' claim.

MACDONALD, J.A.

The facts are somewhat involved. Over ten years ago the South Hill Baptist Church erected a church building on its premises. It borrowed from the Royal Bank (after failing to secure a loan from a company) on the personal guarantee of some of its members. A debt of $12,000 to the bank accumulated and one, Dr. Goostrey by guarantee and by note finally became personally liable to the bank for this sum. To secure him the South Hill Baptist Church executed a mortgage in his

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favour for $12,000. That is the mortgage in question in this action. The bank required additional security and induced Dr. Goostrey to assign the mortgage to it. He was still liable as guarantor for the church's indebtedness. That was the position in 1912. In addition to owing $12,000 to the bank the church owed appellants $2,349.34, and also ten or eleven other creditors over $8,000. The claims however of creditors, other than appellants were unsecured and outlawed. In that situation with an indebtedness of over $20,000 and property worth, perhaps, $7,000, the South Hill Baptist Church appealed to the church at large for assistance. At that time a body known as The Baptist Union of Western Canada (hereinafter called the "Union") launched what was called a "Forward Movement" campaign to raise money for general purposes and in particular to assist churches financially embarrassed throughout Western Canada. Moneys raised were paid in to the treasury of the Union and each Province in Western Canada would make separate representations as to its requirements. The respondents (hereinafter called the "Board") are a corporate body distinct from the Union and from the South Hill Baptist Church, representing all the Baptist churches in British Columbia and it requested and received a grant from the general fund held by the Union to meet requirements in this Province. Grants were made by the Union and received by the Board without any statement as to how the moneys were to be applied, beyond the general understanding that it was for denominational needs in British Columbia. The disposition of the funds thus received from the Union within the limits indicated, was solely in the Boards (respondents') discretion. The prevailing evidence shews that to be unquestionably the true situation. The South Hill Baptist Church applied to respondent Board for assistance in its acute financial difficulties and the Board appointed a committee to look into and to deal with the local situation. It was submitted that the respondent Board thereby took hold of the financial affairs of the South Hill Baptist Church at the request of, and on behalf of the latter as its agents to effect a settlement, compromise or extinguishment of its indebtedness and as such could not make a profit out of its agency by settling its liabilities

for a reduced amount while holding the church responsible for the full amount, *viz.*, $12,000, represented by the mortgage which it acquired. The fact is as shewn by Exhibit 3, that the local church finding itself "quite unable to cope with the matter" asked the respondents "to take over the handling of the enormous debt upon this building." The local church stepped aside and it is not surprising that it did so. It did not maintain the position of a principal. As stated there was a debt of $20,000; a property worth about $7,000, and unsecured claims of over $8,000. Its position was hopeless. Respondent Board did not act subject to the direction of the local church. The local church executive threw up its hands and gave a free hand to the respondent Board to deal independently as best it could with a grave situation. The committee appointed by respondents, having behind it the Union as a source of supply took up the task and approached the Royal Bank, the main creditor. The Board had only a limited amount from the Union to deal with the situation and were compelled to seek a compromise. Its aim was to make the best use of the funds at its command, acting fairly with all concerned. It had to face the indebtedness to the Royal Bank, the appellants and the unsecured creditors in so far as the local church was concerned, and also the general denominational needs of all Baptist churches in the Province. Properly enough it looked upon outlawed claims as morally due (they were incurred for materials supplied), and sought to effect a compromise settlement on an equitable basis fair to all creditors. It was hopeless for creditors to look for payment in full and all but appellants were willing to compromise. The respondent Board felt that morally appellants were not entitled to favoured treatment and they could only secure it if the mortgage was removed. They could then realize on their judgment. The bank agreed to throw off over $3,000 arrears of interest, the principal having been reduced to $7,605 in the meantime, and the unsecured creditors (except appellants)—eleven of them with claims amounting to $8,306.60—agreed to accept 25 cents on the dollar. The appellants were offered the same terms if they would forego interest. The respondent Board not having sufficient funds to settle even upon the foregoing basis, made

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another appeal to the Union and a further sum of $1,150 was given it by that body. It was submitted that this sum, at all events, was ear-marked for a definite purpose and that in reference to it, at least, a trust was impressed upon it for its application in a particular way and the mortgage debt reduced to that extent. I do not think so. That extra grant was given and received on the same basis as the other grants; it was an additional amount required to enable respondents to complete its negotiations and respondents had full control over it. Nor is that situation affected by the fact that Bentall, chairman of the Committee of the Board, said, "We probably told them [the Union] what we were going to use it for." That does not necessarily imply that it was going to use it to pay off in part the mortgage. Even after this $1,150 was received respondent Board found that it had not enough money to arrange the indebtedness to the bank and to the other creditors in the manner arranged with all but appellants. A further sum of $4,000 was necessary and to meet this situation Dr. Goostrey agreed to make a personal contribution or subscription of $1,000 for, as he said in his evidence, the benefit of the local church and to reduce its indebtedness, and he gave his cheque to the bank for this sum, while the remaining $3,000 was secured from one Menzies. Goostrey for his subscription was released from his own liability on a note and on a mortgage against his own property. With this $3,000 from Menzies and Dr. Goostrey's $1,000 added to the former fund the respondents were able to satisfy the bank's claim and that of all creditors save appellants for the amount formerly agreed upon and did so. Appellants at that time were offered similar treatment and that offer still stands. The mortgage, however, was not discharged. If it had been the whole purpose of the negotiations would have been defeated and the only ones who would receive payment would be appellants by the execution of their judgment. In these circumstances the mortgage was assigned by the bank to respondent Board for the consideration of $7,605 paid it by the Board, and by it further assigned to Menzies by way of mortgage only as security for the $3,000 advanced by him. The respondent Board mortgaged the mortgage now in its hands for this amount, and upon payment

to Menzies of the $3,000 with interest, he was to reassign to respondent.

On that state of facts, testified to by the record and registered documents, coupled with oral and documentary evidence, the appellants claim that what took place was a payment of the mortgage debt for the benefit of the South Hill Baptist Church; that it was in fact discharged and should be so regarded, with the exception of the $3,000 due to Menzies. I take it the submission is that it was partially discharged. The respondent Board claims that the mortgage still stands for $12,000, not for the lesser amount it paid to the bank. It appears also to claim the benefit of the amount the bank threw off as interest. The Board would also on that basis get the benefit of the $1,000 paid by Dr. Goostrey. Respondent Board submits that the South Hill Baptist Church still owes it the full amount of the mortgage. Whether payment is ever demanded or not, rests with respondents. That is a matter between the local church and the Board, and the former is not complaining of the attitude of the latter. If respondents had accepted a discharge of the mortgage it would not only have no secured claim against the church for the moneys advanced to help it out of its financial difficulties, but more important still in its view upon its discharge appellants' judgment as already stated, would be realized against the property. If that course had been followed it could not have secured the $3,000 from Menzies as it would have no security to offer him, and without this sum could not carry through its plan of relief as outlined. It was apparent therefore that while willing to treat appellants on the same basis as the other creditors (and still being willing to do so) their refusal to agree made it necessary, in order to enable the Board to carry out an equitable arrangement to retain the mortgage as a registered charge against the South Hill Church property. Counsel criticized the Board's conduct in adopting this course. I see no just ground for criticism. The Board acted honestly in trying to deal equitably with all creditors on a common basis (if it had ample funds it might be a different matter) and when appellants failed to accept similar treatment it followed the course outlined under the advice of a reputable solicitor. If on the other hand, it left

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the bank to foreclose not only would it probably not realize $7,000 but also the property would go and all other creditors, including appellants, would not receive anything. Dr. Goostrey too would be seriously affected. Further, respondent, an independent body, with moneys in its hands to use as the evidence shews, as it saw fit, within the general limits of denominational needs in the Province, was justified in retaining the mortgage as security for sums advanced. Legally it was entitled to do so. The Board was not using the funds of the local church but its own obtained in the manner indicated from the Union, in acquiring the mortgage. The local church no doubt contributed a little to the Union for general use throughout Western Canada. It is conceivable that if conditions improved respondent might demand repayment of the mortgage; at all events, it can prevent the South Hill Baptist Church from running behind again, incurring similar liabilities in the future, tending to cripple its activities. As a witness Rev. Mr. Reynolds stated:

"We never have exacted interest for any moneys given, whether they be termed a grant or a loan, but it is a moral right on the church to pay back that loan sometime when they can."

The South Hill Baptist Church, as stated, is not complaining. It recognizes the validity of the mortgage and is doubtless glad to have it held by a Board that will give it sympathetic consideration, even possibly to the extent of not collecting.

Appellants contend that respondents did not purchase the mortgage for its own benefit; that the moneys received by it from the Union were funds advanced for a specific purpose, *viz.*, to discharge wholly or in part, the indebtedness of the local church and it must be regarded as so applied. That is not the case. The Union, as intimated, granted funds to the Board for general Provincial needs, to apply as the Board saw fit within that ambit, not for any particular church. The only trust impressed on funds in the Board's hands was that it should be used for Provincial denominational purposes. That falls far short of shewing that it was received by the Board for a specific purpose, *viz.*, to pay a specific debt. The respondent could make either a gift or a loan to the local church. It chose the latter course for good reasons. There is no contradiction of Bentall's evidence that respondents were not obliged to (nor did they)

make any account to the Union for any moneys received from it. It would not alter the situation if it did.

Appellants submit that the documentary evidence, apart from the assignments, manifests an intention to discharge the mortgage. There is no documentary evidence which, without explanation would indicate that the Board in its records treated the mortgage as discharged. Oral evidence was given too by the clerk of the Board of the local church to the effect that its minister, Mr. Wood (not a witness) who was representing the church before the Board in connection with its indebtedness, reported that all the church would be responsible for was the $3,000 owing to Menzies. This, however, was inadmissible as hearsay. Bentall, head of the committee of the Board that made all the arrangements, understood a gift was asked for but he said it was not granted. Respondents' financial statement (exhibit 4) shews a payment of $8,285.95 in connection with the South Hill Baptist Church. This was the amount expended to procure the assignment of the mortgage and in settlement of the claims of creditors except appellants. It is said in this statement that

"South Hill (Baptist Church) has its debt reduced to a $3,000 mortgage."

This bears out appellants' submission that the mortgage was regarded as released except for this sum and while a resume of the affairs of the Board given in a financial statement covering a year might contain statements at variance with the true situation without altering that situation, it still called for an explanation. The explanation of Mr. Bentall is not entirely satisfactory. He said:

"This is the report of the Board to the convention (delegates assembled) to shew what the Board owed. It was to tell the people assembled at the convention how much money we needed to clear up our indebtedness as a Board."

I think in framing the financial statement it had in mind that the only active liability was the $3,000 secured from Menzies. Although the respondent owed this to Menzies the local church was to pay it and by last year it was reduced to $1,750, both the Board and the local church contributing. The Board did not intend for the present, at all events, to demand repayment of the original mortgage. It would be difficult in reports to treat as

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an active asset one that might never be called up. A mortgage however is no less a security because the holder of it does not choose to enforce it unless a situation should arise where he might consider it wise to do so. While the explanation is not wholly satisfactory, entries in financial statements made under these circumstances should not be taken as overriding the prevailing evidence and the facts disclosed by registered documents. In respondents' balance sheet too (Exhibit 5) published several years afterwards, its assets amounting to $120,000 were outlined and although loans to other churches are stated therein the $12,000 mortgage in question does not appear. Again a report (Exhibit 8) refers to expenditures for the South Hill Church of $5,680 "leaving a $3,000 mortgage at 6 per cent. on the building." They also speak in this report of removing church indebtedness generally to the extent of $27,000, and it would appear that to make up this amount they would have to include the mortgage in question. This does not appear to be, however, a report by respondent Board. At all events the same general remarks apply. It seems clear that by all bodies this $12,000 mortgage was not treated as an active asset. Similar observations pointing to inconsistencies might be made in respect to Exhibit 7, a report of respondents to the registrar under the Societies Act. The true situation, however, is not necessarily established by proving errors and mistakes in various reports. The somewhat dual capacity in which this mortgage was held and all the facts suggest explanations for statements in reports not strictly accurate. If these three independent bodies, *viz.*, the local church, respondent Board and the Union were commercial concerns the viewpoint in interpretation of conduct and motive might be different. It is for the Board acting within a Christian brotherhood to enforce that security against the local church property—or to permit it to lie dormant so that the local church may carry on. The respondents in the best interests of all concerned hold title to the property through this mortgage while permitting the local body to have the use of the property.

The learned trial judge held that appellants had no *status* to maintain this action. I cannot agree. They find a charge which

prevents them from realizing upon their judgment. If the impediment to the exercise of their legal rights is not a lawful one they are entitled to a declaration. A summary method of procedure is outlined in the Execution Act, R.S.B.C. 1924, Cap. 83, Secs. 38 and 39, but he is not confined to that course.

But they are on ground less secure when on the facts they ask the Court to declare that a mortgage security on the property against which their judgment is registered, assigned to, or purchased by respondents, not without consideration, but for a large consideration is fully paid and satisfied, when the fact is that neither interest nor principal has been paid and when the mortgagor agrees that it is a valid security. To succeed the burden is on the appellants—and it is not a light one—to shew that the intention was to discharge the mortgage or that respondents gave funds to the mortgagor to enable it to procure a discharge and that in frustration of that purpose it is maintained as a charge in the hands of an assignee. I have already outlined my view that the appellants fail in this contention; I have also stated that the funds were not received in trust by the Board to pay off this specific mortgage. The principles applicable, although the facts differ, are laid down by Lindley, J., in *Liquidation Estates Purchase Company* v. *Willoughby* (1896), 1 Ch. 726 at p. 733, where he says:

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"But the question is, whether the interest so transferred was transferred in order to be extinguished, so that the plaintiffs might obtain Kennedy's interest in the security of June, 1888, free from incumbrances, or whether Norton's interest was so transferred as to enable the plaintiffs to treat it as still subsisting, so as to confer upon them rights against third parties which Lord Windsor and Forrest could not confer. The answer to this question depends upon the intention of the parties at the time, and that intention must be found from the terms of the deed and the circumstances under which it was executed."

Clearly when appellants allege that the mortgage is discharged it is for them to shew an intention to wipe it out: *Whiteley* v. *Delaney* (1914), A.C. 132. Where a third party pays off a mortgage the presumption is that he does not intend to discharge it but to keep it alive for his own benefit (Warrington, J., in *Butler* v. *Rice* (1910), 2 Ch. 277 at p. 282). A heavy onus therefore rests upon appellants; heavier I think than the burden that would rest on the mortgagor if it were seeking a similar

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declaration. The amount due under a mortgage does not depend upon the sum an assignee pays to secure it. While that is the general rule, however, it is subject to an exception (Halsbury's Laws of England, Vol. 21, p. 176). The respondents are entitled to recover the whole amount due at the time of the transfer "unless they stand in a position which would make this inequitable." Such a position might arise in varying circumstances. Each case will depend largely on its own facts. Without discussing what the position on this point would be if the South Hill Baptist Church raised the question, I think *qua* the appellants, the respondents are justified in standing upon their legal rights and that it is not, on all the facts and circumstances inequitable to do so.

The appeal should be dismissed.

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

Solicitor for appellants: *A. R. Creagh.*
Solicitor for respondents: *G. Roy Long.*

DANROTH v. RAILWAY PASSENGERS ASSURANCE COMPANY.

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DANROTH v. RAILWAY PASSENGERS ASSURANCE CO.

Insurance, automobile — Fire — Damages — Appraisers — Appraisement— Order to remit—Appeal—R.S.B.C. 1924, Cap. 13, Sec. 13—B.C. Stats. 1925, Cap. 20, Sec. 154 (statutory condition 6).

The plaintiff insured his motor-truck against loss by fire in the defendant Company and during the life of the policy the motor-truck was badly damaged by fire. As the parties could not agree as to the loss, appraisers were appointed to ascertain the extent of the defendant's liability in the manner provided by the statutory conditions of the policy as set out in section 154 of the Insurance Act. The appraisers gave their decision in writing finding that the motor-truck was worth $800 at the time of the fire but failed to state the amount to be deducted for depreciation, salvage or other cause in order to arrive at the actual loss sustained. On motion of the plaintiff the matter was remitted back to the appraisers to determine the actual loss or damage.

Held, on appeal, reversing the decision of FISHER, J., that the proceeding is not an arbitration under the Arbitration Act so that the Act does not apply and as the appraisers are not parties to the application the order must be set aside.

APPEAL by defendant from the order of FISHER, J. of the 13th of March, 1930. On the 4th of July, 1928, the plaintiff took out an insurance policy against fire in the defendant Company to the extent of $1,200 on his motor-truck. On the 14th of October, 1928, and during the currency of the policy the motor-truck was badly damaged by fire. As the parties could not agree as to the extent of the damage each party appointed appraisers under the statutory conditions of the policy and section 154 of the Insurance Act, and the appraisers selected an umpire. The appraisers found that the truck and equipment were worth $800 at the time of the fire but did not state the actual loss or damage resulting from the fire. On motion of the plaintiff the award was remitted back to the appraisers to determine the actual loss or damage.

Statement

The appeal was argued at Vancouver on the 14th of April, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Argument

Alfred Bull, for appellant: An order was made remitting the award for reconsideration. An order cannot be made remitting an award except under the Arbitration Act, but this is not an arbitration and the Arbitration Act does not apply. The appraisers are not parties to this proceeding and an order cannot be made against them. This action was brought on the 12th of October, 1929, and the award was not given until the 22nd of October following. That an order remitting must be under the Act see Russell on Arbitration and Award, 10th Ed., 642. That the Arbitration Act does not apply here see *In re Dawdy* (1885), 15 Q.B.D. 426 at pp. 429 and 430; *In re Hammond and Waterton* (1890), 6 T.L.R. 302; *In re The Canadian Northern Pacific Ry. Co. and Finch* (1914), 20 B.C. 87.

Lennox, for respondent: The order is good as a mandatory order to the appraisers to complete their work as they did not fix the damages. We had to bring our action when we did otherwise we were barred as we had only a year within which to commence action.

Bull, replied.

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MACDONALD, C.J.B.C. (oral): I think the appeal will have to be allowed. It is unfortunate in a way that this has arisen, but I am satisfied that the proceeding is not an arbitration under the Arbitration Act. If it had been, then the matter could easily have been disposed of. We could simply allow this appeal and leave the parties to proceed in the regular way.

Then if the matter is not under the Arbitration Act, as I think it is not, the proceeding is one, as Mr. *Lennox* put it, asking for a mandatory order against these appraisers to complete their work. Objection has been taken by Mr. *Bull* that the appraisers are not parties to this application, are not parties to the proceedings at all, and that fact in itself is a fatal objection.

There is also this: Their finding is not a judicial document, unless under the Arbitration Act. It is simply a finding by these appraisers that the value of the truck was $800. They failed to say what the actual damage to the plaintiff was. Now, if that were a judicial document, it would be there, it would be

in Court, it would be a record and it could not be disregarded, but as it is not, I see no reason why the appraisers should not be asked to complete their work and asked to find if there was any salvage or anything of that sort which would reduce the $800. The mere fact of their present award, or writing, or finding, whichever you choose to call it, is there, would not prevent that being done, and that would be the proper course to pursue. They should be asked to complete: "You have found the value of the truck, now tell us whether there are any deductions to be made from that for salvage," and when they came to their conclusion, they would find the amount the plaintiff was entitled to, and certify that to the judge. In these circumstances, I see nothing for it but to set aside the order that has been made, and leave the matter to be continued as suggested.

MARTIN, J.A.: On the 4th of July, 1928, the defendant (appellant) Company insured, by a policy of that date, the plaintiff's (respondent) motor-truck against loss by fire to the extent of $1,200, and during the life of the policy, on 14th October, 1928, the truck was greatly damaged by fire and so it became necessary to ascertain the extent of the defendant's liability in the manner provided by the statutory conditions of the policy as set out in section 154 of the Insurance Act of 1925, Cap. 20, of which conditions 9 (4), (6), (7) and (8) are specially in point. On a "disagreement" arising as to the liability the insured and the insurer each "selected one appraiser," and the appraisers "duly selected a disinterested umpire" (one Green) to "submit their differences to" in case of their failing to agree, as (6) directs.

By condition (4) the liability of the insurer is thus limited:

"The insurer shall not be liable beyond the actual cash value of the automobile at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would cost to repair or replace the automobile or any part thereof with material of like kind and quality;" etc.

The two-fold duty of the appraisers was therefore first, to find the actual cash value of the automobile at the time of the loss and, second, the "proper deduction for depreciation however

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caused," in the manner directed, to be made from that actual cash value.

It is admitted that the appraisers duly entered upon their said duty and proceeded to "estimate or appraise the loss or damage" with the result that on the 22nd of October, 1929, they came to the following decision in writing:

"We, the undersigned arbitrators appointed by the Insurance Company and Chas. Danroth in the matter of claim *re* fire Duplex Truck and equipment are of the opinion that said truck and equipment as in affidavit was worth at the time of fire Eight Hundred Dollars ($800).

"Signed—Wm. Mason,
"Charles V. Turner,
"Arbitrators."

This was unquestionably an entirely proper discharge of the first part of their duty, and in effect fixed the cash value at $800, but *ex facie* it was an incomplete discharge of the second part of their duty to determine the amount to be deducted for depreciation however caused; the reason given for their omission by appraiser Mason in his affidavit is as follows:

"6. After the said Charles Vernon Turner and myself had arrived at the figure of $800 as the value of the said truck and other articles as aforesaid and our decision had been reduced to writing as aforesaid we decided in conversation that now the value of the said truck and other articles had been agreed upon it would not be difficult for the Insurance Company and the assured to agree on the value of the said trailer and other articles salvaged and in use by the assured and the value of the salvage still remaining, we both being under the impression that we were required only to ascertain the value of the truck and other articles at the time of the said fire."

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The extraordinary, indeed to me incomprehensible, feature of the matter is that the appraisers were not asked by anyone to complete their obviously incomplete though correctly performed and, so far, harmonious duty, and there is nothing whatever before us to warrant the assumption that if they had been asked as they should have been, then and there, to go on with their appraisal and complete the second part of it that they would have refused to do their duty in that second stage as well as they had, with perfect propriety, in the first, and further there is nothing to suggest that they are not now as always prepared to complete that duty.

In such very unusual circumstances it is obvious that all the unfortunate and expensive proceedings which have been taken

to compel these appraisers to perform a duty which they not only never evinced any intention of refusing, but were always ready and willing to perform to completion, are wholly unnecessary and premature, and no precedent has been cited, under this or any other statute of arbitration, to support an application for an order to remit under such circumstances. There is nothing now, and there never was anything to prevent the respondent or the appellant from requesting the appraisers to complete their, so far, entirely proper appraisal, nor anything to warrant the belief that they would have refused to do so then or will refuse to do so now.

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Though there are other interesting questions raised, particularly under condition (9) respecting a refusal to act, yet in this broad view of the matter they really become irrelevant, and it follows, therefore, that the appeal should be allowed and the order for remission be set aside.

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

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MCPHILLIPS, J.A. (oral): I also agree in the result. At the same time, I wish to state that at this moment I am not concluding the matter with regard to the Arbitration Act and the Insurance Act; that is, saying that the proceedings can be supported by one or the other Act, but I rather think that the proceedings may be looked at as being in the matter of the Arbitration Act, and in the matter of the Insurance Act, and that the arbitrators were appointed in that way. The arbitrators call themselves "We the undersigned arbitrators appointed by insurance Company and Charles Danroth" in the matter of so and so, but I think justice may be accomplished by an application to the arbitrators, to proceed and complete their work and that application can well be entitled "In the Matter of the Arbitration Act and in the Matter of the Insurance Act." Being arbitrators appointed by both parties, they should be asked to go on and do the second thing they must do, and that is to find the net amount of damages, and then having found that, their duty under both Acts, as a matter of fact, would be accomplished. I do not see that in the present case there is any point in the Statute of Limitations as contained in the Insurance Act—the

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proceedings were current within the year. It would be a very great misfortune in a case such as this that the limitation section should have application and in my opinion it cannot in the present case be effectively set up and it is possible to continue the proceedings and effect justice in the matter.

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

Appeal allowed.

Solicitors for appellant: *Fulton, Morley & Clark.*
Solicitor for respondent: *E. Claud Savile.*

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PATTERSON v. BRANSON, BROWN & CO., LTD.

Damages—Principal and agent—Stock-broker—Dealing in margins—Sale by broker.

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Stock-brokers bought wheat for P. on margin. On the first transaction P. signed a printed buying order, which provided that "it is further understood and agreed that on all marginal business the right is reserved to close the transactions when margins are running out without further notice," and on several subsequent transactions the notices confirming orders and containing these words were sent by the defendants to the plaintiff. The prices having fallen the brokers notified P. that money was required to cover and if not paid before the opening of the market on the following day he would be sold out. On the following morning no money being paid the wheat was sold at a loss to P.

Held, on the facts, that the plaintiff must be taken to have assented to this condition and that it must be regarded as a term of the contract between him and the defendants; and the broker's decision that P.'s margins had run so low that they were justified in selling him out was a reasonable one on the facts as they then existed.

Held, further, that the brokers were not bound to give P. reasonable notice before selling but even if they were so bound, reasonable notice had, in fact, been given.

ACTION for damages sustained by the plaintiff by reason of the alleged wrongful selling out of wheat purchased by the plaintiff on margin through the defendant Company. The facts are set out in the reasons for judgment. Tried by MURPHY, J. at Victoria on the 22nd and 23rd of April, 1930.

F. C. Elliott, for plaintiff.

Maclean, K.C., for defendants.

28th April, 1930.

MURPHY, J.: I find the facts as follows. Plaintiff was carrying 63,000 bushels of October wheat on margin which was expected on both sides to be maintained at approximately ten cents a bushel. Each drop of a cent a bushel entailed a loss of $630. It was intended by both parties that transactions with regard to the wheat would be carried out on the Winnipeg Grain Exchange. On Saturday May 4th, 1929, wheat dropped on that exchange some 4 cents a bushel. Monday, May 6th, was a holiday in Manitoba and the exchange was closed. The opening price of wheat on Tuesday, May 7th, was 4 cents below the closing price of May 4th. Defendants felt that they must have more margin from plaintiff. I accept the evidence of Blythe, the defendant's margin clerk, that he on the morning of May 7th, called the plaintiff by 'phone and informed plaintiff that he must furnish more margin and that plaintiff promised to come in during the course of the day and attend to the matter. Plaintiff, however, failed to do so. I accept Blythe's further evidence that after two unsuccessful attempts to get in touch with plaintiff on the afternoon of May 7th, he did finally get him by 'phone at about 7.30 in the evening. Blythe then informed plaintiff that if plaintiff did not furnish more margin before the opening of the market next morning plaintiff would be sold out. Humber, the employee of defendants who had in charge the actual duty of ordering purchases and sales to be made on the Winnipeg Grain Exchange also made two attempts to get in touch by 'phone with plaintiff but failed to do so. Humber spoke only with plaintiff's daughter and consequently I do not think it necessary to determine which account of this conversation is correct, as I do not consider defendants were entitled to treat her as her father's agent. Owing to the dif-

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ference in time between Winnipeg and Victoria the Winnipeg Grain Exchange opens at about 6.30 a.m. Victoria time. Plaintiff did not come to defendant's office before the market opened, but he did arrive there at about 9 a.m. He had with him some $4,000 in securities and $500 in cash for the purpose of furnishing more margin. He so informed Humber at any rate as to the securities. Humber thereupon told plaintiff that his wheat had been sold and that plaintiff owed defendant firm some $800 on the transaction. Plaintiff thereupon wanted time to pay this amount and was referred by Humber to Branson one of the chief officials of the defendant Company. I accept Branson's evidence that whilst plaintiff's wife protested about the sale of the wheat, plaintiff himself expressed himself as satisfied with the way the business had been handled and was only concerned with getting time to pay the balance due defendants. Plaintiff informed Branson that he had arranged to go to Europe and wished to postpone the payment of this balance until his return. Branson demurred but promised to lay the matter before his co-directors and to advise plaintiff. Branson did this and by letter written that afternoon advised plaintiff that his proposal for delay could not be entertained. Plaintiff issued the writ herein on May 13th. I have already disposed of all the causes of action other than the one that defendants had no legal right to sell plaintiff's wheat as they did. My opinion is that this claim also fails.

Judgment

Plaintiff had had several dealings in wheat on margin with defendants previous to the one in question herein. On the first occasion he signed an order for purchase in which these words occur:

"It is further understood and agreed that on all marginal business the right is reserved to close the transactions when margins are running out without further notice":

see Exhibit 8. On several subsequent occasions previous to May 7th, sales and purchase accounts and notices confirming orders all containing these words were sent by defendants to plaintiff in connection with his dealings with them in wheat. See Exhibits 12 and 13. I hold on these facts that the plaintiff must be taken to have assented to this condition and that it must be regarded as a term of the contract between him and

defendants. This question is one of fact but the manner of approaching its decision is, I think, found in such cases as *Watkins* v. *Rymill* (1883), 10 Q.B.D. 178; *Parker* v. *South Eastern Railway Co.* (1877), 2 C.P.D. 416; *Richardson, Spence & Co. and "Lord Gough" Steamship Company* v. *Rowntree* (1894), A.C. 217 at p. 219; *Thompson* v. *London, Midland & Scottish Ry. Co.* (1930), 1 K.B. 41. The plaintiff is an educated man and must have seen the printed matter on Exhibits 8, 12, and 13. He must have known from the very nature of these documents and the occasions upon which they reached him that this printed matter contained conditions relating to the terms on which his dealings with defendants would be carried on. What the defendants did was reasonably sufficient to give plaintiff notice of these conditions. They not only gave him all these printed documents but they gave him Exhibit 7 which, whilst it does not in terms refer to the clause in question, gives elaborate information which should at any rate indicate to an educated man embarking on wheat speculation the desirability of not signing documents in connection therewith without reading them and of reading any printed matter appearing on documents coming to him from his brokers when such documents obviously referred to his speculations. If this view is correct then the only remaining question is, Was defendants' decision on May 8th that the margins had run so low that they were justified in selling out the plaintiff a reasonable one on the facts as they then existed? *Nelson* v. *Baird & Botterell* (1915), 25 Man. L.R. 244. The actual outcome of the sale is to my mind conclusive proof that this question must be answered affirmatively. I hold on the evidence that defendants realized upon plaintiff's securities in a proper and judicious manner and obtained for him all that could be obtained. The net result shews the plaintiff indebted to the defendants. It is urged that even if the provision as to sale without notice is held to be a term of the contract defendants were nevertheless bound to give plaintiff reasonable notice before selling and the *Nelson* case, *supra,* is cited. But as I read that case it decides not that notice must be given but that the decision to sell must be reasonable. *Maloof* v. *Bickell and*

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Company (1919), 59 S.C.R. 429, particularly the judgments of Anglin, C.J., and Idington, J. seem to support this view.

But if I am wrong then on the facts as I have found them I hold that reasonable notice was given. All the facts must be kept in mind in deciding the reasonableness of the notice. Two facts are of outstanding importance, *i.e.,* the declining market of May 4th, and of May 7th, and the heavy commitment of plaintiff involving as stated a loss of $630 for every decline of a cent a bushel on the market. Scrutiny of the condition of plaintiff's account on the morning of May 7th, when the cash value of the collateral held by defendants as subsequently determined by realization is kept in mind shews that the existing margin was in danger of being wiped out by the declining market. Plaintiff failed to implement his promise to call and adjust matters. He had a full day within which to do so. Then in the evening he was expressly told that unless more margin was furnished before the market opened the wheat would be sold. It is argued that this conversation amounted to a fresh contract and *Pootmans* v. *Regina Grain Co.* (1918), 2 W.W.R. 1093 is cited. I do not agree. I regard this conversation as a further and legally an unnecessary warning to plaintiff. In any event it could only amount to an offer which would only become a contract on plaintiff accepting and fulfilling its terms. This plaintiff failed to do. It is idle in view of the evidence (*i.e.,* the continuous talk of this wheat deal in plaintiff's home, his own previous dealings in the wheat market through defendants, his large commitments and the warnings he had received) to contend that plaintiff was ignorant of how rapidly losses might pile up on a falling market. If he did not know what time was meant by Blythe in stipulating for cover before the market opened it was in my opinion his legal duty to enquire, or if it was not he cannot place his own interpretation on Blythe's offer and then set up a new contract founded on such interpretation. Further on the evidence of Branson which as stated I accept I hold that plaintiff ratified all that had been done, accepted the situation and was only concerned with getting time to pay the balance he owed defendants. The action is dismissed with costs.

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As to the counterclaim the defendants have produced proof

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that they ordered the wheat sold, that in consequence of such order they received certain moneys from their Winnipeg agents and that they have credited plaintiff with said sums. If plaintiff has any quarrel with the amounts so credited the onus is, I think, on him to shew that the wheat could have been sold at a higher price. So also as to the amounts realized by the sale of the securities. Judgment for defendants by counterclaim for $570.24.

Action dismissed.

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McCALLUM v. THE TORONTO GENERAL TRUSTS CORPORATION.

Administration—Executors—Assets of testator—Breach of trust—Acquiescence of beneficiary—Estoppel—R.S.B.C. 1924, Cap. 262, Sec. 88.

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R., by his will, appointed the defendant Corporation the sole executor of his estate. He directed the executor to pay all his debts as soon after his death as was convenient and the whole estate was bequeathed to his wife, the plaintiff. R. died in 1925 and on application for probate the affidavit of valuation shewed assets of $168,344, and debts of $37,092. R. in his lifetime was in the piano business and the net value of the business on his death was estimated at $109,870. For a time prior to R.'s death the business was prosperous and after his death the executor, with the acquiescence of the plaintiff, allowed the business to continue and also with her acquiescence the property was assigned to a company incorporated in April, 1926. This was done without any action being taken or provision made by the executor to pay the debts. The business continued but did not prosper and eventually became bankrupt. The plaintiff claimed that continuing the business was unbusinesslike and coupled with the assignment in 1926 constituted a breach of trust and she was entitled to damages.

Held, that it may be fairly assumed that the testator would expect that the defendant, upon acceptance of the trust, would pay the debts and retain the assets until this was performed when the plaintiff would be entitled to any balance remaining. This was the intent of the will and the failure to carry out such intent constituted a breach of trust. The fact of there being only one beneficiary who was anxious to act in such a way as might be a breach of trust making no difference in principle.

Held, further, that although there was not only concurrence and acquiescence but even a request from the plaintiff that brought about a transfer of

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the business to the company of which she had control as she did not have knowledge of the facts and circumstances of the case to appreciate their significance, the concurrence or acquiescence did not operate as a release of the defendant from liability.

Held, further, that on the facts of the case the defendant was not relieved from liability under section 88 of the Trustee Act.

ACTION for breach of trust. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at New Westminster on the 23rd and 30th of April and the 1st, 2nd and 5th of May, 1930.

Sullivan, for plaintiff.

A. H. MacNeill, K.C., and *C. M. Morrison*, for defendant.

MACDONALD, J.: On the 9th of May, 1919, Thomas Ross, who had been in the piano business for some years in Vancouver, made his will. It was drawn by the defendant Corporation, which was appointed the sole executor, and was directed to pay all the debts of the testator as soon after his death "as may be convenient." Then the will provided that unless the testator's wife predeceased him, all the estate, real and personal, was devised and bequeathed to his wife, Isabella Ross. She has, since the testator's death in 1925, remarried, and is now Isabella McCallum, the plaintiff herein.

Judgment

The defendant had possession of the will, and shortly after the death of Thomas Ross, it applied for probate of the will, which was granted on the 20th of June, 1925. In so applying for probate, the defendant, by its affidavit of valuation, shewed assets of $168,344.24, and debts of $37,092, or a net surplus of assets over liabilities of $131,252.24. It is stated in such affidavit that the amount thus mentioned constituted a true and fair statement of the total assets received by the defendant as executor, and it paid $4,306.07 as succession duty thereon to the Province of British Columbia.

In the inventory "X," upon the application by the defendant for probate, the business of the said Thomas Ross was valued by the defendant at $137,338.09, less 20 per cent. for bad debts, cost of collection, etc., leaving a net value of $109,870.48. The business, which had been conducted for some time prior to the death of said Ross, had been a fairly profitable and

prosperous one, and I believe might have been sold within a reasonable time after his death. At any rate, the defendant, through its local representatives, made no effort in that direction. Nor does it appear that an energetic, systematic effort was made to collect the outstanding accounts secured by sale agreements. They have, since the bankruptcy, been realized upon to a very appreciable extent.

Almost immediately after the defendant had assumed the duties and responsibilities of an executor of the estate, the question arose as to what disposition should be made of the business. A sale did not seem to be in contemplation of the parties in order to realize upon the assets, pay the debts, and transfer whatever balance there might be to the plaintiff as sole beneficiary. There is considerable conflict as to what occurred with respect to continuing the business, especially as to the attitude adopted by the plaintiff. I am, however, quite satisfied that she desired the business to continue as it had been during the lifetime of her husband, and that she never receded from this position. For some years, during the period prior to the subsequent bankruptcy, she believed she was a rich woman, and as she aptly termed it in one of her letters, she was living in a fool's paradise and spending money extravagantly.

I find that while the plaintiff was thus desirous of having the business carried on, that the defendant, through its local representative, Hewetson, agreed with the plaintiff as to the advisability of so carrying on the business. She had been advised by *C. L. Fillmore,* a solicitor who had acted for her husband in his lifetime, to seek the guidance and advice of the defendant Corporation, and presumably to act accordingly. Now it appears to have been the consensus of all interested parties that the business should continue. Plaintiff was led to this conclusion, to my mind, not only from the view that the business shewed a large surplus, but perchance had in mind that her son might eventually come into control of such business. She had not, however, sufficient knowledge of business to form an opinion which might be considered of any value in deciding a matter of this serious nature. I find that while plaintiff is of quite average intelligence, that in such a business matter she falls short of being any benefit to herself or to those who might

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expect in the future to acquire her property. There was the usual hazard attached to any business, and this was increased by a heavy indebtedness to the Bank of Toronto and the fact that it had necessarily to be carried on and managed by some one not financially interested in its success. I should add that with the lack of business ability she possesses a determined and obstinate disposition, having once set her mind in any direction. This was exemplified in respect to the purchase of a Cadillac motor-car and later on in making a European trip, which involved considerable expense.

Although the plaintiff was thus anxious to have the business carried on, she now complains that this course was unbusiness-like, and shewed bad judgment on the part of the defendant as an executor; further that, coupled with its subsequent actions, particularly the assignment of the property to a company incorporated in April, 1926, it constituted a breach of trust and entitled her to such damages as she may prove, she thereby suffered.

Judgment

It is stated in a leading authority that it is a rule, without exception, that to authorize executors to carry on a trade with the property of a testator held by them in trust, there ought to be the most distinct and positive authority and direction given by the will. This statement of the law appears in the head-note in the case of *Kirkman* v. *Booth* (1848), 11 Beav. 273. I think, however, that under the terms of the will the intent of the testator was that there might be a postponement of realization of the assets for a reasonable time, with a view either of selling the business or collecting the large outstanding accounts and paying the debts.

Defendant contends that under the circumstances, even if this intent existed, it was not imperative and might be modified with the consent of the sole beneficiary.

I think, aside from the plain wording of the will, it may be fairly assumed that the testator would expect that the defendant, upon acceptance of the trust as executor—which it practically did at the outset by having the will drawn in appropriate form in its office—would pay the debts. Further that, having regard to the want of business ability of the widow, it would retain the assets until this was performed. Was it not

then, and only then, that the testator wished the plaintiff to be entitled to any balance which might remain? In other words, the estate and the interest of the widow therein were to be safeguarded until the debts were paid. There was no object otherwise in this testator, or for that matter any testator, resorting to a trust company, with the attendant expense.

I think this was the intent of the will, and the failure to carry out such intent constituted a breach of trust. No attempt even was made by the executor to pay the debts. On the contrary, it, in violation of the terms of the will, in effect transferred all the personal estate to a company controlled by the plaintiff. During the course of the argument I submitted for consideration of the defendant's counsel an advertisement which emanated from an eastern trust company. It reads as follows:

"Absolute fidelity is an important qualification in the executor of a will. Heirs may become dissatisfied with its terms and seek to modify them. They may bring pressure to bear upon the executor or trustee. If he is susceptible to influence, or prone to take the road of least resistance, the will may be compromised. One of the important advantages of trust company service is its freedom from bias and from personal influence. When a trust company acts as executor or trustee there is absolutely no deviation from the testator's wishes, express or implied."

Judgment

Counsel, as I understood him, acceded to this proposition as being one which should be acceptable to any responsible trust company, but differentiated when there was only one beneficiary. This would mean that when there is only one beneficiary, and he or she requests or consents to the breach of trust, then no liability exists as against the executor. I cannot see that in principle there should be any difference.

Lord Langdale, in *Fyler* v. *Fyler* (1841), 3 Beav. 550 at p. 563, outlined a situation which irrespective of the relieving legislation in 1896, might be applied to the facts here presented, though not similar to any great extent. It is however, important, as there is no question whatever, no suggestion even, that the actions of the defendant were dishonest in any way. It is simply a complaint against the defendant for failure to fulfil the terms of the will. Lord Langdale, M.R. at pp. 563-4 said as follows:

"Cases which are very painful are not unfrequent in this Court; we find a married woman throwing herself at the feet of the trustee, begging and

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entreating him to advance a sum of money out of the trust fund to save her husband and her family from utter and entire ruin, and making out a most plausible case for that purpose; his compassionate feelings are worked upon; he raises and advances the money; the object for which it was given entirely fails; the husband becomes bankrupt; and in a few months afterwards the very same woman who induced the trustee to do this, files a bill in the Court of Equity to compel him to make good that loss to the trust. These are cases which happen; they shock everybody's feelings at the time, but it is necessary that relief should be given in such cases: for if relief were not given, and if such rights were not strictly maintained, no such thing as a trust would ever be preserved. The hardship, therefore, of individual cases must not be taken into consideration, and if these parties think fit to insist on their strict rights, they are entitled to have them."

The responsibility thus outlined has been lessened by statutory enactment. Before, however, I deal with that situation, I wish to consider another phase of the matter, and that is as to whether on the ground of concurrence and acquiescence, the plaintiff should not be estopped from setting up any cause of action arising from the breach of trust. In the first place:

"If *a cestui que trust* concur in a breach of trust he is forever estopped from proceeding against the trustee for the consequences of the act, whether he did or did not derive benefit by the breach."

Judgment

Then again, even although the *cestui que trust* did not concur at the time in the breach of trust, he may debar himself from relief by having acquiesced in the breach of trust subsequently. This statement of the law is outlined in various text-books, but there are exceptions to which I will refer. Acquiescence, release and confirmation with respect to a breach of trust, to have the full effect of relieving from liability, must be accompanied with certain conditions. I need not deal with all such conditions, but the one to which I wish to refer particularly is this:

"The *cestui que trust* must be fully cognizant of all the facts and circumstances of the case; and if the release is executed by the *cestui que trust* in ignorance of his rights, it may be set aside after the death of the trustee, and after a long interval as, for instance, twenty years."

So that while I find that there was not only concurrence and acquiescence, but even a request on the part of the plaintiff which brought about a transfer in writing of the assets of the estate to the company of which she had complete control, still that she did not have knowledge of "the facts and circumstances of the case," or if some facts were imparted to her, was she able to appreciate their significance? She had no independent advice

as to the transfer of assets or otherwise. She depended upon the course of action pursued and approved by the trust company selected by her husband. So one of the conditions that became necessary, in order that concurrence or acquiescence may operate as a release from liability, did not exist.

Then as to the effect of the statute which sought to reduce the liability of trustees, *viz.*, section 88 of the Trustee Act, R.S.B.C. 1924, Cap. 262, as follows:

"If it appears to the Supreme Court or a judge thereof that a trustee, however appointed, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court or judge may relieve the trustee either wholly or partly from personal liability for the same."

This confers a jurisdiction upon the Court to relieve the trustee under the circumstances therein outlined. The burden is cast upon the trustee, seeking to obtain the benefit of this legislation, of shewing that he was acting honestly and reasonably and ought fairly to be excused for the breach of trust.

I have already referred to the fact that beyond question there cannot be the slightest suggestion that there was anything dishonest in the actions of the defendant Corporation, and I have then to determine whether the defendant acted "reasonably." I have discussed at some length the situation with respect to the business and the duty cast upon the defendant to deal with the estate along certain lines. I think that were I to hold that the defendant acted reasonably, it would simply mean that the purpose sought to be attained, by appointing a trust corporation to act as executor, would practically fail. The wish of a testator to safeguard the estate would not be accomplished. In this case, as I have already mentioned, the estate was not even as to payment of debts administered by the executor, but was placed in the control of the widow, whose capacity, from a business standpoint, had doubtless been estimated by her husband, and thus the selection of a trust company had been made by him as executor. I think it could not be fairly contended that it was reasonable for an executor, required to pay debts of a testator, to transfer the assets, especially of a hazardous business, to a

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widow, with little, if any, business ability, and burdened with a debt to a bank of over $30,000. The accumulation of further debts, coupled with subsequent bankruptcy, was quite probable.

Finding as I do that the defendant has failed to shew that it acted reasonably, the section to which I have already referred does not afford any assistance to the defendant in this action.

Then there is the further ground of defence, that even if a breach of trust is found and there is no defence afforded through concurrence and acquiescence on the part of the plaintiff, and section 88 has no beneficial result, still that by the course of the probate proceedings, the defendant is relieved from liability. I allowed, on the second or third day of the trial, an amendment, subject to the question of costs, which enabled the defendant to plead what may be termed estoppel. It is contended on its behalf that the registrar having made his report in pursuance of an order to that effect, and such report having been confirmed by a judge of the Court, that it operates to relieve the defendant from any liability. It has been decided that a right of action founded upon breach of trust does not come within the purview of such proceedings: *vide Dowse* v. *Gorton* (1891), A.C. 190 at p. 202 and *In re Hengler* (1893), W.N. 37.

Judgment

I am also of the opinion that it was not intended that during the course of these proceedings, in which the plaintiff was not represented by counsel, but had her husband present to assist her, that the question of the breach of trust or any action to which the plaintiff might be entitled should be dealt with or passed upon by the registrar. In fact it was so stated by counsel for the defendant. I might extend my remarks further in this connection, but it seems to me this should suffice.

The result is that the plaintiff succeeds in the action, and the next question which arises is as to the order which should be made, in order to determine the damages plaintiff may have suffered from such breach of trust. This, it was conceded during the trial, can only be determined by a reference, which I direct. It will be a difficult task, I might mention, for the registrar to determine the extent of these damages, and he may apply for directions.

Judgment for plaintiff.

CAMERON & CAMERON v. BOULTON.

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1930

May 8.

Commission—On collection by solicitors—Scale—Action to recover—Duty of solicitors to inform client of scale of fees—Costs—Order LXV., r. 29.

CAMERON & CAMERON v. BOULTON

On the collection of certain moneys for the defendant from the Canadian Government in respect to damages after an award by the Royal Commission for the investigation of Illegal Warfare Claims, the plaintiffs, who were barristers and solicitors, claimed that in the absence of special agreement, they were entitled to charge the defendant a commission in lieu of costs on the collection of the claim according to the scale provided for by the Rules of Court, Order LXV., r. 29. The plaintiffs recovered judgment for the amount claimed but as they did not, before deciding to let the matter stand without determining the scale of the commission, draw the defendant's attention to the said Supreme Court rule, and give him to understand that in the absence of the scale of commission being determined they intended to exact payment according to the rule, it was

Held, that this was sufficient ground for depriving them of the costs of the action.

ACTION to recover $1,171.25, as commission, payable in the absence of special agreement on the collection of $22,225 for the defendant from the Canadian Government in respect of damages after an award by the Royal Commission for the investigation of Illegal Warfare Claims. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 17th of April, 1930. Statement

J. A. MacInnes, for plaintiffs.
Bruce Boyd, for defendant.

8th May, 1930.

FISHER, J.: The plaintiffs who are barristers and solicitors claim the sum of $1,171.25 as commission payable in the absence of special agreement on the collection of the sum of $22,225 for the defendant from the Canadian Government in respect of damages after an award by the Royal Commission for the investigation of Illegal Warfare Claims. Judgment

As to the employment of plaintiffs, the defendant admits that, on the 31st of August, 1925, he went into the office of the plaintiffs to see them (or one of them) in connection with the

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meeting of the Commission in Vancouver with regard to a claim before the said Commission, that the claim was prepared by one of the plaintiffs (*Ian Cameron*) and the defendant together and presented at $82,000 at a meeting of the said Commission in September, 1925, attended by the said *Ian Cameron* and the defendant, that thereafter plaintiffs having sent affidavits, some of which they had prepared, to the Commission for the purpose of establishing the claim, kept in communication with the Commission until a letter dated May 20th, 1926, was received by the plaintiffs from the Secretary of the Commission stating that the Commissioner had made a substantial award on account of the claim to the defendant. Sometime afterwards the defendant received the sum of $22,225 pursuant to the award.

The plaintiffs say that the defendant asked them to take the claim on a contingency basis and they agreed to do so. The commission on the amount that might be obtained in case of success never having been settled the plaintiffs now claim in the absence of special agreement to be entitled to charge the defendant a commission in lieu of costs on the collection of the claim according to the scale provided for by the Rules of Court, Order LXV., r. 29.

Judgment

The defendant says that he is prepared to pay the plaintiffs their fees but not a commission and contends that after appearing before the Commission the plaintiffs (through the said *Ian Cameron*) agreed to accept $50 and their charges for a few letters.

The defendant says that this agreement was made in a conversation between himself and the plaintiff (*Ian Cameron*) while they were just outside the Rogers Building on their way from the meeting of the Commission in Vancouver and the witness Victor E. Roberts to a certain extent, corroborates his evidence. Speaking of the agreement the defendant says, in answers to questions, as follows:

"Whereabouts did it happen? Just outside the Rogers Building. We walked down from the Vancouver Hotel to the Rogers Building. I said 'How much is that, Mr. *Cameron*?' And he said '$50.' He said 'Of course, there will be a few letters I will have to charge you for.' I said 'That's all right; send me a bill for that amount.'"

Roberts, under cross-examination, says as follows:

"The whole thing took place at the foot of the elevator? At the foot of the elevator.

"Now, tell us the whole thing from beginning to end. I met Mr. Boulton at the foot of the elevator, and I said: 'Who is your friend?' He said: 'It is Mr. *Cameron*; Mr. *Cameron*—Mr. Roberts.' And he said: 'He has been up,' he says, 'to the Vancouver Hotel on this compensation for me,' he says. He says: 'Mr. *Cameron*, by the way, how much will that bill be?' He said: 'About $50.' And that's all."

The plaintiff, *Ian Cameron*, denies the alleged meeting with Roberts and conversation *in toto*. I am inclined to think that some casual meeting occurred between the parties at or about the time and place mentioned which the said plaintiff has forgotten. I have come to the conclusion, however, that though the defendant and Roberts remember something about some conversation they do not remember it correctly after a lapse of nearly five years. There is nothing in the subsequent conduct of the parties that would tend to bear out the correctness of their recollection. The defendant says that he told the plaintiff at the time to send him a bill for that amount but that the plaintiff never sent him a bill for the $50. In another part of his evidence the defendant says that he was in straightened circumstances during the period in question and borrowed a few dollars from one of the plaintiffs who obviously, on his instructions, continued to look after the matter at least until notified of the award in the following May. In the circumstances I do not think that in such a casual manner, as is suggested, an agreement was made between the parties that the solicitors employed should be entitled only to what the defendant contends when so large a claim as $82,000 was being made with the assistance of the plaintiffs as solicitors aforesaid. The account given by the plaintiff (*Ian Cameron*) as to the basis on which the work was done, corroborated as it is in some respects by the other plaintiff (*George Cameron*) seems more credible to me and I find that no special agreement was made.

Judgment

In the absence of any special agreement the scale of commission provided by the said Rule of Court would apply and the material part reads as follows:

"On the first $300 or less.....15 per cent.
On excess over $300 up to and including $1,000.....10 per cent.
On excess over $1,000..... 5 per cent."

On the question of costs, however, I think I should take into consideration the fact that the plaintiffs should be assumed to

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have knowledge of the said rule of which the defendant would not be aware. The plaintiff (*Ian Cameron*) speaking of the original arrangement states as follows:

"The original arrangement was, Boulton told me he was perfectly satisfied if we would handle this matter on a 50-50 basis, and I did not think that was satisfactory because if we obtained anything like the amount that we made claim for, it was altogether too much out of proportion, so we decided to let the matter stand and we would decide on a commission upon receipt of some idea what the award would be, if established."

Under such circumstances it seems to me that the practice suggested in *Union Bank* v. *Stewart et al.* (1895), 3 Terr. L.R. 342 at p. 345 should have been followed and, as was indicated by the Court in such case, I think here that the plaintiffs, before the decision to let the matter stand without determining the scale of the commission, should have drawn the defendant's attention to the said Supreme Court rule and given him to understand distinctly that in the absence of the scale of commission being determined they intended to exact payment according to the rule if they intended to do so. This was obviously not done and in the circumstances I would consider there is good cause for depriving the plaintiffs of their costs.

Judgment

There will be judgment therefore in favour of the plaintiffs against the defendant for the amount claimed without costs.

Judgment for plaintiffs.

WALKER AND ROBERTS v. SILK

MCDONALD, J.

1930

May 20.

Husband and wife—Wife's funds controlled by husband in wife's lifetime—Death of wife—Presumption of gift.

Where a wife entrusts to her husband the management of her funds out of which he pays their expenses and makes investments that they from time to time agree upon, the question of whether the law implies a gift to the husband depends on the particular facts in each case.

Bartlett v. *Bull* (1914), 26 W.L.R. 831 applied.

WALKER AND ROBERTS v. SILK

ACTION for a declaration that the defendant is trustee of the assets of his deceased wife's estate and that such assets be brought into his accounts as administrator of her estate. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 14th of May, 1930. Statement

Macrae, and *Clyne*, for plaintiffs.

Reid, K.C., and *Gibson*, for defendant.

20th May, 1930.

McDONALD, J.: This is an action brought by the sisters of the defendant's deceased wife for a declaration that the defendant is a trustee of the assets of his said wife and as such must bring such assets into his accounts as administrator of her estate.

The defendant and his wife were married in 1907 in Chili whence after some years they came to reside in Vancouver where they lived happily throughout their married life. They were in very straightened circumstances and in debt and the wife was ill when in the year 1926 she fell heir to approximately $177,000. They had no children. Some $10,000 of this legacy was remitted from Great Britain in December, 1926. Some of this money was used to pay debts; some was deposited to the husband's credit in a bank at Vancouver to be used for the purpose of building a house which they contemplated building; and some $2,000 they took with them, in January, 1927, to California where they went for the benefit of Mrs. Silk's health. A bank account was opened in Monrovia, California, in the defendant's name and later during the year 1927, after Judgment

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the remainder of the legacy arrived in Vancouver, various amounts were from time to time drawn from Mrs. Silk's account in Vancouver and deposited in the account in Monrovia and used by the defendant in paying his own and his wife's expenses, his wife's doctor bills and general accounts and also in the purchase of an interest in certain property bought by the defendant in Los Angeles and further property bought in San Bernardino. By arrangements made by Mrs. Silk with her bank manager in Vancouver a large amount of her funds was invested in securities, a considerable part of which were from time to time converted into cash which cash was deposited from time to time partly in the defendant's account and partly in Mrs. Silk's account, deposits being made from time to time as one or the other of such accounts became depleted. They returned to Vancouver in August, 1927. The securities then in the bank were removed to a deposit-box to which both the defendant and his wife held a key. From time to time the defendant out of his wife's moneys increased his investments in California but no definite information is before the Court as to specifically what these investments are. The defendant also from time to time made further investments in Vancouver; a large sum having been spent on a sheep ranch which failed. Speaking generally, it may be said that prior to his wife's death intestate, on October 20th, 1928, at least one-half of the estate had been dissipated in investments which turned out to be of little or no value. Throughout all that period the defendant's bank account and his wife's bank account were drawn upon from time to time and the wife's securities were turned into cash from time to time and moneys were used in the payment of household and living expenses, in the construction of a dwelling-house and purchase of furniture, in real estate and, as to a comparatively small amount, in investments on mortgages. The wife trusted her husband throughout to manage her business, to buy and sell and to invest as he saw fit, though it appears that he kept her advised as to what he was doing.

In February, 1928, some securities were sold and the proceeds deposited to the husband's account. This money was used to purchase certain property at the corner of Maple Street and 10th Avenue in the City of Vancouver to be used for the

purpose of a garage and service station. The conveyance was taken in the name of the defendant and his wife "as joint tenants." On or about March 8th, 1928, a certain property was purchased on Howe Street in the City of Vancouver and this property was also taken in the name of the defendant and his wife "as joint tenants." Later certain properties were purchased from the Government of British Columbia, these properties being taken in the names of the defendant and his wife although they were not described as joint tenants. Evidence was tendered by the defendant and one Smith to the effect that the Maple Street property and the Howe Street property were so conveyed to the defendant and his wife with her full knowledge and understanding and with the intent, as to these two properties that there should be the right in each to take by survivorship. Admittedly these properties, like all the other properties in question, were purchased with Mrs. Silk's money and I am not able to find upon the evidence that she understood the meaning of the expression "as joint tenants"; in fact it seems quite clear that the defendant himself did not understand such meaning until a considerable time at least after he had sworn the affidavits leading to the order for administration of the estate.

Judgment

The defendant contends, and in his examination in chief testifies, that all moneys paid to him by his wife were paid to him as absolute gifts for his sole and only use and with no obligation on his part to give an accounting. Having carefully observed his cross-examination and his examination for discovery and analyzing the investments which were made from time to time and the circumstances under which they were made and with respect to the accounts from which the moneys were drawn for making such investments and considering all the surrounding circumstances, I am not able to find as a fact that any such gifts were made, and I reach this conclusion aside altogether from any rule of law requiring corroboration to substantiate such claim.

The position, therefore, is simply this: the defendant was entrusted by his wife with the management of her funds, out of which funds he was to pay their expenses and to make such investments as they from time to time selected and agreed upon.

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It is contended by Mr. *Reid* that under such circumstances the law implies a gift to the husband and reliance is placed particularly upon the decisions in *In re Young* (1885), 28 Ch. D. 705; *Caton* v. *Rideout* (1849), 1 Mac. & G. 599; *Edward* v. *Cheyne* (*No. 1*) (1888), 13 App. Cas. 373 and *Gardner* v. *Gardner* (1859), 1 Giff. 126.

On the other hand Mr. *Macrae* contends, and I think upon a reading of the later cases it must be held, that the decision of every case must depend upon its own particular facts. This seems clear from the decision of Mr. Justice Walsh in *Bartlett* v. *Bull* (1913), 5 W.W.R. 1207 and the cases there cited.

Judgment

Upon the whole of the evidence I conclude that the action must succeed and that all of the properties in question fall into the estate and that the defendant must account for all properties still held by him and purchased with the moneys of his wife or from the proceeds of property purchased with such moneys and for the proceeds of all properties purchased with such moneys and disposed of by him. He is not of course liable for losses which have occurred by reason of bad investments nor is he bound to account for the moneys which he spent for the benefit of the home or for his own or his wife's expenses prior to his wife's decease.

As to the furniture, it appears that counsel are negotiating a settlement. If no settlement is reached the matter may be spoken to. Judgment will go for the plaintiffs with costs of all parties to be paid out of the estate.

Judgment for plaintiffs.

FOWLER AND ANDREWS v. THE CORPORATION OF THE TOWNSHIP OF SPALLUMCHEEN.

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FOWLER v. SPALLUMCHEEN

Municipal law—Construction of by-law—External circumstances—Payment of taxes—Mistake of law—Recovery back.

The defendant Corporation passed a local improvement by-law extending the operation of its waterworks over a certain area and providing for the assessment and collection of taxes from the owners of the land within said area to cover the cost of construction. The plaintiffs, owners of 80 acres, paid their taxes under said by-law during the years 1919 to 1929. They now seek to recover the taxes so paid, claiming the assessment and levy of said taxes invalid on the ground that in the second recital of the by-law the specific description of their lands by section number, and township, is omitted, all other lands coming within the scope of the by-law being specifically described therein.

Held, that as the by-law refers to the lands benefited by the work as according to the last revised assessment roll of said municipality and the roll includes the 80 acres belonging to the plaintiff and the recital of the total acreage at 1,183 acres shews the 80 acres in question are included within the scope of the by-law, it was clearly understood that these 80 acres were to come under the operation of the by-law and the action should be dismissed.

Held, further, that if there is any question of a mistake having been made as to the payment of the taxes it was a mistake of law and money so paid cannot be recovered.

ACTION to recover the amount of taxes alleged to have been wrongly assessed, levied and collected by the defendant Corporation from the plaintiffs during the years 1919 to 1929. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Vernon on the 1st of May, 1930. Statement

Perry, for plaintiffs.
Lindsay, for defendant.

23rd May, 1930.

SWANSON, Co. J.: The plaintiffs are farmers resident within the limits of the defendant Municipality in the County of Yale, and seek to recover the amount of taxes paid by them to the defendants during the years 1919 to 1929, both inclusive, claiming that said taxes were wrongly assessed, levied and collected from plaintiffs during said years. An annual rate or Judgment

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tax of $16.40 was assessed, levied and collected from plaintiff Fowler, and the annual sum of $16.50 from plaintiff Andrews by defendants pursuant to By-law No. 134 of defendants known as the "Lansdowne Waterworks Extension Loan By-law, 1911," a local improvement by-law. Plaintiffs are the owners of 80 acres of land in said Municipality part of the north-west quarter of section 17 in Township 35 in the said Township of Spallumcheen. These lands form the east half of the said north-west quarter of said section 17, and are shewn on the sketch plan Exhibit 3, used at the trial. These lands are a portion of the 160 acres being the north-west quarter of said section 17 purchased by plaintiffs from T. K. Smith. They are within the "area" to be "served from the system" the "extension of the defendant's waterworks system to serve the inhabitants of the lands" in question (to adopt the language of the by-law), the area comprising 1,183 acres, as the by-law set forth, which lands are "to be immediately directly equally and specially benefited by the said works and improvements." The plaintiffs admit (subject to objections with which I will deal later) that the 80 acres set opposite the name of T. K. Smith in the by-law, and set opposite Smith's name in the petition filed preparatory to the passing of the by-law, are the identical 80 acres now the property of plaintiffs, on which the taxes in question were levied and collected. The pith and substance of the plaintiffs' objection to the validity of the assessment and levy for taxes herein is that in the second recital in the by-law the specific description of the lands in question by section number and township is omitted, all the other lands being specifically described in said recital. The same omission is made in the petition which was signed by T. K. Smith, opposite whose name in the petition appears the acreage affected —80 acres—being the lands then owned by Smith, and now owned by plaintiffs, and being the identical lands in question in this suit. It is to be observed that in the first recital on page 2 of the by-law made Exhibit 2 at the trial the following language occurs:

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"And whereas the said owners of the said described lands are each of them the holders of the number of acres of land set opposite their respective names, according to the last revised assessment roll of the said Munici-

pality as hereinafter mentioned, which said lands are to be served from the said system, that is to say:

"Name of owner.....Acreage....."

Then follow the names of all the property owners in the area affected including the following:

"T. K. Smith, 80 [under heading "Acreage"]."

The total number of acres set out in this recital comes to 1,183 acres. Then in the third recital occur these words:

"And whereas there are 1,183 acres of land and real property in the area above described immediately directly equally and specially benefited by the said works and improvements, upon which it will be necessary to charge an annual special rate of 41 cents per acre sufficient to pay the said principal and interest."

In clause 6 of the by-law occur these words:

"A special rate of 41 cents per acre shall be assessed, levied raised and collected annually in the same manner as Municipal taxes are assessed, levied, raised and collected in addition to all other rates, upon and from the lands and real property within the above described area, to provide for the payment of interest on the debt hereby created during the currency of the said debentures and to provide for the payment of said debt when due."

See similar language in clauses 7, 8 and 9.

It will be noticed that the by-law refers to the said lands "according to the last revised assessment roll of the said Municipality." The rolls are produced and shew the lands in question. There can be no possible doubt as to the identity of the lands in question, and it is quite clear that the intention of T. K. Smith, the owner of the lands at the time the petition was signed, and at the time the by-law was passed, was that the 80 acres belonging to T. K. Smith, being the lands in question, were to come under this local improvement by-law. I think that the plaintiffs' whole case is built up on a pure technicality, a position which I do not think should be supported either at law or in equity or *in foro conscientiæ*. It was all along clearly understood that these 80 acres were to come under the operation of this by-law. I can see no sound reason why the plaintiffs should be permitted at this late date to shift their due share of responsibility under this by-law on to the backs of the other ratepayers in the "area" of the Municipality affected by this by-law. The recital of the total acreage 1,183 acres clearly shews that the 80 acres in question are included within the scope of the by-law. I was inclined to think at the hearing that the reception in evidence of the "petition" preliminary to the

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passage of the by-law was open to question on the same ground that the Courts have repeatedly held that debates in Parliament, amendments in committee are not to be considered in the matter of interpretation of an Act of Parliament; that the Act as finally passed must be interpreted as a complete and final instrument or document in itself. The "petition" is expressly referred to in the second recital of the by-law, Exhibit 2. I think on reconsideration that the authorities will justify its reception in evidence. In any event where there is any doubt as to the identity of the lands in question I think that evidence is properly adducible to establish the same.

Phipson on Evidence, 5th Ed., 585 states:

"In construing private Acts, the Court may also consider not only the circumstances under which the Act was passed, but the position of the parties, the practice as to *locus standi*, and at whose instance and for what reasons a particular clause was inserted"

quoting a decision of the Court of Appeal, *Taff Vale Railway Co.* v. *Davis & Sons* (1893), 63 L.J., Q.B. 347, and decision of the House of Lords in same case (1895), 64 L.J., Q.B. 488 at pp. 490 and 492. In the Court of Appeal, at p. 351, Lord Esher, M.R., said:

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"Now it seems to me that in construing the language of an Act of Parliament like this we must take into consideration the circumstances under which that language was used, and that in this respect we must apply the same rules of construction as we should in construing a contract."

Later on the learned Master of the Rolls observed:

"I think we are clearly entitled to consider the circumstances under which the protection was asked for."

Lord Justice Lopes at p. 352 said:

"I think that, as in the case of a contract, though the Court is not entitled to look at the negotiations which may have taken place and matters of that sort, it is undoubtedly entitled to look at the surrounding circumstances at the time the clause was enacted."

While the House of Lords reversed the Court of Appeal judgment on the facts of the case, the principle above set forth by the Master of the Rolls was approved by Lord Halsbury, L.C. in the House of Lords report at p. 490:

"While I certainly do not question what the Master of the Rolls so emphatically declares, that we are entitled to look at the circumstances (a proposition which Mr. Moulton declares he never questioned), I do not see that we gain very much light here if we do look at the circumstances," etc.

Maxwell on Statutes, 7th Ed., 20, states:

"As regards the history, or external circumstances which led to the enact-

ment, the general rule which is applicable to the construction of all other documents is equally applicable to statutes, *viz.*, that the interpreter should so far put himself in the position of those whose words he is interpreting, so as to be able to see what those words relate to. Extrinsic evidence of the circumstances or surrounding facts in which a will or contract has been made, so far as they throw light on the matter to which the document relates, and of the condition and position and course of dealing of the persons who made it or are mentioned in it, is always admitted as indispensable for the purpose not only of identifying such persons and things, but also of explaining the language, whenever it is latently ambiguous or susceptible of various meanings or shades of meaning, and of applying it sensibly to the circumstances to which it relates."

See also the succeeding pages in Maxwell on the subject of "external circumstances." As to the interpretation of a by-law see *Esquimalt Water Works Co.* v. *Victoria* (1904), 10 B.C. 193, and *Corporation of City of Victoria* v. *Belyea* (1907), 13 B.C. 5. It is contended by counsel for plaintiffs that "taxing statutes" should be "strictly construed," quoting the words of Strong, J. (afterwards Chief Justice of Canada) in *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420 at p. 424. See also Maxwell on Statutes, 7th Ed., 246 *et seq.*:

"Statutes which impose pecuniary burdens, also, are subject to the same rule of strict construction."

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I would also allude to the words of Lord Russell of Killowen, C.J. in a case by the Crown to recover penalties under the Stamp Act of 1891—*Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. 158 at p. 164:

"In the course of argument reference was made on both sides to supposed special canons of construction applicable to Revenue Acts. For my part I do not accept that suggestion. I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed."

These words of Lord Russell are quoted by MARTIN, J.A. in *Bishop of Vancouver Island* v. *City of Victoria* (1920), 28 B.C. 533 at p. 546. I also allude to the words of Lord Russell, C.J. in *Kruse* v. *Johnson* (1898), 67 L.J., Q.B. 782 at p. 785:

"But when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and

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safeguards which have been mentioned, I think that the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered."

See also Lord Russell, C.J. in *Walker* v. *Stretton* (1896), 12 T.L.R. 363. See also the principle of interpretation set forth in our Interpretation Act, R.S.B.C. 1924, Cap. 1, Sec. 34, Subsec. (6):

"Every Act . . . deemed to be remedial, . . . ; and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit."

It is submitted by counsel for the defendant that the plaintiffs having voluntarily paid their money for the taxes imposed on them cannot now recover their money. I think the authorities are conclusive on this point: *Cushen* v. *City of Hamilton* (1902), 4 O.L.R. 265. Osler, J.A. at p. 268 quotes from Dillon on Municipal Corporations, 4th Ed., p. 1150:

" 'Money voluntarily paid to a corporation under a claim of right, without fraud or imposition, for an illegal tax licence, or fine, cannot without statutory aid be recovered back from the corporation, either at law or in equity, even though such tax licence, fee, or fine, could not have been legally demanded or enforced,' citing *Mayor of Richmond* v. *Judah* (1834), 5 Leigh (Virginia) 305."

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See also to same effect decision of Middleton, J. in *O'Grady* v. *City of Toronto* (1916), 31 D.L.R. 632. In Dillon, 5th Ed., sec. 1617:

"The payment [of taxes] by the plaintiff must have been made upon compulsion, as, for example, to prevent the immediate seizure of his goods or the arrest of the person, and not voluntarily. Unless these conditions concur, payment under protest will not, without statutory aid, give a right of recovery."

A great many cases from the American Law Reports are quoted in detail by the learned author. See also Smith on Municipal Corporations, 245 *et seq.*

It is also claimed on behalf of plaintiffs that they paid their taxes under a mistake of fact, and not under a mistake of law. Under certain conditions payments made under a mistake of fact can be recovered back: *Kendal* v. *Wood* (1870), 39 L.J., Ex. 167; L.R. 6 Ex. 243; the leading case of *Kelly* v. *Solari* (1841), 11 L.J., Ex. 10; 9 M. & W. 54; 152 E.R. 24, decisions of Lord Abinger, C.B., Baron Parke *et al.* were quoted

by counsel for plaintiffs. If there is here any question of a mistake having been made it is I think clearly a case of payment under a mistake of law, and not a case of payment under a mistake of fact. The authorities are very clear that such a payment cannot be recovered by action. Pollock on Contracts, 5th Ed., p. 437:

"Money paid under a mistake of law cannot in any case be recovered."

It is also argued by counsel for defendant that the plaintiffs' action (or claim) is barred by the statutory provisions by way of limitation under sections 184 and 451 of the Municipal Act, R.S.B.C. 1924, Cap. 179: *Arbuthnot* v. *City of Victoria* (1913), 18 B.C. 35; *Cameron Investment and Securities Co.* v. *Victoria* (1920), 3 W.W.R. 1043; *Bishop of Vancouver Island* v. *City of Victoria* (1920), 28 B.C. 533; *Hales* v. *Township of Spallumcheen* (1921), 30 B.C. 87.

I think this case is distinguishable from the *Bishop of Vancouver Island* case inasmuch as in that case the Court held that the assessment of the land on which the church "building" stood could not be legally assessed, the "building" being exempt by statute, and that the assessment was void *ab initio*. That does not arise in the present case. All the lands in the assessable "area" were clearly liable to assessment and to be the subject of legal levies, the only point raised being that because of the omission in the by-law of a specific description of the T. K. Smith 80 acres the assessment was not properly made. The defect if any was a mere matter of procedure, and not of the substantive legal right to assess.

Judgment

In the light of the above principles of law I am satisfied that the plaintiffs' action must be dismissed. Judgment accordingly dismissing action with costs.

Action dismissed.

COURT OF APPEAL

1930

June 6.

THE KING v. LIM COOIE FOO.

Statute, construction of—Chinese Immigration Act—Chinaman a former resident of Canada—Goes to China and later applies for re-entry and is refused—Applies again for re-entry in 1930 and is refused—Habeas corpus—Appeal—R.S.C. 1927, Cap. 95, Sec. 8.

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Section 8 of the Chinese Immigration Act provides that "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, . . . (*o*) Persons who have been deported from Canada, or the United States, or any other country, for any cause whatsoever."

Accused, a Chinaman, came to Canada in 1907, when 17 years old. In 1910 he returned to China where he remained 11 years. He then came to Canada again remaining one year and returned to China where he remained until 1928. He then left China booked for Trinidad. On the way he attempted to enter Canada but was refused entry because his destination was Trinidad. He had a substantial interest in a business in Vancouver. In January, 1930, he again applied for admission into Canada and an order was issued that he be deported. An application for a writ of *habeas corpus* was granted.

Held, on appeal, reversing the decision of FISHER, J., that as the accused applied for entry into Canada in 1928 and he was then deported section 8 of the Chinese Immigration Act applies and he is thereby precluded from admission into Canada.

APPEAL by the Crown from the order of FISHER, J. of the 17th of March, 1930 (reported, 42 B.C. 496), releasing Lim Cooie Foo from custody on *habeas corpus* proceedings. Lim Cooie Foo came to Canada in 1907 when 17 years old and remained until 1910, when he returned to China where he remained 11 years. He then returned to Canada and after remaining for one year, went back to China where he stayed until 1928. During all this time he had a substantial interest in the firm of Gin Lee Yuen Company of Vancouver. In 1928 he left China intending to go to Trinidad. While on the way he tried to enter Canada but was not allowed to enter on the ground that he was ticketed through to Trinidad. In January, 1930, he again applied for admission into Canada but was detained by the immigration officials and on the 6th of January, 1930, an

Statement

order was issued by the controller of Chinese immigration for his deportation.

The appeal was argued at Victoria on the 6th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Elmore Meredith, for appellant: Unless he has citizenship or domicil he has no right to enter Canada. The learned judge found he had domicil but whether he had domicil or not, having been deported in 1928, he has no right now to come back again. It is a question whether he had domicil at all, but if he did he subsequently abandoned it.

Argument

Nicholson, for respondent: He had domicil in Canada as he was admitted in 1920 after an absence of ten years: see *Rex* v. *Fong Soon* (1919), 26 B.C. 450 at p. 454.

Meredith, was not heard in reply.

MACDONALD, C.J.B.C.: We do not need to hear you, Mr. *Meredith.*

To put it in the simplest way that it may be put, we think this: That the applicant here, the respondent, came to this Province in 1928 and applied to enter Canada. The commissioner of Chinese immigration held the inquiry authorized by the Act to inquire whether he ought to be allowed to come into Canada or not. It is not disputed that he had jurisdiction to do that. That inquiry was held, and the evidence was taken. There was no evidence given at all that he had domicil in Canada at that time, and the Board found against the applicant and decided that he should be deported. We have this in the Act, that when a person has been deported he is among the class of undesirables and not to be admitted, as the Act puts it, section 8:

MACDONALD, C.J.B.C.

"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."

And no person of Chinese origin may be admitted, if that is

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proved. It was proved and he has been deported. He comes back in 1930 and asks again to be admitted and was again brought before the Board, and sets up evidence that was not before the first Board at all—that he is a domiciled Canadian and is entitled to enter.

I think the first proceeding must prevail, and cannot be treated as a nullity. It may have been wrong that he was not admitted; that is not a question of jurisdiction, that is a question of wrong conclusion. Therefore the deportation in 1928 was not a nullity, and cannot be disregarded now.

MACDONALD, C.J.B.C.

Mr. *Nicholson* claims that he can raise it now, notwithstanding that his admission to Canada was refused in 1928; that he should have been admitted then, and if he ought to have been admitted then, he should be admitted now. That comes within our jurisprudence, that where a case is tried, whether all the evidence that might have been before it was before it or not, and is adjudged by the Board, the case is *res judicata* and cannot be reopened.

That is the case here; it falls fairly within section 8, subsection (*o*); the man was deported, and therefore it is idle to apply for admission now.

MARTIN, J.A.

MARTIN, J.A.: I agree.

GALLIHER, J.A.

GALLIHER, J.A.: I agree. There are one or two points that I might have liked to consider a little more fully, but I do not think that I should hold up judgment in the matter just for the purpose of considering them.

I am, generally, in agreement with what the Chief Justice has said.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree. The order of the minister must have final effect; otherwise it would mean that application to the Court might be invoked at any time. That would be unreasonable. In any case the statute is conclusive: Section 8, subsection (*o*), that persons who have been deported from Canada are not thereafter allowed to be admitted. When deportation has taken place, Parliament has set out the absolute inhibition in apt words—words which cannot be misunderstood—and

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as this applicant was a person who was deported from Canada, that alone constitutes a statutory bar against his re-entry into Canada. We are asked to legislate—as that is what it would mean—and declare that although a person has been deported from Canada, nevertheless he can be re-admitted—that would be flying in the teeth of the statute. There is a lot of judge-made law in the books no doubt. I do not propose to adopt that course. Parliament alone legislates. The order under appeal should be set aside. The respondent is in my opinion subject to being rearrested and deported in conformity with the order of the minister.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

Appeal allowed.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitor for respondent: *P. S. Marsden.*

REX v. GILMORE.

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REX v. GILMORE

Criminal law—Burglary—Informer—Accomplice—Intent to commit a crime —Conviction—New trial.

On a charge of burglary the accused stated he was instructed by a police officer to take part in a burglary in order to assist the police in bringing a criminal to justice. He informed the police before the burglary as to where and when it was to take place, accompanied the real criminal in his breaking into a house and taking goods, then instructed the police where the goods were to be found and gave information leading to the arrest of the criminal. There was conflict between the evidence of the accused and that of the police officer who instructed him. The magistrate convicted the accused, stating he was relieved from weighing the evidence of the police officer and the other witnesses, as the evidence shewed clearly that the accused helped to commit the crime.

Held, on appeal, reversing the decision of the magistrate, that if the accused's evidence is believed, what he did was not with the intention of committing a felony but with the intention of assisting the police in bringing the real criminal to trial. The magistrate was bound to weigh

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the evidence of the witnesses and come to a conclusion, and there being a finding he omitted to make which is essential to the disposal of the appeal, there should be a new trial.

APPEAL by accused from his conviction by H. C. Shaw, Esquire, police magistrate at Vancouver, on the 24th of April, 1928, on a charge of burglary. The accused was a former convict of the penitentiary and went to the police for work. The police employed him for the purpose of catching a suspect named Fraser and after accused got in touch with Fraser he told the police where a burglary was to take place. Fraser and the accused were taken into custody when the burglary took place.

Statement

The appeal was argued at Victoria on the 26th and 27th of June, 1928, before MACDONALD, C.J.A., MARTIN, GALLIHER and MACDONALD, JJ.A.

Arnold, for appellant: This man was an agent for the prosecution and was not an accomplice: see Wigmore on Evidence, Vol. III., p. 2756, sec. 2060; *Rex* v. *Berdino* (1924), 34 B.C. 142 at pp. 146-7; *Rex* v. *De Mesquito* (1915), 21 B.C. 524 at p. 526.

Argument

W. M. McKay, for the Crown, referred to English & Empire Digest, Vol. 14, p. 39; *Rex* v. *Schapiro* (1904), 4 T.S. 355; *Rex* v. *Bernard* (1908), 1 Cr. App. R. 218.

Arnold, replied.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: We do not wish to hear further argument. There is conflict between the evidence of the accused and the evidence of Robertson, the police officer, who instructed the accused to take part in this crime in order to assist the police in not only knowing what was being done by the real criminal, but in catching him after the offence had been committed. If the accused is right in saying that he had these instructions from the police officer, and that he *bona fide* carried them out, it cannot be said that, although he did break into the house along with the real criminal, or was with him when he broke into the house, he did that with the intent to commit a felony therein, but with the intent to assist the police in bringing the real criminal to trial. He kept the police informed of every move that was

made. He informed the police of what was about to happen before it happened, and followed instructions; accompanying the real criminal in his breaking into the house and taking the goods; he instructed them where the goods were after they had been taken, and gave them information which enabled them to immediately make the arrest of the guilty party. Now if that is true, and he did that not with the intent to commit a crime, but with the intent to detect and punish a crime; he does not fall within the definition of housebreaking in the Code. Robertson says that he gave him no such instructions, and the learned magistrate instead of making a finding as to which of the two men he believed, says this: "Fortunately, I am even relieved of weighing the evidence of Robertson and some of the others, because the evidence shews clearly that Gilmore helped to commit the crime." That is he was there when the crime was committed and helped to carry off the goods, not with the intent to steal them, not with the intent to commit a felony, but with a very different intent. Now the language used by the magistrate would, I think, import that he had some difficulty in deciding whether Robertson had given these instructions. His reason for not making a finding was that he did not want to prejudice Robertson with his superiors. With respect, that was not a good reason. I think he was bound to weigh the evidence of one witness against the others, and come to a conclusion, to believe the one or the other. Having avoided that duty we have not the case before us in a way that would enable us to decide this question at all. There is one finding he has omitted to make, which in our opinion is essential to the disposal of this appeal. Therefore the case will be sent back for a new trial.

MACDONALD, C.J.A.

Arnold: I would ask your Lordships for a direction as to a new trial, as to whether it shall be a jury trial or not.

MacKay: Could not your Lordships refer it back to the magistrate to do that?

Arnold: I object to that, your Lordships.

MARTIN, J.A.: Was this a case where he did consent?

MacKay: Yes, he gave that consent.

MACDONALD, C.J.A.: He has not an absolute right to elect, because he should have done that in his notice of appeal; but

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the Court has discretion to allow him to have a jury trial. I do not see any reason why we should not direct it before the same magistrate, Mr. Shaw. He has already heard the evidence, and this may shorten the matter. He has not said anything that can be prejudicial to your client since he did not make a finding in regard to Robertson. I think a new trial should take place before the same magistrate. If you had asked for it in your notice of appeal, it would be different; but you have not done so, and therefore the matter is entirely one of discretion.

Arnold: I ask the Court to permit the accused to make his own election, as to where he will be tried. My opinion is that he should go back to the same magistrate.

MARTIN, J.A.

MARTIN, J.A.: I do not think sufficient grounds have been shewn for taking it away from the original tribunal for trying it.

MACDONALD, C.J.A.: That is the unanimous opinion of the Court.

Arnold: It will be entirely a new trial?

MACDONALD, C.J.A.: I do not think we have any right to direct anything else.

New trial ordered.

Solicitors for appellant: *MacInnes & Arnold.*

Solicitors for respondent: *MacKay, Orr & Vaughan.*

COMMERCIAL SECURITIES (BRITISH COLUMBIA) LIMITED v. JOHNSON.

GREGORY, J.

1930

May 28.

COMMERCIAL SECURITIES (BRITISH COLUMBIA) LTD. v. JOHNSON

Sale of goods—Motor-car—Conditional sale agreement—Assignment thereof —Car left in possession of assignor as mercantile agent—Resale of car —Title of subsequent buyer—R.S.B.C. 1924, Cap. 225, Sec. 60 (1).

S. the general manager of the Pacific Motors, Limited, purchased a car from his own company under a conditional sale agreement. The agreement was executed for the company by S. who also signed the same on his own behalf as purchaser. S. then on behalf of his company assigned the agreement to the plaintiff, a financing company, the agreement and the assignment being duly registered. The plaintiff left the car on the premises of the Pacific Motors, Limited, knowing that it was left there for the purpose of resale. S. then sold the car to the defendant who paid for it believing he was buying from the Pacific Motors, Limited and knowing nothing as to the plaintiff's claim. In an action for conversion:—

Held, that under section 60 (1) of the Sale of Goods Act the defendant has a good title to the car.

W. J. Albutt & Co. v. *Continental Guaranty Corporation of Canada* (1929), 41 B.C. 537 distinguished.

ACTION for conversion of a motor-car. The facts are set out in the reasons for judgment. Tried by GREGORY, J. at Vancouver on the 10th of April, 1930. Statement

E. A. Lucas, for plaintiff.
Hamilton Read, for defendant.

28th May, 1930.

GREGORY, J.: This is an action for conversion of a Gardiner automobile, the ownership of which is claimed by both plaintiff and defendant. The defendant admits being in possession of the automobile in question. He refused to deliver it to the plaintiff. The material facts are as follow: The Pacific Motors, Limited were dealers in automobiles and one Swanston was its general manager. On the 12th of February, 1928, Pacific Motors, Limited sold to Swanston upon time the automobile in question and executed the usual conditional sale agreement. Such agreement was executed for the Company by Swanston who also signed the same on his own behalf as purchaser. On the 14th of February, 1928, the Pacific Motors, Limited, by the said Swan- Judgment

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ston, assigned the sale agreement to the plaintiff, a financing company and in consideration therefor received the plaintiff's cheque for $1,700. Swanston also signed the assignment as purchaser and, *inter alia*, admitted notice of assignment of the agreement to the plaintiff Company. The defendant admits due registration of the sale agreement and the assignment thereof to the plaintiff. The plaintiff left the automobile in the possession of the Pacific Motors, Limited or Swanston for sale. I will refer to the evidence on this later.

On the 27th of April, 1928, Swanston came to the defendant's place of business and invited him to purchase the automobile now in dispute. The defendant knew Swanston to be associated with Pacific Motors, Limited and he says he believed he was buying from the Company. It is not clear just what the conversation between Swanston and the defendant was but defendant did learn that there had been some sort of a sale by Pacific Motors, Limited to Swanston or rather that there had been a transaction of some kind between them with reference to the motor-car. He however insisted that as the car was a new one he should have a bill of sale direct from Pacific Motors, Limited. A sale and purchase was agreed upon at the price of $2,150, payable $1,400 in cash and the surrender by defendant of another car valued at $750. The defendant surrendered his car and gave Swanston his cheque for $1,400 payable to the Pacific Motors, Limited or bearer. This cheque is endorsed "For deposit only . . . to the Credit of Pacific Motors Limited, A. Swanston, Pres." The defendant acted honestly throughout the transaction and knew nothing about the plaintiff's claim until long after his purchase. The original agreement for purchase by Swanston assigned to the plaintiff required the payment by the purchaser Swanston of $100 per month for the next seven succeeding months and $1,128.70 on the eighth month. The plaintiff Company received from the Pacific Motors, Limited $100 on the 22nd of March; $100 on the 2nd of May and $100 on the 28th of May and nothing since.

Judgment

Swanston is now in the penitentiary for fraud in connection with the disputed motor-car. There is not much evidence before me as to the criminal proceedings but it is clear that the defendant laid the information and at the preliminary hearing

and on the trial testified that he did not own the motor-car. It is evident I think from the evidence that while Johnson laid the information it was the plaintiff who complained to the police and the police got defendant to launch the proceedings.

I was much impressed with the defendant's rugged honesty and truthfulness. Notwithstanding his evidence during the criminal proceedings against Swanston I am satisfied that when he purchased the motor-car he believed he was buying from Pacific Motors, Limited.

During the criminal proceedings or immediately prior thereto, the plaintiff seized the motor-car and the seizing officer appointed defendant his bailiff to hold the same. Defendant did not understand the matter and was unconcerned about the seizure as plaintiff assured him the car would remain with him and there would be friendly suit to settle who was to have the motor-car. When the plaintiff demanded possession defendant refused to give it up, hence this action.

In these circumstances I do not find it easy to decide who must suffer the loss but after careful consideration I have come to the conclusion that it must be the plaintiff for I think the defendant is protected by section 60 (1) of the Sale of Goods Act, R.S.B.C. 1924, Cap. 225. That section is identical with the Factors Act, 1889 (52 & 53 Vict. c. 45), Sec. 2 (1) (Imp.) under which the case of *Folkes* v. *King* (1923), 92 L.J., K.B. 125 was decided. Counsel for the plaintiff relied very strongly upon the trial judge's decision in this case as reported in (1922), 2 K.B. 348 but his decision was reversed by the Court of Appeal above referred to and also reported in (1923), 1 K.B. 282. In that case the trial judge had found that the defendant had no title to the car, as he had purchased it from an agent who, in obtaining possession of it, had stolen it, had been guilty of larceny by a trick and having no title or authority to sell could not confer a good title on the defendant. The Court of Appeal however reversed his findings and held that in any case there was no reason to introduce the rules and the principles of the criminal law for the purpose of construing the statute and that the statute applied when it is shewn that the owner consented to the possession of the goods by the mercantile agent. Scrutton, L.J., at p. 135, says:

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"The purport of the Act seems to be that an ostensible mercantile agent ostensibly in possession of goods can give a good title in the ordinary course of business to a *bona fide* purchaser, provided that he proves that the owner intended that man to have possession of the goods."

In the present case the discovery evidence of Murray, the plaintiff's manager, proves that the plaintiff had had many dealings with the Pacific Motors, Limited all through Swanston, that he knew Swanston's position with Pacific Motors, Limited, that on a number of previous occasions—one or two anyway—the Pacific Motors, Limited sold cars to their salesmen. See question 31:

"With the one or two sales to the salesmen of the Pacific Motors? Several dealers used to do that same thing, and the chief reason, as I understood, was that the salesman would have that car, and he would demonstrate with it and would sell it and take over another one."

Murray also admits that he had seen the car in dispute on the premises of the Pacific Motors, Limited and he "supposed he [Swanston] would leave it on the premises."

Judgment

After the plaintiff took the assignment of the Swanston agreement, they knew that it was the Pacific Motors, Limited (not Swanston) who paid them the moneys they received on account of that agreement, *viz.*: $300. They knew the car would be on the premises of the Pacific Motors, Limited in its apparent possession and that the purpose of it being there was to effect a sale of it and I think I must assume that they understood the sale would be in reality a sale by Pacific Motors, Limited. I can see no other way of interpreting Mr. Murray's statement that "several dealers used to do that same thing," *viz.*: the salesman (their salesman) would sell it and take over another car. Such a condition or state of affairs is just what the Act contemplates and, if so, I must hold that the defendant Johnson has a good title to the car and plaintiff's action must be dismissed with costs.

There is a case in our own Courts which at first sight might appear to be opposed to my finding, *viz.*: *W. J. Albutt & Co.* v. *Continental Guaranty Corporation of Canada* (1929), 41 B.C. 537, but it appears to me to be clearly distinguishable for in that case there was no such evidence as that of Murray to which I have already referred.

There will be judgment for the defendant with costs.

Judgment for defendant.

DENNIS v. INDEPENDENT LANDS LIMITED AND HALE.

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DENNIS v. INDEPENDENT LANDS LTD.

Contract—Ploughing of land—Land owned by company—Option to purchase given — Purchaser to have land ploughed — President of company arranges with plaintiff to do ploughing at certain price—Plaintiff unaware of sale to purchaser—Liability for work performed.

The defendant Company, owner of certain lands, gave an option to purchase to one M., one of the terms of the sale being that he should immediately have the lands ploughed. The defendant Hale, who was president of the defendant Company, got in touch with the plaintiff with reference to the ploughing and after they had taken a view of the land with M. the plaintiff entered into an agreement with Hale to plough the land for $9 per acre. The plaintiff proceeded with the work and received money from M. on account of the ploughing although he knew nothing as to M. having an option to purchase the property. While the work was in progress M. threw up the option and left the country. The plaintiff continued his work to completion. The plaintiff recovered judgment against the Company and Hale for the balance due in respect of the contract.

Held, on appeal, varying the decision of MORRISON, C.J.S.C. (MARTIN, J.A. dissenting in part), that the judgment as against Hale should stand but that it should be dismissed as against the Company.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 30th of May, 1930, in an action to recover a balance of $1,475 owing by the defendants to the plaintiff for work done and services rendered by the plaintiff at defendant Hale's request. The defendant Company of which the defendant Hale was president owned 194 acres of land in Pitt Meadows, B. C. They gave an option to one Moffett for the purchase of the property, one of the terms of the option being that the land should be ploughed. Hale interviewed the plaintiff with a view to having him do the ploughing and they with Moffett took a view of the land. Hale then arranged with the plaintiff, without any intimation to the plaintiff as to Moffett's position, that the plaintiff should do the ploughing at $9 per acre. The plaintiff regarded Moffett as an agent of the defendants and received from him payments on account as the work progressed. During the course of the ploughing Moffett

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threw up his option without any notice to the plaintiff who continued his work to completion. The plaintiff obtained judgment for the balance due for the ploughing in an action against the Independent Lands Limited and Hale.

The appeal was argued at Vancouver on the 12th of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Matheson, for appellant: On the evidence this work was done for Moffett who threw up his option during the time the plaintiff was doing the ploughing. In any event he is not entitled to judgment against both the defendants.

G. E. Martin, for respondent: The contract was made with Hale and we are entitled to judgment against him.

Matheson, replied.

Cur. adv. vult.

4th June, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff is a ploughman and the defendants are owners or in control of certain wild lands which they desired to have ploughed. These lands were really the lands of the defendant Company of which Hale is president. They had given an option to one Moffett which contained, *inter alia*, the term that the land should be ploughed by Moffett. The plaintiff who had no knowledge or intimation of Moffett's relationship to the defendants was introduced to Hale as a person having ploughing to do. Hale busied himself about getting a contract with the plaintiff to do the ploughing. The three of them, Hale, Moffett, and Dennis, took a view of the land and the price of $9 an acre was finally agreed upon; the bargaining being done by Hale without any intimation to plaintiff of Moffett's position. Plaintiff regarded Moffett as an agent for the defendants and received money from him on account of the ploughing. Moffett thereafter forfeited his option in the middle of the ploughing, but no notice of this was given to the plaintiff who went on and finished it, but when he demanded the balance of the price he was told to look to Moffett who by this time had gone back to the United States.

The plaintiff sued the land Company and Hale, but in our

Court the plaintiff's counsel abandoned the claim against the land Company and elected to proceed against Hale. The trial judge found for the plaintiff and when all the circumstances of the case are considered I am unable to say that he was clearly wrong in his findings of fact or in his inference drawn from them. It is significant that when Moffett forfeited his option Hale did not advise plaintiff of that fact. If he intended to contend as he now does he ought to have let the plaintiff know the true facts. Instead of doing this he remained silent and it was his company which got the benefit of it to the extent of the ploughing hereafter done.

MACDONALD, C.J.B.C.

The plaintiff's counsel before argument in this Court abandoned $480 of his judgment as against the land Company, but this does not apply to the defendant Hale.

Hale, during the course of the work, acting for one Howard, a neighbour, asked the plaintiff to do some work for Howard, making it clear that Howard was to pay for it. If the cost of that work is included in the judgment it should be deducted. Subject to this the appeal should be dismissed.

The defendant land Company are entitled to their cost of the action. The defendant Hale should pay the plaintiff's cost of the action and of the appeal.

MARTIN, J.A.

MARTIN, J.A.: During the argument we dismissed the action against the defendant Company leaving the question of the liability of the defendant Hale for further consideration, and after a careful perusal of the evidence I find myself unable to reach any other conclusion than that the action should be dismissed against Hale also.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with my brother the Chief Justice. It was impressed upon the learned counsel for the respondent during the argument at this Bar that he could not have judgment against both the principal and the agent and that it was for him to elect. He elected to hold his judgment as against Hale, who made the contract sued upon with the respondent. The judgment as against Hale being affirmed, the Independent Lands Limited must have the judgment set aside

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as against it, with the usual result as to costs, *i.e.*, payable by the respondent to the Independent Lands Limited.

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

Solicitor for appellants: *Mackenzie Matheson.*
Solicitors for respondent: *Martin & Sullivan.*

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KUNHARDT v. COX

IN RE PARSHALLE. KUNHARDT v. COX AND QUAILE.

Administration—Intestate's estate—Equitable owner—Acquisition of legal estate by devise—Merger—Evidence of intention—Costs.

O., who was the owner of certain real property in the City of Victoria, died in 1900 and P. was sole beneficiary under his will. At the time of O.'s death there was registered in the Land Registry office at Victoria against a portion of said real property, a mortgage dated the 5th of August, 1880, to secure to the said P. the repayment of $32,000. P. died intestate in 1925. On the question of whether the mortgage merged in the inheritance when P. received the devise from O.:—

Held, that it is a question of intention and as it appears that after P. received the inheritance she gave a mortgage to secure an advance of $20,000 on certain of the lands that were devised to her by O. and which in the main were included in the $32,000 mortgage, and as collateral security to this mortgage she assigned the $32,000 mortgage to her mortgagees, declaring in the recital that the mortgage was a good and subsisting one, and afterwards upon the $20,000 mortgage being paid off, the $32,000 mortgage was reassigned to her, and never formally discharged. This was unmistakable indication of her intention to keep the mortgage separate. Having elected in the first place to treat the mortgage as a separate portion of her estate it remained so until her death and is now part of the personal estate to be distributed by her administrator.

Statement

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 claims to be the sole surviving cousin of Grace May Parshalle, deceased, against Rupert Leslie Cox, administrator of the estate of said

deceased. Grace Matilda Parshalle died intestate in California on the 27th of January, 1925. Letters of administration were issued in Victoria to Rupert Leslie Cox in respect to the estate in this Province. 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 Matilda Parshalle, but the mother predeceased Oliver and the whole estate went to Grace Matilda Parshalle. Grace Matilda Parshalle was the daughter of James C. Parshalle by his wife Isabella above referred to, the latter being the daughter of John Pugsley. Isabella Parshalle was twice married, first to William Oliver by whom she had one son, William Henry Oliver aforesaid, and secondly to James C. Parshalle by whom she had one daughter, the said Grace Matilda Parshalle, the intestate herein. James C. Parshalle was also married twice, first to Hannah Clark by whom he had several children, three of whom have living descendants, then to said Isabella Oliver. The nearest relative to the intestate on her mother's side is the plaintiff Cornelia Pugsley Shaw daughter of Robert Pugsley who was the brother of the intestate's mother. The nearest relatives on the father's side are of the fourth degree 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 intestate through her mother and the said John Wallace Quaile is of the fourth degree of relationship from the intestate through her father. There are also various relatives living of the fifth, sixth and seventh degree on both father's and mother's side. The plaintiff Cornelia Pugsley Shaw died in April, 1929, and Kingsley Kunhardt, her executor, was, by order of August 1st, 1929, 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 time of the death of the 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 others interested and were not excluded by the latter part of section 126 of the Administration Act. On appeal it was held that the descendants of Isabella Parshalle (maternal) who were living at the time of the death

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Statement

of the intestate were entitled to said lands (see 42 B.C. 413). The question before the Court on this appeal (not argued on the previous hearing) relates to a mortgage given by the deceased Oliver to the intestate to secure an advance by her to him of $32,000 on the 5th of August, 1880. This mortgage remained as a registered charge at the time of the death of the intestate Grace Matilda Parshalle and the question to be decided is whether this is personal estate to be distributed as such or did the mortgage merge in the inheritance when Grace Matilda Parshalle received the devise from her half-brother?

The appeal was argued at Vancouver on the 4th and 5th of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

O'Halloran, for claimants (*ex parte paterna*): Oliver borrowed from his half-sister (the intestate herein) $32,000 in August, 1880, and gave a mortgage on certain property in Victoria as security. This mortgage was duly registered and notwithstanding the fact that the properties mortgaged came to the intestate by devise from Oliver the mortgage remained a registered charge against the properties at the time of intestate's death. The mortgage is still subsisting so that section 126 of the Administration Act does not apply and we, of the half-blood take exclusive of the will. As to whether the mortgage merged when intestate received the property upon which the mortgage was given is a question of intention and as she assigned the mortgage as security on a loan after she had received the property it is clear that she did not intend it to merge: see *District of North Vancouver* v. *Carlisle* (1922), 31 B.C. 372; *Capital and Counties Bank* v. *Rhodes* (1903), 72 L.J., Ch. 336 at pp. 342 and 345; *London County and Westminster Bank* v. *Tompkins* (1918), 87 L.J., K.B. 662 at p. 666. On the question of merger see *Goodright* v. *Wells* (1781), 2 Doug. 771; *Selby* v. *Alston* (1797), 3 Ves. 339; *Wood* v. *Douglas* (1884), 54 L.J., Ch. 421 at p. 423; *In re Selous* (1901), 70 L.J., Ch. 402 at p. 403; *Fung Ping Shan* v. *Tong Shun* (1917), 87 L.J., P.C. 22 at p. 25; *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244. That the mortgage is still subsisting see *Doe, on the Demise of Graham* v. *Scott* (1809), 11 East 478; *Forbes* v. *Moffatt*

(1811), 18 Ves. 384; *Davis* v. *Barrett* (1851), 14 Beav. 542; *Hatch* v. *Skelton* (1855), 20 Beav. 453; *Burrell* v. *The Earl of Egremont* (1843), 7 Beav. 205. When the hand to pay and receive is the same the Statute of Limitations does not apply: see *Topham* v. *Booth* (1887), 56 L.J., Ch. 812; *In re Hawes* (1892), 62 L.J., Ch. 463; *In re Drax* (1903), 72 L.J., Ch. 505. On the question of payment of costs out of the estate see *Johnston* v. *Todd* (1845), 8 Beav. 489; *Boreham* v. *Bignall* (1850), 8 Hare 131; *Milburn* v. *Grayson and the Executors and Administrators Trust Company* (1921), 62 S.C.R. 49; *Brighouse* v. *Morton* (1929), S.C.R. 512; *In re MacDonald Estate* (1929), 1 W.W.R. 193; *Patching* v. *Barnett* (1881), 51 L.J., Ch. 74; *In re Middleton* (1882), *ib.* 273; *In re Jones. Elgood* v. *Kinderley* (1902), 1 Ch. 92 at p. 95; *In re Betts. Doughty* v. *Walker* (1907), 2 Ch. 149; *Standard Trusts Company* v. *Pulice* (1923), 32 B.C. 399.

A. D. Crease, for plaintiff: There was a merger of the mortgage in the inheritance. *Tyrwhitt* v. *Tyrwhitt* (1863), 32 Beav. 244 is in our favour: see also *Hood* v. *Phillips* (1841), 3 Beav. 513 at p. 517. *Prima facie* the charge merges in the inheritance: see *Brydges* v. *Brydges* (1796), 3 Ves. 120; *Whiteley* v. *Delaney* (1914), A.C. 132 at p. 146; Halsbury's Laws of England, Vol. 13, p. 14, sec. 172; *Dean and Chapter of St. John's Cathedral* v. *MacArthur* (1893), 9 Man. L.R. 391; *James* v. *Smyth* (1918), 3 W.W.R. 318; *Pitt* v. *Pitt* (1856), 22 Beav. 294; *Swabey* v. *Swabey* (1846), 15 Sim. 106 at p. 116; *Donisthorpe* v. *Porter* (1762), 2 Eden 162; *Lord Selsey* v. *Lord Lake* (1839), 1 Beav. 146; Falconbridge on Mortgages, pp. 338 and 341. The Ontario cases are subject to special legislation and do not apply. There is an assumption in favour of merger as against the next of kin: see *In re French-Brewster's Settlements* (1904), 1 Ch. 713 at pp. 716-7; *Street* v. *Commercial Bank* (1844), 1 Gr. 169; *Forbes* v. *Moffatt* (1811), 18 Ves. 384; *In re Major* (1897), 5 B.C. 244. Intestate was the sole beneficiary under the Oliver will and upon her death the mortgage was treated by the administrator as not being in existence.

Argument

Jackson, K.C., on the same side: The debts by the terms of

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the Oliver will were satisfied: see Halsbury's Laws of England, Vol. 21, p. 73, sec. 131; *Wood* v. *Douglas* (1884), 54 L.J., Ch. 421 at p. 423; 14 Cyc. 18; Halsbury's Laws of England, Vol. 11, p. 9, sec. 17. It is all real estate. The debt disappeared: see Halsbury's Laws of England, Vol. 21, p. 321, sec. 572; *Goldsmid* v. *Goldsmid* (1818), 1 Swanst. 211. The best title is what she acquired under Oliver's will: see *Brydges* v. *Brydges* (1796), 3 Ves. 120 at p. 126; *The Royal Bank of Canada* v. *Hodges* (1929), [42 B.C. 44]; *Williams* v. *Owens* (1795), 2 Ves. 595 at p. 600; *Selby* v. *Alston* (1797), 3 Ves. 339.

Argument

O'Halloran, in reply: On the question of satisfaction the law leans against satisfaction: see *Eastwood* v. *Styles* (1731), Kel. W. 36; 24 E.R. 883 at p. 884; *Richardson* v. *Elphinstone* (1794), 2 Ves. 463; *Wood* v. *Wood* (1844), 7 Beav. 183; *Hudson* v. *Spencer* (1910), 2 Ch. 285; *Rowe* v. *Rowe* (1848), 2 De G. & Sm. 294; Halsbury's Laws of England, Vol. 13, p. 128; *Lord Chichester* v. *Coventry* (1867), L.R. 2 H. L. 71 at p. 95.

Cur. adv. vult.

4th June, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The main question in this appeal was argued in this Court in January and the question then involved was whether or not relatives of the half-blood could inherit lands which came to the intestate on the part of an ancestor. We held, MARTIN, J.A. dissenting, that they could not. This was the only question in the case decided by the trial judge. The other question on which I am now about to give my judgment was left to be disposed of thereafter. The contest on both branches of the case was between Cornelius P. Shaw the nearest in relationship on the mother's side and persons claiming as heirs at law and next of kin *ex parte paterna* of the intestate. The estate came to the intestate by devise from her brother W. H. Oliver, the issue of her mother's first marriage. Afterwards the mother married a widower Parshalle by whom she had one daughter the intestate though Parshalle had at the time of the marriage several children. The question now to be decided relates to a mortgage given by the

deceased Oliver to the intestate to secure an advance by her to him of $32,000. The question is, Is that personal estate to be distributed as such or did the mortgage merge in the inheritance when she received the devise from her brother? The law seems to be clear that it is a question of intention. If the intestate had by her declaration or conduct indicated an intention to maintain the mortgage separate from the inheritance it would not merge and I think that is sufficient for the decision of this point. After she got the inheritance she gave a mortgage to Messrs. Tupper & Bryden for $20,000 on certain of the lands which had been devised to her by her brother and which in the main were included in the $32,000 mortgage. As collateral security to this mortgage she assigned the $32,000 mortgage to Tupper & Bryden and in addition to that act which was an unmistakable indication of her intention to keep the mortgage separate she declared in the recital that the mortgage was a good and subsisting mortgage. Afterwards the $20,000 mortgage was paid off and released and the $32,000 mortgage was reassigned to the intestate estate, but it was never formally discharged. From that time no facts bear any evidence to shew the intestate's intention either one way or the other if that would matter. I therefore conclude that having elected in the first place to treat the mortgage as a separate portion of her estate it remained so until her death and is now part of the personal estate to be distributed by her administrator. This disposes of the branch of the case which was not argued on the previous appeal and together with the reasons in that appeal disposes of the whole matter before the Court. I understand from the statement of facts submitted by counsel that the plaintiff, Mrs. Shaw, who is now dead was in the fourth degree of relationship to the intestate. It also appears by the said statement of facts that John Wallace Blanck Quaile, now deceased, was next of kin related to the intestate in the fourth degree and is represented here by the defendant, Cox, his administrator. I am not advised that there are any other next of kin of the same degree of relationship to the intestate but speaking generally, those who are next of kin of the same degree are entitled to share in the $32,000.

MACDONALD, C.J.B.C.

COURT OF APPEAL

1930

June 4.

KUNHARDT v. COX

The costs here and below of all parties to this record interested in the estate should be paid out of the estate.

MARTIN, J.A.: I agree with the Chief Justice in the disposition of the further hearing of this appeal.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in complete agreement with the judgment of my brother the Chief Justice.

Appeal allowed.

Solicitors for appellant: *Crease & Crease.*
Solicitors for respondent: *O'Halloran & Harvey.*

COURT OF APPEAL

1930

June 4.

W. J. ALBUTT & CO. v. RIDDELL

W. J. ALBUTT & CO., LIMITED v. RIDDELL.

Conditional sale agreement—Fictitious transaction—Vendor without title to car—Car traded—Subsequent holder obtains loan on car—Default in payment and car sold—R.S.B.C. 1924, Caps. 22, 44 and 225.

Pacific Motors, Limited, purchased a motor-car from Diana-Moon Motor Sales Ltd. Not having the money to pay for it they arranged with the plaintiff, a financing company, whereby the plaintiff was to pay Diana-Moon Motor Sales Ltd. for the car and became the ostensible owners thereof. Upon the car being paid for it was delivered to the Pacific Motors, Limited, and a conditional sales agreement was taken by the plaintiff from the Pacific Motors, Limited for the purchase price, the agreement being duly registered. Pacific Motors, Limited, holding the car for sale, exchanged it for another with Fulwell Motors, Limited, and shortly after Fulwell Motors, Limited, obtained a loan of $900 from the defendant, which was secured by a chattel mortgage on the car. Later Fulwell Motors, Limited, being in default in payment of the chattel mortgage, the defendant seized the car and sold it. In an action for damages for conversion the plaintiff recovered $1,500 found as the value of the car.

Held, on appeal, reversing the decision of MCDONALD, J., that the transaction out of which the conditional sale agreement arose was a fictitious one. The car never came into the possession of the plaintiff and

the conditional sale agreement was ineffective to give them ownership in it. The appeal should therefore be allowed and the action dismissed.

COURT OF APPEAL

1930

June 4.

W. J. ALBUTT & CO. LTD. v. RIDDELL

APPEAL by defendant from the decision of McDONALD, J. of the 24th of January, 1930 (reported, 42 B.C. 344), in an action for damages for conversion of an automobile. The facts are that the Pacific Motors, Limited, purchased a Moon coach from the Diana-Moon Motor Sales Ltd. They could not pay for the car so they applied to W. J. Albutt & Co., Limited to advance the purchase price of the car. The money was advanced and the car was paid for. The Pacific Motors, Limited, and W. J. Albutt & Co., Limited, then arranged that W. J. Albutt & Co., Limited, should be treated as owners of the car, and the car was shipped to the Pacific Motors, Limited, who acted as purchasers from W. J. Albutt & Co., Limited, giving them a conditional sale agreement. The Pacific Motors, Limited, then exchanged this car with Fulwell Motors, Limited, for another car and later Fulwell Motors, Limited, borrowed $900 from the defendant Riddell and gave him a chattel mortgage on this car as security for the loan. Later Riddell sold the car in default of payment of the loan. W. J. Albutt & Co., Limited, then brought this action for conversion.

Statement

The appeal was argued at Vancouver on the 24th of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and McPHILLIPS, JJ.A.

W. J. Whiteside, K.C., for appellant: We submit first, that W. J. Albutt & Co., Limited were never owners of the car; secondly, even if they were, and the conditional sale agreement was properly given the sale was made in the ordinary course of business to the Pacific Motors, Limited; thirdly, the damages are excessive. On the question of ownership see *Madell* v. *Thomas & Co.* (1891), 1 Q.B. 230; *Shenstone & Co.* v. *Hilton* (1894), 2 Q.B. 452; *Folkes* v. *King* (1922), 91 L.J., K.B. 792; *Johnson* v. *Rees* (1915), 84 L.J., K.B. 1276; Barron on Conditional Sales, 3rd Ed., 21. A conditional sale agreement was the wrong form of security: see *Brett* v. *Foorsen* (1907), 7 W.L.R. 13; *National Mercantile Bank* v. *Hampson* (1880), 49 L.J., Q.B. 480; *Walker* v. *Clay, ib.* 560; *Delaney* v. *Downey* (1912), 21 W.L.R. 577; *Dedrick* v. *Ashdown* (1888),

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15 S.C.R. 227. The amount of damages were excessive: see Mayne on Damages, 10th Ed., 388; *Chinery* v. *Viall* (1860), 5 H. & N. 288 at p. 292; *Dulmage* v. *Bankers Financial Corporation Limited* (1922), 51 O.L.R. 433; *R. P. Rithet & Co.* v. *Scarff* (1920), 29 B.C. 70.

J. A. MacInnes, for respondents: W. J. Albutt & Co. Limited bought the car and were the owners: see *Maas* v. *Pepper* (1905), A.C. 102; *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601; *Dulmage* v. *Bankers Financial Corporation Limited* (1922), 51 O.L.R. 433 at p. 436; *Whitney-Morton & Co.* v. *A. E. Short Ltd.* (1922), 31 B.C. 275; *In re Hall. Ex parte Close* (1884), 14 Q.B.D. 386; *Island Amusement Co. Ltd.* v. *Parker & Kippen* (1920), 28 B.C. 43 at p. 45; *Wesbrook* v. *Willoughby* (1895), 10 Man. L.R. 690. On the question of damages see Mayne on Damages, 10th Ed., 374; *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199. The damages is the value of the car: see Halsbury's Laws of England, Vol. 10, p. 344, sec. 633; Vol. 1, p. 556, sec. 1128. *Cur. adv. vult.*

4th June, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The transaction out of which the conditional sale agreement in question here arose was a fictitious one. The Pacific Motors, Limited, bought the motor-car in question from the Diana-Moon Motor Sales Ltd. but found that they lacked the money to pay for it. They applied to the plaintiffs, a financial company, for a loan for that purpose and between them concocted a scheme of treating the plaintiffs as owners and the Pacific Motors, Limited, as the buyer from them. The order was given by the Pacific Motors, Limited, and the car was shipped to and accepted by them. To secure the plaintiffs for their loan recourse was had to the instrumentality of the Conditional Sales Act, instead of to the proper Act the Bills of Sale Act. The plaintiffs therefore assuming to be the owners of the car took a conditional sale agreement instead of a mortgage. The Pacific Motors, Limited afterwards exchanged this car with the Fulwell Motors for another car and thereafter the Fulwell Motors, Limited, borrowed upon its security a sum of money and gave a chattel mortgage to the defendant to secure him for the loan. The defendant afterwards

sold the car in default of payment and the plaintiffs now sue him for damages for conversion relying upon their conditional sale agreement. This is an example of the hit and miss practice of motor dealers and financiers in doing their business by indirect methods instead of direct and proper methods. I do not say that the plaintiffs were dishonest. What they did was done ill-advisedly and without a proper conception of the purposes and objects of the Conditional Sales Act. The car never came into the possession of the plaintiffs and the conditional sale agreement was ineffective to give them ownership in it. Hence it follows that the defendant was right in what he did and the action must be dismissed. The appeal is therefore allowed.

MACDONALD, C.J.B.C.

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

MARTIN, J.A.

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

In my opinion there was no real sale to W. J. Albutt & Co. Limited. They advanced the money on behalf of the Pacific Motors, Limited, to whom the sale was in reality made.

GALLIHER, J.A.

In my view the plaintiffs never had possession or title but were simply financing the Pacific Motors, Limited in this round about manner.

MCPHILLIPS, J.A.: I cannot, with great respect to the learned trial judge, take the view that upon the facts the transaction was one that entitled it being held that the respondents were entitled to the automobile in question under the securities held by them. There was no real transaction established which would admit of it being said that the respondents were entitled to the benefit of the provisions of the conditional sale agreement. Further, the sale made by the appellant was a sale made in the ordinary course of business and under such circumstances that entitled it being said that the sale was supportable under the saving provisions of the statutes governing in the matter, *i.e.*, Conditional Sales Act, Cap. 44, R.S.B.C. 1924, and Sale of Goods Act, Cap. 225, R.S.B.C. 1924.

MCPHILLIPS, J.A.

In my opinion the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Whiteside, Edmonds & Whiteside.*
Solicitors for respondents: *MacInnes & Arnold.*

COURT OF APPEAL

1930

June 12.

WELCH v. THE HOME INSURANCE COMPANY OF NEW YORK.

Practice—Action for loss under an insurance policy—Raft of logs lost at sea—Mode of trial—Issues of complex character—Marginal rules 426 and 429—Appeal.

WELCH v. THE HOME INSURANCE CO. OF NEW YORK

A Davis raft owned by the plaintiff was insured in the defendant Company for $6,000 against loss from perils of the sea while being towed from Green Cove, Barclay Sound, to Victoria, B.C. In the course of the voyage the raft, through the action of the sea, broke up and was lost. In an action for loss under the policy the plaintiff's application for trial with a jury was refused.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that the sole issue is as to the construction of the raft in question which is not of an intricate or complex nature and does not come within the exceptions in marginal rule 429. The plaintiff is entitled to an order for trial with a jury.

APPEAL by plaintiff from the order of MORRISON, C.J.S.C. of the 4th of March, 1930, dismissing the plaintiff's application that the action be tried with a jury. The action was for the recovery of $6,000 under an insurance policy. The defendant Company issued a policy of marine insurance for $6,000 upon one Davis raft containing 485,260 feet of lumber against perils of the sea in tow of tug "Imbricaria" from Green Cove, Barclay Sound, to Victoria, B.C. The said raft left Green Cove for Victoria on the 25th of November, 1928, and in the course of said voyage it broke up through the action of the sea and was lost.

Statement

The appeal was argued at Victoria on the 12th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

D. S. Tait (*P. R. Leighton*, with him), for appellant: It was held that there should not be a jury as the evidence would be of an intricate and complex character under marginal rule 429. This raft consists of a lot of logs tied together by cables, its construction being a simple mechanical device: see *Davis Log and Raft Patents Co.* v. *Cathels* (1927), 39 B.C. 57. It is a simple

Argument

question of testimony and credibility of witnesses. The issues are whether they had single side sticks; whether sufficient cables were used and properly fastened and the state of the sea at the time of the break up: see *Alaska* v. *Spencer* (1904), 10 B.C. 473 and on appeal 35 S.C.R. 362; *Alaska* v. *Spencer* (1905), 11 B.C. 138 and 280.

Remnant, for respondent: Whether or not this was a Davis raft is the issue and technical and expert evidence is required: see *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56 at p. 61; *Swyny* v. *The North-Eastern Railway Company* (1896), 8 Asp. M.C. 132.

Argument

MACDONALD, C.J.B.C.: The appeal should be allowed, and ordered that the case should be tried by jury. The plaintiff has a right under rule 429 to a jury, unless the defendant shews that it is a case of local investigation, where the issues are of an intricate and complex character. The issues here are not in my opinion, of an intricate and complex character. There will be proof, I presume, of the construction of this raft by the plaintiff, that it was a Davis raft. Then the defendant may call witnesses, expert or otherwise, to say that in their opinion it was not constructed in accordance with the specification of the Davis Company. That is the whole question in issue between the parties, was it or was it not a Davis raft and were misrepresentations made with regard to the side sticks. These are simple questions and very proper questions to be tried by jury and one might just as well say that in a collision between two motor-cars, where either one or both parties are injured, that that was of a complex character, because the motor-cars would have to be examined by experts on a question of damages. That would not fall within this rule. I think the learned judge was in error in reaching the conclusion that he did, and that he went contrary to his own expressed opinion in *Alaska Packers* v. *Spencer* (1905), 11 B.C. 280. Therefore his order should be set aside, and an order made for trial by jury.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I am of the same opinion, and really I see no object, in view of the discussion we had, in saying anything other than that the case comes within the decision of the leading

MARTIN, J.A.

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1930

June 12.

WELCH v. THE HOME INSURANCE CO. OF NEW YORK

case of *Alaska Packers* v. *Spencer* (1905), 11 B.C. 280, which has been reported in the four reports I have already referred to. I shall only add this, that after the endeavour to bring this case out of the ambit of the decision of the *Alaska Packers* case one would at least have expected that the case of the applicant would have been verified by some evidence that the Court really could have felt would be some foundation for such a proceeding. But all we have here is simply an affidavit of the solicitor who is obviously not informed on the technical question such as that which is relied upon to take the case out of rule 429. Therefore, as there is no material before the learned judge in the proper sense of the word upon which his decision can be legally founded, the only course open to us is to allow the appeal.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I think the appeal should be allowed. The case is one that appears to me, on the facts outlined to not be one of merely scientific evidence or one for local investigation. It would be a question of oral testimony as to how the raft was constructed and whether or not it could be said to be a Davis raft, and the weight to be attached to that evidence would be a matter for the jury, further the question of whether it was lost through the perils of the sea, would have to be proved by witnesses and eminently a matter for the jury. Upon the facts of this case I consider that the plaintiff is entitled to a jury and that there was error in the Court below in refusing a jury.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Tait & Marchant.*
Solicitor for respondent: *R. L. Maitland.*

EVANS v. HUDSON'S BAY COMPANY.

MORRISON, C.J.S.C.

1930

May 5.

EVANS v. HUDSON'S BAY CO.

Negligence—Damages—Fall from stairway—Defective construction alleged —Res ipso loquitur—Volenti non fit injuria—Evidence—Jury—View.

In an action for damages for negligence when specific questions are put to the jury by the Court, the jury need not answer them but may return a general verdict.

ACTION for damages resulting from the alleged negligence of the defendant Company in the construction of a stairway leading from the basement to the first floor of their store in the City of Vancouver. The relevant facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 28th of April, 1930. Statement

Bray, and *Garfield A. King,* for plaintiff.
Alfred Bull, and *Ray,* for defendant.

5th May, 1930.

MORRISON, C.J.S.C.: The plaintiff was an employee of the defendant Company as "sales lady" of experience and in the course of the performance of her duties as such went down each morning into a sub-basement to affix or reaffix prices on articles coming within her department. A substantial, well-constructed metal stairway led from the upper basement into this lower one, rather steep and at the top was not so well lighted as the lower parts. One side of the stairway was up against the wall of the basement and had a hand-rail. On the outside there was a hand-rail two feet eleven and a half inches high firmly fixed, but the supports to it were some 30 inches apart. The plaintiff on the forenoon in question, whilst ascending and within a few steps of the top, stumbled and fell through between the supports on to the floor beneath about 11 feet and received the injuries of which she complains. In her evidence she admitted she knew of the alleged dangerous condition of the stairs and that she did not complain about it to the defendant. The jury took a view of the premises. After the plaintiff's case was concluded counsel for the defendant moved to have it withdrawn from them. Judgment

MORRISON, C.J.S.C.

1930

May 5.

EVANS v. HUDSON'S BAY CO.

By consent I reserved leave to apply and proceeded to hear the defence. The jury returned a verdict for the plaintiff. I left questions to them which they deemed advisable not to answer. I told them that the law was that they need not answer the questions but that they could return a general verdict and I further stated that both litigants and juries would certainly lose all confidence in a judge if they found him tricking them out of their undoubted rights by concealing the law from them on this point. Scrutton, L.J. in *Hales* v. *Times Publishing Coy.* in the course of his judgment in the Court of Appeal in England on November 27th, 1929, not yet reported, stated:

"The third objection by Mr. Hales was that the judge did not put questions for the jury to answer. It was well rooted in English law that the jury were entitled to find a general verdict. There was a great deal to be said for and against each contention, and it was absurd to say that a judge must ask the jury questions."

Counsel now renew their application to dismiss.

Judgment

Where a thing is solely under the management of the defendant or his servants, and the accident is such as in the ordinary course of events does not happen to those having the management of such things and using proper care, the accident itself affords *prima facie* evidence of negligence—*Scott* v. *London Dock Co.* (1865), 3 H. & C. 596.

Volenti non fit injuria: This maxim is relied upon as one line of defence. In an action of negligence it is a good defence that the plaintiff with full knowledge and appreciation of the risk of danger from the defendant's negligence voluntarily accepted the risk and exposed himself to the danger. *Smith* v. *Baker & Sons* (1891), A.C. 325. And it is a question of fact and not of law whether the plaintiff voluntarily incurred the risk, and the burden of proof is on the defendant. *Williams* v. *Birmingham Battery and Metal Company* (1899), 2 Q.B. 338 (C.A.). Lord Esher, M.R. stated the rule in *Yarmouth* v. *France* (1887), 19 Q.B.D. 647 at p. 657:

"It seems to me to amount to this, that mere knowledge of the danger will not do: there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim *Volenti non fit injuria*. If so, that is a question of fact."

Postulating that there was negligence then the maxim does not mean that whenever a person knows there is a risk of being

injured by another's negligence whilst doing something, he is incapable of recovering in an action if, nevertheless he does the thing with knowledge of that risk. The line between cases where the rule is applicable and where not, seems to be a transient one and often difficult to discern.

It is a question for me to decide whether there is any evidence to be left to the jury from which negligence causing the injuries complained of may be reasonably inferred, and for the jury to say whether and how far the evidence is to be believed, and whether in fact there was negligence which was the effective cause of the damage. Of course if there is but a mere *scintilla* of evidence the case should be withdrawn from the jury. I have to decide whether there is any evidence from which negligence may be reasonably inferred and then leave it to the jury to find whether upon that evidence negligence ought to be inferred—*Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193. I think the view by the jury is a part of the plaintiff's evidence and although, had I been on the jury, I would not, having regard to all the circumstances involved in the view, have found negligence against the defendant, yet the jury having seen the stairway, and the conditions admitted to have existed at the time of the accident, I fear I would be usurping their functions were I to intrude my conclusions and intercept the expression of theirs on a question of evidence amounting to more than a *scintilla*. The application is refused and I shall let the verdict stand.

Judgment

Application dismissed.

MACDONALD, J.

1930

May 23.

BARRON v. MORGAN

BARRON *ET AL.* v. MORGAN AND SILVER LEAF MINES, LIMITED.

Mines and minerals—Mineral claims—Agreement for sale—Area of claims—Mutual mistake as to—Evidence—Rectification—Purchase price—Allotment of.

The plaintiff gave the defendant Morgan an option to purchase a group of four mineral claims on the 5th of November, 1926, for $15,000. Certain payments were made and extensions of time granted for further payments until $4,200 remained, this sum being due for payment on the 1st of July, 1929. In the meantime Morgan conveyed all his interest in the claims to the Silver Leaf Mines, Limited. In October, 1929, the defendants became aware of the fact that the claims in question were encroached upon to a material extent by a previously Crown-granted mineral claim. In an action for a declaration that the agreement be terminated or in the alternative, that accounts be taken and there be an order that the amount due be paid:—

Held, that the agreement was entered into under a mistake common to both parties and the purchasers are entitled to an abatement of the purchase price.

ACTION for a declaration that an agreement for sale of certain mineral claims and all rights thereunder had terminated or in the alternative that an account might be taken by way of a vendor's lien, and payment of the amount found to be due ordered to be made within a time limited by the Court, and in default of such payment that foreclosure should follow. Tried by MACDONALD, J. at Vancouver on the 14th of May, 1930.

Statement

Garland, for plaintiffs.
Dawson, for defendants.

22nd May, 1930.

MACDONALD, J.: In this action the plaintiffs allege that they are owners of the Leroy, Butte City, Silver Leaf and Rover mineral claims, situate in the Nelson Mining Division, and known as the Silver Reef Group. By an agreement, dated November 5th, 1926, they gave to the defendant, Horatio E. Morgan, a right or option to purchase all such claims.

Judgment

The purchase price was the sum of $15,000, payable as therein stipulated, with the provision, however, that if the purchaser

paid the sum of $10,000 within 12 months, such amount should be taken and accepted as the full purchase price of these several mineral claims.

There was an amount of $100 paid on the execution of the agreement and further sums were paid from time to time, resulting in a balance remaining due of $4,200 which should have been paid on July 1st, 1929. There is no covenant for payment in the agreement and, while it recites the fact that it is taken as an option, it is accepted as common ground between counsel for the parties that the trend of events—the various extensions granted—constituted this document really an agreement for sale and purchase.

This amount, being thus overdue and the plaintiffs being desirous of obtaining payment, this action was commenced by plaintiffs seeking a declaration that the agreement and all rights thereunder had terminated or, in the alternative, that an account might be taken, by way of a vendor's lien, and payment of the amount, found to be due, ordered to be made within a time to be limited by the Court and in default of such payment that foreclosure should follow.

Judgment

The defendants in the meantime, some time in the months of October or November, 1929, became aware of the fact that the mineral claims in question were encroached upon, by a previously Crown-granted mineral claim known as the "Cashier." They then surveyed the property for the purpose of determining the extent of the encroachment. The survey was proved by a plan produced, which I accept, and shews that two of the claims, at least, are considerably encroached upon by the "Cashier." The question then arises what redress, if any, was available by the defendants, with respect to this encroachment? Morgan, the purchaser, so terming him, had in the meantime conveyed all his interest to the Silver Leaf Mines, Limited (non-personal liability), and it was joined as a defendant in the action. At the outset, I think any rights possessed by the defendant Morgan are also vested in the defendant, Silver Leaf Mines, Limited. It would be entitled to any relief, to which Morgan might be entitled. His transfer is sufficient for that purpose.

Upon this survey being known and shewing the encroachment,

MACDONALD, J.

1930

May 23.

BARRON v. MORGAN

to which I have referred, a controversy arose between the parties and it was deemed desirable that in order, if possible, to determine their respective rights an action should be started to accomplish that end. The plaintiffs brought the action which I have shortly outlined. The defendants then entered their defence and counterclaim, seeking to obtain a judgment from the Court with respect to the property that was transferred by the document, determining the redress that the defendants might be entitled to with respect to the encroachment, which I have mentioned.

It is contended that no evidence should be adduced which would in any way destroy the effect of the agreement entered into between the parties. I was referred to the case of *May* v. *Platt* (1900), 1 Ch. 616; 69 L.J., Ch. 357. It appeared to me from that case, that unless the defendants could succeed in establishing to my satisfaction that, with respect to this purchase of property, there was an estoppel, common to both parties, then it could not obtain any relief from the Court. While this judgment has been referred by Mr. Justice Neville in *Thompson* v. *Hickman* (1907), 1 Ch. 550; 76 L.J., Ch. 254, and followed, still he makes this remark (p. 561):

Judgment

"I feel considerable difficulty, however, in following the reasoning upon which they appear to be based."

Compare *Davies* v. *Fitton* (1842), 4 Ir. Eq. R. 612; 2 Dr. & War. 225.

As to *May* v. *Platt, supra,* after the learned judge has decided that he could not admit parol evidence to rectify, without however first rectifying the contract and enforcing it as rectified, which he says he could not do, he then adds (p. 623):

"In my judgment, in order to get rescission after conveyance, the allegations would have had to be very different."

He then concludes this portion of his judgment as follows:

"I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud."

He refers to a number of cases to the same effect, and quotes from the judgment in *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925 at p. 937:

"Rescission after conveyance of land can only be obtained on the ground of unfair dealing."

To resume: The grounds upon which the defendants contend they should succeed, in obtaining redress in respect of this encroachment, have then to be determined. Inasmuch as no fraud or misrepresentation amounting to fraud has been suggested, has there been a mutual mistake or, using the words of the judgment to which I have just referred, "whether there is a mistake common to both parties?"

Counsel for the defendants submit that if I so found, he was not desiring to have rectification, pleading the difficulty that presented itself, in view of the authorities to which I have previously referred. He only sought to have a decision as to the effect of the conveyance of the four mineral claims, so that it might be determined if the plaintiff could not fulfil such declaration and, with regard to judgment, then there might be a rebatement of such non-fulfilment. I think it makes little difference what form the judgment should take.

The witnesses on behalf of the defendants stated that they acted upon representations made with respect to the size of these claims; that they were full size claims, in other words, 1,500 feet square. I do not want to bring to bear any knowledge of mining transactions that I had years ago, but it did strike me at the time, that this was rather an unusual statement to make. The matter that most concerns the purchasers is as to the value of the property from a mineral-bearing standpoint. It might only be 100 feet on either side of a location line of a mineral claim and still might be so valuable, as to be worth millions. However that statement was made and I have to deal with it as if amounting to a fraudulent representation on the part of the plaintiffs and that situation I find has not been proved. I might also add that while there may have been some talk about the size of the claims, I do not think it was a matter, which was considered by the plaintiffs, as being essential in supporting the sale of the property, nor was it so in the mind of the defendant Morgan. Then the question arises, aside from those representations, whether the parties are entitled to any consideration or compensation with respect to the size of the claims. If the case were one, where you might simply say there had been a very slight encroachment, I would not have thought it of enough importance to pass upon. But the encroachment has been so

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extensive, it appears to me, that it could not have been in the minds of the parties to such an extent. They proceeded without regard to any encroachment and acting on the assumption that there were four claims of reasonable size. Shortly then I find that an honest mistake was made by the plaintiffs and defendant Morgan. All parties thought they were then dealing with mineral claims of a reasonable size; and not where you might say, the heart of the claims was cut into by the Crown-granted property.

The declaration then will be that the four mineral claims referred to in the agreement for sale were intended to cover the territory according to the location, as appears in the mining recorder's office, and in the outcome, as now appears evident, the plaintiffs will be unable to make conveyance to the extent of the property, as shewn by such locations. I think under such circumstances there should be an abatement accordingly, in the purchase price.

Judgment

I see great difficulty on the part of the referee, to whom I will refer the matter, in determining the amount of such abatement. He has an onerous task, but I hope he will be able to arrive at a conclusion that will be satisfactory.

The defendants are entitled to costs of the counterclaims. Plaintiffs are entitled to the issues either on their action or the counterclaim upon which they have succeeded. It will require a close consideration by the registrar to determine and allocate such costs. If he finds it necessary he may submit the matter for my consideration.

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Mines and minerals—Partners—Sale of claims—Death of one partner—Share of payments—Evidence of surviving partner—Corroboration—Res judicata—Estoppel—R.S.B.C. 1924, Cap. 82, Sec. 11; Cap. 167, Secs. 19, 91 and 94 (1).

L. located the Blue Jay Fraction in July, 1920, and H. acquired the Blue Bird (an adjoining claim) in 1922. L. did the assessment work on both claims until 1924 as H. was an old man in bad health and unable to assist. H. then transferred a half-interest in the Blue Bird to L. but refused to take a half-interest in the Blue Jay Fraction from L. as L. had done the assessment work on both claims and would have to continue doing the assessment work. L. continued to do the assessment work until 1927, when they made a sale of the two claims for $15,000, L. and H. agreeing (according to L.'s evidence) that L. should receive three-quarters of the purchase price and H. one-quarter. When the first payment was made L. paid H. one-half of what remained after the commission was paid as H. was very ill in a hospital and had no means. Upon the second payment being made after paying the commission L. paid $250 of the $1,000 in his hands into H.'s estate, H. having died in the meantime. Upon the final payment being made there remained in the bank after the commission was paid the sum of $8,500. After H.'s death L. engaged a surveyor to Crown grant the two claims and through error he obtained a Crown grant of the Blue Jay Fraction in the names of L. and M. (the administrator of H.'s estate). The error was not discovered until after the final payment was made. Then M. on behalf of H.'s estate claimed one-half of the sum deposited in the bank. L. then filed a petition of right for rectification of the Crown grant to which M. filed an appearance but did not contest the petition further and the Crown grant was amended by striking out M.'s name. L.'s action for a declaration that he was entitled to three-quarters of the moneys deposited in the bank was dismissed on the ground that L.'s evidence was not corroborated by some other material evidence as required by section 11 of the Evidence Act.

Held, on appeal, reversing the decision of GREGORY, J. (*per* MACDONALD, C.J.B.C. and GALLIHER, J.A.), that the case comes within section 19 of the Mineral Act, and excludes the defendant from setting up a trusteeship as to the Blue Jay Fraction and the plaintiff is entitled to three-quarters of the moneys deposited in the bank.

Per MARTIN, J.A.: That the story told by the plaintiff fits into all the probabilities of the case in a way that carries conviction and affords that corroboration by circumstances that is a sufficient compliance with section 11 of the Evidence Act.

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Statement

APPEAL by plaintiff from the decision of GREGORY, J. of the 10th of January, 1930, in an action for a declaration that the plaintiff is entitled to the sum of $6,375 out of the moneys on deposit in the Bank of Montreal at Stewart, B.C., the same being part of the purchase price of the Blue Jay Fractional mineral claim and the Blue Bird mineral claim both in the Cassiar District, B.C. The plaintiff claims that prior to the 21st of March, 1927, he was the sole owner of the Blue Jay Fraction and owner of an undivided one-half interest in the Blue Bird, the late William Hamilton being the owner of the other half interest in the Blue Bird. On the 21st of March, 1927, Larson and Hamilton entered into an agreement for the sale of both claims to one J. A. McDonald for $15,000, Larson and Hamilton agreeing that the two claims should be considered of equal value and that Larson should receive three-quarters of the purchase price and Hamilton one-quarter. At the time of the sale McDonald paid $750 on account of the purchase price. Two hundred and fifty dollars of this was paid to one McGuire as commission for negotiating the sale and Larson claims that owing to Hamilton being ill at the time and out of funds he paid him $250 of the remaining $500 although he was only entitled to $125. On the 13th of October, 1927, a second payment of $1,500 was made and after paying $500 as commission to McGuire, Larson paid to the estate of Wm. Hamilton (then deceased) $250 of the remaining $1,000, and retained the balance. On the 15th of April, 1928, the balance of the purchase price of the claims, *i.e.*, $12,750 was paid and after paying $4,250 to McGuire as commission, $8,500 remained on deposit in the Bank of Montreal at Stewart to the joint credit of Larson and the Hamilton estate. After Hamilton's death the plaintiff engaged one Morkill to survey and Crown grant the claims but he made an error in obtaining the Crown grant of the Blue Jay Fraction in the names of Larson and Montgomery the administrator of the Hamilton estate. The error was not discovered until after the final payment was made when the administrator claimed he was entitled to one-half the money remaining on deposit in the bank. Then on Petition of Right by Larson, the Crown grant of the Blue Jay Fraction was

amended by striking Montgomery's name out of the Crown grant. It was held by the trial judge that although he believed the plaintiff's story in its entirety he was precluded from giving judgment in his favour by section 11 of the Evidence Act.

The appeal was argued at Vancouver on the 5th and 6th of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

F. C. Elliott, for appellant: The learned judge believed the plaintiff's evidence but says there was no corroboration. We submit that there was strong corroboration and the matter was adjudicated upon before and is *res judicata*: see *The Hardy Lumber Company* v. *The Pickerel River Improvement Company* (1898), 29 S.C.R. 211; *Canada Permanent Corporation* v. *Christensen* (1929), 41 B.C. 258; *McCoy* v. *Trethewey, ib.* 295. By the previous judgment the Blue Jay Fraction was put in Larson's name and the onus is on them to shew that this is incorrect: see *McMicken* v. *The Ontario Bank* (1892), 20 S.C.R. 548 at p. 575; Phipson on Evidence, 3rd Ed., 27. There is corroboration by his title also by the affidavit of the respondent.

Argument

A. D. Crease, for respondents: Montgomery did not enter a defence in the previous action as it was brought merely for correcting a mistake as to the record. There was no adjudication on the question before us: see *Isbester* v. *Ray, Street & Company* (1896), 26 S.C.R. 79 at p. 85; *Concha* v. *Concha* (1886), 11 App. Cas. 541 at p. 552; *Irish Land Commission* v. *Ryan* (1900), 2 I.R. 565 at p. 571; *Howlett* v. *Tarte* (1861), 10 C.B. (N.S.) 813; *Hughes* v. *J. H. Watkins & Co.* (1927), 60 O.L.R. 448 at p. 450. On the question of estoppel see Bullen & Leake's Precedents of Pleadings, 8th Ed., 661; *Davies* v. *McMillan* (1893), Cam. Cas. 306 at p. 316. As to partnership between the parties see *Moore* v. *Deal* (1917), 24 B.C. 181; *Archibald* v. *McNerhanie* (1899), 29 S.C.R. 564. We are not bound by a parol partnership as to the proceeds of a sale of mineral claims.

Elliott, in reply, referred to *Wells* v. *Petty* (1897), 5 B.C. 353 and *Harris* v. *Lindeborg et al.* (1930), [42 B.C. 276].

Cur. adv. vult.

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MACDONALD, C.J.B.C.: The trial judge, GREGORY, J., was entirely satisfied with the plaintiff's evidence, but as he says found it impossible to avoid the conclusion that corroborative evidence was necessary to support his claim. He was satisfied that the plaintiff and Hamilton, deceased, were partners in each other's mining claims. In fact it was common ground that there was some arrangement between them that each should share alike in the mineral claims of the other. The two claims in question, the Blue Bird, and the Blue Jay, stood originally the Blue Bird in the name of Hamilton and the Blue Jay in the name of the plaintiff. Plaintiff says that he prepared bills of sale; one assigning a half interest in the Blue Jay to Hamilton, the other a half interest in the Blue Bird to himself from Hamilton. Hamilton signed the bill of sale to the plaintiff but refused to accept the bill of sale from the plaintiff of a half interest in the Blue Jay on the ground that the plaintiff had done the assessment work which Hamilton by reason of his illness had been unable to do or assist in. Before Hamilton's death the parties agreed to give an option on the two claims which it was agreed between them were of equal value; the purchaser to pay the purchase-money into a bank to the joint credit of the two parties. Before the option was finally taken up Hamilton died, having appointed the defendant his executor. The moneys were put into the bank to the joint credit of Larson and Hamilton. The dispute is with respect to the plaintiff's interest in the claims and in the money in the bank. The plaintiff claims three-quarters, he contending that he was the sole owner of the Blue Jay and the owner of a one-half interest in the Blue Bird.

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The plaintiff, after the death of Hamilton, procured Crown grants to be issued for these claims, but by mistakes made by the surveyor who was authorized to survey and procure Crown grants and by the mining recorder, the Crown grants were issued in the joint names of the defendant and plaintiff as to both claims. The plaintiff presented a Petition of Right claiming rectification of the Blue Jay Crown grant by striking out defendant's name. In that petition he alleged that he was the sole owner of the Blue Jay. Defendant entered an appear-

ance but did nothing more and judgment was rendered by the late Chief Justice HUNTER striking out defendant's name from the Crown grant *pro confesso*. The plaintiff set these transfers up in the statement of claim but the learned judge thought that the plea of *res judicata* was not properly pleaded and therefore refused to give effect to that doctrine. Having, therefore, come to the conclusion there was no corroboration of the plaintiff's evidence and that the plea of *res judicata* could not be given effect to he dismissed the plaintiff's action and from this dismissal the plaintiff appeals.

The learned judge thought that the Crown grant of the Blue Jay was of no importance, that Larsen and Hamilton were partners in the Blue Jay from the beginning and that therefore the plaintiff held a one-half interest in it for Hamilton and that the rectification of the Crown grant did not affect the trust.

I think the learned judge was in error in coming to the conclusion that the plaintiff was trustee for Hamilton. There were no written articles of partnership between the parties. Their rights, therefore, depended upon compliance with the partnership sections of the Mineral Act, Cap. 167, R.S.B.C. 1924. Section 91 provides that all mining partnerships shall be governed by the provisions of this Part unless they have other and written articles of partnership. Section 94 (1) provides that a mining claim may be located and recorded in a partnership name but the name of each partner and the number of his free miner's certificate shall be recorded with every such claim. The partnership name shall appear on every such record and all the claims so taken up shall be the partnership property. Now there is no pretence that this section was observed. The Blue Jay subsequently to the verbal partnership was staked and recorded in the name of the plaintiff alone; therefore, Hamilton had no interest in this claim. Section 19 of the said Act provides that "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."

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The present case comes clearly within this section and excludes the defendant from setting up a trusteeship such as above

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suggested. Whether the case be looked at as a partnership one or as a joint interest it is clearly not maintainable in the face of the partnership provisions of the Act and of this section 19. Therefore, the foundation of the learned judge's judgment that leaving apart the rectification of the Crown grant the plaintiff was trustee of a one-half interest of the Blue Jay for Hamilton is not well founded.

Then, we have it that the parties agreed to sell the Blue Bird and the Blue Jay admittedly of equal value under one agreement which provided that the proceeds of the sale should be paid into the bank to the joint credit of both parties and that nothing was said about the proportion which was to go to each. In the absence of evidence the presumption would be that each was entitled to one-half of these proceeds. That is the contention of the defendant, but on the facts and law above set out the plaintiff was entitled to the whole of the Blue Jay and to a one-

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half interest in the Blue Bird and therefore would be entitled to three-quarters of the purchase-money. The onus of proof would be upon the defendant to shew that it was otherwise agreed. I think, therefore, there should have been a declaration to that effect and judgment for the plaintiff in the terms of his claim.

While I express no opinion upon it I am not convinced that the defendant is not barred from setting up a claim to a one-half interest in the Blue Jay by reason of the judgment rectifying the Crown grant. In our system of pleading there is no form prescribed. The parties are to allege the facts and the plaintiff did allege the facts in his Petition of Right claiming ownership of the Blue Jay. That claim was confessed by the defendant. In the plaintiff's petition the very question now raised would have been decided and he is not therefore entitled to have a second trial: he ought to have raised the question in the first. The appeal is therefore allowed. The plaintiff is entitled to three-quarters of the moneys in the bank.

MARTIN, J.A.

MARTIN, J.A.: This appeal is much simplified by the fact that the learned judge below accepted "with no hesitation in the slightest degree" the evidence of the plaintiff and was of opinion that "the merits are with him," but dismissed his claim

solely because his evidence was not "corroborated by some other material evidence" as section 11 of the Evidence Act, Cap. 82, R.S.B.C. 1924, requires.

The effect of this section was very carefully considered by us in *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213, and after applying that decision, and the leading cases it is founded on, to the facts before us it is, to my mind clear, after a critical examination of all the evidence adduced, that the plaintiff has satisfied the requirement of the statute and in a marked degree in the unusual circumstances of the case, by the fact of the deceased giving him, on the 17th of April, 1924, a bill of sale of a half interest in the Blue Bird mineral claim but generously and considerately, in his state of impaired health, refusing at the same time to accept from him a proffered corresponding bill of sale of a half interest in the Blue Jay claim of which he was the sole recorded owner.

MARTIN, J.A.

Having regard to the intimate relationship as prospectors and partners and attached friends that had long existed between these two miners the story told by the plaintiff fits into all the probabilities of the case in a way that carries conviction and "affords that corroboration by circumstances" held to be sufficient by Mr. Justice Killam in *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, cited in the *Dominion Trust* case; therefore the plaintiff's claim against the estate has, in my opinion, been established and judgment should be entered accordingly in his favour.

GALLIHER, J.A.: Section 19 of Cap. 167 of the Mineral Act, R.S.B.C. 1924, which first appears in our statutes of the year 1897 as section 14 of Cap. 28, and which is still in force reads 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."

GALLIHER, J.A.

There were here two claims in question and I will deal with them by their names before being Crown granted.

The Blue Bird mineral claim was located for one A. J. Martin by the plaintiff on the 17th of August, 1922, and later was transferred by the said Martin to the deceased Hamilton

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on the 22nd of January, 1923, and on April 17th, 1924, Hamilton transferred an undivided one-half interest in said claim to the plaintiff which was duly recorded. The Blue Jay fraction was located on the 19th of July, 1920, in the plaintiff's name and recorded on the 2nd of August following. So far as the records shew then after the transfer and recording of a one-half interest in the Blue Bird by Hamilton to the plaintiff (Larson) he Larson was the recorded owner of a one-half interest in the Blue Bird and the owner of the entire Blue Jay Fraction and Hamilton was the owner of a one-half interest in the Blue Bird.

On March 29th, 1927, an agreement for sale of these two properties was entered into between Larson and Hamilton of the one part and J. A. McDonald of the other part for the sum of $15,000.

It is in respect of the balance of the purchase price $6,375, now in the Bank of Montreal at Stewart, B.C., to the joint credit of Larson and the estate of Hamilton who died before the last two payments were made that this action is brought.

GALLIHER, J.A.

The defendant Montgomery is the executor of that estate. Larson claims and the records would shew that he is entitled to a three-quarters share of this balance. The defendant's claim and the learned trial judge has found that although the Blue Jay Fraction was located and recorded in Larson's name that he held the title of that claim when he originally got it for the benefit of himself and the deceased and that they were joint owners of the claim, but dismissed the plaintiff's action by reason of section 11 of the Evidence Act which is in effect that in actions by or against executors, etc., of a deceased person an opposite or interested party to the action shall not obtain a verdict on his own evidence unless corroborated by some other material evidence.

The defendants submit that as the dispute here is not in respect of an interest in a mine but in the proceeds of the sale of a mine, section 19 does not apply and cite *McNerhanie* v. *Archibald* (a decision in our own Courts) (1898), 6 B.C. 260, affirmed by the Supreme Court of Canada (1899), 29 S.C.R. 564. I have carefully read that case in all the Courts and with the law as settled there I have no quarrel but it seems to me

there is a very clear distinction between the facts in that case and in the one at Bar. In the *Archibald* case it was the effect of the statutory provisions as to the lapse of a free miner's certificate which came up for consideration. That case was tried before section 19 was in our statutes. There the plaintiff and certain other parties were interested in some mineral claims of which a sale was made. At the time the agreement for sale was entered into McNerhanie had a free miner's certificate and an interest in the property but before all the purchase-money had been paid he allowed his free miner's certificate to lapse and the defendant refused to recognize him as entitled to any portion of the proceeds of the sale by reason of (among other things) the lapse of his certificate. The point was McNerhanie did have an interest in the claim and was a free miner in good standing at the time of the sale and the Courts held in such a case the lapse of his certificate afterwards did not prevent his sharing in the proceeds. In the case at Bar the statute says except under certain conditions (not present here), see section 19, *supra,* the free miner shall have no interest, etc. I take that section to mean that unless you have the "writing specified" no matter what your private arrangements may be you have no interest and if you have no interest in the claim at any time you can have no interest in the proceeds of its sale. Section 19 was passed in the Session of the Legislature following the decision in *Wells* v. *Petty* (1897), 5 B.C. 353, commonly referred to as the "in on it case." It was there held that the words "in on it" imported an agreement to give an interest. I think section 19 was passed to avoid any difficulty in determining whether a more or less loose expression created an interest and defined the only way in which an interest could be acquired in cases such as this. If I am correct in that conclusion the plaintiff here is entitled to judgment for the amount claimed and of the moneys in the bank with costs and it does not become necessary to decide the other points raised.

GALLIHER, J.A.

The counterclaim is dismissed with costs.

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

MCPHILLIPS, J.A.

Appeal allowed.

Solicitors for appellant: *Courtney & Elliott.*
Solicitors for respondents: *Williams, Manson & Gonzales.*

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NATIONAL POLE & TREATING CO. v. BLUE RIVER POLE & TIE CO. LIMITED, DUNCAN LUMBER CO. LIMITED AND SHAW.

Company—Principal and agent—Contract for sale and delivery of poles—Agreement for advances to be secured by notes and guarantee of a third company—Notes endorsed on behalf of third company by agent—Guarantee signed on behalf of company by agent—Ostensible authority—Forgery—Estoppel—Holding out—Evidence—Liability of principal—R.S.B.C. 1924, Cap. 38, Sec. 127 (3).

NATIONAL POLE & TREATING CO. v. BLUE RIVER POLE & TIE CO.

The defendant Shaw was managing director and vice-president of the Duncan Lumber Co. Limited from 1921 until the 12th of October, 1927. In March, 1927, he formed and controlled the Blue River Pole & Tie Co. Limited. On the 1st of November, 1927, the Blue River Pole & Tie Co. Limited entered into a contract with the plaintiff to sell and deliver 24,500 poles of certain sizes at certain rates and by agreement as supplemental to and part thereof the plaintiff Company agreed to advance the Blue River Pole & Tie Co. Limited $18,000 at once and $12,000 within 60 days represented by notes of the Blue River Pole & Tie Co. Limited payable on demand, and it was agreed that said notes be endorsed by the Duncan Lumber Co. Limited and payment thereof be guaranteed by said Duncan Lumber Co. Limited. The plaintiff paid the $18,000 to the Blue River Pole & Tie Co. Limited on the 1st of November, 1927, and the $12,000 on the 30th of November following. The promissory notes were made by the Blue River Pole & Tie Co. Limited payable to the plaintiff, the first for $18,000 on the 1st of November, 1927, and the second for $12,000 on the 30th of November and were endorsed in the name of the Duncan Lumber Co. Limited by Shaw. Shaw also signed in the name of the Duncan Lumber Co. Limited a guarantee on the 1st of November, 1927, to the amount of $30,000 guaranteeing payment of the money advanced or to be advanced to the Blue River Pole & Tie Co. Limited. The first note, and the guarantee were not delivered to the plaintiff Company until the 12th of November, 1927. At a meeting of the directors of the Duncan Lumber Co. Limited held on the 12th of October, 1927, Shaw was dismissed as managing director of the company and one W. A. Pettigrove was appointed in his place. On the 10th of November, 1927, one Nelson, the manager of the plaintiff Company called at the office of the Duncan Lumber Co. Limited when, on his asking for Shaw he was told by both the stenographer in the office and Pettigrove that Shaw was no longer managing director of the Duncan Lumber Co. Limited and that Pettigrove had been appointed in his place. In an action to recover the amount of the notes, it was held that there was no notice of change in Shaw's position to the plaintiff at the times material to the issue herein and the plaintiff was entitled to judgment.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that although the Duncan Lumber Co. Limited held Shaw out as having authority to make contracts between themselves and others and to sign negotiable instruments in the ordinary course of their business, there was no holding out of Shaw as authorized to endorse notes or give a guarantee for the accommodation of others (*i.e.*, the Blue River Pole & Tie Co. Limited). The transaction was not one made in the course of the Duncan Lumber Co.'s business but contrary to it.

Held, further, that prior to the delivery of the first note and the guarantee to the plaintiff, the plaintiff's agent in this Province had notice of the withdrawal on the 12th of October, 1927, of Shaw from control of the Duncan Lumber Co.'s business, when said Company on that date passed a resolution appointing Pettigrove to the management of the Company's affairs.

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NATIONAL POLE & TREATING CO. *v.* BLUE RIVER POLE & TIE CO.

APPEAL by defendant Duncan Lumber Co. Limited from the decision of MORRISON, C.J.S.C. of the 11th of April, 1929, in an action to recover the amount of two promissory notes made by the Blue River Pole & Tie Co. Limited payable to the plaintiff, and endorsed in the name of the Duncan Lumber Co. Limited by the defendant Shaw who up to the 12th of October, 1927, had been the managing director of the Duncan Lumber Co. Limited. The first was for $18,000 dated the 1st of November, 1927, and the second for $12,000 dated the 30th of November, 1927. Shaw also signed in the name of the Duncan Lumber Co. Limited, a guarantee dated the 1st of November, 1927, to the amount of $30,000 guaranteeing the payment of money advanced or to be advanced to the defendant the Blue River Pole & Tie Co. Limited. The other relevant facts are set out in the judgment of the Chief Justice of British Columbia.

Statement

The appeal was argued at Vancouver on the 26th, 27th and 28th of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Davis, K.C. (*Hossie*, with him), for appellant: As to the notes being endorsed by Shaw for the Duncan Lumber Co., the plaintiff had had notice of the abrogation of Shaw's powers before the notes in question were delivered to them. On the 10th of November Pettigrove was in charge of the Duncan Lumber Co. and Nelson, the manager of the plaintiff Company, was advised of this on the 10th of November by both Mrs.

Argument

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Gordon, the stenographer, and Pettigrove himself. Nelson is no longer in the employ of the Pole Company and is admitted to have been guilty of embezzlement. We are not barred by the finding below: see *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Campbell* v. *Storey* (1924), 33 B.C. 354: Not only is the guarantee a forgery but the notes are also forgeries in that they contain a false statement in the endorsements. Shaw says he is "treasurer"; this is false and constitutes a forgery: see Crankshaw's Criminal Code, 5th Ed., p. 573, sec. 466; *Merchants Bank* v. *Lucas* (1889), 15 A.R. 573 and on appeal (1890), 18 S.C.R. 704; *Kreditbank Cassel G.M.B.H.* v. *Schenkers* (1927), 1 K.B. 826 at pp. 834-8; *Ruben* v. *Great Fingall Consolidated* (1906), A.C. 439. Shaw had never been appointed or held himself out in any way as "treasurer": see *Houghton & Co.* v. *Nothard, Lowe and Wills* (1927), 1 K.B. 246 and on appeal (1928), A.C. 1.

Argument

Harold B. Robertson, K.C. (*A. Bruce Robertson,* with him), for respondent: As to Shaw's authority being taken away the plaintiff had no actual notice of this. Constructive notice is not sufficient: see *Lloyd* v. *Banks* (1868), 3 Chy. App. 488; *Greer* v. *Downs Supply Co.* (1927), 2 K.B. 28; *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380 at p. 387. In any event the notice of the 10th of November does not affect the first note of the 1st of November. From 1921 until the 12th of October, 1927, Shaw was manager and vice-president and he continued to act as such after the 12th of October, 1927. We submit we are within the rule in *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327. See also *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382 at pp. 385 and 388; *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374 at p. 387. Constructive notice is not a positive doctrine but a negative one: see *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103 at p. 112; *Calori* v. *Andrews* (1906), 12 B.C. 236 at p. 247; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869 at p. 893; *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607 at p. 616; *Ernest* v. *Nicholls* (1857), 6 H.L. Cas. 401 at p. 419; *Ticonderoga Pulp & Paper Co.* v. *Cowans* (1925), 4 D.L.R. 1 at p. 3; *Fountaine* v. *Carmarthen Railway Co.* (1868), L.R. 5 Eq. 316 at p. 322;

In re Land Credit Company of Ireland. Ex parte Overend, Gurney, & Co. (1869), 4 Chy. App. 460 at p. 468. There is no reason for following *Houghton & Co.* v. *Nothard, Lowe and Wills* (1927), 1 K.B. 246, as now it is not the law and not binding on this Court: see also *Ruben* v. *Great Fingall Consolidated* (1906), A.C. 439. There is no forgery by his signing as "treasurer." Once the agent is clothed with authority then he has the right to sign and his motive makes no difference: see *Hambro* v. *Burnand* (1904), 2 K.B. 10 at pp. 23-6; *The Bank of Bengal* v. *Fagan* (1849), 7 Moore, P.C. 61 at p. 74; *Bryant, Powis, & Bryant* v. *La Banque du Peuple* (1893), A.C. 170 at p. 180; *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at pp. 737 and 740. Shaw was held out by the principal as having authority and there was no proper notice of any change: see *Trueman* v. *Loder* (1840), 11 A. & E. 589 at p. 593; *Summers* v. *Solomon* (1857), 26 L.J., Q.B. 301; *Curlewis* v. *Birkbeck* (1863), 3 F. & F. 894; *Willis, Faber, and Co. (Limited)* v. *Joyce* (1911), 27 T.L.R. 388; *Sayward* v. *Dunsmuir and Harrison* (1905), 11 B.C. 375 at pp. 388-9; *Watson* v. *Powell* (1921), 2 W.W.R. 128 at p. 131. Under section 127 (3) of the Companies Act there is liability: see *Premier Industrial Bank, Limited* v. *Carlton Manufacturing Company, Limited, and Crabtree, Limited* (1909), 1 B.K. 106; *Dey* v. *Pullinger Engineering Co.* (1921), 1 K.B. 77 at p. 78. The notes and guarantee were put forward to us by the managing director and vice-president of the company as genuine documents and the company is estopped from setting up lack of authority: see *Ruben* v. *Great Fingall Consolidated* (1904), 2 K.B. 712 and on appeal (1906), A.C. 439 at pp. 443-4. As to the word "treasurer" being used after Shaw's name see *Morison* v. *London County and Westminster Bank, Limited* (1914), 3 K.B. 356 at p. 366. The case of *Merchants Bank* v. *Lucas* (1889), 15 A.R. 573 does not apply as the facts are different.

Argument

Davis, in reply: The judgment in *Houghton & Co.* v. *Nothard, Lowe and Wills* (1927), 1 K.B. 246 was upheld by the House of Lords: see (1928), A.C. 1 at p. 16.

Cur. adv. vult.

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4th June, 1930.

MACDONALD, C.J.B.C.: The action was brought to recover the amount owing on two several promissory notes, the first for $18,000, purporting to have been signed on the 1st of November, 1927, the second for $12,000, signed on the 30th of November, 1927. These notes were made by the Blue River Pole & Tie Co. Limited payable to the plaintiff and were endorsed in the name of the defendants by J. A. Shaw, who up to the 12th of October, 1927, had been the managing director of the defendants. Shaw, also, signed in the name of the defendants a guarantee purporting to have been signed 1st November, 1927, to the amount of $30,000, guaranteeing the payment of money advanced or to be advanced to the Blue River Pole & Tie Co. Limited. It was contended on the argument that Shaw had no authority at any time to endorse any notes as he did in this case, though it is clear on the evidence that up to the 12th of October, 1927, he was held out as having authority to manage the defendants' business in the ordinary course. He had no authority to pledge the Company's credit for the accommodation of others. There was a resolution passed December 31st, 1921, laying down a policy directly opposed to that transaction.

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Shaw was managing director of the defendants from 1921 to the 12th of October, 1927, when he was removed from control by a resolution passed on that date. One of the promissory notes sued on purports to be dated the 1st of November, 1927, and is endorsed by Shaw with defendants' name as security for an obligation which was not that of defendants but of Shaw's own company, the Blue River Pole & Tie Co. Limited. It was given for money advanced by the plaintiff to the Blue River Pole & Tie Co. Limited which was Shaw's own company. Shaw had no authority to endorse the note. The written guarantee given in the same connection and covering as well the amount of the second note for $12,000 was executed in my opinion without any actual or presumed authority. The particulars of a number of contracts made between the plaintiffs and the defendants were proved at the trial covering the period between 1921 and the 12th of October, 1927, as proof that the defend-

ants had held Shaw out as having authority to sign the notes in question.

It may well be that defendants did hold Shaw out as having authority to make contracts between themselves and others and sign negotiable instruments in the ordinary course of their business in which the defendants were sellers of poles to the plaintiff but these contracts disclose no holding out of Shaw as authorized to endorse the notes or give the said guarantee. The signing of notes for the accommodation of others was something that defendants had, as far as the evidence as I read it discloses, never been done by Shaw as an officer of the defendants. This transaction was not one made in the course of defendants' business but contrary to it. I do not say that the defendants had no power themselves to endorse for the accommodation of others. That question becomes negligible when it is found that Shaw had no authority to endorse the notes herein sued on, on their behalf.

In the alternative the defendants argued that the plaintiff had verbal notice of the withdrawal on the 12th of October of Shaw from control of the defendants' business when the defendants on that date passed a resolution appointing one Pettigrove to the entire management of the Company's affairs in this Province. On this there was a question raised. Did the plaintiff at the time the said notes and guarantee were delivered to them have notice of this change in Shaw's position? The plaintiff's agent in this Province was one Nelson and the evidence shews that Nelson called at the defendants' office in Vancouver, which was also used by Shaw as the office of the Blue River Pole & Tie Co. Limited of which Shaw was president. The defendants had nothing to do with this Company. Nelson called on the 10th or 11th of November and asked for Mr. Shaw and was told that Shaw was out of town. He then talked with Mrs. Gordon, defendants' stenographer. Mrs. Gordon says that she told Nelson that Pettigrove was in entire charge and that Shaw was looking after the Blue River Pole & Tie Co.'s business only. When introduced by Mrs. Gordon to Pettigrove, Pettigrove says that he told Nelson that he was in charge of the Company's business and that the Blue River Pole & Tie Co. Limited were entirely divorced from

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defendants. Nelson then made no reference to the notes. The date the 10th or 11th of November, 1927, is of importance because it was contended and I think proved that the notes were not delivered to the plaintiff until after that date. Exhibit 28 is a letter dated the 12th of November, 1927, written by Shaw to the plaintiff in which he said that he enclosed therewith the $18,000 note and signed contract of guarantee. This would reach the plaintiff sometime later than that date. Therefore, if the evidence of Mrs. Gordon and Pettigrove be accepted plaintiff did not receive the notes until after it had been notified that Shaw's authority had ceased. Shaw admits in his evidence that he had forged the defendants' signature to the instrument of guarantee. Nelson was the only witness for the plaintiff and I am not disposed to rely upon his evidence. He admits that he had been guilty of fraud upon his Company (the plaintiff) in a prior transaction not connected with this one. The guarantee is also peculiar. It recites falsely that it was given in pursuance of a resolution of the defendant Company passed on the 15th of November, 1927, more than two weeks after the date of the guarantee and of the endorsement of the $18,000 note.

Considering the nature of the transaction and the friendship existing between Nelson and Shaw I prefer to accept the evidence of Mrs. Gordon and Pettigrove in preference to that of Nelson. The dishonest transaction of Nelson above referred to concerned the purchase of $2,000 worth of shares in a company. Nelson not having the money to pay for the shares used the money of his company without the plaintiff's knowledge and induced Shaw to let him charge it to the defendants so as to conceal the transaction. These are the two men who engineered the transaction now in question. It is not contended that there was any holding out of Shaw as having authority after the 12th of October and it is quite clear that he had no actual authority either before or after that date. I think therefore that the appeal should be allowed and the action dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: The contracts put in Exhibits 7, 9, 14, 15,

16, and 17 were all contracts between the National Pole & Treating Co. and the Duncan Lumber Co. Limited as principals and as such were carried out by the respective parties. Shaw signed for the Lumber Company mostly as vice-president, but sometimes as general manager. As I say these transactions were all in the nature of purchase and sale between the respective parties and moneys were advanced from time to time by the Pole Company to the Lumber Company as provided in the contract. There is no dispute arising out of these contracts, but they are introduced here as I understand it as shewing the course of dealings between the parties and the recognition of Shaw's authority throughout. Prior to the transaction in question herein a new company had been organized known as the Blue River Pole & Tie Co. Limited. This was practically, if not wholly, the creature of Shaw—at all events neither the Duncan Lumber Co. Limited nor George M. Duncan personally had any interest therein. Exhibit 19, the one in question, was a contract along the same lines as those formerly referred to with the following exceptions which to my mind determines the question in favour of the appellant: 1. The contract was between the Blue River Company and the National Pole & Treating Co. as principals. 2. The Duncan Lumber Co. Limited had no interest therein. 3. The cheques given by the National Pole & Treating Co. and the moneys advanced under the contract were given and advanced direct to the Blue River Pole & Tie Co. Limited. 4. The contract stipulated for an endorsement of the notes given by the Blue River Pole & Tie Co. Limited by the Duncan Lumber Co. Limited, and a guarantee by them for payment. 5. Shaw presented the notes apparently so endorsed and a guarantee apparently so executed to the National Pole & Treating Co. and two sums $18,000 and $12,000, were advanced by the said last-mentioned Company to the Blue River Pole & Tie Co. Limited. 6. It is admitted that Shaw forged the signature of George M. Duncan to the guarantee and the evidence is that Duncan had no knowledge of this transaction until after the notes had been protested. Nor had he any knowledge that the Blue River Pole & Tie Co. Limited existed until a few days prior to October 10th, 1927, and on that date on looking through the accounts of

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the Duncan Lumber Co. Limited he ascertained that moneys of his company were being advanced or utilized for the benefit of the Blue River Pole & Tie Co. Limited as a result of which on October 12th, 1927, a meeting of the Duncan Lumber Co. Limited was held and by resolution adopted and approved by Shaw it was resolved that the authority of Shaw to sign notes, cheques, or obligations of the Company be cancelled and W. A. Pettigrove was elected a director and secretary with authority to do so. Notwithstanding this Shaw entered into the contract in question on November 1st, 1927, and later on purported to bind the Duncan Lumber Co. Limited as endorsers on the notes and under the guarantee. Now while it might not be open to question that in all the former transactions in which the Duncan Lumber Co. Limited were principals and sellers Shaw had authority to act for them we come to an entirely different condition of affairs when the contract in question was entered into. It was not an agreement for purchase and sale between the same two companies but between the National Pole & Treating Co. and the Blue River Pole & Tie Co. Limited, a different entity entirely, and as affecting the Duncan Lumber Co. Limited an entirely different liability. Up to that time there was in my view nothing to indicate or lead the National Pole & Treating Co. to believe that Shaw while he had power to act for the Duncan Lumber Co. Limited in respect of contracts entered into by them of the nature of the former contracts had any power to guarantee the contracts of strangers, something very different from the entering into and carrying out their own contracts considering the nature of such contracts. I think they were put upon enquiry and if Nelson, the manager of the National Pole & Treating Co., instead of satisfying himself as to Shaw's authority, chose to accept his word for it, then I think the Duncan Lumber Co. Limited should not be held liable.

Mr. *Davis* in cross-examination of Nelson elicited evidence of a transaction in which he and Shaw were engaged which does not incline me to attach undue importance to his testimony, and although perhaps I would not be justified in saying so it leaves an impression in my mind that he might not be unaware of the nature of things when the contract of November 1st, 1927, was entered into, but be that as it may I find no difficulty in coming

to the conclusion that he was made aware of Shaw's *status* either on the 10th or 11th of November, 1927, at a time prior to the receipt of the contract, the notes, and guarantee back from Shaw, established I think by the evidence.

If Nelson had taken the trouble to search the records he could easily have found who and what the Blue River Pole & Tie Co. Limited were and known that he was dealing with a concern in which the Duncan Lumber Co. Limited had no interest and it should at once have suggested itself being an entirely different transaction to all previous transactions and a different liability to be assumed by the Duncan Lumber Co. Limited.

For these reasons, I think the plaintiff's action fails and the appeal should be allowed.

Mr. *Davis* raised other points which it does not become necessary for me to consider in the view I take of this matter.

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

Appeal allowed.

Solicitors for appellant: *E. P. Davis & Co.*
Solicitors for respondent: *Robertson, Douglas & Symes.*

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PATCHING v. HOWARTH

PATCHING v. HOWARTH AND HOWARTH.

Libel—Pleadings—Proof of publication—Plea of justification—Effect of.

In an action for libel after the plaintiff's evidence was in the Court expressed the view that publication had not been proved but defendants' counsel decided to proceed with the defence. It was held that although publication was not proved the plaintiff is entitled to judgment as by pleading justification (and not pleading in the alternative) publication is thereby in fact admitted (following *Bremridge* v. *Latimer* (1864), 12 W.R. 878.

Held, on appeal (*per* MACDONALD, C.J.B.C.), that as the defendant unnecessarily proceeded with her defence of justification she must be assumed to have admitted that she had something to meet. Her course, therefore, must be taken as a virtual admission of publication.

Per MARTIN and GALLIHER, JJ.A.: That although the principles laid down in *Bremridge* v. *Latimer* do not apply in this case, there was sufficient evidence to prove publication and the appeal should be dismissed.

APPEAL by defendants from the decision of MCDONALD, J. in an action for libel tried by him at Vancouver on the 27th of January, 1930. The plaintiff and her husband occupied rooms in the defendant's house from April, 1928, until the following November when, becoming in arrears for rent, they were turned out of their rooms. The husband left substantially everything he had in the rooms and after they were gone the defendant found two letters in a seaman's bag that the husband had left there. The letters were written by one McNeil to the husband in which he accused his wife (the plaintiff) of immoral conduct. The plaintiff alleges that defendant read these letters, and communicated the contents thereof to other persons.

Statement

Jeremy, for plaintiff.
Lawrence, for defendants.

6th February, 1930.

MCDONALD, J.: Action for libel. Evidence was called by the plaintiff with a view to proving publication of the libel. Publication was not proven but the plaintiff contends that nevertheless on the pleadings she is entitled to judgment for the reason that though the defendant denies publication, yet by pleading

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justification (and not pleading in the alternative) publication is thereby in fact admitted.

In paragraph 5 of the statement of claim the plaintiff alleges publication to one Ella B. Blakney.

In paragraph 6 the plaintiff sets out the words alleged to have been contained in the libelous letter complained of which words are defamatory.

Paragraph 12 of the statement of defence is as follows:

"The defendants deny that the words complained of in paragraph 6 of the statement of claim herein refer to the plaintiff or have the innuendo specified, and say that if the said words do refer to the plaintiff that the innuendo is true in substance and in fact."

Plaintiff demanded particulars of paragraph 12 of the statement of defence, and in reply the defendant says:

"In answer to the demand for particulars the defendants allege that the plaintiff informed the defendant, Polly Howarth, that she (the plaintiff) had been guilty of misconduct and had committed adultery with one, James McNeil, in or about the month of September, 1927, in the Austin Hotel, in the City of Vancouver, in the Province of British Columbia, and that at the time of such misconduct she had received from the said James McNeil various sums of money and gifts."

Upon the authorities cited it appears that the plaintiff's contention is correct. See *Bremridge* v. *Latimer* (1864), 12 W.R. 878, *per* Byles, J., at p. 879.

I assess the damages at $250 from which amount there will be deducted $25 in respect of the counterclaim for rent. As the costs of the counterclaim are negligible the plaintiff will have her costs of the action on the appropriate scale.

The defendant's application now made to amend the defence is, I think, made too late, in view of the fact that had an amendment been made at the proper time, the trial would doubtless have taken a different course.

From this decision the defendant appealed.

The appeal was argued at Vancouver on the 14th and 15th of April, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Lawrence, for appellants: On the trial it was held that a plea of justification is an admission of publication following *Bremridge* v. *Latimer* (1864), 12 W.R. 878. A plea of justification must not be treated as a part of the issue of publication:

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see Halsbury's Laws of England, Vol. 18, p. 669, secs. 1238-9; *Restell* v. *Steward* (1875), W.N. 231 at p. 232; *Nagy* v. *Webb* (1930), 1 W.W.R. 357 at pp. 360-3. We say in effect this is an alternative plea: see *Berdan* v. *Greenwood* (1878), 3 Ex. D. 251 at p. 255; *Belt* v. *Lawes* (1882), 51 L.J., Q.B. 359; *Penrhyn* v. *The "Licensed Victuallers' Mirror"* (1890), 7 T.L.R. 1; *Daly* v. *The Irish Transport & General Workers' Union* (1926), I.R. 118.

Jeremy, for respondent: On the question of publication see *Emmens* v. *Pottle & Son* (1885), 34 W.R. 116; *John Lamb's Case* (1610), 5 Co. Rep. 108. The pleadings should be in proper terms.

Lawrence, in reply, referred to *Rainy* v. *Bravo* (1872), L.R. 4 P.C. 287 at p. 295 and *Pullman* v. *Hill & Co.* (1891), 1 Q.B. 524 at p. 527.

Cur. adv. vult.

4th June, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an action of libel brought by the plaintiff against the defendants under these circumstances. The plaintiff and her husband occupied an apartment in the defendant's house and becoming in arrears for rent were turned out of the apartment. The plaintiff's husband left much of his belongings behind him including two letters written by one McNeill to him accusing his wife (the plaintiff) of immorality. It is claimed by the plaintiff that the defendant read these letters and communicated the contents to other persons. The trial judge found that publication was not proved by the evidence offered, but must be taken to have been admitted in the pleadings, the defendant having pleaded justification of the innuendo. The learned judge came to his conclusion upon the authority of *Bremridge* v. *Latimer* (1864), 12 W.R. 878. That case is not directly in point. The application there was to strike out paragraphs in the pleadings as embarrassing but it was remarked by one of the judges that a plea of justification is a plea of confession and avoidance. Without questioning this I prefer to put my judgment on a different ground. At the close of the plaintiff's case, the defendant's counsel elected to proceed with his defence of justification or mitigation. Now unless the plaintiff

had made out a case of publication any defence would be unnecessary unless publication were admitted. Now it has been held by this Court that where a defendant enters upon his defence though the plaintiff has failed to make out a *prima facie* case by reason of failure to prove some essential issue, if the defendant makes out that issue it inures to the benefit of the plaintiff and supports the action. I think therefore that the defendant's course must be taken as a virtual admission of publication. That the defendant in entering upon her defence of justification or mitigation must be assumed to have admitted that she had something to meet. The course of the trial shews, I think, that publication must be inferred to have been conceded and therefore the judgment of the trial judge must be affirmed.

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MARTIN, J.A.: This is an appeal by defendants from a judgment pronounced against them by Mr. Justice D. A. McDONALD for $250 damages for the publication of a libel against the plaintiff. The libel was contained in two certain letters which it is alleged the defendant Polly Howarth exhibited and tendered to two persons (who declined to receive or read them) to prove grossly libellous statements she made against the plaintiff and which she said were contained in said letters and the real "sting" of which (to use the time-honoured and apt expression, *e.g.*, in *Sutherland* v. *Stopes* (1925), A.C. 47, 56, 60, 79) she, in effect, recited therefrom in proof of her accusation, which was, in brief, that the plaintiff had improper relations with men and was a woman of immoral character and "not a fit woman for [the said two persons] to be helping at all."

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Though the evidence is not wholly as precise as one would wish yet there is enough to bring the matter within the principle of the decisions in *Lamb's Case* (1610), 5 Co. Rep. 108; *Maloney* v. *Bartley* (1812), 3 Camp. 210, 213; *Spall* v. *Massey* (1819), 2 Stark. 559; *Forrester* v. *Tyrrell* (1893), 9 T.L.R. 257; and *Hird* v. *Wood* (1894), 38 Sol. Jo. 234; and there is to my mind no doubt that Polly Howarth not merely "repeated any part of the libel" from the letters, which *Lamb's Case* holds to be sufficient publication, but that part of it which was the most substantial and the "real sting" of the charge contained therein.

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On this important branch of the case (which though small in amount is large in principle) I am unable, with respect, to adopt the view of the learned trial judge that publication was not proved; only a few, at best, of the authorities just cited were drawn to his attention, or to ours.

The learned judge was, however, of opinion that though the defendants denied publication yet because they set up a plea of justification, not pleaded in the alternative, the effect of that alone was to admit publication, and the solitary observation of Byles, J. in *Bremridge* v. *Latimer* (1864), 12 W.R. 878 was relied upon to support that view. But, with respect, that case is entirely distinct from this one and the present point was not raised nor dealt with by that Court, nor could have been, relevantly, and the said observations of Byles, J., when read with the context, while there unobjectionable do not apply here, nor touch this point, and it is obvious that he did not have it in mind, because so sound a judge must have known that even where the general issue ("not guilty," which includes a denial of publication, Bullen & Leake's Precedents of Pleadings, 3rd Ed., 722) is pleaded a special plea of justification could always have been set up before alternative pleas were permitted, long before the Common Law Procedure Act even, of which *Spall* v. *Massey, supra,* is an example, so far back as 1819, and *cf.* also *Smith* v. *Richardson* (1737), Willes 20, 25 (*a*); *Underwood* v. *Parks* (1743), 2 Str. 1200; and *Manning* v. *Clement* (1831), 7 Bing. 362, wherein the Court said, p. 367:

> "No rule can be more firmly established than that the defendant cannot give in evidence the truth of the imputation contained in the libel, without pleading such truth as a justification. Since the case of *Underwood* v. *Parks* [(1743)], 2 Str. 1200 there has never existed a doubt on this point."

And see also *Wootton* v. *Sievier* (1913), 3 K.B. 499 at 504; the pleadings in *Daly* v. *The Irish Transport & General Workers' Union* (1926), I.R. 118, 123; and Gatley on Libel and Slander, 2nd Ed., 544, 548-9, 761.

It is moreover to be noted that the letters in question were destroyed by plaintiff's husband before action, in which case proof of "the material words of the libel" is sufficient—*Rainy* v. *Bravo* (1872), L.R. 4 P.C. 287, 295, and even though there might have been distinct libels in different passages in the same letter yet "when a passage contains in itself a complete charge

and is not modified by other passages in the same letter it is not necessary to set out the whole": *ib.* 297; and *cf.* also *Orpwood* v. *Barkes* (1827), 4 Bing. 261; and *Flower* v. *Pedley* (1796), 2 Esp. 491.

The real difficulty in this case is occasioned by the fact that there is to be found in the pleadings what Lindley, L.J. in *Saunders* v. *Seyd* (1896), 12 T.L.R. 546, styled "a curiosity in its way," *viz.*, that the plea of justification sets up "that the innuendo is true in substance and in fact" instead of alleging in the usual and proper way, as conveniently set out in Bullen & Leake's Precedents of Pleadings, 8th Ed., 886, and Gatley on Libel and Slander, 2nd Ed., 548-9, 595, that "the words complained of are true in substance and in fact," and the effect of this "experiment," as Lindley, L.J., calls it, *supra,* is that the parties proceeded to try a novel issue created by themselves and as contained in the innuendo, instead of in the words, after reciting the libel, thus: "meaning that the said plaintiff is a woman of highly immoral character"; and after demand the defendants furnished particulars of the facts upon which they relied to support their justification of that innuendo. The result of these pleadings and particulars was that the issue to be tried became—Did the defendants publish of the plaintiff that she was "a woman of highly immoral character"? and to that sole issue both parties pinned themselves down—Gatley on Libel and slander, 2nd Ed., 525; *Williams* v. *Stott* (1833), 1 Cr. & M. 675 at p. 687; *Ruel* v. *Tatnell* (1880), 43 L.T. 507; *Yorkshire Provident Life Assurance Company* v. *Gilbert & Rivington* (1895), 2 Q.B. 148; and *Arnold & Butler* v. *Bottomley* (1908), 2 K.B. 151; and evidence was given by both parties thereupon with the result that the learned judge, after saying that he did not believe the defendant Polly Howarth, gave judgment as aforesaid in favour of the plaintiff.

I have not failed to note that at the trial, just before going into evidence, the defendant's counsel informed the Court that his said plea of justification, as it was in substance, though inartistically framed, was merely "intended as mitigation of damages . . . if your Lordship finds there has been actual publication of the letter," but clearly a plea of justification cannot be transformed into or reduced to mere mitigation with-

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out amendment or consent—*vide Jones* v. *Stevens* (1822), 11 Price 235, 275; *Hobbs* v. *Tinling* (1929), 2 K.B. 1, 17, 43, 50; *MacGrath* v. *Black* (1926), 95 L.J., K.B. 951, 954; *Watt* v. *Watt* (1905), A.C. 115, 118; Bullen & Leake's Precedents of Pleadings, 8th Ed., 893; Gatley on Libel and Slander, 2nd Ed., 746 *et seq.*

Under such exceptional circumstances, however the whole matter might otherwise be regarded, it is clear that all parties are bound by the course of the trial and cannot now be heard to say that a mistake was made in not trying the real issue instead of the fictitious one they deliberately created by departing from long-established rules of pleading, and precedents, with the resulting confusion and expense that such departures almost inevitably create—*vide Jones* v. *Stevens, supra,* 235, 277-8, 283; *Scott* v. *Fernie* (1904), 11 B.C. 91; *Oxley* v. *Wilks* (1898), 67 L.J., Q.B. 678, 680-1; *Victoria Corporation* v. *Patterson* (1899), A.C. 615, 619; *Hewson* v. *Cleeve* (1904), 2 I.R. 536; *Hall* v. *Geiger* (1930), 42 B.C. 335; (1930), 2 W.W.R. 790; and *Sutherland* v. *Stopes, supra,* wherein the importance in libel actions of having regard to the conduct of the action was stressed Lord Shaw saying, p. 75 in relation to the modern "rolled up" plea, so called, of limited justification (pp. 62, 74-77) that "it becomes imperative and crucial to consider the course of the trial," and to the same effect also on p. 78, and the same consideration applies, *a fortiori,* to the case of complete justification raised by this plea, though wrongly herein directed to the innuendo instead of to the words the truth of which must be substantiated—pp. 50, 55, 62, 79. Lord Wrenbury at p. 87 said:

"The pleadings ought to be in such form as to raise all those questions or all such of them as the parties desire to put in issue."

That is exactly what was done here, and after judgment has been pronounced upon the issues thus raised as "desired" it would be improper, as Lord Shaw says at p. 84, to disturb a verdict thereupon unless "there has been a gross miscarriage of justice," of which there is no suggestion here, and Lord Carson said, p. 98:

"My Lords, I do not think that this House or any appellate tribunal can be too careful in ascertaining by an examination of the proceedings what was the course of the trial, what was the real issue fought out by the

assent of the parties on both sides? More especially is that necessary in a case where a defendant has frankly and fully taken upon himself the onus of all that is involved in such a plea as that of justification in a libel action, and any appellate tribunal ought to be slow in ordering a new trial under such circumstances unless there has been some substantial misdirection or other flaw in the conduct of the trial which you can at least say may reasonably have caused a miscarriage of justice."

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PATCHING v. HOWARTH

As to the manner and extent of justification Lord Shaw said, p. 81:

"I venture to think that the case of *Clarke* v. *Taylor* [(1836)], 2 Bing. N.C. 666, 668, is of the very highest authority for shewing that in libel cases a view meticulously taken, as I have mentioned, of the words of a libel is not sought for, but the opinion of the jury is accepted as conclusive and final on justification if it applies truly to the substantial matter, criminal, nefarious, or contemptible, which the libel as a whole did affirm."

And see cases cited in Gatley on Libel and Slander, 2nd Ed., 178, 182, 731. Applying the foregoing authorities to this case as a whole there is in my opinion no good ground for disturbing the verdict, and also that the learned judge rightly refused, under the circumstances, to grant an amendment, applied for belatedly after judgment was reserved, because if it "had been made at the proper time the trial would doubtless have taken a different course." I shall conclude by citing the apt opening remarks of Lord Justice Scrutton in *MacGrath* v. *Black, supra,* at p. 953, *viz.*:

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"This case should be taken as a warning against imaginative innuendos in actions for libel where no innuendo is required."

It follows that the appeal should be dismissed.

GALLIHER, J.A.: I have had the advantage of reading the very illuminating judgment of my brother MARTIN with whom I am in entire accord and desire to add nothing thereto.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellants: *J. L. Lawrence.*
Solicitor for respondent: *J. E. Jeremy.*

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1930

June 4.

HALL v. GEIGER.

Malicious prosecution—Want of reasonable and probable cause—Evidence of—Onus of proof—Malice.

HALL v. GEIGER

In an action for malicious prosecution the law in this Province does not, at most, go further than to allow the action of the committing magistrate to be considered as one element in the decision by the trial judge on the question of the existence of reasonable and probable cause.

APPEAL by plaintiff from the decision of MACDONALD, J. of the 13th of December, 1929, in an action for damages for malicious prosecution. The defendant Geiger is the manager of Vitomen Cereals Limited. The plaintiff had been employed as secretary of said company and during his employment he had been engaged in Calgary in selling stock. He had certain books with him in which he kept a record as to the various transactions of sales of stock by himself or through salesmen employed by him. He resigned from the company and these books being in the company's offices at the time, he went there, and in the presence of a girl attendant, took them away telling her the books were his. Geiger then laid a charge against Hall for stealing the books. He was committed for trial by the magistrate and let out on bail pending the trial. On the trial before RUGGLES, Co. J. the accused was discharged. The action for malicious prosecution was dismissed.

Statement

The appeal was argued at Vancouver on the 8th and 9th of April, 1930, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Edith L. Paterson, for appellant: The letters shew that Geiger knew Hall had a colour of right to the books. He must have an honest belief in the guilt of the accused: see *Hicks* v. *Faulkner* (1878), 8 Q.B.D. 167 at p. 171. The plaintiff only requires slight evidence of absence of reasonable and probable cause: see *Cotton* v. *James* (1830), 1 B. & Ad. 128 at p. 135; *Taylor* v. *Willans* (1831), 2 B. & Ad. 845 at p. 857. Then the onus shifts: see *Abrath* v. *North Eastern Railway Co.* (1883) 11 Q.B.D. 440 at pp. 452 and 456. As to the effect of committal

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by the magistrate see *Wilds* v. *The Bank of Toronto* (1913), 43 Que. S.C. 330; *Johnson* v. *Emerson* (1871), L.R. 6 Ex. 329 at p. 341; *Quartz Hill Gold Mining Company* v. *Eyre* (1883), 11 Q.B.D. 674 at pp. 683-4; 1 Sm. L.C., 13th Ed., 291. He must honestly believe in the truth of the charge, if not it is proof of want of reasonable and probable cause: see *Broad* v. *Ham* (1839), 5 Bing. (N.C.) 722 at pp. 724-7; *Bradshaw* v. *Waterlow & Sons, Lim.* (1915), 85 L.J., K.B. 318 at p. 322. On the question of delay see *Williams* v. *Banks* (1859), 1 F. & F. 557; *Shrosbery* v. *Osmaston* (1877), 37 L.T. 792 at p. 793; *Cox* v. *English, Scottish, and Australian Bank* (1905), A.C. 168 at p. 175. If he has satisfied the onus that there was want of reasonable and probable cause then malice may be inferred: see *Manning* v. *Nickerson* (1927), 38 B.C. 535 at p. 543; *Brown* v. *Hawkes* (1891), 61 L.J., Q.B. 151 at p. 153.

Coulter, for respondent: The only evidence is some letters from plaintiff's solicitors and answers thereto. We rely on the judgment of the trial judge. His finding that there was reasonable and probable cause cannot be questioned: see *Coxe* v. *Wirrall* (1607), Cro. Jac. 193; 79 E.R. 169; *Richard* v. *Goulet* (1914), 23 Can. C.C. 327 at p. 332; *Smith* v. *Macdonald* (1799), 3 Esp. 7; *Willans* v. *Taylor* (1829), 3 M. & P. 350. As to a reasonable state of mind see *Johnstone* v. *Sutton, in Error* (1786), 1 Term Rep. 510 at p. 545; *Brown* v. *Hawkes* (1891), 2 Q.B. 718 at p. 723; *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247 at p. 252; *Rex* v. *Bell* (1929), 42 B.C. 136; *Cox* v. *English, Scottish, and Australian Bank* (1905), 74 L.J., P.C. 62 at p. 63. On the question of a new trial see *Mitchell* v. *Jenkins* (1833), 5 B. & Ad. 588.

Argument

Paterson, in reply: The letters merely give the defendant notice: see *Perry* v. *Woodward's Ltd.* (1929), 41 B.C. 404.

Cur. adv. vult.

4th June, 1930.

MARTIN, J.A.: It is, first, submitted that the finding of the learned judge below that the defendant had reasonable and probable cause for laying a charge of theft against the plaintiff

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(upon which he was later acquitted after being committed for trial after preliminary hearing) is contrary to the judicial inference that should in this Province be drawn from the facts before him, and, in particular, that he erroneously allowed himself, as his oral reasons shew, to be misguided by the decision of the Court of Review of Quebec at Montreal, in *Wilds* v. *Bank of Toronto* (1913), 43 Que. S.C. 331, wherein the Court said *per* Archibald, J. at p. 333:

> "I am of opinion that the fact of the commitment for trial of the plaintiff in a criminal prosecution was *prima facie* proof of reasonable and probable cause for such prosecution."

Now while that may be the law in Quebec, it is not the law in this Province which does not, at most, go further than to allow the action of the committing magistrate to be considered as one element in the decision by the trial judge of the question of the existence of reasonable and probable cause on all the facts of the particular case before him.

MARTIN, J.A.

But even though the learned judge below may have been unduly influenced to an unknown extent, by the said Quebec decision nevertheless there are some expressions in his said oral decisions which, though uncertain and inexact, yet go to shew that he really only intended to cite said decision as "lending support" to his finding, and not surrender to it, and it is our duty to review all the circumstances that were before him to see if his conclusion may be supported, and after having done so there is, in my opinion, sufficient at large to support that finding, which would only reluctantly be disturbed. It follows that the appeal should be dismissed on this ground alone without having to consider the remaining ones.

GALLIHER, J.A.

GALLIHER, J.A.: Early in the argument I formed the opinion that the appellant could not succeed and after due consideration I think the learned judge below came to the right conclusion.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The learned trial judge, Mr. Justice W. A. MACDONALD, in my opinion, arrived at a proper conclusion in this case. The question of whether there was evidence of reasonable and probable cause was a question for the learned trial judge alone. Upon the facts the learned trial judge was

amply justified in finding as he did, *i.e.*, that there was evidence of reasonable and probable cause—his reasons for judgment very ably demonstrate this. I do not find it necessary to say more.

In my opinion the appeal should be dismissed.

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

Appeal dismissed.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitor for respondent: *H. S. Coulter.*

GRIFFITHS v. FORDYCE MOTORS LIMITED.

Sale of goods—Conditional sale agreement—Illegal seizure by vendor—Damages—Measure of—R.S.B.C. 1924, Cap. 44, Sec. 10.

The plaintiff purchased a motor-car from the defendant Company under a conditional sale agreement, one of the terms being that he was not to take the car out of the Province. About seven months later, wishing to go to Aurora in the Province of Ontario, he obtained leave from the vendor to take the car to Ontario and then proceeded on his trip. All payments on the car had been made but on arrival at Aurora his car was seized by a bailiff and sent back to Vancouver where, after being reconditioned, it was sold by the defendant. At the time of seizure the plaintiff had paid $685 on the purchase price. In an action for damages for illegal seizure and conversion of the car the plaintiff recovered $1,000.

Held, on appeal, affirming the decision of RUGGLES, Co. J. (MACDONALD, C.J.B.C. would reduce the exemplary damages), that there was sufficient evidence to support the award in the unusual circumstances of the case.

APPEAL by defendant from the decision of RUGGLES, Co. J. of the 27th of January, 1930, in an action for damages for illegal seizure and conversion of the plaintiff's car. The plaintiff purchased a car from the defendant under a conditional sale agreement. After using the car for some months during

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which time the payments were regularly made under said agreement, the plaintiff contemplated taking a trip to Aurora, Ontario. The contract provided that the car could not be taken out of the Province, but he obtained leave to do so from the defendant. On his arrival in Aurora, Ontario, the car was seized by a bailiff and shipped back to the defendant in Vancouver, where it was sold for $1,000. The plaintiff recovered judgment for $1,000.

Statement

The appeal was argued at Vancouver on the 28th and 31st of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Reid, K.C., for appellant: We concede the car was improperly seized but the damages are excessive. He gave vindictive damages in an action for breach of contract. We were allowing the plaintiff to use the car until paid for so it is not conversion. There are no circumstances here for allowing vindictive damages. The purchase price was $1,295, and the plaintiff paid $685. He had the use of the car for several months and a trip to Ontario: see *Lambert* v. *Slack* (1926), 1 W.W.R. 614 and (1926), 2 W.W.R. 882; *Harman* v. *Gray-Campbell Ltd.* (1925), 19 Sask. L.R. 526. The damages should be reduced to $390: see Pollock on Torts, 13th Ed., 583; *Guildford* v. *Anglo-French Steamship Company* (1883), 9 S.C.R. 303; *C.C. Motor Sales Ltd.* v. *Chan* (1926), S.C.R. 485; *Campbell* v. *Northern Crown Bank* (1914), 7 W.W.R. 321; *Chinery* v. *Viall* (1860), 5 H. & N. 288; *Bennett* v. *Kent Piano Co.* (1921), 29 B.C. 465.

J. A. MacInnes, for respondent: This is an action for trespass to goods, detention and conversion, and we are entitled to exemplary damages: see Underhill on Torts, 10th Ed., 281. These three elements are present: see Salmond on Torts, 7th Ed., pp. 229-30. Because this is a breach of contract it does not prevent its being a tortious act: see *Bridgman* v. *Robinson* (1904), 7 O.L.R. 591; Halsbury's Laws of England, Vol. 10, p. 306, sec. 566, and p. 325, sec. 598. When you have trespass, exemplary damages may be awarded: see *Bracegirdle* v. *Orford* (1813), 2 M. & S. 77; *Hodgkinson* v. *Martyn* (1928), 40 B.C. 434; *Merest* v. *Harvey* (1814), 5 Taunt. 442; *Clough* v. *The*

London and North Western Railway (1871), 41 L.J., Ex. 17. *Reid,* replied.

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MACDONALD, C.J.B.C.: The plaintiff purchased a motor-car from the defendant on the instalment plan and after using it for some months desired to drive from this Province to Aurora, Ontario. As he was not permitted under his contract to take the car out of the Province he applied to the defendant for leave to do so and that leave was granted. When he got to Aurora he found a bailiff waiting for him who seized his car and eventually reshipped it to the appellant in Vancouver who, reconditioning it, then sold it for $1,000. He then sued for damages and judgment was given in the County Court of Vancouver against the defendant for $1,000. I think the damages are excessive. Plaintiff had paid upon the car $685 and at the time of the seizure nothing was owing and payable. The result is that he got his $685 back and $315 additional. He also had the use of the car for several months including the time of the long journey to Aurora. The defendant admits the wrongful seizure and claims to have forgotten that permission had been given. They were, however, wrongdoers, but the evidence shews that while they were wrongdoers they did not act harshly towards the plaintiff at Aurora. He asked to be allowed to go to Toronto and the bailiff went with him giving him the use of the car, but no compromise was accomplished at the head office of the Company who manufactured the car at Toronto. The car cost $1,418. No special damages were proven except the loss of the car. The general damages suffered were the disgrace of taking the car from him at Aurora, injured pride and wounded feelings, and while no doubt the jury were entitled to give exemplary damages I think they are higher than the circumstances warrant. I think, therefore, that the damages ought to be reduced to the sum of $685 and $100 for general damages making in all $785. To that extent the appeal should be allowed. The plaintiff had in addition the use of the car for many months.

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MARTIN, J.A.: Though I have come to the conclusion that the damages awarded in this action for trespass may be upheld, yet it has not been without hesitation because of the submission that certain expressions used by the learned judge below in his reasons shew that he founded his award largely upon a feeling of indignation rather than upon legal principle. But while there is ground to support that submission yet after eliminating or making allowance for elements of emotion enough evidence remains to support the award in the unusual circumstances of the trespass and so the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: Mr. *R. L. Reid,* counsel for the appellant quite frankly stated to the Court that he could not justify the acts of the appellant and would direct his argument to the question of damages. The circumstances of this case are somewhat different to the ordinary case. The plaintiff was not behind in his payments and left for Ontario with his car with the knowledge and consent of the appellant to be met on arrival there at the home of his friends where he went on a visit with a Pinkerton detective who at the instance of the appellant had been tracing his movements since leaving British Columbia. The detective seized the car when the plaintiff's brother-in-law offered to pay the balance due on it, but refused to pay bailiff or detective costs—some $85. This was not accepted and the parties went to the head office of the car Company at Toronto to endeavour to adjust matters. They were not successful and were allowed to take the car back to Aurora where it was seized and taken away from them. In such a case I think the learned judge was justified in awarding damages outside of what might ordinarily be awarded; for the ignominy and trouble cast upon the plaintiff and I do not feel disposed to reduce the amount.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The respondent bought a motor-car, a Chrysler sedan, from the appellant. The respondent is a cripple unable to walk—caused by wounds received in the Great War. His business is that of a salesman and to carry on his business a motor-car was a necessity—his wife driving him about. Being desirous of visiting some relatives in Aurora, Ontario, and

knowing that according to the terms of the conditional sale agreement under which the motor-car was bought did not admit of the motor-car being taken out of the Province the respondent took up the question with one Brandes a salesman of the appellant, as to whether he could have leave to drive the motor-car into the Province of Ontario. Eventually Fordyce the managing director of the appellant granted leave to the respondent to take the car out of the Province into the Province of Ontario all payments under the conditional sale agreement up to that time having been made. Further, the respondent made arrangements with a friend of his in Vancouver to make all payments when they fell due during his absence and these payments were duly made. Notwithstanding this upon the respondent's arrival at Aurora, Ontario, and when he had got to the house of the relatives he was about to visit, who should come upon the scene but a bailiff with a warrant of authority from the appellant to seize the motor-car because of its being taken from out the Province of British Columbia, contrary to the provisions of the conditional sale agreement. The fact was that the bailiff who made the seizure was a detective well known in the community as such. When one considers the humiliation of these proceedings to the respondent and his wife I do not wonder that His Honor Judge RUGGLES in the Court below was aroused and was animated by righteous indignation and in my opinion the learned judge was quite right in charging the jury that it was a case for exemplary and punitive damages and the jury were right in assessing the damages at $1,000 for the wrongful seizure of the motor-car. Unquestionably there was trespass to the car and in the result the respondent was left without a car far from home. Another fact that calls for passing reference was this: Application was made to the Chrysler agency in Toronto and with every opportunity to communicate with the Vancouver agency and being requested to do so by the respondent the seizure was maintained and the respondent was deprived of the car. Notwithstanding even that a relative of the respondent—a man of substance—was willing to pay all that remained due upon the purchase of the car, a more callous and disgraceful course of conduct upon the part of the appellant cannot be conceived of, it was conduct that called for the imposition of exem-

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plary and punitive damages. The purchase price of the car was $1,295 and the respondent had some months before the seizure made payments to the extent of $685 and the instalment falling due when the car was in Ontario was paid at the due date. Nevertheless the seizure was made. In the dire situation in which the respondent found himself—the car being taken from him—he was obliged to buy another car in Ontario. There was apparent malice in the taking of the car and injured feelings could be taken into consideration as well as the trespass (*Berry* v. *Da Costa* (1866), L.R. 1 C.P. 331, Willes, J. at p. 333; *Clark* v. *Newsam* (1847), 1 Ex. 131; *Davis* v. *Bromley Urban District Council* (1903), 67 J.P. 275; *Chandler* v. *Doulton* (1865), 3 H. & C. 553; *Finlay* v. *Chirney* (1888), 20 Q.B.D. 494, Bowen, L.J. at p. 504; *Bell* v. *Midland Railway Co.* (1861), 10 C.B. (N.S.) 287 at p. 307; *McArthur & Co.* v. *Cornwall* (1892), A.C. 75 at p. 88).

The case was one of highhanded conduct—reprehensible and illegal action. The damages allowed by the jury were in amount quite justifiable.

MCPHILLIPS, J.A.

This case has features that Pollock on Torts, 13th Ed., deals with under the heading of exemplary damages at p. 193:

> "One step more, and we come to cases where there is great injury without the possibility of measuring compensation by any numerical rule, and juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss."

The learned counsel for the appellant, Mr. *Reid,* very ably presented the case for the appellant, but pressed strongly and—as I expressed during the argument—in my opinion, erroneously, that the case was only one of breach of contract not trespass. That contention in my opinion is not sustainable. A trespass, highhanded in the extreme, took place here, and it is to be remarked that the learned counsel in no way justified what was done but as I have said submitted that it was nothing more than a breach of contract and that damages if assessable at all could only be assessed upon that basis.

I would unhesitatingly dismiss the appeal.

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

Solicitors for appellant: *Grossman, Holland & Co.*
Solicitors for respondent: *MacInnes & Arnold.*

REX v. CHUNG CHUCK.

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REX v. CHUNG CHUCK

Produce Marketing Act—Conviction of unlawful marketing—"Shipping," meaning of—Evidence—Jurisdiction—Appeal—B.C. Stats. 1929, Cap. 51, Sec. 23.

The defendant who lived in Ladner in the County of Westminster where he grew potatoes was found with his car loaded with 30 sacks of potatoes in front of a Chinese store on Main Street, Vancouver. He then took the car to a Chinaman's warehouse in Vancouver where he stored the potatoes. He was convicted by the stipendiary magistrate for the County of Westminster of unlawfully marketing potatoes without the permission of the Mainland Potato Committee of Direction. On appeal by way of case stated the conviction was quashed on the ground that there was no evidence of "marketing" in the County of Westminster within the meaning of the Produce Marketing Act and the matters in question did not arise within the limits of the magistrate's jurisdiction.

Held, on appeal, reversing the decision of GREGORY, J., that the accused did market the potatoes as he took them to Vancouver for delivery in his car and under section 23 of the Produce Marketing Act Amendment Act, 1929, the onus was upon the accused to shew that he was not marketing within the meaning of the Act.

Held, further, that the shipping or marketing took place on accused's own farm in the County of Westminster and the magistrate had jurisdiction.

APPEAL by plaintiff from the order of GREGORY, J. of the 31st of October, 1929 (see 42 B.C. 116) allowing the defendant's appeal by way of case stated from his conviction by H. O. Alexander, stipendiary magistrate for the County of Westminster on a charge of unlawfully marketing potatoes without permission of the Mainland Potato Committee of Direction, the potatoes having been grown within the jurisdiction of said Committee. He was fined $300. The case stated contained the following:

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"Chung Chuck was convicted before me for that he 'the said Chung Chuck, of Delta Municipality, on the 18th 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

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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 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 statute 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.'

"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 [in part] 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."

Statement

" '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 around, 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 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.

"'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 sacks.

"'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.'

Statement

"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?"

The appeal was argued at Vancouver on the 15th and 16th of April, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for appellant: It was held in the Court below that there was no "marketing" within the Act and that what took place was not within the County of Westminster and there was no jurisdiction. The defendant lives at Ladner and grows potatoes. He applied for a licence and described himself as of Ladner. He was found in his truck in

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front of a Chinaman's store in Vancouver with 30 sacks of potatoes and he afterwards stored them in a Chinaman's warehouse in Vancouver. In these circumstances under sections 2 and 20 (*b*) of the Produce Marketing Act the onus is on him to shew he was not "marketing."

Argument

Wood, K.C., for respondent: When a man is bringing his produce to market he is not shipping. There is no evidence of making a sale except after he arrived in Vancouver and if the offence is in Vancouver the magistrate had no jurisdiction. On the question of shipping and shipping for sale see *Witham* v. *Vane* (1881), W.N. 79; Words and Phrases Judicially Defined, Vol. 7, p. 6487; *The Ribble Navigation Company* v. *Hargreaves* (1856), 25 L.J., C.P. 97 at p. 100; *Wancke* v. *Wingren* (1889), 58 L.J., Q.B. 519; *Rex* v. *Lynch* (1927), 38 B.C. 124; *Rex* v. *Holmes* (1907), 12 Can. C.C. 235.

Robertson, in reply: He shipped the potatoes when he put them on his truck at Ladner: see *Ex parte McIntyre* (1909), 16 Can. C.C. 38.

Cur. adv. vult.

4th June, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think the accused did market the potatoes in question since he had taken them to Vancouver for delivery on a car. The onus of proof *re* marketing is by section 23, (20B) of the amendment to the Produce Marketing Act, B.C. Stats. 1929, placed upon the appellant. By section 2 of the Act marketing includes shipping and shipper means a person who markets the produce. The accused falls within the above definitions. The onus is upon him to prove that he is not a shipper or did not market his produce. Under the circumstances he was told by the commissioner to store the potatoes awaiting the car on which he was to place them. He had contrary to the Act and regulations no written permit to market them, but claims this verbal permit. That is not sufficient under the Act. It must be a written one. The next question is where did the shipping or marketing occur? I think the proper inference is that it took place on his own farm in the County of Westminster in which case the magistrate had jurisdiction to

try it. The judgment of GREGORY, J. should therefore be set aside and the conviction of the magistrate affirmed.

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

GALLIHER, J.A.: I would allow the appeal and restore the conviction.

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

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

MACDONALD, J.A.

Appeal allowed.

Solicitor for appellant: *T. G. Norris.*
Solicitors for respondent: *Wood, Hogg & Bird.*

THE KING *EX REL.* WHITTAKER v. SHANNON.

MACDONALD, J.

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THE KING v. SHANNON

Information—Quo warranto proceedings—Trial—Onus—Crown Office rule 134.

On the hearing of an information in the nature of *quo warranto* proceedings to oust the respondent from his office as one of the committee of adjustment under the Dairy Products Sales Adjustment Act, the onus is on the respondent to prove that he is entitled to hold the office so attacked.

INFORMATION in the nature of *quo warranto* proceedings to oust Samuel H. Shannon from office as one of the committee of adjustment appointed under the Dairy Products Sales Adjustment Act. Heard by MACDONALD, J. at Vancouver on the 6th of June, 1930.

Statement

Hamilton Read, for the relator.
Maitland, K.C., for respondent.

MACDONALD, J.: Read what appears, Mr. *Maitland* [refer-

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ring to citation from Short & Mellor's Crown Office Practice, 2nd Ed.].

Maitland: That the onus is on me, my Lord?

THE COURT: That the defendant has to prove himself, as it were, not guilty.

[Discussion]

THE COURT: Proceed, Mr. *Maitland*. So that it will be of record. In further regard to my remarks, I have looked at the case of *Rex* v. *Mayor of Penryn* (1724), 1 Str. 582. It does not seem so pertinent as the case, to which I have referred somewhat at length—*Rex* v. *Leigh* (1768), 4 Burr. 2143. I also find referred to in Short & Mellor's notes, under the rule, similar to our rule 134, other cases: *Rex* v. *Birch* (1792), 4 Term Rep. 608, and *Reg.* v. *Blagden* (1714), 10 Mod. 211, 296; also *Rex* v. *Downes* (1786), 1 Term Rep. 453.

Argument

MACDONALD, J.: James Whittaker seeks by *quo warranto* proceedings to oust from his office Samuel H. Shannon. The office, thus sought to be vacated, is that of one of the committee of what is termed by the Dairy Products Sales Adjustment Act, B.C. Stats. 1929, Cap. 20, as a committee of adjustment. The trend of this trial, and I term it such, because the Crown Office rule (Civil) 134, provides that when any information in the nature of *quo warranto* has been filed, the defendant may plead to such information within such time and in like manner, as if the information were a statement of claim delivered in an action. Subject to the rules, the pleadings and all subsequent proceedings, including pleadings, trial, judgment and execution, shall proceed and may be had and taken as if in an action, and where the judgment is for the relator, judgment of ouster may be entered for him in all cases. Then, referring to rule 55, I find that every objection, intended to be made to the title of a defendant, on an information in the nature of a *quo warranto* shall be specified in the order to shew cause or notice of motion, and no objection not so specified shall be raised by the relator, on the pleadings, without the special leave of the Court or a judge.

Judgment

According to that rule, presumably, an order was obtained on the 15th of May, 1930, although it has not yet been issued, as a matter of fact, on behalf of the said Whittaker as relator, and

counsel appeared for said Shannon. This order provides, that an information in the nature of *quo warranto* be exhibited against the said Shannon, to shew by what authority he claimed to exercise the office of a member of the Dairy Products Sales Adjustment Committee. Then it advanced the objections which were intended to be made by the relator to the title of Shannon to said office. It will suffice if I refer to the fact that the first one of these objections states, that a meeting was held for the purpose of appointing a committee of adjustment for the district of T. B. Free area, of the Lower Fraser Valley. And then in paragraph 2 it was alleged that at such meeting dairy farmers other than members of a co-operative association purported to appoint the said Shannon as a member of the said committee. Supplementing these allegations by way of objection, paragraph 3 says that the dairy farmers, who at all times material were members of a co-operative association, participated in the appointment of the said Shannon. In other words, that unqualified voters took part in the election of Shannon.

It is contended, however, that the information having issued, the burden rests upon Shannon to shew an absolute right to hold his office, and that all essentials which would entitle him to be one of the said Adjustment Committee would apply and should be proved by him. Amongst other matters, it is contended that no meeting was held, that could have appointed him to that position, because there was no order in council passed, approving of the method to be adopted with respect to such appointment or election. There has not been produced upon this trial any order in council of that nature, and it has been contended that this provision only refers to the Lieutenant-Governor in Council being required to approve, after some method has been adopted.

Judgment

In the view that I take of this matter, it is not necessary for me to say anything further as to the order in council. I think that the stage of objection, on this point, is past. I think that the manner of the election cannot now be considered. It would be contrary to the trend of the trial and the pleadings.

There is no doubt that Whittaker and his associates were dissatisfied with the selection or appointment of Shannon, whether at the time or subsequently is not material. They then sought

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to have him unseated, and his position vacated upon the one ground alone to which I have referred, namely, that parties were present at the meeting, and voted, who were not duly-qualified voters. Without referring in detail to the authorities dealing with that question, I consider that the election, as held, was carried out in the best of good faith by all those present. It was a public meeting called for the attendance of all those who might be interested, and there was no objection raised as to the manner in which it had been summoned, nor as to the procedure which was then being adopted at the meeting. The chairman, who gave evidence today, were not aware, until his selection, that he was to receive the honour of being chairman. Mr. Young, who was then appointed secretary, and who was somewhat critical or dissatisfied with the legislation passed in this matter, gave his evidence very candidly, and I am satisfied that the procedure was fair to all concerned. After the nominees had been mentioned by the meeting, a ballot was taken, and resulted in the said Shannon receiving the majority of the votes cast. This was strengthened by the two candidates who had opposed him, one moving and the other seconding a resolution that his election be unanimous. This motion was carried.

Judgment

Although this legislation deals with one particular class of persons, or with one particular industry, still, the remarks of Lord Blackburn in *Reg.* v. *Ward* (1873), L.R. 8 Q.B. 210 at p. 213, as to *quo warranto,* are to some extent appropriate, *viz.*:

"The very object of requiring that the information should not be filed without express order by the Court of Queen's Bench made in open Court, was that the Court might in its discretion refuse to file an information where it would be vexatious so to do."

In that case the Court found that while the member of the board of health might be ineligible, still, that his election arose through a mistake and he would have been chosen "had the election proceeded on strictly regular lines," and refused to disturb the peace of the district by filing an information.

I think that both these positions are tenable here. I cannot see that the election of Mr. Shannon to his position is productive of any harm, and I think it would be unwise to disturb an attempt made by such a large number of dairy farmers to utilize, if possible, this legislation and elect him to office for a term.

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The applicant has failed in his attempt to prove the election was not by voters duly qualified. On the contrary, I hold that Shannon has proved that they were all duly qualified and that none of them was a member of a co-operative association.

I view also another aspect of this case, and that is, might this result not have been obtained, when the motion for the information was made and considered by counsel then engaged on behalf of Mr. Shannon? So that, while I dismiss the information, I think that I should consider the question of *quantum* of costs.

Information dismissed.

GENERAL CASUALTY INSURANCE COMPANY OF PARIS v. LAMBERT AND VANCE.

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GENERAL CASUALTY INSURANCE CO. OF PARIS v. LAMBERT

Insurance, automobile—Collision—Driver intoxicated—Statutory condition—False statement by insured—Insurance and costs of action paid—Discovery of falsity of statement after payment—Action to recover back payments—Liability of co-defendant for deceit.

The plaintiff insured L. against loss with respect to his automobile, one of the statutory conditions of the policy being that the Company would not be liable under the policy while the automobile with the knowledge, consent or connivance of the insured is being driven by an intoxicated person. L., while driving his automobile, collided with an automobile driven by one W. Three of W.'s passengers sued L. for damages and the Company undertook the defence. L. filed proof of loss claiming $500 for damages to his car in which he stated that nothing had been done by or with his privity or consent to violate the conditions of the policy or render it void and his statement was corroborated by the defendant V. who was a passenger in his car at the time of the accident. The plaintiff then paid L. the $500 so claimed and paid its solicitors $772.50 in respect of the defence of the above-mentioned action. The defendant V. then brought action against W. for damages and later added L. as a party defendant. The plaintiff Company undertook the defence of the action for L., and upon an examination for discovery learned for the first time that L. was intoxicated at the time of the collision. The Company immediately withdrew from L.'s defence and commenced this action alleging that it was induced to make the said payments of $500 and $772.50 respectively upon the false repre-

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sentation of the defendant L. and that the defendant V. actively assisted in such false representation.

Held, that on the evidence the insured was intoxicated at the time of the accident, and he thereby deprived himself of the benefit of the policy, the insurer not being under the burden of proving that the accident was due to intoxication.

Held, further, that the defendant V. who was L.'s passenger, knew that if the facts were disclosed the insured could not recover and she had in view the making of a claim for damages on her own behalf. She was under an obligation to the insurer not to misrepresent the facts and having done so was jointly liable with the insured for the amount paid him.

ACTION to recover $500 and $772.50 respectively, upon the false representations of the defendant Lambert. The plaintiff had insured Lambert against loss in respect to his automobile. Lambert shortly after, while driving his car collided with an automobile driven by one Wright. Three of Wright's passengers sued Lambert for damages and the plaintiff Company defended the action. In respect of this action the plaintiff paid its solicitors $772.50 and in respect to the damage to Lambert's car it paid $500. One Vance, a passenger in Lambert's car, then brought action against Wright for damages and Lambert was added as a party defendant. The Company undertook the defence of the action on behalf of Lambert and then for the first time it was discovered that Lambert was intoxicated at the time of the collision. The policy contained a condition that the Company would not be liable under the policy while the automobile with the knowledge, consent or connivance of the insured is being driven by an intoxicated person. The Company then withdrew from the defence of the action and brought this action to recover the sums paid as stated above. The further relevant facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 10th of April, 1930.

Statement

Bray, for plaintiff.
Sloan, for defendant Vance.
Macaulay, for defendant Lambert.

11th June, 1930.

MACDONALD, J.

MACDONALD, J.: On the 16th of July, 1928, plaintiff, by its policy of insurance, insured the defendant Lambert against loss

with respect to an automobile. Plaintiff agreed by the policy to indemnify such defendant against all loss or damage, which he should become legally liable to pay, for bodily injury caused to any person through the ownership, maintenance, or use of the automobile. It also agreed to defend in the name of the said Lambert and on his behalf, but at its own cost, any civil action which might at any time be brought against the said defendant Lambert, on account of any injury to any person or persons caused through such ownership, maintenance or use of the said automobile. It further granted indemnity to said defendant against loss or damage to his said motor-car, which might be solely caused by accidental collision with another object.

The policy of insurance was subject to the statutory conditions contained in section 154 of the Insurance Act, being Cap. 20, B.C. Stats. 1925. One of such conditions is as follows:

"5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven . . . . by an intoxicated person."

On the 6th of July, 1929, defendant Lambert, while driving the said automobile, collided with another automobile driven by one J. A. R. Wright and three persons were injured, as well as the automobile damaged. Immediately thereafter, pursuant to a condition of the policy of insurance, defendant Lambert gave notice of the accident and the plaintiff having investigated the matter, concluded that it was liable under the said policy. It had obtained a statement from the defendant Lambert, which placed the blame for the accident on the said Wright. His statement was corroborated by the defendant Vance (who was a passenger in the motor-car of the defendant Lambert at the time of the collision). Defendant Lambert then filed a proof of loss, claiming to be entitled to payment of $500 for damage to his automobile. While the document purports to be a statutory declaration, it was not declared before a commissioner or notary public; but simply witnessed by F. R. Robertson, an appraiser or adjuster appointed by the plaintiff. It contains, however, the statement by the defendant Lambert "that nothing has been done by or with my privity or consent to violate the conditions of the policy, or render it void." Plaintiff then paid the defend-

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ant Lambert the claim for $500, as his compensation for the damage to his automobile. Then on the 28th of August, 1929, Sarah N. Rhys, one of the passengers in the automobile driven by the said Wright, commenced an action in the Supreme Court against the said defendant Lambert and the said Wright, for damages, in respect of injuries sustained by her in the collision. On the 19th of September, 1929, a similar action was commenced by Gwen Mary Rhys and E. M. Rhys. Plaintiff, in pursuance of the terms of its policy, undertook the defence of these actions, which were subsequently consolidated, and upon the trial said Wright was alone held liable. Plaintiff alleges that, in the defence of the said actions, it paid to its solicitors the sum of $772.50. Then on the 6th of November, 1929, defendant Vance commenced an action against said Wright, for damages for negligence in respect of injuries, alleged to have been sustained by her in the said collision. She subsequently obtained an order adding the defendant Lambert as a defendant in such action. Plaintiff undertook the defence of this action, on behalf of defendant Lambert. It alleges that, for the first time, upon an examination for discovery, on or about the 5th of March, 1930, of the defendant Vance in her said action, it learned that the defendant Lambert was intoxicated at the time of the said collision. It then withdrew from the further defence of the said defendant. Lambert in the pending action and its solicitor or counsel ceased to act for him. On the 12th of March plaintiff commenced this action, alleging that it was induced to make the said payments of $500 and $772.50 respectively upon the false representation of the defendant Lambert, as to his not being intoxicated at the time of the said collision and that the defendant Vance actively assisted in such false representation. It further alleges that the said action brought by the defendant Vance against the defendant Lambert is collusive and fraudulent. It is contended that the aim and object of these two parties is, that upon the failure of defendant Lambert in such action, and the success of the defendant Vance, she might then resort to the said insurance, in order to recover from the plaintiff the amount of the judgment she might obtain against Lambert.

Aside from representations made after the said collision, plaintiff submits that if the defendant Lambert was, as a matter of fact, at the time of the said collision intoxicated then that under the statutory condition referred to, it is not liable under its policy.

The material fact, then to be determined, is whether the said defendant Lambert was intoxicated, when he was driving his automobile at the time of the accident. I think that a finding to that effect deprives a person insured of the benefit afforded by his insurance. It would be putting too great a burden upon the Insurance Company to require that it should prove that the accident was due to intoxication. The condition of intoxication on the part of the driver places the insured outside the scope and benefit of the policy, just as if the automobile were, for example, being driven by a person within the prohibited age. It is a term of the contract of insurance, and an observance of its conditions is essential, in order to create any liability thereunder at the suit of the insured or any one claiming through him.

The burden rests upon the plaintiff of proving to my satisfaction that the defendant Lambert was intoxicated. Neither of the defendants gave evidence at the trial. Plaintiff contends that it has satisfied this burden of proof, through admissions made by the defendant Lambert. If I find, as a fact, that the plaintiff has afforded satisfactory evidence to this effect, then it becomes unnecessary to consider whether defendant Lambert made representations in the matter after collision, as, aside from any question of liability of the defendant Vance, the result would be the same. He would have improperly obtained payment of compensation and put the plaintiff to cost and expense. It could not well be contended that the payments and assumption of liability by the plaintiff were voluntary. They arose through a contract, which it believed, was in full force and effect.

Judgment

In the first place, I do not believe that the plaintiff Company was aware of, or even suspected, any intoxication of the defendant Lambert at the time of the accident, until the examination for discovery of defendant Vance to which I have referred.

Plaintiff, pursuant to its custom, had made enquiries, as to the circumstances attendant upon the accident and amongst

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other matters had enquired from defendant Lambert, as to whether he was intoxicated or under the influence of liquor, at the time of the accident. Francis R. Robertson, the appraiser so appointed by plaintiff, interviewed defendant Lambert and in response to a question, as to whether he had anything to drink or not, at the time, replied in the negative. This, according to admissions made by him later on, was clearly far removed from the truth. He repeated the same statements, as to not drinking, prior to making any demand upon the plaintiff under the policy, by way of compensation or otherwise, and during a time when the plaintiff relied upon his having complied with the conditions of the policy. He, at one of the discussions, as to the accident, emphasized his views as to intoxication when driving an automobile as follows:

"I have not had anything to drink for six months. Gasoline and alcohol do not mix."

At the same time the defendant Vance stated that the defendant Lambert had not had anything to drink at the time of the accident. Plaintiff acted upon this basis in assuming liability. After the examination of defendant Vance for discovery a meeting, by appointment, took place and the statements which had been then made by defendant Vance were discussed with the defendant Lambert, especially as to his condition at the time of the collision. They were outlined at length in the evidence of the said Robertson. I accept his evidence in this connection, without reservation, especially as it has not been contradicted. Defendant Lambert admitted that at the time of the accident he had previous thereto imbibed whisky, rum and beer. He said:

Judgment

"I can handle whisky and I can also handle rum but I can't handle beer. . . . He had whisky first and plenty of it and quite a lot of rum and three bottles of beer; that he was argumentative and quarrelsome."

Whether or no Mrs. Vance smelt liquor off his breath and refused to go down town with him, he had made up his mind that he was going to force her to do so. He admitted that he was what he called "ginned up" and then upon being pressed further as to what that meant, he said he would not call it intoxicated but, according to the evidence of said Robertson he subsequently admitted that he was in an intoxicated condition. Without further discussion of this aspect of the case, unless the

evidence given by witnesses called for the defence destroyed the effect of these admissions, I would accept his admissions that defendant Lambert was intoxicated while driving the automobile. I have not been afforded any judicial definition of "intoxication" in Canada. The definition in the United States, as stated in 33 C.J. at p. 802:

"[It] is a broad and comprehensive term, having a different meaning to different persons. . . . According to some definitions, the word may be applied to any mental exhilaration, however slight, produced by alcohol, without regard to its effect on the judgment or reasoning processes. In the absence of any controlling definition, the word should be given a reasonable interpretation, having reference to the purpose of the instrument in which it is used."

In support of this proposition, the case of *People* v. *Weaver,* 188 N.Y. App. Div. 395; 177 N.Y. Suppl. 71 at p. 74 is cited. Then a portion of the judgment in *Elkin* v. *Buschner* (Pa.) (1888), 16 Atl. 102 at p. 104 is pertinent, as follows:

"Whenever a man is under the influence of liquor so as not to be entirely at himself, he is intoxicated; although he can walk straight, although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk, yet if he is under the influence of liquor so as not to be at himself, so as to be excited from it, and not to possess that clearness of intellect and that control of himself that he otherwise would have, he is intoxicated."

Then the evidence of Dr. Panton, with his wide experience in this city as police surgeon, as to the effect and result of a certain quantity of alcohol proves of assistance. He quoted from an article by Dr. Emil Bogen, published in the Journal of the American Medical Association, 1927:

"That a person may be under the influence of alcohol to an extent that seriously affects his powers of observation and behaviour, especially in such a responsible position as driving an automobile, without presenting the entire common picture of drunkenness."

Notwithstanding statements made by the said defendant Lambert upon his examination for discovery, previous to the admissions to which I have referred, I accept such admissions as containing a true statement of his condition at the time of the collision when he was driving the automobile. Giving such admissions reasonable construction, coupled with the surrounding circumstances, I find that he was intoxicated. He did not give evidence to the contrary at the trial. I have not overlooked the positive statement of E. B. Brydges who gave evidence that

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the said Lambert was perfectly sober upon the day of the accident, though his employee, Charles E. Curley, qualified his estimate of Lambert's condition by stating "that he looked able to take care of himself." Both these witnesses may have been truthful in giving their evidence, but mistaken. As to Lambert's true condition they may have been only casual observers and he "may not have given any outward and visible signs" that he was drunk. The result is, that the defendant Lambert having broken one of the conditions, upon which he obtained the insurance, became disentitled to recover thereunder. He deceived the plaintiff in the matter and should repay the $500 which he received. He is also liable to make payment of the moneys properly expended by the plaintiff in defending the Rhys action on his behalf.

As to the costs incurred up to the time when the solicitor employed by the plaintiff retired from the Vance action, these should also be paid by the defendant Lambert. If these amounts cannot be settled between the parties then the defendants are entitled to a taxation.

Statement

As to the liability of the defendant Vance it is alleged that the defendant Vance collusively with the defendant Lambert brought the action against him with the fraudulent object which I have mentioned. There was no evidence adduced of such action being collusive. It is submitted, however, that from the facts proved I should draw an inference, which would support this conclusion. While I think that the circumstances may be suspicious, especially in the face of the previous finding as to Wright being solely responsible for the accident, still suspicion is not sufficient and I do not feel disposed to find upon suspicion, that the action was brought collusively.

The question then arises whether the defendant Vance was a party to the deception practised upon the plaintiff, with respect to the condition of the defendant Lambert at the time of the collision. I have already expressed my belief that, according to her admissions, he was then intoxicated. This was a change of front from the statement she made to James E. Dunbar when, in referring to the accident, he asked her if there had been any drinking and she said "No." I think she thus aided in the

deception which brought about the payment of the $500 for damages to the automobile and incurring of the costs referred to. I feel satisfied that from the circumstances surrounding the insurance and the claim arising out of the collision, she was well aware that the condition of the defendant Lambert, as to intoxication at the time, was important, in determining whether plaintiff was liable under its policy of insurance. She knew that if the true facts were disclosed that her employer could not recover so she refrained from telling the truth. Viscount Haldane in *Nocton* v. *Ashburton (Lord)* (1914), A.C. 932 at p. 954 in referring to *Derry* v. *Peek* (1889), 14 App. Cas. 337 said:

"[It] simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation."

Judgment

Strictly speaking it may not have been a duty cast upon the defendant Vance to inform the plaintiff or its agents as to the intoxication of defendant Lambert, but having in view her prospective claim for damages and the circumstances, I think an obligation existed upon her not to misrepresent the facts. I consider she is jointly liable with the defendant Lambert.

There should be a declaratory judgment, that the defendant Lambert or any one claiming under or through him was not and is not entitled under the policy of insurance to recover any loss, costs or damages, in respect of the said collision. There will be an order for judgment against the defendants for the recovery of the moneys, for the amount which I have mentioned and judgment accordingly.

Plaintiff is entitled to its costs.

Judgment for plaintiff.

MACDONALD, J.

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THOM AND LAMONT v. WALKER

THOM AND LAMONT v. WALKER.

Mortgage—Solicitor acting for mortgagor—Misappropriation by solicitor of moneys intended for payment of mortgage—Release of mortgage executed—Evidence—Estoppel.

The defendant, against whose property the plaintiffs held a mortgage for $1,000, desiring to obtain a loan at a lower rate of interest, arranged with one Mueller that certain moneys of his in the hands of one *Fraser*, Mueller's solicitor, should be used to retire the plaintiff's mortgage and the defendant would give Mueller a mortgage on the property to secure his advance. The plaintiff Thom was advised of this and *Fraser* prepared a release of the first mortgage which was duly executed by the plaintiffs and returned to *Fraser* who prepared a mortgage in favour of Mueller which was duly executed by the defendant. Fraser shewed the release to the defendant and Mueller in which the plaintiffs admitted payment, but *Fraser* did not register the documents. After the defendant had made two payments of interest to Mueller, *Fraser* absconded without having paid the plaintiffs the moneys for which the release was given. The plaintiffs then filed a *caveat* to prevent registration of the release and brought action to enforce payment of the mortgage.

Held, that as more than a year lapsed between the delivery of the release to *Fraser* and the time of his absconding and the plaintiffs took no precautions to protect themselves but relied on *Fraser* to make payment in due course without asking him for payment and in the meantime *Fraser* with the release in his possession satisfied the defendant and Mueller that the transaction was complete as shewn by the defendant paying two instalments of interest to Mueller, the plaintiffs put it in the power of the wrongdoer (*Fraser*) to commit the wrong and they should bear the loss.

Held, further, that the plaintiffs are estopped by the release from now asserting that the mortgage had not been paid after the defendant and Mueller had seen the release apparently duly executed as the plaintiffs told them by this release that they received the money.

Statement

ACTION to recover $1,000 secured by a mortgage given by the defendant to Elizabeth Thom, deceased, upon a property in Trail, B.C. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 30th of May, 1930.

Donald MacDonald, for plaintiffs.
H. W. McInnes, for defendant.

12th June, 1930.

MACDONALD, J.

1930

June 12.

THOM AND LAMONT v. WALKER

MACDONALD, J.: Plaintiffs, as executors of the estate of Elizabeth Thom, deceased, seek to enforce a mortgage, dated 13th January, 1926, given by the defendant to the said Elizabeth Thom for $1,000 upon property in the City of Trail, B.C. The interest upon the mortgage, at the rate of 10 per cent., was duly paid, both before and after its maturity. In December, 1928, defendant, being anxious to obtain a loan at a lower rate of interest and retire the Thom mortgage, negotiated with Fritz Mueller for that purpose. It was arranged that a requisite amount of the moneys of said Mueller, then in the hands of his solicitor, *Frederick Fraser,* should be appropriated for that purpose. The plaintiff Thom who was resident in Trail, was advised to that effect and a mortgage was duly executed by the defendant in favour of said Mueller and a release of the Thom mortgage prepared by the said *Fraser* for execution. It was duly signed by the plaintiff Thom and by arrangement then sent to Vancouver to be signed by the plaintiff Lamont. It was not regularly executed, however, by plaintiff Lamont and had to be returned to have an error rectified. Upon its return to *Fraser* duly executed by the plaintiffs, it was, later on, exhibited to both the defendant and said Mueller. It was not registered however and, after *Fraser* had absconded from the Province, it was found amongst his papers. Then, upon enquiry, in January, 1930, to obtain some information, to assist in registration of the release, plaintiff Thom asserted that it should not be utilized as he had not, contrary to his admission in the document, received the money therein mentioned. In other words, he contended that the Thom mortgage had not been paid and a *caveat* was filed to prevent registration of the release. There was no doubt that said Mueller had more than sufficient money in the hands of the said *Fraser* at the time when the release was signed and which could have been paid over by *Fraser* to the plaintiffs. Plaintiff Thom, who had particular charge of this portion of the estate, according to his candid admission, forgot the transaction and did not apply for the money, being, as it were, to plaintiffs' credit, for payment of the mortgage. His lapse of memory existed for over a year and in the meantime *Fraser* left the Province without either paying the money or being requested

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to do so. The question to consider then is, in the words of Lindley, L.J. in *Gordon* v. *James* (1885), 30 Ch. D. 249 at pp. 257-8:

"Which of two innocent parties perfectly free from all imputation of fraud, or anything of the kind, is to suffer?"

The law is stated to the same effect by Mr. Justice Story in his book on Agency as follows:

"Where one of two innocent persons must suffer, that party shall suffer who by his own acts and conduct has enabled the other to be imposed upon."

This principle was also referred to by Mr. Justice Wright in *Murray* v. *Crossland* (1929), 64 O.L.R. 403 at p. 406; (1929), 4 D.L.R. 721 where, under almost similar facts, he said:

"That one who put it in the power of the wrongdoer to commit the wrong must bear the loss."

In that case a solicitor had also absconded, after having misappropriated $1,100.

It is contended by the plaintiffs that, *Fraser* never ceased to be the agent of the defendant or Mueller and that, they were thus liable for his actions. It is quite true that, at the inception of the transaction, he was acting as solicitor for the defendant, with respect to the new loan to retire the plaintiffs' mortgage. After the release of the mortgage was executed, however, he held the requisite funds for plaintiffs. Such amount was at their disposal as agent or trustee for the plaintiffs. The release was not executed by them, as an escrow document, but *Fraser* could have registered it immediately. There were no "strings" upon it. Plaintiffs took no precautions to protect themselves either by placing the release in a bank, to be delivered upon payment of the proper amount, but relied upon *Fraser* making payment in due course. This he failed to do but, with the release in his possession, he satisfied both the defendant and Mueller that the transaction was complete. This was emphasized in a tangible way by the defendant, on two successive occasions, paying half-yearly interest to Mueller on his mortgage, they both believing, with good reason, that the Thom mortgage had been fully paid and satisfied and that the Muller mortgage was in full force and effect. In my opinion the plaintiffs "put it in the power of the wrongdoer" (*Fraser*) to commit the wrong and should bear the loss, differing in this respect from the conclusions of Wright, J. in *Murray* v. *Crossland, supra,* at p. 723 upon the facts there

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presented. If there had been there, as here, a discharge or release shewn to the plaintiffs a different result would have followed. My conclusion, therefore, is that the Thom mortgage was paid, through moneys placed by defendant by means of the Mueller mortgage in the hands of the said *Fraser* at the disposal of the plaintiffs.

Then I also think that the plaintiffs are estopped by the release, as well as their conduct, from now asserting that the Thom mortgage has not been paid. The principles applicable are outlined in the oft-cited case of *Pickard* v. *Sears* (1837), 6 A. & E. 469 at p. 475. Compare *Freeman* v. *Cooke* (1848), 18 L.J., Ex. 114. Paraphrasing a portion of the judgment of Lindley, L.J. in *Gordon* v. *James, supra,* at p. 259 this would appear to have been the situation, after defendant and Mueller saw the release, apparently duly executed. "The plaintiffs told them by this release that they got their money. They had no knowledge and no reason to suppose for a moment that this statement was not true. They had every reason to suppose that it was true. Acting upon that supposition they went on in perfect security, treating the new mortgage as valid and binding and of course not considering the prior mortgage, which they would have done, if their suspicions had been aroused. The plaintiffs by their carelessness you might say, but I would rather say by their acts, enabled *Fraser* to deceive the defendant and Mueller, and lulled them into security. It appears to me, therefore, that the plaintiffs are not in a position to say that they are entitled to any relief as against the defendant. I do not see that defendant has in any way contributed to the plaintiffs' loss whereas, on the other hand, they have entirely misled him by their incautious act." This latter statement I have already applied to the plaintiffs leaving the money to which they were entitled, for such a length of time in the hands of *Fraser.*

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While so finding in favour of the defendant, I think there is another feature of this case, which is worthy of consideration, especially, if I had come to the conclusion that the mortgage in question had not been paid or the plaintiffs not estopped from setting up non-payment. While Mueller is not a party to this

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action, still his security would be impaired, if not destroyed, should it be decided that plaintiffs had a first mortgage upon defendant's property. He expected to obtain this position himself and doubtless assumed, when he saw the discharge of the prior existing mortgage in the hands of *Fraser* that he was so secured and received payment of interest accordingly. It might be contended that plaintiffs, with a knowledge of the circumstances, and viewing a possible claim as to priority, should not have added Mueller as a party to determine his rights and avoid multiplicity of actions.

Subsection (4) of section 2 of the Laws Declaratory Act, R.S.B.C. 1924, Cap. 135, provides:

"The Court and every judge thereof shall recognize and take notice of all equitable estates, titles, and rights and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court sitting in equity would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the said twenty-ninth day of April, 1879:"

Judgment

While a duty is thus cast upon a trial judge irrespective of any pleading or application, I think it only applies to the parties then in litigation. I do not think that marginal rule 133 would, in the circumstances, be applicable. I thought it well to refer to the matter and indicate that Mueller's rights under his mortgage are not in any manner affected in the action.

The action is dismissed with costs.

Action dismissed.

RENAHAN *ET UX.* v. CITY OF VANCOUVER.

MACDONALD, J.

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Sept. 17.

RENAHAN v. CITY OF VANCOUVER

Damages—City waterworks—Bursting of a main—Flooding of plaintiff's property—Liability of the city.

A water main being part of the waterworks system of the City of Vancouver burst, and the water flooded the plaintiff's property causing considerable damage. In an action for damages:—

Held, that the construction of the waterworks being authorized by Act of Parliament, and there having been no act of negligence, the city is not liable in damages to the plaintiffs.

ACTION for damages. The main pipe of the City's waterworks, for the supply of water to residents on Beach Avenue, burst in front of the plaintiffs' property and spread on to the premises causing material damage. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 4th of September, 1930. Statement

E. A. Lucas, for plaintiffs.

McCrossan, K.C., for defendant.

17th September, 1930.

MACDONALD, J.: On the 17th of February, 1930, a main pipe for the supply of water on Beach Avenue, Vancouver, B.C., burst. It was close to the adjoining property, occupied by the plaintiffs and the flooding, which then ensued, caused substantial damage to the plaintiffs. It is alleged that the breaking of such water-pipe constituted a nuisance, for which the defendant is liable. The contention of the defendant is, that the water-pipe in question was part of a waterworks system duly installed by the defendant, as a public body, performing a public duty under statutory authority, consequently that it was under no liability in the matter, unless negligence in such performance be alleged and shewn on the part of the defendant. This submission follows the statement of the law by Lord Macnaghten in *East Fremantle Corporation* v. *Annois* (1902), A.C. 213 at p. 217 as follows: Judgment

"The law has been settled for the last hundred years. If persons in the position of the appellants, acting in the execution of a public trust and for the public benefit, do an act which they are authorized by law to do, and do

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it in a proper manner, though the act so done works a special injury to a particular individual, the individual injured cannot maintain an action. He is without remedy unless a remedy is provided by the statute. That was distinctly laid down by Lord Kenyon and Buller, J. and their view was approved by Abbott, C.J. and the Court of King's Bench. At the same time Abbott, C.J. observed that if in doing the act authorized the trustees acted arbitrarily, carelessly, or oppressively, the law in his opinion had provided a remedy."

There has been no suggestion, that the actions of the defendant were unreasonable or oppressive in any way, which might have afforded a ground of action, even where statutory authority was shewn as in *Howard-Flanders* v. *Maldon Corporation* (1926), 70 Sol. Jo. 544.

It was, however, incumbent upon the defendant when the bursting of the pipe with attendant damage was proved, not only to shew the statutory authority for the construction of the waterworks at the place in question, but that there was no negligence in utilizing this power in that behalf. On this point evidence was adduced to satisfy me, that every precaution was taken with respect to the purchase of suitable pipe, inspection of the same and proper installation for use as part of the waterworks system. This occurred over two years, prior to the occurrence complained of, and immediately thereafter steps were taken to remedy, as near as possible, any damage that might result from the flooding.

Judgment

"As a general proposition, it may be stated that the properly doing of that which the law itself expressly or by necessary implication authorizes is not a nuisance, although it be the doing of that which, but for the justification of the law's authority, would be so."

This statement of the law in the United States appears in 46 C.J. p. 672, sec. 40, but it is qualified later on in that work, as to there being no protection against a private action for damages resulting from what is termed a "public nuisance." Then the distinction between the law in that country and in England is referred to at p. 675 as follows:

"The English rule is that if an injury is caused by the doing of an act authorized by Parliament there is no redress whatever. But by force of statute, if in the course of the doing of the thing authorized a nuisance is created, damages may be recovered therefor."

This distinction is emphasized in the case of *E. I. Du Pont de Nemours Powder Co.* v. *Dodson* (1915), 49 Olk. 58 at p. 64; 150 Pac. 1085 at p. 1087. A portion of the judgment reads as follows:

"The rule in England that no damages or redress can be obtained in the Courts for a nuisance, or any structure or use of real property, which does direct injury to private property, provided Parliament has authorized the same, and not provided for compensation for such injuries, does not and cannot exist in this country. The rule in England is founded on the unrestrained and unlimited power of Parliament to take or damage private property at will without compensation."

Then to the same effect and as being more applicable to the supply of water to residents of a municipality, *vide* Halsbury's Laws of England, Vol. 21, p. 402, sec. 673 as follows:

"Where water is artificially introduced into buildings for supply to the occupants, or is in the ordinary course artificially drained away by pipes or gullies, liability for damage caused by its escape only ensues upon proof of negligence.

"Water companies and others, who are entitled by statute to accumulate water artifically, are not liable except for acts which are not authorized directly or by implication, or for acts which, although authorized, are negligently performed."

Green v. *The Chelsea Waterworks Company* (1894), 70 L.T. 547, is one of the cases cited for the last proposition and is very applicable here and is practically conclusive. The head-note is supported by the context of the judgment and reads as follows:

"A main belonging to a waterworks company burst, and the water flooded the plaintiffs' premises, causing considerable damage.

"*Held*, that the company being authorized by Act of Parliament to lay the main, and having been guilty of no negligence, were not liable in damages to the plaintiffs."

Judgment

A portion of the judgment of Mathew, J. is in accordance with the facts of this case and I so find. He said (p. 548):

"In this particular case the waterworks company obtained from Parliament the power to construct reservoirs, and to carry their mains and pipes under public thoroughfares, with the obligation that, when once the works are constructed, they shall continue to supply the public. It is clear that with no amount of care or skill can they prevent the bursting of one of their pipes, and the consequent damage that may be occasioned to those who may be living near to where the bursting has taken place."

That case is also important, as in appeal, the doctrine of *Rylands* v. *Fletcher* (1868), 19 L.T. 220 was discussed and held inapplicable as follows:

"It was argued that the company were liable by reason of the doctrine in *Rylands* v. *Fletcher* (*ubi sup.*), and it was said that this was like the case of a landowner who stores water on his land so as to become a source of danger to his neighbours, and that consequently the defendants were bound to shew that they were relieved by the Acts of Parliament under which the company was constituted from the duty of keeping the water in their pipes. The fault of that argument is in the major proposition.

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Rylands v. *Fletcher* was not a case of a company authorized to lay down water pipes by Act of Parliament. It was a case of a private individual storing water on his own land for his own purposes."

The case of *Dunn* v. *Proprietors of Birmingham Canal Navigation* (1872), 27 L.T. 683 was also referred to as follows:

"The same argument was used without success in the case of *Dunn* v. *The Birmingham Canal Company* (*ubi sup.*), where, without any negligence on the part of the company, water from the canal had flooded the plaintiff's mine. It was there held that the defendants were not liable expressly on the ground that the doctrine of *Rylands* v. *Fletcher* was inapplicable to a company which was doing what it was authorized to do by Act of Parliament."

Then in the face of these authorities and others that may be found in *Leighton* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 183 how do the plaintiffs hope to succeed in this action? It is submitted on their behalf, that the effect of such decisions is destroyed, if, upon the facts, the case of *Charing Cross Electricity Supply Company* v. *Hydraulic Power Company* (1914), 3 K.B. 772 (following *Midwood & Co., Limited* v. *Manchester Corporation* (1905), 2 K.B. 595) can be applied.

In those cases the defendants were held liable, because there was a statutory provision that they should not be exempt from liability, through creating a nuisance. They differed in this respect from the *Green* v. *Chelsea* case and others of a like nature, where there was no such provision as to liability.

Judgment

There is no specific exemption from liability in the statute, authorizing the defendant to construct and maintain its waterworks system, nor any clause creating a liability in connection therewith, but the plaintiffs contend that the provision in the statute, as to repair of streets, has the same effect, as in the *Charing Cross* case. This provision, as amended in 1928, reads as follows:

"320. (1.) Every public street, road, square, lane, bridge, and highway in the city shall, save as aforesaid, be kept in reasonable repair by the city."

I intimated during the argument, that—while the trend of the trial should govern—(see *Scott* v. *Fernie* (1904), 11 B.C. 91) and this contention on the part of the defendant was only raised during the argument, still, even if an amendment to the pleadings took place, I did not think this section would be of any benefit to the plaintiffs. I would in the first place hold, that the street had been "kept in reasonable repair." Then I do not

think a construction could well be placed upon this legislation, which would shew an intention to thereby impose liability upon the defendant, in carrying out a waterworks system for the general benefit of the city. In other words that the section had no applicability.

In *Lambert* v. *Lowestoft Corporation* (1901), 1 K.B. 590, though the action arose out of a defective sewer, still the other facts are so similar as to afford in this case an application of the principles therein outlined. Plaintiff there contended that an absolute duty was cast upon the defendant Municipality of keeping the sewer in repair and not to allow it to be a nuisance. Further that the liability was not dependent on negligence.

It was contended that *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256 and the *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433 applied. Lord Alverstone, C.J., however, in his judgment distinguished those cases. He, after having referred to the lack of liability in the execution of a statutory duty, unless negligently performed, said (p. 595):

"I am clearly of opinion that neither of those cases is sufficient to support the argument of the plaintiff. In the *Bathurst Case* [(1879)], 4 App. Cas. 256, not only might the plaintiff have recovered upon the ground of negligence, but, as pointed out by Lord Herschell in the *Sydney Case* (1895), A.C. at p. 441, the defective drain had caused the road to become dangerous, and no steps had been taken by the defendants in that case to prevent accidents, although they were well aware of the condition of the road. Their Lordships in the *Bathurst Case* found that the appellants had caused a nuisance in the highway by the construction of the drain, by their neglect to repair it, and by leaving a dangerous hole open and unfenced."

Judgment

Then further reference is made to the *Sydney Case* by Lord Alverstone stating, that in his opinion Lord Herschell was only in that case dealing with the subject-matter under discussion and his expressions must be so construed—that he did not intend to lay down a general rule that "simply because an accident has occurred in a road due to a latent defect in a sewer," the defendants, whose duty it is to maintain the sewer, are liable, apart from negligence. He concluded his judgment in words that may be aptly applied, with requisite changes, to my findings in this case, with respect to the water main:

"I find that in this case there was nothing to warn the defendants that there was anything wrong with the sewer, nor could they by the exercise of any reasonable care have discovered the existence of the hole under the road until the accident happened."

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Judgment

I feel no doubt that my conclusion is correct, as to there being no liability in this case against the defendant. It is true, as admitted by the city engineer, that the plaintiffs, if such a conclusion were reached, would be suffering a loss, which might be said to be for the benefit of the community as a whole.

I am not dealing, however, with this aspect of the case but simply the legal rights of the parties. While entertaining such opinion as to the liability, it was deemed advisable that evidence should be adduced as to the damages suffered by the plaintiffs.

Plaintiffs claimed both special and general damages. I would have allowed the special damages at $1,000.60, but, as to the general damages, they seem too remote and would not have been recoverable had my decision been in favour of the plaintiffs.

The action is dismissed with costs.

Action dismissed.

COURT OF APPEAL

1930

June 30.

REX v. CHOW DUCK YUET

REX v. CHOW DUCK YUET.

Criminal law—Charge of selling opium—Conviction—Revision of sentence—Power of Court of Appeal—Criminal Code, Secs. 1013 (2) and 1015—Can. Stats. 1929, Cap. 49, Secs. 4 and 14.

On a charge of selling opium the accused was found guilty and sentenced to imprisonment for one year and one day and fined $200. On appeal by the Crown that the sentence be increased by directing that in default of payment of the fine the accused be imprisoned until the fine be paid or for a period not exceeding twelve months, as required by section 14 of The Opium and Narcotic Drug Act, 1929:—

Held, that the Court has power to increase the sentence and there should be added thereto a term of imprisonment in default of payment of the fine.

Statement

APPEAL by the Crown from the decision of MCINTOSH, Co. J. of the 7th of April, 1930. The accused was convicted on a charge of unlawfully selling opium and he was sentenced to imprisonment for one year and one day in the common gaol at Oakalla in the County of Westminster, and fined $200. The ground of appeal was that the sentence did not direct that in default of payment of the fine the accused be imprisoned until the fine and the costs imposed be paid or for a period of not less than twelve months as required by section 14 of The Opium and Narcotic Drug Act.

COURT OF APPEAL

1930

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REX v. CHOW DUCK YUET

The appeal was argued at Victoria on the 26th and 30th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Moresby, K.C., for appellant: The learned judge overlooked the provisions of section 14 of The Opium and Narcotic Drug Act. Under that section it is imperative that the sentence should provide for a term of imprisonment in case the fine is not paid. Where there is an illegal sentence the Court of Appeal can correct it: see Criminal Code, Sec. 1013; *Rex* v. *Adams* (1921), 36 Can. C.C. 180 at p. 181; *Rex* v. *Finlay* (1924), 43 Can. C.C. 62 at p. 63; *Rex* v. *Carney* (1914), 10 Cr. App. R. 79; *Rex* v. *Pilley* (1926), 19 Cr. App. R. 101; *Rex* v *England* (1924), 19 Sask. L.R. 165; see also section 1015 of the Criminal Code. As to how far the Court of Appeal may vary the judgment below see *Rex* v. *Musgrave and Reid* (1926), 58 N.S.R. 536; *Rex* v. *De Young* (1927), 60 O.L.R. 155; *Rex* v. *Zimmerman* (1925), 37 B.C. 277 at pp. 278-9.

Argument

Stuart Henderson, for respondent: Both section 1013 (2) and section 1015 have the words "unless the sentence is one fixed by law." The sentence imposed was an illegal sentence and this Court has no power to make an illegal sentence legal without looking at the evidence to find out whether there is any warrant for sentencing the accused at all. Accused can only be convicted in his own presence: see *Rex* v. *Hales* (1923), 17 Cr. App. R. 193.

[Argument adjourned to June 30th in order that accused may be present.]

30th June, 1930.

Henderson: The question is whether the Court can rectify the illegal sentence.

Moresby, replied.

The judgment of the Court was delivered by

MACDONALD, C.J.B.C.: We think this Court has the power to amend. The sentence will therefore be amended by adding thereto "and in default of payment of the fine imprisonment until such fine be paid or for a period of three months to commence at the end of the term of imprisonment awarded by the sentence."

Judgment

Appeal allowed.

COURT OF APPEAL

1930

June 30

DUNCAN v. THE BOARD OF SCHOOL TRUSTEES OF LADYSMITH.

Negligence—Damages—Limitation of action—R.S.B.C. 1924, Cap. 145, Secs. 3, 8 and 11; R.S.B.C. 1911, Cap. 206, Sec. 81.

DUNCAN v. THE BOARD OF SCHOOL TRUSTEES OF LADYSMITH

On the morning of the 17th of November, 1921, the principal of the Ladysmith High School, conducted certain experiments in chemistry before his class. He then went to lunch and left the apparatus for the pupils to clean. During the lunch hour the pupils managed to get the required chemicals from a closet in which they were kept and setting up the apparatus proceeded to repeat the experiments seen in the morning. While so engaged the plaintiff, then 14 years old, came into the room and when approaching the apparatus an explosion took place, a piece of glass entering the plaintiff's right eye in which he lost his sight. The plaintiff reached his majority in November, 1927, and he brought action for damages in April, 1929. The jury returned a verdict in defendant's favour and the action was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., *per* MACDONALD, C.J.B.C., and GALLIHER, J.A., that section 81 of the Public Schools Act provides that "No action shall be brought against any school trustee, . . . unless within three months after the act committed," etc., and as the action was not brought within the time so fixed the appeal must be dismissed.

Per MARTIN, J.A.: That the action is barred by section 11 of the Statute of Limitations and the appeal should be dismissed.

Statement

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. and the verdict of a jury in an action for damages for loss of eyesight by reason of the negligence of the defendant, its servants or agents in failing to protect the plaintiff against chemicals and other dangerous substance used by the defendant in its school system. During the year 1921, one Hudson was principal of the Ladysmith High School and on the morning of the 17th of November, 1921, he conducted a chemistry class in which he shewed them certain experiments. When he had finished the experiments he had used up all the chemicals he had for the purpose and left the apparatus to be cleaned up by the pupils. He then left the school during the lunch hour, and while he was away some of the pupils set up the apparatus themselves and obtaining chemicals they experimented with them. While they were so engaged the plaintiff who was 14 years of

age at the time, and in another class, entered the room and on nearing the apparatus there was an explosion, a piece of glass piercing his right eye. The glass was taken out but he lost his sight in this eye. There was a cupboard in this room in which the principal kept all the chemicals that he used but he says he always kept it locked and that it was locked when he went to lunch at the noon hour on the day in question. From the evidence of the pupils who were in the room at the time of the accident it would appear that the chemicals were taken from the cupboard and that it was not locked but owing to the length of time since the accident the evidence was of an uncertain character as to this. The jury brought in a verdict for the defendant and judgment was entered accordingly.

Statement

The appeal was argued at Vancouver on the 11th and 12th of March, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Craig, K.C. (*Cunliffe,* with him), for appellant: The chemicals were kept in the cupboard and there is conflict of evidence as to whether the cupboard was locked during the noon hour. There should be special care in keeping dangerous chemicals locked with a lock that cannot be opened by others. The pupils got the chemicals, which has all the appearance of laxity on the part of the school staff. We say there was misdirection and wrongful admission of evidence. Hudson is no longer principal of the school and his examination for discovery should not have been used as evidence on the trial.

Argument

Farris, K.C., for respondent: The accident took place nine years ago and the evidence as to how the chemicals were obtained is very vague. On the question of liability see *Bohane* v. *Driscoll* (1929), I.R. 428. That Hudson's evidence should be allowed in on the trial see marginal rule 370c (1). The action is barred by the Statute of Limitations. The only section that assists them is section 8, but see *Piggott* v. *Rush* (1836), 4 A. & E. 912; *Harnett* v. *Fisher* (1926), 135 L.T. 724. This comes really within section 11 (2) of the Act and the other sections do not apply. We rely on section 81 of the Public Schools Act.

Craig, in reply: That the Statute of Limitations does not apply see *Inglis* v. *Haigh* (1841), 8 M. & W. 769 at p. 778;

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1930

June 30.

DUNCAN v. THE BOARD OF SCHOOL TRUSTEES OF LADYSMITH

Chandler v. *Vilett* (1670), 2 Wms. Saund. (3rd Ed.) 117 *e*; *Collins* v. *Brook* (1860), 5 H. & N. 700 at p. 705. There is a distinction between an obligation arising by statute and one arising by common law: see *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1; *Bradford Corporation* v. *Myers* (1916), 1 A.C. 242.

Cur. adv. vult.

30th June, 1930.

MACDONALD, C.J.B.C.: Section 81 of the Public Schools Act, R.S.B.C. 1911, being Cap. 206, provides that:

"No action shall be brought against any school trustee individually or against the Board of School Trustees in their corporate capacity, or against the secretary of the said Board, for anything done by virtue of the office of trustee or secretary, unless within three months after the act committed, and upon one month's previous notice thereof in writing."

At the time of plaintiff's injury he was fourteen years of age. He reached his majority in November, 1927, and the action was commenced in April, 1929. He founds his claim to bring it at this late date on sections 3 and 8 of the Statute of Limitations, Cap. 145, R.S.B.C. 1924. The defendant submits that an action of trespass on the case which this is is not within said section 8. They pleaded in defence as well said section 81.

In my view of the case it is unnecessary to consider section 8 since I think that said section 81 is the controlling section and that the plaintiff's action is out of time under it.

MACDONALD, C.J.B.C.

By the Public Schools Act powers and duties of the Board are defined to be *inter alia* to furnish houses, maps, and apparatus and to appoint teachers. They appointed a head master, Hudson, and they furnished him with the apparatus and chemicals which caused the mischief. By the Act these are under the control of the School Board.

The said chemicals were kept in a cupboard in the principal's class-room and were necessarily used by him from time to time in making chemical tests and demonstrations to his class. The key to the cupboard was entrusted to him and the plaintiff alleges that the principal left the school for lunch leaving no one in charge and leaving the cupboard unlocked with the result that pupils got out some of the chemicals and were experimenting with them when an explosion occurred which destroyed the sight of one of the plaintiff's eyes. The plaintiff was merely a

bystander but was taking no part in the use of the chemicals.

The gist of the negligence alleged is the leaving of the cupboard unlocked and leaving the pupils in the class-room and about the school-house without anyone in authority over them. Hudson was the servant or agent of the Board and I think the doctrine *respondeat superior* applies. The defendant put the chemicals in the school-house without providing efficient means of safeguarding them from the children, but since the action was not brought within the time fixed by section 81 the appeal must be dismissed.

MARTIN, J.A.: This is an appeal from the dismissal of the plaintiff's action, tried by Chief Justice MORRISON and a jury, for damages for the loss of his eye on 17th November, 1921, when he, being then fourteen years of age, was a pupil in the high school at Ladysmith conducted and controlled by the defendant under the Public Schools Act and in charge of one Hudson as principal who, pursuant to defendant's proper orders, conducted classes in chemistry, and it is alleged that during the lunch hour, after the conclusion at noon of a class in chemistry, Hudson negligently left dangerous chemicals in his said class-room in a cupboard with its door unlocked so that certain scholars, during said recess, in attempting to repeat Hudson's experiments in his absence with dangerous chemicals taken from said cupboard, brought about an explosion thereof with the result that a piece of glass from a test-tube was blown into plaintiff's right eye, destroying its sight, when, on returning from lunch, he lawfully went into Hudson's class-room from his own class-room across the hall and was approaching a group of pupils that he saw standing about the sink.

The defendant denied all negligence and in particular that the cupboard had been left unlocked, and the jury returned a verdict in its favour.

No question has been raised as to the law of negligence applicable to the case, which I presume must be conceded to be as laid down in the unanimous decision (though it was not cited) of the Court of Appeal in the very similar case of *Williams* v. *Eady* (1893), 10 T.L.R. 41, which was approved by that very eminent judge, Chief Baron Palles, and other learned judges, in *Sullivan*

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v. *Creed* (1904), 2 I.R. 317, 334, and *cf.* also *Jackson* v. *London County Council and Chappell* (1912), 28 T.L.R. 359; and *Shepherd* v. *Essex County Council* (1913), 29 T.L.R. 303; but weighty objections have been taken to the wrongful admission of evidence and to misdirection in a vital matter, *i.e.*, respecting the mere rumoured possession by some unknown pupil of a key to the cupboard, but before they are entertained it is necessary to consider the submissions that the action is barred by both sections 3 and 11 of the Statute of Limitations, Cap. 145, R.S.B.C. 1924.

As to section 3 it was also submitted by respondent that as this action is one for trespass on the case it is barred by section 3 because it does not come within the saving proviso of "actions upon the case for words" (*i.e.*, slander actionable in itself—Clerk & Lindsell on Torts, 8th Ed., 160) in section 8, but there is a long and ancient chain of authority upon sections 3 and 7 (same as our 3 and 8) of that difficult and obscurely worded statute of 21 Jac. 1, to support the counter submission of the appellant that by the expression "actions upon the case" (*i.e.*,

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trespass on the case, or shortly case, Lightwood's Time Limit on Actions, 1909, pp. 192, 291; Salmond on Torts, 7th Ed., 229-232) in section 3 such actions were intended by Parliament to be included in the expression "action of trespass" in sections 7-8—*cf. Chandler* v. *Vilett* (1670), 2 Wms. Saund. (3rd Ed.) 120; and *Crosier* v. *Tomlinson* (1676), 2 Mod. 71, in which the Court said (p. 73):

> "When the scope of an Act appears to be in a general sense, the law looks to the meaning, and is to be extended to particular cases within the same reason; and therefore they were of opinion, that actions of trespass mentioned in the statute are comprehensive of this action, because it is a trespass upon the case; and the words of the proviso save the infant's right in actions of trespass."

And see also *Webber* v. *Tivill* (1670), 2 Wms. Saund. (3rd Ed.) 124, particularly Serjeant Williams's note (7) at 127*d*, and *Piggott* v. *Rush* (1836), 4 A. & E. 912. In *Inglis* v. *Haigh* (1841), 8 M. & W. 769, it was held by the Court of Exchequer *per* Baron Parke, pp. 779-80:

> "The statute is unfortunately worded very loosely, and great latitude has been adopted in construing it. For instance, the saving clause in cases of disability (s. 7) does not in terms mention any actions on the case, except actions on the case for words; and yet it has always been held to

extend to all actions on the case, from the manifest inconvenience of a contrary construction: see *Chandler* v. *Vilett* [(1670)], 2 Saund. 120."

Recently in the Court of Appeal in England in *Harnett* v. *Fisher* (1926), 135 L.T. 724 Lord Haworth, M.R., p. 728, approved the view of Horridge, J., p. 727, that the authorities shew that "on a liberal interpretation of the statute, the proviso [in section 7] would extend to actions on the case within the third section." It follows therefore, from all these authorities that the present action of trespass on the case is not barred by said section 3. This brings us to section 11, *viz.*:

"(2) Where no time is specially limited for bringing any action in the Act or law relating to the particular case, no action shall be brought against any person for any act done in pursuance or execution, or intended execution, of any Act of the Legislature, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, unless the action be commenced within twelve months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within twelve months next after the ceasing thereof."

The section receives much consideration, in the leading cases of *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1, and *Bradford Corporation* v. *Myers* (1915), 85 L.J., K.B. 146; (1916), 1 A.C. 242, in the House of Lords, and *Edwards* v. *Metropolitan Water Board* (1922), 1 K.B. 291, wherein there is an enlightening judgment by Lord Justice Scrutton in which he points out the difficulty in finding "a clear or distinct line of any exact principle" (p. 304) in construing the Act and goes on to say, p. 305:

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"In this difficulty I find several decisions of the Court of Appeal referred to in the House of Lords without disapproval, and I propose to follow decisions of the Court of Appeal so treated even though it may not be easy to distinguish them from the ultimate finding or decision of the House of Lords in the particular case in which they were cited. These decisions of the Court of Appeal, not overruled by the House of Lords, bind us to say that it is not essential that an act should be done in discharge of a duty in order to bring the doers within the protection of the Act of 1893. It is enough if it is done in exercise of a power or of an authority provided it is to be exercised for the public benefit."

After a careful consideration of the facts of the case at Bar I do not doubt that it comes within this definition, and so if the matter ended there this action would be barred by this statute.

But Mr. *Craig* submits that he can successfully invoke section

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81 of our Public Schools Act, Cap. 206, R.S.B.C. 1911, in force at the time of the accident, *viz.*:

"81. No action shall be brought against any school trustee individually or against the Board of School Trustees in their corporate capacity, or against the secretary of the said Board, for anything done by virtue of the office of trustee or secretary, unless within three months after the act committed, and upon one month's previous notice thereof in writing, and the action shall be tried in the district where the cause of action arose. The defendant in any such action may plead the general issue and give the special matter in evidence. If it appears that the defendant acted under the authority of this Act, or any Act in amendment hereof, or of any regulations made pursuant to the powers herein given, or that the cause of action arose in some other district, the judge or jury shall give him a verdict. The provisions of this section shall not extend to actions upon contract."

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Now, assuming this provision to be a "specially limited" time which would take the matter out of said section 11 (and incidentally, if applicable, reduce the time from twelve months to three) it is not in my opinion, after a careful consideration of its sweeping language, *viz.*, "anything done by virtue of the office of trustee or secretary," of assistance to the plaintiff because the reasoning of the cases already cited in relation to section 11 apply thereto, and I can find no sound ground for drawing a distinction between obligations imposed by statute and those by common law, for they are equally "done by virtue of the office" in such cases as the present, where the trustees are acting in pursuance of the legislative duty imposed upon them, even though their manner of discharging that duty may be negligent by reason of their omission to take proper precautions to safeguard the pupils entrusted to their care.

It follows that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: In my opinion this action is barred by the provisions of section 81 of the Public Schools Act, Cap. 206, R.S.B.C. 1911, which was in force at the time the accident occurred.

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *C. F. Davie.*

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK AND BERRY.

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Insurance, accident—Automobile driven by insured's daughter—Judgment obtained by plaintiff against her for negligent driving—Action defended by insurance company—Action against insurance company—Costs and interest—Extent of liability—B.C. Stats. 1925, Cap. 20, Sec. 24.

B., the owner of an automobile, was insured against loss in the defendant Company. Under the policy the indemnity to the owner is also available in the same manner to 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 taking charge of the defence on the trial. In an action against the Insurance Company under section 24 of the Insurance Act the plaintiff recovered judgment for the amount of the judgment against B.'s daughter.

Held, on appeal, affirming the decision of GREGORY, J., that the plaintiff acquires her right to sue the Company under section 24 of said Act providing the person causing the injury is insured against liability and although the insured's daughter was not specifically named in the policy she answers the description of parties interested and to whom indemnity is available under section E. thereof and would be entitled to bring action under said section.

Held, further, that although the policy limited the Company's liability to $5,000, the limitation does not include the costs of a suit on a claim for damages which was defended by the Company pursuant to the terms of the policy, or interest from the date of the judgment, the interest to be on the amount of the limitation only.

APPEAL by defendant Company from the decision of GREGORY, J. of the 24th of December, 1929 (reported, 42 B.C. 255) in an action against the 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. Statement

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Argument

The appeal was argued at Vancouver on the 3rd and 4th of April, 1930, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Alfred Bull, for appellant: There is no evidence to support the contention that the injury was caused by the insured's car and that she was liable: see *Continental Casualty Co. of Canada* v. *Yorke* (1930), 1 D.L.R. 609; *Barlow* v. *Merchants Casualty Insurance Co.* (1929), 41 B.C. 427. Jean Berry could not have recovered judgment against the company if she had satisfied the judgment against her: see *Trites-Wood Company* v. *Western Assurance Co.* (1910), 15 B.C. 405; *Mitchell* v. *City of London Assurance Co.* (1888), 15 A.R. 262 at p. 281; *Tweddle* v. *Atkinson* (1861), 1 B. & S. 393 at p. 396; Arnould on Marine Insurance, 10th Ed., p. 237, sec. 172; *Watson* v. *Swann* (1862), 11 C.B. (N.S.) 756; *Boston Fruit Company* v. *British and Foreign Marine Insurance Company* (1906), A.C. 336 at p. 343; *Keighley, Maxsted & Co.* v. *Durant* (1901), A.C. 240; *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; *Grover & Grover, Limited* v. *Mathews* (1910), 2 K.B. 401; *Williams* v. *Baltic Insurance Association of London, Ld.* (1924), 2 K.B. 282 at p. 284. Making Berry a party makes no difference as the time for bringing action had expired: see *Trites-Wood Company* v. *Western Assurance Co.* (1910), 15 B.C. 405; *Ayscough* v. *Bullar* (1889), 41 Ch. D. 341 at p. 346. So far as Jean Berry is concerned the contract of insurance is void under section 10 of the Insurance Act: see *Howard* v. *Lancashire Ins. Co.* (1885), 11 S.C.R. 92; *The Sadlers' Company* v. *Badcock* (1743), 2 Atk. 554. Miss Berry is a mere licensee. She has no insurable interest: see *Lucena* v. *Craufurd* (1806), 5 Bos. & P. 269 at p. 302; *Victoria-Montreal Fire Ins. Co.* v. *Home Ins. Co. of New York* (1904), 35 S.C.R. 208 at p. 220; *Hessen* v. *Iowa Automobile Mut. Ins. Co.* (1922), 190 N.W. 150. Under the omnibus clause of the conditions Berry should direct in writing to indemnify her: see *Schoenfield* v. *Pilot Ins. Co. Ltd.* (1930), 37 O.W.N. 355; *Heane* v. *Rogers* (1829), 9 B. & C. 577.

C. L. McAlpine, for respondent: The case of *Continental Casualty Co. of Canada* v. *Yorke* (1930), 1 D.L.R. 609 does not apply to the facts in this case: see also *Yangtsze Insurance*

Association v. *Lukmanjee* (1918), A.C. 585 and *Ayscough* v. *Bullar* (1889), 41 Ch. D. 341.

Bull, replied.

Cur. adv. vult.

30th June, 1930.

MARTIN, J.A.: This case has, in view of its importance, engaged our very careful attention with the result that I am so much in accord with the very lucid and succinct judgment of our brother GALLIHER that I feel it would be superfluous to add anything to the reasons that he is handing down for our disposition of the appeal and cross-appeal.

GALLIHER, J.A.: This is an appeal from the decision of GREGORY, J., awarding the plaintiff judgment in the sum of $5,000 and costs. The material facts are set out in his reasons for judgment.

Four main grounds of appeal were argued before us, *viz.*: 1. Jean Berry was not insured under the policy. 2. So far as Jean Berry is concerned the contract is void under the Insurance Act, B.C. Stats. 1925, Cap. 20, Sec. 10. 3. As Jean Berry could not recover plaintiff could not. 4. Under the terms of the policy it is a condition precedent in order to recover under section E that the named insured shall in writing direct to whom the indemnity payable to unnamed persons thereunder shall be applied.

It was further argued that this case is not distinguishable from *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180.

I do not think there is any merit in the contention that as regards Jean Berry the transaction was one of gaming or wagering under section 10 of the Insurance Act.

As to the contention that she was not insured under the policy —while it is true that she was not specifically named therein yet she answers the description of parties interested and to whom indemnity is available under section E thereof and would I think be entitled to bring an action and maintain it on proof that she came within that section.

The plaintiff (respondent) acquires her right to sue the Company by virtue of section 24 of the Insurance Act, Cap. 20,

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of 1925, providing the person causing the injury is insured against liability and the plaintiff has brought herself (which in this case she has) within the other conditions of the section. If I am right in holding that Jean Berry was insured against liability then that section is fully complied with and the plaintiff's right to sue is established. I do not regard the last line of section E of the policy "as the named insured shall in writing direct" as a condition precedent. If it were so R. E. Berry by refusing to so direct could defeat the benefit of the provision. I regard it more in the nature of a protection to the Company in the application of its indemnity after the final ascertainment of its extent in a case where the named insured is entitled to a portion thereof and some other person is also entitled to indemnity in order that the Company may not be called upon to pay twice over or in different amounts. Here there is no claim by J. E. Berry to indemnity and in such a case as this "direction" would have no application for no protection of the other persons entitled to indemnity is necessary. But Mr. *Bull* argues that assuming all these points found against him he is still within the decision of the Supreme Court of Canada in the said case of *Continental Casualty Co.* v. *Yorke, supra,* on the corresponding section 85 of the Ontario Insurance Act, R.S.O. 1927, Cap. 222, which is in present essentials identical with our section 24, hence if this case cannot be distinguished from that decision of the Supreme Court plaintiff cannot succeed. But there is this distinction and I think it is a material one—that in the *Continental* case the Company at no time took any part in the proceedings instituted against the insured; while here the Company from the inception of the proceedings against Jean Berry took over her defence as obligated by said section E, and conducted the action on her behalf, pleading on her behalf to the claim with full opportunity of raising all defences which she might have to the claim, conducted the trial on her behalf, examined the witnesses and had the benefit of all advantages to be gained from a judgment in her favour which would accrue to them in freeing her from liability and hence itself as well.

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Mr. Justice Lamont who delivered the judgment of the Court says at p. 186:

"If the judgment was evidence as against the appellant of the existence

of the injury insured against and of the liability of the insured therefor, the appellant would be liable on the policy if the insured, having a good defence to the claim for damages, failed to set it up in her pleadings, and prove it at the trial, and judgment went against her on that account. This would be to expose the appellant to the obligation of indemnifying the insured not only where it had agreed to do so, but also where it had not agreed to do so but judgment had been obtained against the insured through failure on her part to set up or establish an available defence."

This cannot I think be said of the case at Bar for everything was in the hands of the Company who conducted the defence as was its liability to do so under said section E, and all defences were available to it to set up, and to say that under such circumstances the question of liability would have to be tried out anew in an action against the Company would be equivalent to giving it a second opportunity to dispute the subject-matter of the action where it had already full opportunity to do so and did do so in the action against Jean Berry where the defence in that action if successful would have relieved it from all liability.

It was in effect under its delegation trying out its own liability at the same time as that of Jean Berry though it was not named a party to the action—and the result under the present circumstances is that there are no equities here reserved by said section 25 which prevent the plaintiff from recovering damages under that section. To this extent therefore as regards the defendant's liability the judgment for $5,000 appealed from should be affirmed without however adopting the reasons given by the learned judge below and so the appeal of the defendant should be dismissed.

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But there is a cross-appeal by which the plaintiff seeks to increase the judgment in her favour to $5,649.26, being made up of $4,600 for the amount of the judgment originally obtained by the plaintiff against Jean Berry plus the amount of $780.25 for costs then awarded amounting to $5,380.25 as the total of the judgment on 13th June, 1929, together with interest on that sum at 5 per cent. from that date.

The learned judge below gave judgment only for a total of $5,000 as the suggested limit of the indemnity under the policy but this would appear to ignore the further liability for costs and interest imposed by section E (4), which provides that the Company shall

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"pay all costs taxed against the insured in any legal proceedings defended by the insurer; and all interest accruing after entry of judgment upon such part of same as is not in excess of the insurer's limit of liability, as hereinbefore expressed."

After a careful consideration of sections 25 and E there does not appear to be any warrant for awarding the plaintiff only so much of the costs and interest as would, added to the damages, keep her whole claim within $5,000 and therefore the cross-appeal should be allowed, so as to include them in her judgment that she is otherwise entitled to bearing in mind that her counsel informed us he did not claim interest on more than $5,000, which would be defendant's limit of liability in this respect.

GALLIHER, J.A.

No Canadian or English decisions have been cited to us on the point but the reasoning in general of the Federal Circuit Court of Appeal in *New Amsterdam Casualty Co.* v. *Cumberland Telephone and Telegraph Co.* (1907), 152 Fed. 961 is in accord with our view with the justice of the case.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would dismiss the appeal.

Appeal dismissed.

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

COAST CEMENT COMPANY LIMITED v. NAVIGAZIONE LIBERA TRIESTINA S.A.
McKENZIE BARGE & DERRICK COMPANY v. NAVIGAZIONE LIBERA TRIESTINA S.A.

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1930

July 2.

COAST CEMENT CO. LTD. v. NAVIGAZIONE LIBERA TRIESTINA S. A.

McKENZIE BARGE & DERRICK CO. v. THE SAME

Ship—Bill of lading—Damage to scow and loss of cargo while being discharged—Duty of carrier—Liability for loss.

In the discharge of a cargo from a vessel on to a scow, the carrier through its stevedores is in charge of the scow to the extent that it owed a duty to the owners of the scow and of the cargo to take reasonable care.

ACTIONS for injury to a scow and loss of cargo owing to the alleged negligent loading of the scow from the defendant's ship. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 18th of June, 1930.

Griffin, K.C., and *Sidney A. Smith,* for plaintiffs.
Bourne, and *A. C. DesBrisay,* for defendant.

2nd July, 1930.

McDONALD, J.: In these cases which were tried together I find the facts to be as follows:

The plaintiff, McKenzie Barge & Derrick Co., which I shall refer to as the "Barge Company," under a contract with the plaintiff, The Coast Cement Company Limited, which I shall refer to as the "Cement Company," sent on the 29th of September, 1929, two scows and placed them alongside the defendant Company's ship the "Cellina," a single-screw motorship, to receive therefrom certain cement clinker which had been brought to Vancouver Harbour and which was stowed under hatches Nos. 5 and 6 of said ship. The Cement Company was the holder of a bill of lading from the defendants which bill of lading contained clauses having effect, subject to the provisions of the rules scheduled to the Carriage of Goods by Sea Act, 1924. Certain of these clauses tend to limit the liability of the carrier, and particularly the "Cesser of Liability" clause.

Judgment

The defendant was under a running contract with The Louis Wolfe & Sons Limited, stevedores, whereby the stevedoring com-

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pany had undertaken to discharge the defendant's ships arriving at the port of Vancouver. On Friday, 20th September, 1929, the Barge Company's scow F.A. 1 was brought by the Barge Company alongside No. 5 hatch; lines were thrown from the ship and made fast to the barge by the Barge Company's servants on board the scow. A second scow "Norcon No. 50" was at that time tied alongside the scow F.A. 1. Later in the day when certain general cargo had been discharged from No. 6 hatch, being the hatch farthest aft on the vessel, the scow Norcon was moved by the stevedores and placed alongside No. 6 hatch. A line was attached from the forward outside corner of the scow to the deck of the ship. Another line from the after outside corner was similarly attached as were also a spring line from the forward inside corner and another line from the after inside corner. This was the usual and proper method of mooring a scow in Vancouver Harbour alongside ship for the purpose of receiving cargo. The forward line from the outside corner was made and kept "taut" in order to keep the forward inside end of the scow "snug" against the ship's side, thereby tending to keep the after end of the scow out from the ship's side.

The discharging on the scow Norcon proceeded on Friday afternoon, on Saturday morning and again on Monday the 23rd. On each day at some period Mr. McKenzie, president of the Barge Company, was in attendance at the ship and saw how the scows were moored and the manner in which the discharging was proceeding. On Monday afternoon it became necessary, in order to complete the loading of the Norcon, to reverse her. This was properly and safely done and she was again moored in the same way with her forward end about half way between No. 5 hatch and No. 6 hatch. She was 90 feet long and in that position her after end would extend beyond the propeller of the ship, a distance of some eighteen feet.

About 4 o'clock in the afternoon of Monday the scow Norcon took a list to port (by that I mean toward the ship), at her forward end. This list continued with the result that the lines gradually became slack, the scow drifting in under the counter. Efforts were made, by attaching lines, to pull her out. These efforts failed and a small tug having arrived on the scene was requisitioned and a line to the after outer or starboard corner of

the scow having failed to pull her out, another line was attached to the forward starboard corner and as she was pulled out the list to port having continued she in the end completely capsized toward the ship, the cement was lost and the after end of the scow was damaged. The time elapsing from the time when the list to port was first noticed until the scow capsized was approximately 20 minutes. I have no doubt that the injury to the scow was caused by the ship's propeller but, after a careful consideration of the evidence and of the witnesses, I find that that injury was caused after the scow began to list to port, which list continued until she capsized. There is a conflict of evidence on this question but I have concluded that the plaintiffs have not proven that that injury took place prior to the time when the scow was actually in the act of listing and ultimately capsizing. As to what caused the list to port, it is difficult to say. There is no suggestion that the scow was not kept properly trimmed but there is a suggestion that she may have sprung a leak. All I have to say on this phase is, that as to the evidence given by the plaintiffs as to the inspections for leaks which were made prior to the accident, I find that evidence unsatisfactory indeed. One thing may be said in this connection: the Barge Company's officer, who placed the scows alongside, testified that the same test was made of the F.A. No. 1 as was made of the Norcon and it developed at a later stage of the trial that the F.A. No. 1 was in such condition about, or immediately after, the time of the accident that it was necessary to pump her out. I ruled at the trial that evidence regarding the F.A. No. 1 was irrelevant, and thereby prevented defendant's counsel from developing this subject to any extent. I adhere to that ruling in a general sense. Nevertheless when one is asked to accept the evidence of witnesses who testified to a proper inspection of the scow in question, and whose evidence at best is not convincing, there is at least a slight indication in this instance as to where the truth probably lies. In any event I am satisfied on the whole of the evidence that the scow did list to port and that that listing continued throughout until she capsized.

Judgment

Under these circumstances upon what ground can the defendant be held responsible for the injury to the scow and the loss of the cargo?

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Judgment

The plaintiffs' claims are based upon negligence and the plaintiffs, in order to succeed, must therefore establish (1) That the defendant owed a duty to the plaintiffs to take care and (2) a breach of that duty. The care required is that which a prudent and reasonable man would provide under the circumstances.

Plaintiffs set up and pressed very strongly during the taking of the evidence that the defendant ought to have supplied something in the nature of a fender to prevent the scow from drifting on to the propeller and suggested a fender hung down over the ship's side to provide a fulcrum to operate in connection with the forward starboard line. They also suggested something in the nature of a box-work consisting of boom logs surrounding and enclosing the propeller or a spar lying along the ship's side between the scow and the propeller. Upon the argument this ground of negligence was jettisoned by counsel who placed his reliance entirely upon two grounds: (1) That the forward starboard line was allowed to become slack and (2) That there was no line over the stern to the after port side of the scow. As to the first point the facts are against them. The line in question was kept "taut" until the scow listed to port and drifted inwards under the counter.

As to the second point, the men on the scow stated that after the trouble arose they asked the hatch-tender to throw a line over the stern of the ship to attach to the after port side of the scow. These witnesses were incorrect on certain matters as to which they testified and I am not prepared to hold as a fact that this demand was made; even if I am wrong in this and the demand was made, there is no evidence to shew that such a line, if attached, would have borne the strain or prevented the accident. There is also this to be said, that Mr. McKenzie, who has been accustomed to work of this nature for years, was present from time to time. He knew what was usual; he saw the situation and he admits that he was satisfied and anticipated no danger. I, therefore, hold that negligence has not been established.

In view of the above findings, I am not called upon to rule as to whether or not the defendant is protected by the terms of its bill of lading, nor whether it is responsible for the acts of its stevedores. As at present advised I would hold, having regard to the decision in *Heyn* v. *Ocean Steamship Company Limited*

(1927), 17 Asp. M.C. 228, that it is so responsible and that it was, through its stevedores, in charge of the scow to the extent that it owed a duty to the owners of the scow and of the cargo to take reasonable care. That duty, in my opinion, was discharged.

The plaintiffs pressed another ground which of course is tenable provided the facts justified the application of the principle involved. That principle is that one who invites another to moor a ship at a certain place undertakes with that other that there are no concealed dangers. See *The Moorcock* (1889), 14 P.D. 64; *Coast Steamship Co., Ltd.* v. *Canadian Pacific Ry. Co.* (1921), 3 W.W.R. 631 and *A. H. Bull & Co.* v. *West African Shipping, Etc., Co.* (1927), A.C. 686. Here, there was no concealed danger. The vessel was a single screw and the concealed danger which might exist in the case of a twin-screw is absent.

Reference was also made to *New York and Hastings Steamboat Company* v. *S.S. Teno et al.* (1929), Amer. M.C. 1472 where, although the facts singularly coincide with those in the present case, there are essential distinctions which make the decision inapplicable here. Suffice it to say that there the Court in giving judgment against the ship held that the proximate cause of the loss of the cargo was not the fact that the scow "got hung up" on the propeller but it was the manner in which the cargo was shifted in order to release the scow from the propeller. It was held that this shifting of cargo was negligently and improperly done, that the loss of the cargo was the result of that act and that those responsible for that act must be held liable for the loss.

Judgment

The actions are dismissed.

Actions dismissed.

MURPHY, J.

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July 12.

SYMINGTON v. REIFEL *ET AL.*

SYMINGTON v. REIFEL

Contract—Procuring evidence for a conviction under Excise Act—Consideration of certain payments on obtaining conviction—"Ex turpi causa non oritur actio."

The plaintiff, who had been convicted for a breach of the Excise Act, advised R., his solicitor, that one B., against whom he had a grievance, had likewise committed a breach of the Excise Act. R. then approached the defendant L. who was in touch with parties eager to be revenged on B. as B. had given information to the Customs Commission which resulted in heavy penalties being imposed on said parties, and he entered into an agreement with L. on behalf of himself and the plaintiff to secure evidence against B. shewing that he had been guilty of a breach of the Excise Act for which R. was to receive from L. $150 for bringing about the prosecution; $1,000 when a conviction was secured and $1,000 for each month that B. was sentenced to serve. R., with the plaintiff's assistance, then secured the necessary evidence and on it being submitted to the Customs officials proceedings were instituted against B. who was convicted and sentenced to 12 months' imprisonment. Under the contract R. was paid through L. two sums of $100 and $550 before the trial, $1,000 after B. was convicted and $850 after B.'s appeal was dismissed. S. then brought action for the balance due under the contract.

Held, on the facts, that the action should be dismissed on the principle *"ex turpi causa non oritur actio."*

Statement

ACTION to recover certain sums due under a contract to secure evidence against one Ball shewing that he had been guilty of a breach of the Excise Act. The facts are set out in the head-note and reasons for judgment. Tried by MURPHY, J. at Vancouver on the 11th of June, 1930.

J. A. MacInnes, and *Arnold*, for plaintiff.
Griffin, K.C., for defendants H. F. and G. Reifel.
J. W. deB. Farris, K.C., for defendant Vancouver Breweries.
Wismer, for defendant Lobb.

12th July, 1930.

MURPHY, J.: I find the facts as follows:

Judgment

Towards the end of February, 1928, the Customs authorities had launched a prosecution against plaintiff Symington for a breach of the Excise laws. Symington engaged *Richmond*, a

barrister and solicitor, to defend him. The case against Symington was so strong that *Richmond* advised him the wisest course was to enter a plea of guilty. During the discussions Symington informed *Richmond* that one Ball had likewise committed a breach of the Excise laws. Symington was without funds but he gave this information to *Richmond* not in the expectation that *Richmond* could use it to get money but because he had a personal grievance against Ball and wished to satisfy this by having Ball prosecuted and desired *Richmond's* assistance to bring about such prosecution. *Richmond*, however, saw in this information an opportunity to make money for himself and also to obtain funds wherewith to pay Symington's fine and also to procure some money for Symington. The case at Bar is put forward on the basis that the contract hereinafter referred to was made by *Richmond* as Symington's solicitor and on his behalf. My opinion is that *Richmond* was more of a principal than an agent. As a matter of law the point is immaterial since on the case as presented Symington must be held responsible for *Richmond's* actions as well as for his own. My view is that *Richmond* originated the scheme and made the contract for the mutual benefit of Symington and himself with Symington's knowledge and concurrence that Symington aided *Richmond* in carrying it out.

Judgment

Richmond's expectation of turning Symington's information into cash was based on the following facts:

Through previous dealings which *Richmond* had had with defendant Lobb regarding Ball he was aware that Lobb was in touch with corporations or parties who were eager to be revenged on Ball because Ball had given to the Customs Commission information which resulted in heavy penalties being imposed on said parties or on corporations in which they were financially interested for breach of the Excise laws. *Richmond* accordingly 'phoned Lobb to come and see him. Lobb came and as the result of two or more interviews the following agreement was entered into: *Richmond* was, with Symington's assistance, to secure evidence against Ball shewing that Ball had been guilty of a breach of the Excise Act. He was to lay this before the Customs authorities and endeavour to have them prosecute Ball. Should they decline he was then to approach the Attorney-Gen-

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eral for British Columbia to have the prosecution launched by Provincial authorities. The evidence which *Richmond* was to obtain was to be of such a nature as not only to bring about Ball's prosecution but, if possible, his conviction and the imposition upon him of a long prison term. In return *Richmond* was to receive from Lobb $150 for bringing about the prosecution, $1,000 for the conviction as soon as same was secured and an additional $1,000 for each month that Ball would be sentenced to serve. Since Symington's evidence and assistance were necessary the agreement further provided that a sum not exceeding $200 was to be furnished through Lobb to pay Symington's fine. Under this contract there was paid through Lobb to *Richmond* $100 about the middle of March, $550 later on, $1,000 soon after Ball was convicted and $850 in December after Ball's appeal had been dismissed. This money was given to Lobb by Samett, the manager of the defendant Vancouver Breweries Ltd. and came from the treasury of that Company. Samett had a wide discretion to use said Company's funds for other than ordinary business purposes. Lobb was an employee of Vancouver Breweries Ltd. ostensibly engaged in promoting their soft-drink trade but really utilized by Samett in carrying out activities not related directly to the Company's legitimate business. If these payments were not directly authorized by the Company, Samett acted on the well-founded belief that they would be ratified by the directors as in fact they were. The contract being concluded *Richmond* proceeded, with Symington's assistance, to secure the necessary evidence against Ball. Having obtained it he laid it before the Customs officials. After some delay the latter instituted proceedings against Ball. Two hundred dollars of the $550 paid *Richmond* by Lobb was paid to carry out that part of the contract dealing with Symington's fine. *Richmond* apparently anticipated that at Ball's trial, when it took place, enquiries might be made of Symington, who would be a witness, whether or not he was receiving anything from what was referred to as the "liquor interests" for his activities against Ball. *Richmond,* as a barrister, was well aware that should that fact transpire or any suspicion of its existence arise the evidence against Ball would be very closely scrutinized by the tribunal before whom Ball was tried. *Rich-*

mond was accordingly anxious that no information of the true state of affairs should come out at the trial. He thought this might occur if he himself paid Symington's fine. He, therefore, returned the $200 to Lobb by cheque so that Lobb could arrange that some one other than Symington's solicitor should pay the fine when imposed. The delay of Ball's trial and in consequence the fixing of Symington's fine, however, was such that Lobb had to go to the interior on company business and Lobb returned the $200 to *Richmond*. *Richmond* desired to be in touch with Lobb but he was particularly anxious that all his dealings about this affair should be kept secret. With that end in view he took precautions that no real evidence connecting him with Lobb should come into existence. He, therefore, arranged that Lobb should wire to his (*Richmond's*) stenographer instead of to himself. He also made no entries in his books of account relative to this matter. Ball was eventually convicted and sentenced to twelve months in gaol. He appealed but the appeal failed. *Richmond* then demanded his money from Lobb. As stated $850 was paid in December but Samett decided that no more would be paid. When suit was threatened $1,000 more was offered to *Richmond* in full settlement. This offer he refused and this action was launched.

Judgment

Such being my view of the facts I am of opinion that this case should be forthwith dismissed on the principle *ex turpi causa non oritur actio*. To my mind it would be difficult to conceive of a scheme more likely to corrupt the administration of the criminal law. The bargain entered into between Lobb and *Richmond* was not one creating the relation of solicitor and client. It was not one for the defence of Symington. Lobb's principals had no interest in Symington except in so far as he might serve their purpose in securing the conviction of Ball. It was not a retainer given to *Richmond* for the prosecution of Ball. It was intended by both parties that such prosecution was to be carried on by the Customs authorities or failing them by the Provincial authorities. Such prosecution would in the normal course be conducted by the City prosecutor. *Richmond* did, it is true, interest himself in Ball's prosecution to such a degree as to excite the suspicion of the City prosecutor but he did so not because he held any retainer but because Ball's con-

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viction was to be a source of profit to himself and because the heavier Ball's sentence the more money he would get. The real bargain was for the prosecution and, if possible, the conviction of Ball and the obtaining of a heavy sentence against him. Revenge was the motive on the one side; the desire for money on the other. *Richmond* was not acting as Symington's agent so much as for himself though he had of course to have Symington's co-operation if success was to be achieved and accordingly had to keep Symington informed and give him part of the money. *Richmond* and Symington, therefore, had a strong incentive to procure the prosecution and, if possible, the conviction of Ball whether innocent or guilty and it was they who were to gather the evidence. Moreover the blacker the case they could make out against Ball the more money they would get since the sentence would be based on the evidence. In my opinion any person, but particularly a barrister, who would enter into a contract such as the one herein set out is to say the least open to the suspicion that he would not be over-scrupulous in his methods of obtaining the desired evidence. I am fortified in this view by *Richmond's* precautions to prevent if possible any real evidence coming into existence to shew his connection with the matter. The value of evidence so procured is shewn by Symington's denial on oath at Ball's trial that he was receiving anything from the "liquor interests" despite the existence, to his knowledge, of the said contract and despite the fact that he had already received some $150 thereunder.

Judgment

The action is dismissed with costs.

Action dismissed.

McKNIGHT v. THE GENERAL CASUALTY INSURANCE COMPANY OF PARIS

MORRISON, C.J.S.C.

1930

Aug. 29.

Insurance, automobile—Statutory conditions—Accident—Intoxication of driver—Evidence of—B.C. Stats. 1925, Cap. 20, Sec. 158, Subsec. (5).

McKNIGHT v. THE GENERAL CASUALTY INSURANCE CO. OF PARIS

The plaintiff's car upset in making a turn in the road while he was driving a young lady from Kamloops to Tranquille Sanitarium. The young lady was killed and her parents recovered judgment against him for $1,500. Immediately after the accident people arrived on the scene including doctors and constables and a bottle of gin, partially filled was found under the car. In an action for indemnity under an insurance policy against the defendant Company the main defence was that the plaintiff whilst driving and in control of the car at the time of the accident was intoxicated and the Company was relieved from liability under section 158 (5) of the Insurance Act. The plaintiff smelled of liquor and had been drinking but the evidence was conflicting as to whether he was intoxicated.

Held, that the proper interpretation to put upon said section is, that one who has taken alcohol in sufficient quantity to render himself unsafe to be in charge of an automobile is intoxicated. In this case, however, there is not sufficient evidence to justify the finding that the plaintiff on the occasion in question was intoxicated.

ACTION against an insurance company for indemnity in respect of a judgment obtained against the insured arising out of an automobile accident. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Kamloops on the 27th of June, 1930. Statement

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

29th August, 1930.

MORRISON, C.J.S.C.: The plaintiff insured his automobile with the defendant Company who covenanted (a) to indemnify the plaintiff against all loss or damage for which the plaintiff might become legally liable to pay for bodily injury (including death resulting therefrom) caused to any person or persons by the ownership, maintenance or use of the plaintiff's automobile; (b) To indemnify the plaintiff against direct loss or damage to the plaintiff's automobile if caused solely by accident or collision with another object either movable or stationary. Judgment

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On August 6th, 1928, the plaintiff's car upset whilst making a turn in the road leading from Kamloops to Tranquille Sanitarium. One of the occupants, a Miss Latroumille was killed and the car damaged. Immediately after the accident people arrived on the scene, including doctors and constables. Under the car was found a bottle containing gin. The bottle was not then quite full of liquor.

On the 12th of June, 1929, the parents of the deceased recovered a judgment for some $1,500 and costs against the plaintiff for the loss of their daughter. Upon this suit being brought the defendant undertook, as is usual in cases of this kind, the defence and entered an appearance. However, before trial it notified the plaintiff that it denied all liability and apparently washed its hands of the defence. The plaintiff was, therefore, obliged to engage other solicitors and counsel.

The substantial defence put forward in the present action is contained in paragraphs 8, 14 and 15 of the statement of defence in which it alleges that the plaintiff whilst driving and in control of the car at the time material to the issues herein was intoxicated, and the Insurance Act, Cap. 20, B.C. Stats. 1925 is pleaded, in particular section 154, adding that they did not covenant to indemnify the plaintiff against loss or damage which would occur while the plaintiff was driving the car while intoxicated, and that the intoxication of the plaintiff was the effective cause of the accident.

I was impressed throughout the trial that the main defence was that the plaintiff was intoxicated at the time.

Condition 5 of section 154 of the statutory conditions deemed to be incorporated in the policy is as follows:

> "The insurer shall not be liable under this policy while the automobile, with knowledge, consent or connivance of the insured, is being driven by . . . . an intoxicated person."

The evidence as to the plaintiff's condition is contradictory, one set of witnesses in some respects balancing the other as to credibility—and I would be somewhat perplexed were it not for the evidence of Dr. Jones. Dr. Jones examined the plaintiff at the time with particular reference to intoxication, and he stated that the plaintiff was not under the influence of liquor. He gave his evidence rather emphatically. Dr. Chisholm, who was not

cross-examined, stated that he did not notice he was under the influence of liquor. Then the evidence of Van Buskirk an elderly man to whom the plaintiff had spoken offering to help him with his car just before the accident was to the same effect. The evidence of the defence tends the other way although in parts quite contradictory. Levi, the orderly clerk at the Sanitarium who saw the plaintiff before the accident at the Sanitarium states that he was intoxicated. Constable Elliott stated that the plaintiff was not drunk, but that he smelt of liquor, and had been drinking. I venture to suppose that this would be an inference he had drawn from the alleged smell of liquor. Constable Fraser said the plaintiff smelt of liquor and that he admitted having had beer. Dr. Archibald swore he did not smell liquor when he had seen him.

The evidence in this case shews how loosely and off hand the expressions "drunk," "intoxicated" and "under the influence of liquor" are sometimes used. In the opinion which I have formed based, of course, solely on the evidence and the powers and opportunity of observation of the various witnesses, it is immaterial upon whom the onus of proof is thrown to prove whether the plaintiff was or was not intoxicated at the time of the accident. If upon the plaintiff that he was not intoxicated, then I find that he has discharged that onus. If upon the defendant that he was intoxicated, then in the absence of tests which could readily have been made, and that the defendant's own witnesses gave contradictory evidence, I find that the defendant has not discharged that onus.

Judgment

There is no statutory or judicial definition of such words as "drunk," "intoxicated," "inebriated" which may be and are used interchangeably, nor of the expression "under the influence of liquor." It has been submitted that a man may be under the influence of liquor without being intoxicated, to such an extent that he is unfit to drive an automobile. It would be safe to assume that if a man is intoxicated he is under the influence of liquor. There are all stages of intoxication. Some on the border line.

The question frequently arises in England in cases under the Criminal Justice Acts, the Licensing Acts and Inebriates Acts.

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Scientific experts are called in to the aid of the Courts who venture definitions *obiter*. Definitions have been attempted and used all the way from the effusion of the bibacious rhymster who protests that—

> "He is not drunk who from the floor
> Has strength to rise and drink some more,
> But drunk is he who prostrate lies
> With neither strength to drink nor rise."

down to the scientific definition attempted by Sir James Purves-Stewart, senior physician to the Westminster Hospital, *viz.*:

> "A drunk person is one who has taken alcohol in sufficient quantity to poison his central nervous system producing in the ordinary processes of reaction to his surroundings a temporary disorder which causes him to be a nuisance to himself or others."

I can quite understand that a man may be unfitted to drive his car in consequence of being under the influence of alcohol without being intoxicated or drunk. Yet the determination of that should be based upon the examination of the individual charged, by persons assigned for that purpose. That examination for the purposes of judicial pronouncement is usually given by medical men who apply well-known tests, to which the man charged is subjected. The matter should not and usually is not left to guess work, or to the more or less partizan opinions of casual witnesses. Often the time which elapses between that of the accident and an opportunity of applying these tests renders it quite impossible, but in the case under consideration there was available means of so doing, doctors being present and a hospital within a few minutes distance.

Judgment

What then are the signs which put together constitute alcoholic intoxication? Surely not having liquor in one's possession although that fact might justify putting the party involved to the test. Doubtless what the section of the Insurance Act quoted above means is that a man who has taken alcohol in sufficient quantity as to render himself unsafe to be in charge of an automobile is intoxicated. Unless counsel for the defence can go so far as to urge and to cite authority in support of his submission that the doctrine of *res ipsa liquitor* applies to the circumstances of a car being overturned by skidding at a turn and under which intoxicating liquor is found, constitutes evidence that the driver was intoxicated, there is not sufficient evidence to justify one

finding that the plaintiff on the occasion in question was intoxicated. Accidents such as this one happens when the driver of the car is perfectly sober.

The defence raises other grounds turning upon the alleged non-compliance, or imperfect compliance by the plaintiff of certain requirements of the Act as to notices and so forth. As to these grounds, in my opinion, it would be inequitable to give effect to them even were I satisfied that such defence had been made out. The relief from forfeiture as provided in section 158 should be given.

I cannot refrain from referring to the evidence as to what is said to have transpired in the office of the defendant Company in Vancouver, between the plaintiff, who was obliged at his own expense to come from Kamloops, and Messrs. Robertson and Sheriff representing the Company. All I have to say is that it would indeed be unsafe for Courts of Justice to proceed to the determination of any matter which is in controversy upon testimony obtained by parties interested in such an inquisitorial manner, and where the inducement to badger a party into making incriminating admissions was so powerful, particularly where the plaintiff had already gone through the ordeal of two trials touching the subject-matter of such interrogation.

I have read the reasons for judgment of Mr. Justice W. A. Macdonald in *General Casualty Ins. Co. of Paris* v. *Lambert* (1930) (not yet reported*) in which the facts were entirely different from those in the present action.

There will be judgment for the amounts proved at trial, and if necessary a reference and taxation as to any items left to be adjusted.

Judgment for plaintiff.

* Since reported, *ante*, p. 133.

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Sept. 24.

CHAPMAN & SONS v. STODDART & COMPANY.

Arbitration—Case stated—Evidence—Production of documents—Documents in possession of servant as such—Production refused by servant—R.S.B.C. 1924, Cap. 13, Sec. 22.

CHAPMAN & SONS *v.* STODDART & CO.

A dispute between the owners and charterers of a vessel as to the construction of a charter-party was referred to a sole arbitrator. *Subpœnas duces tecum* were served on the general manager of the Pacific Terminal Elevator Company Ltd. and of the Vancouver Terminal Company Ltd. on two stock clerks, one of each of the said companies and on the assistant to the manager of the James Stewart Grain Corporation. On the hearing they did not produce any of the documents described in the *subpœnas* and the arbitrator declined to order them to do so. On a special case stated by the arbitrator under section 22 of the Arbitration Act as to whether the arbitrator should direct the witnesses to produce the documents specified in the *subpœnas*:—

Held, that the arbitrator should not direct the witnesses to produce the documents in question under the circumstances disclosed by the transcript of the proceedings from which it appears that none of the said companies is a party to the arbitration and in no case have the directors been shewn to have given any authority to any of the said witnesses to produce the documents, though in some cases the directors may not have been asked for or refused such authority.

Eccles & Co. v. *Louisville and Nashville Railroad Company* (1912), 1 K.B. 135 and *Crowther* v. *Appleby* (1873), L.R. 9 C.P. 23 applied.

CASE STATED by *Harold B. Robertson, K.C.*, as sole umpire in a dispute between the owners and charterers of the steamship "Carlton" pursuant to section 22 of the Arbitration Act. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 15th of September, 1930.

Statement

Griffin, K.C., for plaintiffs.

J. W. deB. Farris, K.C., *Lucas, K.C.* and *Locke*, for defendants.

24th September, 1930.

FISHER, J.: This is a special case stated by *Harold B. Robertson, K.C.* for the opinion of the Court pursuant to section 22 of the Arbitration Act.

Judgment

It would appear that by a charter-party dated at London the

12th of November, 1927, between the above-named owners and the above-named charterers, it was, among other things, provided that the S.S. "Carlton" should proceed to Vancouver, British Columbia, and there load a cargo of wheat in bulk.

A dispute having arisen between the said owners and charterers as to the construction of the said charter-party and as to the cause of the delay in the vessel getting to a berth such dispute was referred to Mr. *Robertson* as sole umpire.

Upon the hearing of the arbitration Donald McLean, general manager of the Pacific Terminal Elevator Company Limited and also of the Vancouver Terminal Company Limited was called under a *subpœna duces tecum* and asked to produce certain documents in the possession of the said elevator companies in Vancouver. One Harold J. Parker, stock clerk of the Pacific Terminal Elevator Company Limited, and John McM. Maclennan, stock clerk of Vancouver Terminal Company Limited, were also called under a *subpœna duces tecum* and asked to produce certain documents in possession of the said companies.

One Harry A. Snowball, the assistant to the manager of the James Stewart Grain Corporation Limited, was called under *subpœna duces tecum,* and asked to produce certain documents in possession of the said James Stewart Grain Corporation Limited in Vancouver.

Judgment

The said Donald McLean, Harold J. Parker, John McM. Maclennan and Harry A. Snowball each and all did not produce any of the documents set out and described in the *subpœnas* and the arbitrator declined to order them to do so.

The question for the opinion of the Court is: Whether or not the arbitrator (umpire) ought to direct the said Donald McLean, Harold J. Parker, John McM. Maclennan and Harry A. Snowball to produce the documents named and specified in the said *subpœnas duces tecum* and each of them, under the circumstances disclosed by the transcript of the proceedings of the arbitration.

A good deal of the argument before me was directed to the relevancy of the documents and their admissibility in any event as evidence to prove the truth of the matters stated therein. However, I do not need to determine the questions so raised in

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view of the conclusion I have arrived at on the whole matter which is that the arbitrator should not direct the said persons to produce the documents in question under the circumstances disclosed by the transcript of the said proceedings from which it appears that none of the said companies is a party to the arbitration and in no case have the directors been shewn to have given authority to any of the said persons to produce the documents though in some case or cases the directors may not have been asked for or refused such authority. Under such circumstances it seems to me that the decisions in *Eccles & Co.* v. *Louisville and Nashville Railroad Company* (1912), 1 K.B. 135 and *Crowther* v. *Appleby* (1873), L.R. 9 C.P. 23, are conclusive against such production.

In the *Eccles* case, at p. 148, Buckley, L.J. says:

"We were pressed with the argument that the production of these documents was of very great importance to the plaintiffs for the purposes of their action. That may be so. They may be documents of which they are entitled to discovery if they can get it from the proper person. Without saying that is so, I will assume it. That cannot, however, lead to the result that they ought to get it from a servant without summoning the master, if the master is the proper person to summon. They say that, under the circumstances of this case, they may have great difficulty in obtaining production of the documents, unless they can obtain it from the servant, and that the master may say, when brought before the Court, that they are not his documents, but belong to the Serra and Tintore Steamship Company, which is not in this country but in Spain, or somebody else, and that, if the order for attachment is sustained, the appellant will not go to prison but will produce the documents. Assuming all this, it constitutes no reason for sustaining the order of the Divisional Court if it was erroneous."

Judgment

Mr. *Griffin* of counsel on behalf of the owners, has called attention to certain parts of the evidence tending to shew that the books and documents are in the actual custody, possession and control of the said persons or some of them who are officials in charge of the affairs of the companies locally. But, on this point, I must note that in *Crowther* v. *Appleby, supra,* at p. 29, Coleridge, C.J. says as follows:

"Mr. Sharpley has not the books and documents in his possession otherwise than as the servant of the company, and without their authority or consent he could have no right to remove them from their proper place of custody and bring them up to London."

In the *Crowther* case, the Court refused to grant an attachment against a witness for disobedience of an order which required the witness to produce, before an arbitrator in London,

a large number of books and documents belonging to a railway company in Lincolnshire, of which he was the secretary and solicitor, and which the directors refused to allow him to bring, the company not being parties to the reference. In his judgment, Coleridge, C.J., at pp. 28-9, also says as follows:

"The books and documents which the order requires him to produce are sought to be made evidence in a matter to which the company are not parties; and they object to their production. It seems to have been held in two cases in equity—*Attorney-General* v. *Wilson* [(1839)], 9 Sim. 526 and *Lee* v. *Angas* [(1866)], L.R. 2 Eq. 59,—that the production of documents by a witness would not under similar circumstances be enforced there. In the former of those cases Vice-Chancellor Shadwell refused to compel a partner in a bank to produce, upon a *subpœna duces tecum*, books and accounts of the firm, in a suit to which they were not parties, where his co-partners refused to consent to his producing them."

It might be suggested that in the *Crowther* case there had been a direct refusal, and in the present case only an absence of consent or authority but that this difference does not in itself make the decisions any less binding here is apparent from the judgment of the Court in the *Eccles* case, *supra,* where, at pp. 145-6, Vaughan Williams, L.J., says as follows:

"This is the case of a servant or employee who, according to the view which I take of the evidence, had no authority from his master to produce the documents in question; and upon the evidence before us I also take it that, although he had in a sense possession, custody, and control of the documents, he had not possession, custody, and control of them in the sense that he was justified, as between himself and his master, in shewing them or producing them in evidence without the authority of his master. Judgment

"I do not think that it is really disputed that in point of fact he had not that authority. It is urged that he admits that he never asked for that authority. That is quite true, but, when once the conclusion is arrived at that he is merely a servant, and that his possession, custody, and control of the documents is only such that he cannot properly produce them without the authority of his master, it seems to me to follow that it is impossible to attach him for non-production of them, unless we can draw the inference, which is said to have been drawn by the Divisional Court, that he could without violating his duty to his master produce them. . . . I am of opinion that in the present case there is no evidence to justify us in coming to the conclusion that the appellant here could have produced the documents in question without violating his duty to his employer."

From the transcript of the said proceedings it would seem that the said Donald McLean stated in effect that his superior officer was F. W. Riddell, vice-president of each of the said elevator companies and a resident of Calgary, Alberta, and that he had been instructed by him not to produce the documents.

FISHER, J.

1930

Sept. 24.

CHAPMAN & SONS v. STODDART & Co.

Counsel on behalf of the owners has pointed out that in the *Eccles* case it would appear to have been admitted that the master was within the jurisdiction of the Court and could have been summoned and it is argued that the principle of the decisions referred to is not applicable to a case where the master is outside the jurisdiction of the Court. I hardly think that this argument would be justified by the passages from the judgment above set out. Mr. *Locke* of counsel on behalf of the charterers, however, has pointed out that Phipson (Law of Evidence, 6th Ed.) has obviously stated the principle as applicable without apparently qualifying the statement in any way. At pp. 442-3 Phipson says as follows:

" . . . and in the following cases a witness cannot be compelled to produce his principal's documents:—A steward having the title-deeds of the estate, for his possession is that of his employer (*Falmouth* v. *Moss* [(1822)], 11 Price, 455); a secretary of a company, whose directors have forbidden him to produce, or not been shewn to have consented to his producing, the company's books (*Crowther* v. *Appleby* [(1873)], L.R. 9 C.P. 23; *R.* v. *Stuart* [(1885)], 2 T.L.R. 144); *Eccles* v. *Louisville Ry. Co.* (1912), 1 K.B. 135; *cf. Balfour* v. *Tillett* [(1913)], 29 T.L.R. 332, C.A.); a clerk in a public office, with respect to official papers (*Austin* v. *Evans* [(1841)], 2 M. & G. 430); or, under the Bankruptcy Act, 1914, s. 25, the managing clerk of a creditor (see *Re Higgs; Exp. Leicester* [(1892)], 66 L.T. 296). The partner of a party, however, may be compelled to produce on *subpœna* his own fully-executed counterpart of the joint deed, although his other co-partners object, for each partner has a property in his own copy (*Forbes* v. *Samuel* (1913), 3 K.B. 706, 721-5; and *cf. Rattenberry* v. *Monro* [(1910)], 103 L.T. 560), though this does not apply to documents and letters belonging to the firm. In criminal cases, however, the document must be given up, notwithstanding any instructions from the depositor (*R.* v. *Daye* (1908), 2 K.B. 333)."

Judgment

Under the circumstances I can see no sufficient reason for holding that the cases referred to should be read on the assumption that the decisions would have been otherwise if the master had been outside the jurisdiction. The answer to the question submitted therefore is that the arbitrator should not direct the said persons or any of them to produce the specified documents or any of them.

Question answered in the negative.

REX v. MAH FUNG.

GREGORY, J. (In Chambers)

1930

Oct. 1.

REX v. MAH FUNG

Criminal law—Charge of being in possession of opium—Conviction—Imprisonment — Deportation — Warrant — Validity — Habeas corpus—R.S.C. 1927, Cap. 93, Sec. 43 (2)—Can. Stats. 1929, Cap. 49, Sec. 4 (d).

An applicant for a writ of *habeas corpus* had been convicted for having drugs in his possession and sentenced to imprisonment. On the expiration of his term he was brought from Alberta to Vancouver, placed in the custody of the controller of Chinese immigration there and held for deportation on a warrant from the deputy minister of immigration and colonization addressed to "Mr. Thomas Jelley, controller of Chinese immigration, Winnipeg, Man., or any Canadian immigration officer."

Held, dismissing the application that the applicant was properly detained under the warrant.

APPLICATION for a writ of *habeas corpus*. The applicant had been convicted of having drugs in his possession, and sentenced to imprisonment. On the expiration of his sentence he was brought from Lethbridge, Alberta, to Vancouver under a warrant of the deputy minister of immigration and colonization and placed in the custody of A. E. Skinner, divisional commissioner of immigration and controller of Chinese immigration at Vancouver. The warrant was addressed to "Mr. Thomas Jelley, controller of Chinese immigration, Winnipeg, Man., or any Canadian immigration officer." The application was made on the ground that under section 43, subsection (2) of the Immigration Act, the warrant of the deputy minister must be issued to the officer named therein to detain such person in his custody or in custody at any immigrant station and on the further ground that the warrant was defective because it was also addressed to "any Canadian immigration officer." Heard by GREGORY, J. in Chambers at Vancouver on the 1st of October, 1930. Statement

Nicholson, for the application.
Maitland, K.C., for the Crown.

GREGORY, J.: The man must be deported. Subsection (2) of section 43 of the Immigration Act shews clearly that he may be Judgment

GREGORY, J. (In Chambers)

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detained in the custody of the person to whom the warrant is addressed or in the custody at any immigrant station. The section has been drawn to meet a case such as this.

Application refused.

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1930

June 30.

REX v. WONG CHEUN BEN

REX v. WONG CHUEN BEN. (No. 2).

Criminal law—Electing mode of trial—Speedy trial—Effect of subsequent improper election—Notice of appeal—Service on solicitors—Habeas corpus—Criminal Code, Secs. 827 and 1014.

Where a prisoner is convicted in the County Court Judge's Criminal Court after electing for speedy trial and an entry of this appears on the record it will be presumed on *habeas corpus* proceedings, unless the contrary is shewn, that the consent of the prisoner to be so tried was regularly obtained and that his option to elect was exercised only after the judge stated his right of election in the manner prescribed by section 827 of the Criminal Code.

A good election for speedy trial was held not to be affected by the fact that a subsequent election made after a slight amendment in the charge may not have been taken in the proper manner.

Per MARTIN, J.A.: Upon the County Court Judge's Criminal Court becoming a Court of competent jurisdiction with respect to a case before it, the remedy, if any, for irregularities in the subsequent conduct of the proceedings is in section 1014 of the Criminal Code.

Statement

APPEAL by the Crown at the instance of the acting minister of immigration from the order of FISHER, J. of the 7th of April, 1930, discharging the accused from custody on a writ of *habeas corpus*. The accused was charged with selling opium and was sent up for trial by the police magistrate at Maple Ridge. On the 10th of July he was brought before HOWAY, Co. J. the record of what took place being as follows: "Accused brought up and elects for speedy trial—trial Monday, July 15th, 1929, at 2 p.m." When accused was brought up for trial on the 15th of July the charge was amended by adding thereto the words "contrary to The Opium and Narcotic Drug Act, 1929." Owing to the amendment of the charge the learned judge asked the accused to elect again but in doing so he did not use precisely the

words in section 827 of the Criminal Code leaving out the words "or to remain in custody or under bail as the Court decides." The accused then elected for speedy trial and pleaded guilty to the charge. He was convicted and sentenced to imprisonment for one year and fined $300, or in default of payment six months' imprisonment. Shortly before the expiration of his term of imprisonment accused applied for a writ of *habeas corpus* on the ground that the learned judge had not properly taken his election to be tried summarily and the Court had no jurisdiction to try him. Upon this ground he was released by order of FISHER, J. but was immediately rearrested and delivered to the custody of the controller of Chinese immigration and ordered to be deported because of said conviction. He then applied for another writ of *habeas corpus* and was again released by FISHER, J. on the ground that the conviction was a nullity and furnished no ground for deportation.

Statement

The appeal was argued at Victoria on the 4th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Wood, K.C., for appellant: The accused is not represented. The solicitor on the record accepted service of the notice of appeal. That this is good service see *Lady de la Pole* v. *Dick* (1885), 29 Ch. D. 351; *Sunder Singh* v. *McRae* (1922), 31 B.C. 67; *Rex* v. *Reader, ib.* 417; *Arthur* v. *Nelson* (1898), 6 B.C. 316; *Bagley* v. *Maple and Co. (Limited)* (1911), 27 T.L.R. 284; *Reg.* v. *Justices of Oxfordshire* (1893), 2 Q.B. 149. Accused elected for speedy trial. He pleaded guilty and was convicted. *Habeas corpus* does not lie in this case: see *Rex* v. *Yeaman* (1924), 33 B.C. 390; *Reg.* v. *Murray* (1897), 1 Can. C.C. 452; *Reg.* v. *Burke* (1898), *ib.* 539; *Reg.* v. *Goodman and Wilson* (1883), 2 Ont. 468; *Reg.* v. *St. Denis* (1875), 8 Pr. 16; *Rex* v. *Martin* (1927), 60 O.L.R. 577 at p. 579; *Reg.* v. *Crabbe* (1853), 11 U.C.Q.B. 447; *Reg.* v. *Powell* (1861), 21 U.C.Q.B. 215; *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 at p. 197; *Rex* v. *Chow Chin* (1921), 29 B.C. 445; *Rex* v. *Mali (No. 1)* (1912), 19 Can. C.C. 184; *Rex* v. *Simpson* (1923), 3 W.W.R. 1095.

Argument

No one, for accused.

Cur. adv. vult.

COURT OF APPEAL

1930

June 30.

REX v. WONG CHEUN BEN

30th June, 1930.

MACDONALD, C.J.B.C.: This is an appeal by the Crown. The respondent was convicted on July 15th, 1929, and served the greater part of his term. Just before its expiry however he applied for a writ of *habeas corpus* on the ground that the judge of the County Court Judge's Criminal Court had not properly taken his election to be tried in that Court summarily and therefore had no jurisdiction to try him. FISHER, J. released him on that ground. He was then rearrested and delivered to the custody of the controller of immigration and ordered to be deported because of said conviction. He applied for another writ of *habeas corpus* and was again released by FISHER, J., on the ground that the conviction was a nullity and furnished no grounds for deportation. The appeal is from this order.

The cases relied upon by the Crown shew that where a conviction was by a Court of Record of competent jurisdiction *habeas corpus* will not lie. Here it was contended that the County Court Judge's Criminal Court had no jurisdiction unless the prisoner had elected under the directions of section 827 of the Criminal Code. In the absence of such an election the County Court Judge's Criminal Court was not a Court of competent jurisdiction. It was however further argued on behalf of the Crown that there was a good election here if not on the 15th of July when the case came up for trial but on the original election on the 10th of July when the prisoner was brought before the Court to make his election. The record on the later date is as follows:

MACDONALD, C.J.B.C.

"July 10th, 1929, before HOWAY, Co. J., at 10 a.m. *Rex* v. *Wong Cheun Ben*, Mr. *Nicholson* for accused, Mr. *Pettapiece* for Crown, Jim Goon, sworn interpreter. Accused brought up and elected for speedy trial. Trial July 15th, 1929, at 2 p.m."

When the trial opened on the 15th the Crown made a slight correction in the charge adding "Contrary to The Opium and Narcotic Drug Act, 1929," whereupon the learned judge asked the prisoner to elect again which he did by electing to be tried summarily. It appears however from the material before me which are the notes of the stenographer who was present that the judge failed to use the language of said section 827, leaving out the words "or to remain in custody or under bail as the Court decides." That election was bad but I do not think that it affects

the one of the 10th of July which was a good election notwithstanding the correction in the charge. There is nothing in the material before me to shew that at that time the judge did not properly state all that is required by section 827, and as it appears by the record that he elected to be tried summarily it will be presumed that the statements were made to him as required by that section. *Rex.* v. *Therrien* (1915), 25 Can. C.C. 275; *Rex* v. *Mali* (1912), 1 W.W.R. 766. There is nothing in the record to the contrary. The prisoner pleaded guilty and was convicted and sentenced. The conviction itself recites the prisoner's election to be tried summarily, but, of course, contains nothing of the statement made to him by the judge. In these circumstances I think there was a proper election to be tried by the County Court Judge's Criminal Court. The cases cited to us in support of the argument that *habeas corpus* would not lie even if the election were imperfect do not I think shew that where it is clear that no election was made in law and that the Court therefore had no jurisdiction to hear the case at all that *habeas corpus* is excluded. The case of *Reg.* v. *Crabbe* (1853), 11 U.C.Q.B. 447 is not of much assistance. The Quarter Sessions had general jurisdiction in that case. There was no question of election there. Authorities are not wanting in support of the decision in that case. The Ontario authorities of recent years were pronounced after the passing of an Ontario statute which in effect prohibited *habeas corpus* proceedings when the conviction of a Court of Record was attacked by *habeas corpus*. We have no such law in this Province. In *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 the Court dealt exhaustively with the question of *habeas corpus* in connection with decisions of Courts of Record of general jurisdiction. See the language of Ritchie, C.J., at pages 193 and 197 and of Strong, J., at pages 204-5, which predicate the case upon the Court convicting being one of general or competent jurisdiction.

It is difficult to believe that when a conviction is by a Court without any jurisdiction at all and the conviction is therefore a nullity that *habeas corpus* will not lie to release the prisoner. If it had not been for the first election which I have held was a good election I should have much hesitation in reversing the judgment of FISHER, J. However, holding as I do that the

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Crown's case does not depend upon the second election and since the prisoner's affidavit does not deny that the learned judge made the complete statement required by section 827 at the time of the first election I would allow the appeal without making any finding as to what would have been the result had the case depended upon the second election.

The order appealed from should be set aside.

MARTIN, J.A.: This appeal from an order of Mr. Justice FISHER liberating the respondent on *habeas corpus* from the custody, for deportation, of the controller of Chinese immigration at Vancouver, B.C., should, in my opinion, be allowed upon the first ground, *viz.*, that whatever may be said of the second election, taken (under section 827, C.C. *ex abundanti cautela,* on the 15th of July, 1929, the first one taken on the 10th of that month (the charge not having been altered—*Rex* v. *Yeaman* (1924), 33 B.C. 390) was a good one, as appears by the record of the convicting Court, *viz.*, the County Judge's Criminal Court sitting at New Westminster, B.C., under Part XVIII. of the Criminal Code, and therefore that Court became, beyond question, a Court of competent jurisdiction and fully seized of the whole matter, and hence its conviction (on 15th July upon a plea of "guilty") of the accused for selling opium could not be reviewed by *habeas corpus* or *certiorari* in aid thereof, even though irregularities occurred in the subsequent conduct of the proceedings before it in relation to said re-election after amendment of the charge to cover omissions therein, or otherwise. The remedy, if any, for such irregularities is now to be found, since the Act to amend the Criminal Code of the 30th of June, 1923 (Can. Stats., Cap. 41), in the very wide provisions of that statute which afford (section 1014) adequate relief in all cases where "on any ground there was a miscarriage of justice."

MARTIN, J.A.

These new and adequate provisions for relief should, I venture to say, be borne in mind when applications for *habeas corpus* are considered because the successful result of several of them, in this Province at least, have regrettably brought about frustrations of justice by the improvident liberation of criminals properly convicted of grave crimes, owing to an erroneous conception at the time of the real state of the law, as appears by

certain well known reported cases wherein the error was later acknowledged but too late for a remedy, and also by cases not reported but which have come before us, and the recent observations on the abuse of the writ by Mr. Justice Rinfret of the Supreme Court of Canada in *In re Henderson* (1930), S.C.R. 45, 55-6, merit citation in this connexion, *viz.*:

"The writ of *habeas corpus* is a prerogative process available when 'there is a deprivation of personal liberty without legal justification' (Halsbury, Laws of England, Vol. 10, p. 48). 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.'"

And *cf.* the authorities cited *infra.*

Such being my opinion on the success of the first ground it is unnecessary to consider the other grounds arising out of the second election (alleged to be invalid and insufficient to confer jurisdiction) or express any opinion thereupon, and the more so in this case because the Crown only was represented by counsel and no one appeared for the convict (though we held in the circumstances that the notice of appeal was properly served upon his solicitor upon the record) hence we have not had the benefit of the usual complete argument presenting both sides of the nice questions raised on which there is much to be said—*cf., e.g., Rex* v. *Martin* (1927), 60 O.L.R. 577, and cases therein cited; and also *Rex* v. *Therrien* (1915), 25 Can. C.C. 275; *Reg.* v. *Burke* (1898), 1 Can. C.C. 539; *Reg.* v. *Goodman and Wilson* (1883), 2 Ont. 468; and *Rex* v. *Simpson* (1923), 3 W.W.R. 1095, and section 835 of the Criminal Code conferring upon the judge (which in this Province includes the judges of the Supreme Court thereof, section 823) the powers of a jury "trying the offence in the ordinary way."

MARTIN, J.A.

It follows that the appeal should be allowed, the order for *habeas corpus* set aside and the respondent recommitted to the lawful custody of the said controller of Chinese immigration.

GALLIHER, MCPHILLIPS, MACDONALD, JJ.A.

GALLIHER, MCPHILLIPS and MACDONALD, JJ.A. agreed.

Appeal allowed.

Solicitors for appellant: *Wood, Hogg & Bird.*

Solicitors for respondent: *Russell, Nicholson & Co.*

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1930

June 5.

W. THOMSON & CO. v. BRITISH AMERICA ASSURANCE CO.

W. THOMSON & COMPANY v. BRITISH AMERICA ASSURANCE COMPANY AND PACIFIC SHIPPING COMPANY LIMITED.

Practice—Lapse of six weeks after pleadings closed—Application to dismiss action for want of prosecution—Notice of trial thereafter given—Order for trial at earlier date—Discretion—Rule 436.

The pleadings were closed in the action on the 7th of November, 1929. At the instance of the defendant, a summons was issued on the 26th of May, 1930, for an order for dismissal of the action for want of prosecution and on the 28th of May the plaintiff served notice of trial for the 15th of September. An order was made that the plaintiff give notice of trial for a date not later than the 24th of June, 1930.

Held, on appeal, affirming the order of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the plaintiffs giving notice of trial in the interval between service of notice and the hearing of the motion did not interfere with the learned judge's discretion which was properly exercised and the appeal should be dismissed.

APPEAL by plaintiffs from the order of MCDONALD, J. of the 29th of May, 1930, on an application by the defendant the British America Assurance Company that the action be dismissed as the plaintiffs had not given notice of trial within six weeks after the closing of the pleadings. The pleadings were closed on the 7th of November, 1929, and the summons herein was issued on the 26th of May, 1930. The plaintiff then served notice of trial on the 28th of May for the 15th of September following. The action was to recover $4,892.50 due and owing under a bond under seal entered into between the plaintiffs and the defendant on the 30th of January, 1929. It was ordered that the plaintiffs give notice of trial for a date not later than the 24th of June, 1930, otherwise the action be dismissed for want of prosecution.

Statement

The appeal was argued at Victoria on the 5th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellants: At the instance of the defendant, interrogatories were sent to Scotland, were answered by the

Argument

plaintiffs and received in Vancouver on the 8th of April last. The summons was served on the 26th of May and on the 28th of May we served notice of trial for the 15th of September. The order forcing us to trial on or before the 24th of June is a harsh order and there is no jurisdiction to make it: see *Evelyn* v. *Evelyn* (1879), 13 Ch. D. 138; *Gilder* v. *Morrison* (1882), 30 W.R. 815. Having cured the default there is no jurisdiction and if there is jurisdiction the learned judge wrongly exercised his discretion: see *Maxwell* v. *Keun* (1928), 1 K.B. 645.

A. H. MacNeill, K.C., for respondent: Under marginal rule 436 the learned judge has in his discretion jurisdiction to make this order, and it was properly exercised: see *Sievier* v. *Spearman* (1896), 74 L.T. 132 at p. 133. Giving notice of trial for September is too long and the learned judge has so held: see *Hayes* v. *Howard* (1919), 27 B.C. 167; Annual Practice, 1930, p. 614.

Argument

Bull, replied.

MACDONALD, C.J.B.C.: I think in the circumstances of this case, there has been no reason shewn to entitle us to infer that the order of the learned judge was erroneous. The plaintiffs were in default in not delivering notice of trial. The defendant, as it had a right to do, moved to dismiss for want of prosecution. The plaintiffs then gave notice of trial, for September, a long time ahead. There may have been some difficulties in regard to giving earlier notice, but they did not attempt to overcome those difficulties. The morning when the motion came before the learned judge, it read either to dismiss for want of prosecution, or to make some other order, with such conditions as he thought fit to impose. He did not wish to take the extreme course of dismissing the action for want of prosecution, but he fixed a date, the 24th of June, before which the trial must be had. I think he had jurisdiction to do that; and I do not think the fact that the plaintiff had given notice of trial in the interval between service of notice and the hearing of the motion would interfere in any way with the judge's discretion. That is that view of it. There was nothing in what the plaintiffs did to stay the judge's hand on the motion before him. But the plaintiffs go further and say, assuming that to be so, the order is a

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harsh and unnecessary order because I wanted to receive instructions, or to communicate with my clients, and I couldn't do it in that time. Now Mr. *MacNeill* answers that by saying that there is nothing involved in this case but a question of law. The facts are all undisputed. Apart altogether from that, it has not been shewn that the plaintiffs meant to go to trial at that date. It has not been shewn by Mr. *Bull* that he made any effort, or by letter directed to his clients in London, or by cable or in any other way to get such instructions as he might desire to have; and I do not think that it is sufficient to say that I cannot be ready for trial upon a certain date. He must give a more substantial reason than that. And therefore, on that phase of his case, he must fail. The appeal should be dismissed, and the order of the judge below should be sustained.

MARTIN, J.A.

MARTIN, J.A.: Despite the very persuasive way in which Mr. *Bull* has presented his case, I am unable to accept his view of the same, because I think the matter is really decided in one aspect by the Court of Appeal in the case of *Sievier* v. *Spearman* (1896), 74 L.T. 132, with which I am in entire accord. And as to another aspect of rule 436, I only wish to say that it cannot be that once an application is properly launched to dismiss for want of prosecution, that the jurisdiction of the learned judge can be ousted, or his proper judicial discretion curtailed, by the plaintiff serving notice of trial, or taking any other step thereafter. All that would simply go to mitigation of the terms which the learned judge would see fit to impose in the particular circumstances of each case. And there is nothing in that view which at all conflicts with Vice Chancellor Malins's decision in *Evelyn* v. *Evelyn* (1879), 13 Ch. D. 138, because when that case is properly understood it appears that it is a decision upon this point and upon this only, that where in pursuance of the practice which both counsel agree is the proper practice (and the learned judge set out the proper practice in the Chancery Division at that time) that is, when an undertaking to speed the cause has been given, it is, in ordinary circumstances, really unnecessary and useless to apply to the Court because such an undertaking would be sufficient in that ordinary case to satisfy the discretion

of the Court under the rule, and hence "the only question is how the costs (of the motion) are to be dealt with."

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.: I may say that I take a contrary view with great respect to my learned brothers. The cases cited to support the order do not cover this case. Technicalities should never be allowed to prevail against the interests of justice. Therefore, if in the Chamber Court an order is made which would offend against the fundamental principles of justice, that is, the accomplishment of justice, the discretion of the learned judge in making it cannot tie the hands of the Court. The discretion of the judge in the Court below must be a legal discretion, and it is fundamental that unless there is abuse of the process of the Court, the action should be only carried to trial when both sides are ready for trial. All jockeying for time and place of trial with the aim to get some advantage cannot be viewed with favour. Now the order we ought to make is that class of order made by Lord Esher in the case referred to, which is the true principle. The principle is that the order to be made will depend on the circumstances of the case. Now the circumstances presented to the Court are these: Firstly, we have a member of the Bar, Mr. *Ray*, a barrister and solicitor; he swears in paragraph 4:

MCPHILLIPS, J.A.

"I am informed by counsel and verily believe that the plaintiff cannot proceed to the trial of this action until after the long vacation."

There has been no cross-examination on this affidavit. Then Mr. *Ray* in paragraph 7 says:

"A notice has been posted in the Vancouver Registry of the Supreme Court, to the effect that by the order of the learned judges of the Courts of British Columbia, no cases will be set for trial after the 20th of June, 1930, and prior to the beginning of the long vacation, without a special order. I was well aware that no dates were available prior to the 20th of June, knowing well the state of the trial list, and the fact that a number of actions in which my firm is engaged were not set down."

In view of these facts can it be said in the circumstances of this case that the order made below was a proper order? I am not of that opinion. When the notice for trial was given, before the summons was heard, the learned judge was disentitled to make any order except to dismiss the application; and perhaps

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giving costs if thought proper. Here the plaintiffs are foreign plaintiffs, a distance of a continent and the Atlantic Ocean dividing the clients from their solicitors. Is it fair, or is it right that a plaintiff should be compelled to go to trial under these circumstances? He has a right to commence an action, and he is entitled to carry on that action, and he is entitled to carry it on according to instructions of his client, and unless there was some abuse of the process of the Court, there is no right on the part of the defendant to force a plaintiff to trial. The plaintiffs should be at liberty to present their case properly. Is a judge's order of such sacredness when made in the exercise of a discretion that it becomes a bar to this Court making an order which will accomplish justice and reasonably admit of a proper trial being had? My answer unhesitatingly is that the order must give way. I would therefore allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I doubt if I would have made this order in the first instance; but on the other hand, feel I cannot interfere with the discretion, because it was shewn that the postponement gave the opportunity to make that application.

Appeal dismissed, McPhillips, J.A. dissenting.

LAWSON v. INTERIOR FRUIT AND VEGETABLE COMMITTEE OF DIRECTION. (No. 2).

FISHER, J. (In Chambers)

1930

Sept. 11.

LAWSON v. INTERIOR FRUIT AND VEGETABLE COMMITTEE OF DIRECTION

Costs—Taxation—Review—Witness fees—Affidavit of disbursements—Hotel expenses and meals—Witnesses not called.

In general the fees for witnesses called at a trial should not be disallowed on the ground that evidence negativing the fact of his attending more than one trial at the time was not produced; where, however, it is seriously suggested as a fact by counsel on the taxation that a witness has attended in more than one case or for another purpose the taxing officer in his discretion may require an affidavit negativing the statement or suggestion so made.

APPLICATION by defendant to review the taxation of defendant's costs. Heard by FISHER, J. in Chambers at Vancouver on the 4th of September, 1930. Statement

A. Bruce Robertson, for the application.
Wood, K.C., contra.

11th September, 1930.

FISHER, J.: Application by defendant to review taxation of defendant's costs.

The rule seems to be well established that the taxing officer's ruling as to whether any particular item should be allowed or excluded ought not to be interfered with on appeal unless it is perfectly clear that he has acted on a wrong principle. See *In re Legal Professions Act. Noble & St. John* v. *Bromiley* (1928), 39 B.C. 518; *Canadian Educational Films Ltd. and Goodart Pictures Inc.* v. *Horan and Nichols Theatres Ltd. ib.* 424. Judgment

Applying the foregoing rule I would interfere only with respect to the items *re* E. J. Chambers amounting in all to approximately $50. The taxing officer in his reasons for judgment states that he disallowed witness fees of Chambers though called at the trial on ground that evidence negativing fact of his attending more than one trial at the time was not produced. He seems to have treated it as an inflexible rule that the affidavit of disbursements is required to state that the witness did not attend

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as witness in any other cause and in support of this is cited *Ham et ux.* v. *Lasher et al.* (1865), 24 U.C.Q.B. 357, which however was decided under a rule in Ontario specifically requiring such a negativing affidavit whereas we have no similar provision in our Rules.

Where it is stated or even seriously suggested as a fact by counsel on the taxation that a witness has attended in more than one case or for another purpose as I assume was the case in the *Murray* v. *Harper* taxation referred to by counsel for plaintiff then I would agree that the taxing officer in his discretion, even in the absence of a specific rule, might require an affidavit negativing the statement or suggestion so made.

Here, however, there is nothing in the material to shew that any statement or serious suggestion, that the witness attended in more than one case or for another purpose, was made but only the submission that the onus was on the party whose bill was being taxed and that there was no affidavit denying what according to the material was never seriously put forward as a fact. In answer to the submission counsel for the defendant asked leave to file an affidavit but leave was refused and the items disallowed, the taxing officer apparently acting on the wrong principle that there was an inflexible rule and that he had no discretion in the matter. Under such circumstances I would allow the said items *re* E. J. Chambers including the hotel expenses and meals as I am advised that in *Angliss* v. *Penticton* (unreported) a reasonable amount for hotel expenses and meals having been allowed by the taxing officer, the item was sustained on an application for a review and I see no sufficient reason for deciding otherwise in the present case.

Judgment

As to the disallowance of the fees to witnesses not called, I cannot say that the taxing officer was clearly wrong in holding that the defendant had not discharged the onus of shewing their relevancy. It seems to me also at least doubtful whether the defendants had shewn the reason why the witnesses were not called. The disallowance will, therefore, stand. See *Eastern Townships Bank* v. *Vaughan* (1910), 15 B.C. 299.

Order accordingly; no costs.

Order accordingly.

HYSLOP v. BOARD OF SCHOOL TRUSTEES OF NEW WESTMINSTER.

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HYSLOP v. BOARD OF SCHOOL TRUSTEES OF NEW WESTMINSTER

Discovery—Persons subject to examination—Action on building contract—Examination of architect.

Where an architect is engaged in such a capacity that the primary purpose and effect of his engagement is to delegate to him a portion of the defendants' authority and constitute him their agent to deal with third parties within the general scope of his employment, he is subject to examination for discovery by the plaintiff.

APPLICATION by plaintiff for the examination of James B. Whitburn, architect, employed by the defendants, for discovery. Heard by FISHER, J. in Chambers at Vancouver on the 13th of September, 1930. Statement

G. E. Martin, for the application.
W. J. Whiteside, K.C., contra.

20th September, 1930.

FISHER, J.: This is an application on the part of the plaintiff for the examination of James B. Whitburn, architect, for discovery herein.

Although the affidavits before me on the application do not state any more as to the employment of the architect than that he was the architect for the defendants, and drew the plans and specifications for the erection of the Richard McBride School, New Westminster, and superintended the construction, it was agreed by counsel that the contract between the parties herein should be considered part of the material before me. Judgment

The inference I draw from such contract is that the defendants had practically appointed the architect their agent, at least to a limited extent, for the purpose of taking charge of the work and accepting or rejecting the work as done by the plaintiff; and so the case referred to on the argument *Smith* v. *Clarke* (1887), 12 Pr. 217, applies; in which case it was held that under similar circumstances an order for the examination by the plaintiff of the architect for discovery should be allowed.

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Judgment

The Ontario rule would not seem to be substantially different from our own rule.

Reference might also be made to *Powell* v. *Edmonton, Yukon & Pacific Ry. Co.* (1909), 2 Alta. L.R. 339; 11 W.L.R. 613, where at p. 340, Beck, J. says as follows:

"The answer to the question whether a person is or is not an officer within the rule seems to me to depend upon the point I have suggested, that is, whether the person in question is engaged merely to perform certain services for the company, although as a mere incident in the performance of his duties he may become in some sense an agent of the company, or engaged in such a capacity that the primary purpose and effect of his engagement is to delegate to him a portion of the company's authority and constitute him its agent to deal with third parties within the general scope of his employment."

Here I think the architect was engaged in such a capacity that the primary purpose and effect of his engagement was to delegate to him a portion of the defendants' authority, and constitute him their agent to deal with third parties within the general scope of his employment.

I would, therefore, grant the application; costs in the cause.

Application granted.

IN RE MEDICAL ACT. *IN RE* MURPHY.

Physicians and surgeons—College council—Inquiry into alleged misconduct of practitioner — Disciplinary powers — Functions of council and executive committee thereof—Appeal—R.S.B.C. 1924, Cap. 157, Secs. 51, 53 and 54.

Where the conduct of a member of the College of Physicians and Surgeons is the subject of inquiry the Medical Act only authorizes the executive committee of the council thereof to find the facts and report to the council. It cannot adjudicate on the facts as found and the fact that the membership of the executive committee is identical with that of the council does not entitle the council to merely adopt the adjudication made by the committee.

When the conduct of a member is the subject of an inquiry he is entitled to be represented by counsel both before the committee and before the council.

Where the Court holds on appeal that the council has not adjudicated on the matter before it, the matter should be remitted to council for rehearing and adjudication.

APPEAL by a member of the College of Physicians and Surgeons from the decision of the Council of the College of Physicians and Surgeons on an inquiry under the Medical Act. Argued before MURPHY, J. at Vancouver on the 25th of September, 1930. Statement

T. E. Wilson, for appellant.
Harold B. Robertson, K.C., for respondent.

2nd October, 1930.

MURPHY, J.: Counsel for the College of Physicians and Surgeons rightly, in my opinion, remarked at the hearing before me that the procedure sections of the Medical Act, R.S.B.C. 1924, Cap. 157, make the working out of its provisions a difficult task. It is complained *in limine* by appellant that there has been such departure from the requirements of the Act as to make it imperative that the matter be sent back for rehearing. I have given careful study to the procedure sections and would construe them as follows: Judgment

When a complaint, such as the one which originated the proceedings herein, is lodged, the Council must cause the facts to

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IN RE MURPHY

be ascertainel by the executive committee. This seems to be the clear meaning of section 51. The combined result of sections 51, 53 and 54 is, I think, that the executive committee is the sole body that can find facts. Section 54 for instance requires the testimony to be given under oath and the chairman or acting-chairman of the committee is the only person authorized by the Act to administer an oath for that purpose. A perusal of sections 47 and 51 will shew that power to adjudicate on the facts so found and to impose such penalty as is deemed just is vested in the Council. Nowhere in the Act can I find any authority given to the executive committee to do more than find the facts and report same to the Council. It is objected here that the executive committee has in its report to the Council purported to adjudicate. I think the committee has done so in the second and third subparagraphs of paragraph 4. The objection does not, however, seem to be of much substance for two reasons.

Judgment

(1) Because the members of the executive committee who acted herein were all the same gentlemen and the only ones who sat on the Council when action was taken on this case and so could not have been influenced by any adjudication by the executive committee; and (2) because the committee did find and report the essential facts as appears from a full transcript of the evidence attached to their report. This transcript shews that no material facts were controverted before the committee as no witnesses were called on behalf of appellant except one whose evidence it would appear to me does not bear on the matter in issue in any way.

The next objection is that the Council did not adjudicate at all but merely adopted the adjudication made by the committee and then imposed a penalty. It follows from the views above expressed on the procedure sections that this is a weighty objection. The executive committee, I think, can only find facts; it cannot adjudicate on facts found by it. That adjudication—by far, in my opinion, the more important function—is the exclusive duty of the Council. It is urged here that as the gentlemen who sat on the executive committee and those who constituted the Council when appellant's case was before that body are identical and were all present and as no other member of the Council took part in the proceedings no harm was done. But

the reply is that no authority can be found in the Act for such a departure from its provisions. It may be that I am to assume that the Council did actually adjudicate though that position was not taken in the argument but there is a further matter of grave moment in connection with the proceedings before the Council. Appellant's counsel on April 30th, 1930, had written to the registrar of the College asking to be notified of the time and place of the hearing. On May 5th, 1930, he received a reply that such information would be given. According to an affidavit filed herein, the statements in which are not controverted, at 10 a.m. on May 13th, 1930, appellant's counsel was notified by 'phone from counsel for the College that the Council hearing would take place at 4 p.m. of that day. Appellant's counsel replied that owing to a prior engagement he would be unable to appear and suggested the hearing should be adjourned but was informed the hearing must go on as in fact it did. The fact that counsel has other engagements is of course no reason why an adjournment should be granted if reasonable notice of time and place of hearing has been given. But the notice of a few hours given herein, in my opinion, was not reasonable notice considering the grave nature of the subject-matter to be adjudicated upon and particularly considering the possibility, in case of an offence being found to have been committed, of the infliction of a penalty which, in effect, would deprive the appellant from ever again practising his profession. It was argued before me that appellant's counsel had full opportunity of argument before the executive committee. To this there are two answers: (1) It follows from views already expressed that such argument, in so far as it was directed towards anything other than the question of what facts should be found, was made before the wrong tribunal; and (2) That appellant's counsel stated at the hearing before me that he had not made an exhaustive argument before the committee and had not dealt at all with the important matter of the possible penalty. In reply to this it is urged that the true meaning of section 53 is that the person whose conduct is the subject of inquiry is entitled to be represented by counsel before the committee only and not before the Council. If my view of the procedure sections is correct this cannot be so for whereas section 53 gives such person

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the right without qualification to be represented by counsel, to deny this right at the Council hearing would be to deprive him of counsel's services before the tribunal where the most important questions are to be determined and, in my opinion, would invalidate the proceedings. It is urged further that since the appeal is a hearing on the merits I should decide the matter irrespective of what happened before the case reached me. To do so would be to ignore the tribunals set up by the Act and to substitute a hearing before a Supreme Court judge as a proceeding of first instance under the Act.

Clearly no such course is authorized. The views herein expressed are supported by *Re Stinson and College of Physicians and Surgeons of Ontario* (1912), 27 O.L.R. 565; 10 D.L.R. 699, as I read that case. The *Stinson* case was decided on the provisions of the Ontario Act (R.S.O. 1897, Cap. 176, now R.S.O. 1927, Cap. 196) which has many features in common with the British Columbia Act as to the method of dealing with complaints against practitioners. The matter is remitted to the Council for rehearing and adjudication. Reasonable notice of the time and place of such rehearing must be given to appellant's counsel who should be accorded a hearing if he so desires. In view of the conflicting arguments made before me as to what legal principle should govern the adjudication the task of an appellant tribunal, should the case come again to appeal, will be simplified if the Council, in case they find that an offence has been committed, will give written reasons for such finding. Costs reserved.

Judgment

Order accordingly.

REX v. BURNETT.

LAMPMAN, CO. J.

1930

Sept. 20.

REX v. BURNETT

Constitutional law — Municipal tax — Trades Licence By-law — Ejusdem generis rule—B.N.A. Act, Sec. 92 (9).

The defendant was convicted by the police magistrate in Victoria on a charge of carrying on in the City of Victoria the profession of a teacher of music without a licence as required by the Trades Licence By-law of said City.

Held, on appeal, that there is power in the municipality to impose the licence tax and the appeal should be dismissed.

APPEAL by defendant from his conviction by the police magistrate at Victoria, on a charge of carrying on his profession as a teacher of music without a licence as required by the Trades Licence By-law. Heard by LAMPMAN, Co. J. at Victoria on the 19th of September, 1930. Statement

Beckwith, for appellant.
C. L. Harrison, for respondent.

17th October, 1930.

LAMPMAN, Co. J.: This is an appeal from a conviction by the Victoria Police Magistrate of the appellant on a charge of carrying on in the City of Victoria the profession of a teacher of music without a licence as required by the Trades Licence By-law of the City of Victoria. There is no dispute about the facts but Mr. *Beckwith* contends that there was no power in the Municipality to impose the licence tax and he relies on the judgment of Chief Justice BEGBIE in 1886 in *Regina* v. *Mee Wah,* 3 B.C. 403. The jurisdiction of the Province to pass the requisite legislation and of the City to pass the requisite by-law depends on the meaning and effect of subclause (9) of section 92 of the British North America Act, and the material words are: Judgment

"In each Province the Legislature may exclusively make laws in relation to . . . shop, saloon, tavern, auctioneer, and other licences. . . ."

In *Regina* v. *Mee Wah* it was held that a licence could not be imposed on a person carrying on a wash-house or laundry, the *ratio decidendi* being that the licence fee was in reality a pro-

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hibition or restriction, but the learned Chief Justice was inclined to think—he used the words "seems probable"—that wash-houses were not taxable under subclause (9) of section 92 of the British North America Act.

Since that decision the scope of taxation has broadened immensely and the trend does not seem to be much curbed by judicial decision.

In *Corporation of Victoria* v. *Belyea* (1907), 13 B.C. 5 a barrister was held liable for the payment of a licence fee. The point now taken by Mr. *Beckwith* was not taken but I am inclined to think the point had already been decided adversely to the contention now taken by him although the decision is not reported.

In the head-note to *Regina* v. *Mee Wah* it is stated (and the judgment warrants the statement):

"The most reasonable rule to adopt to ascertain whether a certain matter or thing is within the meaning of a statute as being *ejusdem generis* with things specified therein "and others," is to look to the object or mischief aimed at by the statute. All similar things that come within that object, though not in the abstract *ejusdem generis* are so for the purposes of the statute."

Judgment

If that reasoning is applied why should "music teacher" not be included? He is carrying on his calling and like the auctioneer is no doubt charging for his services. The municipalities in 1867 were no doubt looking for people to tax just the same as they are now and why should auctioneers alone be singled out as fit subjects for taxation? I do not think they were so singled out.

In *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General of Ontario* (1897), 66 L.J., P.C. 34 at p. 36 Lord Herschell, in delivering the judgment of their Lordships of the Privy Council, said:

"They do not doubt that general words may be restrained to things of the same kind as those particularized, but they are unable to see what is the *genus* which would include 'shop, saloon, tavern,' and 'auctioneer' licences, and which would exclude brewers' and distillers' licences."

The appeal must be dismissed with costs fixed at $20 and the disbursements.

Appeal dismissed.

IN RE TAXATION ACT. *IN RE* HASTINGS STREET PROPERTIES LIMITED.

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IN RE HASTINGS STREET PROPERTIES LIMITED

Taxation—Income—Real estate transaction by company—Money advanced by shareholders to make deal—Company agreeing to return shareholders' loan and profits made—Profit made on transaction—Whether income of company and liable to taxation.

Hastings Street Properties Limited was incorporated with power to purchase, lease, etc., lands and to sell and dispose of same. Its authorized capital was 50,000 shares of $1 each but only five shares were issued, one to each of five shareholders. The Company purchased certain property in Vancouver for $40,000 in 1926, and sold it in 1928 for $70,000. In order to raise the money to make the purchase, the five shareholders advanced the necessary sum under agreement with the Company that upon a sale being made the profits would be paid to the shareholders and this was carried out. The Minister of Finance sought to recover income tax on $30,000 contending that it was profit made by the Company. It was held by the Court of Revision that after payment of the profits to the five shareholders under the said agreement there was no taxable income.

Held, on appeal, reversing the decision of the Court of Revision (MARTIN, J.A. dissenting), that the $30,000 profit was "income" of the Company within the meaning of the Taxation Act and is subject to taxation.

APPEAL by the Minister of Finance and the Assessor for Vancouver Assessment District from the decision of *W. H. S. Dixon,* Esquire, judge of the Court of Revision for Vancouver Assessment District of the 11th of January, 1930, on appeal by the Hastings Street Properties Limited against the assessment for the year 1928. Said Company was incorporated in 1926 for the purpose, *inter alia,* of purchasing, leasing, mortgaging or acquiring lands; to borrow or raise money for the purposes of the Company; to sell or dispose of the undertakings of the Company and to make and enter into agreements or contracts with any person. In July, 1926, the Company purchased a property on Hastings Street in Vancouver and in 1928 this property was sold at a profit of about $30,000. The Company itself at no time had more than $5 paid-up capital and in order to purchase the property in question the Company entered into an agreement with its five shareholders whereby they advanced

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the money to purchase the property and in consideration of the advances they were to receive all the profits in the event of a sale. On the sale being made the profits were divided amongst the shareholders under the agreement. The Company was assessed on taxable income for 1928, in respect of this sale for $26,393. On appeal from the Court of Revision it was held that under the agreement referred to the Company did not make any profit on the transaction and had no taxable income for the period in question.

Statement

The appeal was argued at Victoria on the 4th and 5th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Harper, for appellants: Buying and selling property was part of the Company's business and the property in question was bought by the Company and sold at a profit. This profit is taxable: see *Ritson* v. *Phillips* (1924), 131 L.T. 384; 9 T.C. 10; *Inland Revenue Commissioners* v. *Blott* (1921), 2 A.C. 171 at p. 201; *Dovey* v. *Cory* (1901), A.C. 477 at p. 486. The case of *In re Taxation Act and The All Red Line, Ltd.* (1920), 28 B.C. 86 is clearly distinguishable as in that case it was not part of the business of the Company to sell its ships.

Argument

Remnant, for respondent: What took place here was an appreciation of capital: see *Assets Co., Limited* v. *Inland Revenue* (1897), 24 R. 578 at p. 586; *Stevens* v. *Hudson's Bay Company* (1909), 101 L.T. 96; *Collins* v. *The Firth-Brearley Stainless Steel Syndicate, Ltd.* (1925), 9 T.C. 520. On the construction of the statute see Broom's Legal Maxims, 8th Ed., 514; *Attorney-General* v. *Selborne* (*Earl of*) (1902), 1 K.B. 388 at p. 396.

Harper, in reply: As to expenses and bonuses see *Last* v. *London Assurance Corporation* (1885), 10 App. Cas. 438.

Cur. adv. vult.

7th October, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The Hastings Street Properties Limited was incorporated with objects, *inter alia,* to buy and sell land. There were only five shareholders and the paid-up capital of the Company was the sum of $5. Their principal transaction

was the purchase of a piece of property on Hastings Street, Vancouver, which was shortly afterwards resold at an advance of $30,000. To enable the Company to buy this property each of the five shareholders advanced moneys aggregating $40,000, the price of the property, and the Company entered into an undertaking with them in consideration thereof to pay to them the profits which should be realized on a resale. The Assessor fixed the Company's income after the resale of the property aforesaid at the sum of $26,393, approximately the profits made by the resale of it and levied the tax complained of thereon. The Court of Revision held that the said profits were not income of the Company which could be taxed under the Taxation Act and amendment thereto. The Court of Revision said that the question was whether the Company should be allowed as deductions from their gross income the amount agreed to be paid to the five shareholders as money expended in producing "the income" and decided that after payment of the profits to the five shareholders there was no taxable income.

In my opinion the money supplied by the five shareholders as aforesaid to enable the Company to buy the said property was a loan of capital; that it was such is evidenced by a resolution (not amongst the exhibits but mentioned by witness Robert Kerr) of the Company authorizing the borrowing of it. If these profits are treated as equivalent to interest they fall within the provisions of the Taxation Act, Cap. 254, R.S.B.C. 1924. This Act was amended in some respects by the statute of 1925, Cap. 54. Section 44 of the main Act, as so amended enacts that the expenses incurred in the production of the income may be deducted from the gross income but that no deduction by way of expenses shall be made for (*b*) any interest on capital. This subsection is renumbered (*e*) in the amended Act.

MACDONALD, C.J.B.C.

Subsection (*c*) of the last-mentioned Act allows to be deducted,—

"Interest on moneys borrowed from without the Province either by way of loan, advance, or through a bond or debenture issue, unless a separate return is made covering the aggregate amount of such interest and income tax is paid on that amount at the rates provided under section 52, except that the maximum rate shall not exceed four per centum."

Interest on money borrowed from without the Province therefore may be set off against the cost of producing the income con-

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ditionally upon the making of a separate return and if the income tax be paid by the person or persons to whom the interest was paid. Subsection (*f*) deals with interest which shall not be set off against the cost of production of the income if advanced by a "parent, subsidiary, or associated corporation."

The Court of Revision thought that under said subsection (*e*) capital was not to receive its widest signification because of the references to interest in other subsections, in other words subsection (*e*) was practically rescinded by construction of the other sections. Now the words of subsection (*e*) are clear and explicit. Interest on capital is not to be set off against cost of the production of the income. The other subsections, if indeed we may look at them at all for the purpose of cutting down the wording of subsection (*e*) refer it is true to interest and upon certain conditions being performed that that interest may be set off against the gross income. But I think the proper construction is that interest other than interest on capital may be set off conditionally. The Legislature having dealt specifically with interest on capital then proceeded to enact respecting other interest,

MACDONALD, C.J.B.C.

not interest on capital. All these provisions are capable of being given effect to notwithstanding any suggested conflict. The Court if possible is to construe the statute so as to give effect to all its provisions and therefore if I am permitted to construe subsection (*e*) by reference to other sections I am forced to the conclusion that the other sections are not in conflict with subsection (*e*) and that therefore said subsection (*e*) stands as a direct provision against the set-off of interest on capital. Section (*f*) I think has no real bearing upon the question at all and the fact that shareholders are not mentioned in it does not imply that because they are lenders of capital and are not mentioned in (*f*) the Company shall be entitled to set off interest in contravention of the plain words of subsection (*e*). Now while the profit may be looked upon as the consideration for the loan it is not at all events what is popularly called interest. It may therefore not be affected by subsection (*e*) of section 44. I must therefore enquire whether or not the transaction was an illegal evasion of the Taxation Act. It seems to me that if this transaction is legal that all companies by resorting to the like methods may evade the payment of income tax. They may

carry on their business on borrowed capital under an agreement such as the one in question here and thus defeat the Act. They may claim the profit made by their company under such an agreement and thus leave nothing for the tax collector. I think a transaction which leads to this result must be regarded as an illegal evasion of the Act, and I hold this transaction to be such. The only object of the scheme as I see it is to evade payment of income tax. Instead of the shareholders supplying the company with capital and receiving their profits if any in dividends they may set up a dummy company without capital and use it to buy property for itself with borrowed money under a scheme which defeats the revenue.

MACDONALD, C.J.B.C.

The assessment of the Assessor should be restored.

MARTIN, J.A.: This appeal should, in my opinion, and with all due deference to other opinions, be dismissed because, in brief, I think the Court of Revision below took substantially the right view in holding that under the unusual circumstances of the special arrangement between the Company and five of its shareholders, the deductions that should be made from the gross income of the proceeds of the particular adventure, or speculative loan, if you like, leave no net income subject to taxation against the Company whatever may be the personal liability of the said five members.

It is no answer, in my opinion, to this view to point out, truly, that the results of a number of such transactions might, or indeed would, lead to something unexpected; that often is so where there is a *casus omissus,* as herein. It might be otherwise if it could be held that the transaction was a sham one, but such is not the fact here: the most that can fairly be said is that it is peculiar but not illegal. It really comes down to this that the Company was, within its powers, permitting some of its members to make a profit out of a real-estate speculation by using its name while putting up their own money. Now I know of nothing which prevents a company from so doing, in any honest business venture, just as a private person may, to, *e.g.,* oblige a friend.

MARTIN, J.A.

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

GALLIHER, J.A.

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IN RE HASTINGS STREET PROPERTIES LIMITED

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: The Crown appeals from the decision of the Court of Revision for Vancouver Assessment District. The decision was that the Company had no taxable net income for the period in question. To get a proper understanding of the matter so as to apply the law to the relevant facts I will in a short manner state what the facts necessary to bear in mind are. The respondent is a company incorporated under the British Columbia Companies Act (B.C. Stats. 1929, Cap. 11). The powers may be said to be shortly, to purchase and sell lands, erect buildings, to take mortgages, to manage lands and buildings, to borrow money for the purposes of the Company. It was primarily a company to buy and sell lands and with powers to borrow moneys in the carrying out of its business. There are only five shareholders each holding one share of the par value of $1. The share capital of the Company authorized was 50,000 shares of $1 each, the total issued capital being the five shares of $1 each. In the course of carrying on its business the Company, it would seem, embarked upon only one transaction in the exercise of its corporate powers and that was to purchase lot 5, block 22, D.L. 541, in the 700 block on Hastings Street in the City of Vancouver, the purchase price being $40,000. Admittedly the Company did not have the requisite money to make the purchase—it obtained the money by borrowing the sum from the shareholders it being agreed with the shareholders that the net proceeds made on the sale of the land should go to the shareholders making the advances. A sale was made of the land in 1928, the purchase having been made in 1926. The short question is whether the $30,000 profit realized by the Company can be said to be income within the purview of the Taxation Act (Cap. 254, R.S.B.C. 1924, Secs. 4 (1), 44 (1)).

The contention of the Crown is that the profit made is income within the meaning of section 4 (1) of the Act, and the assessment made in respect of the profits so made on the sale as for the year 1928 was put at "Net taxable income $26,393. Tax thereon $2,111.44, less 10 per cent. $211.14. Tax $1,900.30." The judge of the Court of Revision in his judgment in the matter said in part as follows:

"Under the definition of 'Income' in the Taxation Act, R.S.B.C. there is no doubt in my mind that the moneys received by the Company in payment for the sale of the property in question is income, and the question is

whether or not deductions from this gross income should be allowed for the respective amounts owing and paid to the five shareholders under the agreements entered into by them as aforesaid."

Unquestionably it was income and being income is taxable as such, that the Company made an agreement to pay the profits to the shareholders cannot meet the question and satisfy the demand of the Crown based upon the statute. The procedure adopted and the manner of carrying it out, if acceded to, would be an illegal evasion of the Taxation Act in my opinion. It was advanced at this Bar that the moneys in question were in their nature assets not income or in other words to be treated as capital. Upon this point I would refer to what Lord Halsbury, L.C. said in *Dovey* v. *Cory* (1901), A.C. 477 at pp. 486-7:

"The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable influence in determining the question what may be treated as profits and what as capital."

Here it was the sole business transaction entered into by the Company and in plain exercise of powers taken, *viz.*: to buy and sell land. As the merchant sells goods over the counter that which is realized over and above the cost to the merchant must be said to be profit. Such a proposition is unchallengeable and that is income within the meaning of the statute. I would refer to what Cozens-Hardy, M.R. said in *Stevens* v. *Hudson's Bay Company* (1909), 101 L.T. 96 at p. 97:

MCPHILLIPS, J.A.

"This is not a case where land is from time to time purchased with a view of resale."

That is exactly the present case and applying the reasoning of the Master of the Rolls, in the present case, the profit made is liable to income tax. We find Farwell, L.J. saying in the above case at p. 98:

"But if, instead of dealing with his property as owner, he embarks on a trade in which he uses that property for the purposes of his trade, then he becomes liable to pay not on the excess of sale prices over purchase prices, but on the annual profits or gains arising from such trade, in ascertaining which those prices will no doubt come into consideration."

Lord Dunedin in the *Commissioner of Taxes* v. *Melbourne Trust, Limited* (1914), A.C. 1001 at p. 1010, said:

"But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

And that was the case here. In the *Scottish Investment Trust Co., Limited* v. *Inland Revenue* (1893), 21 R. 262, it was held

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"that gains made by the company by realizing at larger prices than those paid for them were to be reckoned as 'profits and gains' of the company, in the sense of the Property and Income Tax Act, 1842, Schedule D."

In *Assets Co., Limited* v. *Inland Revenue* (1897), 24 R. 578 (3 T.C. 542), Lord Young at p. 586 said:

"I should say that I have really no doubt that any person or any company making a trade of purchasing and selling investments will be liable in income tax upon any profit which is made by that trade."

In my opinion the assessment is a valid one. The Company made the profit, not the shareholders who advanced the moneys, and the Company erred in making payment to the shareholders of all the profits so earned by the Company without first deducting the income tax thereon. The profit was not earned by the shareholders it was a profit of the Company, in other words, for the purpose of this inquiry, income under the Taxation Act. That the Company obligated itself to pay to the shareholders all the profits cannot affect the question to be here determined. The profits on the transaction being the profits of the Company, *i.e.*, the income of the Company the moneys were properly assessable as such and the net taxable income as levied, *viz.*, $1,900.30, was properly so levied and is due and payable in my opinion by the Company. I would allow the appeal and reinstate the assessment as made.

MACDONALD, J.A.

MACDONALD, J.A.: Respondent Company was incorporated, *inter alia*, "to purchase . . . lands and to sell" the same and although it had wide powers it was apparently formed to acquire and resell at a profit, if possible, the property in question. Of its authorized capital of 50,000 shares of $1 each five shares only were issued. It purchased lot 5, block 22, D.L. 541, Vancouver, for $40,000 in 1926, and sold it for $70,000 in 1928, and the Minister of Finance seeks to recover income tax on the $30,000 profit made, it is alleged, by the Company. It had not, of course, sufficient subscribed capital to make the purchase in the ordinary way and proceeded to consummate the deal by obtaining proportionate parts of the purchase price from its shareholders giving them letters of which the following is a sample:

"In consideration of your having already advanced to the Company the sum of Six Thousand three hundred and eight dollars and three cents ($6,308.03) and contributing one-third of any further moneys required to

finance the purchase of lot 5, block 22, D.L. 541, the Company hereby agrees to pay to you one-third of the net proceeds of the sale of said property as and when realized, which payment shall be accepted by you in full settlement of said advances."

The proceeds of the sale were distributed to the shareholders as outlined in the letter quoted and the respondent Company now submits that it did not make a profit on the transaction in the ordinary course of its business, but merely distributed to its shareholders a capital asset which appreciated in value in two years to the extent referred to.

If the Company purchased the lot to enable it to carry on business within its powers from which profits might be derived the appreciation in value would not be income. That, it is suggested is the true situation. As part proof of it, rentals, it was pointed out, were received during the two-year period. That however was merely incidental to the ownership of the property. If it had purchased a second tract of land for the purpose of reselling at an advanced price such a profit would be regarded as income but the first purchase it is submitted should not be so regarded. It was however open to the respondent when it appealed against this assessment to the judge of the Court of Revision to shew that the purchase and sale in question was in the nature of an acquisition of capital and it did not do so. That burden was upon it (section 133 (3), Cap. 254, R.S.B.C. 1924).

MACDONALD, J.A.

We have to decide on a fair interpretation of the facts and the letters referred to whether or not the purchase and resale at an advance of $30,000 should be treated as the acquirement of, and disposal of a capital asset or as a profitable transaction from trading in land. I have no doubt that it bears the latter aspect.

It was submitted, however, that assuming the Company received this profit it only earned it by procuring the purchase price from its shareholders upon the terms that it would pay them the net proceeds of the sale. It earned a profit of $30,000 but expended the full amount in doing so. That is the suggestion. No profit was received by the Company: it went to the shareholders. Expenses incurred in the production of income may be deducted from the gross income. To come within this exception respondent must shew that it expended $30,000 in making a profit of a similar amount. It is a far-fetched interpretation

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of section 8 of the 1925 amendment, B.C. Stats. Cap. 54, referring to deductions to say that occurred in this case. It is not a fair construction of the letters to hold that the methods disclosed reveal an expenditure by the Company in any form, whether as interest on borrowed money or otherwise in the course of earning the income which reached the coffers of the Company. It is "a very forced interpretation of the contract and the position of the parties to put it down as part of the expenses of making the income" (*Last* v. *London Assurance Corporation* (1885), 10 App. Cas. 438 at p. 451).

I would allow the appeal.

Appeal allowed, Martin, J.A. dissenting.

Solicitor for appellants: *A. M. Harper.*
Solicitor for respondent: *S. J. R. Remnant.*

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RUFF v. SUTHERLAND AND MOSS.

Negligence—Collision between motor-cars—Driver to whom owner entrusted car — Civil liability of owner — Motor-vehicle Act, R.S.B.C. 1924, Cap. 177.

At about half past eight in the evening the plaintiff's son driving a motor-truck easterly on the Pacific Highway came into collision with a motor-car going in the opposite direction driven by the defendant M. to whom it was entrusted by the owner, the defendant S. The paved portion of the road was 18 feet wide and according to the evidence of two policemen who examined the tiremarks on the pavement after the accident the defendant's car was about 18 inches over on the plaintiff's side of the middle line. The trial judge gave full credence to the evidence of the policemen but concluded that the onus on the plaintiff had not been satisfied and dismissed the action.

Held, on appeal, reversing the decision of MURPHY, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the evidence of the policemen which is uncontradicted and impressed the learned trial judge favourably, should be accepted. From this evidence it appears the defendant's car was 18 inches on the wrong side of the road at the time of the accident, and the defendant M. was therefore guilty of negligence.

Held, further, that the Motor-vehicle Act does not add to the civil liability

at common law of an owner of a motor-vehicle who has entrusted it to another person through whose negligence in operating it a third person is injured.

Boyer v. *Moillet* (1921), 30 B.C. 216 followed.

APPEAL by plaintiff from the decision of MURPHY, J. of the 3rd of March, 1930, dismissing an action for damages for injuries sustained by the plaintiff owing to the alleged negligence of the defendant Marcia C. Moss in driving an automobile the property of the defendant Lillooet Sutherland. At about 8.30 in the evening of the 28th of August, 1929, the plaintiff's son was driving his father's motor-truck easterly on the Pacific Highway and just before reaching Port Mann Road he came into collision with a motor-car going westerly on the highway and driven by the defendant Marcia C. Moss and owned by the defendant Lillooet Sutherland. The front wheel of the plaintiff's motor-truck was torn off and the plaintiff was thrown from the truck and severely injured. The paved portion of the road is 18 feet wide and the evidence was conflicting as to which side of the middle of the pavement the collision took place.

Statement

The appeal was argued at Victoria on the 9th and 10th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Edith L. Paterson, for appellant: The car was driven by Marcia Moss but the owner is liable under section 35 of the Motor-vehicle Act: see *Boyer* v. *Moillet* (1921), 30 B.C. 216 at p. 219; *Perrin* v. *Vancouver Drive Yourself Auto Livery, ib.* 241; *Hall* v. *Toronto Guelph Express Co.* (1929), S.C.R. 92. The marks on the pavement shew clearly that the collision took place on the south half of the road and Marcia Moss was responsible for the accident.

Alfred Bull, for respondent: As to the responsibility of the owner, the Supreme Court held differently in the case of *O'Connor* v. *Wray* (1930), S.C.R. 231 at p. 246. The car in front of Ruff swerved to the left to avoid a car in front and there is a clear inference that Ruff also swerved as he was close behind and getting on the wrong side of the road ran into the car driven by Marcia Moss. The judgment below should not be interfered with except on strong grounds.

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Paterson, in reply, referred to *Curley* v. *Latreille* (1920), 60 S.C.R. 131.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: This case gave the learned trial judge some trouble. He was not impressed as he says by the evidence of the plaintiff which I presume means the driver of the plaintiff's car, or of that of the defendant which I take it means the driver of the defendant's car nor of the sister of Marcia Moss in respect of the position on the road of either car at the time of the collision. The witnesses Aitken and McAlpine, police constables who examined the roadway after the accident impressed the judge favourably. Beyond this there is very little assistance to be derived from his reasons for judgment. Aitken and McAlpine clearly fixed the point of collision by tracing the tire marks on the highway. There is no clear evidence inconsistent with theirs, though there is some other evidence for plaintiffs which would help them if given full credence which I regard as insufficient to displace that of the constables. Therefore, I take it that the collision happened on the plaintiff's side of the road some 18 inches from the middle of it. I adopt the trial judge's opinion of the two constables and find that the defendant Moss was on the wrong side of the road to the extent above indicated and as there is no evidence at all of contributory negligence on the part of the plaintiff's driver beyond a mere idle suggestion there is no occasion to divide the damages. The learned judge expressed the hope that the case might come up to this Court and said "with considerable doubt as to the correctness of my view I dismiss both the action and the counterclaim." I think I ought to accept the evidence of the two constables thus credited and find that the defendant Moss caused the accident by her negligence.

MACDONALD, C.J.B.C.

With regard to the defendant Sutherland I hold that she is not responsible and that the action as against her was rightly dismissed. I would also dismiss the counterclaim. A question arises with respect to the law applicable to the defendant Sutherland. The plaintiff's counsel argued that our decision in *Boyer* v. *Moillet* (1921), 30 B.C. 216 has been in effect overruled by

subsequent cases in the Supreme Court of Canada and in support of that cited *Hall* v. *Toronto Guelph Express Co.* (1929), S.C.R. 92 and *O'Connor* v. *Wray* (1930), S.C.R. 231. In my opinion these cases do not affect our decision in *Boyer* v. *Moillet* except that the *dicta* in the latter supports it. The Ontario Courts found language in other sections which indicated to them that the owner was responsible not only for the penalties provided by the Act but was rendered civilly responsible in damages for breaches of the Act while in *Boyer* v. *Moillet* we found no such indication of intention in our Act and held that no civil responsibility was imposed by it.

Our Act was consolidated and amended by Cap. 177 of the Revised Statutes of this Province, 1924, which also re-enacts the original section (now section 35) but in addition section 34 renders the licensed owner, who has entrusted his car to others, liable as a principal offender, to the penalties prescribed by the Act, and subsection (2) enacts that in every prosecution of an offence against any provisions of the Act the onus of proof that the car was not entrusted to the offending driver shall be on such owner. There is not in our Act any suggestion of civil liability to the opposite party and hence I adhere to my original opinion expressed in *Boyer* v. *Moillet* that the object and purpose of the Act was the regulation of traffic and the punishment by fine or imprisonment of persons committing breaches of it and that it was not intended to impose a new liability civilly upon the owners of motor-cars. The original section was re-enacted after the decision in *Boyer* v. *Moillet* and the re-enactment contains no suggestion of liability for a civil wrong by action of damages.

MACDONALD, C.J.B.C.

In the case above referred to in *O'Connor* v. *Wray* the Supreme Court of Canada expressed the opinion that in legislation in Quebec of the character of ours no civil liability was imposed. It follows from what I have said above that the only defendant against whom judgment should have been entered is Marcia C. Moss who was driving the car with her co-defendant's permission. The appeal is therefore allowed as to Marcia C. Moss and damages awarded against her to the plaintiff for $3,000.

MARTIN, J.A.: After reading with care all the evidence in the

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appeal book I can only form the opinion that the learned judge below reached the right conclusion in dismissing the action because the facts did not warrant a finding that the defendant Moss had been negligent in driving, with the owner's permission, the car of the defendant Sutherland, and therefore the appeal should be dismissed.

GALLIHER, J.A.: In dismissing the action against both defendants the learned judge below found that the onus of proof which rested on the plaintiff had not been satisfied. In his reasons for judgment he thus deals with the evidence:

"I give full credence to the evidence of Aitkin and McAlpine and because I do this case is most perplexing to me. I am not impressed by the evidence . . . as to the position on the road of either car at the time of the collision."

If we accept the point where burned tire marks on the road were located by the plaintiff and McAlpine and Aitkin as the point of impact of the cars then these marks were some distance over on the side of the middle line of the travelled road (I think one foot six inches) and moreover that the tire marks of the respective cars after the impact are traceable from that point to where the cars finally brought up it seems to me we should accept that as the point of impact especially when it is only opposed by the theory that these burned marks might have been caused by other cars and the further theory as to how the cars came together as indicated by the marks on the cars.

GALLIHER, J.A.

The case is not free from difficulties but the balance of probabilities are strongly in favour of the plaintiff's contention and I do not feel myself in the same doubt as the learned judge below did in regard to the onus of proof. I would find that the onus of proof was satisfied and that the plaintiff should succeed on the question of negligence. This brings us to the consideration of the liability of the defendant Sutherland. In that regard we are bound by the decisions in our own Court in *Boyer* v. *Moillet* (1921), 30 B.C. 216, and *Perrin* v. *Vancouver Drive Yourself Auto Livery, ib.* 241.

Speaking for myself I did not sit in the former case but in the latter my judgment was based wholly on the interpretation of our own statute, my view being that there was nothing in that statute to indicate that the Legislature in any way intended to

give greater rights to the plaintiff than he already had at Common Law.

From the above it would follow that the appeal should succeed as against Marcia C. Moss with costs and be dismissed as against the defendant Sutherland with costs.

I adopt the learned trial judge's findings as to the amount of damages.

MCPHILLIPS, J.A.: The learned trial judge heard the case without a jury and dismissed the claim as well as the counter-claim. The learned judge apparently was unable to find as contended for by the appellant that the motor-car of the respondents was encroaching upon the territory of the appellant, *i.e.*, was over the middle of the travelled highway or that the collision between the truck and motor-car was beyond the middle line and within the right of way of the appellant. No negligence has been found by the learned trial judge as against the respondents. It is now attempted in this Court to retry the action. No doubt the Court of Appeal is called upon to rehear the action (*Coghlan* v. *Cumberland* (1898), 1 Ch. 704) but considerations that cannot be passed over lightly must have careful attention. The *onus probandi* was upon the appellant to establish negligence otherwise the action could not succeed. That was not done in the Court below to the satisfaction of the learned trial judge. The appeal has been ably argued upon both sides and the evidence canvassed at length and I may say that upon the argument at this Bar I was satisfied that the appellant had failed to discharge the onus which the law imposes upon one who avers that there was negligence constituting an actionable wrong entitling judgment being entered for him. I adhere to that opinion. The evidence did not satisfy the learned trial judge and it certainly does not satisfy me. In *Ruddy* v. *Toronto Eastern Railway Company* (1917), 86 L.J., P.C. 95 at p. 96 we find Lord Buckmaster saying:

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

In *Lodge Holes Colliery Company, Limited* v. *Wednesbury*

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Corporation (1908), A.C. 323, Lord Loreburn, L.C., said, at p. 326:

"It has not been assailed, and if it were, I need not repeat what has often been said as to the advantages enjoyed by a judge who has heard the witnesses. When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons."

(Also see Newcombe, J. in *O'Connor* v. *Wray* (1930), S.C.R. 231 at p. 246). I cannot see that there is any need to in detail refer to the evidence—in my opinion no case has been made out which would warrant any disturbance of the judgment of the Court below. I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: We have to decide how this accident occurred unaided by findings of fact except that the testimony of two police officers, who testified regarding marks on the roadway indicating the point of collision and to some extent the manner in which it occurred, was accepted as credible evidence. After considering the various aspects of the evidence afforded by the marks I am convinced that the collision occurred when respondents' car passed beyond the middle line of the highway to the extent of approximately eighteen inches. That being so, one driving, particularly at night, with a line of cars travelling in both directions, displays lack of care if he or she passes beyond the middle line. That is an encroachment upon a part of the highway which, under the conditions described, should be reserved for the on-coming traffic. When cars move in opposite directions the full use of one-half of the highway for each line is essential, not because it is always necessary to utilize all of it, but to enable a driver to execute any turn or manœuvre on his own half of the road which may become necessary should (as in this case) an exigency arise requiring it. In this case a car parked on the side of the road close to the pavement presented an object that a driver at night, rightly or wrongly, might regard as a possible obstruction making it necessary for him to swerve to some extent at all events within his own half of the roadway to avoid colliding with it. True the parked car was slightly off the paved way but the driver of appellant's car particularly when he saw that the car ahead of him turned out, presumably to avoid it, might very naturally, as an extra precaution and

without negligence, follow the same course so long as the swerve did not carry him beyond the middle line of the roadway. I am inclined to think appellant's driver did swerve to some extent but if he did so, notwithstanding his own evidence it did not bring him beyond, nor indeed up to, the middle line of the road. In that event he was not negligent: much less not negligent if, as he testified he maintained a straight course to the right of the middle line. Negligence depends upon the circumstances. Where, therefore, we have two lines of cars, as indicated, drivers should keep to the right or left of the middle line as the case may be and if a collision occurs between a car on its own half of the roadway with a car transgressing this rule of safety the driver of the latter car is guilty of negligence.

I am satisfied that the marks found by the two witnesses referred to were caused by the impact and not as suggested, by other cars. The latter supposition is not reasonable. I am also convinced on analyzing the evidence that the marks shew the point of contact at the time of the impact, and not as suggested a moment or two afterwards when respondent's car was admittedly over the line. This view is consistent with the evidence of respondents' expert witnesses who based their deductions on the nature of the damage to the cars shewing, in their view, that respondent's car did not swerve but maintained a course parallel to the middle line of the roadway at least for a short distance before reaching the point of impact. I do not think the driver of respondent's car swerved to the left in the sense of making a noticeable turn. There was no reason to do so. But I do think she gradually drifted beyond the middle line. That being so her car might well be, practically, if not fully parallel, with the middle line at the precise moment of impact. Her car would be astride the middle line—the wheels on the left side eighteen inches over it and viewing it in that light the evidence of the witnesses referred to is explained. True witnesses who were in the parked car at the side of the road say that respondent's driver appeared to be driving in line with the cars before and behind her on the proper side of the road but a variation by one car from that course to the extent necessary to bring her over the line when she got near to the point of impact and about opposite to the parked car would not necessarily be noticed by

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them. Observations of a casual nature such as this by onlookers may be, and often are, faulty but definite marks on the roadway afford infallible evidence, once established, from which deductions may be drawn. These marks, on the fair view which Courts ought to take, shew that respondent's driver drifted beyond the middle line at a time when the traffic conditions referred to made it a negligent act to do so. I can find no negligence on the part of the appellant's driver because if he swerved by reason, not of an actual but a possible obstruction, he was justified in doing so and because in executing it he kept to the right of the middle line. I do not think I am precluded from reaching these conclusions by reason of the judgment of the learned trial judge. He practically invited this Court to form an independent judgment with however the finding referred to as to the credibility of the two police officers. He made no observations as to the credibility of the witnesses in the parked car.

The appeal should be allowed and judgment entered for $3,000 (I would not increase the amount) but only as against the respondent, Miss Moss, the driver. Her co-respondent, the owner of the car was not present. She simply entrusted it to the driver and the latter alone is responsible. The decision in *Boyer* v. *Moillet* (1921), 30 B.C. 216 is not affected by the later decisions referred to, *viz.*, *Hall* v. *Toronto Guelph Express Co.* (1929), S.C.R. 92, and *O'Connor* v. *Wray* (1930), S.C.R. 231.

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

Solicitors for appellant: *Hamilton Read & Paterson.*

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

THE KING v. B.C. FIR & CEDAR LUMBER COMPANY LIMITED.

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THE KING v. B.C. FIR & CEDAR LUMBER CO.

Income tax—Fire insurance—Use and occupancy insurance—Plant destroyed by fire—Insurance moneys paid for use and occupancy—Whether taxable—"Income"—Definition—Appeal—R.S.B.C. 1924, Cap. 254, Sec. 2.

The defendant Company, manufacturers and dealers in lumber products, insured in several companies against loss and damage to its plant and property by fire. Further insurance was taken out in 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 in question 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." It was held on the trial that the money so received was subject to taxation.

Held, on appeal, affirming the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the money received from "use and occupancy insurance" was taxable income and subject to taxation under the Taxation Act.

APPEAL by defendant from the decision of MACDONALD, J. of the 9th of January, 1930 (reported, 42 B.C. 401), in an action to recover $8,678.68 for personal property and income tax, interest and penalties under the Taxation Act. The defendant who is a manufacturer and dealer in lumber products in the City of Vancouver insured in 1923, in seventeen companies against loss and damage to its plant and property by fire and also in the same companies against loss or damage which would be sustained in the event of its plant being shut down and business suspended in consequence of fire. This latter insurance, known as "Use and Occupancy Insurance" amounted to $60,000 in respect of loss of net profits and $84,000 in respect of fixed charges. The plant and premises were destroyed by fire on the 21st of August, 1923. The Company and the insurance adjusters agreed that the period of the interruption of the Company's business would be 215 days divided into 113 days in 1923 and 102 days in 1924, and $43,000 was agreed on as the allowance

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for net profits and $52,427.90 for fixed charges. These sums were divided into $22,600 net profits and $27,555.05 fixed charges for the year 1923, and $20,400 net profits and $42,872.85 fixed charges for the year 1924. The Company not having taken legal advice as to whether such insurance moneys were taxable as income, included in its return for 1923, the sum of $41,293.20 of such moneys and in 1924 they similarly included the sum of $33,706.80 and they paid the income tax accordingly. The Company did not pay the tax on the balance of such insurance moneys received, namely, $20,427.90, claiming exemption as they considered this sum was in excess of the actual loss sustained, the rebuilding of the plant having taken a less number of days than estimated by the adjusters. It was agreed between the parties that if the Use and Occupancy Insurance is taxable as income there would be $3,265.94 to be paid in taxes in addition to what had already been paid.

The appeal was argued at Victoria on the 16th and 17th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Craig, K.C., for appellant: It was decided below that having received this insurance in lieu of profits it should be treated as profits but we submit that because it is received in lieu of profits it is not necessarily profits on income. The money taken by itself is not income: see *Attorney-General* v. *Milne* (1913), 2 K.B. 606 at p. 611. In the case of gambling the profits are not taxable. Unless we are taxed in plain language we are not taxed at all: see *Glenboig Union Fireclay Co.* v. *Inland Revenue* (1922), S.C. (H.L.) 112. We cannot charge the premium as a deduction from the profits so the Government cannot get the benefit of the proceeds: see *Rhymney Iron Company* v. *Fowler* (1896), 2 Q.B. 79; *Guest, Keen, & Nettlefolds, Limited* v. *Fowler* (1910), 1 K.B. 713; *Graham* v. *Green* (1925), 2 K.B. 37. The Court followed *Re International Railway Works Co.* (1925), 3 U.S. Tax Appeal Reports 283 at p. 290, but in another case at p. 1009 of the same volume the opposite conclusion is arrived at. Moneys so received do not partake of the quality of the thing it is in lieu of: see *Jones* v. *Commissioners of Inland Revenue* (1920), 1 K.B. 711 at p. 714; *Chibbett* v.

Joseph Robinson and Sons (1924), 132 L.T. 26; *London County Council* v. *Attorney-General* (1901), A.C. 26 at p. 35; *Scoble* v. *Secretary of State in Council for India* (1903), 1 K.B. 494; 4 T.C. 618; *Inland Revenue* v. *Noble* (1919), S.C. 534 at p. 538; *Simpson* v. *Maurice's Executors* (1929), 45 T.L.R. 371 at p. 373; *Commissioners of Inland Revenue* v. *Ballantine* (1924), 8 T.C. 595; *Cowan* v. *Seymour* (1920), 1 K.B. 500. The Taxation Act should be construed in favour of the subject: see *Dilworth* v. *Commissioner of Stamps* (1899), A.C. 99.

Pepler, for respondent: I adopt the decision of Maclean, J. in *The B.C. Fir & Cedar Lumber Co. Ltd.* v. *Minister of National Revenue* (1930), Ex. C.R. 59. They can get no credit unless they insure and insurance is part of their business. This insurance money is profits and is taxable as such: see *Re International Boiler Works Co.* (1925), 3 U.S. Tax Appeal Reports 283 as to the contention that something received in substitution is not what the original was: see *Graham* v. *Green* (1925), 94 L.J., K.B. 494; *Short Bros.* v. *Commissioners of Inland Revenue* (1927), 136 L.T. 689; *Commissioners of Inland Revenue* v. *Newcastle Breweries Limited* (1926), 135 L.T. 618; *Rhymney Iron Co.* v. *Fowler* (1896), 65 L.J., Q.B. 524; *Lochgelly Iron & Coal Co. Ltd.* v. *Crawford* (1913), 6 T.C. 267; *Chibbett* v. *Joseph Robinson and Sons* (1924), 132 L.T. 26. Argument

Craig, in reply, referred to *T. Beynon and Co. Limited* v. *Ogg* (1918), 7 T.C. 125.

Cur. adv. vult.

7th October, 1930.

MACDONALD, C.J.B.C.: I think the learned trial judge has arrived at the right conclusion and I would therefore dismiss the appeal. MACDONALD, C.J.B.C.

MARTIN, J.A.: During the argument I felt much impressed by the soundness of the reasons advanced by appellant's counsel in favour of reversing the judgment below and a further consideration of the matter has strengthened that impression. MARTIN, J.A.

If, in short, this fire policy is viewed, as I think it ought to

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be, as intending to put the insured company in the same position as if it had not suffered a loss by fire, then its loss so suffered is not its net profit, but that profit plus the overhead charges it has disbursed to produce that income; and the payment of the premium did not assist it in making a profit but in obtaining indemnity from forced suspension of operations. The statute provides for no more than taxation on net profit and in ascertaining that profit the appellant is entitled to set off the fixed charges necessary to produce it, under section 44, the construction of which should not be strained against the tax-payer.

MARTIN, J.A.

As to the decision of the Exchequer Court of Canada, *per* Maclean, J., in *The B.C. Fir & Cedar Lumber Co., Ltd.* v. *Minister of National Revenue* (1930), Ex. C.R. 59, I need only say that even if the National statute on which it is based were identical in essentials with the Provincial one before us, we should not, I think, with all due respect, give it our sanction.

I would, therefore, allow the appeal.

GALLIHER, J.A.: The only question as I take it to be determined by this Court is were the sums paid the defendant under what is known as Use and Occupancy Insurance policies for estimated profits during the time the mill was shut down taxable income within the definition of income in the Taxation Act, R.S.B.C. 1924, Cap. 254.

The learned trial judge has so held and I am so much in accord with his well reasoned judgment on this point that I need not add thereto.

GALLIHER, J.A.

In addition to the cases referred to by his Lordship I might refer to the cases of *Gliksten & Son* v. *Green* (*Inspector of Taxes*) (1929), 98 L.J., K.B. 363; *Commissioners of Inland Revenue* v. *Newcastle Breweries Limited* (1926), 135 L.T. 618; and *Short Bros.* v. *Commissioners of Inland Revenue* (1927), 136 L.T. 689.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: My conclusion upon this appeal coincides so completely with the very careful judgment of the learned judge below, Mr. Justice W. A. MACDONALD, that I do not find it necessary to enter into any elaboration of my views. I am

content to say that I entirely agree with the learned judge and am of the opinion that the judgment should be affirmed and the appeal dismissed. I do wish though to call attention to 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."

In the present case great reliance was placed by counsel for the appellant upon *Glenboig Union Fireclay Co.* v. *Inland Revenue* (1922), S.C. (H.L.) 112; 12 T.C. 427. It is to be observed that in Scotland the statute under review gave no definition of "Income Tax," whilst the British Columbia statute does to some extent at least define the nature of the tax. In the case of *Miller* v. *Inland Revenue* (1928), S.C. 820; (1930), A.C. 222; 15 T.C. 25, we have The Lord President (Clyde) saying (p. 49):

"The Income Tax Act nowhere defines 'income,' and it follows that this word—which limits and controls the scope of the entire Income Tax system—must be interpreted in its plain and ordinary meaning."

Here admittedly that which has been taxed was income being the amount found by the insurance adjusters to be the net profits that would have been earned had the mill been in operation and over and above all capital loss, and such moneys were received by the appellant and therefore taxable as income. I would lastly refer to *London County Council* v. *Attorney-General* (1901), A.C. 26 at p. 35 where Lord Macnaghten said:

MCPHILLIPS, J.A.

"Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. . . . One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit."

Here by the exercise of good judgment an eventuality was provided against and moneys received—it was taxable income and taxable under the statute.

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

MACDONALD, J.A.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *C. H. Locke.*
Solicitor for respondent: *Eric Pepler.*

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[IN BANKRUPTCY.]

IN RE HUGH W. ROBERTSON LIMITED (BANKRUPT). *IN RE* WEATHERHEAD *ET AL.*

IN RE HUGH W. ROBERTSON LTD.

IN RE WEATHERHEAD *et al.*

Bankruptcy—Stock-brokers — Creditor — Customers — Claims of — Shares bought for claimants—Not included in assets held by trustee—Valuation of claims—Effect of appreciation or depreciation of stock after purchase.

The appellants employed the bankrupt stock-brokers to purchase certain shares for them. The shares were purchased but they were not included in assets held by the trustee and there was no evidence as to what became of them.

Held, (1) Where claimant paid for his shares in full and at the time of the assignment the shares had appreciated in value the sum allowed should be the value of the stock on the date of the assignment and to this should be added the amount of any dividend received by the bankrupt.

(2) Where the stock depreciates in value the same rule applies and the claimant receives only the value of the stock at the time of the assignment.

(3) Where the claimant bought on margin and her stock increased in value her claim must be treated in the same way, the trustee having a lien for the balance of the purchase price and interest.

Statement

APPEAL by three creditor customers of Hugh W. Robertson Limited (Bankrupt) from a disallowance by the trustee in bankruptcy of a portion of their claims. Argued before GREGORY, J. at Vancouver on the 4th of November, 1930.

Dawson, for appellants.
Matthew, for the trustee.

7th November, 1930.

Judgment

GREGORY, J.: These are three appeals from a disallowance by the trustee in bankruptcy of a portion of the appellants' claims.

In all cases the appellants employed the bankrupt, stock-brokers, to purchase certain stocks and shares for them. It is admitted that the shares were duly purchased as required but that the trustee in bankruptcy has not now got them to deliver.

There is no evidence as to what has become of them and of course no suggestion that the trustee has disposed of them.

1. Gussin paid for his shares in full and claimed their value on the date of the assignment plus the sum of $37.50 received by the bankrupt as a dividend on the shares while in his possession making a total of $1,807.50 as the shares had appreciated in value at the time of the assignment. He was only allowed the amount Gussin had paid (less broker's charges) and the dividend of $37.50. The appreciation of $7.50 per share amounting to $370 was disallowed. This was wrong; his claim should have been allowed in full.

2. Mrs. Vigneux paid $946 for her shares and she claimed the full amount so paid. Her stocks had depreciated in value to the exent of $605.25 and she was allowed the sum of $340.75, being the value of her stocks on the day of the assignment. This I think was correct. It was claimed on her behalf on the strength of *Re Iveson, Ex parte Gurner* (1841), 1 Mont. D. & De G. 497, referred to in English & Empire Digest, Vol. 4, p. 314, that she had the option of claiming either the value of the stock at the time of the assignment in bankruptcy or the return of the money she had paid, whichever was most advantageous. The report of that case is not in the library but it is clear from the digest reference that that was a very different case. It was a case of a trustee who sold stock forming a trust fund and converted the proceeds to his own use and it was held that on his bankruptcy the *cestui que trust* had the option of proving either for the amount of the proceeds of the stock or for its value at the time of the bankruptcy.

Judgment

3. Mrs. Weatherhead was allowed only the amount of money she had actually paid the bankrupt plus a dividend of $18.75 received by the bankrupt on her shares while in its possession. Her shares had materially increased in value at the time of the bankruptcy. Her claim must be treated in the same way as Mr. Gussin's. The fact that she purchased on margin can, I think, make no difference in principle as she had the right at any time after the purchase on her behalf to call for a delivery of the shares upon paying the balance due on them and the interest upon that amount. The bankrupt only had a lien upon them for such balance and interest. In making up her account she of

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course must be charged with that interest up to the day of the bankruptcy.

All three cases are, I think, governed by the same principle.

The bankrupt was the appellants' agent to buy. It did buy and thereafter it held the stocks as agent for appellants.

Appellants have lost their stocks and have a right to prove for their value at the date of the assignment regardless of whether they paid much or little for them.

Appellants were all represented by one solicitor and, as I understand the case, were in reality friendly test cases. The costs will be paid out of the bankrupt's estate.

Appeal allowed in part.

CAYLEY, CO. J.

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REX *v.* CANADIAN BAKERIES LTD.

REX v. CANADIAN BAKERIES LIMITED.

Criminal law—Sale of bread under weight shewn on stickers attached—Criminal intent—Error due to accident—Volume of business—Criminal Code, Sec. 489.

On a charge of selling bread to which a false trade description was applied, two loaves were produced in Court with stickers on them stating them to be sixteen ounces in weight, whereas, one was actually fourteen ounces and the other fifteen ounces. Evidence was also given of a sale a month previously of six double loaves, the combined weight of which was 30 ounces apiece and they should have weighed 32 ounces but the purchaser in this case having brought the error to the attention of the vendors it was rectified. Up-to-date machinery was employed by the accused who turned out from 40,000 to 60,000 loaves of bread per day. The evidence disclosed that mistakes might arise first by putting 16-ounce stickers on 14-ounce loaves as the bakery turned out loaves of both weights and secondly that the adjusting screw controlling the dividing of the dough became loose at times through accident and light-weight loaves might have been produced before it was adjusted.

Held, that the question is whether the defendant has been infringing upon the Act by design. The evidence discloses only two cases of the sale of light-weight bread in a very large volume of business carried on with proper machinery, and of which the directors and owners of the bakery had no connection or knowledge, and there being so much opportunity of letting a light-weight loaf of bread on the market by mere accident the charge should be dismissed.

The defendant was tried in the County Court Judge's Criminal Court in Vancouver on a charge of unlawfully selling bread to which a false trade description was applied, namely, a label denoting that the bread weighed sixteen ounces, whereas, in fact it weighed less than sixteen ounces. Tried by CAYLEY, Co. J. at Vancouver on the 13th and 14th of November, 1930.

DesBrisay, for the Crown.
R. L. Maitland, K.C., and *Hutcheson,* for the accused.

CAYLEY, Co. J.: The evidence given in Court was supplemented by an inspection of the machinery employed, by myself accompanied by counsel on each side. The machinery employed by the accused is up-to-date machinery and is stated to be so by Mackay and Nichols who are not employed by the accused but are employed by other concerns, other bakeries, and since the accused turn out anything from 40,000 to 60,000 loaves of bread per day one can admit that their machinery is up to date. Nevertheless a short-weight loaf has been found to have been issued by the Bakeries, that is, two loaves were produced in Court. One was fourteen ounces and the other fifteen ounces and both had stickers on them stating them to be sixteen ounces, but one must naturally distinguish between an occurrence that might be due to accident and one that might be due to design.

Judgment

If the Crown had been able to produce evidence that short-weight bread was being distributed on a large scale by the Canadian Bakeries Limited, the Court could hardly get away from coming to the conclusion that the practice thus on a large scale must have been intentionally done and one can easily see from the evidence that a bakery that chooses to put 16-ounce stickers on 14-ounce bread could easily get away with it, as most people do not weigh the bread that is distributed to them and one might easily if one wanted to act this way, being a bakery, mix fourteen-ounce and sixteen-ounce loaves indiscriminately all bearing, however, the 16-ounce stickers. That is a matter with which I have nothing to do. The possibility of a bakery mixing them in that way is not my concern. My only concern is as to the sufficiency of the evidence before me to shew that this

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defendant, the Canadian Bakeries Limited, has by design been infringing the Act.

I find in Tremeear's Criminal Code, 4th Ed., in the notes to the section on which this charge is brought, section 489, the remarks of Lord Russell, C.J., at p. 641, as follows:

"The master or principal may be relieved from criminal responsibility when he can prove that he had acted in good faith and done all that it was reasonably possible to do to prevent the commission by his agents and servants of offences against the Act."

Now, there is nothing to shew that the proprietors were guilty, and that they do not come within that relief judgment. In fact there is no evidence whatever that the directors and owners of this bakery had any connection with the escape into the market, the general market, of light-weight bread. They have furnished their foreman and servants in the bakery with the proper machinery. The evidence is that they have directed them to carry on the business in a proper manner and have given them the appliances to do so. If there has been any intentional crookedness on the part of any employee in the bakery it has not been shewn that the management or directorate were aware of it and they should have been if they wanted to make it possible. I do not know whether we can form any opinion at all from the very scanty evidence of short-weight bread in this case.

Judgment

On a certain date in June two loaves were found to be short weight, sold to a certain grocer, and two loaves out of 40,000 distributed that day would hardly bring any rational man to any conclusion at all. In the month of May another grocer received six double loaves, the combined weight of which was 30 ounces apiece and they should have weighed 32, that is, each individual loaf was 15 ounces instead of 16 ounces. He immediately notified the management and the mistake was rectified. That man is not bringing any charge and the only relevance it has to the case is to shew that if there was a criminal act committed in June it was not by accident, but that it was in line with the previous acts of the same accused.

So that in effect it comes to this that the Crown are basing their charge on the discovery in one grocery, out of I do not know how many dozens, or hundreds in the city, of two loaves of bread which had the wrong stickers on them.

There are two ways in which a mistake may arise in a bakery of this kind, one is that the man whose duty it is to apply the stickers may have put a 16-ounce sticker on a 14-ounce loaf. This bakery was turning out a large number of 14-ounce and 16-ounce loaves and one can easily see that the stickers, without any intention on the part of the man who did so, may have got on the wrong loaf.

There is another way in which error might have crept in, and that is that the adjusting screw which controls the dividing of the dough might have become loose through accident which occurs to machinery in all parts and in all times and probably does occur in a bread-making machine. These accidents to machinery are provided for by a simple check that is maintained in this Canadian Bakeries Limited. They weigh so many loaves out of every ten to see that the adjusting screw is working properly. If they find anything is wrong they adjust the screw and the fact that they have to adjust the screw shews that the adjusting screw may get out of order for a short period of time before they observe it. That is another source of error. There is too much opportunity for a mere accident to let a loaf on the market that is short weight, to bring the Court to any conclusion against the accused in this matter.

Judgment

The charge is dismissed. I do not want to add anything more to that. The evidence is not sufficient. I think that the Canadian Bakeries Limited have a right to claim that there is no proof whatever of the charge brought against them, except the production of two loaves which got on the market and which they have explained in a manner which most ordinary men would accept as reasonable.

Charge dismissed.

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MOUAT BROTHERS CO. LTD. v. WARNIER

MOUAT BROTHERS COMPANY LIMITED v. WARNIER.

Debt—Action to recover—Assignment of debt after commencement of action—Debt reassigned to plaintiff before trial—Equitable assignment—Laws Declaratory Act—Costs—R.S.B.C. 1924, Cap. 135.

The plaintiff brought action on the 2nd of July, 1929, for balance of account for goods sold and delivered. On the 25th of October following the plaintiff assigned the debt to three persons who on the following day assigned the debt to M. and on the 1st of January, 1930, M. reassigned the debt to the plaintiff. The trial commenced on the 21st of February, 1930. These facts were disclosed before the close of the plaintiff's case when the defendant was put in the box and gave his evidence in chief before adjournment. On the following morning defendant moved for and obtained an amendment to his dispute note setting up in defence the several assignments, and the plaintiff's motion to add the several assignees as parties to the action was refused. The judge then dismissed the action holding that the plaintiff's right of action was lost by reason of the assignments.

Held, on appeal, reversing the decision of MCINTOSH, Co. J., that both motions were unnecessary and improper. The several assignments were merely equitable, no notice having been given to bring them within the Laws Declaratory Act and the plaintiff was the proper party in whose name to bring the action. The case was not completed, the plaintiff not having insisted on his right to cross-examine the defendant and there should be judgment directing the continuance of the trial.

Held, further, there should be no costs to either party as both were to blame, the one for bringing about the dismissal and the other for not insisting upon its right to cross-examine.

APPEAL by plaintiff from the decision of MCINTOSH, Co. J. of the 22nd of February, 1930, in an action to recover $52.30, balance of account for goods sold and delivered by the plaintiff to the defendant. On the 25th of October, 1929, the plaintiff Company assigned this account to Jane Mouat, G. J. Mouat and W. M. Mouat and on the following day the assignees assigned the account to Gavin Mouat who on the 1st of January, 1930, assigned the account back to the plaintiff. The action was commenced on the 2nd of July, 1929, and the trial took place on the 21st of February, 1930. The action was dismissed.

Statement

The appeal was argued at Victoria on the 13th of June, 1930, before MACDONALD, C.J.B.C., MARTIN and MCPHILLIPS, JJ.A.

Clearihue, for appellant: That the assignments do not deprive the plaintiff of the right of action see *Dell* v. *Saunders* (1914), 19 B.C. 500; *Griffiths et al.* v. *Kenney et al.* (1917), 1 W.W.R. 800. The debt was assigned back to the plaintiff before the trial of the action: see *Guilbault* v. *Brothier* (1904), 10 B.C. 449; *The House Property and Investment Co.* v. *The Horse Nail Co.* (1885), 52 L.T. 507 at p. 508; *Showell* v. *Winkup* (1889), 60 L.T. 389 at p. 390; Daniell's Chancery Practice, 8th Ed., Vol. I., p. 238.

Lowe, for respondent: All the evidence is not before the Court: see *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629; *Robertson* v. *Latta* (1915), 21 B.C. 597. As to the discretion of the trial judge see *Brownell* v. *Brownell* (1909), 42 S.C.R. 368; *Rex* v. *Davis* (1914), 19 B.C. 50. That he has lost his right of action by the assignment see Halsbury's Laws of England, Vol. 1, p. 31, sec. 42; Holmested's Judicature Act, 4th Ed., 758; *Roper* v. *Hopkins* (1898), 29 Ont. 580; *Strong* v. *Canadian Pacific Ry. Co.* (1915), 22 B.C. 224; *Maritime Motor Car Co.* v. *McPhalen* (1920), 28 B.C. 168 at p. 172; Bullen & Leake's Precedents of Pleadings, 8th Ed., 25; Annual Practice, 1930, p. 249.

Argument

Clearihue, replied.

Cur. adv. vult.

On the 7th of October, 1930, the judgment of the Court was delivered by

MACDONALD, C.J.B.C.: The plaintiff in July last sued the defendant in the County Court to recover the amount of an account. The trial which took place later was interrupted and postponed, but in the meantime the plaintiff had assigned the debt to assignees and later these had assigned it to others who in turn before the trial was completed assigned it back to the plaintiff. These facts were brought out at the continuance of the trial. At the close of the plaintiff's case in chief the defendant was put in the box and had been examined in chief when the Court adjourned. Next morning the defendant's counsel moved for and obtained an amendment to the dispute note setting up in defence these several assignments. Plaintiff then moved for

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MOUAT BROTHERS CO. LTD. v. WARNIER

leave to amend the plaint by adding the several assignees as parties plaintiff. This was refused. The judge granted defendant's application and held that the plaintiffs' right of action was lost by reason of the assignments and thereupon dismissed the action. At the time of adjournment the defendant had not been cross-examined. The judge however disposed of the case on the question of law thus depriving the plaintiff's counsel of his right to cross-examine the defendant. The plaintiff now asks for a new trial on the ground that the judge was wrong in his law and that the trial was incomplete. I think the trial was incomplete and ought to have been continued to its completion. Both motions were unnecessary and improper. The several assignments aforesaid were merely equitable, no notice having been given to bring them within the Laws Declaratory Act. The plaintiff was therefore the only proper party in whose name to bring it and remained such throughout the trial notwithstanding the assignments. Moreover I think that the plaintiff had not in fact closed its case, but it without objection on this ground refrained from claiming its right of cross-examination. Both parties are to blame, the one for bringing about the dismissal, the other for not insisting upon its right, thus bringing about a failure of the trial. There must therefore be judgment directing the continuance of the trial. No costs to either party of this appeal since I think there is good cause for so disposing of them. Appeal allowed.

Judgment

Appeal allowed.

Solicitors for appellant: *Clearihue & Straith.*
Solicitors for respondent: *Moresby, O'Reilly & Lowe.*

GODSON AND RAY v. PANTAGES *ET AL.*

FISHER, J. (In Chambers)

1930

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GODSON v. PANTAGES

Landlord and tenant—Non-payment of rent—Breaches of other covenants—Relief from forfeiture—Ambiguities in documents and transactions between parties—Effect of—Covenants not to assign without leave, to insure and to pay taxes—R.S.B.C. 1924, Cap. 135, Sec. 2 (14).

On an application by the defendants for relief under the Laws Declaratory Act and for an order for relief from forfeiture of premises held under lease:—

Held, that the circumstances here are not such as to disentitle the defendants to relief when the Court is exercising a statutory as well as an equitable jurisdiction and forfeiture for mere non-payment of rent on its due date has always been looked upon as a thing against which a Court of Equity should afford relief.

Considering all the documents and transactions between the parties it was held that the covenant, not to assign without leave, had been so expressed that its meaning is doubtful and the tenant in good faith has done what he supposed to be a performance of it, in which case a forfeiture will not be enforced for the difficulty of construing the covenant was a special circumstance entitling the tenant to relief.

As to the alleged breach of a covenant by the tenant to insure it was held that in view of the conduct of the parties interested since the date of the lease (*i.e.*, 1916) the plaintiffs should not now be at liberty to invoke a breach of the covenant to insure as a ground to disentitle the defendants to relief from forfeiture for non-payment of rent, though some condition with regard to the insurance might be a term upon which such relief should be granted.

APPLICATION by defendants for relief under the Laws Declaratory Act and for an order that the said defendants be relieved from forfeiture of the premises comprised in a lease of the 5th of June, 1926, on Hastings Street East in the City of Vancouver. The relevant facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 8th of September, 1930. Statement

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

30th October, 1930.

FISHER, J.: This is an application on behalf of the defendants, Alexander Pantages and Pantages-Vancouver Theatre Company, Limited, for relief under the Laws Declaratory Act, Judgment

FISHER, J. (In Chambers)

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section 2 (14) and for an order that the said defendants be relieved from forfeiture of the premises comprised in a lease dated the 5th of June, 1916, and made between Charles Arthur Pollard Godson as lessor and the said Alexander Pantages as lessee and in the lease dated 24th September, 1917, and made between Alexander Pantages, as lessor, and the said Pantages-Vancouver Theatre Company, Limited, as lessee consequent on non-payment of rent and that all further proceedings in this action be stayed.

The action is for a declaration that the plaintiffs have effectually forfeited the said lease dated the 5th of June, 1916, which lease was for the term from the 1st of July, 1916, to the 30th of June, 1936, with a conditional option to renew as therein provided and covered premises upon which a theatre was to be built by Pantages and operated by the defendant Company and the plaintiffs claim to have re-entered upon the said premises on the 10th of July, 1930, and forfeited the lease, possession having been demanded and refused.

Judgment

The lease made the 24th of September, 1917, between Alexander Pantages and the Pantages-Vancouver Theatre Company, Limited, purported to sub-lease and demise unto the lessee the said lands from the date thereof to and including the 30th of June, 1936, yielding therefor during the said term the yearly rental of $12,000 payable as follows: That is to say the sum of $1,000 on the 1st of each and every month in advance, the lessee to pay the said rentals either to the lessor or to the said Charles Arthur Godson, or his representatives, as the lessor might direct.

The defendant Dewees became interested in the property through an agreement dated the 7th of December, 1929, and made between the plaintiffs and the three defendants in this action whereby the said Pantages sold to Dewees 1920 shares in the capital stock of the Pantages-Vancouver Theatre Company, Limited, for the price of $94,050 payable in 66 consecutive monthly instalments of $1,425 each and the executors of the estate of the said Godson sold to Dewees 640 shares being the balance of the shares in the capital stock of the said Company for the price of $31,825 payable in 67 consecutive monthly instalments of $475 each.

Some of the material clauses contained in said agreement of the 7th of December, 1929, read as follows:

"Pantages further agrees that he will procure the resignation of the present officers of the Theatre Company and the appointment in their place of such officers as Dewees may name at such times as Dewees may direct, and that he will procure the handing over to such officers of all the books, papers, documents and property of the Theatre Company."

"Dewees hereby guarantees to Pantages—so long as this agreement shall be in force as between Dewees and Pantages—the payment by the Theatre Company of the rent due Pantages under the said lease of the 24th of September, 1917, and the performance by the Theatre Company of all its other obligations under the said lease and agrees that the insurance which the Theatre Company is obliged under the said lease to maintain shall be in the full insurable value of the said theatre building. It is hereby agreed that payment of the rent aforesaid direct to the Godson Estate shall be deemed to be a good and valid payment to Pantages under the said lease of the 24th of September, 1917, and shall be deemed to be a payment for a corresponding period by Pantages to the Godson Estate under the lease of the 5th of June, 1916, and the Theatre Company is hereby authorized to make such payments accordingly."

"10. (a) Should the Theatre Company grant an operating licence to anyone to operate the theatre the Godson Estate for the avoidance of doubts and at the request of Dewees concedes and agrees that such licence shall not be deemed a breach of the covenant against assigning or sub-letting without leave contained in the said lease of the 24th of September, 1917, but the Godson Estate is not to be deemed to be a party to such licence or to have any privity or relationship with the licensee and is to be in no way bound by the licence."

From about the beginning of 1930 it would appear that the rent had not been paid promptly to the Godson Estate by either Dewees or anyone else and on the 2nd of July, 1930, the rent was three months in arrears. On the 10th of July, 1930, the plaintiffs gave notice of forfeiture and re-entry and demanded possession which was refused by the occupant. On the 11th of July, 1930, the sum of $3,000 being the amount due for rent, was tendered to the representative of the plaintiffs but refused. The plaintiffs desire to have the full legal effect of the covenant as to payment of rent while the defendants apply as stated for relief from the forfeiture for non-payment of rent.

In the first place Mr. *Griffin* of counsel for the plaintiffs, citing *Hill* v. *Barclay* (1811), 11 R.R. 147 and other authorities, submits that relief should not be granted because the non-payment of rent was wilful and refers to certain correspondence between the said defendant Dewees and H. V. Sharples

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which would tend to shew that the said Dewees was unwilling to pay the rent unless he got an extension of time for making the other payments which he had agreed to make under said agreement of December 7th, 1929. *Coventry* v. *McLean* (1892), 22 Ont. 1 (affirmed on appeal (1894), 21 A.R. 176) is relied on in support of the principle that a lessee is not entitled as of right to relief against forfeiture for non-payment of rent and that relief may be refused on collateral equitable grounds.

Although under the agreement of December 7th, 1929, Dewees had agreed to purchase all the shares of the Company and was virtually in control of said Company and theatre premises, so long as he did not get in default with his payments, I cannot see that the identity of the defendant Theatre Company was lost in that of Dewees' pending payment for the shares nor do I think even that the conduct of Dewees in delaying the payment of the rent pending negotiations to get Pantages to postpone payment of some of the said monthly instalments due him should react to the prejudice of the Company and thereby to the prejudice of Pantages who would again become a shareholder if Dewees defaulted in his payments. In any event I would hold that the circumstances here are not such as to disentitle the Company and Pantages to relief where the Court is really exercising a statutory as well as an equitable jurisdiction and, as was said in *Huntting* v. *MacAdam* (1908), 13 B.C. 441, forfeiture for mere non-payment of rent on its due date has always been looked upon as a thing against which a Court of Equity should afford relief.

Judgment

It is further submitted on behalf of plaintiffs, however, that there is no power to relieve from forfeiture for non-payment of rent where the lessee has committed breaches of other covenants entitling the plaintiffs to re-enter for the forfeiture and it is contended that the lessee here has broken the covenants not to assign without leave, to insure against loss by fire and to pay taxes. *Bowser* v. *Colby* (1841), 1 Hare 109 is cited where at p. 132 the Court says:

> "I think it clear that the defendants [lessors] have a right to bring before me any breaches of covenant which may have been committed other than the non-payment of rent, and which, if committed, would have occasioned a forfeiture of the lease."

In connection with the alleged covenant, not to assign without leave, it must be noted that a preliminary agreement of the 3rd of June, 1916, between Godson and Pantages, after providing for Pantages proceeding with the construction of a theatre building on the said premises and the incorporation of a company to be called the Pantages-Vancouver Theatre Company, Limited, provided also that Pantages should sub-let the said premises to the said Company in which Company Godson would have, as additional rental to that hereinafter set out, 25 per cent. of the capital stock of the Company and would also have the right to designate one of the three directors or trustees thereof. The said agreement also provided that Godson should execute to Pantages a lease on the above described premises for a period of 20 years from July 1st, 1916, at a rental of $12,000 per year and that the lease should contain a provision under which Godson should have the option at the end of said term of 20 years to purchase the building on the said land on certain terms.

The subsequent lease seems to have carried out the terms of the preliminary agreement for the most part in similar phraseology but the second paragraph thereof reads as follows:

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"The said lessee covenants to repair and to keep the premises to be erected upon the said lands in good condition, and will not assign without leave, and will not sub-let except to the company to be known as the Pantages-Vancouver Theatre Company, Limited, and will keep and leave the premises in good repair."

The lease from Pantages to the Pantages-Vancouver Theatre Company, Limited, dated 24th of September, 1917, although purporting to be a sub-lease, comprises the whole term and it is contended by counsel on behalf of the plaintiffs that such sub-lease therefore operates as an assignment and is a breach of what it is argued is a covenant not to assign without leave. The cases of *Barrow* v. *Isaacs* (1890), 60 L.J., Q.B. 179 and *Hamilton* v. *Ferne and Kilbir* (1921), 1 W.W.R. 249, cited by counsel, would seem to be conclusive against relief being granted here if I come to the conclusion that clearly there was a covenant not to assign, that such covenant had been broken and that the plaintiffs had not waived the benefit of same. In the present case, however, it is to be noted that the preliminary agreement provides for the lease to contain, and the subsequent lease did contain, the further provision that should the lessor not elect to purchase the

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said building the lessee should have the option or right to renew the said lease for the further period of 10 years from the expiration of said first leasehold period and the lessee should likewise sub-let upon the same terms to the Pantages-Vancouver Theatre Company, Limited, for a like period on the rental basis to be settled as therein set out. This provision considered along with the provision that Mr. Godson should have shares in the Company and that one of the directors should be designated by him would seem to me to indicate that all parties anticipated that the corporation to be formed, *viz.*, The Pantages-Vancouver Theatre Company, Limited, should have a lease from Pantages of the said premises upon the same terms and for a like period as Pantages himself and that the covenant, if interpreted strictly as one not to assign without leave and one prohibiting such a lease to the Pantages-Vancouver Theatre Company, Limited, would be contradictory to the intention of the parties as expressed elsewhere in both preliminary agreement and the subsequent lease. Moreover the lease itself between Pantages and Pantages-Vancouver Theatre Company, Limited, dated the 24th of September, 1917, which purports to be a sub-lease but assigns the whole term, provides that the lessee may pay the said rentals either to the lessor or to Godson or his agents as the lessor may direct and it would seem as though the rent had been demanded from the Company by the said Godson or his representatives and paid accordingly ever since the date of the lease. It may be noted also that the document dated the 7th of December, 1929, between the plaintiffs and the defendants herein contains the following recitals:

"WHEREAS by an agreement dated the 3rd day of June, 1916, and made between the said Charles Arthur Pollard Godson (in the said agreement described as Charles Arthur Godson, and hereinafter referred to as "Godson") and Pantages, it was agreed that a lease of the lands hereinafter described should be given by Godson to Pantages for the purpose of the erection of a theatre on the said lands:

"AND WHEREAS in pursuance of the said agreement Godson gave to Pantages a lease of the said lands, which lease is dated the 5th day of June, 1916, and registered in the Land Registry Office at the City of Vancouver, British Columbia, as number 95003-F:

"AND WHEREAS a theatre was duly erected by Pantages on the said lands pursuant to the said agreement of the 3rd day of June, 1916:

"AND WHEREAS on or about the 24th day of September, 1917, Pantages caused the Theatre Company to be incorporated under the laws of the State

of Washington, which Company was on or about the 26th day of October, 1917, duly registered as an extra-provincial company in the Province of British Columbia:

"AND WHEREAS by a lease dated the 24th day of September, 1917, Pantages did, among other things, lease the said lands to the Theatre Company pursuant to the said agreement of the 3rd of June, 1916, which lease is registered in the Land Registry office at the City of Vancouver aforesaid as number 97338-F:

"AND WHEREAS in consideration of the granting of the said lease of the 24th of September, 1917, the Theatre Company did issue and allot as fully paid to Pantages its total authorized share capital, namely, 2,560 shares of $100 each:

"AND WHEREAS of the said shares 1920 are now owned by and registered in the name of Pantages and 640 are now owned by and registered in the name of the Godson Estate:

"AND WHEREAS Godson has since died and Probate of his will has been granted to the parties referred to herein as the Godson Estate, and to William Graham Breeze, who has since renounced the same:

"AND WHEREAS the Godson Estate is registered under number 28225-K as the owner in fee simple of the said lands, which are more particularly known and described as lot Fourteen (14) (except the west ten inches (10"), and Parcel 'A' (Reference Plan No. 895-A) of lot Fifteen (15) block Twenty-nine (29) district lot Five Hundred and forty-one (541) group one (1), New Westminster District. Plan 210, City of Vancouver."

It would appear to me from these recitals and other expressions used in the said agreement of December 7th, 1929, that all parties to this action were satisfied that all the documents up to that time had been in order and it would seem to be an afterthought now to complain that the lease of September 24th, 1917, was a breach of a covenant not to assign contained in the lease of the 5th of June, 1916. Judgment

Considering all the documents and transactions between the parties it seems to me that the covenant has been so expressed that its meaning is doubtful and the tenant in good faith has done what he supposed to be a performance of it in which case a forfeiture will not be enforced for the difficulty of construing the covenant is a special circumstance entitling him to relief. See *McLaren* v. *Kerr* (1876), 39 U.C.Q.B. 507. Should I be wrong in this, my opinion would be that the plaintiffs have waived the right to avail themselves of this objection thirteen years after the lease had been entered into and acted upon by all parties.

As to the covenant to insure, it is contended by the plaintiffs that this has been broken by failure of the lessee to insure in

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the joint names of the plaintiffs and lessee with loss payable to the mortgagees and also by failure to insure to the full insurable value of the building "furnished and equipped as a modern first-class theatre." In this connection it must first be noted that, though the lease is made in pursuance of the Leaseholds Act, the very words of the Act, as to insuring in the joint names of the lessor and lessee, were not used as would appear to be necessary in order that the Act should operate on the words. See *Delamatter* v. *Brown Brothers Co.* (1905), 9 O.L.R. 351. The clause in question in the lease reads as follows:

"The said lessee covenants and agrees with the said lessor to insure the said building in a reputable company or companies at his own expense."

The preliminary agreement already referred to provided that the building to be erected upon the premises should be furnished and equipped as a modern first-class theatre. The present insurance is in the name of the Theatre Company alone and is sufficient to cover the value of the building itself but it is contended by plaintiffs that the covenant means that the insurance should amount to the full insurable value of the building furnished and equipped as aforesaid.

Judgment

I think it might well be argued that the exact meaning of the covenant to insure is doubtful with respect to both points raised but I think I should take into consideration the conduct of the parties interested in the matter since the date of the lease in question. It would not seem to be disputed by the defendants that, up until the 31st of December, 1929, insurance to a satisfactory amount had always been in the name of Godson or the Godson estate with loss payable to the mortgagees according to their interest but on the said 31st of December, 1929, the insurance then in force on the said premises was discontinued and insurance taken out in the name of the Pantages-Vancouver Theatre Company, Limited, the total insurance in force on the real and personal property being $215,000. Upon objection being raised to the change the parties would appear to have corresponded with each other with a view to an adjustment along the lines of having the Godson Estate agree that, in the event of any part of the insurance moneys being paid to the mortgagees, the Theatre Company should have the right to raise a corresponding sum by way of mortgage on the property or that

the mortgagees should agree that, in the event of a fire, the money might be used for rebuilding. It would seem as though at one time during the correspondence solicitors for the parties reached an adjustment of the matter upon the understanding that certain letters should be obtained from the mortgagees but the letters required were not obtained though it would appear that it was not until early in July last or shortly before proceedings herein were taken that it became apparent that such letters would not be forthcoming. Under all the circumstances I incline to the view that parties seeking relief should not now be heard to cast any doubt upon the meaning of the covenant being along the lines in which it had been carried out for years and on the other hand, in view of the position in which the correspondence had left the matter, the plaintiffs should not now be at liberty to invoke a breach of the covenant to insure as a ground to disentitle the defendants to relief from forfeiture for non-payment of rent though some condition with regard to the insurance might be a term upon which such relief should be granted.

As to the alleged breach of the covenant to pay taxes it is admitted that the taxes have been paid to the end of 1929 and, in my opinion, the fact that the defendants have not yet paid the current year's taxes should not be good ground for refusing the relief asked for though it might affect the terms upon which such relief should be granted.

Judgment

It is further submitted by counsel on behalf of the plaintiffs as a ground against relief from forfeiture that the sub-lessee or assignee—the Pantages-Vancouver Theatre Company, Limited—and Dewees have become insolvent. The defendants contend that in any event it is the insolvency of only the lessee Pantages that would affect the matter. However, it is not necessary that I should decide the exact point thus raised in view of the conclusion I have reached which is that there is not sufficient proof before me that the said Company is insolvent and the financial condition of Dewees is immaterial.

It is further submitted as a final ground against relief from forfeiture being granted to the defendants that the plaintiffs, upon giving notice of forfeiture and re-entry, were obliged to, and did, give notice to Dewees of cancellation of the agreement

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for the sale of the aforesaid shares to him by the Godson Estate as otherwise it might be contended that, if such agreement remained in good standing and payments thereunder were made, the forfeiture could not be effectual as said shares, according to the preliminary agreement, were to be received by Godson as "additional rent." On this point, however, I might say that the argument of Mr. *Robertson* on behalf of the defendants seems to me to be conclusive and I would hold that when the shares were issued and delivered to Godson by the Theatre Company the "additional rent" was then and there forever paid. When the Godson Estate thereafter entered into an agreement to sell the shares to Dewees such agreement was not an agreement with respect to unpaid rent and, in my opinion, its cancellation would not be necessary to support the forfeiture for non-payment of rent. I, therefore, cannot hold that the position as between the parties has been so altered as to cause injustice if the forfeiture should be relieved against.

Judgment

My conclusion, therefore, is that both of the said defendants are entitled to be relieved from forfeiture and, with leave to speak to the matter of insurance as hereinafter allowed, the relief will be granted upon the following terms:

(1) Payment of arrears of rent and interest thereon. (2) Payment into Court on account of the taxes of any rebates or discounts so that same may be secured in any event. (3) Payment of the cost of attempting to collect rent before action was begun. (4) Payment to the plaintiffs of the costs of the action herein upon a solicitor and client basis. (5) Payment of the arrears due by Pantages on the said 10th of July, 1930, under clause 19 (b) of the said agreement of December 7th, 1929.

I would suggest that the parties should arrange to have the matter of the insurance adjusted between them. If no satisfactory arrangement can be made, the question of making some condition with regard to the insurance one of the terms of the relief, may be spoken to if the plaintiffs so desire.

Application granted.

IN RE TAXATION ACT AND ESQUIMALT WATER WORKS COMPANY.

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Taxation—Income—Expropriation of waterworks system by city—Assumption of mortgage by city—Payment of balance deferred—Additional annual payments by reason thereof—Income—R.S.B.C. 1924, Cap. 254, Parts III. and IX.

The City of Victoria expropriated the Esquimalt waterworks system, the price agreed upon being $1,450,000. The City assumed a mortgage of $625,000 and it was agreed that the balance of $825,000 might be paid at any time upon giving three months' notice failing which the sum of $40,000 per annum was to be paid the Company during the currency of the mortgage (12 years) and thereafter semi-annual payments of $40,000 to be allotted one-half to the Company and one-half to a sinking fund for paying off the debt. Forty thousand dollars was received by the Company in 1928, and the same amount in 1929. These sums were assessed as income under Part III. of the Taxation Act. On appeal the judge of the Court of Revision held the assessment should be made under Part IX. of the Act.

Held, on appeal, reversing the decision of the judge of the Court of Revision (MCPHILLIPS, J.A. dissenting), that the assessment should be made under Part III. of said Act.

APPEAL by the Provincial Assessor from the decision of *R. H. Green*, Esquire, judge of the Court of Revision for the Victoria Assessment District, of the 21st of March, 1930, on appeal from the assessment made by the Provincial Assessor under the Taxation Act for the years 1928 and 1929. By notice of expropriation of the 4th of August, 1925, subsequently validated by The Esquimalt Water Works Company Winding-up Act, 1925, the City took over the waterworks system from the Company for $1,450,000. The City was to assume a mortgage to the Royal Trust Company of $625,000 which was to fall due in 12 years as part payment of the purchase price and pay the Company $40,000 a year during the currency of the mortgage. Thereafter the City was to pay $40,000 semi-annually of which $21,656.25 was to be allotted to the Company and $18,343.75 to a trust sinking fund and upon the sinking fund amounting to $825,000 (the balance of the purchase price of the system) this sum was to be paid over to the Company as pay-

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ment in full for the system. Under this arrangement $40,000 was paid by the City to the Company in 1928, and a similar sum in the year 1929. The Company claims that these payments are made on capital account and are not taxable as income.

The appeal was argued at Victoria on the 23rd of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Bullock-Webster, for appellant: These $40,000 payments are interest. This is apparent on reading the notice of expropriation as a sinking fund is provided for to pay the capital sum due for the works. The assessment should be made under Part III. of the Taxation Act.

Maclean, K.C., for respondent: Under Part III. the tax is about $2,800, whereas under Part IX. it is about $800: see *Esquimalt Water Works Co.* v. *Leeming* (1930), 42 B.C. 163. We are not exercising our full corporate powers. We obtain this money yearly on the purchase price and that is all. We do not come under Part III. of the Act at all. We are under Part IX. Our assets are taken away by the City and we come under subsection (*j.*) of section 42 of the Act: see *Lee* v. *Neuchatel Asphalte Company* (1889), 41 Ch. D. 1 at p. 27; *Verner* v. *General and Commercial Investment Trust* (1894), 2 Ch. 239 at p. 264.

Argument

Bullock-Webster, replied.

Cur. adv. vult.

7th October, 1930.

MACDONALD, C.J.B.C.: In *Esquimalt Water Works Co.* v. *Leeming* (1930), 42 B.C. 163, this Court held that the sum of $40,000 payable yearly by the City of Victoria to the Company was the Company's income; it being in lieu of interest on the deferred sum of $825,000, a portion of the purchase price of the Company's assets by the City for approximately twelve years. That decision is applicable to the present case and governs the decision here in so far as that portion of it is concerned.

MACDONALD, C.J.B.C.

There is, however, a further question, that is to say, whether the said sum should be taxed under Part III. or on the contrary

under Part IX. of the Taxation Act. The Assessor assessed it under Part III. of the Act. The Court of Revision held this wrong and decided it was assessable under Part IX. The Assessor appeals and the Company cross-appeals submitting that they are not liable under either of said Parts; that they are not liable to assessment at all.

The Esquimalt Water Works Company formerly carried on the business of supplying water to users thereof. Some years ago they entered into an agreement under which they agreed to sell to the City of Victoria all its assets for a fixed sum part of which was paid by the assumption of certain liabilities of the Company, the balance being postponed for twelve years, for which postponement the City agreed to pay $40,000 a year. On examination of the evidence it will be found that no part of the purchase price is included in the $40,000 a year. The whole purchase price is to be paid in full apart from the yearly payments. Shares in the Company are not under any circumstances to belong to the City of Victoria. The liquidator is acting only in the capacity of collector from the City for the benefit of the shareholders and when the full debt has been paid the City at its option may ask for a final winding-up. The contention of the Company is that it is entitled to a lower rate of income tax because it is in name a waterworks company and falls within section 99 and section 100 of said Part IX., where it is provided that certain named corporations including waterworks companies carrying on business in the Province shall in lieu of all income tax and personal property tax otherwise imposed by this Act be assessed and taxed annually on its gross income received or accrued from the business carried on in the Province and that the rate of taxation of such corporation shall be two per centum of the amount of its gross income. In my opinion the Company is not within this Part. It is not carrying on business within the Province or at all. It exists for one purpose only, that of the collection of the balance of the purchase-money and the distribution of it amongst the shareholders. That being the case the Company is taxable under Part III. Income is defined by the Act to include, *inter alia,* money received from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business, or profession of any

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kind whatsoever. Part III. provides that "every person (and this corporation is a person as defined by the Interpretation Act) shall be assessed and taxed on his income wheresoever derived in the assessment district in which he is resident," etc. Section 44 enacts that the net income of every person shall be ascertained for the purposes of taxation by deducting from his gross income the exceptions provided for in section 42. I think, therefore, that the said Company must be assessed under Part III. and not under Part IX. and that judgment should be entered accordingly.

MACDONALD, C.J.B.C.

I would allow the appeal and dismiss the cross-appeal.

MARTIN, J.A.

MARTIN, J.A. would allow the appeal.

GALLIHER, J.A.: This Court has already decided in *Esquimalt Water Works Co.* v. *Leeming* (1930), 42 B.C. 163 that the moneys in question were income and taxable. The question now is, Is the income taxable if at all under Part III. or Part IX. of the Taxation Act, R.S.B.C. 1924, Cap. 254? Mr. *Maclean* on behalf of the Company submits they are exempt from taxation under Part III. by virtue of subsection (*j.*) of section 42 of the Act, which reads as follows:

"The following income shall be exempt from taxation:—

"(*j.*) The income of every . . . corporation not less than ninety per centum of the stock or capital of which is owned by the Province or any municipal corporation."

Dealing with Part IX., section 99 reads:

"This part shall apply to the following corporations . . . water-works companies," etc.

GALLIHER, J.A.

Then follows section 100:

"Every corporation to which this Part applies carrying on business in the Province shall, in lieu of all income-tax and personal-property tax otherwise imposed by this Act, be assessed and taxed annually in the Victoria Assessment District on its gross income," etc.

And by section 102,—

"The rate of taxation of every corporation to which this Part applies shall be two per centum upon the amount of its gross income."

The judge below has held that the companies named in section 99 as companies to which Part IX. applies whether they are doing business within the Province or not are taxable under this Part and that section 100 does not call for them to be doing business in order to come under this Part.

With respect I take a different view. I think in reading sections 99 and 100 what is meant and what is the proper construction to be placed on these sections is in effect this: Section 99 names certain corporations (including this particular Company) to which this Part shall apply and that when under section 100 these companies are doing business within the Province then they come under Part IX. for the purposes of taxation.

Now is the Company here carrying on business within the Province? If we look at the Act ratifying and confirming the agreement between the Corporation of the City of Victoria and The Esquimalt Water Works Company, B.C. Stats. 1925, Cap. 69, we find what the City of Victoria took over from the Company were its assets, its franchise and the corporate rights, powers and privileges of the Company. Section 5 of the Act reads:

"5. During the period covered by the making of the payments by the Corporation of the City of Victoria called for by the said Notice of Expropriation, The Esquimalt Water Works Company shall not exercise any other corporate powers than such as are necessary to deal with and dispose of the moneys received from the City of Victoria in the premises, and to proceed for and recover all or any part of such moneys by action in any Court of competent jurisdiction should any default in payment be made by the City of Victoria for any period of default exceeding three calendar months, and for and in aid of such recovery The Esquimalt Water Works Company shall have a vendor's lien."

This limits the exercise of their corporate powers by the Company to those necessary to deal with the receipt and disposal of the moneys received from the City and to sue in case of default in payment. These are powers exercised in the course of winding up—it is not in my opinion a carrying on of business within the purview of Part IX.

As to subsection (*j.*) of section 42 it does not in my view apply to the circumstances of this case. I would hold therefore that the Company are assessable under Part III. of the Act, and would allow the appeal.

And as I have already intimated the Company are not exempt under section 42 (*j.*) the appeal of the Esquimalt Water Works Company is dismissed.

MCPHILLIPS, J.A.: This appeal involves at first sight some inextricable features; however I have finally come to the con-

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clusion that the statute law is quite workable and that the judgment of the learned judge of the Court of Revision for the Victoria Assessment District should be sustained. It is clear to me that the Company is in existence because in a certain eventuality, *i.e.*, default in payment on the part of the City of Victoria all of its corporate rights powers and privileges are exercisable (see section 8 The Esquimalt Water Works Company Winding-up Act, 1925). But apart from this consideration the powers of the Company are by the statute only limited during the period covered by the making of the payments. There is no termination of the existence of the Company until all payments called upon to be made have been duly made (see sections 5 and 6 of the Act).

The closest analogy that I can apply to the whole transaction, *i.e.*, the acquirement by the City of Victoria of the assets, powers, privileges and franchise of the Company is that of a lease with the right of purchase. The City of Victoria is required to make the payment of $40,000 per annum for a certain time, that is, during the currency of the mortgage to The Royal Trust Company, but these annual sums are not a return of capital and cannot be treated as such as the moneys do not go in the way of the purchase price—this Court has already decided this—and these annual payments have been held by this Court to be annual income and taxable as such.

MCPHILLIPS, J.A.

Unquestionably most of the powers of the Company are not exercisable so long as the payments by the City of Victoria are made and there is no default but it would be going too far to say that the Company is not carrying on business (see sections 5 and 6 of the above Act and section 100 of the Taxation Act, Cap. 254, R.S.B.C. 1924).

Then we come to the crucial point under what Part of the Taxation Act is the Company subject to taxation? The only answer, it would seem to me, is under Part IX., section 99 of the Taxation Act reading as follows:

"99. This Part shall apply to the following corporations, namely: All insurance companies, guarantee companies, loan companies, savings and loan associations, trust companies, telegraph companies, telephone companies, express companies, gas companies, waterworks companies, electric lighting companies, electric power companies, and street-railway companies."

I do not consider that section 100 is at all disturbing in

arriving at this view as section 99 is the controlling section and as I have previously pointed out the Company is carrying on business to a limited extent anyway and this would if need be satisfy section 100. Section 100 reads as follows:

"100. Every corporation to which this Part applies carrying on business in the Province shall, in lieu of all income-tax and personal-property tax otherwise imposed by this Act, as assessed and taxed annually in the Victoria Assessment District on its gross income received or accrued from the business carried on in the Province: Provided that in the case of an insurance company its gross income, for the purposes of this Part, shall not include any amount paid by it for reinsurance to another company licensed under the Fire Insurance Act or the Insurance Act, or any amount returned by it to an insurer by way of refund of premium, and where it has paid in any year the sum of one hundred dollars for renewal of its licence under either of those Acts, a rebate not exceeding that sum shall be allowed to the company from the tax payable in that year by it under this Act."

I would for the foregoing reasons dismiss the appeal and also dismiss the cross-appeal.

MACDONALD, J.A. would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. H. Bullock-Webster.*
Solicitors for respondent: *Elliott, Maclean & Shandley.*

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GILCHRIST MANUFACTURING CO. v. INTERNATIONAL JUNK CO.

GILCHRIST MANUFACTURING CO. LIMITED v. INTERNATIONAL JUNK CO. LIMITED.

Contract—Agreement to dismantle ship and share profits—Whether partnership or joint adventure—Appeal.

The plaintiff and defendant entered into an agreement on the 10th of January, 1929, to undertake the cutting and dismantling of the remainder of the hulk of the S.S. Japan lying in Vancouver Harbour. They were each to pay one-half the cost of cutting, dismantling, loading, scow rent, wages and other necessary expenses incurred to put the steel obtained from the hulk alongside transport ship necessary for loading. After said expenses were paid the defendant was entitled to retain $500 per shipment from the net profits of the first two shipments only, and the ultimate balances of the net profits from all shipments were to be divided equally between the plaintiff and defendant. They worked together under said agreement until the 7th of September, 1929, when the plaintiff claims the defendant retained moneys due the plaintiff and on the 9th of October, 1929, the defendant was indebted to the plaintiff in the sum of $1,013.51. Judgment was given for the amount claimed the learned trial judge holding that there was not a partnership as defendant claimed but the parties were independent contractors.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that while there were elements that might point to a partnership, the nature of the transaction, the circumstances surrounding it and the manner in which it was carried out point to the fact that the parties had no intention of carrying on as a partnership.

APPEAL by defendant from the decision of MCDONALD, J. of the 27th of March, 1930, in an action to recover $1,013.51 due the plaintiff under an agreement for the dismantling of the S.S. Empress of Japan. On the 10th of January, 1929, the plaintiff and defendant entered into an agreement in writing whereby they undertook as a joint adventure to cut and dismantle the remainder of the hulk of the S.S. Empress of Japan lying in Vancouver harbour. The principal terms of the agreement were that they should each pay half the cost of cutting, dismantling, loading, scow rent, wages, and all necessary work to put the steel obtained alongside transport ship ready for loading. After deducting expenses the defendant was to be entitled to retain from the net profits of the first two shipments only up to the sum of $500 per shipment and the ultimate balances of

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the net profits from all shipments were to be divided equally between the parties. The parties worked together in pursuance of said agreement until the 7th of September, 1929, when the plaintiff claims the defendant retained moneys due the plaintiff and on the 9th of October, 1929, the defendant was indebted to the plaintiff in the sum of $1,013.51. At this time there was still 150 tons of steel to be removed from the said hulk.

The appeal was argued at Victoria on the 19th and 20th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: The dismantling was not completed. The defendant says this was a partnership agreement and no accounts taken and the plaintiff had no right to sue. That this was a partnership see *Agnew* v. *McKenzie, Ellis Wood Co.* (1913), 5 W.W.R. 741 at p. 746; *Brown* v. *Tapscott* (1840), 9 L.J., Ex. 139; *Lowe* v. *Dixon* (1885), 16 Q.B.D. 455. If this is a partnership we have one partner suing another: see *Richardson* v. *The Bank of England* (1838), 4 Myl. & Cr. 165; *Carr* v. *Smith* (1843), 5 Q.B. 128. Whether the nature of the action is changed by amendments during the course of the trial see C.E.D. Vol. 6, p. 488; *Kosolofski* v. *Goetz* (1919), 2 W.W.R. 805; Smith's Mercantile Law, 12th Ed., p. 33.

Argument

Dickie, for respondent: This is a working agreement, a joint adventure. The defendant sold all the steel that was dismantled and collected. After the steel was put alongside the scows we had nothing more to do with it. They then took it and sold it. That this was merely a joint adventure as distinguished from partnership see *Walker* v. *Hirsch* (1884), 54 L.J., Ch. 315 at p. 317. All the cases appellant referred to were where third parties were concerned: see also Halsbury's Laws of England, Vol. 22, p. 4, note (*e*).

Farris, in reply, referred to *Green* v. *Beesley* (1835), 2 Scott 164.

Cur. adv. vult.

7th October, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The learned judge appealed from held that there was not a partnership as defendant alleges, but

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that the parties were independent contractors. I think he came to the right conclusion, though I think the case bears some marks of partnership. It appears that plaintiff agreed to dismantle the hulk not as a partner of defendant but on joint adventure, each contributing towards the costs of the work, the plaintiff taking what was given it by the contract as remuneration for the work. There is no partnership name, nor books, nor did defendant claim that a partnership existed until it got into Court when it suited its case to set up a partnership.

Appeal dismissed.

MARTIN, J.A.

MARTIN, J.A.: With every respect to the contrary opinion of my learned brothers, I am unable to reach any other conclusion than that the agreement entered into between the parties was a partnership one and not a mere "working agreement" or "joint adventure," as submitted by the respondent, and therefore the judgment as entered should, in my opinion, be set aside.

GALLIHER, J.A.

GALLIHER, J.A.: I take the same view as my brother the Chief Justice that while there are elements that might point to a partnership, the nature of the transaction, the circumstances surrounding it, and the manner in which it was carried out point to the fact that the parties had no intention of carrying on as a partnership.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The contention upon the part of the appellant in this appeal was wholly confined to the one point that the subject-matter of the action and the contract entered into between the parties established that a partnership had been created and that the respondent had no right to sue—that the action should have been one to take the partnership accounts. Now as to whether there was a partnership?

The contract entered into under which it is contended a partnership was constituted reads as follows, being in the form of a letter from the respondent to one A. Klein acting for the appellant and the terms of the letter were accepted by the appellant and the venture was entered upon, the letter reading as follows:

"We agree to proceed with the work of cutting and dismantling the

balance of the hulk of the S.S. Empress of Japan now lying in the Harbour of Vancouver on the following basis:

"1st. You to pay the half total cost of cutting, dismantling, loading, scow rent, etc., necessary to put the steel alongside the ship ready for loading, a cost sheet to be made each week and half the total cost to be paid each week.

"2nd. Steel to be sold at the highest price on market, and the sale of same to be agreeable to both parties, and where sale is made for export, a letter of credit must be put up by the purchaser of the steel.

"3rd. It is understood that after each shipment is made, the moneys received from such shipment to be divided as follows: Each party to be reimbursed for moneys paid out by him in connection with the work, and after operating expenses have been paid, the following to be the distribution, Five Hundred Dollars ($500) to be paid to Mr. Klein, and the balance divided equally between both parties. It is understood that Mr. Klein is to have an advance of Five Hundred Dollars ($500) payment from each shipment from the first two shipments only. After the first two shipments the balance of profit, after deducting working expenses, to be divided on a fifty-fifty basis.

"4th. The charges against this work will be, all wages, including wages to Mr. R. J. Christian, explosives, oxy-acetylene, tool breakages, derrick hire, scow rent and harbour dues.

"5th. The work to be completed within six months or sooner if possible to comply with your Bond with the Harbour Commissioners.

"6th. It is further agreed that the work already done by us on the above hulk shall be paid for under the basis of this agreement as specified under item number one (1).

"Accepted."

In the statement of claim we find the cause of action set forth as follows:

"2. The principal terms of the said agreement were:

"(a) That the plaintiff and defendant would each pay half the cost, as per cost sheet to be prepared by the plaintiff each week or as near that period as could be done, of cutting, dismantling, loading, scow rent, all wages, including wages of R. J. Christian, manager of the plaintiff Company, cost of explosives, oxy-acetylene, tool breakages, derrick hire and other necessary expenses incurred and including some work already done by the plaintiff in connection with the said hulk, necessary to put the steel obtained from the said hulk, alongside transport ship ready for loading, and

"(b) That after the said expenses were allocated between the plaintiff and defendant, after deducting therefrom the receipts for material sold, the defendant would be entitled to be paid, or retain, as the case may be, from the net profits of the first two shipments only, so much thereof, up to the sum of five hundred dollars ($500) per shipment and the ultimate balances of the net profits from all shipments were to be divided equally between the plaintiff and defendant.

"3. The plaintiff and defendant in pursuance of the said agreement worked together, and the plaintiff rendered to the defendant cost sheets as above-mentioned and settlements were made pursuant to the said agreement upon the basis of the cost sheets rendered between them, until about the

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7th day of September, 1929, whereupon the defendant retained moneys due to the plaintiff and on the 9th October, 1929, the defendant was indebted to the plaintiff in the sum of $1,013.51."

The action coming on for trial and during the progress thereof the point above referred to was taken by the appellant, *i.e.*, that it was the case of a partnership and there was no right to sue but that the action should be one for the taking of the partnership accounts. The learned trial judge, Mr. Justice D. A. MCDONALD in his oral reasons for judgment said:

"I do not think there is very much in it, but I am going to give him leave to amend in the alternative for an accounting. I am going to give judgment for the plaintiff for $1,013.51, and I am going to trust to Mr. *Dickie* to produce that cheque for $105, and also that time sheet of the 20th September, to see that it is not charged twice, and whether you paid out that $15 and $13.70, and if you did, he will give you credit."

It would appear plainly enough that leave to amend was granted and an accounting was had and the learned judge found that there was $1,013.51 due and payable by the appellant to the respondent. So that all that was necessary to be done was done and it was the course of the trial. However, in my opinion, no partnership was established and it was not a case where the amendment was necessary. The evidence establishes that the appellant was indebted to the respondent to the extent of $1,013.51 the amount sued for and for which judgment was given, founded on the obligation to pay it arising out of the special contract entered into. In Pollock's Digest of the Law of Partnership, 12th Ed., pp. 19-20:

MCPHILLIPS, J.A.

"From the latter part of the eighteenth till past the middle of the nineteenth century the prevailing doctrine was that anyone who shared in the profits of a business (at all events profits in the correct sense, net profits as opposed to gross returns, or gross profits as they were sometimes improperly called) must be liable as a partner. The decision of the House of Lords in *Cox* v. *Hickman* (1860), 8 H.L. Cas. 268 shewed this doctrine to be erroneous. The true doctrine, as laid down in recent authorities, and now declared by the Act, is that sharing profits is evidence of partnership, but is not conclusive. We have to look not merely at the fact that profits are shared, but at the real intention and contract of the parties as shewn by the whole facts of the case. Where one term of a contract creates a right to share profits, it is not correct to take that term as if it stood alone and presume a partnership from it, and then construe the rest of the agreement under the influence of that presumption. Sharing profits, if unexplained, is evidence of partnership: but where there is an express agreement the agreement must from the first be looked to as a whole to arrive at the true intention."

(*Cox* v. *Hickman* (1860), 8 H.L. Cas. 268, 306; 125 R.R. 148, 168 (the leading case which puts the law on its present footing), *Mollwo, March, & Co.* v. *The Court of Wards* (1872), L.R. 4 P.C. 419, 435; *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238; 57 L.J., Ch. 468; *Davis* v. *Davis* (1893), 63 L.J., Ch. 219; (1894), 1 Ch. 393, 399).

In *Mollwo, March, & Co.* v. *The Court of Wards, supra,* Sir Montague Smith said at pp. 434-5:

"But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox* v. *Hickman* [(1860)], 8 H.L. Cas. 268 and the cases which have followed that decision. It was contended that these cases did not overrule the previous ones. This may be so, and it may be that *Waugh* v. *Carver* [(1793)], 2 H. Bl. 235, and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox* v. *Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties."

MCPHILLIPS, J.A.

Now apply the above language to the present case, take the concluding words of the above quotation "whether that relation does or does not exist must depend on the real intention and contract of the parties" as demonstrated in the present case? The respondent was to proceed with the cutting and dismantling of the hulk of the S.S. Empress of Japan in the Harbour of Vancouver and the appellant was to pay half the total cost of the cutting, etc., necessary to put the steel alongside the ship ready for loading, a cost sheet to be made each week and half the total cost to be paid each week. The appellant for a considerable time complied with the terms of the contract, then failed to comply with the contract and the suit was one for admittedly the amount due thereunder and evidence was led by the respondent in the Court below, which fully established the liability of the appellant and judgment was given by the learned judge for the amount proved which judgment was duly entered

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from which judgment this appeal is taken. I have no hesitation in arriving at the conclusion that the present case is not one of partnership; it is a case of special contract and during the prosecution of the operations agreed upon certain payments were to be made weekly and the appellant failed to do that which he contracted to do in respect of the moneys sued for and it follows that the respondent had an immediate cause of action upon default made. Even were I wrong in my view that it was not a partnership the amendment to cover an accounting was made and the learned judge found the amount to be due to the respondent. I cannot but observe that this is an idle appeal in my opinion most unconscionable and one absolutely devoid of merit in any particular. In my opinion the judgment of the learned trial judge should be affirmed and the appeal dismissed.

MACDONALD, J.A.

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

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *A. H. Fleishman.*
Solicitor for respondent: *E. A. Dickie.*

MacINNES v. CARTWRIGHT & CRICKMORE, LIMITED.

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MacINNES v. CARTWRIGHT & CRICKMORE, LTD.

Stock—Instruction to broker to sell at not less than certain price—Stock sold at lower price—Local usage—Return of certificate—Right to original certificate.

An agent of the defendant Company advised the plaintiff to purchase Weymarn Petroleum stock. The plaintiff had no money but delivered the agent a certificate for 500 shares of Silver Cup (Hazelton) Mining Co. Ltd. with instructions to sell it at not less than 30 cents per share and then buy with the proceeds 100 shares of Weymarn Petroleum at $1.50 per share, the certificate to be returned to him in case the shares were not sold at the named price. The stock was at 28 cents on the market when delivered. It never reached 30 cents but gradually diminished in price afterwards. On the plaintiff demanding the return of his certificate the defendant tendered him another certificate for the same number of shares in said stock which was refused. In an action for conversion, the defendant claimed that by local usage it could use the certificate for its own purposes which it did by selling the stock. The action was dismissed.

Held, on appeal, reversing the decision of RUGGLES, Co. J., that the arrangement between the plaintiff and the agent was that the certificate should not be parted with unless the shares were sold at the named price but should be kept and redelivered to the plaintiff. The alleged local usage does not apply to this case as it cannot displace an actual contract between the parties. The plaintiff is entitled to $115 damages, the market price of the stock at the time of conversion.

APPEAL by plaintiff from the decision of RUGGLES, Co. J. of the 27th of February, 1930, in an action for damages for detention of plaintiff's funds or in the alternative for damages for conversion. The plaintiff claims that he was approached by an agent of the defendant Company and asked to purchase some Weymarn petroleum stock. He stated he had no money but he had a certificate for 500 shares of Silver Cup (Hazelton) Mining Co. Ltd. and he handed over this certificate to the defendant stating that if this stock could be sold at 30 cents per share they could use the proceeds in buying 100 shares of Weymarn Petroleum stock at $1.50. The Silver Cup stock was at about 28 cents per share at the time of delivery, but it never went higher and later steadily dropped in value. No purchase

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of petroleum stock was made and sometime later the plaintiff demanded redelivery of his share certificate but the defendant sent him another certificate for 500 shares of Silver Cup. The plaintiff claims he is entitled to his original stock certificate.

The appeal was argued at Victoria on the 23rd and 24th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. A. MacInnes, for appellant: The question is whether the plaintiff is entitled to his original certificate: see Halsbury's Laws of England, Vol. 27, p. 238, sec. 486. Any disposal by a broker contrary to instructions is conversion: see *Clarkson* v. *Snider* (1885), 10 Ont. 561; *Taylor* v. *Plumer* (1815), 3 M. & S. 562. He must return identical stock: see *Langton* v. *Waite* (1868), L.R. 6 Eq. 165 and on appeal (1869), 4 Chy. App. 402 at p. 404; *Haggart* v. *Trustee of Heron* (1930), 11 C.B.R. 163; *In re Neuville Belleau* (1929), *ib.* 383; *Plummer* v. *Mack & Timms* (1930), 2 W.W.R. 107; *Clarke* v. *Baillie* (1911), 45 S.C.R. 50. Usage is no answer: see *Mara* v. *Cox and another* (1884), 6 Ont. 359; Halsbury's Laws of England, Vol. 10, p. 252, sec. 469; Chitty on Contracts, 17th Ed., 44; *Sutherland* v. *Cox* (1884), 6 Ont. 505; *Neilson* v. *James* (1882), 9 Q.B.D. 546; *Pearson* v. *Scott* (1878), 9 Ch. D. 198; *Ponsolle* v. *Webber* (1908), 1 Ch. 254; *Aikman* v. *Burdick Bros., Ltd.* (1923), 33 B.C. 23 at p. 25. A broker cannot benefit apart from special contract from his customer's business: see *Bickell* v. *Cutten* (1926), S.C.R. 340. He sold the stock without authorization: see *Priestman* v. *Kendrick et al.* (1833), 3 U.C.Q.B. (o.s.) 66.

J. W. deB. Farris, K.C., for respondent: The issue is whether or not when a broker has stock on hand for his customers he must be careful to keep them segregated for the customer according to what he gives: see *In re Bryant, Isard & Co.* (1922), 2 C.B.R. 471; *Langton* v. *Waite* (1868), L.R. 6 Eq. 165 does not hold that the identical shares must be given back. It is immaterial so long as the same number of shares in the particular stock is returned: see *Mara* v. *Cox* (1884), 6 Ont. 359 at p. 387; *Sutherland* v. *Cox* (1887), 15 A.R. 541; *Ussher* v. *Simpson* (1909), 13 O.W.R. 285; *Ames* v. *Conmee* (1905),

10 O.L.R. 159 at pp. 160-1 and on appeal (1906), 12 O.L.R. 435 and (1907), 38 S.C.R. 601; *Clarke* v. *Baillie* (1911), 45 S.C.R. 50; article on "Proving Identity of Customers' Securities on Stock Broker's Bankruptcy," 2 C.B.R. 261 at p. 263; *In re Burge, Woodall & Co., ex parte Skyrme* (1912), 1 K.B. 393 at p. 396. In a transaction of this nature the circumstances are such that it should not militate against the defendant as the plaintiff has suffered no damage: see *Forget* v. *Baxter* (1900), A.C. 467 at p. 478.

MacInnes, replied.

Cur. adv. vult.

7th October, 1930.

MACDONALD, C.J.B.C.: The plaintiff delivered to one Christy the defendant's agent a certificate of ownership of 500 shares in the Silver Cup (Hazleton) Mining Co. Ltd. with instructions to sell them at 30 cents per share and if that price could not be obtained to redeliver back to him his own certificate. It is common ground that the shares could not be sold at that price and thereupon the plaintiff demanded his certificate which was refused, the defendant tendering him instead another certificate for the same number of shares in the Silver Cup (Hazleton) Mining Co. Ltd. which was also refused. Plaintiff brings this action for conversion. The substantial defence to it is an alleged local usage that the brokers might use the certificate for their own purposes, which they did in this case, provided they were at all times able to deliver the same number of shares in the same company to the plaintiff on demand. This was said to be the local usage of the Vancouver Stock Exchange of which the defendants were members. I do not find that there was not such a local usage in that Exchange. It is unnecessary to make a finding on this point. I find that the defendant was in a position to redeliver to the plaintiff another certificate for 500 shares of Silver Cup (Hazleton) Mining Co. Ltd. when he demanded the redelivery of his own certificate and I think defendant has sufficiently shewn that it was in a position to tender such other certificates at any time up to the time of the plaintiff's demand.

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I do not think, however, that the alleged local usage is applic-

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able to the facts of this case, such usage cannot displace an actual contract between the parties and the actual contract in this case was that the plaintiff's own certificate should be returned to him in case the shares were not sold at the named price. There were many other questions argued before the Court why the alleged usage was not applicable to the facts. The plaintiff's shares were registered in his own name and were thus effectually ear-marked. It was therefore contended that what was tendered was not the equivalent of his own certificate, and also that the usage was not reasonable since in case of the bankruptcy of the defendant the identity of the shares might be lost. I find it, however, unnecessary to decide such questions since the usage cannot be set up against an express contract to redeliver the identical certificate on failure of a sale. Christy was not called as a witness and there is no contradiction whatever of the plaintiff's evidence to the effect that his own certificate was to be redelivered to him. Whether the transaction be treated as a contract between the plaintiff and Christy as agent for the defendant or as instructions to Christy as such agent with respect to what was to be done with the certificate in my opinion makes no difference. The defendant called witnesses to prove the alleged usage, among them one Wolverton who put this limitation upon it, that the usage would not apply where the certificate had been deposited for safe keeping. Now the arrangement between the plaintiff and Christy was that the certificate should not be parted with unless the shares were sold at the named price but should be kept and redelivered to the plaintiff. So that even on the evidence of defendant's principal witness this case I think would fall within the exception. I would therefore allow the appeal and give judgment for $115 damages, the apparent market price on 14th August, the date of the conversion, no other value being given. Costs to plaintiff here and below.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This appeal should, in my opinion, be allowed on the short and clear ground that this transaction was simply the entrustment of the share certificate in question to the defendant Company with the instruction to sell the shares therein mentioned at a certain price, but instead of carrying out

MARTIN, J.A.

its principal's directions it made use of the certificate for its own purposes and sold them for a less sum than it was empowered to do.

Now whatever may be said under other circumstances of the legal position created by various dealings between principal and broker, the present case is what the Privy Council in *Bertram* v. *Godfray* (1830), 1 Knapp 381, styles "a particular commission" (383) saying:

"If he [agent] thinks fit to accept such a commission, he must perform that commission according to his duty."

It follows, therefore, that the plaintiff herein is at least entitled to elect to hold the defendant to account to him for his said shares that it wrongfully converted to its own use and sold on the 14th of August, 1929 (as appears by Exhibit 8) at the price therein set out, and so judgment should be entered in plaintiff's favour for that amount.

MARTIN, J.A.

GALLIHER, J.A.: Whatever custom, if custom it can be called in the true sense, might apply in cases where brokers are buying on margin and protecting themselves as against the market and their clients' default by calling for margins and the deposit of securities by their clients with power to deal with such securities for their protection, any such custom cannot apply here.

Certain shares were placed in the defendant's hands for sale at a certain price. A sale of those shares was made and those specific shares applied to cover a portion of certain buying orders. The shares were sold contrary to instructions, *i.e.*, at a less price than they were authorized to dispose of them at. The point taken is that as they were at all times prepared to hand back to their client other shares of the same kind they were entitled to deal with their customers' shares in the meantime in any way they saw fit and turn the moneys received to their own account thus speculating with the shares on their own account. That is in the face of the direct agreement between the parties and I would consider any such custom both unreasonable and illegal. The evidence we have as to what these shares were sold at is 23 cents and I would fix the damages that the plaintiff should recover on that basis.

GALLIHER, J.A.

I would allow the appeal.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I have arrived at the conclusion that this appeal should be allowed. The evidence shews that 500 shares of Silver Cup (Hazleton) mining stock were delivered by the appellant to the respondent with instructions to sell the same for 30 cents a share or better. The stock was fully paid. The respondent is a corporation engaged in business in the City of Vancouver as brokers. The evidence is all one way. The shares were delivered to the respondent on these admitted terms, the shares to be sold for 30 cents a share or better. This would mean for $150, or such further sum as the shares would fetch in the market. Now what the respondent did do was to sell the shares for 23 cents a share. The respondent contends that it had other shares to an equal amount, *viz.*, 500 shares, which shares were delivered to the appellant but it was discovered that the shares so delivered by the respondent to the appellant were not the same shares as those delivered, *viz.*: shares standing in the name of the appellant but other shares. The appellant refused to accept the shares so delivered and elected to look to the respondent as and for a conversion of the 500 shares placed with the respondent with special instructions to sell them for 30 cents or better. Upon this footing it would seem to me, upon the authorities, that if the appellant is entitled to succeed upon this appeal, and in my opinion he is, the damages the appellant should recover would be the market value of the shares at the time the sale was made and that would appear to have been 23 cents. That the damages in this case cannot be more when the appellant absolutely refuses to accept the identical number of shares he placed with the respondent. It is not, in view of this fact, a case for the imposition of exemplary or punitive damages.

The cases of *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601 and *Clarke* v. *Baillie* (1911), 45 S.C.R. 50, are not really applicable to the present case as they were cases where the brokers were carrying stocks on margin. That is not the position of the present case. It will be observed, though, that the holding of the Supreme Court of Canada in the *Conmee* case was that the brokers had no right to hypothecate with others for a greater sum than was due to them. In the present case, of course, nothing was due to the respondent. This differentiates

the case entirely from the *Clarke* case where it was held that stock carried by the broker on margin having been pledged as security for an amount greater than the advances made and the broker making no profit and the client suffered no loss there was no liability for the conversion provided he delivered to the client the number of shares ordered and which he had been carrying for his client. The respondent in this appeal seeks to escape liability in accordance with the decision herein last referred to. In my opinion, such a contention is not tenable. It is to be noted that the *Clarke* case does not overrule the *Conmee* case—merely distinguishes it. I would refer to what Mr. Justice Duff said at p. 70 in the *Clarke* case, *supra*:

"A very different question arose in *Conmee* v. [*Securities Holding Co.*] (1907), 38 S.C.R. 606, and I refer to it only because some language of mine has been cited as shewing that the memorandum on the bought note was not to be given effect to. In that case it appeared to me there was no evidence of any general practice which would affect the transaction under consideration. The point upon which it appeared to me, rightly or wrongly, that the decision must turn was that the plaintiffs, the brokers (who are suing the principal for a payment alleged to have been made on his account), had on the facts proved failed to establish that they had executed his mandate. I thought also that the memorandum in the bought note (on the same terms as that referred to above) not having been brought to the defendant's notice could not be held to govern the rights of the parties in respect of transactions completed before the bought note was despatched by the broker. That view has no possible bearing upon the questions arising in this case."

The above excerpt from the judgment of Mr. Justice Duff fittingly and pointedly covers the present case. I would in particular call attention to these words "the brokers . . . had on the facts proved failed to establish that they had executed his [the principal's] mandate." Here we have it admitted that the respondent, the brokers, did not execute the mandate of the appellant, *i.e.*, only sell for 30 cents or better. Here no custom was established that could warrant the respondent to do what was done, *i.e.*, in face of the plain mandate to effect a sale of shares for 30 cents or better. What the respondent did was a distinct breach of contract and also of the fiduciary duty to the appellant—it was a conversion of the property of the appellant. The position in law is that the appellant at his option can require the respondent to account to him for the proceeds of the sale so wrongly made or the value of the shares as upon a con-

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version thereof to its own use. That liability cannot be escaped by tendering the same number of similar shares—*Langton* v. *Waite* (1868), L.R. 6 Eq. 165 at p. 173. That the respondent was in a fiduciary position to the appellant is well indicated in *Foley* v. *Hill* (1848), 2 H.L. Cas. 28 at pp. 35-6. In my opinion the appellant is entitled upon the particular facts of the present case to require the respondent to account to him for the proceeds of the sale so wrongly made. There is no evidence of value of the shares and in that situation all that can be done is to give judgment for the price the respondent sold for, *i.e.*, 500 shares at 23 cents=$115.

The appeal therefore, in my opinion, should be allowed.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondent: *Grossman, Holland & Co.*

C. BATTISTONI AND L. BATTISTONI v. C. M. THOMAS AND C. THOMAS.

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BATTISTONI v. THOMAS

Master and servant—Negligence of servant—Liability of master—Deviation from employment—Presumption—Contributory negligence—Evidence—B.C. Stats. 1925, Cap. 8.

The defendant C. who was in the employ of his father the defendant M. as a truck-driver, was instructed to take a load of milk from Lulu Island to the Fraser Valley Dairies at the corner of 8th Avenue and Yukon Street in the City of Vancouver and return home with the empty cans in time for dinner with the family at three o'clock in the afternoon. C. delivered the milk at the Fraser Valley Dairies, reloaded the empty cans and proceeded in the truck to a downtown cafe. He then picked up a friend and they spent the afternoon together. Shortly after five o'clock when darkness was coming on they proceeded westerly in the truck approaching Jackson Avenue. At this time the plaintiff L. Battistoni, wife of her co-plaintiff was walking across Union Street in a northerly direction on the east side of Jackson Avenue. After she had passed the middle of the road the defendant C. attempted to drive past between her and the north side of Union Street but his left fender struck her. She fell under the rear wheel and was very severely injured.

Held, that the proximate cause of the accident was the negligence of the driver but the plaintiff was to some degree at fault in not having looked up the street before attempting to cross and she should be assessed in one-fifth of the damages imposed.

Held, further, that as it appears from C.'s own evidence that he was "on his way home" when the accident took place, notwithstanding his deviation from the direct route after delivering the milk at the Fraser Valley Dairies contrary to the instructions received from his father, in the circumstances of this case the driver must be held to have been at the time of the accident acting within the scope of his employment and his employer is therefore liable.

ACTION for damages resulting from the negligent driving of an automobile by the defendant, Claude Thomas. The facts are set out in the reasons for judgment. Tried by McDONALD, J. at Vancouver on the 26th of November, 1930. Statement

Arnold, for plaintiffs.

W. B. Farris, K.C., for defendant C. M. Thomas.

Wismer, for defendant Claude Thomas.

28th November, 1930.

McDONALD, J.: On Christmas Day, 1929, the defendant Claude Thomas, son of the defendant Morgan Thomas, being in Judgment

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his father's employ as a truck-driver collected a load of milk on Lulu Island and, as it was his duty to do, drove his load to Fraser Valley Dairies at the corner of 8th Avenue and Yukon Street in the City of Vancouver. His duty then was to return home with the empty cans. The father says that on this day, though he had on other occasions permitted his son to drive the truck on other errands in the city, he had told his son to return home for dinner with the family at 3 o'clock. I accept this statement made by the father as it is not contradicted. As to the son I entirely discard his evidence on every point in issue in the case as "the truth is not in him." Having arrived and off-loaded his milk the son loaded the truck with his empty cans and proceeded in the truck to a downtown cafe. From there he picked up his friend Reggy who, as to truthfulness, is on a par with himself, and they spent the afternoon together (where and how they will probably never truthfully tell). At any rate, shortly after five in the afternoon, when darkness was falling, they were proceeding in the truck, still carrying the empty milk cans, in a westerly direction on Union Street and approaching Jackson Avenue. At this time the plaintiff, L. Battistoni, the wife of her co-plaintiff, was crossing Union Street on foot on the east side of Jackson Avenue. Union Street from curb to curb is 39 feet wide. On the north side of Union Street, and some 30 or 40 feet east of Jackson Avenue a motor-car was parked at the curb. The woman (at least so far as she now remembers) did not see the truck approaching and I think I am bound to hold that she did not look as she ought to have done for if she had looked she could not have failed to see the truck. When she had reached the middle of the road, or perhaps a little beyond that point, the defendant Claude Thomas, the driver of the truck, saw her but instead of taking the precautions which a careful driver would have taken, he gave no signal of his approach but "took a chance" on being able, by swerving sharply to his right, to pass between the woman and the sidewalk on the north side of Union Street which she was approaching. The woman was knocked down by the left front fender of the truck, fell under the rear wheel and suffered terrible injuries, resulting in the amputation of one leg and rendering the other leg, to all intents and purposes, useless for the remainder of her life. She

Judgment

is a woman of 48 years of age and I assess her damages at $15,000. I hold that the cause of her injuries was the inexcusable negligence of the driver of the truck in failing to take the precautions which a reasonably prudent driver would have taken under the circumstances.

Upon reflection, however, I think I must hold, though with considerable doubt, that it is a case for the application of the Contributory Negligence Act. I am satisfied that the proximate cause of the injury was the negligence of the driver and yet I think that the plaintiff was to some degree at fault in not having looked up the street before attempting to cross. It is argued, and with a good deal of weight, that even if she had looked she was justified in crossing and continuing on her way. Yet it seems to me that if she had looked she might reasonably have assumed that it was not safe to cross although when she entered upon the street the truck was about half a block away. If she is entitled to recover therefore I would hold that she must make good the damage to the extent of one-fifth.

The really difficult question in the case, however, is whether or not the driver of the truck was, at the time of the accident, acting within the scope of his employment. On his examination for discovery he stated that at the time of the accident he was "on his way home" and he repeated this in his cross-examination by counsel for the plaintiffs but when cross-examined, and of course led by counsel for his father, he stated that before going home he intended to take his friend Reggy to the Dominion Hotel. No evidence was given as to the exact location of the Dominion Hotel but I would assume that it was not on an absolutely direct route from the point where the accident happened to the defendants' home on Lulu Island. The driver stated further in cross-examination that he had been told some time ago that if he was not acting within the scope of his employment then his father would not be liable in damages. I do not accept his evidence that he was going to the Dominion Hotel but do believe that he was on his way home as he stated in the first instance. If he was on his way home with his truck full of empty cans then he was doing what he was employed to do and was acting within the scope of his employment and the case is far stronger for the plaintiffs than was the case for the

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plaintiff in *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150 or in *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422. The fact that he had, instead of proceeding directly from 8th Avenue and Yukon Street to Lulu Island with his empty milk cans, deviated from that direct route does not I think place his employer in any better position than was the employer in either of the cases mentioned. In *Whatman* v. *Pearson* the driver of a horse and cart, in direct contravention of orders, went home about a quarter of a mile out of the direct line of his work to his dinner and left his horse unattended on the street before his door. The horse ran away and the employer of the driver was held liable for the damage caused to a third person. In *Merritt* v. *Heppenstal* a tradesman's teamster sent out to deliver parcels went to his supper at his own home before completing the delivery. He afterwards started to finish his work and in so doing ran over and injured a child who was held entitled to recover from the employer. Neither *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476 nor *Mitchell* v. *Crassweller* (1853), 13 C.B. 237, though decided in favour of the respective defendants, is in conflict I think with the conclusions I have reached. As has been stated time and time again in these cases every case must depend upon its own circumstances. In my opinion in the circumstances of this case the driver must be held to have been at the time of the accident acting within the scope of his employment and his employer is therefore liable.

Judgment

The husband of the plaintiff sues for special damages which already amount in medical and hospital fees to some $2,000. His wife is still in a wheel-chair and he and his seven children are deprived entirely of her services and he will be put to unascertainable expense. I think I am well within reason in placing his damages at $3,000.

In the result the plaintiff C. Battistoni recovers $3,000 and the plaintiff L. Battistoni four-fifths of her damages, *viz.*, $12,000.

Judgment for plaintiffs.

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Criminal law—Conviction by magistrate — Fine — Payment to magistrate under protest—Appeal—Effect of—Jurisdiction—R.S.B.C. 1924, Cap. 245, Sec. 78 (c).

On appeal from a conviction by a magistrate for selling liquor the County Court judge found in favour of the accused on the merits but reserved judgment on a preliminary objection that the deposit of $300 which accused was fined was not in Court and there was no jurisdiction to hear the appeal. In his reasons for judgment on the preliminary objection the County Court judge found that accused on being arrested was released on cash bail of $300. After conviction by the magistrate this cash bail of $300 was by consent of all parties converted into payment of the fine, the fine being paid under protest to the magistrate. Later the magistrate fixed $50 as the amount required to cover costs of appeal, which was paid. The magistrate then remitted the $50 to the County Court registry but remitted the $300 fine into the treasury of the City of Rossland. The reasons for judgment concluded with the statement that the accused deposited with the justice making the conviction an amount sufficient to cover the sum so adjudged to be paid together with such further sum as such justice deems sufficient to cover the costs of appeal. There was a sufficient compliance with section 78 of the Summary Convictions Act. The preliminary objection therefore fails and the conviction should be quashed.

Held, on appeal, affirming the decision of BROWN, Co. J. (MACDONALD, C.J.B.C. dissenting), that although in the reasons of the judge below there is a statement which is in absolute contradiction to his final declaration upon the matter and it being final it should receive the most attention, namely, "that accused deposited with the justice making the conviction an amount sufficient to cover the sum so adjudged," citing the very words of the statute. It must be held there was a substantial compliance with the statute and the appeal should be dismissed.

Per MARTIN, J.A.: "Under protest" is an improper expression because fines cannot be paid in that way. It is a growing practice which should be sharply discountenanced that such a transaction should take place in the Court as a fine being paid under protest.

APPEAL by the Crown from the decision of BROWN, Co. J. quashing a conviction of the accused by the police magistrate at Rossland, for selling intoxicating liquor. On the hearing before the County Court judge the Crown took the preliminary objection that the deposit of $300 which the accused was fined was not in Court and therefore there was no jurisdiction to hear

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the appeal. Judgment was reserved on the preliminary objection and the hearing was proceeded with when it was found that on the merits the appeal from the magistrate should be allowed. It appeared from the County Court judge's statement of the facts that the accused was arrested and later released on bail of $300 paid by her employer, one Wessel. On the hearing before the magistrate the accused was convicted and fined $300. The magistrate, counsel for the Crown, counsel for accused and Wessel then consented to the $300 cash bail being converted into payment of the fine and this money was paid under protest to the magistrate. Later the magistrate fixed $50 as the amount required to cover the costs of appeal and this sum was duly deposited with him and was remitted by him to the County Court registry. However, instead of remitting the $300 fine to the County Court registry he paid it into the Treasury of the City of Rossland. It was held by the County Court judge that the accused deposited with the justice making the conviction an amount sufficient to cover the sum so adjudged to be paid together with such further sum as such justice deems sufficient to cover the costs of appeal, that there was a sufficient compliance with subsection (*c*) of section 78 of the Summary Convictions Act and the preliminary objection failed.

The appeal was argued at Victoria on the 4th of July, 1928, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

Alexis Martin, for appellant: The only question is whether accused complied with subsection (*c*) of section 78 of the Summary Convictions Act. According to the facts as set out in the first part of the judgment of the learned judge below, the $300 first paid as cash bail was on conviction given to the magistrate as payment of the fine under protest. If this is so subsection (*c*) aforesaid was not complied with and there was no jurisdiction for the learned County Court judge to hear the appeal and the conviction should stand.

Bray, for respondent: The learned judge at the end of his judgment states specifically that the accused complied with subsection (*c*) of section 78 and it is the duty of this Court to accept that finding.

Martin, replied.

MACDONALD, C.J.A.: Even without the statements which Mr. *Martin* has just referred to, I was driven to the opinion that the fine had been paid. We must treat the declaration of the magistrate, in the absence of other evidence, as being true. He says in the most precise terms, "the fine being paid under protest to the magistrate." That is the conclusion he came to; and then he goes on, as Mr. *Martin* has just read to us, "The magistrate, Sergeant Gammon, on behalf of the Crown, Mr. *McInnes* on behalf of the accused, and Wessel who first paid it [*i.e.*, had paid the money in as cash bail] consented to the $300 being so treated." That is to say, the $300 that was put up as bail should be treated as payment of the fine. It seems to me that that settles it beyond all question. It is quite true that the magistrate uses language that might be construed as inconsistent with that; but I choose, at all events, to take the precise language that he used. I must confess my inability to understand security for costs being given under protest. When the money was paid to the magistrate as alleged as security for the costs of an appeal, it was paid admittedly under protest.

I would allow the appeal; the Court, however, is of the opposite opinion.

MARTIN, J.A.: In my opinion the appeal depends upon this fact, that the Crown's objection to the allowance of the appeal by the County judge below is based upon the fact that no deposit of $300 was made as, in this particular instance, is required by section 78, subsection (*c*) of the Summary Convictions Act, Cap. 245. That is a question of fact; and the onus is upon the Crown to shew that the $300, which admittedly was paid, was paid as a fine. With or without protest makes no difference. "Under protest" is an improper expression because fines cannot be paid in that way; they are paid or they are not paid. It is a growing practice which should be sharply discountenanced that such a transaction should take place in the Court as a fine being paid under protest, and I hope such things will not be done in future. But the point is this, the fact is, not as the Crown alleges, that the $300, which admittedly got into the hands of the magistrate, got in as payment of a fine, but as a deposit which the statute says shall be made—the language is,

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"or deposit with the justice making the conviction." There is no evidence, as there ought to be, to support that contention of the Crown. That is a matter of fact; and the onus is upon the Crown to shew, as I say, that the money, the $300, is not a deposit; and yet, strange to say, there is not a word of evidence, in the whole case to support it—no word of evidence, I say, because unfortunately there is in the reasons of His Honour a statement, on page 13, which is in absolute contradiction to his statement on page 16; in his statement on page 13 he says (based upon no evidence whatever adduced) that the fine was paid under protest, whereas on page 16, which is his final declaration upon the matter, and therefore, being final, is the one that we should pay most attention to, he says this, in the most specific terms in regard to the payment of this deposit, "she chose the last mentioned," that is, the last mentioned in section 78 (of the statute) that is to "deposit with the justice making the conviction or order an amount sufficient to cover the sum so adjudged"—citing the very words of the statute, and ending up by repeating the expression, "The accused deposited this with the justice as hereinbefore set out;"—that is to say, in compliance with the very words of the statute, with its requirements.

MARTIN, J.A.

Such being the case, the only thing I have to say, with all deference to other opinions, is this, that as the Crown has not shewn, as they must do, that the $300 in Court is not a deposit —and the learned judge has given his final declaration that it is a deposit—certainly the case is one where we must hold, I think, that there has been a material as well as substantial compliance with the statute. And therefore the appeal should fail.

GALLIHER, J.A.: The point taken by the Crown here is a very technical one, at all events in one sense, and in fact my mind is not entirely satisfied as to what the judge really means in his contradictory language. I think when the matter is left in that way, that I should not interfere with the conclusions the learned judge has arrived at. I take very much the same view as my brother MARTIN does. And, moreover, taking the Crown's view of the case, it would lead to this, that a person who has been pronounced innocent on the merits, would be held to be

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guilty, and have to suffer the penalty. Where it is so undecided, as it is on this material before us here, I certainly am inclined in favour of the accused in this matter; and would dismiss the appeal.

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

Solicitor for appellant: *R. J. Clegg.*
Solicitor for respondent: *K. A. Pincott.*

NEMETZ v. TELFORD *ET AL.*

Sale of land—Action for damages—Fraudulent misrepresentation—Evidence—Finding of trial judge—Appeal.

The defendant Telford and his wife, owners of two lots at the southwest corner of Pender and Thurlow Streets, and the plaintiff, owner of five lots on 10th Avenue all in the City of Vancouver, entered into an agreement whereby the plaintiff purchased the defendants' lots for $15,000 of which $5,500 was payable at once and the balance in instalments, the defendants agreeing to take the plaintiffs' lots on 10th Avenue at a valuation of $3,150 as part of the first payment which was duly made. In an action for damages for deceit the plaintiff claims that the defendant Amess, a real-estate agent, who acted for the Telfords in negotiating the sale, represented that two years previously the Telfords had purchased the inner lot of the two on Pender Street for $5,500 and that the corner lot being more valuable a fair price for the two lots was $15,000. Subsequently the plaintiff discovered that in February, 1929, the Telfords had purchased both lots for $5,500. The plaintiff's evidence was supported by three witnesses who swore that Amess made the above representations. The learned trial judge refused to accept the evidence of the plaintiff and his witnesses and dismissed the action.

Held, on appeal, affirming the decision of McDONALD, J., that as the appeal depends upon questions of fact and veracity directly in conflict it is impossible to say that the learned judge took a "clearly wrong" view of the evidence and the appeal should be dismissed.

APPEAL by plaintiff from the decision of McDONALD, J. of the 12th of May, 1930, in an action for damages for deceit by reason of false and fraudulent misrepresentation made by the Statement

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defendants in respect to parcels D and E of lot 1 in block 16 in District lot 185, group 1, New Westminster District. The above lots are at the southwest corner of Pender and Thurlow Streets in the City of Vancouver. On the 23rd of February, 1925, the parties entered into an agreement whereby the plaintiff purchased the above lots from the defendants for $15,000 of which $5,500 was payable at once and the balance in instalments. The plaintiff had five lots on 10th Avenue and these were taken by the defendants at a valuation of $3,150 as part of the first payment, the balance of the first payment being duly paid. The plaintiff claims the exchange of lots was made on a basis of the amount paid for them by the respective parties and the defendants' agent, one Amess, told him the defendants had purchased lot D for $5,500 and lot E for $8,000, the interest and taxes paid bringing the price up to $9,500, the cost of both lots being $15,000. Subsequently he found that the two lots had been bought two years previously by the defendants for $5,500. The learned judge below would not accept the evidence of the plaintiff and his witnesses and dismissed the action.

The appeal was argued at Victoria on the 17th and 18th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: The plaintiff dealt with Amess the defendants' agent. This was an exchange of properties and as the Pender Street property was the more valuable he had to pay the balance in money. He paid $2,550 and gave a mortgage on the property for the balance of $9,500. Amess told him the two lots cost $15,000 when in fact they were both purchased for $5,500 and the sale was made on the basis of what had previously been paid for the lots. The plaintiff's evidence and that of his witnesses should have been accepted.

Craig, K.C., for respondent Amess: The plaintiff discredited himself in the box and the learned judge did not believe his witnesses and Amess's evidence is corroborated: see Taylor on Evidence, 11th Ed., 115, Sec. 112; *Ashburton (Lord)* v. *Pape* (1913), 2 Ch. 469; *Gosse-Millerd Ltd.* v. *Devine* (1927), 38 B.C. 499 and on appeal (1928), S.C.R. 101 at p. 104. There is evidence that these two properties could be sold at $15,000.

Before the sale went through the plaintiff's solicitor knew the defendants had purchased the two lots for $5,500. This is binding on the plaintiff: see *Vane* v. *Vane* (1873), 8 Chy. App. 383 at p. 389; *In re The Halifax Sugar Refining Company (Limited)* (1891), 7 T.L.R. 293.

H. C. Green, for respondents Telford: No one questions the Telfords' actions as they knew nothing of the representations made to the plaintiff. On the question of holding the principal liable for the representations made see *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at p. 726. On the question of damages see *Derry* v. *Peek* (1889), 14 App. Cas. 337 at p. 343; *Rosen* v. *Lindsay* (1907), 17 Man. L.R. 251; *Steele* v. *Pritchard, ib.* 226. The judgment below should not be disturbed: see *McCoy* v. *Trethewey* (1929), 41 B.C. 295.

Argument

Cur. adv. vult.

7th October, 1930.

MACDONALD, C.J.B.C.: The learned trial judge was unable to accept the evidence of the plaintiff and his witness, Shapiro, and thought that his witnesses, Brock and Knott, had fallen into or had been led into error. He, therefore, dismissed the action. At the conclusion of the argument I was satisfied that the appeal could not succeed and after further consideration of it I remain of that opinion. The case turns almost entirely on the credibility of witnesses and while Brooke and Knott were not in the same category with the plaintiff and Shapiro, I have no doubt that the learned judge felt that there was a good deal of room for doubt as to the accuracy of their evidence apart altogether from the question of their veracity. I would therefore dismiss the appeal.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This appeal primarily depends upon questions of fact and veracity directly in conflict, and about which the learned judge below expressed himself very strongly during the trial and it is not necessary to say more than that after a very careful consideration of the evidence it is impossible in law, to my mind, to say that he took a "clearly wrong" view of it (to employ our time-honoured test under such circumstances), and therefore it follows that the appeal must be dismissed.

MARTIN, J.A.

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GALLIHER, J.A.: In view of the reasons for judgment given by the learned trial judge in which he discredits the testimony of the plaintiff and Shapiro and states that as to the evidence of Brooke and Knott he concludes they have fallen into or been led into error and the rather unusual nature of this exchange of properties as is alleged at what they cost the respective parties I find it very difficult to reverse the judgment.

It is a pure question of fact and while I am not free from doubt in the matter I do not think I would be justified in saying the learned judge was clearly wrong, he having the witnesses before him being in a better position to judge than I am.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is in respect of a cause of action wherein the appellant alleged that the respondents were guilty of deceit in respect of the sale of certain property in the City of Vancouver, the appellant being the purchaser, the respondents the vendors, the purchase price being $15,000, and the specific allegation was that the respondents at the time of the making of the contract of sale falsely and fraudulently represented to the appellant that they had been for years the owners in fee of parcel D and had only a little time before purchased parcel E, another property adjoining for the sum of $5,500, and that by reason of the fact that parcel D being a corner lot and therefore of considerably greater value than parcel E the price of $15,000 of D and E was a fair and just one, and that the surrounding lands were in equal ratio of value to the sale price, *viz.*, $15,000.

In these days in a city of the proportion of Vancouver with every opportunity to make enquiries it is somewhat difficult to see how the representations made were not capable of scrutiny and verification or demonstration of their falsity. No doubt though it is not open to vendors to make representations that are untrue and then assert that if false the purchaser had ample opportunity to advise himself as to whether they were true or false. The purchaser having such representations made to him is entitled to believe in their truth. There is one circumstance that is most important in this case and that is that the sales agent may well be said to have been the agent of both parties and the appellant went with the agent and viewed the properties.

Now it is all important in a case of this kind, where the action is one of deceit, where fraud must be the essential ingredient and the inducing cause of the contract of sale, to establish that beyond any reasonable doubt. The evidence is most voluminous, the trial extending over three days, the trial being held before Mr. Justice D. A. McDONALD without the intervention of a jury. It is evident that the learned trial judge during a prolonged trial had full and ample opportunity to note the demeanour of the witnesses and well weigh the value of the testimony led by both parties and it is also evident that at the close of the trial the learned trial judge had arrived at the conclusion that the case had not been made out. The reasons for judgment of the learned trial judge read as follows:

"I reserved judgment in this case in deference to counsel who had ably presented and argued it. I formed an opinion against the plaintiff at the trial and notwithstanding the argument, which I have carefully studied, I am unable to give him judgment. I did not and do not accept the evidence of the plaintiff or of his witness Shapiro. As for the witnesses Brook and Knott, I can only conclude that they in some way have fallen, or been led, into error.

"The action is dismissed."

MCPHILLIPS, J.A.

Lord Chancellor Hardwicke in *Earl of Chesterfield* v. *Sir Abraham Janssen* (1751), 2 Ves. Sen. 125 at p. 157 said:

"There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness."

Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions and when the relative position of the parties is such as to raise this presumption the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence proving it to have been in point of fact, fair, just and reasonable. The appellant is a merchant engaged in extensive business and would seem to be a very alert man. With these facts and the witnesses before him it is to be noted that the learned trial judge did not hesitate to state that he could not accept the evidence of the plaintiff nor that of witnesses called upon the part of the appellant and without belief in this evidence it was of course impossible for the learned judge to find for the appellant. The fraud set up in the present case is all

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based upon alleged false representations of the sales agent Amess who I have already observed can reasonably upon the evidence be said to have been the agent for both parties and the sales agent Amess is one of the defendants in the action. The appellant in his evidence said:

"The only complaint I made against Amess is that he lied to me. He told me that one parcel was $5,500 and they owned this other. If he had told me the two parcels bought for $5,500 I would surely never have paid $15,000.

"That is your only complaint? That is the only complaint."

Under cross-examination by the appellant's counsel at the trial we have this sworn to by Amess:

"When did you first know that Telford paid $5,500 for this property? I told you before on or about the time I got the writ." [meaning the writ in this action].

The witness, Amess, being believed by the learned trial judge which I assume—we have no observations against his evidence—it is apparent that Amess could not have made the representation complained of as he was not aware that Telford only paid $5,500 for the property. Then we have Amess under direct examination saying:

MCPHILLIPS, J.A.

"What do you say as to the evidence given that you told Nemetz that Telford paid $5,500 for one of these parcels? That who told Nemetz?

"That you did? I did not know what they paid."

"Did you tell him that or not? I certainly did not."

I do not think that there is need to further canvass the evidence or set any further portions of it out in detail. The appellant in a case of this kind—one of fraud—has a heavy burden and that burden in my opinion cannot be said to have been discharged. The present action is one for deceit and fraud must be proved.

"Fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false":

see *Derry* v. *Peek* (1889), 14 App. Cas. 337 *per* Lord Herschell at p. 374; 58 L.J., Ch. 864, discussed as to No. 3 in *Angus* v. *Clifford* (1891), 2 Ch. 449; 60 L.J., Ch. 443; *Tackey* v. *McBain* (1912), A.C. 186, and cases collected under *Pasley* v. *Freeman* (1789), 1 Term Rep. 51; 2 Sm. L.C., 13th Ed., 59.

Further, the evidence would not support the finding of fraud in the present case when we have here the disbelief of the learned trial judge of the essential evidence in the case of the appellant.

In an action based on fraud the demeanour of the witnesses is a matter of first importance. In *Nocton* v. *Ashburton (Lord)* (1914), A.C. 932 at p. 945 (and see pp. 957-8), Viscount Haldane, L.C., said:

"My Lords, I think that to reverse the finding of the judge who tried the case and saw the appellant in the witness-box was, in the circumstances of this case, a rash proceeding on the part of the Court of Appeal."

And this observation was with respect to a contention made and denied by the trial judge that there was fraud (and see *Nanoose Wellington Collieries, Limited* v. *Jack* (1926), S.C.R. 495, Anglin, C.J.C. 498). The learned trial judge dismissed the action. It would assuredly be a very long step for the Court of Appeal to in this case find fraud where fraud has not been found by the learned trial judge. 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 pp. 47-8.

MCPHILLIPS, J.A.

I do not think the case one in which the judgment of the Court below should be disturbed. I would therefore dismiss the appeal.

MACDONALD, J.A.: While there may be a doubt raised as to the conclusion arrived at by the learned trial judge, particularly in view of the evidence of independent witnesses, Brooke and Knott, nevertheless I feel that on these pure questions of fact I would not be justified in interfering. The learned trial judge felt that the witnesses referred to fell, or were led into error. It is quite possible that witnesses not personally interested in the subject-matter of the conversation overheard and without full knowledge of the negotiations might not fully apprehend its purport. At all events when the learned trial judge at closer range reached that conclusion I cannot say that he was clearly wrong in doing so.

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *A. H. Fleishman.*
Solicitors for respondent Amess: *Craig, Ladner & Co.*
Solicitors for respondents Telford: *Collins & Green.*

COURT OF APPEAL

1930

Oct. 7.

KEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence — Collision between tram-car and automobile — Contributory negligence—Ultimate negligence—Effect of finding—B.C. Stats. 1925, Cap. 8.

KEY v. BRITISH COLUMBIA ELECTRIC RY. CO.

At about seven o'clock on the evening of the 31st of December, 1929, the plaintiff, with her husband and child, was proceeding easterly on 49th Avenue in Vancouver in their automobile, the husband driving. On nearing the track of the defendant Company that crossed the road, and seeing a tram-car approaching from the south he stopped, but as there was a station platform immediately on the south side of the road upon which passengers were standing, evidently thinking the tram-car was to stop, he started up to cross the track, but the tram-car did not stop and proceeding on struck the automobile in the middle. The husband and child were killed and the plaintiff was severely injured. The jury found the servants of the Company were guilty of negligence and that the driver of the automobile was guilty of contributory negligence but that notwithstanding the negligence of the driver of the automobile the driver of the tram-car could have avoided the collision by the exercise of reasonable care and they assessed the damages for which judgment was entered.

Held, on appeal, affirming the decision of GREGORY, J., that where the jury finds, on sufficient evidence, that notwithstanding the negligence which the plaintiff was found guilty of, the defendant could, by the exercise of reasonable care, have avoided the accident, the plaintiff is entitled to recover and the contributory negligence Act has no application.

APPEAL by defendant from the decision of GREGORY, J. of the 21st of May, 1930, and the verdict of a jury in an action for damages owing to the negligence of the servants of the defendant Company. The plaintiff resided on 43rd Avenue West, in Vancouver, to the west of the defendant Company's line running north and south between the City and Lulu Island. On the evening of the 31st of December, 1929, at about 7 o'clock, the plaintiff and child with her husband were driving in their car easterly along 49th Avenue. At the intersection of 49th Avenue and the street-car line there were railway stations immediately beyond the street line on both sides. As the plaintiff's husband approached the intersection he partly stopped his car as a tram was approaching from the south. Evidently thinking

Statement

the tram would stop at the station as there were passengers on the platform, he again speeded up to cross the track but the tram did not stop as there was another tram immediately behind it that was to stop and pick up the passengers. The first tram going on struck the plaintiff's car. The car was wrecked and the plaintiff's husband and child were thrown out and killed. The plaintiff was found senseless in the driver's seat with one hand on the steering-wheel. She was so badly injured that she remembered nothing of the accident when she recovered her senses. The jury found the defendant guilty of negligence and the driver of the automobile guilty of contributory negligence, but further found that notwithstanding the negligence of the driver of the automobile the driver of the tram-car could have avoided the collision by the exercise of reasonable care. They then gave $5,150 to the plaintiff for personal injury, pain and suffering and $25,000 as executrix of her husband's estate.

Statement

The appeal was argued at Victoria on the 24th and 25th of June, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: They drove close to the track and stopped and then proceeded on. The whistle was blown. In answer to question 8 the jury found ultimate negligence against the defendant. We submit there was no evidence on which a jury could find that the defendant could have avoided the accident notwithstanding the neglect of the plaintiff. There was no charge to the jury on ultimate negligence: see *Winch* v. *Bowell* (1922), 31 B.C. 186 at p. 191; *Skidmore* v. *B.C. Electric Ry. Co.*, *ib.* 282 at p. 285. That there was no reasonable evidence to support the finding see *Jones* v. *Toronto and York Radial R.W. Co.* (1911), 25 O.L.R. 158. The negligence found to be original negligence cannot serve as ultimate negligence: see *Walker* v. *Forbes* (1925), 56 O.L.R. 532. This is an action under Lord Campbell's Act and cannot be disturbed by the Contributory Negligence Act. There can be no apportionment under Lord Campbell's Act: see *British Columbia Electric Railway Company, Limited* v. *Gentile* (1914), A.C. 1034; *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at pp. 136 and 144. That there can be no appor-

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tionment under Lord Campbell's Act see Beven on Negligence, 4th Ed., 268; *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59 at p. 68; *McLaughlin* v. *Long* (1927), S.C.R. 303 at p. 311. The apportionment is very unfair on the facts. The damages are very excessive especially as to what is given under Lord Campbell's Act. The verdict is based on the wife's life which is wrong.

Maitland, K.C., for respondent: The last word on the question of ultimate negligence will be found in *Cooper* v. *Swadling* (1930), 1 K.B. 403; see also *City of Calgary* v. *Harnovis* (1913), 48 S.C.R. 494; *Canadian Pacific Rway. Co.* v. *Hinrich, ib.* 557; *Roberts* v. *West India Electric Co., Ltd.* (1920), 3 W.W.R. 268; *Toronto Railway* v. *King* (1908), 77 L.J., P.C. 77; *Symons* v. *Winnipeg Electric Company* (1927), 3 W.W.R. 650 and on appeal (1928), S.C.R. 627; *Banbury* v. *Regina* (1917), 3 W.W.R. 159; *Nicholas Chemical Co. of Canada* v. *Lefebvre* (1909), 42 S.C.R. 402; *Harper* v. *McLean* (1928), 39 B.C. 426. On the question of evidence of its being a populous district see *Bell* v. *Grand Trunk Rway. Co.* (1913), 48 S.C.R. 561.

Argument

O'Brian, K.C., on the same side: As to damages see *Canadian Pacific Railway* v. *Steamship "Belridge"* (1917), 27 B.C. 537. The general rule is not to interfere unless a conclusion was arrived at on a wrong principle: see Mayne on Damages, 11th Ed., 516; *Rowley* v. *London and North Western Railway Co.* (1873), L.R. 8 Ex. 221; *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309; *Day* v. *Canadian Pacific Ry. Co.* (1922), 30 B.C. 532; *Ward* v. *Mainland Transfer Co.* (1919), 3 W.W.R. 193 at p. 195; *Taylor* v. *British Columbia Electric Ry. Co.* (1912), 2 W.W.R. 923; *Panetta* v. *Canadian Pacific Ry. Co.* (1917), 24 B.C. 249 at pp. 250 and 252; *Royal Trust Co.* v. *Canadian Pacific Ry. Co.* (1922), 3 W.W.R. 24; *Grand Trunk Railway Company of Canada* v. *Jennings* (1888), 13 App. Cas. 800.

Farris, in reply: There is not a case where the same act is treated as both original negligence and ultimate negligence.

Cur. adv. vult.

7th October, 1930.

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MACDONALD, C.J.B.C.: The wife and executrix of Frank Key, deceased, sues for damages suffered by her in a collision between her husband's automobile and defendants' tram-car. She sues under the Families Compensation Act, Cap. 85, R.S.B.C. 1924, for damages for the loss of her husband who was killed in the collision, and for personal injuries to herself, she having been in the car at the time of the collision. The jury found that the deceased driver of the automobile, Frank Key, and not the plaintiff, was driving the automobile at the time of the collision, that the scene of the collision was a thickly peopled portion of the City of Vancouver, that the defendant was guilty of negligence, and that the driver of the automobile was guilty of negligence which contributed to the accident. They also found that notwithstanding Key's negligence the driver of the tram-car could have avoided the collision by the exercise of reasonable care. They assessed the personal damages for injury to the plaintiff herself at $5,150 and the damages to her as executrix at $25,000, making in all $30,150.

MACDONALD, C.J.B.C.

Questions were put to the jury concerning ultimate negligence both of the deceased person and of the Company. The jury answered the question as to defendant's ultimate negligence in this way:

"Notwithstanding the negligence of the driver of the automobile (if any) could the defendant by the exercise of reasonable care have avoided the accident? Yes."

They held that the plaintiff's husband was not guilty of ultimate negligence. The jury came back with a verdict, giving the plaintiff an annuity, which in their opinion would meet the circumstances of the case. The learned judge instructed them that they must find a lump sum and sent them back, when they returned with the verdict which I have stated above.

A good deal of argument was directed to this attempt to give an annuity, it being contended that the jury's minds had been diverted from the real purpose of their task to that of an annuity and that that fact may have and did affect their final verdict. I am convinced that the discussion which took place in the jury room concerning the annuity did not influence their final determination. I am confirmed in this by the observations

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of the foreman. The verdict is not in excess of what the jury was entitled to award.

The jury, however, having found the defendant guilty of what is called ultimate negligence it seems to me that if this is sustained the findings of contributory negligence on the part of both the deceased and the defendant are of no moment. It was strongly urged that the evidence would not sustain this finding. I have carefully considered this phase of the case relying almost entirely upon the evidence of the tram driver himself. In his examination for discovery, J. R. Greer, motorman, said that he had been running on that line for four years and was well acquainted with the locality. On the night in question he was nineteen minutes behind his schedule and was instructed by his conductor not to stop at 49th Avenue where the accident occurred, but to drive through. He admits having seen the automobile in question, which was being driven along 49th Avenue, a considerable time before he reached the station on the north side of that avenue. His car was travelling about 25 miles an hour on a slight up-grade; he slowed to 15 to 18 miles an hour before reaching the station. When the car came to the north side of the station the driver released the brakes and went right on. At this time while he saw the automobile moving towards the track he thought the driver of it would stop and let him go by. He did not apply his brakes again or make any endeavour to stop when he saw this. In his discovery he said his bell was not ringing, although at the trial he said it was. He struck the automobile in the middle. The space in which his car could have been stopped under ordinary circumstances was 75 feet, when running at 15 miles per hour, which he estimates his speed was at that time. He saw the deceased driving slowly towards the track when he was an estimated distance of 100 feet from where they came together. He saw passengers waiting on the platform to take the car. I think it was open to the jury to find that had he applied his brake 100 feet from the crossing when he saw the deceased about to cross the accident would not have occurred. If he had not succeeded in stopping it wholly in that distance he could have slowed down sufficiently to have enabled the automobile to have got across in safety. The fact that the deceased saw as he must have seen the passengers on the platform and

knowing that it was a place where passengers usually boarded the car or left it would imply that the tram would stop and that he would be safe in proceeding across. That assumption would, I think, be more reasonable than the tram-driver's assumption. I think therefore that the findings of the jury on the question of ultimate negligence cannot be properly interfered with. This in my opinion disposes of the whole case. The plaintiff is entitled to her verdict.

If it were necessary to decide this case outside of the ultimate negligence finding I would have to consider whether the Contributory Negligence Act has been aptly framed to cover cases under Lord Campbell's Act, but it is unnecessary to decide the question. The appeal is dismissed.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I concur in the dismissal of this appeal, no good reason having been shewn, in my opinion, for disturbing the verdict of the jury.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal is one from the verdict of a jury in a negligence action being a collision between an automobile and an interurban passenger train at Magee Station, Vancouver, British Columbia. The evidence establishes that the interurban train slowed down before arriving at the station south of the intersection of the highway upon which the automobile was travelling; the automobile was brought to a stop before attempting to cross the railway track but observing the passenger train slowing up proceeded on, but the passenger train was not pulled up at the station but increased speed and struck the automobile as it was crossing the railway track with the result that the driver of the motor, the husband of the respondent, and the infant daughter were both killed and the respondent suffered serious personal injuries. It is really unnecessary to canvass the evidence in detail at all in my opinion as the jury had ample evidence upon which to make their findings. The verdict of the jury is comprised in answers to agreed upon specific questions placed before the jury prepared by counsel upon both sides. There is this further point to be borne in mind that the jury were duly charged by the learned trial judge and

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no exception was taken to the charge by the learned counsel for the appellant. The charge covered the facts as well as the law and dealt with the possible *quantum* that might be allowed if the jury were of the opinion that the respondent should have a verdict. The verdict was in favour of the respondent and judgment was entered therefor.

The jury in the answers given found that the appellant and the respondent were both guilty of negligence and apportioned the damages according to the degree of negligence—appellant 90 per cent. and respondent 10 per cent. However, the jury made answer to questions 8 and 9 as follows:

"8. Notwithstanding the negligence of the driver of the auto (if any) could the defendant by the exercise of reasonable care have avoided the accident? Yes.

"9. Notwithstanding the negligence of the defendant (if any) could the driver of the auto by the exercise of reasonable care have avoided the accident? No."

In view of the above answers the appellant was notwithstanding that there was negligence found in the degree above set forth entitled to judgment in her favour and in my opinion the learned trial judge was entitled to direct as he did direct that judgment be entered in favour of the respondent as against the appellant for the sum of $30,150, made up as follows: 1. The sum of $5,150 in respect of personal injuries, and 2. The sum of $25,000 as executrix of Frank Key, deceased.

MCPHILLIPS, J.A.

This appeal was very ably argued by the learned counsel engaged therein at this Bar, the facts and the law being all reviewed very fully, and a great deal of attention was directed to the *quantum* of damages allowed the respondent under the Families Compensation Act (Cap. 85, R.S.B.C. 1924, being 9 & 10 Vict., Cap. 93 (Imperial), Lord Campbell's Act).

I do not consider that it is at all necessary to in detail deal with the many authorities cited especially in view of the fact that since the argument was had before this Court we have the very authoritative judgment of the House of Lords in *Swadling* v. *Cooper* (1930), 46 T.L.R. 597 (the judgment being delivered on the 28th of July). The actual decision was in that particular case in these terms as reported in the head-note:

"*Held*, that since, on the facts of the case, from the moment when the parties became aware of their respective positions there could have been no time for the defendant to do anything to avoid the impact, and there-

fore the negligence of each party contributed to the collision, the judge's directions to the jury were sufficient, and there must be judgment for the defendant."

In the *Swadling* case though there was no finding, such as we have in this case that notwithstanding the negligence of the driver of the automobile the defendant could by the exercise of reasonable care have avoided the accident. I would refer to what Viscount Hailsham in his speech in the House of Lords said upon the point which is all important in this case, at p. 598:

"If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover."

In my opinion the above language of Viscount Hailsham exactly fits the facts of the present case and is a declaration of the law which entitled the judgment under appeal in the present case to be entered as it was entered for the respondent. As to the *quantum* of damages I cannot see that the jury awarded excessive damages in view of all the facts they had before them, *i.e.*, there was ample evidence entitling the damages allowed by the jury. Upon the principle that should guide both judges and juries in the assessment of damages and the curtailment upon the Court of Appeal in disagreeing therewith I would refer to what Lord Moulton said in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309:

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"The tribunal which has the duty of making such assessment, whether it be judge or jury, had often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to *quantum* of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck, J.'s assessment of the damages is erroneous and they are therefore of opinion that it ought not to have been disturbed on appeal."

I would dismiss the appeal.

MACDONALD, J.A.: After careful consideration I found it difficult to discover evidence supporting the jury's answer to Question 8. They were not instructed on the point and I doubt if they considered in its right light the issue arising consequent upon a finding of negligence on the part of both drivers con-

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cerned. However, counsel for appellant did not urge this omission as a ground for a new trial.

To sustain the answer there must be reasonable evidence shewing that after the motorman and the driver of the automobile reached a position in relation to the point of impact—both negligently reaching that point—the motorman knew, or ought to have known that unless he adopted emergency measures a collision would occur and he failed to do so. It must, of course, have been possible to avoid the accident at that stage. To my mind it was easier for the driver of the automobile, in the more readily controlled vehicle, to avert the accident, but apparently the jury did not think so.

On the other hand the motorman at that point might have applied the emergency brake. He did apply it when he realized that "the auto was coming on to the track." He was then, however, only 35 feet from the crossing. Should he have realized that situation a little earlier at a point more distant from the crossing? I am not prepared to say that the jury might not reasonably think he should have done so because the motorman said that he saw the automobile "moving in the direction it would go to cross the tracks" when he was 100 feet from the point of impact. Of course at that point the motorman may have thought that the driver of the automobile would stop short of the track but in view of the general situation, the station near by, the intending passengers ready to board the train, the likelihood of everyone thinking that the tram-car would do the usual thing and stop at the station particularly as people were waiting for it, the motorman should have realized that the driver of the automobile would likely share the general view and govern himself accordingly. Had he applied the emergency brake 100 feet or less from the crossing the jury on the evidence could find that the driver of the automobile would have time to cross the tracks in front of the tram-car with a margin of safety.

MACDONALD, J.A.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *V. Laursen.*
Solicitor for respondent: *C. M. O'Brian.*

SUNDERLAND v. SOLLOWAY, MILLS & CO. LIMITED.

FISHER, J.

1930

Dec. 6.

SUNDERLAND v. SOLLOWAY, MILLS & Co.

Stock-brokers — Sale of customer's shares — Unauthorized—Conversion— Action for damages—Measure of—Estoppel.

In assessing damages where stock-brokers were held liable to a customer for selling shares they held for him without his authority:—

Held, that the date when the customer would have sold had he not been prevented by the brokers' prior sale, should be determined on the assumption that he would have done what a prudent person would do, and in this case the date is fixed when, after objecting to a statement of his account which shewed his shares were sold, he requested that they be placed to his credit as he wanted to sell them. He was allowed the difference between the low market price on that day and the price at which the brokers had previously sold.

ACTION against stock-brokers by a customer for damages for selling his shares without authorization. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 17th and 18th of November, 1930. Statement

Sugarman, for plaintiff.
W. B. Farris, K.C., for defendants.

6th December, 1930.

FISHER, J.: In this matter I accept the statement of the plaintiff that he cancelled his instructions for the sale of the 1,000 shares of Advance. I also think that under the circumstances the onus would be on defendants to shew that such cancellation was not in time and find it has not discharged such onus. In respect to the other issues the evidence is very contradictory. I do not find the oral evidence very convincing and therefore turn to the documentary evidence for some satisfactory basis from which to start. Judgment

Monthly statements were sent by defendants to the plaintiff and the plaintiff produces, *inter alia,* those sent for the months of January to June, 1929, inclusive. Referring to the one received by him early in May, 1929 (Exhibit 4), shewing his debits and credits for the month of April, the plaintiff says that he received only one sheet but one notes that the balance brought

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forward at the top of the sheet is the sum of $3,679.75 which does not correspond with the balance shewn at the end of the statement for the month of March. Reference to the other monthly statements produced shews that the balance brought forward at the beginning of each statement corresponds with the balance shewn at the end of the previous month's statement. One would incline to the view that the plaintiff had received another sheet for April but as he denies it and there is no evidence of such sheet having been sent I cannot find that he received it. If one compares Exhibit 4 with what is produced by the defendants as the plaintiff's ledger sheets (Exhibit 10) we find the same debit balance of $3,679.75 appearing on plaintiff's account immediately prior to the date April 22nd. The account contains entries apparently made between the 17th of April, 1929, and the 22nd of April, 1929, with respect to other transactions between the parties in March not appearing on the statement sent in April to plaintiff for March. Two of such entries, *viz.*, $255 and $748, with respect to Dallas's and Reeves's shares respectively correspond exactly with the items shewn on two of the confirmation slips dated March 28th, 1929, and March 12th, 1929, respectively sent to and produced by the plaintiff. The said balance of $3,679.75 is apparently the debit after taking into consideration such entries and the added or correcting entries *re* the sale of 1,000 Advance with respect to which the witness Jones says that he put through the journal entries in April. As pointed out the sheet or statement sent to the plaintiff at the end of April and produced by plaintiff shews the said corresponding debit balance of $3,679.75 just before an item dated April 22nd which item also corresponds with the entry in the ledger sheet immediately following the item of $3,679.75.

Judgment

The plaintiff says that after he got the statement for March which did not shew the stock position he went down to see what stocks he was holding and saw some one in the office of the defendants about the matter and he gave him 1,000 Advance and the balance of his stocks and said he was long that stock and later on, or about May 6th, he went to see defendants again, after he got the April statement shewing stocks long without Advance being shewn. The evidence of the plaintiff, as to his May visit, is in part as follows:

"In the month of May you received your April statement did you? Yes.

"Did you do anything with regard to that statement? I went to see them again."

"Who did you see then? Mr. Shawner.

"Who is Mr. Shawner? I know he worked there.

"In what department, do you know? He was in the margin department at the time I went. I asked him if he would get my sheets, and he gave me a list of the stocks I held.

"Did he do that? He went to the back where the files are and brought two sheets, and brought them to the counter and got a list and made out my stocks, including the 1,000 Advance long; but before he finished, Mr. Jones—I think he was in charge of that department, I am not sure—he saw him and I at the counter, and he came along to him and told him to go and fix something else and he would finish looking after me, and he looked at this list, and when he looked it over he said, 'There is a mistake.' And I said, 'What is the mistake?' And he said, 'You haven't any Advance.' I said, 'Why is it Mr. Shawner has taken my 1,000 Advance off that sheet, and you say I haven't got them?' And he said, 'Wait a moment,' and he went away and brought another sheet—that made a third sheet. But as soon as he went away again, I fetched Mr. Sutherland and asked him to come along up to the counter, and by the time we got back he was there with the sheet, not for the 1,000 Advance long, but on February 28th two entries of 500 each, making 1,000 on a clean sheet.

"One thousand long or 1,000 short? One thousand long or short.

"Which was it? He said it was a sale of 1,000 shares of Advance.

"Was your name on that sheet? I couldn't swear to that. I don't know; I didn't look. But he said that was 1,000 shares of Advance that was sold on February 28th.

Judgment

"Did you continue that conversation with him? Yes. I asked him the reason for having 1,000 Advance on a new sheet and why these men should give me 1,000 long on the old sheet and he give a sale of 1,000 on the new sheet, why was it not on this sheet a continuation of it under date of February 28th? The March sales were continued on this old sheet for several days afterward. I don't know all he said then, but I told him I was not satisfied with the account and didn't think it was correct, and asked him if he would send me a correct account."

"But you knew from May, about May the 7th, 1929, until you left them in March, 1930, that they were contending that your shares had been sold in February, 1929? I wanted them to send me a correct account.

"I am saying this to you: They were claiming they had sold those shares? They said so.

"And they took that position all the way through, did they not? They did, but that didn't prove it to me. They didn't put it in my statement."

"You also said there were two other sheets brought to you and I am suggesting to you that at the same time two other sheets were produced to you? I didn't say that.

"I am asking you to look at that and say? No, that is the only way I saw that sheet.

"How do you mean? They were back on the back of the counter.

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"Did you never see your ledger sheets at Solloway, Mills? Never more than that.

"At any time? Only as they checked them on the bench.

"The ledger sheet was there? I can't see it upside down.

"You could ask them to turn it around? I didn't ask them.

"But it was there in front of you? It was there in front of me, but they were checking up.

"Do you recognize that sheet as being the one that was in front of you? I couldn't swear to that. I cannot read upside down.

"All right. I did see the other one, that Mr. Jones had hold of it in his one hand, but that is the only time I saw that one."

Mr. Jones says in part as follows:

"Was there any mix-up in regard to this account at all? Yes, the account was under the name of Sutherland.

"In reference to the sale of Advance? Yes.

"Was that corrected? It was corrected, yes."

"On April 17th, 1929, according to Exhibit 10, I see a credit item for Advance stock $1.35—$1.35—two items, credit given to Mr. Sunderland in his account. Yes."

"How was the correction made? By journal entry.

"Did you say that after the correction was made you had a talk with Mr. Sunderland? I had talked with him quite a few times, yes, sir.

"At the time the correction was made, or afterward, did you have any talk with him? I don't remember exactly at the time, but afterward Mr. Sunderland came in and complained about the Advance, and I had a talk with him quite a few times.

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"And were these sheets shewn to him then? Yes, sir."

"In this discussion between you and Sunderland, did he tell you he had gone to Mr. Macdonald? The only discussion between Mr. Sunderland and myself was he refused to take the entry for the sale of Advance.

"Did he know of the entry at that time? Pardon?

"He knew of it at that time, did he? Oh, yes."

"Now, do you remember Mr. Shawner? Yes.

"Was Mr. Shawner, to your knowledge, shewing any ledger sheets or making any statements to Mr. Sunderland regarding Advance Oils to your knowledge? I think I remember Mr. Shawner had the sheets at the time, and I said—I went over and said that I knew about the Advance and I would attend to it."

Plaintiff says he did not know of receiving any credit for the Advance sale and that he does not remember looking at any ledger sheets of his with the additional or corrected entries shewing such credits. Plaintiff says he had (Exhibit 4) statement consisting of one sheet for April with him which he evidently did at some time, as Mr. Jones, then an adjustment clerk for defendants, admits writing thereon at some time but plaintiff says nothing about any conversation *re* the first sheet not having been sent to him and yet the only sheet he apparently had with

him for April did not shew any transactions in April before the 22nd of April although he had at least several April transactions before that date and, as has been pointed out, there were several transactions in March that had not appeared on the statement for March and apparently affected the debit balance ($3,679.75) shewn as aforesaid. The plaintiff still had the March statement as he produces it now and yet, according to his evidence, no connection between the balance on one and the balance on the other was shewn or discussed. According to the evidence of the witness Jones the correcting entries had been put through in April and later on the plaintiff was advised by him accordingly though he is not sure plaintiff actually looked at the entries.

The witness A. B. McPhail testifies to the making out of two confirmation slips with regard to the sale of 1,000 shares of Advance Oil on February 28th in the name of E. Sutherland of the same address as the plaintiff and that in the ordinary course of business the original of such confirmation slips would be sent to such address by mail. The plaintiff admits there was no E. Sutherland at the address where he was residing but denies receipt of the confirmation slips. The witness Gregg called on behalf of the defendants states that he was in the employ of the defendant at the time and remembers the plaintiff coming into the defendant's offices with the slips about the middle of March and asking if the slips were intended for him. Gregg says that he told the plaintiff they were intended for him and he made the correction on the slips immediately and gave them to the adjustment clerk to make the corresponding corrections in the entries. I cannot see anything in the ledger sheets or the monthly statements sent to the plaintiff that would corroborate in any way what Gregg seems to state that the corrections were put through in the month of March. Gregg says that he took the original corrected statements over to the desk of one of the clerks and there is no evidence before me as to their having been returned to the plaintiff nor are they produced from the custody of the defendants nor any explanation given as to their whereabouts. As pointed out the plaintiff denies receipt of such and under the circumstances I am not convinced that the original confirmation slips were received by the plaintiff. I am satisfied, however, that a mistake was made in the office of the

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defendants, that correction was made in the ledger sheets shewing the plaintiff's account about the middle of April, that the witness Glass is wrong when he says otherwise, and that the plaintiff was in the office of defendants about May 5th and either shewn or advised of the sale and the correction. Mr. Jones, however, admits that the plaintiff refused to take the entry for the sale of Advance but Jones says he told him it would have to stand as the cancellation had not gone through to the best of his knowledge. I am satisfied that from this time on the defendants continued to insist that the shares were sold and the plaintiff was refusing to admit that they had been sold with his authority or to take the entry. The contention of the defendants is that in any event the plaintiff had received credit for the sale continued until March, 1930, to do business with the defendants on the basis of using the credit given him on account of the sale of the 1,000 shares of "Advance" and that he accepted the situation and thus waived any rights to object later. It is contended on behalf of the defendants that for some time the plaintiff was knowingly using the credit given him by defendants on the basis of the Advance shares having been sold and that in March, 1930, the plaintiff's account was transferred to another broker upon payment by the plaintiff of $330 on the same basis. On the other hand it is contended on behalf of the plaintiff that, according to his view of the situation, the defendants had, or should have had, 1,000 shares of Advance belonging to him unsold and was thus amply protected. As pointed out the plaintiff admittedly refused to take the entry and continued to complain. Under the circumstances I cannot see that the plaintiff acquiesced or concurred in the defendants' position and I hold that the plaintiff is entitled to damages.

Judgment

As to the amount of damages it may be noted that in *Williams* v. *Archer* (1847), 5 C.B. 318 an action of detinue for railway script it was argued on behalf of the defendant that the true measure of damages was the value of the certificates at the time of the detention but it was held in effect that the true measure of damages was the loss that the plaintiff sustained by not having the certificates when demanded. It seems to me that this is the correct principle but in estimating the loss that the plaintiff sustained by not having the shares when demanded it would be

a necessary foundation of the plaintiff's claim in the present case that he was prevented from selling by the defendants' wrongful act and, as the market rose and fell during the time the question arises whether the plaintiff would have sold. In this connection I would refer to the judgment of Bowen, L.J. in *Williams* v. *The Peel River Land and Mineral Company Limited* (1886), 55 L.T. 689 where, at p. 693, he says as follows:

"Within those limits, if you want to know what the wrong-doer has to pay, you first must ask yourself what the person who is in the right has suffered. Therefore it is that in this case we have simply to decide something which turns upon the question, Would the owner of the stock have sold his stock during the period which intervened between the refusal to give it up and the trial? Now, the market rose during a portion of the time, and the market fell during the latter part. Would the owner of the stock have sold? That is not exactly the same question as whether at any moment he desired to sell, because he might have desired it at one moment and not desired it at another; or, even if he did not desire it when he had not got the stock in his own hands and it was in the hands of the bank, he might still have desired, and might have sold if the bank had not been wrong-doers and kept it from him. The issue, therefore, is, Would the owners have sold if the bank had not interfered with their rights? . . . It seems to me (although we have to deal with a case in which the field of circumstances is not very rich, and we have few facts to assist us) that, on the whole, the true view is that the plaintiffs would have done what prudent people would have done, and would have sold when the hour came to sell. For that reason I think that substantial damages ought to be given."

Judgment

In the present case I do not think the defendants are right in their contention that the plaintiff is precluded from maintaining that he would have sold, if he had been permitted to do so, by the fact that he admits he did not give specific instructions to the defendants to sell as there was no use in giving such instructions for the defendants had told the plaintiff that the stock was sold and it would have to stand at that. On the other hand I do not think that the plaintiff should be heard to say that he wants the damages assessed on the assumption that he would have let the time pass by and sold only at 17. It would appear from the evidence that the plaintiff wanted at one time to sell at $1.20 and changed his mind. As suggested in the passage from the judgment above set out, an owner might have desired to sell at one moment and not desired it at another and it seemed to Bowen, L.J. that the true view was that the plaintiff would have

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done what prudent people would have done and sold when the hour came to sell. This point of time, however, might of course be very difficult to determine. In the present case the plaintiff testifies that he requested Mr. Jones to put the 1,000 shares of Advance on his sheet because he wanted to sell them and it seems to me that, unless it is obvious that the hour had not come to sell, the time is fixed by such a request. I think I am doing justice to both parties when I draw the conclusion, as I do, that, in the present case, the plaintiff would have sold when he requested the shares from the defendants for the purpose of sale and not before. I am satisfied that such a request was made but the time of the request is important. The plaintiff in one part of his evidence says that it was in June but in the course of his evidence he did not give me the impression of being very exact in his references as to time. From his evidence it would seem to have been when he requested Mr. Jones to put the 1,000 shares on his sheet. There is other evidence already referred to tending to shew that the ledger sheets containing the account of the plaintiff and the monthly statement for April were discussed at the time the plaintiff took in the said statement on the 6th of May and I think both parties made their respective positions plain then and there and that the later conversations in which they evidently maintained the positions already taken should not be considered as altering the rights of the party. My conclusion is that it was on the 6th of May, 1929, that the plaintiff requested the 1,000 shares from the defendants for the purpose of sale. After that time each party knew the position taken by the other and could have acted accordingly in reference to the stock. I think, therefore, that for the loss he has sustained through the wrongful acts of the defendants the plaintiff should be allowed as damages the difference between a sale of 1,000 of Advance Oils Limited shares at $1.35 per share and a sale at $9.50 the latter being the price per share according to the Low transactions on the said 6th day of May, 1929, less the difference in the brokerage charges.

Judgment

Judgment accordingly in favour of the plaintiff against the defendants with costs.

Judgment for plaintiff.

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Mechanic's lien—Time for filing—Completion of contract—Items ordered at different times included as one job—R.S.B.C. 1924, Cap. 156, Sec. 19 (a.).

The defendant D., in the course of the construction of a building, entered into a written contract with the plaintiffs for the necessary plumbing and shortly after arranged with the plaintiffs orally for installing a furnace and putting in a flour-bin. On the 4th of July, 1930, the furnace was installed and the plumbing was finished with the exception of the installation of one tap. Nothing further was done until the 9th of August, 1930, when the plaintiffs put in its proper place the flour-bin and fixed the tap. The total cost of the work was $380.90. The cost of the flour-bin and putting it in was $4.50 and of fixing the tap 50 cents. The plaintiffs filed a lien for the cost of the work on the 28th of August, 1930.

Held, that the three items of work in plaintiffs' claim should properly be considered as one job of work and they are entitled to enforce their lien filed on the 28th of August, notwithstanding the trifling value of the work done on the 9th of August.

Statement

ACTION to enforce a mechanic's lien. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Kamloops on the 4th of December, 1930.

Archibald, for plaintiffs.

Dunbar, for defendants.

6th December, 1930.

Judgment

SWANSON, Co. J.: The plaintiffs are a firm of plumbers carrying on business at Kamloops in this County, and are seeking to enforce a mechanic's lien against defendants' house property in the City of Kamloops. The amount claimed is as follows:

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"Aug. 9. To plumbing contract	$344.00
To installing furnace	32.40
To flour-bin and putting in same	4.50
Total	$380.90."

The lien was filed on the 28th of August, 1930. It is contended by the defence that the work was practically completed on July 4th and, as no lien was filed within 31 days "after the completion of the contract" as defined by section 19 (*a*) of our

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Mechanics' Lien Act, Cap. 156, R.S.B.C. 1924, the lien "has absolutely ceased to exist." The sole point for decision is whether the affidavit of lien was filed within the proper time.

The plaintiff Fred W. Carr states that there were three items of work in the one job which he did for the defendant Dempsey, who is a contractor by occupation, and was the original owner of the premises in question. Homersham subsequently acquired the premises under a deed of conveyance from Dempsey subject to a mortgage for $2,000 in favour of Lothian as mortgagee from Dempsey. Carr states that Dempsey gave him an order to instal a plumbing outfit, furnace and flour-bin in the residence Dempsey was erecting on lot 17 block 82 on Columbia Street in this City, the premises in question. He says that he regarded it all as one job, that the plumbing contract was in writing, but the work of putting in the furnace and the flour-bin was day work no memorandum respecting same being in writing. He states that these three items of work "were not necessarily ordered at the same time, but were regarded as all one job," that he had previously done work for Dempsey on other properties on similar terms, or in a similar way. On the 4th of July the furnace was installed and the plumbing all done except the fixing of one tap, which plaintiffs left over to be later fixed. On the 9th of August Carr put in the flour-bin which had to be affixed to its proper place in the house, and which I think is clearly a fixture, and has become part of the freehold. He also fixed the tap on this occasion, the cost of fixing the tap being about 50 cents and the cost of the flour-bin and putting it in place of $4.50. A great deal was made by counsel for the defendants of a statement of Carr's that he was holding over the fixing of this tap to a later date trusting to thus extend the life of his lien, as he was giving time to Dempsey for payment. I do not think there was any so-called *mala fides* in that. Certainly there was none respecting the date on which Carr did the work in connection with the putting in of the flour-bin on August 9th.

I hold that it is clear that the three items of work in plaintiffs' claim are all properly considered as one job of work, and that to protect themselves the plaintiffs were not obliged to file separate liens in respect to each individual item of work. I

think the authorities fully bear out that position. I think the authorities also support the right of plaintiffs to enforce their lien filed August 28th although the work done on August 9th was of "trifling value" to use the term which occurs in different authorities.

I refer to the words of Walsh, J. in the Appellate Division of Alberta in *Dominion Radiator Co. Ltd.* v. *Payne* (1917), 2 W.W.R. 974 at p. 984:

"In the judgments of the Manitoba Court of Appeal in *Brynjolfson* v. *Oddson* (1917), 1 W.W.R. 1000, 32 D.L.R. 270 are collected many authorities and amongst them a judgment of the Supreme Court of Canada, *Day* v. *Crown Grain Co.*, 39 S.C.R. 258; (1908), A.C. 504; which hold that if the work upon which the lien claimant relies as giving a new day from which the statute begins to run against his lien is something which the owner could have insisted upon before accepting it as complete it will be sufficient for that purpose. To quote from the judgment of Idington, J. in delivering the judgment of the Court in *Day* v. *Crown Grain Co.*, *supra*, at page 263, 'The test question here is whether or not the appellant could in law have sued on the 20th of April and recovered from Cleveland as for a completed contract. I am of opinion he could not. Trifling as the parts unfurnished were, the party paying in such case was entitled to insist on the utmost fulfilment of the contract, and to have these parts so supplied that the machine would do its work.'"

Walsh, J. then adds:

"Applying that test, I think the plaintiff must on the facts of this case have failed in such an action if he had brought it against the contractor immediately after December 14."

Judgment

In the case at Bar I apply that test and find that if plaintiffs had entered their action against the defendant Dempsey on July 4th they must have failed in such action as having been brought prematurely, before the plaintiffs had fully completed their engagement with defendant Dempsey. I hold that the work done on August 9th was an essential part of the whole job of work which plaintiffs undertook to do for defendant Dempsey, that there is no *mala fides* to taint their action and that they should now succeed.

I refer to the words of the late Chief Justice of Manitoba Dubuc, in *Carroll* v. *McVicar* (1905), 2 W.L.R. 25 at p. 28:

"It is contended on behalf of defendant that plaintiff's work was done under three different contracts, and that, as to the first one, the putting up of the furnace, his lien was not filed within the time required. He swears that the putting up of the furnace, of the soft water tank, and of the pump, although ordered at different times, was done by him as one job. I do not think it would be proper to hold that, when a man is doing such

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work, being ordered or requested to do one thing then another, in his line of business, he should be required, in order to secure his payment, to file a lien after completing each piece of work. His doing so when he has completed his work ought to be considered sufficient."

I think the words of the eminent Chief Justice are entirely applicable to the condition of facts now before me.

I refer to the words of Macdonald, J. (now C.J.) in a Manitoba case *Curtis* v. *Richardson* (1909), 10 W.L.R. 310 at p. 311:

"And, if this work was done in pursuance of his contract, and if the preservation of his lien was his object, *mala fides* cannot be imputed to him."

See also the words of the late Mr. Justice Cameron, of the Court of Appeal of Manitoba, in *Brynjolfson* v. *Oddson, supra,* at p. 1003:

"The contention made on behalf of the plaintiffs is that so long as work done is work required to be done pursuant to the contract, the statutory remedy by way of lien is available if the proceedings thereon are duly taken and that the trifling amount or value of the work so done is not, in itself, material, if it is done pursuant to the contract."

These words of the learned judge are I think entirely applicable to the facts of the case before me. At p. 1007 Cameron, J.A. says:

"In my humble opinion the question of good faith cannot well arise when the crucial work has been done pursuant to a contract which it is the bounden duty of the contractor faithfully to fulfil."

Judgment

In *Clarke* v. *Moore and Simpson* (1909), 1 Alta. L.R. 49 the saving work done there consisted merely in fastening the hot-air furnace registers in place in the house there constructed, and painting them. Mr. Justice Harvey held this sufficient citing words of the late Mr. Justice IRVING in *Sayward* v. *Dunsmuir and Harrison* (1905), 11 B.C. 375. Similarly in *Steinman* v. *Koscuk* (1906), 4 W.L.R. 514: see also Killam, C.J. in *Robock* v. *Peters* (1900), 13 Man. L.R. 124 at p. 136. In *Merrick* v. *Campbell* (1914), 6 W.W.R. 722 the saving work was comparatively trifling and occupied only a few hours yet it was held sufficient. In *Foster* v. *Brocklebank* (1915), 8 W.W.R. 464 it was held that the clearing away of some debris by the contractor which was necessary for the complete performance of the contract was sufficient to save the lien. See also Harvey, J. in *Clarke* v. *Moore and Galbraith* (1908), 8 W.W.R. 411 at p. 412 holding that the erection of steps at back of the verandah although a piece of trifling work was sufficient to keep

the lien alive. In *Fuller* v. *Beach* (1912), 21 W.L.R. 391 similarly touching up plaster was held sufficient to save the lien.

I think that the authorities as applicable to the facts as found by me in this case abundantly support the plaintiffs' right to a lien.

There will be judgment accordingly for the plaintiffs in the terms prayed for in the plaint, and costs. There will also be judgment in the third-party proceedings in favour of Homersham against Dempsey with costs.

Judgment for plaintiffs.

OVERN v. STRAND *ET AL.*

Practice—Appeal—Application to allow in fresh evidence—Whether due diligence exercised—Rule as to.

On an application to the Court of Appeal to introduce fresh evidence, due diligence must be shewn and the application should not be granted unless supported by affidavits shewing the evidence desired to be used and setting forth when and how the applicant became aware of its existence and what efforts were made to have it adduced at the trial.

An application to introduce fresh evidence on the facts as set out in the statement below was refused (GALLIHER and MACDONALD, JJ.A. dissenting).

MOTION to the Court of Appeal for leave to adduce fresh evidence that certain invoices that were put in as exhibits at the trial were altered at the request of the plaintiff. In 1925, the plaintiff went to a place called Deserter's Canyon some distance north of Prince George where she had dealings with two traders and trappers named J. J. Weisner and Charles Overn. She married Overn in due course. Weisner had a store at Whitewater a place a short distance beyond Deserter's Canyon. The defendant Strand traded there and loaned money to Weisner from time to time. In the spring of 1928 he owed Strand $2,280. About this time Weisner was in poor health and deciding to go out he sold his trading post at Whitewater and freighting outfit to Mrs. Overn who intended to continue the trading

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post on her own account. Mrs. Overn, her husband and Weisner proceeded to come out to Prince George and on the way were met by a bailiff who served Weisner with a writ issued at the instance of Strand for the money Weisner owed him. On their arrival at Prince George the defendant *J. O. Wilson* drew up a bill of sale from Weisner to Mrs. Overn for Weisner's Whitewater property and outfit. Mrs. Overn then proceeded to Edmonton and bought a stock of goods that she brought to Prince George and from there she took these goods with other goods purchased at Prince George to Whitewater taking Weisner along with her as a river pilot. In the meantime Strand obtained judgment against Weisner and while Mrs. Overn and Weisner were on the way in they were overtaken by a process server who served them both with a writ issued at the instance of Strand praying for a declaration that the bill of sale from Weisner to Mrs. Overn was fraudulent and void and that the stock-in-trade in the plaintiff's hands was liable to seizure under the judgment obtained against Weisner. Shortly after their arrival at Whitewater Weisner went out to Prince George and instructed Messrs. *Wilson & Wilson* to defend the action both for himself and Mrs. Overn. It was then agreed between counsel that the action be tried before ROBERTSON, Co. J. at Prince George, and judgment was given in favour of Strand. Mrs. Overn claimed she was unaware as to what happened as she remained at Whitewater and gave no instructions to Messrs. *Wilson & Wilson* to defend on her behalf. A writ of *fi. fa.* was issued in the first action against Weisner for $2,705 and also in the second action against Weisner and Mrs. Overn for $497 for debt and costs. Mrs. Overn claims she knew nothing of this until the sheriff's officer appeared in Whitewater and executed the writ selling the entire stock of goods and merchandise at Mrs. Overn's post with the buildings in which they were stored to the Hudson's Bay Company which had a post nearby. On Mrs. Overn appealing from the decision of ROBERTSON, Co. J., it was held that as the proceedings before him only amounted to an arbitration there was no appeal. Mrs. Overn then brought this action to vacate and set aside the appearance entered by Messrs. *Wilson & Wilson* on her behalf without authority and that the judgment and writ of execution be vacated and set aside

and for $25,000 damages. The invoices in question on this motion were those received by Mrs. Overn for the goods purchased by her at Edmonton and at Prince George before proceeding north to Whitewater on the last occasion with Weisner as a pilot. Mrs. Overn recovered judgment for $10,000 for loss of stock-in-trade and $1,000 for general damages.

The motion was argued at Vancouver on the 13th of October, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for the motion: We submit that judgment was obtained by the plaintiff through wrong evidence and forgery. The action was against Messrs. *Wilson & Wilson* for damages for defending the Strand action without authority but we say we did have authority to defend. On the plaintiff being recalled she said the invoices were in the same shape as they were when she got them. In fact the plaintiff employed a Miss Baillie, a public stenographer, to change the invoices as appears on their face but at that stage it was too late to get this evidence before the jury returned their verdict. That the evidence should be allowed in see *Sanders* v. *Sanders* (1881), 19 Ch. D. 373 at pp. 380-1 and *Marino* v. *Sproat* (1902), 9 B.C. 335.

Argument

J. A. MacInnes, contra: Due diligence has not been shewn. They knew of these invoices long before the plaintiff was examined as to the changes made in them and had plenty of time to get the evidence they now want to put in. As to the rule on this question see *In re Enoch and Zaretzky, Bock & Co.'s Arbitration* (1909), 79 L.J., K.B. 363 and *Coulson* v. *Disborough* (1894), 2 Q.B. 316.

Craig, in reply: It was only at the last minute that we knew of Miss Baillie's evidence.

MACDONALD, C.J.B.C.: I think the motion must be refused.

The rule with regard to the admission of evidence is thoroughly established, not only in this Court, but in every other British Court, that in order to make it admissible it must be proved that the person tendering it has exercised due diligence to obtain it before the trial, and that it must be of such importance as to practically decide the issue when it is admitted.

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I am satisfied in this case that due diligence was not shewn on

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the part of the applicant to discover that these invoices had been changed. I am inclined to the view that is put forward by Mr. *MacInnes* that counsel and solicitors did know before the close of the trial that these documents had been changed, and that they took no steps to obtain evidence which would shew that they had been changed at the instance of the plaintiff. That being so, and it also appearing that one of the solicitors for the parties knew and recalled—when the plaintiff was recalled—that Miss Baillie had done stenography for her, that the applicant has shewn no due diligence at all in this case.

The rule, which, as I say, is well established and cannot be stretched to a breaking point, is founded upon this, that, if it is exercised it may mean a new trial. In a case where the trial has been complete and thorough in every way, the parties would be put to the great expense of a new trial and the postponement of the decision of their rights. In this case it is peculiarly important that the parties should not be sent back for a new trial. The issues are extensive and the parties involved in it are numerous, counsel involved are numerous and the expense, of course, is very great, seeing that the last trial lasted five days;

MACDONALD, C.J.B.C.

therefore we ought to uphold the rule which I have stated and not permit a new trial if the parties have not been diligent at the first trial, and in this case I am satisfied that they were not diligent. They ought to have known, if they did not know, that the invoices had been changed. They were the parties relying upon these facts, the plaintiff was not relying upon them at all. They were not put in by the plaintiff, they were put in by the defence. They were relying upon them and they ought to have known that they were changed, and they ought to have taken steps, they ought to have accepted the clue which they had to follow up and ascertain by whom the change was made, that they could go to the jury with the statement that this plaintiff had committed forgery.

I have no doubt that the only thing that is open to us to do in this case is to follow the rule and not to permit new evidence to be put in.

MARTIN, J.A.

MARTIN, J.A.: I am of the same opinion. I think that it would not be consistent with the course of justice that this

motion should be acceded to: it would be upsetting many decisions of this Court to do so, *e.g., The King* v. *The Minister of Lands* (1926), 37 B.C. 106, founded upon the decision of the old Full Court in *Marino* v. *Sproat* so far back as 1902 (9 B.C. 335), I then being a member of that Bench, where the Full Court unanimously decided in that case that, in effect, due diligence must always be shewn, and that applications of this kind should not be granted unless they were supported by affidavits shewing the evidence desired to be used, and setting forth when and how the applicant became aware of its existence, and what efforts were made, if any, to have it adduced at the trial.

The remarkable part of this case is that though this very evidence was, literally, in the hands of counsel almost four months before the trial, upon examination of the plaintiff for discovery no steps were taken to go into the matter of the alterations in the documents in question, although they appeared upon the exhibits in so striking a manner that they could not have failed to arrest the attention of any person of any diligence, and accustomed in the ordinary way to prepare exhibits for a trial. It is a very remarkable thing that in each one of these exhibits they have alterations which are so striking that it is impossible, without really being careless, not to have enquired into the cause of them. Each one of them contains alterations, either in another hand, or in another ink, or in another typewriter, so distinct in their character that they must inevitably, to anyone who was accustomed to prepare evidence, have excited his suspicion, if the question to which they relate was relevant, and counsel presents this motion to us upon the basis that not only are they relevant, but they are crucial. And then, again, we look at the trial proceedings and find that on the opening day of it these documents which, *ex facie,* have been the subject of alteration, are put in, not by the plaintiff, who could not put them in, but by the cross-examining counsel, the same counsel who had them in his very hands three and a half months before.

MARTIN, J.A.

Now, in such case, to invite us to say that it is due diligence to shut your eyes to alterations in a vital point of your case, is something which, with all respect, I find myself unable, consistent with the decisions of this Court, to accede to; therefore, in my opinion, it is clear that the only course open to us

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in the discharge of our duty and in the exercise of our discretion is to refuse this application as being contrary to all the decisions of this Court.

GALLIHER, J.A.: I recognize that the rule which has been discussed in this case is a rule that should be adhered to. The circumstances under which the rule may apply in one case may be so different to the circumstances in another case that what may be due diligence in one case may not be due diligence in another. That all depends on the circumstances of the case.

Looking over these exhibits, a person is apt to discover whether there are alterations in it, and, looking to find alterations, it can be seen that there have been alterations made. A cursory examination of them would not necessarily, unless one's mind was directed to them to look very closely into them, disclose this. Nor do I think that the solicitor was so much at fault in the matter. It was something that would not present itself to his mind unless he was closely scanning these documents for a specific purpose. I must say that, notwithstanding what has been said to the contrary, I have not the slightest hesitation in saying that under the circumstances of this case this evidence should be admitted. The shadow of forgery stands out; and I also might add there is the shadow of perjury, because either one or the other of these individuals has committed perjury; and I think we should take some cognizance of that fact and add it as one of the circumstances—at all events, it is worthy of some consideration in determining whether we should allow this evidence to come in or not.

GALLIHER, J.A.

I would grant the application.

MCPHILLIPS, J.A.: I would refuse the motion. The rule that this Court has to consider is the Court of Appeal rule. Further evidence, save as to the matters subsequently occurring, may be admitted on special grounds only. Now, we have to find the special grounds here; and as referred to both by my learned brother the Chief Justice, and by my learned brother MARTIN, we have a long course of decisions in this Court, with which of course we are familiar, and the necessity for certainty of procedure is very important when we have to consider the ends of justice.

MCPHILLIPS, J.A.

Now, it cannot be said upon the evidence before us that the parties were not aware of their legal rights. It is thought that something could be made out of the fact that there was an apparent erasure in the invoices. That question is at the last moment brought before the jury, no doubt, for the purpose of influencing the jury—I do not say improperly. It was known all along, and no steps taken apparently to account for it. From a forensic point of view, counsel no doubt thought that to bring this matter out at the very last minute before the jury was good tactics, and to leave it at that and take their chances before the jury. Well, they took their chance, and they failed. Now we are asked to admit further evidence—evidence which did not go to the jury—in a case lasting five days, and without that evidence going to the jury. If, upon the examination of the plaintiff on this point, counsel were of the opinion that in the interests of justice there should have been a postponement, it should have been moved for before the learned trial judge. As a learned Master of the Rolls once said, in a proper case it is only a question of costs. And that postponement might have been applied for to introduce this evidence. They had their five days in Court and took their chance.

MCPHILLIPS, J.A.

The principle upon which this Court acts was set forth by Lord Chelmsford in *Shedden* v. *Patrick* (1869), L.R. 1 H.L. Sc. 470, 545, and Lord Justice Scrutton in *Nash* v. *Rochford Rural Council* (1917), 1 K.B. 384 at p. 393, refers to the governing practice of the Court of Appeal, which is analogous to our practice and conformable to the rule we have. Lord Chelmsford said in that case, as quoted by Lord Justice Scrutton:

> "'It is the invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, [which is this case] no opportunity for producing that evidence ought to be given by the granting of a new trial.'"

Good citizens, of course, should be diligent when it is suspected that a crime has been committed, and the proper authorities notified, but unfortunately, as the world knows, citizens do not seem to be actuated by that proper motive. I have not very

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much patience myself with people who advance a proposition that some crime has been committed and yet have not done that which good citizens ought to do, but endeavour to achieve some advantage in a civil Court by suggestions of crime.

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I conclude with the language of Lord Atkinson in *Toronto Electric Light Company, Limited* v. *Toronto Corporation* (1917), A.C. 84 at pp. 99-100:

"With the hardships (if any) or the moralities of the case this Board has no concern. It deals with the legal rights of the parties and those alone, and, having regard solely to them, their lordships are on the whole case of opinion that the judgment appealed from was right and should be affirmed and this appeal be dismissed."

MCPHILLIPS, J.A.

In this case, it cannot be said that the parties were not aware at the time of trial of their legal rights. It must be assumed that counsel guided himself by the instructions of the solicitor, and took his chance forensically, and the jury made its findings, and now we are asked upon this scant material—insufficient material, to my mind—to really, in effect, have a new trial. In any case, the new evidence should be—which that proposed is not—of such a character as would reasonably decide the case. I cannot express myself as being favourable to that view.

MACDONALD, J.A.: As it developed, this evidence must have become material, when the plaintiff denied that she got the letters. I think, however, there is no insuperable difficulty in applying the rule. A rule is a good servant, but a bad master. Where the interests of justice require it, I would, if necessary, stretch the rule, without breaking it, although that is not altogether necessary in this case. There is ground for fearing that a fraud has been committed, and when that is apparent the Court, in my judgment, ought to endeavour to prevent it by admitting this additional evidence.

MACDONALD, J.A.

Motion refused, Galliher and Macdonald, JJ.A. dissenting.

JAMIESON AND JAMIESON v. B.C. AMUSEMENTS COMPANY LIMITED.

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JAMIESON v. B.C. AMUSEMENTS CO. LTD.

Negligence—Injury to invitee—Res ipsa loquitur—Motion for non-suit reserved—Verdict—Finding of contributory negligence—Special damages allowed as claimed but no general damages—Motion for non-suit then granted—Appeal—New trial—B.C. Stats. 1925, Cap. 8.

The defendant Company operated amusement devices in Hastings Park, Vancouver, B.C., one of which was known as "The Old Mill," a circular tunnel through which water runs in sufficient force and volume to carry through small boats with seats for passengers. The plaintiff, an infant, purchased a ticket from an employee and took a seat in one of the boats. As he was proceeding through the tunnel his right hand came in contact with the side or ledge of the tunnel and caught on a nail or some other projection. His finger was so badly torn that it had to be amputated. In an action for damages judgment was reserved on the defendant's motion for non-suit and after the defence was in the jury found contributory negligence, gave special damages for the amount claimed but no general damages. The motion for non-suit was then granted and the action dismissed.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that it was the duty of the jury to pass upon general damages as well as special damages, they having made no allowance for pain and suffering, loss of finger and the attendant inconvenience for life; further, having found contributory negligence it was their duty after finding the whole of the damages to apportion them between the parties in the manner specified by the Contributory Negligence Act: there should therefore be a new trial.

APPEAL by plaintiffs from the decision of MORRISON, C.J.S.C. of the 21st of January, 1930, in an action for damages for negligence. The defendant Company duly incorporated in British Columbia owned and operated certain amusement devices at Hastings Park in the City of Vancouver among which is one known as "The Old Mill" which consists of a tunnel through which the water runs conveying small boats having seats for passengers. On the 6th of July, 1929, the infant plaintiff purchased a ticket from an employee of the defendant Company for admission to "The Old Mill" and took a seat in one of the boats. As he was proceeding through the tunnel his right hand came in contact with the side or ledge of the tunnel and caught a nail, sliver or other projection and his finger was so badly injured that it had to be amputated. At the end of the plaintiff's case judgment was reserved on a motion for non-suit

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and upon hearing the defence the jury brought in a verdict finding contributory negligence and assessing special damages for the amount claimed for hospital charges and doctor's fees but did not give any general damages. The learned Chief Justice then allowed the motion for non-suit and dismissed the action.

The appeal was argued at Vancouver on the 4th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Wismer, for appellants: The learned judge dismissed the action following *Serediuk* v. *Posner* (1928), 1 W.W.R. 258 at p. 261; *Welfare* v. *Brighton Railway Co.* (1869), L.R. 4 Q.B. 693. On the question of taking the case from the jury see *Halliwell* v. *Venables* (1930), 99 L.J., K.B. 353; *McGowan* v. *Stott* (1923), *ib.* 357 (n.). The jury gave a compromise verdict and allowed nothing for general damages. There should be a new trial: see *Holt* v. *Andrews* (decision of our Court of Appeal, Jan. 24th, 1928, not reported); *Phillips* v. *London and South Western Railway Co.* (1879), 48 L.J., Q.B. 693 at p. 694.

Hossie, for respondent: Something more must be shewn than the mere fact that an accident occurred. There is no evidence to shew that the premises were dangerous: see *Maclenan* v. *Segar* (1917), 2 K.B. 325 at pp. 329 and 333; *Welfare* v. *Brighton Railway Co.* (1869), L.R. 4 Q.B. 693 at pp. 696 and 699; *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74; *Kynoch* v. *Bank of Montreal* (1923), 3 W.W.R. 161. *Res ipsa loquitur* does not apply in this case: see *Wilson* v. *Glasgow and South-Western Railway Co.* (1915), S.C. 215 at p. 221; *Sheehan* v. *Dreamland, Margate, Limited* (1923), 40 T.L.R. 155; *McLean* v. *Y.M.C.A.* (1918), 3 W.W.R. 522; *Rowley* v. *The London and North-Western Railway Company* (1873), 42 L.J., Ex. 153; *Canadian Pacific Rway. Co.* v. *Jackson* (1915), 52 S.C.R. 281 at pp. 287 and 291.

Wismer, in reply: On wrongful withdrawal of case from jury see *Littley* v. *Brooks and Canadian National Ry. Co.* (1930), S.C.R. 416 at p. 421. *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74 is in our favour.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I am of opinion there should be a

new trial. In the first place, the jury only allowed by way of damages special damages that this boy had suffered. They made no allowance at all for pain and suffering, or for loss of the finger and the inconvenience that it will mean to him during the rest of his life. They should have taken that into consideration. It is admitted in the book that their verdict was one simply for the special damage which he had suffered. They have put the other aside altogether.

I think they were bound to decide it; they were bound to decide the whole case, the general damage as well as the special damage. That is one reason why there should be a new trial. Another reason is that instead of following the direction of the learned judge and of the Contributory Negligence Act, and finding the damages, they find only the special damages. It was argued by Mr. *Hossie* that the sum found for damages is only the plaintiff's proportion of what he would get if they had taken the whole of the damages and apportioned them. I do not think that is what the Act requires. The jury must find the whole of the damages. Then they must find how it is to be apportioned between the parties. That is the clear interpretation of the Act as shewn both by the section itself, which says that the jury shall find the damages, but also by the fact that the judge is permitted to apportion the costs in the same way that the jury have apportioned the damages, and that when he comes to deal with the costs he ought to have that apportionment of the jury as a basis upon which to make his finding. There again the jury were wrong, and for that reason there should be a new trial.

Then I am satisfied that the evidence of Hinsdale, secretary of the Workmen's Compensation Board, was not admissible. He simply gives evidence that the Board has come to the conclusion that a certain percentage of damage occurred to this boy, and figures what that would amount to for his lifetime. It is just as if he said, "My Board are of the opinion that one fifty-eighth of $100 a month is the amount that he is entitled to for the loss of his finger." That evidence cannot be admitted. A witness cannot be called to give the opinion of another, and except in a case where experts are called, he would not be entitled to give his own opinion. There again the learned judge made a mistake in admitting that evidence. It is not as though that were evidence given by means of an actuary's tables, because that is founded upon fact, fact and experience, the fact

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that persons have lived so long, and by taking a sufficient number of them you can arrive at the average life of a human being. There is nothing of that sort here, because what the Compensation Board has done is simply to fix an arbitrary figure not based upon fact, but based upon their own opinions and a certain amount of experience as well. It is not necessary to enlarge more upon this case. It is a clear case for a new trial.

MARTIN, J.A.

MARTIN, J.A.: I am so largely in accord with what the learned Chief Justice has said on the first two grounds that he has mentioned so fully—*viz.*: that it is obvious the jury considered only the special damages and excluded the pain and suffering and disfigurement from their consideration, and also that it is necessary that the damage should be ascertained under the Contributory Negligence Act before the degree of fault can be ascertained as it should be—that I shall add nothing to what he has said. With regard to the third point, I prefer in the present case to say nothing about it, but in principle I would disagree with what my learned brother has said and I do not think it is open to us; I think the submission of Mr. *Hossie* is correct, that counsel for the plaintiff at page 74 of the appeal book withdrew in effect any objection he might have had to the reception of the evidence.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with the learned Chief Justice in allowing a new trial on the first two grounds. On the other ground, as at present advised, I am inclined to think, though it is not necessary for me to decide that, it is rather a question of the weight of evidence, owing to the manner in which it has got before the Court and jury.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am in agreement with the opinions expressed that there should be a new trial. I only add this, that the verdict here is an instance of the jury failing to discharge the duty that they were called upon to perform. Having found contributory negligence the proportion of liability must be fixed by them.

MACDONALD, J.A.

MACDONALD, J.A.: I agree that there should be a new trial. The provisions of the Contributory Negligence Act were not followed.

New trial ordered.

Solicitor for appellants: *G. S. Wismer.*
Solicitor for respondent: *Ghent Davis.*

SCEATS AND MURRAY v. YOUNG AND THE GLYCERINE-PUMICE SOAP COMPANY LIMITED.

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Contract — Misrepresentation — Rescission — Trade-mark — Registration— Materiality—R.S.C. 1927, Cap. 201, Sec. 20.

The defendant Young, managing director and chief owner in the defendant Company, incorporated for the manufacture and sale of Glycerine-Pumice Soap, entered into an agreement for the sale of the assets and goodwill of the Company to the plaintiffs, including a secret formulæ for the manufacture of the soap and trade-mark which the defendant Young represented as duly registered. The purchase price was $500 down and $4,500 in one month, also a royalty of 25 cents per gross on all soap manufactured until $7,500 be paid. The plaintiffs paid the $500 and took over the business including the formulæ and trade-mark. Subsequently they found the trade-mark was not registered, and on bringing action for rescission of the contract recovered judgment.

Held, on appeal, affirming the decision of McDONALD, J., that the statement that a trade-mark was registered when it was not is a material misrepresentation upon which rescission of a contract will be ordered.

Held, further, in respect to restitution of the secret formulæ that if a person makes a contract and in pursuance thereof puts a secret document in the hands of the other, and it afterwards turns out that the contract should be rescinded because of innocent misrepresentation, he has only himself to blame and cannot claim he is entitled to the formulæ back in the same condition as he held it before entering into the contract.

APPEAL by defendant Young from the decision of McDONALD, J. of the 21st of February, 1930, in an action for rescission of an agreement between the defendant the Glycerine-Pumice Soap Company Limited of the first part, the defendant Young of the second part and the plaintiffs of the third part on the ground of misrepresentation on the part of the defendant Young. The agreement which was entered into on the 13th of July, 1929, was for the sale to the plaintiffs of the goodwill of the business of the manufacture of glycerine-pumice soap and other products as carried on by the Company in the City of Victoria, together with the assets of said business including the formulæ for the manufacture of said soap and other products and the trade-mark and the sole right to manufacture the said

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soap and other products. For these assets the plaintiffs agreed to pay $500 in cash and $4,500 on or before the 15th of August, 1929, and a royalty of 25 cents per gross on all soap manufactured until $7,500 had been paid. The plaintiffs further agreed to assume and pay certain obligations owing by the Company including a $1,500 note held by the Bank of Commerce. The plaintiffs made the cash payment, also the further payment of $4,500 and then went into possession, the shares of the Company being transferred to them with possession of the formulæ. They went on with the business but were not very successful and on September 20th they complained to Young that business was not successful and asked that interest be waived. Young agreed to this provided he was relieved of his obligation as security upon the $1,500 note to the Bank of Commerce, but this was not carried out. On September 24th, 1929, Young's solicitor advised the plaintiffs' solicitor that the trade-mark for the manufacture of the glycerine-pumice soap had not been registered, and on October 10th following the plaintiffs repudiated the contract and sued for fraud, and in the alternative for rescission upon the ground that Young had made certain misrepresentations (1) That the Company had made a profit of $1,590 in the year 1928, (2) that the defendant Young stated the Company's average sales amounted to 40 or 50 gross per month of the soap, (3) that the Company had an established business upon the "Prairies" and (4) that the Company's trade-mark was registered. The learned trial judge acquitted the defendants of fraud also of misrepresentation as to the first three grounds above stated, but found that the representation that the trade-mark was registered was a material representation upon which the plaintiffs relied, and they were entitled to rescission and the return of the moneys paid under the contract.

Statement

The appeal was argued at Vancouver on the 10th, 13th and 14th of October, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Clearihue, for appellant: An unregistered trade-mark will of itself be protected by the Courts: see *The Collins Co.* v. *Brown* (1857), 3 K. & J. 423. Registration of a trade-mark does not make it a better trade-mark: see *In re Christie Trade-Mark*

Argument

(1920), 20 Ex. C.R. 119 at p. 121. Registration of a trade-mark does not create a right akin to a patent: see *In re "Vulcan" Trade-Mark* (1914), 15 Ex. C.R. 265 and on appeal (1915), 51 S.C.R. 411; *Mouson & Co.* v. *Boehm* (1884), 26 Ch. D. 398. It is not registration that makes one proprietor of a trade-mark: see *Partlo* v. *Todd* (1888), 17 S.C.R. 196; *Anheuser Busch* v. *Edmonton B. & M. Co.* (1911), 16 W.L.R. 547. As to misrepresentations made by mistake see Kerr on Fraud and Mistake, 6th Ed., 115; *In re contract between Fawcett and Holmes* (1889), 42 Ch. D. 150. Rescission will not be granted in this case: see *Chamberlain* v. *Lee* (1840), 10 Sim. 444; *Halkett* v. *Dudley (Earl)* (1907), 1 Ch. 590 at p. 601; *In re Spencer and Hauser's Contract* (1928), Ch. 598; *Redican* v. *Nesbitt* (1924), S.C.R. 135. The formulæ is a secret one and they cannot return this so they cannot have rescission, further they cannot return the business as a going concern as it was closed down. After knowing of the alleged misrepresentations they elected to go on with the business.

Argument

N. W. Whittaker, for respondents: His saying there was a registered trade-mark is a material misrepresentation: see *Anheuser Busch* v. *Edmonton B. & M. Co.* (1911), 16 W.L.R. 547; *Salada Tea Co. of Canada, Ltd.* v. *Anne Kearney* (1925), Ex. C.R. 119; *In re Christie Trade-Mark* (1920), 20 Ex. C.R. 119. The trial judge on the facts has found in our favour and this Court will only interfere on strong grounds: see *Gagnon* v. *Nelson* (1915), 21 B.C. 356. That there should be restitution see *Hines* v. *McCallum* (1925), 1 W.W.R. 838 at p. 846; *Adam* v. *Newbigging* (1888), 57 L.J., Ch. 1066, Kerr on Fraud and Mistake, 6th Ed., 469; *Bawlf Grain Co.* v. *Ross* (1917), 55 S.C.R. 232 at p. 236.

Clearihue, replied.

MACDONALD, C.J.B.C.: After the very full argument of Mr. *Clearihue* and the very neat and satisfactory argument of Mr. *Whittaker,* I have come to the conclusion that the appeal must be dismissed.

MACDONALD, C.J.B.C.

It is one of those cases where a business has been transferred from the seller to the buyer, and by reason of the misrepresentation it has been returned and is not in exactly the same condition

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as when received. The facts remain such in this case that there is no other course that I can see open for the Court but to dismiss the appeal, since there is no doubt that the representation was made. That is not disputed, and it was, in my opinion, a material representation. I should say that it was a crucial representation. The buyer, when he was considering the closing of the deal, and feeling that he must be satisfied that what he was getting would not be interrupted by infringement of trade-mark, got this assurance that the trade-mark was registered.

Now, a registered trade-mark is a very different thing from an unregistered one. It gives the owner the right to bring action for innocent infringement, and if he has not got the trade-mark registered he cannot bring that action, or, if he does bring it, he has greater difficulty in making out his case. The trade-mark was really one of the essentials of the case. It was the trade-mark under which the manufacture of this "Glycerine-Pumice Soap" was intended to be carried on. Now, that is what they proposed to do. That is what the previous company had had done. Now, purchasers would naturally place great reliance upon having something that was not likely to be attacked because of non-registration. They would save also the trouble of obtaining evidence, which would be very difficult to obtain, of a long-continued use of the trade-mark. So that I can well understand that the purchasers were very much interested in having a registered trade-mark. I think that the representation was a very material one.

MACDONALD, C.J.B.C.

Then as to the other points raised by Mr. *Clearihue*. First, that it was an executed agreement and therefore could not be set aside. It was not an executed agreement, for this reason, among others, that while the purchasers were given, in pursuance of the agreement, the trade-mark, it was unregistered. There was that which remained to be done by the company which has never been done up to the time of the trial. Therefore, it was not an executed agreement at all.

Then it was said that there was adoption of the contract afterwards, about the end of September, when the two plaintiffs came to Vancouver for the purpose of appointing an agent to represent them in making sales. Now, there is no definite evidence upon

that question at all. It was said that they came here about the end of September, while the evidence is that they returned home on the 28th of September. So that the question was whether they came here after they had notice of the failure to register the trade-mark (which notice was given on the 24th of September) or not. That matter has been left at large, and I am unable to say from the evidence whether or not they came here after notice, or whether they came before notice. I am inclined from the evidence to believe that they came before they received the notice. Therefore, what they did over here was not done with notice or knowledge of the defect in the registration.

Then it was said that restitution had not been made with respect to the formulæ. That the defendant gave the formulæ to the plaintiffs disclosing the secrecy which theretofore had surrounded it, and if the defendant was to return it to them after the cancellation of the agreement, that the secrecy was lost, and therefore they do not receive back what they had given.

MACDONALD, C.J.B.C.

As I understand the law, it is this: If a person makes a contract and in pursuance of that contract puts a secret document in the hands of the other, and it afterwards turns out that the contract is rescinded because of innocent misrepresentation, he has only himself to blame. He has delivered over the secret and he has delivered it under a misrepresentation and he is not entitled then on the question of the rescission of the contract to say, "You have not given me back my formulæ in the same condition as you received it."

I do not think there is anything else that I need say in regard to the case. On the whole I think the learned trial judge has come to the right conclusion, that there was a material misrepresentation, and that nothing has been done by the plaintiffs to deprive them of their right to take advantage of it. The appeal is dismissed.

MARTIN, J.A.: In my opinion the learned trial judge below reached the right conclusion, and therefore the appeal should be dismissed. As to any question of the suggested difficulty of restitution that point is met by the principle quoted in Salmond & Winfield on Contracts, at pp. 239-40, as follows:

MARTIN, J.A.

"The essential effect of *restitutio in integrum* is not the restoration in all

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respects of the *status quo ante*, but the reciprocal restoration by each party to the other of all money or property which either of them has received from the other in pursuance of the contract. At common law this was the entirety of the matter. Equity, however, will, as incidental or accessory to such restoration make pecuniary adjustments between the parties in respect of the profit or loss accruing to the parties from the possession of the property so restored."

That principle has been adequately followed out in the judgment before us.

GALLIHER, J.A.: I understand my learned brothers are all in favour of dismissing the appeal, and while I am not dissenting from the judgment, as at present advised I am in some doubt as to the relative importance of the trade-mark as against the importance of the formulæ which was turned over to them, and I think that the trade-mark without the formulæ would be of very little benefit to them or anybody manufacturing the soap.

GALLIHER, J.A.

However, those are the only points on which I have, as I say, some doubt as at present advised, and I do not wish to hold up the judgment, as I can see no good purpose to be served in doing so.

MCPHILLIPS, J.A.: It is evident that the learned judge in the Court below had in this case a very full, complete and able argument.

Now, the learned trial judge, having an opportunity we have not had of seeing the witnesses, considering their demeanour, and all the attendant circumstances that arose in the trial, was in a much better position to form an opinion on the question of the materiality of this representation that there was a registered trade-mark and whether that was or was not the inducing cause of the contract. The learned judge has found that the representation was made and that it was the inducing cause and that it was a material representation.

MCPHILLIPS, J.A.

There was no period of time fixed within which it was to be established that there was a registered trade-mark. The representation was that it existed, and it would seem to me that the respondents, discovering its non-existence, had the right to elect for rescission or the adoption of the contract. If there had been fraud, of course, damages might have been claimed for deceit.

In this particular case the rescission was claimed before the

registration of the trade-mark had been effected, and upon the cases as I read them, if they had waited until after the registration had been completed, before electing I think they would have found themselves in an insuperable difficulty. We are faced with the decision of the learned judge of the Court below that it was a material representation, and that it was the inducing cause of the entry into the contract. In the face of that, it would only be in a very extreme case that the Court of Appeal would disagree with the learned trial judge.

In this case that was referred to in our own Court, *Gagnon* v. *Nelson* (1915), 21 B.C. 356, in my judgment there, at p. 365, I referred to the leading case upon the principle, and what Lord Justice Fry said. He, of course, was a master of the law in respect to specific performance:

"The second question is whether the purchasers purchased on the faith of that representation. The learned judge has found that they did. On that question I feel the same difficulty as Lord Justice Bowen, and on the evidence as read before us I should have felt inclined to come to the conclusion that the contract was not induced by that representation [and I may say that I was rather of that opinion throughout the argument of Mr. *Clearihue*]; but as Mr. Justice Denman, who saw and heard Alderman Knight, was satisfied with his evidence, I cannot give my voice for reversing his decision."

MCPHILLIPS, J.A.

And it is to be noted here that the learned trial judge said in his judgment, towards the conclusion:

"I feel that I ought not to leave the case without expressing my appreciation of the great assistance which I have received from counsel engaged, both in the presentation of the evidence and in their careful and painstaking arguments. Although I am not citing any case in this judgment, I have carefully read the authorities cited by counsel, and so far as I am able to understand they are not in conflict with the conclusions which I have reached."

The learned judge evidently gave the most careful attention to all the arguments and submissions in the Court below, and it would seem to me to be not a case where a contrary view can rightly be taken.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

Solicitors for appellants: *Clearihue & Straith.*
Solicitors for respondents: *Whittaker & McIllree.*

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IN RE EVA C. JOHNSON, AN INFANT.

JOHNSON v. HALL

IN RE EVA C. JOHNSON, AN INFANT. JOHNSON v. HALL.

Infant—Custody—Parental rights—Child brought up from infancy by aunt —Welfare of child paramount consideration—Delivery to father.

Shortly after the birth of an infant in January, 1921, the mother died and the father who was an engineer in Vancouver having no suitable home gave the infant over to Mrs. H. (the married sister of his late wife who lived with her husband in Ontario) to take charge of her and bring her up as one of her own family, there being evidence of the father stating that his daughter was to be hers for all time. The infant lived with the aunt in Ontario where she was well cared for and received proper instruction until August, 1930, when on the father's invitation the aunt and child visited him in Vancouver. Shortly after their arrival the father took the child away and put her in a convent, refusing to give her back to the aunt. During the child's stay in Ontario the father sent $500 for her maintenance the aunt still retaining $300 of this in a trust account for the infant. The child was unhappy in the convent and wanted to remain with her aunt. An application by the aunt by way of originating summons for custody of the child was granted.

Held, on appeal, reversing the decision of MCDONALD, J. (MACDONALD, J.A. dissenting), that the father had never surrendered his parental right. There was no suggestion of unfitness in the father and although the welfare of the infant is the paramount consideration it is the settled practice that the claim of the father must prevail unless the Court is judicially satisfied that the welfare of the child required that the parental right should be superseded.

APPEAL by Donald Allen Johnson from the order of MCDONALD, J. of the 6th of October, 1930, granting the application by way of originating summons of Maude Campbell Hall for an order that the custody of Eva Campbell Johnson, an infant, be committed to her during the child's minority. The petitioner is the child's aunt. The child was born in the City of Vancouver on the 25th of January, 1921, and her mother died the following 10th of February. The father of the infant is an engineer and resides in Vancouver. On the mother's death the father gave the infant into the care of Mrs. Shirley Pearce another sister of the mother to whom the father stated that it was the mother's wish that the infant should be given into the custody of the applicant. As Mrs. Pearce was living in

Statement

Alberta at this time and not in a position to look after the child owing to her husband's absence in the Peace River District she brought the child to the home of her sister, the petitioner, in Ontario on March 29th, 1921. The father was advised of this and wrote the petitioner telling her he had no choice as to which of his wife's sisters had the custody of the child. The petitioner claimed the child was left with her on the understanding with the father that she was to have the child as her own permanently. The petitioner's husband was a merchant in Leamington, Ontario, well to do, and the child was well taken care of and properly educated. The father went to Ontario to see the child in 1923, and again in 1929. On his return to Vancouver from the last trip the petitioner and the child came with him, but after a short stay she returned to Ontario with the child. In August, 1930, pursuant to invitation by the father, the petitioner again brought the child to Vancouver, and shortly after her arrival the father took the child to the Sacred Heart Hospital in Vancouver where she remained. During the child's stay with the petitioner the father sent about $500 for the child's maintenance, $300 of which still remains to the credit of the infant. The child's desire was to remain with her aunt and wished to be taken away from the convent. The aunt's application for custody of the child was granted.

Statement

The appeal was argued at Vancouver on the 20th and 21st of October, 1930, before MACDONALD, C.J.B.C., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. Edward Bird, for appellant: When the father is a good man, kind and helpful to the child, she cannot be removed from his custody: see *In re Curtis* (1859), 28 L.J., Ch. 458; *Vansittart* v. *Vansittart* (1858), 2 De G. & J. 249; *In re Fynn* (1848), 2 De G. & Sm. 457. When the child is in the lawful possession of the father that possession should not be disturbed: see *The Queen* v. *Gyngall* (1893), 2 Q.B. 232; *In re Thain* (1926), Ch. 676; *In re Mackay* (1923), 3 W.W.R. 369. The Court will not make an order taking the child out of the jurisdiction: see *Mountstuart* v. *Mountstuart* (1801), 6 Ves. 363; *De Manneville* v. *De Manneville* (1804), 10 Ves. 52. When the question of the custody of a child arises the child is a ward

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of the Court: see Daniell's Chancery Practice, 8th Ed., pp. 974 and 982.

J. W. deB. Farris, K.C., for respondent: No question of jurisdiction is involved and was not raised in the Court below. The child has been with the aunt continually since its birth, with the consent of the father. She has been well treated with good surroundings and carefully educated. The child decidedly wants to stay with her. The welfare of the child is paramount and there is no question but that the aunt is in a better position to provide for her welfare: see *In re Ross* (1928), 2 W.W.R. 161; *In re Gehm, an Infant* (1927), 39 B.C. 45.

Bird, replied.

Cur. adv. vult.

24th October, 1930.

MACDONALD, C.J.B.C.: This contest concerns the possession of a child of about 10 years of age. The mother died a few days after her birth. The father entrusted the care of the child to the mother's sister Shirley, who, without the father's consent, took it to Ontario and left it with another sister a Mrs. Hall. The Halls have had her ever since. The father has nothing but praise for the care and nurture of the child by the Halls who have no child of their own and who have become deeply attached to her and she to them. The father supplied some money to the Halls for their expenses and trouble but was told that they did not want money; they wanted the child. The Halls live in Ontario, the father in Vancouver. He visited the child once or twice and on more than one occasion offered to pay the expenses of Mrs. Hall and the child to visit him in Vancouver. Last year he went to Ontario and the custody of the child was discussed, he insisting on his right to it. Finally he consented, he says, and this is not positively denied, that the Halls should have the child for another year. This year he paid the expenses of Mrs. Hall and the little girl to Vancouver and insisted that the child should be restored to him. He has a home here but has not remarried. He, therefore, arranged with the Sacred Heart Academy to place her there for a time and, as the Academy required a few days to provide accommodation for her, he placed her in the meantime with the Children's Aid Society. She is

MACDONALD, C.J.B.C.

now in the Sacred Heart Academy in the custody of the appellant.

The fitness and character of the Halls was not questioned. The father does ample justice to them. Nor have the fitness and ability of the father to take the custody of the child been questioned. Each party throughout this dispute had no charge of any kind to make against the other as to their character or means to properly care for the child. Neither does any question of religion intrude into the question. The whole trouble, as I see it, arises out of the alleged injustice of taking the child from the Halls who have become very much attached to her and who desire to have her.

There is no dispute, and indeed there could be none of the father's legal right to the custody of the child and who is in all respects desirous and capable and financially well able to care for her. That is conceded but it is said, and rightly I think, that the interests of the child are in the eyes of the Court the paramount interest to be considered. In my opinion that axiom does not exclude consideration of a parent's right, if the parent is in all respects fit and capable, as to character and means, to care for her. That fact cannot be ignored. When that is established the question of the interests of the child must be an important element in deciding her custody. Due regard to the parents' legal rights in the child and in the child's legal right to be fostered and cared for by the parent cannot be justly ignored because of sympathy for the foster parents. They must shew facts which a Court may act upon to make it reasonably clear, having regard to the parent's duty, and the child's rights and duties, that the interest of the child requires that its custody should be placed otherwise than with the parent. In this case the order appealed from would put an end to the father's right to his child and would rob him of the opportunity of receiving as well as expressing that affection which is one of the prime advantages of parenthood. This interest of the child has, in this case, been overlooked. The evidence shews that the affections of the child have been already alienated from her parent, a result which may have been intentionally or unintentionally accomplished by the Halls but which, in any event, is certain to prejudice the parent and that condition must become more pro-

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nounced as time goes on. There is nothing to be feared from the fact that the child's education under her father's control is to be prejudiced at present at least, in the Sacred Heart Academy. Many parents send their girls of like age to boarding schools thinking it more advantageous to them than a public school education. That is a matter peculiarly for the parent and therefore the Courts are very loath to interfere in matters of parental control.

There is not a fact in evidence in this case which, in my opinion, would justify the order made by the learned judge. A clearer case of the father's right to the custody of his child it is difficult to imagine and, therefore, I think the order should be set aside and the custody of the child granted to the father.

MACDONALD, C.J.B.C.

The appeal is allowed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): The evidence supports the inalienable right of the father to the custody of the child. There has been nothing shewn that would militate against the welfare of the child, everything shewn indicating that the child's interests will be advanced, educationally and otherwise, and ability on the part of the parent to carry out the paternal duty. One cannot help but feel a certain amount of sympathy for the aunt, Mrs. Hall, but we must temper it with the overriding sympathy that must go forward to the father. People must always recognize that when they take infant children into their custody and bring them up, even for a number of years, and care for them—and no doubt this child was well cared for—that the moment may arise when the parents come in and exercise that right, indeed it is a duty which is upon them, a duty of which they cannot unburden themselves. Parents cannot be excused from doing that which parents should do, that is care for their child, educate their child, and advance the interests of the child. And here the father (the mother having died) never at any time indicated in the slightest way that he did not intend to carry out that duty. But even if he had, still the duty was upon him. Christianity teaches this, and that conscientious duty is ever upon the parents.

In this particular case it would be very terrible indeed if the order should be sustained and the father be deprived of the custody of his child and the child be taken thousands of miles away from here into a distant Province. It is unthinkable, absolutely unthinkable, that it was ever intended that such a drastic order could be made. This Court is required on appeal to review orders made by the learned judges of the Court below. We cannot shirk that duty, it is an obligation which is upon us, and we must apply our minds to the case and arrive at a fixed opinion in the matter.

I see no ground whatever upon which the order made below giving the custody of the little girl of ten years of age to the aunt rather than the father, should be maintained. The order made below is that the aunt should have the custody of the child during the minority of the child, and the intention of the aunt is to take the child to her home in the Province of Ontario thousands of miles from her father who has his residence in the City of Vancouver where he holds a very responsible position and with ample means to care for his child. When at the Bar I came in contact with cases where children were neglected, and where their morals might be contaminated and where the provisions of the Children's Protection Act were invoked, when acting as honorary counsel for the Children's Aid Society of Victoria for many years, but here there are no elements of that kind. The child being with Mrs. Hall (the aunt) was in very good surroundings and had loving care, but the father has the paramount right. We have not yet arrived at the stage in legislation—and I know we never will—that the child shall be taken from the parent, and that would be the case here if the order of the Court below were sustained. I therefore think, with the greatest respect to the learned judge, that the order made in the Court below should be reversed and that the father be given the custody of his child. I would therefore allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: We should not, in my opinion, interfere with the decision arrived at by the trial judge when, after an exhaustive hearing, and with evidence bearing on the vital point, *viz.*, the welfare of the child, he restored her to the custody of the only mother she ever had. When a father, however excel-

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lent, places a child, on the death of its mother in childbirth, with one who by close relationship (here a sister of the deceased) fulfils the functions of a mother better than anyone else and for good reasons permits that relationship to continue for nine years the welfare of the child may be vitally affected by an attempt to break that relationship while the child is yet of tender years and requires motherly care. It is not a question of sparing the feelings of the foster parents by leaving the child with them; that is beside the real point. Their feelings only throw light on the love bestowed on the child and affection is an important element in its early life. What we have to consider is, the value to the child of the close attention provided and affection bestowed by the foster mother and the loss to the child by its withdrawal. The daily care, training, and supervision of an infant by one who stands in the shoes of her mother bestowing possibly as much care and affection upon it as the mother could had she lived, is a matter of paramount importance to a child of tender years. This is particularly true where the child is a girl. That is one of the reasons why the death of a mother is so regrettable, *viz.*, the removal from the child of the care that only a mother can give. That same care to an almost equal degree may be given and was given in this case by the foster mother and this affection and supervision is a matter of greater moment to the child and its future welfare than any advantages the father has to offer at the present time. What the situation may be in the future I do not profess to say.

MACDONALD, J.A.

Further, there was evidence to support the trial judge's finding. While it is true we can exercise our own judgment it is permissible for the Court to receive evidence from independent sources. The trial judge, in his anxiety to decide aright, called in Dr. Gillies. Medical opinion is of value on the question of the sort of care required by a young child. This child requires, in his opinion, constant care and oversight and few fathers would claim that they could give the sort of attention the witness regarded as important.

Nor is it without significance that the deceased mother appreciated the situation in a way that men often do not and asked, in the event of her death, that the child should be placed with

her sister. I think she displayed good judgment and the time has not arrived to interfere with her expressed wish.

On the other hand, it is clear that the father, although of good repute, cannot furnish the special care to which I alluded. He may have a home of his own with a housekeeper or with relatives assisting him or he may marry again, but all that is problematical and not of the slightest value in considering the welfare of the child at the present time and on the present application. His housekeeper left him upon hearing of his action in taking the child and his means of meeting the situation were so limited, through no fault of his own, that he had to place the child for a few days in the Children's Aid Society before placing her in a boarding school.

With the two alternatives before him, as to the immediate future of the child, the trial judge, in my view, reached the right conclusion. In any event with the parties concerned before him and evidence to justify the conclusion reached we should not interfere. Can we with assurance say that he was clearly wrong?

Appeal allowed, Macdonald, J.A. dissenting.

Solicitors for appellant: *Bird & Bird.*
Solicitors for respondent: *Beck & Grimmett.*

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1931

Jan. 23.

SALE v. EAST KOOTENAY POWER CO.

Appeal—Time for—When time begins to run—Judgment in accordance with verdict for plaintiff refused on motion after trial, and entered in favour of defendant—Stare decisis.

SALE v. EAST KOOTENAY POWER CO.

The time for appealing against a judgment of the Supreme Court dismissing an action runs from the date of signing and entering, even though the judgment has been given on a motion by the plaintiff for judgment after a jury trial.

Short v. *Federation Brand Salmon Canning Co.* (1899), 7 B.C. 35 criticized but followed because it has governed the practice for so many years.

Statement

MOTION by the respondent (defendant) to quash an appeal as out of time. The action had been brought for personal injuries caused by the plaintiff's fishing pole having come into contact with the defendant's power line. The trial ended on the 29th of May, 1930, with a verdict for the plaintiff. On the 30th of May both parties moved for judgment and after argument the trial judge, W. A. MACDONALD, J., held that the plaintiff was a trespasser and gave judgment for the defendant *non obstante veredicto*. The judgment as taken out stated in the body thereof "Dated and entered the 30th day of May, A.D. 1930" and there was a notation at the top signed by the registrar: "Judgment entered in Cranbrook registry as at May 30th, 1930." The date stamp however bore date in August and an affidavit filed by the appellant stated that the actual date of entry was the 9th of September, 1930. Notice of appeal was given on the 9th of December, 1930.

The motion to quash was heard at Victoria on the 20th of January, 1931, by MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Sinclair, for appellant.

Mayers, K.C., for respondent: This appeal is out of time. Under section 15 of the Court of Appeal Act, time runs from the date when the judgment is signed, entered or otherwise perfected. A judgment simply dismissing an action is perfected by delivery, because the plaintiff knows at once what he has to

appeal against: *International Financial Society* v. *City of Moscow Gas Company* (1877), 7 Ch. D. 241. Signing and entry are only necessary where the plaintiff succeeds or both parties succeed in part. In *Short* v. *Federation Brand Salmon Canning Co.* (1899), 7 B.C. 35, the Full Court refused to follow the *International* case, but the Full Court was wrong. They drew a distinction between the English rule and our section which is quite unfounded, as shewn by *A. H. Selwyn Ltd.* v. *Baker* (1924), W.N. 195 in which the English Court of Appeal followed its prior decision in spite of the English rule having been changed so that it had become almost exactly the same as our section. But even if right the *Short* case is distinguishable, because here judgment was entered on motion, and when it is, then section 15 expressly makes time run from pronouncement of judgment. Apart from authorities, the grammatical construction of section 15 clearly shews that "motion" does not refer to motions in Chambers. Moreover this judgment states on its face that it was entered on the 30th of May and affidavit evidence cannot be used to contradict the record.

Argument

Sinclair: The words "motion" and "application" in section 15 should be read in their ordinary sense as meaning interlocutory motions and applications in Chambers. Here there was no motion in the ordinary sense; it was merely a continuation of the trial. The judge heard argument just as he would hear the legal arguments at the conclusion of the evidence at any trial.

It is clear that the registrar has made a blunder and that the words in the judgment "Dated and entered the 30th day of May, A.D. 1930" are misleading. The words "as at May 30th" in the notation shew the date is fictitious, as does the date stamp. Affidavits can be used to dispel a doubt.

Cur. adv. vult.

23rd January, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: A motion to quash the appeal was moved on behalf of the respondent (defendant in the action) on the ground that the notice of appeal was not served in time under Appeal Court Rule 14.

It is true that the English Court of Appeal held in *International Financial Society* v. *City of Moscow Gas Company*

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(1877), 7 Ch. D. 241, under a rule identical, so far as this case is concerned, with our said rule 14, that the time in which notice of appeal must be served is to commence from the date of the pronouncement of the judgment where the motion for judgment was dismissed. That Court held that the word "application" used in the rule is general in its scope and is properly applicable to an application to enter judgment at a trial and that when that was done the time for appealing commenced to run from the pronouncement.

There is, however, a case in our own Full Court, *Short* v. *Federation Brand Salmon Canning Co.* (1899), 7 B.C. 35, in which this very rule was under construction. It was there held that the time for appeal commenced to run from the date of the signing, entry, or perfecting of the judgment or order and not from the date of pronouncement. The above case of *International Financial Society* v. *City of Moscow Gas Company* was very carefully considered in that case and the Court, MCCOLL, C.J., and WALKEM, J., IRVING, J. dissenting, held as above stated.

MACDONALD, C.J.B.C.

The late Full Court was a Court of Appeal of which the present Court of Appeal is the successor and this Court will not set aside a judgment of the Full Court unless under special circumstances, one of which is that the contrary decision of the concurrent or higher Court was not cited to the Full Court. This is not the case here. Another reason why it is important to follow the decision of our own Court is that it is a question of practice and the decision of our Court has been in force and followed for over 30 years. It would, therefore, be in a high degree disturbing to reverse that decision now and to adopt in its place a decision of a Court whose judgment is not binding upon us. On the other question involved in the appeal, namely, that the judgment appealed against was entered just after its pronouncement and that it simply dismissed the motion for judgment on the verdict of the jury and that there was therefore nothing of controversy about its terms and nothing to be settled or otherwise perfected, it is to be noted that the judgment is peculiar in this that in the body of it it is recited that it was signed and entered on the 30th of May. If that were so the notice of appeal would be out of time, but it is

apparent on the face of it that the inclusion in the body of the judgment of the date of entry was a departure from the usual practice. The usual practice is well known. If the terms of the judgment are clear it may be entered at once upon the initialling of it by the judge. Here although it recited that the judgment was entered on the 30th of May the parties appear to have pursued in fact the usual practice. It was sent to the opposite party for approval, afterwards returned to the registrar and submitted and approved by the learned trial judge and entered by the registrar on the 9th of September and I think on the face of the judgment and in view of the evidence as to what was done with it it must be taken that that is the true date of entry and that the notice of appeal was in time.

MACDONALD, C.J.B.C.

In this view of the case, the motion to quash should be dismissed, costs in the appeal.

MARTIN, J.A. (oral): That is the view I take of the matter, in the circumstances, which are somewhat unusual, in this, that it really comes to this, that we are invited to set aside the decision of the old Full Court in *Short* v. *Federation Brand Salmon Canning Co.* (1899), 7 B.C. 35. That, however, was a decision on practice, and has stood for over 31 years, and of course that gives rise to considerations which are not present in other cases. I therefore think that the course we ought to adopt is that which we have adopted in similar cases—*e.g.,* in one of the earlier decisions given by this Court in *Laursen* v. *McKinnon* (1913), 18 B.C. 10. In so doing I do not wish it to be understood that I think that had it been a recent decision that it would not have been open to us to have reviewed that decision of the old Full Court in the *Short* v. *Federation* case because it is apparent that an error was made, in that the statutory rules in Order LII., respecting Court as well as Chamber motions, were overlooked, and the decision of the Court proceeded upon the mistaken assumption that by that section of the statute which is now under consideration, it dealt only with Chamber applications, whereas if the Court's attention had been drawn to the said statutory rules they would, I have no doubt, have come to another conclusion. And, therefore, had it not been for the great lapse of time, and the fact that the profession have acted

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upon that decision for so long, I have no doubt it would have been open to us to consider as to whether or no it would be desirable to refuse to follow that decision. Therefore I think, even if Mr. *Mayers's* submission of the law is right, as I think it was originally, that his point cannot now be given effect to because of the long-established practice, as laid down by that case, and our course on the said *Laursen* case is fortified by that taken by the Privy Council in a celebrated case that my brother MCPHILLIPS drew our attention to yesterday.

As to the other point respecting the entry of the judgment, that, I think, in the present circumstances, must be decided in favour of the appellant, because, according to the judgment itself, it would appear beyond all reasonable doubt that it was not entered upon that date which is recited in the main body of the judgment itself. And that, also, is a strange thing, in that it is not the practice to recite in the judgment the fact that it is entered upon a certain date. The judgment in question begins, "Dated and entered." That should not have been there. The date and place of the judgment are of course essential to be placed in it, but it is no part of the judgment to recite prophetically, so to speak, that it would be entered, because at the time that recitation was made in the judgment it was a physical impossibility that it could then have been entered. Therefore, as a matter of practice, and otherwise, it was improper to put that in such a novel and obviously incorrect statement.

MARTIN, J.A.

I wish it to be understood that I do not at all approach the judgment in question in a spirit of what might be called external criticism based upon any affidavits which have been directed to shewing that it was wrongly entered contrary to its tenor, because that cannot be done. If the judgment contained a false recital, false in any respect, the proper tribunal to correct it is the judge who pronounced it, and it cannot be attacked collaterally by an affidavit asking this Court to set it aside after it has been properly signed and sealed with the seal of the Court; that would be a most improper thing to do.

GALLIHER, J.A.

GALLIHER, J.A.: I am in agreement with the result.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: (oral): I am also of the view that the

motion to quash the appeal as being out of time, should be refused. I think it was quite outside the proper exercise of his office for the registrar to put that notation upon the office copy, entered as of a certain date. It was improper; the office copy is to be an exact copy of the order itself, and apparently the order itself had no such notation upon it. And in utilizing such material, a wrong course was pursued.

With regard to the application itself, that the appeal is out of time, there is one thing to note, that at the time the decision was given in the English Court of Appeal it was just at a time of transition between the old practice and the Judicature Act, and that naturally had some bearing on the decision arrived at; because the practice in the Court of Chancery was no doubt as there decided.

We have a controlling decision upon the practice with us, a decision that has stood for 31 years, a decision of the Full Court that the profession are thoroughly familiar with, and have acted upon; I know myself I acted upon that view when in practice for many years. It would certainly be an extreme step now to reverse the long existent practice. And I might say, speaking by way of analogy, that 50 or more years ago, it was determined that there was no appeal in divorce actions, and that has been maintained right along; it would not be right to overturn practice of such long standing. Mr. Justice CLEMENT some 25 years ago held that there was no divorce jurisdiction in this Province; a little later my brother MARTIN, then sitting as a judge of the Supreme Court of British Columbia had occasion to consider the same point in *Sheppard* v. *Sheppard* (1908), 13 B.C. 486 and decided to the contrary, that is, that there was jurisdiction. Lord Collins in *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573 at p. 579, said:

MCPHILLIPS, J.A.

> "Since the decision of the present case by CLEMENT, J., MARTIN, J., in the case of *Sheppard* v. *Sheppard* [13 B.C. 486] decided April 1, 1908, has refused to follow it, and has given his reasons at length in a very able and elaborate judgment, tracing the evolution of divorce jurisdiction in the Colony back to its first beginnings and removing some apparent misapprehensions."

It is a good principle, one which has a great place in our jurisprudence, and eminent judges and lawyers have made the statement, that it is better to allow a decision which might be

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admitted to be contrary to law at the time when given, to stand, since it has been woven into the law of the land, in some cases for centuries, and it would be a great reversal of things, almost revolutionary, to set aside that law so well understood. I think that reasoning is applicable to this matter.

MACDONALD, J.A.

MACDONALD, J.A.: The English cases referred to by Mr. *Mayers* fully bear out his submission, but they are in conflict with the decision of the Full Court in *Short* v. *Federation Brand Salmon Canning Co.* (1899), 7 B.C. 35 and as it has remained unchallenged for over 30 years and deals purely with a matter of procedure this Court ought to follow it. I may add that I think the rule there laid down is a more workable one.

Motion refused.

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Will—Administration—Executors—Assets of testator—Payment of debts—Power of executor to carry on business—Breach of trust—Concurrence of cestui que trust—Marginal rule 481,—R.S.B.C. 1924, Cap. 262, Sec. 10.

The defendant corporation was appointed sole executor of R.'s estate under his will. He directed the executor to pay all his debts as soon after his death as was convenient, his wife, the plaintiff, being the sole beneficiary under the will. R. died in 1925 and on application for probate the affidavit of valuation shewed assets of $168,394 and debts of $37,092. R. in his lifetime was in the piano business, its net value at the time of his death being estimated at $109,870. For some time prior to R.'s death the business was prosperous and after his death, at the request of the plaintiff, the executor allowed the business to continue under the management of a former employee of R. who had knowledge of its affairs and in April, 1926, at the request of the plaintiff, it allowed the business to be assigned to a company incorporated to carry on the business. This was done without any action being taken or provision made by the executor to pay the debts. After this the business did not prosper, and eventually became bankrupt. In an action for damages the plaintiff claimed that continuing the

business was improper and combined with the assignment in 1926 constituted a breach of trust. It was held that failure to pay the debts constituted a breach of trust, and the plaintiff had not sufficient knowledge of the facts to appreciate the significance of the transfer of the property to a company, and she was entitled to judgment.

Held, on appeal, reversing the decision of MACDONALD, J., that the evidence disclosed the plaintiff was thoroughly informed of the essential facts from the very beginning. She wanted to carry on the business of which she had acquired some knowledge from her husband, and she had been advised by her solicitor both as to carrying on the business and incorporating a company to avoid the risk of personal liability. Further, the plaintiff knew of and acquiesced in the transfer of the indebtedness to the Bank of Toronto with the bank's consent (the only remaining debt) to the company at the time of its incorporation. There was therefore no breach of trust on the part of defendant.

APPEAL by defendant from the decision of MACDONALD, J. of the 5th of May, 1930 (reported, *ante*, p. 31) in an action for damages for maladministration by the defendant of the estate of Thomas Ross, deceased, husband of the plaintiff. Thomas Ross who had been in the piano business in Vancouver for some years, under his will on the 9th of May, 1919, appointed the defendant sole executor, and directed that the executor pay all his debts as soon after his death "as may be convenient." The will then provided that all the estate, real and personal, be devised to his wife Isabella Ross. The testator died in 1925 and his wife afterwards remarried, she now being Isabella McCallum, the plaintiff herein. The affidavit of valuation shewed assets of $168,344.24 and debts of $37,092, the net surplus being $131,252.24. The net value of the piano business was estimated at $109,870.48. The business which had been conducted for some years by the testator was a fairly profitable one and on the death of the testator the question of what disposition should be made of the business was discussed. The plaintiff was advised by *C. L. Fillmore*, a solicitor who acted for the testator in his lifetime, to seek the guidance and advice of the defendant. The plaintiff was most anxious to carry on the business, not only because she thought it was in a prosperous condition, but because she had in mind that her son might eventually come into control of it. The local representative of the defendant, one Hewetson, also agreed with the plaintiff as to the advisability of carrying on the business. All parties

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agreed that the business should be continued under the management of one Thompson who had previously been in the employ of the testator and had a knowledge of the business. The business was continued under this arrangement until May, 1926, when at the request of the plaintiff a company was formed for taking over the assets and liabilities, all the shares of the company being in the name of the plaintiff, except those required for qualifying its directors. The plaintiff thought she was rich and lived extravagantly, taking an extended trip to Europe and buying a Cadillac car. A receiving order was made under the Bankruptcy Act for winding up the company in August, 1928, and after paying winding-up expenses a dividend of 85 cents on the dollar was paid to the creditors.

Statement

The appeal was argued at Vancouver on the 21st, 24th and 25th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C. (*Christopher Morrison,* with him), for appellant: There was a debt of $34,000 to the Bank of Toronto in connection with the business which was done on credit and long-term payments. The plaintiff insisted that they should go on with the business, and to this the local manager of the executor and the bank agreed. The real esate was handed over to the plaintiff. A *cestui que trust* cannot take two standings; she elected to carry on the business: *Fyler* v. *Fyler* (1841), 3 Beav. 550, *Dowse* v. *Gorton* (1891), A.C. 190; *Chillingworth* v. *Chambers* (1896), 1 Ch. 685; Halsbury's Laws of England, Vol. 28, p. 198, sec. 399; *Fletcher* v. *Collis* (1905), 2 Ch. 24; Lewin on Trusts, 13th Ed., 974 and 980; *Adams* v. *Clifton* (1826), 1 Russ. 297; *Randall* v. *Errington* (1805), 10 Ves. 423; *Buckeridge* v. *Glasse* (1841), Cr. & Ph. 126. We submit that independent of the consent the executor can hand over the assets to the legatee: see *Lloyd* v. *Attwood* (1859), 3 De G. & J. 614; *Bennett* v. *Colley* (1833), 2 Myl. & K. 225; Halsbury's Laws of England, Vol. 14, p. 302; *In re Nickels, Nickels* v. *Nickels* (1898), 1 Ch. 630. This is not a case for reference under marginal rule 481.

Argument

Sullivan, for respondent: A business cannot be carried on without authority under the will. They can only comply with

the legatee's wishes where she has full knowledge of the circumstances and consequences of allowing the business to be carried on. The executor's first duty in compliance with the directions in the will was to see that the debts were paid: see *Henderson* v. *Henderson's Trustees* (1900), 2 F. 1295 at p. 1309; *Clough* v. *Bond* (1837), 3 Myl. & Cr. 491 at p. 496. As to the executor's duties as a trustee see Ingpen on Executors, Can. Ed., p. 53; *Low* v. *Gemley* (1890), 18 S.C.R. 685 at p. 691; *Graham* v. *Keble* (1820), 2 Bligh 126; *Re Crawshay; Dennis* v. *Crawshay* (1888), 60 L.T. 357 at p. 359. An executor's first duty is to pay the debts, then comes his duty to the legatee: see *Bennett* v. *Colley* (1833), 2 Myl. & K. 225; *Eaves* v. *Hickson* (1861), 30 Beav. 136 at p. 142; *Farrant* v. *Blanchford* (1863), 1 De G. J. & S. 107 at p. 118; *Life Association of Scotland* v. *Siddal* (1861), 3 De G. F. & J. 58 at p. 74; *Strange* v. *Fooks* (1863), 4 Giff. 408 at pp. 413-4. The executors must have knowledge of the law: see *M'Carthy* v. *Decaix* (1831), 2 Russ. & Myl. 614; *Marker* v. *Marker* (1851), 9 Hare 1 at p. 16; *Burrows* v. *Walls* (1855), 5 De G. M. & G. 233 at p. 254; *Cockerell* v. *Cholmeley* (1830), 1 Russ. & Myl. 418 at p. 425; *Lloyd* v. *Attwood* (1858), 3 De G. & J. 613 at pp. 649-50; *Davies* v. *Hodgson* (1858), 25 Beav. 177; *Walker* v. *Symonds* (1818), 3 Swanst. 1; *Ryder* v. *Bickerton, ib.* 80; *McLeod* v. *Annesley* (1853), 22 L.J., Ch. 633 at p. 636; *Sanders* v. *Sanders' Trustees* (1879), 7 R. 157. The onus of proof that the legatee had sufficient knowledge of the facts was on the defendant.

Argument

MacNeill, replied.

MACDONALD, C.J.B.C.: I think the appeal must be allowed. The only serious question raised by Mr. *Sullivan* was this, that while the plaintiff went into this business, and asked to have the company incorporated to take it over for her own protection, she was not properly informed as to the transaction, and did not know all the facts. The learned judge below has found that issue in her favour.

MACDONALD, C.J.B.C.

On looking at all the evidence in the case, I am convinced she was thoroughly informed as to the essential facts of the case, from the very beginning. She wanted to carry on the business.

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She knew what that meant. She was not altogether devoid of business experience, since her husband had talked over matters with her during his lifetime. He had told her about the overdraft at the bank and how it should be reduced so that she was aware that it was her husband's custom to have overdrafts at the bank and to reduce them gradually out of the profits of the business. Now, at that time she was anxious that the business should be preserved for her son, and she wanted to carry it on herself until he came of age. Her solicitor, Mr. *Fillmore,* advised her that it would be better to incorporate a company, so that she would not be at any personal risk in case anything should happen to the business. The company was therefore incorporated.

The only other question of importance was that instead of the executors paying all the debts before handing the property over to her, they had left the debt to the Bank of Toronto unpaid. She knew all about the Bank of Toronto's claim. She knew that the amount of the debt was some $39,000, and she must have known that when the company was incorporated that the bank had consented to transfer their debt to the company. That fact must have been of necessity known to her when the terms of the incorporation were being discussed.

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Now, with all these matters before her, all the essential facts before her, and being a person *sui juris,* and an intelligent person at that, she knew the facts. She now says that the executor should not have done it, that it was their duty to wind up the estate and pay all the debts, and hand over the balance to her, and she claims damages against them for failure to perform their duty. That would have been quite right if there had not been her consent, but where a *cestui que trust* consents to what has been done, knowing all the essential facts and circumstances to the transaction, she cannot afterwards say that the course which she herself insisted upon should not have been pursued. She now in effect says "I am going to hold you responsible for damages for what I requested and consented to your doing."

The authorities bear me out when I say that the Court will not permit a *cestui que trust* to take that position.

There is really nothing more to be said about the case except

this, that having consented, her claim for damages cannot be allowed.

The appeal should be allowed.

MARTIN, J.A.: I am also of the opinion that this appeal should be allowed. It would be impossible to attempt to cite in the course of a judgment the many facts which lead me to this conclusion, but it must be borne in mind what the nature of the action is, and as the statement of claim discloses, there is nothing in it at all which lays the foundation for anything in the way of overreaching, or fraud, or mistake, or anything of that description, or anything at all on which equitable principles the Court could be invoked in favour of this plaintiff. The honesty of the defendant company has been admitted before us during the argument, and in several places it is shewn on the record.

There are two facts which should be borne in mind in approaching the matter, and they are these: First, that by this will the plaintiff is the sole legatee, and as it recites, it is to this effect: "I give, devise and bequeath all my estate, real and personal, of every nature and kind, and wheresoever situate, unto my wife, Isabella Ross."

The second point is this, that the appellant Company is appointed sole executor with no power of conversion of the estate, and with the sole direction to pay "all my just debts, funeral and testamentary expenses as soon after my death as may be convenient."

I shall only briefly cite some of the leading circumstances, and above all there is this one, that this woman was fortunate in the hour of her affliction in having an experienced adviser at her right hand, in the person of her husband's clerk, accountant and practical manager, as he says himself he was. That was Thompson, who had been with him for five years, and, as he swore, and there is no suggestion to the contrary, he was just as well acquainted with all the affairs of the business as the deceased himself was. She thought so highly of him that she invited him immediately after her husband's death to continue to manage the business, and when the time came later on, under the agreement of the 1st of May, 1926, to incorporate the

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company, by her request, and by the request of the trust company, he was appointed manager by the two directors, as the evidence shews.

Such being the case, it is impossible for the position to be taken that she did not have full knowledge of everything that occurred in this matter which was of the slightest importance, because she had the best means of knowledge at her right hand in the person of her most experienced and trusted manager and if she neglected to ask him what anything was, then that is her own fault, and it cannot be attributed to the trust company, and if she did ask him to supply her with information which it was his duty to supply her with and he suppressed it and kept her ignorant, then her action lies not against the trust company, but against her servant. Such being the case, it appears that by means of a new company formed, after an interregnum under Thompson, the business was carried on at her special request, and by an agreement made on the 1st of May, 1926, a little over a year after her husband's death—he died on the 9th of April, 1925—she was given the entire property to such an extent that out of 800 shares of said company only one was kept out for the manager of the defendant corporation to enable him to qualify as a director, so as to permit the company to be formed. She was, in effect, the entire owner of that company. In this relation, there is an interesting letter of Mr. *Fillmore's,* her husband's trusted solicitor and friend of the family, written a few days after her husband's death, and which is of moment because at this time it must be remembered Mr. *Fillmore* was not the solicitor *ad hoc* as he later was for the trust company, and this is the advice that he gave her—very wise advice—to be found on page 333—written within less than two weeks after her husband's death, when she consulted him as to what she ought to do, and he says on the 25th of April, 1925, a year before the incorporation, to her this:

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> "*Re* our conversation as to your future, I strongly advise the view, before deciding whether you will carry on the music-store business or not, consult Mr. Hewetson, Mr. Thompson and the manager of the Bank of Toronto, where your husband kept his account. If you decide to carry on, I think the business should be incorporated, so as to enable you to withdraw money from time to time from the business, and to invest same in Victory, municipal, or other safe bonds. In such a case, the moneys so invested would not be subject to whatever danger the business incurred."

Excellent advice, and which was concurred in by Mr. Lamprey that this suggestion which came from an old family friend was the best thing to do. It was carried out, and it must be remembered that Thompson carried on the business and made a reasonable profit, and then owing to certain matters in connection with the business, which it is not necessary to go into, it experienced serious difficulty, and there was also the fact of the extravagance of the plaintiff herself, in taking an expensive trip to Europe, borrowing $5,000 from the bank for that purpose, and buying expensive motor-cars, and putting her son at an expensive school in England. Extravagant ideas, Mr. *Fillmore* pointed out, were dangerous, and he was apprehensive, but she persisted in her ideas, wrong-headed and stubborn, as the learned judge below finds, with the one end as might be expected, that difficulties were encountered, which in August, 1928, led to the bankruptcy of the business, which only paid 85 cents on the dollar. It is a wonder that it paid so much under the circumstances.

MARTIN, J.A.

Having regard to all the facts and circumstances of this case, which are entirely unique, we are nevertheless invited to give judgment against this Company because it acceded to the urgent request of the plaintiff when she was fully apprised of what she was doing. The only possible ground upon which we could hold the Company liable in this case would be to hold that it is possible for a woman to be fully advised of a matter, or be in such a position that if she is not advised it is her own fault, and that having dealt with business people upon those terms, and they having trusted her in this way, nevertheless she can turn round and repudiate everything that was done. I have yet to learn that this Court should give its approval to such a course of conduct.

I am of the opinion that there is no merit in this peculiar case whatever.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I am also of opinion that the appeal should be allowed.

MCPHILLIPS, J.A.

The only doubt that has crossed my mind has been just one,

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that whilst there was apparently a complete knowledge of all the facts and circumstances—whether this lady (the respondent) was really made aware of her legal rights. That was, strictly speaking, this—that the estate should be disposed of, at any rate, to the extent that the debts should be paid and then that which remained should go to her. The case is unique in this particular, that the will does not lay down any particular line of duty for the executor, and therefore there was only one thing for the executor to do, and that was to pay the debts, but at a certain stage of things the executor is asked by the respondent, the sole beneficiary, to continue the business. That is permissible in law if it is in the nature of winding up the business, which I understand was the case, and Mr. *Sullivan,* the learned counsel at this Bar for the respondent does not dispute that (see *Ontario Bank* v. *McAllister* (1910), 43 S.C.R. 338). He is not complaining about that ten months. When that ten months expired, then the scheme that was proposed to the executor by the respondent was the incorporation of a company whereby the sole beneficiary, this lady, would be the proprietor of that company in effect, that is, she would have all the shares except one, which of course gave her control, and really gave her, in effect, the property. This course was the following out of the advice given to the respondent by Mr. *Fillmore,* who had been a close friend and legal adviser of the testator, the late husband of the respondent. This was agreed, and assented to by the executor, and carried out by the necessary documents, that is, that estate should pass to the respondent, the sole beneficiary under the will, freed from all the debts, the creditors then remaining unpaid accepting the company as their debtor and releasing the estate. The company was incorporated which was a separate entity. In law it cannot be said that the respondent was the company (*Salomon* v. *Salomon & Co.* (1897), A.C. 22). The respondent, at her urgent request, had her estate conveyed to this company. This company then carried on business and unfortunately met with disaster.

In the ordinary case, where there has been a breach of a trust, that in the main amounts to this—that the trustee or executor has made improper investments, gone against the statutory provisions perhaps, and so on, well, then the judgment of the Court

when it is so found directs what? It directs that the money be restored.

Now, in this particular case, what would be the order made if there was a breach of trust? You could not restore the estate. The estate was freed of debt and transferred in accordance with the beneficiary's request to the company upon the mandate of the respondent, the sole beneficiary of the estate, and the person entitled thereto. I cannot see any real foundation for this action.

There was a reference to the registrar to fix the damages. I do not see that any heads of damage have been formulated, or that there is any basis upon which any damage could be arrived at. I can see nothing that could be established. You cannot restore that which has been handed over to the company at the respondent's request, a company which the respondent controlled and was the holder of all the shares but one.

I do not propose to further extend my remarks. The case is one that seems to me, after all, to be very clear and understandable, and apparently this lady desired that a certain course of action should be adopted. She had it agreed to by the executor in so far as its consent was necessary, and at a time when the executor was at liberty to pass over the estate either to her or to whoever she should nominate and that was the incorporated company that she controlled, holding all the shares but one.

Were it necessary to exercise the powers contained in the Trustee Act of granting relief, and should it be deemed that that which took place constituted a breach of trust, I should think that this case was eminently one in which that relief should be granted, because at this Bar counsel for the respondent has been very frank in the statement that there is no allegation of any bad faith or improper conduct, merely the technical point, which was very ably put by Mr. *Sullivan*, that there was a breach of trust in the executor not selling out the estate and paying the debts and transferring the balance to the beneficiary. Unquestionably the executor acted honestly and reasonably and ought fairly to be excused.

In my opinion, the executor, in view of all the facts and circumstances, discharged its duty. It is incontrovertible that

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if there was a breach of trust here the respondent concurred in the breach of trust. With the conclusion of fact found I would refer to what Lord Justice Vaughan Williams said at p. 30, in *Fletcher* v. *Collis* (1905), 2 Ch. 24:

"Further, quite independently of any authority, and if there had been no authority to that effect, I should have been prepared to say that on general principles it is impossible to hold that a *cestui que trust* who had so concurred should be allowed to take proceedings against the trustee based upon a complaint of the impropriety or wrong dealing with the trust property in which dealing he had himself concurred."

Then we have Lord Justice Romer in the same case at p. 35 saying:

"The beneficiary, if he consented to the breach of trust, could not be heard to make that a ground of complaint or a ground of action as against the trustee."

Finally we have Lord Justice Stirling saying at pp. 36-7:

"In the case of *Chillingworth* v. *Chambers* (1896), 1 Ch. 685, 699, Lindley, L.J., says: 'If I request a person to deal with my property in a particular way, and loss ensues, I cannot justly throw that loss on him.' And Kay, L.J., in the same case, after referring to the passage which I have read from *Walker* v. *Symonds* [(1818)], 3 Swanst. 1, 64; 19 R.R. 155, 173, says this (1896), 1 Ch. 704: 'This refers only to an attempt by the *cestui que trust* to make the trustee liable for any loss which the *cestui que trust* may suffer by reason of a breach of trust which he instigated or concurred in. Such a claimant is estopped by his concurrence in the breach of trust.'"

It is well to bear in mind in this case that the respondent is the sole beneficiary under the will, and she concurred in the breach of trust, if it be that.

And we have Lord Justice Stirling saying at p. 38:

"That being so, we have to apply the law in the present case. In the first place, if the tenant for life had not become bankrupt, if the application had been made by him, it is quite clear upon the authorities to which I have referred that he could not in any way attempt to make the trustee liable for a loss which had been occasioned by his concurrence in the payment of the trust fund to his wife; and the trustee in bankruptcy cannot stand in any better position, unless indeed he has in some way acquired some new and better right than he would have had simply as trustee in bankruptcy succeeding to the position of a *cestui que trust* who had concurred in a breach of trust."

It is abundantly clear upon all the facts of the present case that there is no enforceable cause of action here by the respondent, the *cestui que trust,* who concurred in the breach of trust, if there was one, then, further, the respondent really received the balance of the estate after the payment of the debts, that is, the executor paid off some of the debts and the debts remaining

to be paid at the time of the transfer to the company were assumed by the company, and the estate was released therefrom so that at the time of the transfer to the company the estate was wholly exonerated from all debts and the executor had discharged its duty and agreed in the transfer of the balance of the estate to the company pursuant to the request of the respondent, the sole beneficiary under the will. It follows that upon the facts and upon the law the action is not sustainable. In my opinion therefore the judgment should be reversed and the action dismissed; that is, the appeal should be allowed.

MACDONALD, J.A.: I agree with what has been said by my learned brothers.

I only wish to add with respect to Mr. *Sullivan's* submission that she was not informed of her legal rights and not bound by concurrence, that that is based upon the assumption that the executor was bound to sell the business, pay the debts, and hand over the residue of the estate to her. That is not correct. The executor was at liberty under the will to transfer the business to her. That was done with the concurrence of all parties interested including the appellant.

Appeal allowed.

Solicitors for appellant: *MacNeill, Pratt & MacDougall.*
Solicitors for respondent: *Martin & Sullivan.*

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CHISHOLM v. AIRD

CHISHOLM v. AIRD.

Negligence—Collision between automobiles—Intersection—Right of way—Evidence—B.C. Stats. 1925, Cap. 8.

Shortly after ten o'clock on the evening of the 28th of August, 1929, the plaintiff, driving her car easterly on Twelfth Avenue, in the City of Vancouver, slowed down to 15 miles an hour as she neared the intersection of Oak Street on which was a double street-car line. On reaching the tracks she states she saw the defendant's car about 150 feet to her right coming north on Oak Street. She continued on but the right rear end of her car was struck by the front left wheel of the defendant's car. The defendant, on approaching Twelfth Avenue, saw the plaintiff but thought, from the position of her lights that she was turning north on Oak Street when she suddenly turned back to continue along Twelfth Avenue immediately in front of him. He then turned sharply to the right and put on his brakes, but too late to avoid his left front wheel hitting her. Both cars overturned. The trial judge believed the plaintiff's story, found on the evidence that the defendant was going at an excessive speed when entering the intersection and gave judgment for the plaintiff.

Held, on appeal, affirming the decision of CAYLEY, Co. J. (GALLIHER, J.A. dissenting), that notwithstanding the evidence being rather extraordinary in several respects on both sides, the trial judge believed the evidence of the plaintiff and her witnesses and would not accept the evidence submitted for the defence, which he is entitled to do, and having found in the circumstances that the defendant by his own conduct brought about the collision and was alone responsible for it, his decision should be upheld.

Statement

APPEAL by defendant from the decision of CAYLEY, Co. J. of the 2nd of April, 1930, in an action for damages resulting from a collision between the plaintiff's and defendant's automobiles. Shortly after ten o'clock in the evening of the 28th of August, 1929, the plaintiff was driving her car easterly on Twelfth Avenue with her father sitting on her right and her mother and sister in the back seat, and when crossing the intersection on Oak Street the right rear end of her car was struck by the left front wheel of the defendant's car after he had come on to the intersection driving northerly on Oak Street. The plaintiff's car was carried across Twelfth Avenue and upset near the northerly curb of Twelfth Avenue. There was a double street-car line on Oak Street and the plaintiff claims that she was crossing the intersection at 15 miles per hour and in

reaching the tracks she saw the defendant's car to her right opposite a lane about 150 feet from the intersection. The defendant's story was that he looked to the left when nearing Twelfth Avenue at about 10 miles an hour, and on reaching the intersection he looked to the right and saw the plaintiff's car entering the intersection and from the position of her lights she appeared to be turning north on Oak Street, then she suddenly turned in front of him to continue along Twelfth Avenue. He then turned his car sharply to the right and put on his brakes, but too late to avoid a collision, his right wheel striking the rear end of the plaintiff's car. There was evidence from independent witnesses that the defendant was travelling past the lane above referred to at an excessive speed. The learned trial judge found that the defendant was negligent in not seeing the plaintiff sooner and was responsible for the accident.

Statement

The appeal was argued at Vancouver on the 18th of November, 1930, before MACDONALD, C.J.B.C., GALLIHER and MACDONALD, JJ.A.

Alfred Bull, for appellant: The defendant had the right of way and the plaintiff should be held responsible for the accident, but even if the defendant is held to have been negligent the plaintiff was equally guilty and the Contributory Negligence Act applies: see *Nelson* v. *Dennis* (1930), 3 D.L.R. 215; *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at p. 137; *Cooper* v. *Swadling* (1930), 1 K.B. 403.

Argument

Gonzales, for respondent, referred to *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512.

Bull, replied.

MACDONALD, C.J.B.C.: The trial judge believed the plaintiff; believed her witnesses; and disbelieved the defendant's witnesses. He said: "I do not accept the evidence of the Cookes, because they are not experienced persons." That simply means, "I disbelieve them. I do not think they are competent to give credible evidence on the point, and I put their evidence to one side altogether, I have the right to do that." He was quite right as to that, and he was quite at liberty in believing the plaintiff when she said she was driving at 15 miles an hour and was going

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carefully, and he was quite at liberty to disbelieve the defendant himself and to accept the plaintiff's story, although it was at one point rather incredible; in other respects it was not.

So that I am satisfied that the learned judge, having heard the whole case, and seen the witnesses, observed their demeanour in the witness box, has not gone wrong when he held that the plaintiff was entirely blameless, and that the defendant was responsible for the whole damage.

MACDONALD, C.J.B.C.

I think *Loach* v. *B.C. Electric Ry. Co.* (1914), 19 B.C. 177; (1916), 1 A.C. 719, is authority for this: that a person who, by his own conduct, brings about a collision is the one who is responsible, and alone responsible for it. That is the correct theory, according to that decision.

In these circumstances, I think the appeal must be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: As I understand that I am in a minority, I do not see much purpose in my going over the whole thing. I just simply say that in my opinion Mr. *Bull* has made out a case where the learned judge below should have divided the responsibility evenly between the parties. I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I have only this to add to the judgment of the learned Chief Justice, with whom I agree: Mr. *Bull* suggests in support of his contention that the plaintiff was guilty of contributory negligence, that she failed to keep a proper look-out. I can see that there is considerable strength in the submission. It is to be remembered, however, that the evidence is that she looked first to the right, as she was required to do, and then to the left, because a street-car or other vehicles might be approaching, and again turned her eyes to the right at the time she reached the tracks—whether the westerly tracks or the devil-strip is not quite clear. We should remember that the car is in motion in the meantime, and I cannot say that the trial judge was clearly wrong in declining to say that her failure to look more thoroughly did not constitute contributory negligence.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitors for respondent: *Williams, Manson & Gonzales.*

REX v. NOLAN.

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Criminal law—Breaking and entering—Theft—Jury—Charge—Names of aliases on indictment—No proof of—R.S.C. 1927, Cap. 59, Sec. 4 (5)—R.S.B.C. 1924, Cap. 123, Sec. 7—Criminal Code, Secs. 460 and 1014.

In the early morning of the 21st of October, 1929, the safe in the Government Liquor Store at Vernon was blown open and over $1,100 in cash stolen. Four days previously the accused borrowed 75 cents from a man in Kelowna and in conversation with him stated he was going to Vernon and was going to have a holdup. The accused was not seen again until the 22nd of October in Revelstoke, there being evidence of his spending in the three following days various sums amounting in all to about $250. In the month of March following he was arrested on a charge of breaking and entering under section 460 of the Criminal Code and convicted. Six *aliases* of the prisoner had been recited in the indictment which was preferred to the grand jury and the learned trial judge in his charge stated that accused was going about the country under three or four *aliases* when in fact only one *alias* was proved on the trial.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting and holding there should be a new trial), that the inclusion of a number of *aliases* unnecessarily in the bill of indictment is contrary to the practice, is a deviation from the ordinary course of criminal justice, and should be deprecated, but there was in fact one *alias* shewn to have been used by the accused. Whether this amounts to a substantial wrong to the accused is a question of degree, but considering this with the exact language used in the charge, and having regard to all the circumstances of the case it was held that no miscarriage of justice actually occurred and so the appeal was dismissed.

APPEAL by the accused from his conviction by MORRISON, C.J.S.C. and a jury at Vernon, B.C., on the 13th of June, 1930, for breaking and entering the Government Liquor Store at Vernon on the 21st of October, 1929, and stealing $1,183.90. The safe in the Liquor Store was blown open at about three o'clock in the morning of the 21st of October, 1929, and the contents taken. The accused was not seen by any person in Vernon before or after this event. Four days previously a witness took the accused to a cafe in Kelowna, paid for his dinner and loaned him 75 cents. Accused had a kitbag with him in which he had a bottle well sealed and four or five feet of fuse, and he told the witness he was going to Vernon and was going to have a holdup. There was no evidence of his where-

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abouts until the day after the explosion, when he was in Revelstoke spending considerable money, including $60 at the Legion Club, $117 for clothes at a haberdasher's, and about $25 to a taxi driver. Later the accused went down the Canoe River and worked in a coal camp. He was arrested there on the 21st of March, 1930, and taken to Vernon where he was tried and convicted. Six *aliases* were set out in the indictment, but there was no evidence on the trial to shew that he had any more than one *alias*. He was sentenced to ten years in the penitentiary.

The appeal was argued at Vancouver on the 25th and 26th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

J. E. Bird, for appellant: Accused was never seen within 36 miles of Vernon. We submit there was not sufficient evidence to convict. The police commissioner at Vernon sat as foreman of the jury, which is in contravention of section 7 of the Act. The accused made a statement, which he has a right to do, but there was comment on the fact that he did not give evidence. As part of the Crown's case the bad character of the accused was commented on: see *Rex* v. *William Henry Ball* (1911), A.C. 47 at p. 71; *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57; *Rex* v. *Deal* (1923), 39 Can. C.C. 105. Four witnesses on the back of the indictment were not called.

George Black, for the Crown: The only point raised of any substance is as to the trial judge referring to the five *aliases* in his charge when there was no evidence proving the *aliases,* but my submission is there was sufficient evidence on which the jury could find as they did and no substantial injustice was done the accused. As to the witnesses on the back of the indictment that were not called, there is no definite rule as to this: see *Rex* v. *McClain* (1915), 23 Can. C.C. 488 at p. 495.

Bird, replied.

Cur. adv. vult.

1st December, 1930.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): I think there ought to be a new trial. I think when the learned judge, in charging the jury, told them that this man had been going about the country under four or five *aliases* and that that was a circumstance which they

should take into consideration, he was wrong. I think the fact that the *aliases* were set out in the indictment was perhaps not wrong. I express no opinion on this. But there seemed to be a tendency to make that propaganda against him, and the learned judge, instead of clearing that up, said he was going about the country under three or four *aliases*. He stated this in error; it was not shewn by the evidence. There was no evidence that he had any more than one *alias, viz.*, O'Brien. Therefore the judge was mistaken. There are other things in the trial which force me to believe he had not had a fair trial. He may be guilty, but he was entitled to a fair trial, and did not get it.

MACDONALD, C.J.B.C.

MARTIN, J.A.: Several questions were raised on this appeal, and in view of the forceful way they were put forward by Mr. *Bird* on behalf of the appellant we reserved our judgment and gave them our very careful consideration, with the result that, in my opinion, the appeal must be dismissed upon all grounds.

The most substantial of those grounds was the objection that the various *aliases* of the prisoner had been unnecessarily recited in the bill of indictment which was preferred to the grand jury and that the learned judge in his charge to the jury had made certain observations which tended to prejudice a fair trial of the accused. If that were so, of course, it would be a ground for a new trial. For that reason, as I have already said, we gave the matter our very careful consideration, with the result that I am of opinion that the view submitted by Mr. *Black* (who very properly did not attempt to countenance the inclusion of the number of *aliases* unnecessarily in the bill of indictment, which, of course, is contrary to the practice and deviates from the ordinary course of criminal justice, and so I think, with respect, should be deprecated), should prevail, *viz.*, that we should apply section 1014, subsection (2) of the Criminal Code which says:

MARTIN, J.A.

"The Court may also dismiss the appeal if, notwithstanding that it is of opinion that on any of the grounds above mentioned the appeal might be decided in favour of the appellant, it is also of opinion that no substantial wrong or miscarriage of justice has actually occurred."

To that test I have addressed my mind, and examined meticulously the language used by the learned judge, in the light of the fact that there was one *alias* which was material and shewn to

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have been used by the accused. It really becomes a question of degree, and, considering that question of degree with the exact language used, I am unable to say that a substantial wrong or miscarriage of justice has actually occurred, having regard to all the circumstances of the case, and therefore the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree with my brother MARTIN in dismissing the appeal on all grounds.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the same opinion as my brother MARTIN. The *aliases* appeared in the indictment preferred by the grand jury, but save as to one of them no evidence was adduced at the trial. *Aliases,* after all, are mere expressions of current or notorious knowledge. The Crown's desire, of course, was to identify the prisoner. I cannot see that there was any materiality in proving any of the other *aliases.* The *alias* proved was the name under which he was known in Kelowna, in the near neighbourhood of Penticton, where the crime was committed.

The prisoner was allowed to make a statement, as Mr. *Bird* pointed out in his argument, it is allowed, although the prisoner may give evidence on his own behalf and be duly sworn. It is well known that no comment shall be made upon the fact the prisoner has not given evidence. I do not think there was any such comment upon the part of the learned trial judge, the Chief Justice of the Supreme Court. The prisoner made a statement, and it is to be noted he said nothing about the *aliases.* I am convinced, reading the whole charge of the learned judge, it has to be taken as a whole, that no miscarriage of justice took place. I may say that even later, when the question of sentence was considered, the various convictions were placed before the learned trial judge, and again the prisoner failed to say—he could have made a statement then—that any of these *aliases* under which there had been convictions were not true in fact.

Taking the whole case into consideration, in my opinion no miscarriage of justice took place. I am, therefore, of the opinion that the appeal should be dismissed.

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

REDMOND v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED.

MACDONALD, J.

1930

Dec. 5.

REDMOND v. CANADIAN CREDIT MEN'S TRUST ASSOCIATION LTD.

Mortgage—Foreclosure—Redemption—Time for—Application to reduce.

In a foreclosure action unless the mortgagee can shew that the security would be seriously impaired unless the usual time for redemption be abridged an application to reduce the time for redemption will be refused.

ACTION for foreclosure and for an order reducing the usual time for redemption to one month. Tried by MACDONALD, J. at Vancouver on the 3rd of December, 1930.

E. A. Lucas, for plaintiff.

Wood, K.C., for defendant Canadian Credit Men's Trust Association Limited.

5th December, 1930.

MACDONALD, J.: Plaintiff seeks foreclosure of property covered by his mortgage and applies to have the usual time of redemption reduced from six months to one month. The mortgage in question is only a second mortgage, being subject to a prior mortgage to the Huron & Erie Mortgage Corporation for $4,500. It appears that the mortgagor is bankrupt. It is submitted by plaintiff that his security would be in jeopardy should the usual time of redemption be fixed. There is, however, a margin over and above the two mortgages and taxes of about $1,000. I considered the question of the time to be allowed for redemption of an agreement for sale in *Davis* v. *Von Alvensleben* (1914), 20 B.C. 74; 29 W.L.R. 296; 6 W.W.R. 1184. I relied upon *Gibson* v. *McCrimmon* (1889), 9 C.L.T. Occ. N. 40, and *Ardagh* v. *Wilson* (1866), 2 C.L.J. 270. I also drew a distinction between the time to be allowed for foreclosure of a mortgage and an agreement for sale. If the facts here came within those outlined in *Ardagh* v. *Wilson, supra,* I might follow that decision, but a later case of *Town of Wiarton* v. *Canada Casket Co. Ltd.* (1918), 14 O.W.N. 321, seems conclusive on the point, especially where the mortgagee cannot shew

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that the security would be seriously impaired unless the usual time for redemption were abridged. In that case Falconbridge, C.J. in a considered judgment, refused an application for immediate foreclosure, stating:

"The plaintiff must take the usual decree for foreclosure (6 months to redeem), or, if they prefer, a decree for sale in three months."

Plaintiff is entitled to an order for foreclosure with the usual period of six months for redemption.

Judgment for plaintiff.

MORRISON, C.J.S.C.
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DRINNEN v. DOUGLAS

DRINNEN v. DOUGLAS.

Negligence — Dentistry — Extracting teeth — Unskilful work — Test of negligence.

The doctrine in the case of a physician that treatment is to be tested by the principles of the physicians' school is not applicable to the mechanical manipulative labour entailed in the pulling of teeth. The rule in such a case is that applicable to all skilled labourers, namely, that if your position implies skill you must use it. When, therefore, injury has been sustained that could not have arisen except from the absence of reasonable skill or negligence, there is liability.

Statement

ACTION for damages resulting from the defendant's negligence as a dental surgeon in attempting to extract the plaintiff's teeth. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at New Westminster on the 22nd of December, 1930.

Cassady, for plaintiff.
Beeston, for defendant.

13th January, 1931.

Judgment

MORRISON, C.J.S.C.: The plaintiff, a comparatively young woman, claims damages from the defendant for injury to her caused by the defendant's negligence as a dental surgeon. The plaintiff at the material times had been receiving dental treatment from the defendant, a duly qualified dental practitioner,

and, at a certain juncture, he advised her to have her teeth extracted. The defendant undertook to extract the plaintiff's teeth and in attempting to do so broke off the top part of seventeen teeth, leaving the nerve exposed. The plaintiff's physician, who was in attendance to administer the anæsthetic, remonstrated with the defendant as to the manner in which he was performing his work pointing out the necessity for removing the whole of the teeth at the same time. The defendant, however, pursued his work with the result as above stated. He left the patient with her physician who had her removed to a hospital and the next day another dentist was called who extracted the remainder of the seventeen teeth. The plaintiff suffered injury to her gums and in the interim endured great pain and distress owing to the alleged negligence of the defendant.

It has been submitted that the treatment by a physician is to be tested by the principles of the physicians' school. That principle is put compendiously by Erle, C.J. as follows in *Rich et uxor* v. *Pierpont* (1862), 3 F. & F. 35:

"To render a medical man liable, even civilly, for negligence, or want of due care or skill, it is not enough that there has been a less degree than some other medical men might have shewn, or a less degree of care than even he himself might have bestowed; nor is it enough that he himself acknowledges some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result."

Judgment

Although dentistry is practised as a specialty of medicine yet there are minor operations, such as the extraction of teeth, which are mechanical and require manipulative skill—skilled labour—and which are collateral to the special professional knowledge and skill required in the science of medical surgery. The rule applicable to all skilled labourers, and which is invoked in this case, is this: that if your position implies skill you must use it. If you have not that skill you are liable or if having that skill you nevertheless perform your work negligently you are liable, for a person holding himself out to do certain work impliedly warrants his possession of skill reasonably competent for its performance, each case depending on its own special circumstances. When injury has been sustained that could not have arisen unless from the absence of reasonable skill or negligence then there is liability. Beven on Negligence, 4th Ed.

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I do not think that the doctrine that treatment is to be tested (as in the case of a physician) by the principles of the physicians' school is applicable to the mechanical manipulative labour entailed in pulling a tooth. The doctrine of common sense should have restrained what appears to have been an uncontrolled impulse to adopt a "high-rigging" method of breaking the teeth in this wholesale fashion. Indeed, may I not go so far as to hold that in a case of this sort the very act speaks for itself obviating the necessity of the Court invoking the adventitious aid of any practitioner of this or that school in determining its character or the painful experience of the patient. I find that there was that degree of carelessness amounting to negligence in the performance of this work for the consequences of which the defendant is liable. As the plaintiff was liable to pay for the work performed for her by the second dentist; for hospital and doctors' charges and for help at home, as claimed, the fact that someone else, even though it may be her husband, paid those items for her does not disentitle her claiming them from the defendant.

Judgment

There will be judgment for the plaintiff as special damages for the bills which she incurred and proved at the trial as having been incurred in consequence of the negligence as aforesaid and $700 general damages.

Judgment for plaintiff.

CANARY AND ZERBINOS v. VESTED ESTATES LIMITED.

MURPHY, J.
1930
June 4.
COURT OF APPEAL
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CANARY v. VESTED ESTATES LIMITED

Contract—Company—Solicitor acting for company—Authority—Evidence—Marginal rule 370r.

Where on the trial of an action or issue the plaintiff had put in certain parts of the examination of the opposite party, it is the duty of the judge, either *ex mero motu* or at the request of counsel to "look at the whole of the examination" to see if he could form the "opinion that any other part of it is so connected with the part to be used that the last-mentioned part ought not to be used without such other part," and in so doing the object sought to be accomplished by putting in the original part must be taken into consideration as one of the elements in the forming of that opinion.

It is to be observed that the part to be put in by the judge is not "explanatory" merely, but is "connected" with the original part in such a way that it would be contrary to justice to disregard it.

APPEAL by plaintiff from the decision of MURPHY, J. of the 4th of June, 1930, in an action for breach of an agreement made by the defendant with the plaintiffs on the 30th of May, 1929, for a lease of premises known as 837 Granville Street in the City of Vancouver. Prior to May, 1929, the plaintiffs, who are fishmongers, were tenants of the defendant and in occupation of the premises at Numbers 850 and 852 Granville Street (east side) under a yearly tenancy, expiring December 31st, 1929. One *W. F. Brougham,* solicitor for the defendant Company entered into negotiations with the plaintiffs with a view to having them surrender their lease and lease and occupy a premises on the other side of the street (No. 837) owned by the defendant, that the defendant would get ready for them, arrangements being made to satisfy certain sub-lessees under the plaintiffs. *Brougham* then drew up an agreement that was duly signed by the plaintiffs, but as far as is known was never signed by the defendant. The defendant never prepared the premises on the west side of Granville Street for the plaintiffs, the result being that the plaintiffs lost their sub-tenant and were forced to lease other premises for their business as fishmongers. Statement

J. A. MacInnes, for plaintiffs.
Griffin, K.C., for defendant.

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4th June, 1930.

MURPHY, J.: The alleged contract for breach of which damages are sought herein was according to the pleadings, made by *Brougham* as agent for defendant. At the trial, when evidence was being led that might have established a contract but one made by someone other than *Brougham,* defendant's counsel objected that such evidence was inadmissible on the pleadings as they stood. I sustained this objection but offered to allow plaintiff's counsel to amend on the usual terms. He, however, declined to do so. The case must, therefore, be adjudicated strictly as pleaded.

So far as I can see there is nothing on the record shewing that defendant ever authorized *Brougham* to make the alleged contract. The evidence shews that *Brougham* acted in the matter as defendant's solicitor but as such he would have no authority to make a contract such as the one sued upon. This being my view of the matter it is not necessary to deal with the defence based on the Statute of Frauds. Such cases as *Daniels* v. *Trefusis* (1914), 1 Ch. 788, cited by plaintiffs' counsel, have no bearing on the primary question to be decided here—whether or not *Brougham* had authority to bind defendant. Since no evidence was led establishing this vital feature the action fails. Action dismissed with costs.

MURPHY, J.

From this decision the plaintiffs appealed.

The appeal was argued at Vancouver on the 19th, 20th and 21st of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: When the plaintiffs left the premises under the alleged agreement the defendant put up a large block on these lots with others adjoining. In entering into the agreement *Brougham* acted with the knowledge and concurrence of the Company: see *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *Varrelmann* v. *Phœnix Brewery Co.* (1894), 3 B.C. 135; *Faviell* v. *The Eastern Counties Railway Company* (1848), 2 Ex. 344. There is no direct authority from the Company to Reifel, but Reifel as president of the Company instructed *Brougham* who carried out his instructions.

Argument

Reifel carried on the business of the Company. This is within the scope of the president's authority: see Taylor on Evidence, 11th Ed., sec. 377; Best on Evidence, 12th Ed., 323, secs. 374-586; *Wedgwood* v. *Hart* (1856), 2 Jur. (N.S.) 288; *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534 at p. 543; *General Accident Fire and Life Assurance Corporation* v. *Robertson* (1909), A.C. 404 at p. 413. As to the Statute of Frauds we say there was part performance. They are estopped by conduct and there is a memorandum signed: see *Parker* v. *Smith* (1845), 1 Collyer 608; *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 at p. 481; *Daniels* v. *Trefusis* (1914), 1 Ch. 788; *Williams* v. *Evans* (1875), L.R. 19 Eq. 547; Halsbury's Laws of England, Vol. 13, p. 323, sec. 452; *Ramsden* v. *Dyson* (1866), L.R. 1 H.L. 129; *Fenner* v. *Blake* (1900), 1 Q.B. 426. There is a memorandum signed by the Company: see *Craig* v. *Elliott* (1885), 15 L.R. Ir. 257; *Bailey* v. *Sweeting* (1861), 9 C.B. (N.S.) 843; *Buxton* v. *Rust* (1872), L.R. 7 Ex. 279. The case of *Smith* v. *Webster* (1876), 3 Ch. D. 49, is relied upon but it is disapproved: see *John Griffiths Cycle Corporation, Limited* v. *Humber & Co., Limited* (1899), 2 Q.B. 414; *North* v. *Loomes* (1919), 1 Ch. 378; *Grindell* v. *Bass* (1920), 2 Ch. 487; *Farr, Smith & Co.* v. *Messers, Ld.* (1928), 1 K.B. 397.

Argument

Craig, K.C., for respondent: There are three questions here (1) Did anyone on behalf of the Company make the contract, (2) Was it done by anyone having authority and (3) Statute of Frauds. As to the first, the trial judge below found there was no verbal contract. Where parties contemplate a written contract the presumption is there is no contract until it is signed. Under the agreement they should have given up possession but they stayed until the old lease expired. As to the agreement being authorized, the directors had no authority to bind the Company, and the president has no more authority except to preside at meetings: see Palmer's Company Precedents, 13th Ed., 692; *In re Cunningham & Co., Limited* (1887), 36 Ch. D. 532 at p. 538; 14 C.J., p. 93, sec. 1858; *Smith* v. *Hull Glass Co.* (1852), 11 C.B. 897; *Re Manitoba Commission Company* (1912), 22 Man. L.R. 268; *Almon et al.* v. *Law et al.* (1894), 26 N.S.R. 340 at p. 346. Even if Reifel had authorized everything *Brougham* did it would not bind the Company. There is

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no agreement proved with *Brougham*: see *Elk Lumber Co.* v. *Crow's Nest Pass Coal Co.* (1907), 39 S.C.R. 169. There is no proof of authority to Reifel or *Brougham* to bind the Company. The solicitor's letter does not make him agent of the Company to authorize the contract: see *Thirkell* v. *Cambi* (1919), 2 K.B. 590. These cases are authorities as to the Statute of Frauds and as to solicitor's authority, see *Smith* v. *Webster* (1876), 3 Ch. D. 49; *Forster et uxor* v. *Rowland* (1861), 7 Jur. (N.S.) 998; *Bowen* v. *Duc D'Orleans* (1900), 16 T.L.R. 226; *Chinnock* v. *The Marchioness of Ely* (1865), 12 L.T. 251; *Daniels* v. *Trefusis* (1913), 83 L.J., Ch. 579 at p. 584; *Ridgway* v. *Wharton* (1857), 6 H.L. Cas. 238. As to the Statute of Frauds there is not a good memorandum here: see *Blackburn* v. *Walker* (1920), 150 L.T. Jo. 73. As to part performance, getting one man to give up his lease is not part performance: see Palmer's Company Precedents, 13th Ed., 727.

MacInnes, replied.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I agree with the judgment of the trial judge and would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: Several questions arise in this appeal but the first to be decided is: Was the contract set up entered into? That question cannot, to my mind, be satisfactorily answered without ruling upon the important objection that that part of the evidence on discovery of the witness *Brougham* which was put in evidence by the learned trial judge, should not have been so dealt with. The rule governing the situation is 370r, *viz.*:

"(1.) Any party may, at the trial of an action or issue, use in evidence any part of the examination of the opposite party; but the judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be so used that the last-mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence."

It was, therefore, the duty of the judge, either *ex mero motu* or at the request of counsel, when the plaintiffs had put in certain parts of the examination of *Brougham,* to "look at the whole of the examination" to see if he could form the "opinion that any other part of it is so connected with the part to be used

that the last-mentioned part ought not to be used without such other part," and in so doing the object sought to be accomplished by putting in the original part must be taken into consideration as one of the elements in the forming of that opinion. It is to be observed that the part to be put in by the judge is not "explanatory" merely, but is "connected" with the original part in such a way that it would be contrary to justice to disregard it.

This has been the construction adopted in this Province since 1893, when the former Full Court in *Adams* v. *National Electric Tramway and Lighting Co.* (1893), 3 B.C. 199 upheld the action of Mr. Justice DRAKE in reading *ex mero motu* to the jury certain parts of the examination upon discovery of the defendant's managing director (Mr. Higgins) which had not been put in by plaintiff's counsel, being of opinion that under the circumstances that course was warranted. Chief Justice BEGBIE deals with the matter at p. 210, and Mr. Justice CREASE at p. 213 says, after citing the existing rule 725 (which is identical in essentials with our present rule 370r):

" . . . This was in my opinion admissible under rule 725, and as Mr. Higgins was not produced in Court by the defendant at the trial it became necessary for the information of the jury to supply them with the evidence, and having been introduced, it became the duty of the learned judge at the trial, whether counsel in introducing them knew his exact position or not, in charging the jury, to lay before them the purport of those portions of the evidence of Higgins which were so closely connected together as to form one subject."

And again on p. 214:

"Though plaintiff's counsel only put in part of the examination the judge could see and examine the whole, and if the interests of justice, and the proper and complete understanding by the jury of the portions put in called for it, use and repeat to the jury such portions connected with them as he found necessary. It would be impossible for a judge to stop a trial by excluding such portion of the evidence before him as formed a necessary sequence to the portion specially put in, merely because of some misapprehension or mistake of counsel as to his position."

In this Court, also, there is our decision of *Semisch* v. *Keith* (1910), 16 B.C. 62, wherein the ruling of CLEMENT, J., in admitting additional parts of the examination was sustained and that decision, in a redemption action, goes further than that what we should, I think, do in the present circumstances.

The case of *Lyon et al.* v. *Marriott* (1896), 5 B.C. 157 should also be noted as an illustration of the proper refusal of

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DRAKE, J., at defendant's request, to put in certain parts of the evidence which were clearly not "connected," within the meaning of the rule, with the part already put in by the plaintiff.

There is also the decision of the English Court of Appeal in *Lyell* v. *Kennedy* (1884), 27 Ch. D. 1, on their corresponding rule 366, and the following passage in the judgment of Cotton, L.J., at p. 15 shews that they proceed upon the same principle as we do, *viz.*:

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> "Of course, when an admission is read, everything ought to be read which is fairly connected with that admission; but I think it would be wrong for the defendant, and he would not be allowed, to try to bring in matter which was not in any way connected with the matter admitted."

Applying these precedents to the present circumstances, in my opinion the learned judge rightly admitted the parts of the examination then and now objected to, and the result of them, taken in conjunction with the testimony of all the other witnesses, is that I find it impossible to reach the conclusion that the agreement the plaintiffs set up has been established with any reasonable degree of certainty, and therefore on that primary and most substantial ground, apart from all others, the action should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: The reasons of the learned judge below are short but in my view very much to the point, and I would adopt them in dismissing the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: This appeal must fail for want of authority in *Brougham* to bind the respondent. That is made clear particularly by part of the discovery evidence to which objection was taken, an objection based upon a misconception of marginal rule 370r. The important words in that rule are "so connected."

Appeal dismissed.

Solicitors for appellants: *MacInnes & Arnold.*
Solicitor for respondent: *W. F. Brougham.*

MACK v. THE ROYAL BANK OF CANADA.

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MACK v. THE ROYAL BANK OF CANADA

Banks and banking—Local manager—Money left with him for investment—Misappropriated by him—Agency—Liability of bank.

The plaintiff sold a piece of property in May, 1928, for $4,500. The money came from England through the defendant Bank to its Kelowna Branch, and after deducting therefrom moneys owing by him to the Bank, there remained on deposit to his credit about $3,000. For some years prior to this he was a small customer of the Bank and was well acquainted with the local manager who had been there for many years. Shortly after receipt of this money the local manager made representations to the plaintiff as to investment of this money at 8 per cent., and induced him to withdraw $2,500 of the money so deposited and hand it over for investment as suggested. The local manager drew up two cheques for $1,850 and $650 respectively that the plaintiff signed, cashed, and handed over the money to the local manager who gave him a receipt as follows: "This will acknowledge receipt of twenty-five hundred dollars advanced at 8 per cent. for your account." Some time later the plaintiff needed the money and on asking the local manager for it was told the money was not then available, but suggested that the plaintiff should put through a note on the Bank for the money he required and this was done. Afterwards the plaintiff made enquiries from time to time as to his investment without definite reply, but he had confidence in the local manager and did nothing further. Then through outside enquiries by an inspector it was found that the local manager during a number of years previously had defrauded over sixty customers of the bank to the extent of over $80,000. In an action against the Bank to recover the $2,500 so paid to the local manager:—

Held, that the Bank was liable to the plaintiff, a customer, for the loss sustained because of the misappropriation by the local manager of money which the plaintiff had left with him for investment in his capacity as local manager acting within the apparent scope of his authority.

ACTION to recover $2,500 that the plaintiff claims he deposited with the defendant Bank for investment. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 11th of November, 1930. Statement

Norris, for plaintiff.
Alfred Bull, for defendant.

13th December, 1930.

MACDONALD, J.: Plaintiff seeks to recover from the defend- Judgment

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ant hereinafter called "the Bank," $2,500 and interest thereon at 8 per cent. from the 25th of May, 1928. He alleges that, on that day, he deposited with the Bank this amount for investment and, although payment has been demanded, the Bank disputes any responsibility or liability in the matter. Plaintiff is willing that his claim should be credited upon an admitted indebtedness by him to the Bank, which arose in the meantime.

It appears that for some years prior to 1928 the plaintiff had been a small customer of the Bank, through its branch at Kelowna, B.C. He is a fruit farmer residing 35 miles east of Kelowna and was in the habit of annually borrowing from the Bank, through its local manager, H. F. Rees, in order to finance his crop. Beyond such loans he had no other business with the Bank until May, 1928, when he sold a piece of property and realized $4,500. This money came from England through the Bank and after deducting therefrom moneys, owing by him to the Bank, there remained on deposit to his credit about $3,000. His intention at the time was to keep this money on hand, ready to make a payment during the ensuing year upon some land he had purchased. Rees, the said manager, however, communi-

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cated with the plaintiff and upon his coming to the Bank made representations as to an investment at 8 per cent. This induced the plaintiff to withdraw $2,500 of the money so deposited and to hand it over to said Rees, so that it might be invested, as suggested by him. This amount was divided into two cheques, drawn up by Rees, for $1,850 and $650 respectively. He in turn gave a receipt or acknowledgment as follows:

"Kelowna, May 25/28.

"This will acknowledge receipt of twenty five hundred dollars advanced @ 8% for your account."

It was noticeable that the word "your" in the receipt was originally "my" and it is contended that it may read now simply as "our." It is not signed by Rees, on behalf of the Bank. When you consider the relationship between the plaintiff and Rees as his banker, it is not likely that the plaintiff was critical as to the terms of the receipt. Rees had gained his confidence, as well as that of many others in Kelowna and no doubt plaintiff trusted him implicitly. Rees shrewdly gave the plaintiff very little opportunity of considering the receipt or shewing it to his

friends as he put it in a sealed envelope and then placed it in plaintiff's safety-deposit box. When the plaintiff needed this money—$2,500—he asked Rees for it, but was put off with some statement as to the money not being available and Rees suggested that the better course would be, to put through a note for the time being. The intention, presumably being, that later on, it would be retired by the moneys which had been so invested. The plaintiff repeatedly made inquiries as to the investment and the expectation of payment, but apparently felt perfectly safe as to his investment until July of this year. He, up to that time, had not heard anything to the contrary, and thought he had been dealing with the Bank alone. It then transpired that Rees during a series of years had defrauded above 60 of the customers of the Bank to the extent of over $80,000. This appears amazing, in view of the annual visits of inspectors and the knowledge which is usually gained, as to business transactions in a community the size of Kelowna. It may have been due, in a great measure, to the personality of Rees and his popularity in the locality. He was president of the Board of Trade and also a member of the Rotary Club. His position as a bank manager doubtless created confidence. He took a prominent part in the affairs of the community and one can easily conclude that, dealing in financial matters, the plaintiff would be putty in his hands. Each case must depend upon its own facts and while it is asserted that many customers of the Bank were defrauded, still the facts may not be alike in all cases. I have to determine whether the contention made by the Bank will prevail as against the sworn statements of the plaintiff as to his dealing only with the Bank. There was no evidence submitted to support the submission of the Bank, that the transaction, in question, was a personal one, between the plaintiff and Rees, who is now in California. On the contrary I have no reason to doubt the evidence given by the plaintiff on this important point. I might well, under very similar facts, ask myself a question, similar to that submitted by Erle, J. to the jury, in *Thompson* v. *Bell* (1854), 10 Ex. 10—Did Rees intend to make plaintiff believe and did he so believe that he (Rees) was acting for the Bank in receiving the $2,500 for investment?

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I answer this query in the affirmative. Pollock, C.B. said in the appeal in that case:

"That being so, the conclusion is, that the money is still in the bank, since it was paid to the agent of the bank. In my opinion, it is unnecessary to travel further."

A further portion of such judgment shews how alike the facts were, to those here presented, as follows:

"The manager of a bank is a person appointed to conduct the entire business irrespective of the partners; and in this case the manager undoubtedly received the money in the first instance from the plaintiff's wife, and gave her a deposit receipt. He then represents to her that some benefit would accrue by her investing that money in a different way. She listens to his suggestion, and draws out the money, which she hands over to him, as manager of the bank, to be disposed of in the way suggested. That he does not do, therefore the money is still in the hands of the bank."

Rees did not invest the money, but appropriated it to his own use, so the money paid to the Bank was not utilized for the purpose intended and should be repaid to the plaintiff.

Defendant contended that in any event, even assuming that plaintiff acted in good faith, still, that Rees, as its manager, could not invest moneys, received from a customer and that such a proceeding would be beyond the scope of his authority and not impose any liability on the Bank. *Richards* v. *Bank of Nova Scotia* (1896), 26 S.C.R. 381 was cited, as lending support to this contention. I think, however, that the facts in that case were so different, as not to afford any assistance to the Bank. The basis of that decision was that the bank manager acted outside the apparent scope of his authority. Here, there was nothing to put the plaintiff upon enquiry, nor any question as to Rees not having authority, to invest moneys through the Bank. The cases of *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259 and *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* (1887), 18 Q.B.D. 714 were submitted as authorities shewing that there was no liability on the part of the Bank. These cases were discussed in *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 in such a manner that they could not well be cited as supporting a proposition, that a principal is not liable for the fraud of his authorized agent, acting within his authority. Lord Macnaghten referred with approval to Lord Blackburn's view of the judgment in the *Barwick* case, *supra,* at pp. 735-6:

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"The substantial point decided was, I think, that an innocent principal was civilly responsible for the fraud of his authorized agent, acting within his authority, to the same extent as if it was his own fraud."

He, before expressing his view that, aside from the authorities, it would be absolutely shocking to his mind, if the principal had not been held liable for the fraud of his agent, stated (p. 738):

"The only difference in my opinion between the case where the principal receives the benefit of the fraud, and the case where he does not, is that in the latter case the principal is liable for the wrong done to the person defrauded by his agent acting within the scope of his agency; in the former case he is liable on that ground and also on the ground that by taking the benefit he has adopted the act of his agent; he cannot approbate and reprobate."

Lord Shaw of Dunfermline (S.C.) at pp. 739-40 stated that:

"The case is in one respect the not infrequent one, of a situation in which each of two parties has been betrayed or injured by the fraudulent conduct of a third. I look upon it as a familiar doctrine as well as a safe general rule, and one making for security instead of uncertainty and insecurity in mercantile dealings, that the loss occasioned by the fault of a third person in such circumstances ought to fall upon the one of the two parties who clothed that third person as agent with the authority by which he was enabled to commit the fraud."

In this connection Mr. Underhay, in an essay, in 8 C.B. Rev. 661, discussing the doctrine of *Carlisle and Cumberland Banking Company* v. *Bragg* (1911), 1 K.B. 489 states, at pp. 671-2 that:

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"The accepted limitation is that he who has enabled the third party to hold out false colours to the world must sustain the loss, provided he has done something which has in fact misled others: Kerr, Fraud and Mistake, 6th Ed., 15 and 144."

And later on aptly remarked that,

"It appears more in accordance with principle that the person selecting the rascal should suffer rather than he whom the rascal deceives."

The Bank pleaded that the payment of $2,500 was represented by a promissory note given by Rees to the plaintiff, but there is no evidence to support this statement and it is not a fact.

It is also contended that, as the plaintiff had borrowed sums of money aggregating with interest $3,222 he was estopped from alleging that the transaction, with respect to the $2,500, was not a personal transaction between the plaintiff and Rees or that the Bank was in any way responsible in respect of such transaction. The evidence did not disclose any facts, which would support the principles essential in order to create an estoppel

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against the plaintiff. He is entitled to recover the $2,500 and interest at 8 per cent. from 25th May, 1928. He was, however, compelled, through non-payment of this amount, to borrow money from the Bank in excess of the amount intended to be invested and to give security. Plaintiff admitted his indebtedness to this extent and there should be judgment for the defendant upon the counterclaim with proper interest after deducting the sum of $2,500 and interest as mentioned. Plaintiff succeeds upon the only issue between the parties and is entitled to his costs of the action. As plaintiff did not pay any money into Court, defendant has a right to the costs which would be incurred in a default judgment. These costs should be set off against the costs awarded to the plaintiff.

Judgment

Upon the costs being taxed and the amount determined there will probably be a balance still owing by the plaintiff to the defendant and for which defendant my enter judgment. Pursuant to marginal rule 595 I grant a stay of execution for 20 days from entry of judgment: compare *Cotton* v. *Corby* (1859), 5 L.J. 67.

Plaintiff is entitled to its judgment in declaratory form with proper terms so that it may enforce its equitable mortgage, arising from the deposit of title deeds by way of security.

Order accordingly.

REX v. ROBERTSON'S BAKERIES LIMITED.

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REX v. ROBERTSON'S BAKERIES LIMITED

Criminal law—False trade description—Corporation—Procedure—Preliminary investigation—Prohibition—Criminal Code, Secs. 489, 781 and 782—Can. Stats. 1919, Cap. 46, Sec. 13.

Objection to a magistrate proceeding with a preliminary inquiry against an accused on the ground that being a corporation the offence charged could be prosecuted by indictment only, is without force since the passing of section 782 of the Criminal Code.

APPEAL by defendant from the order of GREGORY, J. of the 23rd of July, 1930, dismissing an application for an order that the deputy police magistrate at Vancouver be prohibited from taking any further proceedings on a charge of unlawfully selling bread to which a false trade description was applied, namely, a label denoting that the loaf weighed sixteen ounces, and particularly from holding a preliminary investigation or inquiry into the said charge against Robertson's Bakeries Limited on the ground that the magistrate had no jurisdiction. Statement

The appeal was argued at Vancouver on the 7th of October, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Gibson, for appellant: This is a charge under section 489 of the Criminal Code. Upon such a charge against a corporation the proceedings should be by indictment: see *The Queen* v. *T. Eaton Company, Limited* (1898), 2 Can. C.C. 252; *Re Chapman and Corporation of London* (1890), 19 Ont. 33; *Re Schofield* (1913), 22 Can. C.C. 93; *Rex* v. *Daily Mirror Newspapers* (1922), 2 K.B. 530.

Argument

W. M. McKay, for the Crown: There must be a preliminary hearing in this case. Section 782 of the Code, as it is at present, was passed in 1919 providing for procedure in cases of corporations in summary trials of indictable offences. The section was passed for the purpose of dealing with corporations and the cases cited were decided prior to that time and do not apply. That prohibition will not lie to prevent a magistrate holding a pre-

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liminary inquiry on the information see *Rex* v. *Lambton* (1926), 46 Can. C.C. 13.

Gibson, replied. *Cur. adv. vult.*

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MACDONALD, C.J.B.C.: The authorities prior to the amendment to the Code in 1919, now section 782, are not of value in view of this amendment. The amendment makes it clear that the appeal must be dismissed with costs.

MARTIN, J.A.

MARTIN, J.A.: This appeal from the order of Mr. Justice GREGORY refusing to prohibit the deputy police magistrate of Vancouver from proceeding with a preliminary inquiry under sections 781 and 782 of the Criminal Code, on a charge of selling short-weight bread, should, in my opinion be dismissed, because, under the circumstances, subsection 3 of section 782 of the Code (which section changed the law since 1919), has no application, and therefore the magistrate was right in proceeding with said inquiry, in default of any consent to a summary trial, under the appropriate prior subsections, whereby a corporation for the purposes of the section is treated as "a natural person," so far as is possible in the conduct of the proceedings. If the corporation charged does not take advantage of the right conferred under this new procedure upon its attorney, by whom the statute commands it "shall appear," either to "elect, and confess or deny the charge," the consequences of such refusal must be upon its own head. When said section 782 is read with the preceding one, no practical difficulty need be encountered in carrying out what is, to my mind, the obvious intention of Parliament.

GALLIHER, J.A.

GALLIHER, J.A.: This charge is laid under section 489 of the Criminal Code and was proceeded with by preliminary inquiry.

Mr. *Reid, K.C.,* appeared for the Company for the purpose of objecting to the jurisdiction of the magistrate to hold a preliminary inquiry claiming the Company could only be brought up on indictment. The magistrate overruled the objection and the preliminary hearing was proceeded with and evidence taken. The defendant took no part in the proceedings and at the end of the hearing was committed for trial.

Mr. *Reid* in the meantime moved before GREGORY, J. for a writ of prohibition on the grounds above stated, which writ was refused and from that refusal this appeal is taken. The point is a short one but is important in deciding the mode of procedure in cases of this kind as against corporations.

If the charge was against an individual he could be tried with his consent or failing that a preliminary investigation could be had and a committal made.

In *The Queen* v. *T. Eaton Company, Limited* (1898), 2 Can. C.C. 252, on a similar charge, Rose, J. holding that proceedings against a corporation should be instituted by indictment, the case was again brought up on indictment ((1899), 3 Can. C.C. 421), and was tried on the merits.

In *Re Schofield* (1913), 22 Can. C.C. 93, Meredith, C.J.C.P. while he did not decide the point expressed strong views that under the code as amended since the hearing in the *Eaton* case, *supra,* that the proceedings against a corporation should ordinarily be initiated before a magistrate.

GALLIHER, J.A.

The question of whether a limited company could be committed to prison came before the Criminal Court of Appeal in England in the case of *Rex* v. *Daily Mirror Newspapers* (1922), 2 K.B. 530, where the defendant company had been taken before a justice and committed for trial. An indictment was laid before the grand jury.

It was moved to quash the indictment which was refused and after trial and verdict an appeal was taken against the conviction. Lord Hewart, C.J. delivered the judgment of the Court and it was there held that there was not and could not be a proper committal for trial of the defendant company. This would appear now to be provided for in the Criminal Justice Act, 1925 (15 & 16 Geo. 5), Cap. 86, Sec. 33 (Imp.).

In *Re Chapman and Corporation of London* (1890), 19 Ont. 33, Robertson, J. held the justice had no jurisdiction to commit. This case was referred to by Meredith, C.J.C.P. in the *Schofield* case, *supra,* at p. 97, in this wise:

"That, since it was decided, one of the strongest points made in it in support of the prohibition had been turned the other way by the legislation now contained in the Code, expressly making its provisions applicable to corporations. . . ."

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But, whatever may be said as to conflicting views held in these cases, I think it is put beyond doubt in Code section 782, R.S.C. 1927, Cap. 36, which was an amendment introduced into the Criminal Code in 1919, Cap. 46, Sec. 13:

"When a corporation is to be charged the summons may be served on the mayor or chief officer of such corporation, or upon the clerk or secretary or the like officer thereof, and may be in the same form as if the defendant were a natural person.

"2. The corporation in such case shall appear by attorney, who may on its behalf elect, and confess or deny the charge, and thereupon the case shall proceed as if the defendant were a natural person.

"3. If the corporation does not appear and confess or deny the charge, the magistrate may proceed in the absence of the defendant as upon a preliminary investigation."

GALLIHER, J.A.

I think that section disposes of any distinction that may have existed as between a natural person and a corporation in being brought before a magistrate and where consent is not given proceeding by way of preliminary hearing and committal.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: Application for prohibition directed to the deputy police magistrate for the City of Vancouver to prevent him from proceeding with a preliminary inquiry against the accused on the ground that being a corporation the offence charged could be prosecuted by indictment only. This objection is without force since the enactment of section 782 of the Criminal Code (Cap. 31, R.S.C. 1927) particularly subsection 3. Unless a preliminary inquiry may be held under certain circumstances no meaning can be assigned to this subsection. The corporation in this case did not "appear and confess or deny the charge." I agree with the views of the editors of Seager's Magistrates Manual, 3rd Ed., pp. 147 and 148. I refer also to *Re Schofield* (1913), 22 Can. C.C. 93 and *Rex* v. *Lambton* (1926), 46 Can. C.C. 13.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *D. S. Wallbridge.*
Solicitors for respondent: *McKay & Orr.*

COMMERCIAL SECURITIES (B.C.) LIMITED v. JOHNSTON.

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COMMERCIAL SECURITIES (B.C.) LIMITED v. JOHNSTON

Sale of goods—Automobile—Conditional sale agreement—Assignment to plaintiff—Car left in possession of assignor as mercantile agent—Resale of car—Title of subsequent buyer—R.S.B.C. 1924, Cap. 44, Sec. 4; Cap. 225, Sec. 60 (1).

Swanston, the general manager of Pacific Motors, Limited, purchased a car from his company under a conditional sale agreement. The agreement was executed for the company by Swanston, who also signed it for himself as purchaser. Swanston then, on behalf of his company, assigned the agreement to the plaintiff, a financing company, the agreement and the assignment being duly registered. The plaintiff left the car on the premises of Pacific Motors, Limited, knowing that it was left there for the purpose of resale. Swanston then sold the car to the defendant, who paid for it, believing he was buying from Pacific Motors, Limited, and knowing nothing as to the plaintiff's claim. An action for conversion was dismissed, it being held that the defendant was protected by section 60 (1) of the Sale of Goods Act.

Held, on appeal, affirming the decision of GREGORY, J. (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting), that if the trial judge was justified in accepting the defendant's evidence he reached a right conclusion, and as the evidence discloses some justification for his view of the defendant's honesty, the appeal should be dismissed.

APPEAL by plaintiff from the decision of GREGORY, J. of the 28th of May, 1930 (reported, *ante*, p. 61) in an action for damages resulting from the defendant converting to his own use and wrongfully depriving the plaintiff of one Gardner automobile. The Pacific Motors, Limited were dealers in automobiles and one Swanston was its general manager. On the 12th of February, 1928, Pacific Motors, Limited sold the automobile in question to Swanston upon time, and a conditional sale agreement was executed for the company by Swanston, who also signed the same on his own behalf as purchaser. On the 14th of February, 1928, the Pacific Motors, Limited, by the said Swanston, assigned the sale agreement to the plaintiff, a financing company, and in consideration therefor received the plaintiff's cheque for $1,700. Swanston also signed the assignment as purchaser and admitted notice of assignment of the agreement to the plaintiff Company. The agreement and assignment

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thereof were duly registered. The plaintiff left the automobile in the possession of Pacific Motors, Limited, or Swanston its manager, for sale. On April 27th, 1928, Swanston saw the defendant and proposed to him that he should buy this car for $2,150. The defendant purchased the car, giving Swanston a cheque for $1,400 payable to Pacific Motors, Limited or bearer and surrendered an old car to Pacific Motors, Limited for the balance of the purchase price. The defendant knew nothing of the plaintiff's interest in the car until long after his purchase. The original agreement to the plaintiff required monthly payments of $100, and three payments were made of $100 each on the 22nd of March, 1928, 2nd of May and 28th of May, respectively, but no further payments were made. On Johnston finding out the plaintiff's interest in the car he laid an information against Swanston who was arrested and on a charge of obtaining money by false pretences was sentenced to three years in the penitentiary. During the criminal proceedings the plaintiff seized the motor-car and the seizing officer appointed the defendant his bailiff to hold it. Later when the plaintiff demanded possession the defendant refused to give it up. The action was dismissed, the learned trial judge holding that the defendant was protected by section 60 (1) of the Sale of Goods Act.

Statement

The appeal was argued at Vancouver on the 14th and 17th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Lucas, K.C., for appellant: The defendant's evidence is unsatisfactory; he told two different stories and his evidence should not have been given credence. This appears clearly from what he said as a witness on the criminal trial of Swanston and on the evidence he gave in this case: see *Gandy* v. *Gandy* (1885), 30 Ch. D. 57; *W. J. Albutt & Co.* v. *Continental Guaranty Corporation of Canada* (1929), 41 B.C. 537; *Folkes* v. *King* (1923), 1 K.B. 282; *Heap* v. *Motorists' Advisory Agency, Ld., ib.* 577.

Argument

Edith L. Paterson, for respondent: We submit we come within the exception in section 4 of the Bills of Sale Act, and rely on section 60 of the Sale of Goods Act. The car was pur-

chased by the defendant in the ordinary course of business from a mercantile agent. As to the defendant's evidence, the trial judge heard his evidence and decided in our favour: see *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at p. 47; *W. J. Albutt & Co.* v. *Continental Guaranty Corporation of Canada* (1929), 41 B.C. 537 at p. 542; *Folkes* v. *King* (1923), 1 K.B. 282 at p. 295. If he sells in the ordinary course of business the purchaser is protected: see *Lowther* v. *Harris* (1927), 1 K.B. 393; *International Business Machines Co. Ltd.* v. *Guelph Board of Education* (1927), 61 O.L.R. 85, and on appeal (1928), S.C.R. 200; *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601.

Statement

Lucas, replied.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The Pacific Motors, Limited sold the car in question to its manager, Swanston, and took from him a conditional sale agreement, which was discounted with the plaintiff for value. The plaintiff duly registered this agreement. Swanston used the car for some time then sold it to the defendant, telling him that he (Swanston) was the owner of it. Default being made in payment to the plaintiff under the assigned conditional sale agreement they seized the car under the same, but apparently realizing that the defendant was an innocent purchaser and had been imposed upon by Swanston appointed him a bailiff to hold it for them on the seizure. Later they demanded possession of the car which was refused. They then brought this action for damages for conversion. Swanston has been convicted and sentenced to prison for his share in the transaction. The defendant has given conflicting testimony at the trial of Swanston from that which he gave at the trial of this action. I do not find it necessary, however, to say more than this about that evidence that the defendant probably was confused and did not intend to commit perjury.

It was attempted by defendant's counsel to make out that the sale of the car to Swanston was not a real sale but was made for the purpose of Swanston demonstrating it and that the sale to defendant was really made not by Swanston but by the Pacific

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Motors, Limited in a way which brought it within the Conditional Sales Act or within the Sale of Goods Act, so as to give the defendant good title to it. A great deal of ingenuity was displayed in an attempt to bring the case within one or other of the said Acts. I think the attempt has failed and that the plaintiff is entitled to judgment for damages in the amount claimed in the statement of claim.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed, the learned judge below having, on the peculiar facts before him, reached the right conclusion.

GALLIHER, J.A.

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

Notwithstanding what the learned judge below has said regarding the defendant's honesty the fact remains that on the criminal trial when Johnston was a witness against Swanston his testimony, which was an important element in the conviction of Swanston, is in direct conflict with his testimony in the present action upon which he seeks to justify—in other words he tells one story in the Criminal Court and another story when his own interests are involved as here.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the learned trial judge, Mr. Justice GREGORY, arrived at the right conclusion in this case. It is clear upon the evidence that the defendant (respondent) is protected in his property in the motor-car in question in this action by virtue of Cap. 225, Sec. 60 of the Sale of Goods Act, R.S.B.C. 1924. The manager for the plaintiff (appellant), Murray, makes the admission that he was acquainted with what would appear to be somewhat of a custom amongst dealers of selling a motor-car to one of the salesmen and that salesman would demonstrate the car and effect a sale, ostensibly selling for the dealer. The learned trial judge quotes the evidence in his judgment. In the present case the sale of the motor-car in question was made by the Pacific Motors, Limited to Swanston its general manager and Swanston assigned the conditional sale agreement he gave to the Pacific Motors, Limited to the plaintiff (appellant) it being what is called in the business of selling motor-cars a financing company. Now the defendant is shewn

the car by a salesman of the Pacific Motors, Limited who demonstrates it to him and in the end the defendant buys the car, the sale being effected at the price of $2,150, payable $1,400 in cash and the transfer of another car valued at $750. It is true that the conditional sale agreement made to the defendant refers to the car as Swanston's car but that was not a matter that would really be noticeable to the defendant or call for particular attention by him—it might well be a reference to identify the particular car. The cheque for the $1,400 in respect of the purchase price payable in cash has endorsed thereon "For deposit only to the credit of Pacific Motors, Ltd., A. Swanston, Pres." and was deposited in the Bank of the Pacific Motors, Limited. So that the sale was made in the ordinary course of business by a mercantile agent, there being complete evidence of all this. That the car, notwithstanding that the plaintiff had obtained an assignment of Swanston's conditional sale agreement from the Pacific Motors, Limited, was allowed to be on the floor of the Pacific Motors, Limited is well established by the evidence, Murray, the manager, admitting this and this evidence the learned trial judge calls particular attention to in his judgment. It follows then that the plaintiff is prevented by statute from setting up any title to the motor-car as it must be held to have been a valid sale, *i.e.*, the sale of the motor by the Pacific Motors, Limited to the defendant. Then the defendant has a still further statutory protection in view of all the evidence in this case and that is section 4 of the Conditional Sales Act, Cap. 44, R.S.B.C. 1924, which reads as follows:

"4. 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."

It is therefore clearly apparent that the plaintiff by its conduct made it possible for the Pacific Motors, Limited to effect a valid sale of the motor-car to the defendant and the plaintiff cannot be heard to say that the motor-car is its property. In effect it would be the perpetuation of a fraud upon the defendant to admit of any such claim having legal effect. Undoubtedly the plaintiff put complete trust in the Pacific Motors, Limited, and was a consenting party to this course of business

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and in due course expected that it would receive its money but its course of action has led to the loss of the money but this would not have been the case had the Pacific Motors, Limited remained solvent, but now we see this vain attempt made—as I view it—to visit the loss upon an innocent purchaser who gave valuable consideration for the motor-car—bought from the ostensible owners thereof—the sale being made to him in the ordinary course of business by the Pacific Motors, Limited and the plaintiff so conducted itself as to make it possible for that sale to be made. In my view it is idle contention to attempt to present this case in any other way.

With respect to the criminal proceedings, they cannot be held to be at all relevant to the matter that has to be decided here. It is plain that the plaintiff utilized the defendant to launch criminal proceedings against Swanston—Swanston now being in the penitentiary for fraud in connection with the sale of the motor-car in question—and evidence given by the defendant in the case of the Crown sworn to by the defendant is sought to be relied upon as shewing that the defendant made some admission that the car was Swanston's car. I can well understand how the defendant could be confused in the matter with the plaintiff presenting its case to the defendant, the assignment of the conditional sale agreement from Swanston to it and all the surrounding facts, but it is to be remembered all these facts were not known to the defendant when he purchased the motor-car, they are facts, so far as he is concerned, after the event. In this connection I would refer to what the learned trial judge said of the defendant, and he had an opportunity that this Court has not of seeing the witness and observing his demeanour, most valuable in deciding as to credibility and honesty. The learned judge has said in his judgment [*ante*, p. 63]:

MCPHILLIPS, J.A.

"I was much impressed with the defendant's rugged honesty and truthfulness. Notwithstanding his evidence during the criminal proceedings against Swanston I am satisfied that when he purchased the motor-car he believed he was buying from Pacific Motors, Limited."

Folkes v. *King* (1923), 1 K.B. 282, 295, 297, 305, is a case very much in point in this case and the decision is upon analogous statute law (*Lowther* v. *Harris* (1927), 96 L.J., K.B. at pp. 170, 172).

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of Education (1927), 61 O.L.R. 85, is a case much in point and that case was affirmed in (1928), S.C.R. 200.

I would refer to pertinent language of Masten, J.A. in *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601 at p. 604:

"The business of the Auto Motor Sales Company was to sell new and second-hand automobiles. In the carrying on of that business the defendant company co-operated with them by financing their operations. The object of both parties was to promote the sale of automobiles to the public on credit. That was the business in which they were engaged and in which they were co-operating with each other."

That was exactly the business that the Pacific Motors, Limited and the plaintiff were engaged in, but because the Pacific Motors, Limited has become insolvent the plaintiff wishes to recoup itself by compelling the defendant to deliver up to it a motor-car he bought in good faith and gave valuable consideration for, the sale being made to him in the ordinary course of business which the plaintiff made possible or contributed to by consenting to the motor-car being carried on the sale floor of the Pacific Motors, Limited. The statute law wholly supports the judgment of the learned trial judge—upon the facts of the present case—and in my opinion the contention advanced upon the part of the plaintiff is without merit. That which is being attempted now by the plaintiff is to make an innocent purchaser liable for its careless conduct and it is indeed fortunate that the Legislature has anticipated such being done, and protected the innocent purchaser.

MCPHILLIPS, J.A.

I would dismiss the appeal.

MACDONALD, J.A.: If convinced that the learned trial judge was clearly wrong in accepting the respondent's evidence because in an important respect it differed from his evidence given in a criminal trial I would allow the appeal. But a review of the evidence discloses some justification for the very strong view taken by the trial judge as to the "rugged honesty and truthfulness" of the respondent and following the usual practice I would not interfere.

MACDONALD, J.A.

Appeal dismissed, Macdonald, C.J.B.C. and Galliher, J.A. dissenting.

Solicitors for appellant: *Lucas & Lucas.*

Solicitors for respondent: *Hamilton Read & Paterson.*

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SYMINGTON v. REIFEL *ET AL.*

Contract—Excise Act—Procuring evidence to convict under—Payment on scale according to length of imprisonment—Public policy—"Ex turpi causa non oritur actio."

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The plaintiff who had been convicted for a breach of the Excise Act advised *Richmond* his solicitor that one Ball, against whom he and certain others had a grievance, had likewise committed a breach of the Excise Act. *Richmond* then approached the defendant Lobb who was in touch with the other parties who were eager to be revenged on Ball, as Ball had given information to the Customs Commission which resulted in heavy penalties being imposed on said parties, and he entered into an agreement with Lobb on behalf of himself and the plaintiff to secure evidence against Ball, shewing that he had been guilty of a breach of the Excise Act for which *Richmond* was to receive from Lobb $150 for bringing about the prosecution, $1,000 when a conviction was secured, and $1,000 for each month that Ball was sentenced to serve. *Richmond*, with the plaintiff's assistance, then secured the necessary evidence, and on it being submitted to the Customs officials proceedings were instituted against Ball, who was convicted and sentenced to 12 months' imprisonment. Under the contract *Richmond* was paid through Lobb two sums of $100 and $550 before the trial, $1,000 after Ball was convicted and $850 after Ball's appeal was dismissed. The defendants refusing to make any further payments, Symington brought action for the balance due under the contract. The action was dismissed on the principle *"Ex turpi causa non oritur actio."*

Held, on appeal, affirming the decision of MURPHY, J. that as the contract provides for remuneration upon a sliding scale, corresponding in amount to the length of the sentence secured by the informer's evidence, this is so direct and inevitable an incentive to perjury and other nefarious conduct, that it is not in the public interest to countenance a transaction that is so dangerous to the administration of criminal justice.

Statement

APPEAL by plaintiff from the decision of MURPHY, J. of the 12th of July, 1930 (reported, *ante*, p. 172) in an action to recover certain sums due under a contract to secure evidence against one Ball to prove that he had been guilty of a breach of the Excise Act. In February, 1928, the Customs authorities prosecuted the plaintiff Symington for a breach of the Excise Act. Symington engaged one *Richmond*, a solicitor, to defend him. While discussing the case Symington told *Richmond* that one Ball had likewise committed a breach of the Excise Act.

Ball had been engaged in giving the Customs Commission information which resulted in heavy penalties being imposed on certain parties. *Richmond* knew that one Lobb was in touch with these parties who were eager to be revenged on Ball, so *Richmond* sent for Lobb and then entered into an agreement whereby *Richmond,* with the assistance of Symington was to secure evidence against Ball shewing that Ball was guilty of a breach of the Excise Act, lay it before the Customs authorities and endeavour to have them prosecute Ball, or failing the Customs authorities the Attorney-General. In return *Richmond* was to receive from Lobb $150 for bringing about the prosecution, $1,000 for the conviction when secured and an additional $1,000 for each month that Ball would be sentenced to serve. Proceedings were taken against Ball, who was convicted and sentenced to twelve months' imprisonment. Under the contract Lobb paid Richmond $100 in March, 1929, $550 later on, $1,000 soon after Ball was convicted, and $850 in December after Ball's appeal was dismissed. The parties for whom Lobb was acting then refused to make any further payments and an action to recover the balance due under the contract was dismissed.

Statement

The appeal was argued at Vancouver on the 23rd to the 28th of October, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: You cannot look into the motives that bring about a contract: see Leake on Contracts, 7th Ed., 3; *The Marquis of Downshire* v. *Lady Sandys* (1801), 6 Ves. 107 at p. 114; *Williams* v. *Cawardine* (1833), 2 L.J., K.B. 101; 34 Cyc. pp. 1740 and 1744. On the question of the morality or immorality of the tranaction see *Toronto Electric Light Company Limited* v. *Toronto Corporation* (1917), A.C. 84; *Bennett* v. *Clough* (1818), 1 B. & Ald. 461 at p. 463; *Sissons* v. *Dixon* (1826), 5 B. & C. 758. In order to avoid a contract which can be legally performed it must be shewn there was a wicked intention to break the law: see *Waugh* v. *Morris* (1873), L.R. 8 Q.B. 202; *Farmer's Mart Lim.* v. *Milne* (1914), 84 L.J., P.C. 33; *Barton* v. *Muir* (1874), 44 L.J., P.C. 19 at p. 24; Bullen & Leake's Precedents of Pleadings, 7th

Argument

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Ed., 591. The point the learned judge decided the case on was never at issue: see *Day* v. *Day* (1889), 17 A.R. 157 at p. 161. Assuming Symington did commit perjury, that has nothing to do with the contract: see *Wetherell* v. *Jones* (1832), 3 B. & Ad. 221 at pp. 225-6; *The Shrewsbury and Birmingham Railway Company* v. *The London and North-Western Railway Company* (1852), 16 Beav. 441 at p. 451; *Petherpermal Chetty* v. *Muniandy Servai* (1908), 24 T.L.R. 462; *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625; Addison on Contracts, 6th Ed., 6. The offer of a reward is a contract enforceable by law: see *Lancaster* v. *Walsh* (1838), 4 M. & W. 16; *England* v. *Davidson* (1840), 11 A. & E. 856; *Smith* v. *Moore* (1845), 1 C.B. 438; *Thatcher* v. *England* (1846), 3 C.B. 254; *Neville* v. *Kelly* (1862), 12 C.B. (N.S.) 740. They rely on *Mayor, &c. of Salford* v. *Lever* (1890), 59 L.J., Q.B. 483 at p. 489, but the facts here are different. "Maintenance" has no application to criminal proceedings: see *Grant* v. *Thompson* (1895), 72 L.T. 264. The morality or immorality or legality or illegality of a contract is not contrary to public policy unless the Legislature says so: see *Richardson* v. *Mellish* (1824), 2 Bing. 229; *Printing and Numerical Registering Company* v. *Sampson* (1875), L.R. 19 Eq. 462; *Janson* v. *Driefontein Consolidated Mines, Limited* (1902), A.C. 484 at p. 490 *et seq.*

Argument

J. W. deB. Farris, K.C., for respondent: The evidence does not disclose any contract with the defendant Brewery. The contract was with Lobb and he alone. The money was given to Lobb by one Samett who was a sales manager for the Vancouver Breweries, but he had no authority from the company to make these payments and could not bind the company. This contract on its face is contrary to public policy: see Halsbury's Laws of England, Vol. 7, p. 360; *Day* v. *Day* (1889), 17 A.R. 157 at pp. 159 and 161. It is an illegal contract and lack of pleadings will not prevent the Court from so finding: see *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724; *Major* v. *The Canadian Pacific Ry. Co.* (1922), 64 S.C.R. 367 at p. 371. Illegality appearing on the plaintiff's case prevents him from recovering: see *Farmers' Mart, Lim.* v. *Milne* (1914), 84 L.J., P.C. 33; *Scheuerman* v. *Scheuerman* (1916), 52 S.C.R. 625. This tends to corrupt the administration of justice: see Hals-

bury's Laws of England, Vol. 7, p. 398; Leake on Contracts, 6th Ed., 520. If we can shew they bargained to put a man in gaol then it is an illegal contract, the question of justice is entirely subordinate: see *Dominion Fire Insurance Co.* v. *Nakata* (1915), 52 S.C.R. 294 at p. 297; *Butler* v. *Butler* (1888), 13 P.D. 73; *Pearce* v. *Brooks* (1866), L.R. 1 Ex. 213. This is not a contract that is in the interest of public policy to permit. There is a sliding scale of remuneration, the length of the sentence being very material: see *Stanley* v. *Jones* (1831), 7 Bing. 369; *Mayor &c. of Salford* v. *Lever* (1890), 59 L.J., Q.B. 483. The questions that must be answered in this case are (1) Was Lobb authorized to make the agreement? (2) Was he acting within the scope of his authority? (3) Did the company ratify? (4) Is there any evidence of giving authority to make the agreement? See *Hedican* v. *The Crow's Nest Pass Lumber Co.* (1914), 19 B.C. 416; *Wright* v. *Glyn* (1902), 1 K.B. 745; *Phosphate of Lime Co.* v. *Green* (1871), L.R. 7 C.P. 43 at p. 53; *Biggerstaff* v. *Rowatt's Wharf* (1896), 65 L.J., Ch. 536 at p. 540; *Doctor* v. *People's Trust Co.* (1913), 18 B.C. 382; *Dey* v. *Pullinger Engineering Co.* (1920), 89 L.J., K.B. 1229; *Russo-Chinese Bank* v. *Li Yau Sam* (1909), 79 L.J., P.C. 60 at p. 64. As to the powers of the company to be a party to this agreement see *Almon et al.* v. *Low et al.* (1894), 26 N.S.R. 340 at p. 346.

Argument

MacInnes, replied.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.: I agree with the trial judge in dismissing the action and would therefore dismiss the appeal.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed upon the ground that the contract set up by the plaintiff in paragraph 6 of his statement of claim (assuming it to have been entered into as the learned judge below has found was the case) is on the face of it void as contrary to public policy in the due administration of justice. In reaching this conclusion I am unable, with respect, to adopt all the reasons assigned by the said learned judge in dismissing the action on that ground

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because it has long ago been held (*cf. Williams* v. *Cawardine* (1833), 38 R.R. 328; 2 L.J., K.B. 101; Chitty on Contracts, 18th Ed., 726) that bad motives on the part of informers (such as cupidity, hatred, revenge, destruction of trade, rivalry, or fear of injury, which last is really a form of self-protection) do not vitiate a promise to pay for information they supply which will lead to the arrest, or prosecution, or conviction, as the case may be, of those criminals who violate the law of the land.

There is nothing, to my mind, that is wrong in law for private persons, such as, *e.g.*, banks, express and railway companies, as well as public Governments, to continue the long-established practice in this Province of offering rewards for evidence which will protect their private or public property and will bring about the arrest and conviction of train or bank robbers, or for a railway company to employ persons (agents provocateurs) to procure evidence to establish prosecutions for the common offence known as "knocking-down fares," which can only be prevented by such methods, and numerous convictions have, as the books shew, for years been obtained by that necessary means without any question of its legality.

MARTIN, J.A.

Every such agreement with informers depends, however, on its special circumstances, and there is a peculiar and sinister element in this case which distinguishes it from all the others that have been cited to us, *viz.*, that it provides for remuneration upon a sliding scale corresponding in amount to the amount of the sentence secured by the informer's evidence. This is so direct and inevitable an incentive to perjury, and other concomitant nefarious conduct, that it cannot be in the public interest to countenance a transaction which is dangerous to such an exceptional degree to the administration of criminal justice. Therefore our only proper course is, I apprehend, to dismiss the action on the plaintiff's own statement of the agreement sued on.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal on the ground that such an agreement is against public policy.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be dismissed. The short point upon which I proceed in so con-

cluding is this—that the agreement sued upon is an unlawful and illegal contract and against public policy. The plaintiff (appellant) was in a position to give evidence which would establish that one Ball was implicated with him (the plaintiff) in the illegal manufacture of alcohol and it would appear that the defendants (respondents) offered, promised and agreed with the plaintiff to pay the plaintiff for such disclosure certain sums of money, aggregating $13,350, upon which sum payments have been credited leaving the amount sued for $11,900. The plaintiff made the disclosures to the Crown officers and the plaintiff and four other witnesses named by the plaintiff gave evidence resulting in the conviction on the 5th of June, 1929, of Ball who was sentenced to pay a fine of $500 and to 12 months' imprisonment and to a further term of six months' imprisonment in default of payment of the fine of $500, and the plaintiff was also convicted with being in illegal possession of a still for the manufacture of alcohol. I have no hesitation in arriving at the conclusion that the agreement is in its nature an unlawful contract and is incapable of being enforced in a Court of law, which was attempted in the Court below but refused by the judgment of Mr. Justice MURPHY. The learned trial judge in his reasons for judgment has carefully and succinctly set forth the salient facts which I see no necessity to repeat and proceeded on the principle *ex turpi causa non oritur actio.* I may say that I am in full accord with the learned trial judge's dismissal of the action. I will content myself on the question of law, *i.e.,* the warrant for the dismissal of the action by a reference to the case of *Williams* v. *Bayley* (1886), L.R. 1 H.L. 200, 220, wherein Lord Westbury said "That you shall not make a trade of a felony." That was exactly what the agreement sued upon in this action was—the plaintiff traded evidence he could give and did give and the names of other witnesses who also gave evidence and the action is based on this class of an agreement, an unenforceable agreement. I would refer to what Lord Westbury said in the above case as reported in 35 L.J., Ch. 717 at p. 726:

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"Now, such being the nature of this transaction, I apprehend the law to be this, and, unquestionably, it is a law dictated by the soundest consideration of policy and morality, that you should not make a trade of felony. If

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you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. But that is the position in which these bankers stood. They knew well, for they had before them the confessing criminal, that forgeries had been committed by the son, and they converted that fact into a source of benefit to themselves, by getting the security of the father. Now, that is the principle of the law and the policy of the law, and it is dictated by the highest considerations. If men were permitted to trade upon their knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal offence and a great moral offence would be committed. And that is what I apprehend the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, misprision of felony. That was a case where a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and further converted it into a source of emolument to himself."

MCPHILLIPS, J.A.

And on page 727, we have Lord Westbury saying after dealing with the particular facts of that case:

"I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which, undoubtedly, in the first place, is a departure from what ought to be the principles of fair dealing between man and man; and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I think, therefore, that the decree which has been made in this case is a perfectly correct decree."

What Lord Westbury said is peculiarly applicable to the facts of the present case. Therefore I am in complete agreement with the disposition made of the case by the learned trial judge, that is, the dismissal of the action.

It follows that my opinion is that the appeal fails.

MACDONALD, J.A.

MACDONALD, J.A.: Action was brought to recover a balance due under an agreement entered into between the respondent Symington and one of the appellants Lobb, said to be acting upon his own behalf as well as on behalf of his co-defendants although respondent, Vancouver Breweries Limited, deny knowledge of, or responsibility for the execution of this contract. Summarized the contract was as follows:

(1) If one James Ball should be charged and prosecuted for the illegal manufacture of alcohol and convicted and fined only the respondent should receive from appellants the amount required to pay any fine imposed upon himself for a similar offence: $150 for counsel acting for him and an additional sum of $500. (2) If Ball should be sentenced to imprisonment for a month (omitting some of the details) respondent should receive $1,000. (3) If Ball should be sentenced to more than one month's imprisonment,

a further sum of $1,000 would be paid for each and every month of imprisonment called for in the sentence.

This last term opened up inviting possibilities as one might be sentenced to imprisonment for several years for the offence charged. Ball received a sentence of 12 months' imprisonment. He might have received a much longer term and no doubt the leniency of the Court was disappointing.

This contract was negotiated by a solicitor acting for the respondent. The learned trial judge describes him as a principal rather than an agent. That is immaterial. Part payment under it was made and action brought for the balance of $11,900.

I outline the agreement because its mere recital should be sufficient to dispose of the action. If *ex facie* its true nature is not disclosed, certainly when sufficient evidence was adduced to make its character apparent the Court should refuse to further assist respondent. It was mainly by respondent's evidence that Ball was to be convicted. His conviction was to be a source of profit to the respondent and the solicitor. The motives behind it were revenge and greed for money. The incentive to convict, doubtless by any means, fair or foul, was evident. Ball was probably guilty but if such agreements should be sanctioned by the Courts they might in future be applied against innocent parties. The stronger the evidence of the beneficiary of this contract the greater would, in all likelihood, be the sentence imposed and the larger the reward received. The reward would be so enticing that, as the learned trial judge stated, such a party "would not be over-scrupulous in his methods of obtaining the desired evidence."

It is difficult to conceive of an agreement of a more degrading or mischievous character; one more offensive to the public or so likely to pervert the course of justice. The case did not merit the lengthy discussion accorded to it at the Bar.

"It is admitted that any contract or engagement having a tendency, however slight, to affect the administration of justice is illegal and void": Lord Lyndhurst in *Egerton* v. *Earl Brownlow* (1853), 4 H.L. Cas. 1 at p. 162.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *C. S. Arnold.*

Solicitors for respondents: *Farris, Farris, Stultz & Sloan.*

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IN RE ESTATE OF J. D. BYRNE, DECEASED.

Succession duty—Life-insurance policies—Sister of deceased's wife named—Beneficiary—Proceeds subject to succession duty—R.S.B.C. 1924, Cap. 244, Sec. 5, Subsec. (1) (f)—B.C. Stats. 1929, Cap. 57, Sec. 3.

IN RE ESTATE OF J. D. BYRNE, DECEASED

A testator had taken out five insurance policies, in all of which his wife was named as beneficiary. His wife predeceased him and he then appointed his sister-in-law sole beneficiary under the policies. A motion for an order declaring that the moneys payable under the policies were not subject to succession duty was granted.

Held, on appeal, reversing the decision of GREGORY, J., that the insurance moneys were subject to be disposed of, notwithstanding the appointment of them to the respondent by the deceased, as he saw fit up to the time of his death, and are therefore subject to succession duty under subsection (1) (*f*) of section 5 of the Succession Duty Act as amended in 1929.

APPEAL by the Minister of Finance of the Province of British Columbia from the order of GREGORY, J. of the 2nd of July, 1930, declaring that the net amounts payable under five insurance policies on the life of James Dillon Byrne, deceased, are not liable to succession duty under the Succession Duty Act. James Dillon Byrne died in California, U.S.A., on the 17th of December, 1929. At the time of his death he had five life-insurance policies, one in the Catholic Mutual Benefit Association for $2,000, and four in the Canada Life Assurance Company aggregating $10,000. Owing to a reduction made by the Catholic Mutual Benefit Association on all beneficiary certificates and to deceased having borrowed certain moneys against his policies in the Canada Life Assurance Company, the net amount payable on the five policies at the time of his death was $8,495.10. The original beneficiary under said policies was the deceased's wife, but as she predeceased him, he then appointed his sister-in-law, Kate Currie Reardon, the petitioner herein, sole beneficiary under the said policies. She is also sole executrix and trustee under his last will. The petitioner objected to the assessment of succession duty in respect to the said policies and upon motion by the petitioner to the Supreme Court an order was made as above stated.

Statement

The appeal was argued at Vancouver on the 17th and 18th

of November, 1930, before MACDONALD, C.J.B.C., GALLIHER and MACDONALD, JJ.A.

Beeston, for appellant: Under the Act this money is subject to succession duty: see *In re Succession Duty Act and Wilson* (1926), 37 B.C. 336. After his wife's death the testator made the petitioner beneficiary under the policies, but after so doing he could have disposed of them otherwise if he saw fit up to the time of his death, so that under the amendment in 1929 to subsection (1) (*f*) of section 5 the amount received under the policies is subject to taxation: see *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1920), 90 L.J., K.B. 113 at p. 117.

Alfred Bull, for respondent: The petitioner is the beneficiary named in the policies and the moneys are not subject to succession duty: see *Re Templeton* (1898), 6 B.C. 180; *Partington* v. *The Attorney-General* (1869), L.R. 4 H.L. 100 at p. 122; *Blackwood* v. *The Queen* (1882), 8 App. Cas. 82 at p. 91; Quigg on Succession Duty in Canada, 132. It is only what is included in his estate at the time of his death that is taxable: see *Attorney-General* v. *Dobree* (1900), 1 K.B. 442 at p. 450; *Earl Cowley* v. *Inland Revenue Commissioners* (1899), A.C. 198 at p. 212. Petitioner is a sister of deceased's wife and not of the preferred class.

Argument

Beeston, replied. *Cur. adv. vult.*

6th January, 1931.

MACDONALD, C.J.B.C.: The only question argued was the right of the Province to collect succession duty from the insurance moneys mentioned in the petition.

The respondent is the sister-in-law of the deceased and thus not a preferred beneficiary under the Insurance Act, 1925 (B.C.), Cap. 20.

By section 5 (1) of the Succession Duty Act, Cap. 244, R.S.B.C. 1924, the following properties shall be subject on the death of any person to succession duty as thereinafter provided:

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"(*a*) All property of such deceased situate within the Province."

"(*f*) Any property of which a person dying after the 31st day of August, 1900, was at the time of his death competent to dispose; and a person shall be deemed to have been and to be competent to dispose of property if he had or has such an estate or interest therein, or such general or limited

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power as would, if he were *sui juris*, enable him to dispose of the property as he should think fit."

The said insurance moneys were subject to be disposed of notwithstanding the appointment of them to the respondent by the deceased as he might think fit up to the very moment of his death and are therefore subject to succession duty.

The appeal is allowed.

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

MACDONALD, J.A.

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

Appeal allowed.

Solicitors for appellant: *Noble & Beeston.*
Solicitors for respondent: *Walsh, Bull, Housser & Tupper.*

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MERCER v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED.

Negligence—Street-car—Starting with too much speed at curve—Passenger thrown from his feet—Damages—Jury—Misdirection.

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On a point of misdirection in an action for damages for negligence the charge as a whole must be read, and if statements are made by the learned judge which go too far, they may be rectified by other statements so as to make the whole charge consistent with the law.

Statement

APPEAL by defendant from the decision of MURPHY, J. of the 16th of September, 1930, and the verdict of a jury in an action for damages for negligence. On the 26th of December, 1929, at about 6 o'clock in the evening, the plaintiff boarded a southbound street-car of the defendant Company on Main Street before it reached 18th Avenue. At 18th Avenue there is a double curve in the street-car line, and as the plaintiff was going to his seat he fell and injured his knee. He complained that the car started up too quickly before he got to his seat, the result being that he was thrown off his feet. The jury found the

defendant Company negligent and gave $2,212 special damages and $2,500 general damages for which judgment was entered.

The appeal was argued at Vancouver on the 27th and 28th of October, 1930, before MACDONALD, C.J.B.C., GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: As to damages, the evidence shews there was a diseased condition of the bone of the knee before the accident. The motorman saw him limping as he came on to the car. The verdict is perverse as there is no evidence to support a verdict for $5,000. In the next place, there was misdirection as to the care to be taken for the safety of passengers: see Beven on Negligence, 4th Ed., pp. 766 and 1175; *Stokes* v. *The Eastern Counties Railway Company* (1860), 2 F. & F. 691; *Ford* v. *The London and South Western Railway Company* (1862), *ib.* 730 at p. 733; *Hill* v. *Burritt Co.* (1930), 2 D.L.R. 220 at p. 222. Argument

C. L. McAlpine, for respondent: The evidence is conflicting as to whether the bone in plaintiff's knee was diseased prior to the accident and the jury decided in our favour: see *McDonald* v. *Owen* (1924), 1 D.L.R. 85.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.: I think there was sufficient evidence to sustain the jury's finding that the accident was brought about by reason of the defendant's car having been run at an excessive rate of speed in the circumstances. The circumstance which called for care was that the car was approaching a sharp switch and in making the switch the car swayed so as to throw the plaintiff down and cause his injuries. One of the principal points argued, however, was that there should be a new trial because of misdirection, which is alleged as follows: MACDONALD, C.J.B.C.

"Negligence, as I say, is the absence of reasonable care under all the circumstances. A street railway company in common with other companies that carry passengers are not insurers. It does not absolutely guarantee that its passegners will not be hurt, but the law requires that such a company shall, as far as human care and foresight can go, provide a safe conveyance for its passengers."

It may be that the learned judge in part of this statement overstated the duties of the Railway Company, but he made it

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clear that negligence was the absence of reasonable care in all the circumstances which is the true definition. Frequently throughout his charge the learned judge emphasizes this. The charge as a whole must be read and if statements are made by the learned judge which go too far they may be rectified by other statements so as to make the whole charge consistent with the law. The rule as to this has been authoritatively laid down in the Privy Council in *Blue & Deschamps* v. *Red Mountain Railway* (1909), 78 L.J., P.C. 107. It was also claimed that the following language was misdirection:

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"In this action it is not sufficient for the plaintiff to adduce evidence to you that the street-car was going more than ten miles an hour through a thickly populated portion of the city. That may be a breach of the regulations. It would be."

The learned judge goes on to say:

"It does not follow at all because the defendant Company—assuming you find it proven—has been guilty of such a breach, that the plaintiff must necessarily recover, because you must remember the other element, namely, that it must be shewn that that negligence was the proximate cause of the injury. It might not have had anything to do with the injury."

I do not see any misdirection in that statement.

I think the appeal must be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: Reading the learned trial judge's charge to the jury as a whole and the answers to the questions submitted to them I do not think any prejudice was occasioned to the defendant and would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I cannot say that the judgment under appeal is wholly wrong and that being my view the appeal must in my opinion stand dismissed.

MACDONALD, J.A.

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

Appeal dismissed.

Solicitor for appellant: *V. Laursen.*

Solicitor for respondent: *W. H. Campbell.*

LLOYD v. HANAFIN.

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Negligence — Motor-vehicles — Collision — Intersection — Right of way— Damages.

At about five o'clock in the evening the plaintiff was proceeding east on 10th Avenue. On nearing Alma Road where there was a "slow" sign he slowed down to ten miles an hour. He then saw the defendant close to the intersection coming south in his car on Alma Road, but he proceeded across the intersection and his rear left wheel was struck by the defendant and his car overturned. The plaintiff recovered judgment in an action for damages for negligence.

Held, on appeal, affirming the decision of RUGGLES, Co. J., that as the evidence disclosed that the parties arrived at the intersection at substantially the same time the trial judge below took the proper view that the plaintiff had not lost his right of way and the collision was solely due to the defendant's negligence.

APPEAL by defendant from the decision of RUGGLES, Co. J. in an action for damages resulting from a collision between the plaintiff's and defendant's automobiles. On the 23rd of December, 1929, at about 5 o'clock in the evening the plaintiff was proceeding easterly on 10th Avenue in his automobile, he slowed down to ten miles an hour when nearing the intersection of Alma Road. He states that he looked to his left and saw the defendant's car approaching the intersection from the north on Alma Road, but he continued on and the rear part of his car was struck by the defendant's car, who, he says, was travelling at an excessive speed. There was a slow sign on 10th Avenue and a double street-car line on Alma Road also a double street-car line on 10th Avenue from the west that turned north into Alma Road. Statement

The appeal was argued at Vancouver on the 19th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellant: There was a slow sign on 10th Avenue. As to the objection that contributory negligence is not pleaded, we submit that it is not necessary. We have pleaded fault: see Bullen & Leake's Precedents of Pleadings, 8th Ed., Argument

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8. The evidence shews we were on the intersection appreciably ahead of the plaintiff and this, in addition to the fact that there was a slow sign on 10th Avenue gives us the right of way: see *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512; *Swadling* v. *Cooper* (1930), 46 T.L.R. 597; *Nelson* v. *Dennis* (1930), 3 D.L.R. 215.

Argument

Sloan, for respondent: There was a slow sign on 10th Avenue but the defendant admits the plaintiff slowed down to ten miles an hour. He had the right of way over traffic coming from the left. It was held by the trial judge that he slowed down sufficiently and had the right of way. If the defendant did not see the plaintiff he was negligent, as it was his duty to see him: see *Johnson* v. *Giffen* (1921), 3 W.W.R. 596.

Bull, replied.

Cur. adv. vult.

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MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appeal should be dismissed. The only point upon which I wish to comment in respect to His Honour's reasons for judgment is the question of the right of way. The vehicle coming from the right has by statute or by-law the right of way, but where the other vehicle has reached the intersecting street substantially ahead of the one having the right of way he is not obliged to wait upon the other if the way appears to be clear. In this case it appears the two parties reached the intersection at substantially the same time. Therefore the one having the statutory right of way should have been allowed to take it. In this case he was not given it and injury to the plaintiff ensued. The right of way at intersections must be decided upon the circumstances of each particular case and not by a hard and fast rule unless both parties arrive at the intersection at the same time when the one coming from the right would undoubtedly be entitled to the right of way. The rights of the parties would have to be decided by viewing the circumstances of the case reasonably and deciding whether one or the other of the parties acted with reasonable care or with a clear right. In this case the parties having arrived at the intersection at substantially the same time, if the defendant did not see the plaintiff it was his own fault and he was the real cause of the plaintiff's injury.

MARTIN, J.A.: It is conceded that the appellant (defendant) was guilty of negligence but it is submitted that the learned judge below should also have found that the plaintiff was guilty of contributory negligence, and reliance is chiefly placed upon the decision of this Court in *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512, and if Mr. *Bull's* view of the extent of that case is correct, it does lend support to his submission. It must, however, be read in the light of the circumstances on which it is founded, and the width of the streets in question is a fact of the first importance yet that is not stated in the report, though according to the statutory Official Map of Victoria the said streets Johnson and Quadra are both practically a chain wide respectively at the intersection where the collision took place, while in this case it was agreed by counsel that the street in question is 80 feet wide and a chain between the curbs. My brother MCPHILLIPS and I dissented from that judgment and so we did not express ourselves on the question so much debated in this case, of when the actual crossing of the intersection began and the effect of it, but I understand that the majority of the Court did not intend to express the opinion that a motor-car which has the right of way and is proceeding on it in a proper manner is displaced from that right merely because, *e.g.*, another car reaches the intersection (which means at the property lines) a few feet ahead of it and then proceeds to "cross its bows." In my opinion before the right of way of one car can be displaced by another car there must be, under the circumstances of each case, a reasonable and substantial prior entry upon the crossing of the intersection by that other car.

MARTIN, J.A.

In the present case the learned judge below took the proper view that, on the facts before him, the plaintiff had not lost his right of way and that the collision was solely attributable to the negligence of the defendant, and so the appeal should be dismissed.

GALLIHER, J.A.: I see no good reason for disturbing the judgment below and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This is an appeal with respect to damages to a motor-car brought by the plaintiff against the defend-

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ant, and the learned trial judge, RUGGLES, Co. J., in the County Court of Vancouver found for the plaintiff and held that there was no negligence on the part of the plaintiff or any contributory negligence. I was satisfied upon the argument of the appeal that the learned judge arrived at the proper conclusion and am confirmed in that view after further consideration. I may say that the learned counsel for the defendant (appellant) admitted that if it could be said that his client was not in the intersection of the street upon which the accident took place when he proceeded along Alma Road—he then being at the building line, *i.e.*, the width of the sidewalk intervening before he would be upon the travelled way—that he could not contend that his client was other than in the wrong in proceeding as the plaintiff (respondent) would have the right of way (Highway Act, Cap. 103, R.S.B.C. 1924, Sec. 19). The facts were that the plaintiff was going east on 10th Avenue in the City of Vancouver and the defendant going south on Alma Road. The plaintiff had by statute the right of way, the defendant did not see him—he ought to have seen him—and cannot on that account be excused and under the circumstances the defendant was clearly negligent in proceeding without advising himself of the situation upon entry into the intersection. I cannot agree with the submission of the learned counsel for the defendant that being at the building line—he was then in the intersection—he would not be in the intersection until he was upon the travelled way, *i.e.*, beyond the outer side of the sidewalk line. It is true there was a stop sign against the plaintiff. The learned judge found that the plaintiff obeyed that sign and was only going at ten miles an hour, a speed reasonable in view of all the circumstances. The learned judge said:

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> "He [the plaintiff] had seen the defendant away up at the north line of the intersection. I think then that the question of the car in front, whether there was one or whether there was not, I do not care—that would not interfere with the defendant seeing the plaintiff. He should have seen him."

The case is undoubtedly one of the defendant blundering along and recklessly failing to advise himself of the conditions then present. In a case of this kind there can be but one answer and that is that the defendant was solely to blame for the accident and must be held answerable for the damages occasioned

by his negligence—an actionable wrong which entitled the learned judge to assess the damages in favour of the plaintiff as against the defendant. In *Johnson* v. *Giffen* (1921), 3 W.W.R. 596, being a judgment of the Appellate Division of Alberta, McCarthy, J., who delivered the judgment of the Court said at p. 598:

"All operators of motor-vehicles in addition to exercising reasonable care and caution for the safety of others who have the right to use the highways must anticipate the presence of others. They have no right to assume that the road is clear but under all circumstances and at all times they must be vigilant and must anticipate and expect the presence of others."

In view of all the facts and circumstances of this case the learned judge rightly found for the plaintiff. The case is not one calling for the consideration of the law of contributory negligence as there is no evidence which would have entitled the learned judge to have so found and the learned judge expressly found that there was no contributory negligence upon the part of the plaintiff. Even were it a case of contributory negligence it is to be borne in mind that that does not wholly absolve the defendant and in this connection I would draw attention to the very recent case of *Swadling* v. *Cooper* (1930), 46 T.L.R. 597. There in the unanimous judgment of the House of Lords, delivered by Viscount Hailsham. His Lordship said at p. 598:

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"If, although the plaintiff was negligent, the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover."

I would dismiss the appeal.

MACDONALD, J.A.: I think counsel for appellant rightly submitted that respondent was guilty of contributory negligence. The appellant entered upon the intersection before respondent's car reached it. A further question arises, however. Appellant had the right to cross the intersection ahead of respondent's car but was obliged to exercise due care in doing so. It is conceded that appellant was negligent inasmuch as he did not see respondent's car approaching the point of impact until he was about 6 feet away from it. His attention was improperly and unnecessarily diverted in another direction. The decisive point is the ultimate negligence, if any, forming the real cause of the accident. While the learned trial judge does not address himself

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to this point his general finding in favour of respondent is entitled to some weight even though in error in holding that respondent was not guilty of any negligence. Apart, however, from the trial judge's general finding in favour of respondent I think on the facts the ultimate negligence causing the accident was that of appellant. At a time subsequent to respondent's negligent act in driving across the intersection in front of appellant's car the latter had an opportunity, after his original negligent act in not keeping a proper look out was committed, to avoid the accident by stopping or turning his car to the right enabling him to pass behind respondent's car. It is important on this point to notice that his car came into contact with the rear left wheel of respondent's car. All respondent could do at that stage, to avoid the accident, after his original fault, would be to increase his speed to get out of the way. It is not easy to materially increase the speed of a car in a second or two when one is driving slowly. Appellant, however, by his apathy and neglect either incapacitated himself from making the movement referred to in time, *viz.*, a swerve to the right or in the alternative failed to make that necessary turn of a few feet to clear the other car. Viewing it in this light and bearing in mind that appellant's original negligence need not necessarily be segregated, so to speak, from his ultimate negligence (the two may in a measure overlap) I think we must hold that appellant had the last chance to avoid the accident and failed to take advantage of it.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

AMERICAN SEAMLESS TUBE CORPORATION *ET AL.* v. GOWARD.

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AMERICAN SEAMLESS TUBE CORPORATION v. GOWARD

Company law—Agreement to purchase treasury shares—Shares of another transferred to defendant and registered in his name—Insolvency—Action by creditors—Repudiation—California law—Whether applicable—Estoppel.

An agent of a California company went to Victoria to sell shares and through him the defendant applied for shares in the Company. His understanding was that he was to receive treasury shares but he actually received shares that were transferred to him by another person. The defendant's name was entered upon the Company's register to his knowledge, he received dividends, and later contributed funds to assist in rehabilitating the company but it was not until after this action was brought that he discovered he had not received treasury stock. He then repudiated ownership of the stock. An action by the creditors of the Company to fix the defendant with liability for the Company's debts in proportion to the amount of his shares in accordance with the laws of California, was dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that the plaintiff being in the position of that of a person having a statutory right to bring an action against shareholders it must first appear that the defendant was a shareholder before he can succeed, but the defendant was led to believe he was buying treasury stock by the statement of the Company's agent when as a fact he was not given treasury shares, so that there was no contract between the Ahlburg Company and the defendant for the shares standing in his name.

Held, further, that although the defendant permitted his name to be entered on the books of the Company as a shareholder, was paid a dividend and after the Company became insolvent he joined with other parties in sending an agent to investigate with a view to rehabilitating the company, it was not till after this that he discovered he did not receive treasury stock. Estoppel *in pais* can only be set up in transactions between the parties to the action or persons claiming through a party and the Ahlburg Company not being a party to this action, the plaintiffs are not entitled to claim through that company.

Per MCPHILLIPS, J.A.: Even if it could be said that the defendant was a shareholder, upon the facts of the case no "mutual intention" of the application of the California law was established nor by "fair implication" could it be implied (see Lord Watson in *Hamlyn & Co.* v. *Talisker Distillery* (1894), A.C. 202 at p. 212).

APPEAL by plaintiffs from the decision of MURPHY, J. of the 10th of April, 1930 (reported, 42 B.C. 551), in an action

Statement

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in which the creditors of the Ahlburg Gasoline Corporation, a body corporate, incorporated under the laws of the State of California, sought to fix the defendant, an alleged shareholder therein, with liability according to the laws of California for a proportionate part of its debts. An agent of the Ahlburg Gasoline Corporation had been sent to Victoria to sell shares, and through him the defendant purchased 100 shares of the par value of $100 each in the Ahlburg Gasoline Corporation. The defendant claimed that the shares were offered to him by the agent of the Company as shares to be allotted by the Ahlburg Gasoline Corporation to him, whereas in truth he was given shares previously held by one Frank Ahlburg in lieu of shares in the unissued capital stock of the company.

The appeal was argued at Vancouver on the 15th, 16th and 17th of October, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Maclean, K.C., for appellants: Goward had 100 shares in the Ahlburg Gasoline Company, a California company that went into bankruptcy in 1927. In the summer of 1926 he bought 50 shares upon which he received three dividends, and in the November following he bought 50 more shares. Under the laws of California he as a shareholder is liable to the creditors of the Corporation for a proportion of the debts, dependent upon the number of shares he holds, and when worked out he is found liable for one-sixty fifths part of the whole debt, namely $873. This case must be decided by the law of California: see *Allen* v. *Standard Trusts Co.* (1919), 3 W.W.R. 974, and on appeal (1920), 3 W.W.R. 990. The evidence shews Goward did not apply for treasury stock: see *Allan* v. *McLennan* (1916), 23 B.C. 515 at p. 518; *Re Bankers Trust and Barnsley* (1915), 21 B.C. 130. There is no proof of any misrepresentation: see Halsbury's Laws of England, Vol. 20, p. 694, Sec. 1672; *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325 at p. 351; *First National Reinsurance Company* v. *Greenfield* (1921), 2 K.B. 260 at p. 265; *Bank of Ottawa* v. *Jones* (1919), 2 W.W.R. 4 at p. 20; *Scholey* v. *Central Railway Company of Venezuela* (1868), L.R. 9 Eq. 266 (n). He received dividends on the stock he purchased: see *Gouthwaite's Case* (1850), 3

De G. & Sm. 258; *Re Gramm Motor Truck Co. of Canada and Bennett* (1915), 35 O.L.R. 224 at p. 231; *Cheltenham Railway Co.* v. *Daniel* (1841), 2 Q.B. 281; *Bernard's Case* (1852), 5 De G. & Sm. 283; *Kent* v. *Freehold Land and Brickmaking Company* (1867), L.R. 4 Eq. 588 at p. 600. His conduct estops him from repudiating the shares: see *Lawrence's Case* (1867), 4 Chy. App. 421 at p. 423; *Re Thunder Hill* (1895), 4 B.C. 61; *In re Railway Time Tables Publishing Company* (1889), 42 Ch. D. 98; *Re James Pitken and Co. Limited* (1916), 114 L.T. 673; *In re James Burton & Son, Ld.* (1927), 2 Ch. 132; *Scott* v. *Deweese* (1900), 181 U.S. 202 at pp. 212-5. He cannot say he was induced by fraud to take this stock. That he is estopped by taking dividends see *In re James Burton & Son, Ld.* (1927), 2 Ch. 132; *Shean* v. *Cook* (1919), 180 Cal. 92; 179 Pac. 185; *Walter* v. *Merced Academy Ass'n.* (1899), 59 Pac. 136; *Perkins* v. *Cowles* (1910), 108 Pac. 711. As far as the creditors are concerned he is on the register as a shareholder and is liable: see *Brenaman* v. *Whitehouse* (1915), 148 Pac. 24. That the stockholders should contribute to the debts of the company is a statutory liability see *Hunt* v. *Ward* (1893), 34 Pac. 335.

Argument

J. W. deB. Farris, K.C., for respondent: These cases are distinguishable as the minds of the contracting parties here were not *ad idem*. Goward agreed to buy treasury stock but he got Ahlburg's shares. One becomes a shareholder by virtue of a contract and there never was a contract either by British Columbia law or California law. The Courts here will not impose any obligation on the defendant under the California law unless he agrees to it. See *Risdon Iron and Locomotive Works* v. *Furness* (1906), 1 K.B. 49. The case of *Allen* v. *Standard Trusts Co.* (1920), 3 W.W.R. 990 does not apply as there was a contract in that case. See also *Copin* v. *Adamson* (1874), 43 L.J., Ex. 161; *Emanuel* v. *Symon* (1908), 1 K.B. 302 at p. 314; *McCraken* v. *McIntyre* (1877), 1 S.C.R. 479 at p. 530; *Re Lake Ontario Navigation Co.* (1909), 20 O.L.R. 191; *Baillie's Case* (1898), 1 Ch. 110; *The Magog Textile & Print Co.* v. *Price* (1887), 14 S.C.R. 664 at p. 671; *Western Union Fire Insurance Co.* v. *Alexander* (1918), 2 W.W.R. 546; *Allan* v. *McLennan* (1916), 23 B.C. 515; *Fitzherbert* v.

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Dominion Bed Manufacturing Co. (1915), 21 B.C. 226; Buckley's Company Acts, 11th Ed., 236; Palmer's Company Precedents, 13th Ed., 194. It must be shewn that Goward submitted himself to the California law, but we say even the California Courts would not hold him liable: see *Ryon* v. *Mt. Vernon National Bank* (1915), 224 Fed. 429; 14 C.J. 950, sec. 1476; *Hobbs* v. *Tom Reed Gold Mining Co.* (1913), 129 Pac. 781; *Doe d. The Bishop of Rochester* v. *Bridges* (1831), 9 L.J., K.B. (o.s.) 113; *Pasmore* v. *Oswaldtwistle Urban Council* (1898), 67 L.J., Q.B. 635; *Waghorn* v. *Collison* (1922), 91 L.J., K.B. 735.

Argument

Maclean, in reply, referred to *Re Thunder Hill* (1895), 4 B.C. 61; *In re Railway Time Tables Publishing Company* (1889), 42 Ch. D. 98; *Bank of Ottawa* v. *Jones* (1919), 2 W.W.R. 4; *Re James Pitkin and Co., Limited* (1916), 114 L.T. 673; *International Casualty Co.* v. *Thomson* (1913), 48 S.C.R. 167.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.: The decisive question in this appeal, as it appears to me, is whether or not the respondent became a stockholder in the Ahlburg Gasoline Corporation, a Corporation created under the laws of California, and that if he is not such by agreement, whether he is estopped from alleging the contrary. The respondent was approached by one Brownlie who was offering stock in the said Gasoline Corporation for sale to the respondent, who is a resident of Victoria, British Columbia. Goward asked Brownlie why the Company was selling stock when it was paying dividends. Brownlie answered that the Company was expanding and acquiring new interests and wanted money for that purpose. Respondent agreed to buy 50 shares and subsequently another 50, making in all 100 shares at the par value of $100 per share, which he paid to Brownlie. It appears now instead of Company's shares Brownlie, without respondent's knowledge, transferred to him shares of Ahlburg and had them registered in the books of the Company in respondent's name. By the law of California undisclosed to Goward stockholders in a company, such as this one was, were liable for

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the debts of creditors as therein set out and the Corporation having become indebted to the plaintiff the plaintiff brought this action to recover from Goward the proportion of their debts which his alleged shares bore to the whole capital of the Company. That obligation is imposed by section 322 of the California Civil Code, article 1, and under section 3, article 12 of the Constitution of the State of California. Plaintiffs in this action claim the sum of $873.

In my opinion there was no contract between the said Ahlburg Gasoline Corporation and the respondent for the shares now standing in his name on the Corporation's books. Respondent thought he was buying treasury stock and he was led to this belief by the statement of Brownlie above referred to. While as a matter of fact there was delivered to him shares which were not treasury shares but the shares of Ahlburg himself. Therefore the respondent is not by contract a shareholder in the Ahlburg Gasoline Corporation. Section 322 gives the creditors of the Corporation the right of action against shareholders and since respondent is not a shareholder he is not liable unless he be estopped from setting up the want of validity to his contract.

MACDONALD, C.J.B.C.

I think it must be taken that the Ahlburg shares were transferred to respondent's name on the books of the Company with his acquiescence although he did not know that they were not treasury shares. The conduct relied upon to find estoppel is that respondent permitted his name to be entered on the books of the Corporation as a shareholder, and was paid a dividend by the Corporation, and that after the Corporation became insolvent he joined with other parties in sending an agent to California to investigate and if possible rehabilitate the Corporation. Respondent did not discover the true nature of what had been done until after the insolvency of the Corporation, and further when he assented to his shares being entered in his name he assented only to shares which he had agreed to buy being entered in the Corporation's books in his name and when he accepted a dividend he accepted it in the belief that he was a shareholder in respect to shares that he had agreed to buy, namely treasury shares. The sending of a representative to California to investigate resulted in nothing but that act could not be regarded as one which could be put forward as an estoppel. The debts had

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been incurred before this and the act aforesaid could not have prejudiced the plaintiffs. Again there is no evidence that the plaintiffs were prejudiced by any of the aforesaid acts of the respondent. They did not incur the debts relying upon respondent being a shareholder. There is no evidence to that effect. Estoppel *in pais* can be set up only in transactions between parties to the action or other persons claiming through a party. The Ahlburg Gasoline Corporation is not a party to this action, and I am of opinion that the plaintiffs are not entitled to claim through that Corporation. It is true that there is evidence by California professional witnesses to the effect that by reason of the said section 322, the shareholder is deemed to have entered into a contract with the creditors to pay what they are made liable to pay by the section; that a fictitious contract is implied to have been made by the Corporation acting for the shareholders and the plaintiff that the shareholders would pay these moneys. That seems to me to be rather a strained construction of the section, but assuming it to be the true construction the respondent not being a shareholder which is the only relationship between him and the corporation from which an agency could be implied it is not drawn within the operation of the section. Therefore nothing in the nature of an implied agreement or an agreement in which the Corporation is the agent of the shareholder can be maintained. If on the other hand the plaintiff's position is that of a person having a statutory right to bring action against shareholders then it must appear that the respondent was a shareholder before that can succeed and that I have decided, sustaining the trial judge, that he is not.

Other points were raised in argument, that is to say that the Corporation had no power to sell its shares at the date of the transaction between respondent and Brownlie, it not having then obtained the permit necessary under the law of California to enable it to sell shares. This point was not strongly pressed, and since it has become unnecessary to decide it, in view of what I have said above, I need express no opinion upon it.

The result is that the appeal should be dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.: Whether there was a contract or not should I think be determined by British Columbia law. If there was a contract then I think the interpretation and effect of that contract and the resultant liability thereunder should be determined by California law.

In the case at Bar had Goward received treasury shares he would (apart from what might be urged as to contracting for shares before permit being issued) have been in the same position as was the defendant in the case on appeal in Manitoba of *Allen* v. *Standard Trusts Co.* (1920), 3 W.W.R. 990. With the law as laid down in that case and the authorities cited, if I may respectfully say so, I am fully in accord. But it is to be noted that in the *Allen* case, *supra,* there was no dispute as to Sir William Whyte being a shareholder while here it is urged that Goward never was a shareholder and there was no contract. The learned judge below has found that there was no contract. Brownlie was sent up by Ahlburg the president of the Ahlburg Gasoline Company to obtain subscriptions for shares in that Company and in the course of negotiations with Goward Brownlie stated in answer to a question by Goward that they were making these sales of stock for the purpose of procuring money for enlarging their operations. Goward himself says that while he cannot say definitely that the thought entered his mind at the time he never contemplated anything but that he was buying treasury shares and I think he was justified in so believing by reason of what I have just stated.

He was given reissued shares of Ahlburg and on the face of the certificate there was nothing that would apprise him of this fact so that he never received what he was contracting for and the minds of the parties never met and I agree with the learned trial judge that there was no contract between the parties, unless a contract can be established by estoppel.

But another and more difficult question arises as to what position he is in as to the creditors of the Corporation which is now in liquidation and as I have already stated that I think it must be determined by the law of California.

Subdivision B, section 5, Cap. 111 of the Bankruptcy Act in force in the United States being a Federal Act and applicable in all the States is as follows:

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"The bankruptcy of a corporation shall not release its officers, directors or stockholders as such from any liability under the laws of the United States."

And in the California law in section 322, article 1, in the Civil Code under liability of stockholders it is enacted:

"Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation.

"Any creditor of the corporation may institute joint or several actions against any of its stockholders for the proportion of his claim payable by each, and in such action the Court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith."

The learned trial judge while he held that liability in the case of an *ex juris* stockholder should be determined under British Columbia law dealt with the question also under the California law and in either event determined that there was no liability.

GALLIHER, J.A.

In dealing with the British Columbia law the learned judge relied on the case of *Risdon Iron and Locomotive Works* v. *Furness* (1906), 1 K.B. 49. There the facts are shortly these: The Company was incorporated under the Joint Stock Companies Act as a limited company for the purpose of acquiring and working mines in (amongst other countries) the United States of America, and by the articles of association the directors were empowered to do all things necessary to comply with the requirements of the law of any country where the company might carry on business. The company acquired and worked mines in the State of California and purchased machinery from the plaintiffs. The company afterwards became insolvent and the action was brought for the defendant's proportion of the price of the machinery. It was there held that the defendant did not by becoming a member of the company upon the terms of the memorandum and articles of association authorize the directors to pledge his personal credit for the price of the goods supplied and that in the absence of express authority on his part the action could not be maintained against him affirming the judgment of Kennedy, J., in the Court below. The *ratio decidendi* of that case as I read it is not applicable to the circumstances of this case. The company in which Goward sub-

scribed for shares is incorporated under the laws of the State of California and is not a limited company. Goward, as I take it, had he received treasury shares, would have been bound by the laws of the State of California and would have been directly within the decision of *Allen* v. *Standard Trusts Co., supra.*

Then what is the position of the creditors in view of the fact that Goward appears on the books of the Company as a recorded shareholder? The mere fact that he so appears would not of itself constitute him a shareholder—in other words while it would be *prima facie* proof it would not necessarily be conclusive and evidence might be given that he was not a shareholder such as was given in the case of *Shean* v. *Cook* (1919), 179 Pac. 185.

By reason of difference of views expressed by the experts on California law called as witnesses we may look at United States decisions cited as authorities. *Shean* v. *Cook, supra,* is an authority in the circumstances of that case. These circumstances were that the husband of the defendant was the principal shareholder in the company—that he without the knowledge or consent of his wife transferred his shares to her and issued a certificate to her and recorded it in her name. He then took the certificate to her telling her what he had done but she repudiated the transaction and told him she would have nothing to do with the shares or the concerns of the company and endorsed the certificate in blank in order to have the shares retransferred and re-recorded in her husband's name which was not done so that when action was brought she still appeared on the books of the company as a shareholder. The Court held that she was not a shareholder and not liable.

I think the case at Bar really comes down to this: No contract having been found, is Goward estopped by reason of his acts and conduct from denying that he is a shareholder? And the following grounds are relied upon: Goward knew (1) that he was on the books of the Company as a shareholder; (2) he voluntarily permitted his name to be so recorded; (3) he was in receipt of dividends; (4) he took part with other shareholders in endeavouring to rehabilitate the Company when it got into difficulties.

It might be well to mention here that Goward did not know

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until this action was brought that the shares for which he was registered were not treasury shares. I think the doctrine of estoppel is dealt with in the same manner in the California Courts as it is in ours. Goward's position is that as there is no contract there can be no estoppel and that is in effect the finding of the learned judge below. Though the parties are not *ad idem* there may be a contract by estoppel. In Everest & Strode on Estoppel, 3rd Ed., under the heading "Contract by Estoppel" the learned author says at p. 239:

> "There can be no contract when the parties are not *ad idem* except by estoppel. In order for a contract by estoppel to arise, the circumstances must be such as to preclude one of the parties from denying that he has agreed to the terms of the other."

citing *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597 at p. 607. In that case Blackburn, J. says at p. 607:

> "But I have more difficulty about the second point raised in the case. I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other."

GALLIHER, J.A.

The circumstances here do not I think preclude Goward from denying that he ever agreed to accept reissued shares in the Company, his position being that all acts done by him and benefits accepted were done and accepted on the assumption that he was the holder of treasury stock which he believed he was and which he believed he was contracting for, and could not be taken to have agreed or assented to something he knew nothing about at that time, *viz.*, that the shares were transferred shares.

I would say here that there is no contract by estoppel, and no contract between the parties as they were not *ad idem*. In such a case can the California statute relied upon create any liability in favour of the creditor?

The evidence—Montgomery—"the liability is one created by statute, but is held to be contractual in its nature" and Richards, "The stockholder's liability is one created by statute."

I think the liability is predicated on the fact that he is a stockholder and in my opinion he is not.

As no contract has been established, and he has never agreed to the terms of the contract sought to be enforced, in this view

it is not necessary to deal with the question of fraud, or contracting for shares before permit issued.

I would dismiss the appeal.

MCPHILLIPS, J.A.: In my opinion the learned trial judge, Mr. Justice MURPHY, arrived at a correct conclusion and was right in dismissing the action. In any case, and if the respondent could rightly be deemed a shareholder the obligations that he would have been under would be such obligations only as the *lex loci celebrationis* would impose, not the *lex loci solutionis*. Here we have a novel territorial law of the State of California invoked whereby it is attempted to impose a liability upon the respondent upon the footing that he is a shareholder in a California company and liable for the debts owing by the company. Certainly a most startling contention, *i.e.*, that the mere purchase of shares in British Columbia has created a liability upon the individual shareholder and a privity of contract with creditors of the company, entitling creditors to sue the shareholders and that is what is attempted here. It is clear that under the law of England (and that law we have) the contract is presumed to be governed by the law of the country where the contract is made, and that was British Columbia. This is the law where the contract is partly or even wholly to be performed in another country. In the present case in the State of California. That is in its result this—that the *onus probandi* is upon the party asserting the obligation to establish that there was a contractual obligation assumed by the respondent to be bound by the law of the State of California and there is absolutely no evidence to support this.

MCPHILLIPS, J.A.

I would refer to what Lord Watson said in *Hamlyn & Co.* v. *Talisker Distillery* (1894), A.C. 202 at 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 construction 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

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ought to be attributed to them when the place of contracting is in one form, and the place of performance in another."

It could not for a moment be contended that in the present case the respondent contemplated that in purchasing shares in a California company, that notwithstanding his shares were fully paid, there was a further liability to unpaid creditors of the company. That is it could not be successfully said in this case that the purchase and holding of shares in the company, *ipso facto,* imposed an obligation upon the respondent to discharge the obligations of the company—that certainly cannot be said to have been contemplated when the contract was made. How-

MCPHILLIPS, J.A.

ever, it is not really necessary to pursue this subject in affirming as I do the judgment under appeal but were it necessary to do so I would consider that no enforceable cause of action was established by the appellant against the respondent even upon the premise that the respondent is a shareholder in the company and estopped from contending otherwise.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: The appellants, creditors of the Ahlburg Gasoline Corporation, a California company, sued respondent in British Columbia on the ground that, as the holder of 100 shares on the register of said corporation upon its bankruptcy (or whether bankrupt or not) he was, by California law, liable to pay to them such proportion of their claims as the amount of shares owned by him bore to the whole of the subscribed capital stock of the corporation. As the subscribed capital amounted to $6,500 respondent is sued for a one-sixty-fifth part of the debts of the company. Mr. Justice MURPHY dismissed the action mainly on the finding that respondent was not, in fact, a shareholder in said corporation because he received not the stipulated treasury shares of the company, but certain shares owned by one Ahlburg who promoted it. Respondent did not, in the opinion of the trial judge, receive what he contracted to purchase. There was neither identity of subject-matter nor of purpose.

The pertinent sections of California law (section 322, article 1, Cap. 11 under "Corporations" Civil Code) are as follows: [already set out in the judgment of GALLIHER, J.A.].

It was, I think, conceded that appellants must shew that

respondent was a shareholder in the Ahlburg Gasoline Corporation according to the laws of this Province to enable them to maintain this action although, I take it, the ordinary common law principles relating to the formation of a contract is common to both countries. If, however, a contract to take treasury shares is established then,—

"It is now established by the law of this country that one who becomes a shareholder in a foreign company, and therefore and thereby a member of that company—such company existing in a foreign country, and subject in all things to the law of that country—himself becomes subject to the law of that country, and to the articles or constitutions of that company construed and interpreted according to the law of that country in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively":

Kelly, C.B. in *Copin* v. *Adamson* (1874), L.R. 9 Ex. 345 at p. 349, sustained on appeal (1875), 45 L.J., Ex. 15).

The principal point to decide is—Was respondent a shareholder in said corporation or did he acquire the private property, to wit: certain shares belonging to another shareholder (Ahlburg) who was at liberty to dispose of them as his own personal property? Respondent purchased the first 50 shares in Victoria, B.C., through one Brownlie who represented that he was interested in a gasoline absorption plant in Los Angeles and was selling stock to enable it to carry on and enlarge projects in view. In my opinion he was the agent of the company, not of Ahlburg, although he sold the latter's shares. He asked respondent to become a shareholder, *i.e.*, in the company. Respondent at first demurred but upon further representations that more capital was necessary to enlarge the plant and to operate in new fields agreed to subscribe; paid to Brownlie $5,000 and received a receipt for $5,000 "for 50 shares stock in the Ahlburg Gasoline Corporation." He finally received certificate No. 22 for 50 shares in the Ahlburg Gasoline Corporation. About four months after the first purchase respondent bought another block of 50 shares for $5,000 and received a similar receipt from Brownlie except that "*per* Alice H. Brownlie" was added to it. I make no distinction between the first and second purchase. There is no doubt that respondent thought he was purchasing shares in the corporation, not transferred shares. The purpose for which the money was required, *viz.*, to provide additional capital

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carried that inference and no other. In addition Ahlburg in a letter to the respondent, setting out the facts, stated that Brownlie was to "sell the company's shares and thus obtain working capital." At the time of the purchase the Ahlburg Gasoline Corporation had no authority to issue shares. A permit required by California law to sell stock was not issued until some time thereafter and pursuant thereto a block of shares was issued by the Corporation to Ahlburg in consideration of certain assets transferred to the company by him. It was from this personal stock that respondent received the shares in question.

Respondent's money was paid over to and received by Ahlburg and held by him as trustee in trust for the company and later when a permit to issue stock was obtained he transferred part of his own shares to respondent and to other purchasers. It is not a question of whether or not Brownlie falsely represented that he was selling treasury stock when none was available whereas he was selling Ahlburg's personal holdings. The point is, Did respondent on his part negotiate for the purchase of treasury shares while Brownlie had in mind transferred shares and if so could a contract to purchase shares in the company eventuate? It was material that respondent should get treasury shares because had Ahlburg remained a shareholder respondent's liability would be decreased. However, respondent's name apparently finally appeared on the register of the company as the holder of the shares purchased by him through Brownlie. How it was effected is not quite clear, although presumably, a transfer in blank was written by Ahlburg and a new certificate issued and sent to respondent.

MACDONALD, J.A.

Counsel for appellants submitted that respondent's name was placed on the register without fraud on the company's part and that his defence amounts to an effort to have his name removed and because the company is in bankruptcy he cannot do so. He submits, as I understood it, that the inquiry is terminated by the appearance of his name on the register as the holder of 100 shares. That fact, however, would only be *prima facie* evidence that he was a shareholder. If he received treasury shares he is properly registered because that is what he bargained for. A contract to take shares of course is proven like any other con-

tract. Delivery of the thing bargained for is necessary and without it there is no contract unless there is an election to take the substituted article.

Allan v. *McLennan* (1916), 23 B.C. 515 was relied on. I do not think it is relevant. McLennan on the facts involved was held liable in damages for deceit but the point which might have been helpful, had it been decided, was not dealt with, *viz.*, whether or not double liability could be imposed upon the plaintiffs in view of the fact that, although they purchased what were virtually McLennan's shares and did not, as they thought, provide additional capital for the bank yet they appeared as shareholders on the register of the bank. Had it been held that, they could not escape the ordinary liabilities attached to registered shareholders the case would be of assistance. That was left for further determination in the liquidation proceedings and we have no information as to the outcome on this point, if it was in fact litigated.

Cases like *Oakes* v. *Turquand and Harding* (1867), L.R. 2 H.L. 325 do not assist appellants. It establishes that after bankruptcy a shareholder induced to subscribe for shares by fraud cannot resist the creditors' right to have him placed on the list of contributories. A contract induced by fraud is voidable at the option of the party defrauded. It is not a void contract. If respondent's alleged contract to purchase shares in the corporation is void for failure of the parties to treat in respect to the same subject-matter the foregoing and many other cases cited have no application. No beneficial results can accrue from a void contract. It is, subject to later observations, as if the parties never met and the directions in an arbitrary manner entered the names of one of the parties on the register and issued a certificate. Affirmation, acquiescence or failure to repudiate cannot affect something not *in esse*. It is not a question of misrepresentation but failure to reach an agreement where one offers to sell one thing and the other agrees to buy something essentially different, in this case very materially different as the event proves. Of course if one enters into a contract for a certain article and receives another and retains it he must pay for it (Lindley, L.J., in *Ex parte Sandys* (1889), 42 Ch. D. 115). But respondent, as the learned trial judge found "only became

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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." He did not therefore wittingly retain the transferred shares. He committed no conclusive act, with knowledge of the facts, shewing an assent to the acceptance of the transferred shares. Had he acted otherwise he might have been treated as a shareholder of the company. If after his name was placed on the register he acted in a manner only consistent with membership he would fall heir to all the obligations of an original shareholder. That is not to say that efficacy is given to a void contract: it is a new situation created by the acts of the parties. From these acts a new promise is implied. I agree, therefore, with the learned trial judge that there was no contract. True respondent's evidence with its lack of clarity in not fully appreciating the difference between transferred and company shares is somewhat vague. But the learned trial judge on the facts, and the natural inferences arising therefrom, reached that conclusion and we should not interfere.

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We were referred to authorities to shew that after the winding up of a company shareholders who before that event might on various grounds have their names removed from the register cannot then do so. As already intimated, liability in California to pay creditors' claims does not arise only upon bankruptcy. However, the rule does not apply where the alleged contract is void and the shareholder promptly repudiates and where he is not, as in this case, estopped from denying assent. (*Re Lake Ontario Navigation Co.* (1909), 20 O.L.R. 191 at p. 194).

I agree with the conclusions reached in two decisions by single judges (MURPHY, J. and GREGORY, J. in *Brydges* v. *Dominion Trust Co.* (1919), 2 W.W.R. 510 and *Western Union Fire Insurance Co.* v. *Alexander* (1918), 2 W.W.R. 546) in which where transferred shares were given to applicants for treasury shares it was held no contract was effected and after liquidation the applicants' names were removed from the list of contributories. If that is good law *a fortiori* can respondent not be held liable for the corporation's indebtedness to creditors in California? The fact of bankruptcy cannot alter or enlarge

the obligations of the respondent. It follows that respondent is not a shareholder in the California company and because of that finding the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Elliott, Maclean & Shandley.*
Solicitors for respondent: *Heisterman & Tait.*

LECHTZIER v. LECHTZIER.
LEVY v. LECHTZIER.

Negligence—Motor-vehicles—Collision—Intersection of streets—Damages—Gratuitous passengers—Evidence—Practice—Amendment of pleading—Discretion.

The plaintiffs were gratuitous passengers in the defendant's car as she drove northerly on Angus Drive in Vancouver. As she approached 41st Avenue she slowed down to 15 miles an hour and although there was a stop sign, she continued across the intersection without stopping. One Sumner was driving his car westerly on 41st Avenue at about 30 miles an hour. When he was 80 or 90 feet from the intersection of Angus Drive he saw the defendant at the stop sign on Angus Drive, and thinking she would stop, continued on. When he saw the defendant's car come out on to the intersection, he put on his brakes and turned to his left, but his right wheel struck the defendant's rear right wheel and the plaintiffs were injured. The plaintiffs recovered judgment in an action for damages.

Held, on appeal, affirming the decision of GREGORY, J., that Sumner had a right to assume the defendant would stop at the stop sign and her failure to do so was the proximate cause of the accident.

The plaintiff Levy claimed general damages in the sum of $200 in her statement of claim and the learned trial judge gave judgment in her favour for $350 in general damages. No application was made to amend the statement of claim in the Court below. An application to the Court of Appeal to amend the statement of claim by striking out the figures $200 in the prayer of relief and substituting the figures $350 was refused, and the general damages reduced to $200 (MCPHILLIPS, J.A. dissenting).

APPEAL by defendant from the decision of GREGORY, J. of the 22nd of May, 1930, in an action for damages arising out of Statement

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Statement

a collision between the defendant's automobile and an automobile driven by one Sumner at the intersection of Angus Drive and 41st Avenue in Vancouver at about 1 o'clock in the morning of the 30th of May, 1929. The defendant was driving her car northerly on Angus Drive, the plaintiff Mrs. Levy sitting beside her in the front seat and the plaintiff Mrs. Lechtzier sitting in the back seat, both being gratuitous passengers. Sumner was driving his car westerly on 41st Avenue, on which was a double street-car line, and he approached the intersection of Angus Drive at about 30 miles an hour. When he was from 80 to 90 feet from the intersection he saw the defendant's car to his left, close to the stop sign on Angus Drive, and about 47 feet from where the cars came together. When he saw the defendant continuing across the intersection without stopping, at about 15 miles an hour, he put on his brakes and turned sharply to his left, but too late to avoid a collision, his right front wheel striking the rear right wheel of the defendant's car. Sumner's car was overturned and the defendant's car was turned completely around. The plaintiff Lechtzier's shoulder was broken and she suffered other injuries. Mrs. Levy was thrown from the car and badly scraped, being confined to her room for two weeks from the shock.

The appeal was argued at Vancouver on the 5th, 6th and 7th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Craig, K.C., for appellant.

Locke, for respondents, moved to amend the statement of claim in the Levy case by increasing the claim for general damages from $200 to $350, as the trial judge allowed Mrs. Levy $350 general damages. There is power under marginal rule 305: see also *Wyatt* v. *The Rosherville Gardens Company* (1886), 2 T.L.R. 282; *The Dictator* (1892), P. 304; *Beckett* v. *Beckett and Jones* (1901), P. 85; *The City of Montreal* v. *Hogan* (1900), 31 S.C.R. 1; *Australian Steam Navigation Company* v. *Smith & Sons* (1889), 14 App. Cas. 318.

[Judgment on the motion was reserved].

Craig, on the merits: Both plaintiffs signed statements contrary to the evidence on the trial, and the defendant herself

being injured she was a hostile witness. On the evidence this defendant was not negligent, the negligence of Sumner, the driver of the other car being the proximate cause of the accident. Not stopping at a stop sign may be a breach of the by-law but it does not constitute negligence: see *Gauley* v. *Canadian Pacific Railway Co.* (1930), 65 O.L.R. 477 at p. 484. Assuming we were negligent, the driver of the other car was guilty of contributory negligence and his negligence was the proximate cause of the accident: see *Dent* v. *Usher* (1929), 64 O.L.R. 323; *Engel* v. *Toronto Transportation Commission* (1926), 59 O.L.R. 514; *Wallace* v. *Viergutz* (1920), 2 W.W.R. 333; *Howard* v. *Henderson* (1929), 41 B.C. 441; *Macdonald* v. *Tavistock Milling Co.* (1924), 27 O.W.N. 299; *McLaughlin* v. *Long* (1927), S.C.R. 303; *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512; *Turner* v. *Cantone & Whelan* (1929), 4 D.L.R. 724; *Watt* v. *Reid* (1930), 2 D.L.R. 215; *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719; *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423; *Hanley* v. *Hayes* (1924), 55 O.L.R. 361; *Allen* v. *City of Edmonton* (1930), 2 W.W.R. 25. It was held that the by-law in so far as it interfered with the right of way was *ultra vires*: see *Pipe* v. *Holliday* (1930), 42 B.C. 230. They were gratuitous passengers and are not entitled to recover on the negligence here shewn: see *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65; *Armand* v. *Carr* (1926), S.C.R. 575. The fact of their being gratuitous passengers is one of the circumstances.

Argument

Locke: The contributory negligence of a driver when he is neither the servant nor agent of a passenger is not a defence to an action by the passenger against the person responsible for the accident: see *The Canadian Pacific Railway Company* v. *Smith* (1921), 62 S.C.R. 134. As to the right of way, it is not a question who is ahead: see *Swadling* v. *Cooper* (1930), 46 T.L.R. 597. The other car proceeded on the assumption that the defendant would obey the law and stop when the stop sign was facing her: see *Toronto Railway* v. *King* (1908), A.C. 260 at p. 269; *Chaplin* v. *Hawes* (1828), 3 Car. & P. 554; *Sands* v. *Greer* (1930), 3 D.L.R. 67 at p. 70. On ultimate negligence see *Winnipeg Electric Rway. Co.* v. *Canadian Northern Rway.*

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Co. (1919), 59 S.C.R. 352. A third party is now suing: see Beven on Negligence, 4th Ed., 227; *Abbot* v. *Macfie* (1863), 2 H. & C. 744; *Armand* v. *Carr* (1926), 3 D.L.R. 592 at p. 597; *Harris* v. *Perry & Co.* (1903), 2 K.B. 219; *Pratt* v. *Patrick* (1924), 1 K.B. 488 at pp. 490-1. A breach of a by-law is evidence of negligence itself: see *Nelson* v. *Dennis* (1930), 38 Man. L.R. 553.

Craig, replied.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.: I would dismiss the appeal, and in *Ruth Levy* v. *Lechtzier* I would dismiss the appeal subject to the reduction of the amount of damages. The plaintiff claimed $200 damages and the learned judge gave her damages $350. No application to amend was made until it was made to this Court. I would dismiss the application to amend and reduce the damages to $200. If the amendment was to have been made at all, and I do not think it ought to have been, the application should have been made to the learned trial judge who could then have reconsidered his judgment in view of the amendment.

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MARTIN, J.A.: I agree in the disposition of this appeal, and also in the dismissal at this stage, under the circumstances, of the motion to amend the plaint by increasing the amount of damages asked for.

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GALLIHER, J.A.: In the best consideration I can give to the evidence in this case I am of the view that the defendant and the driver of the other car who is not a party to this action were both negligent, that each could have avoided the accident in the circumstances, that the negligence of both contributed to the accident in an equal degree including what might be termed ultimate negligence.

In such a case if the action was between these two parties the Contributory Negligence Act would apply but as it is between a passenger in the defendant's car and the defendant herself it does not, as I view it, apply; and at the most what the plaintiff as a passenger has to prove to entitle her to recover is that the

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defendant contributed to the accident in the manner I have indicated.

The appeal should therefore be dismissed.

As to the judgment in favour of Mrs. Levy, I would reduce that to the amount claimed in the statement of claim for the reasons stated by the Chief Justice.

McPHILLIPS, J.A.: Both cases were tried together and the appeals were considered and heard together. The actions were brought for personal injuries, pain and suffering and special damages. The trials were heard before Mr. Justice GREGORY without a jury. The learned trial judge found that there was negligence upon the part of the defendant and that the plaintiffs were each entitled to recover in respect of the actionable wrong committed, assessing the damages respectively at $1,950 and $541.95.

Apparently in the Levy action only $200 was claimed in the plaint for general damages and the learned judge allowed $350. The order for judgment was duly taken out and entered without any amendment being made. At this Bar an application was made for an amendment to the extent of the amount allowed for general damages, *viz.*, $350. The application was reserved. In my opinion it is a proper case for the allowance of an amendment as asked. There can really be no valid reason for not allowing the amendment—it is after all merely formal in its nature and no prejudice is possible of being occasioned and none is shewn (*Tildesley* v. *Harper* (1878), 10 Ch. D. 393 at pp. 396, 397; *London and Northern Bank* (*Limited*) v. *George Newnes* (*Limited*) (1900), 16 T.L.R. 433; *Beckett* v. *Beckett and Jones* (1900), 70 L.J., P. 17; *Knowlman* v. *Bluett* (1873), 43 L.J., Ex. 29, 32). It is significant that no objection was made at the time of the settlement of the order for judgment and the judgment was duly passed and entered. The objection to the amendment upon the facts of the case here cannot be termed otherwise than factitious and should not prevail. It must be remembered that in practice general damages are not as a rule stated at any given sum it only happens to have been done here, no doubt, technically. Where larger damages are allowed than claimed they connot be allowed without an amendment

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being had. If the defendant had elected to pay the damages claimed and paid the amount into Court in satisfaction of the claim that would no doubt have been the end of the matter but that course was not adopted. At this late date to not grant the amendment would be to render abortive the learned trial judge's judgment to the extent of $150 in the Levy action. This, in my opinion, would be clogging the wheels of justice without justification. The learned counsel for the defendant (appellant) in his very able argument contended that the plaintiffs' cause of action was not one enforceable against his client but if at all against one Sumner who was driving the car which collided with the car in which the plaintiffs (respondents) were. Upon the facts I am of the opinion that the learned trial judge was right when he rejected this submission in the Court below. Such a contention is not supportable in law, the plaintiffs had the right to elect what person they should hold liable it being necessary to establish negligence as against that person. And that negligence in my opinion was amply established as against the defendant. The defendant was guilty of two distinct acts of negligence in view of all the circumstances surrounding the accident. Firstly in not stopping at the stop sign before entering upon the intersection of the street. Secondly in not seeing, in fact, not looking, at the state of traffic upon the street into which she was entering. If she had looked she would have seen the Sumner car approaching but recklessly proceeded and placed her car in the way of that car. If she had stopped at the stop sign the accident would not have happened. Even without stopping at the stop sign, if she had looked at or about the stop sign and seen the Sumner car, as she should have seen it, she would still have had time to obviate the accident. The learned trial judge's findings upon the facts are very precise and clear and I do not find it necessary to enlarge upon them in any way and they are fully supported upon a review of the evidence.

The case of *The Canadian Pacific Railway Co.* v. *Smith* (1921), 62 S.C.R. is a case in point upon the facts here and deals with the failure to look. Sir Louis Davies, C.J. at pages 136 and 137. This case also deals with the question of the contributory negligence of the driver of a motor-car when he is neither the servant nor the agent of a passenger injured and it

was held that it was no defence in an action brought by the passengers against the party causing the accident.

With respect to the By-law No. 841 (1927) and By-law 1874 Street Traffic and Parking By-law covering the requirement to stop where a stop sign has been put up—and here a stop sign was in place—the exact words of the requirement are:

"17. The driver of every vehicle shall, before entering upon or crossing any intersecting street in the City at which a 'stop' sign or signs has or have been set up, placed, painted, or established, come to a full stop at, and shall give the right of way to vehicles travelling upon, such intersecting streets; provided, however, that nothing herein contained shall apply to such driver at any street intersection at which a police officer is in control of street traffic."

At the point where the accident took place in the present case no police officer was on duty controlling the traffic. The by-laws are challenged upon the ground that they are *ultra vires* but I did not gather that the learned counsel was himself very convinced that his submission was a very forceful one. The Motor-vehicle Act (Cap. 177, R.S.B.C. 1924) provides for concurrent powers of municipal councils and in section 17 of the Act it is provided that the municipal council of any municipality in the Province is authorized to make by-laws "regulating traffic and motor-vehicles and trailers on highways in every respect save as to rules of the road and rate of speed." The rules of the road are well understood and are covered by the Highway Act (Cap. 103, R.S.B.C. 1924) and "rules of the road" are dealt with in Part II. and cover vehicles meeting, right of way at intersections, vehicle overtaking another and stopping vehicle where impracticable to turn out and some other provisions not relevant here. I have no hesitation in coming to the conclusion that the stop sign requirement as contained in the by-laws is *intra vires* of the municipal council as being conferred legislative powers granted to the municipal councils in respect of regulating traffic—it cannot be said to come within the terminology "rules of the road and rate of speed," a reserved power. Although I do not think upon the facts of this case that consideration has to be given to whether the plaintiffs' cause of action is one against Sumner—not against the defendant—a pertinent point is this—Was not Sumner entitled to assume that the defendant would obey the stop sign which she did not? And

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it might well be that the defendant would not have an action against Sumner if failing to stop was the proximate cause of the accident; and as to the plaintiffs' cause of action if it should be that they could successfully sue Sumner they are not compelled to sue Sumner alone as the defendant was negligent in not stopping, not looking, and precipitating the motor-car in front of the Sumner motor-car whereby the accident ensued.

In *Toronto Railway* v. *King* (1908), A.C. 260 at p. 269, Lord Atkinson who delivered the judgment of their Lordships of the Privy Council said:

> "It is suggested that the deceased must have seen, or ought to have seen, the tram-car, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all the other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."

It might even be said in the present case that as against the plaintiffs there was joint negligence, that is that the defendant was negligent and Sumner was also negligent yet that does not compel the plaintiffs to sue both the parties that were guilty of negligence as against them. I would refer to Beven on Negligence, 4th Ed., Vol. 1, p. 227:

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> "A word must be added on joint negligence [*Hughes* v. *Macfie; Abbott* v. *Macfie* (1863), 2 H. & C. 744]. . . . It is clear that if the negligence were the joint negligence of Hughes and the defendant, and the plaintiff was free from negligence, the plaintiff could recover against both or either."

Further I would refer to what Mr. Justice Duff said in *Winnipeg Electric Rway. Co.* v. *Canadian Northern Rway. Co.* (1919), 59 S.C.R. 352 at p. 365:

> "These contentions are first open to the observation—although in the present state of the litigation the controversy has become one between the appellant company and the respondent company—that the decision of that controversy must be dictated by the answer given to the question whether the plaintiff had or had not a cause of action against the respondent company."

It follows that in this case the question is whether the plaintiffs have or have not a cause of action against the defendant quite without relation to whether they would have a right of action against Sumner whose motor-car collided with the car of

the defendant in which car the plaintiffs were passengers. Then we have it said in Beven on Negligence, p. 691:

"To constitute joint negligence it is not necessary that both the negligent persons should be partakers in the very act causing injury; for as Pollock, C.B., says in *Reg.* v. *Swindall* (1846), 2 Car. & K. 233: 'When two persons are driving together, encouraging each other to drive at a dangerous pace, then, whether the injury is done by the one driving the first or the second carriage, I am of opinion . . . the other shares the guilt.' Once more, as explained by Parke, B. in *Governor and Company of the Bank of Ireland* v. *Trustees of Evans' Charities in Ireland* (1855), 5 H.L. Cas. 410, the injurious act should be 'the necessary or ordinary or likely result of that negligence.'"

The plaintiffs in the present case were gratuitous passengers in the car of the defendant but the defendant upon the evidence has been shewn to have failed to obey the traffic rules and guilty of gross negligence in not looking and apprizing herself of the state of the traffic on the intersecting street—had she looked she would have seen the Sumner car; in any case she should have seen the car. The Chief Justice of Canada, Anglin, C.J.C., dealt with the law with respect to liability to gratuitous passengers in *Armand* v. *Carr* (1926), 3 D.L.R. 592 at p. 597:

"If there was any error on his part, it certainly amounted, at the most, to nothing more than an excusable mistake in judgment and did not involve any breach of duty owing to his passengers such as would predicate a failure to take that care which would have been 'reasonable under all the circumstances.' We regard this as the test of the responsibility of one who undertakes the carriage of another gratuitously (*Karavias* v. *Callinicos* (1917), W.N. 323; *Harris* v. *Perry & Co.* (1903), 2 K.B. 219), rather than some lower standard, which counsel for the appellant argued is implied in the decision of this Court in *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65."

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In the present case there was a clear breach of duty (*Pratt* v. *Patrick* (1924), 1 K.B. 488; *Pipe* v. *Holiday* (1930), 42 B.C. 230).

In *Nelson* v. *Dennis* (1930), 38 Man. L.R. 553, the question of "Stop Signs" was considered. Mr. Justice Dennistoun delivered the judgment of the majority of the Court of Appeal and at p. 562 said:

"So long as the stop signals are in position, in my humble judgment, the public have a right to rely on them, and persons who decline to obey them are guilty of actionable negligence if injury is caused by their so doing."

Upon the facts of the present case there can be but one answer and that is—if the defendant had obeyed the "stop sign" the accident would not have happened. Other acts of negligence of

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course are established independent of failure to observe the "stop sign" sufficient to uphold the judgment below.

I would dismiss the appeal.

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MACDONALD, J.A.: This appeal was fully argued and there is really no controversy as to the law applicable once the facts are established. I see no reason for rejecting the finding of fact of the learned trial judge, *viz.*, that the driver of the Ford car was at a point 80 or 90 feet from the intersection at the moment the defendant was at or near the stop sign referred to in the evidence particularly as this finding is consistent with the further view expressed by him that the driver of the Ford car was travelling at 30 miles an hour. The distance from the stop sign to the point of impact was 47 feet 5 inches, or deducting 2 feet the distance defendant's car may have been beyond it when the driver of the Ford car was 80 or 90 feet away it would mean that defendant travelled 45 feet while the Ford car driver travelled 90 feet. As defendant was travelling at the rate of about 15 miles per hour the driver of the Ford car travelling at twice that speed must have been 90 feet from the point of impact when defendant was at or near the stop sign.

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The point is, under the foregoing circumstances, who was substantially to blame for the accident causing damage to the plaintiffs—defendant or the driver of the Ford car? The plaintiffs were gratuitous passengers in the defendant's car. We would not be justified in disturbing the conclusion reached by the trial judge holding defendant liable. Indeed I would have decided similarly if at the trial. The defendant committed almost every act of negligence open to her according to the evidence of this family party which perhaps unfortunately for the Insurance Company we are obliged to accept. She did not stop at the stop sign as required by a valid by-law; and did not look to the right or, as the trial judge intimated, if she did, she must have seen the Ford car approaching and still continued on her course. When she saw (or should have seen) the Ford car, had she been alert, she would have repaired her initial mischief in failing to stop at the sign by stopping in the intersection before reaching the point of impact.

Further a driver approaching a stop sign should permit another car in a through street twice the distance from a point of possible impact to pass on before him. One car is travelling (or should be) slowly; the other rapidly consistent with due care. Again, if the drivers of both cars had an equal opportunity to avoid the accident and failed to do so the plaintiffs would still be entitled to succeed. That there was at least an equal opportunity on the part of defendant to avoid the collision by stopping there cannot be any doubt. She, travelling at 15 miles an hour, could just as readily stop her car in 45 feet as the driver of the Ford car travelling 30 miles an hour could stop his car in 90 feet. In fact, on account of her reduced speed she was in a better position to control her car in a more limited area. The driver of the Ford car did everything possible to avoid the collision when it became imminent. The defendant, after committing a breach of the by-law, did nothing to avoid it. Her apathy and indifference rendered her incapable of taking precautionary measures. Had it been otherwise and the driver of the Ford car could have avoided the accident at some appreciable moment of time subsequent to the negligent acts of the defendant the result might be different. That however is not the case.

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I am not overlooking the fact that this defendant, securely insured, may not—indeed I think did not—defend her conduct in the way she would have done had she to bear the burden of a judgment. She appeared to court judgment against her. Evidence given under such circumstances should be carefully scrutinized and rejected if necessary. That of course is for the trial judge and no doubt, after considering this aspect, he felt justified in making the findings of fact referred to.

I would dismiss the appeal. I would not however on all the facts allow the amendment of the plaint at this stage to conform with the judgment awarded the plaintiff Mrs. Levy. The amount of general damages awarded her should be reduced to $200.

Appeal dismissed.

Solicitor for appellant: *J. F. Downs.*

Solicitors for respondents: *Mayers, Locke, Lane & Thomson.*

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PACIFIC SALVAGE COMPANY, LIMITED AND VANCOUVER DRYDOCK & SALVAGE COMPANY, LIMITED v. THE M.S. "TEX."

PACIFIC SALVAGE CO., LTD. v. THE M.S. "TEX"

HOME INSURANCE COMPANY OF NEW YORK v. THE M.S. "TEX."

HOME INSURANCE CO. OF NEW YORK v. THE SAME

Admiralty law—Salvage—Agreement for—Salvors to get 90 per cent. of value if successful, nothing if not—Reasonableness of—Unusual circumstances—Expense of obtaining information as to location of vessel—Independent claim for.

In determining whether an agreement for salvage services is to be upheld, one must look at the service contemplated by the parties at the time, and the circumstances under which the agreement was entered into. If the agreement was just and reasonable when entered into, it will be enforced and will not be disregarded or set aside because something has happened subsequently or some contingency of which one party or the other has taken the risk, has occurred, to make it more onerous on one or the other than was anticipated when it was entered into.

An agreement was entered into between an insurance company on behalf of the owner of a vessel, and a salvage company that if the company could raise the vessel and bring her to dock at Vancouver they were to be paid 90 per cent. of her value, but if they failed they were to get nothing.

Held, that as the raising of the vessel from a depth of 350-400 feet required skill and salvage operations of a high order at the lowest depth ever undertaken by the company, the operations being ever attendant with the uncertainty of success, there is nothing that would warrant the Court in disturbing the agreement entered into.

Statement

ACTION for salvage for recovering the gasoline screw vessel "Tex" from Howe Sound near Potlatch Creek in February and March, 1930. The facts are set out in the reasons for judgment. Tried by MARTIN, Lo. J.A. at Vancouver on the 17th of December, 1930.

Griffin, K.C., and *Sidney A. Smith,* for plaintiffs Pacific Salvage Co., Ltd. and Vancouver Drydock & Salvage Co., Ltd.

Maitland, K.C., for plaintiff Home Insurance Co. of New York.

Hossie, for mortgagees.

24th December, 1930.

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MARTIN, LO. J.A.: This is an action for salvage services rendered to the gasoline screw vessel "Tex" (length 50.3; breadth 10.3; depth 6.75; registered tonnage 13.83; owner Charles L. Matthews, Vancouver) in Howe Sound, near Potlatch Creek, during the months of February and March, 1930. She was insured in the Home Insurance Company of New York for $8,000 under a policy for one year expiring on February 15th, 1929, loss payable to the registered mortgagees Ethel M. and Ritchey Elliott to the extent of $1,500 and interest.

It was proved that the owner on or about February 9th, 1930, scuttled his vessel in deep water, as later recited, and then on February 12th put in a fraudulent claim for the insurance on her to the plaintiff Insurance Company as an abandoned wreck and total loss by fire and stated that she had sunk in Howe Sound at an alleged place in water about 500 feet deep. At first the Insurance Company believed his account of loss by fire and opened negotiations with the Pacific Salvage Company, a firm of local experience and with special facilities in ships and equipment, to raise the vessel, on his behalf, but the Company was reluctant to undertake any contract regarding a vessel so circumstanced because of past experience in attempting, in several cases, to raise vessels at such a depth which resulted in failure and loss, and also because the cost of the work, even if successful, would probably be as much as the vessel was worth when raised, but after sending up a small boat to make a preliminary investigation of the locality an agreement was eventually made through the said Insurance Company, on behalf of the owner, who, I find, approved of it and became the principal thereto, that if the Salvage Company could raise the vessel and bring her to dock at Vancouver they were to be paid 90 per cent. of her value, there and then, but if they failed to do so they would get nothing—in short, on a "no cure, no pay" basis, as it was described by witnesses.

Pursuant to this agreement the Salvage Company began continuous operations on the 26th at the place falsely indicated by the owner, said Matthews, and shewn on the Admiralty charts in evidence, but were unable to locate her there. On the 28th, however, they tried again at another point some three-quarters

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of a mile to the westward and there finally located her in 350-400 feet of water and got her up to 40 feet of water and finally to the surface at about 8 p.m., and beached her next morning and brought her to Vancouver that same night about 10 o'clock. The direction in which the vessel was found was not that deceitfully given by the owner but in accord with that subsequently given to the salvors by one Lundy, though it was considerably further westward, *viz.*, three-quarters of a mile, than his private information led him to suppose.

It was submitted on behalf of the mortgagees that the said agreement for salvage was not one which the Court would countenance as being exorbitant and unreasonable on the face of it. The leading case on that question in Canada is *The Steamship Dracona* v. *Connolly* (1896), 5 Ex. C.R. 207, which is a decision of the presiding judge of this Court and therefore binding on me. The judgment, which if I may say so, is an able and comprehensible one, lays it down clearly, as applicable to the present case, that (p. 210):

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"In determining the question as to whether such an agreement is to be upheld or not one must look at the service contemplated by the parties at the time, and the circumstances under which the agreement was entered into. If the agreement was just and reasonable when entered into, it will be enforced and will not be disregarded or set aside because something has happened subsequently, or some contingency of which one party or the other has taken the risk has occurred, to make it more onerous on one or the other than was anticipated when it was entered into. Where the parties have made an agreement the Court will enforce it, unless it is manifestly unfair and unjust; but if it be manifestly unfair and unjust the Court will disregard it and decree what is fair and just."

And *cf.* also the cases cited in Mayers's Admiralty Law and Practice, p. 177, where, as here, the owner has abandoned the vessel; in *The Mercator* (1910), 26 T.L.R. 450, the total value was awarded.

Applying these guiding principles to the special circumstances of this unusual case I have come to the conclusion that there is nothing in it which would warrant me in disturbing the agreement entered into, the carrying out of which at the depth from which the vessel was actually raised, *viz.*, 350-400 feet, required skill and salvage operations of a high order, at the lowest depth ever undertaken by said Company, and rendered still more uncertain in its success because of the false informa-

tion given by the owner of the vessel's location as being one and one-half miles to the eastward, and it is very probable that she would not have been located or salved by Lundy (a carpenter and fisherman living beyond Squamish, about eight miles away) after the fruitless searches of the preceding two days on the said false line.

The day after the vessel's arrival in Vancouver she was officially surveyed for the underwriters and the fraud discovered and reported by the Board of Marine Underwriters, upon which the said Insurance Company repudiated liability and about that same time the owner fled the country.

According to the agreement the 90 per cent. was to be paid on the value of the vessel on her arrival in Vancouver, and that value should be taken, upon the evidence, as being $3,000 and therefore the plaintiff Salvage Company is entitled to that sum, *viz.*, $2,700.

There is also a further sum claimed by the plaintiff Vancouver Drydock & Salvage Company, Ltd., for the immediate care of the vessel upon her arrival at their dock, it being necessary to oil the machinery instantly otherwise very rapid deterioration sets in, to the extent of 50 per cent. within 50 hours if neglected; a raised vessel at such a time is largely in a perishable state and in such an extremity corresponding precautions to save her must be taken by all concerned in her preservation. There is every reason, therefore, that such charges should be allowed, and also those for docking her then, and subsequently keeping her in dock, and insurance $47. They are not, as I understand it, objected to as a proper claim against her.

Judgment

There remains the claim for salvage advanced by the said Home Insurance Company for $477 of which only two items of $155 and $45.95 require further consideration, they being disbursements made by the Insurance Company to Lundy, $155 for his time (on the basis of his usual pay as a first-class carpenter) lost in attending the salvage operations, and $45.95 for hire of a launch in conveying him to and from Squamish, from which he lived about 15 miles inland up the P.G.E. Railway.

That the information thus acquired by said Insurance Company was of substantial service in the salvage operations (at

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the very least in shortening the duration of the period of search for the vessel) is, in my opinion, beyond question, but it is objected that the expense in obtaining it was primarily incurred by that Company in resisting, successfully, the fraudulent claim of the owner for $8,000 as a total loss as not being covered by its policy, and therefore even if the information so acquired did also contribute substantially to the success of the salvage operations (*cf.* Maclachlan on Merchant Shipping, 6th Ed., 506) yet that secondary "contribution" cannot form the base for an independent salvage claim by the Insurance Company. This aspect of the matter has occasioned me much reflection with the result that I am, somewhat reluctantly, if I may say so, driven to the conclusion that, under the present circumstances this claim of salvage cannot be supported in law and therefore must be dismissed, though I feel impelled to say, in the very unusual circumstances, that the Insurance Company has a moral claim against the Salvage Company, as well as the absconding owner, to the extent of at least half the expense it was put to in obtaining information of such material benefit in finding the wreck so speedily.

This leaves only the position of the mortgagees for consideration, but in view of the above conclusion it does not at present appear that, unfortunately for them, there will be anything left for them after the sale of the vessel (which is hereby directed, and without appraisement) is had (*cf.* Mayers, *supra,* p. 71) but if they wish to be heard further as to their position, before or after the sale, I am prepared to hear them. Unless it is for some good cause otherwise desired, the marshal may sell the vessel, with all due expedition, either at public auction or by private contract and after such advertisement as he may deem expedient, after consulting the parties concerned.

Judgment for plaintiffs.

IN RE ROBB, DECEASED.
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Jan. 6.

IN RE ROBB, DECEASED.

PLANTA v. GREENSHIELDS

Will, construction of — Charitable gift — Validity—"Aid and help any worthy cause or causes as he shall think fit"—Void for uncertainty.

A testator disposed of his residuary estate in the following words: "The balance of the estate I leave entirely in the hands of my executor to aid and help any worthy cause or causes as he shall think fit." It was held on originating summons that there was a good charitable bequest.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that the words are too vague and uncertain to create a valid charitable trust, nor will they sustain a finding that the executor should take the residue beneficially. The property in question falls into the residue of the estate.

APPEAL by Laura Alma Planta and Albert Edward Planta, executor and trustee of the estate of Amy Planta, deceased, from the order of MORRISON, C.J.S.C. of the 4th of September, 1930. William Rowley Robb died at Comox on the 5th of January, 1916, having made his last will on the 18th of November, 1915. He devised to his wife, Jane Robb, his house and grounds at Comox with $1,200 a year during her lifetime. He then made three bequests, *i.e.*, $10,000 to his niece Laura Alma Hunter, widow; $10,000 to his niece Mrs. Amy Planta, and $1,000 to Mrs. Nellie Davis, then the will proceeded as follows:

Statement

"It is distinctly understood that the executor has the power given him to pay these three bequests, when and how he likes; the estate is not to be sacrificed in any way to pay them. The first bequest to be paid is Mrs. Hunter, then Mrs. Planta, then Mrs. Davis.

"The balance of my estate I leave entirely in the hands of my executor to aid and help in any worthy cause, or causes, as he shall think fit, and I appoint my friend, John M. Greenshields of Victoria, Chief Engineer, Steamer 'Charmer' as my executor."

Mrs. Amy Planta, one of the beneficiaries under the will died on March 28th, 1922, and Mrs. Hunter, another beneficiary, later married Albert Edward Planta. Jane Robb, the wife of the testator, died on the 3rd of March, 1930. By originating summons issued upon the application of Laura Alma Planta and Albert Edward Planta, executor of the estate of Amy

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Planta, deceased, the question below was asked relating to that portion of the will reading:

"The balance of the estate I leave entirely in the hands of my executor to aid and help any worthy cause, or causes, as he shall think fit."

"Is the above bequest or devise void for uncertainty?"

On the application coming on for hearing it was held that the question should be answered in the negative.

The appeal was argued at Vancouver on the 7th to the 11th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Harold B. Robertson, K.C. (*Bruce Robertson,* with him), for appellants: We submit this is not a good charitable trust. The executor claims that if there is no trust it is a gift to him. The leading case is *Morice* v. *The Bishop of Durham* (1804), 9 Ves. 399; see also *Blair* v. *Duncan* (1902), A.C. 37; *In re Macduff* (1896), 2 Ch. 451 at p. 456 *et seq.*; *Hunter* v. *Attorney-General* (1899), A.C. 309 at p. 323; *In re Davidson* (1909), 1 Ch. 567 at p. 570; *Attorney-General* v. *National Provincial Bank* (1924), A.C. 262 at p. 264 *et seq.*; Halsbury's Laws of England, Vol. 4, p. 106, sec. 167; *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1891), A.C. 531 at pp. 580 and 583; *In re Hood* (1930), 46 T.L.R. 571; *In re Freeman. Shilton* v. *Freeman* (1908), 1 Ch. 720 at p. 724; *Kendall* v. *Granger* (1842), 5 Beav. 300; *In re Sutton. Stone* v. *Attorney-General* (1885), 28 Ch. D. 464. As to who the money goes to, the contention that it goes to the executor cannot be supported. We submit it becomes an intestacy and the next of kin inherit: see *Morice* v. *The Bishop of Durham* (1805), 10 Ves. 521 at pp. 527 and 539; *Vezey* v. *Jamson* (1822), 1 Sim. & S. 69; *In re Chapman. Hales* v. *Attorney-General* (1922), 2 Ch. 479. The language in the will gives nothing to the executor: see *Williams* v. *Arkle* (1875), L.R. 7 H.L. 606; *In re Lopes* (1930), 46 T.L.R. 577; *In re Gwyon* (1929), *ib.* 96.

Maclean, K.C., for respondents: The rule governing charitable bequests is that the Court leans in favour of a charity: see Tudor on Charities, 5th Ed., 93. If there is a charitable bequest and there is no provision for carrying it out the Court will carry it out: see *Cox* v. *Hogan* (1925), 35 B.C. 286 at p.

294; *In re White. White* v. *White* (1893), 2 Ch. 41 at p. 53. If you have a general charitable intention the Court will execute the charitable intention. This bequest is for a religious purpose and is a "charitable gift." The words "worthy causes" is synonymous with "charitable causes." In the cases of *Hunter* v. *Attorney-General* (1899), A.C. 309; *In re Macduff* (1896), 2 Ch. 451 and *In re Davidson* (1909), 1 Ch. 567 the distinction is that the gift is to both charitable objects and non-charitable objects and so found in *Blair* v. *Duncan* (1902), A.C. 37. His next of kin are provided for and if this is not a charitable bequest the executor takes beneficially: see Halsbury's Laws of England, Vol. 14, p. 270, sec. 626; *Gibbs* v. *Rumsey* (1813), 2 V. & B. 294; *In re Howell* (1915), 1 Ch. 241; *Re Magnus Brown* (1891), 8 Man. L.R. 391; *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875), L.R. 6 P.C. 381; *In re Benner* (1923), 2 W.W.R. 206; *In re Chapman. Hales* v. *Attorney-General* (1922), 2 Ch. 479.

Argument

Robertson, in reply.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.: The appeal should be allowed. It is clear to me that the facts will not sustain a finding of "charitable trust" nor will they sustain a finding that the executor was entitled in default of appointment. The property in question falls into the residue.

MACDONALD, C.J.B.C.

MARTIN, J.A.: It is beyond question, to my mind, in the light of the authorities considered during the argument (to which I shall only add *In re Stratton* (1930), 47 T.L.R. 32, decided since then) that the bequest herein is not a charitable gift in the legal sense, though benevolent in object.

As to the second question, I am unable to distinguish this case from the principle laid down in *Re Chapman. Hales* v. *Attorney-General* (1922), 2 Ch. 479, distinguishing *In re Howell* (1914), 84 L.J., Ch. 209 and therefore the executor, also trustee by codicil, does not take the residue beneficially, and so the appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.: At the close of the respondent's argument

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I understood the Court was of the view that the bequest contained in the will was not a charitable bequest and appellant's counsel was not called upon to reply except on the point raised that if it was not a charitable bequest it went to the respondents personally. I have read the will and examined the cases cited and have no doubt that under the authorities it cannot be classed as a charitable bequest by reason of uncertainty. On the point that if not a charitable bequest the executor takes personally, I am against that view. The parties who take in my opinion are the next of kin.

The words in the will are "The balance of the estate I leave entirely in the hands of my executor to aid and help any worthy cause or causes as he shall think fit." In support of his view the respondent relied on the case of *In re Howell* (1915), 1 Ch. 241. In that case the words in the will were "After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal" and it was held that the executor took beneficially.

GALLIHER, J.A.

But the words in the will in the case at Bar above set out are entirely different and convey an opposite intention to the one in effect invoked here that the executor can consider himself the worthy cause referred to in the will and thus take beneficially.

In my opinion the appeal must be allowed, costs to all parties out of the estate.

McPHILLIPS, J.A.: This appeal calls for the determination of whether or no the language in the will created a good charitable trust. If it is not a good charitable trust, then whether the residue of the estate goes to the executor or to the next of kin.

With great respect to the learned Chief Justice in the Court below I cannot arrive at the conclusion at which he arrived, *i.e.*, that a good charitable trust was created under the language used in the will. That language reads as follows:

MCPHILLIPS, J.A.

"The balance of the estate I leave entirely in the hands of my executor to aid and help any worthy cause, or causes, as he shall think fit, and I appoint my friend, John M. Greenshields of Victoria, Chief Engineer, steamer 'Charmer' as my executor."

Later by a codicil the testator appointed the executor trustee of the estate, in the words following:

"I also appoint John M. Greenshields as trustee of my estate."

The governing statute law applicable in this case is section 83 of Cap. 4 of the Administration Act, R.S.B.C. 1911, which reads as follows:

"83. When any person shall die, having by his will or any codicil appointed an executor, such executor shall be deemed to be a trustee for the person who would be entitled to the estate under the provisions of this Act relating to distribution in respect of any residue not expressly disposed of, unless it shall appear by such will or codicil (if any) that such executor was intended to take such residue beneficially. But nothing herein contained shall affect or prejudice any right to which any executor, if this Act had not been passed, would have been entitled in cases where there is not any person who would be entitled to the testator's estate in manner aforesaid."

I may say that I examined the cases very carefully in respect to the question here necessary for decision in *Cox* v. *Hogan* (1925), 35 B.C. 286 at pp. 290-3. My judgment in that case was a dissenting one. There it was held that the clause in the will calling for construction created a valid charitable trust. The present case, though, is a very much weaker case, in truth, in my opinion, it is devoid of any substance whatever.

I do not propose to repeat any of my references (save perhaps one, *viz.*, *Attorney-General* v. *National Provincial Bank* (1924), A.C. 262; I did cite that case but did not call any attention to any particular passages therein) to the cases that I referred to in the *Cox* case and merely content myself by saying that my judgment and reasoning in that case may be said to be equally applicable to the present case. In *Attorney-General* v. *National Provincial Bank, supra,* I would refer to what the Lord Chancellor said at pp. 264-7 in his speech in the House of Lords.

MCPHILLIPS, J.A.

Here we have the words "any worthy cause or causes." Are these words more effective than "patriotic purposes" dealt with by the Lord Chancellor above? I would not think so; in truth much less effective and I would apply the language of the Lord Chancellor when considering the words "patriotic purposes" to the words used in the present case "any worthy cause or causes." The Lord Chancellor said and I apply it to the present case taking the liberty to insert the words "worthy cause" instead of "patriotic purposes" which we have here, pp. 265-6:

"Whether a purpose is [a worthy cause] or not is a matter of opinion; it depends to a great extent upon the state of mind of the person who

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uses the expression. An object which appears to some persons to be [a worthy cause] may legitimately appear to others not to fall within that description; and there is no fixed rule by which a Court may determine whether a particular purpose is or is not [a worthy cause]. Further, it is not difficult to conceive purposes which to most persons would appear [a worthy cause], but which are clearly not charitable within the legal meaning of that term. It seems to me therefore that the expression [worthy cause] is one which cannot be said to bring the trust within the category of a charitable trust."

Adopting the language as I have done of the Lord Chancellor to the present case, and I trust it has not been too great a liberty, it is clearly apparent that the words of the will are too vague and uncertain and do not create a valid charitable trust.

I would refer to what Lord Justice Moulton (as Lord Moulton then was) said in *In re Freeman. Shilton* v. *Freeman* (1908), 1 Ch. 720 at p. 724:

"We must look at the description of what are to be the objects of the trust. Now, the Charity Organization Society has earned for itself a well-deserved renown, not only for the purity of its motives, but also for the breadth of its views and for its having realized that many of these problems of poverty are best dealt with indirectly rather than directly, and that putting a stop to such abuses as indiscriminate charity is a better way of assisting the poor than giving them doles. The consequence is that it looks upon many branches of work that are going on in the realm as being directly serviceable to the cause of the poor, although they would not come within the legal definition of charitable purposes; and I think that in leaving nine-tenths of the income of his residue to this society, without any words in any way restricting its freedom in using this money of which it was only the trustee, and which money was not to form part of its funds or be bound by its objects, the testator believed that he would establish an annual fund which would be distributed with a wise discretion and would be productive of great public good. If he could legally have accomplished his object I think it would have been a very wise plan. Unfortunately such a limitation is far too wide to be supported as creating a charitable gift; it is too uncertain. The Charity Organization Society might under the powers so given have used this money for many purposes of public utility, and in assisting many worthy societies whose purposes could not be called charitable in a legal sense. The gift therefore being too wide, we cannot support it."

MCPHILLIPS, J.A.

Then proceeding upon the premise that there has not been a valid charitable trust in the present case, it becomes necessary to deal with the contention made that the residue does not go to the next of kin—a widow and two nieces—but to the executor and trustee absolutely. In considering this point the governing statute has to be borne in mind (Cap. 4, R.S.B.C. 1911, Sec.

83). A copy of the section of the Act has already been set forth. It is to be noted that it in part reads:

"Such executor shall be deemed to be a trustee . . . unless it shall appear by such will . . . that such executor was intended to take such residue beneficially."

There is no specific devise or bequest to the executor here and the words rebut any such intention upon the part of the testator. It is only necessary to note them:

"The balance of the estate I leave entirely in the hands of my executor to aid and help any worthy cause, or causes, as he shall think fit, and I appoint my friend, John M. Greenshields of Victoria, Chief Engineer, Steamer 'Charmer' as my executor."

The residue was to go according to the testator's words "to aid and help any worthy cause or causes as he shall think fit" but if it be that there is no legal charitable trust created—and that is my opinion—the residue must go not to the executor but to the next of kin. The words "leave entirely in the hands of my executor" in no way amount to any intention that the executor should take the residue beneficially. And here we have persons who are in law entitled to the residue of the testator's estate.

In this connection I would refer to *In re Chapman. Hales* v. *Attorney-General* (1922), 2 Ch. 479 at pp. 483, 484, 486. At pp. 483-4, Lord Sterndale, M.R., said: MCPHILLIPS, J.A.

"Then the next question is, if that be so, is it a bequest to the executor beneficially or not? If it be not to him beneficially but only upon trust then, there being no valid trust, he holds the residue for the next of kin, and Eve, J. has so decided. I have had some difficulty about this, but upon the whole I have come to the same conclusion as Eve, J. There seems to me to be an atmosphere, if I may so call it here, of devoting this residue to something apart from the personal purposes of anybody. I do not rely very much upon that, but I rely simply upon the words, because if I relied upon the other I should be getting again into the region of speculation. The words are 'I desire applied for charitable purposes as I may in writing direct or to be retained by my executor for such objects and such purposes as he may in his discretion select and to be at his own disposal.' That does not seem to me to be a direct gift to him beneficially. If the property does not go to charitable purposes in consequence of the testatrix not having given her directions in writing—it was her view that it would be valid for her to direct in writing—then it is 'to be retained by my executor.' It has been laid down, and I do not wish to controvert it in the least, that, in the construction of a document, a gift to an executor must be construed in the same way as a gift to anybody else, but when the word 'retained' is used it seems to me not to be an apt word to convey a direct gift to the executor, it looks very much more like 'to be retained by my

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executor, in his character of executor,' and it is to be retained 'for such objects and such purposes as he may in his discretion select and to be at his own disposal'; and I read those last words as if they were 'and to be at his own disposal for such purposes.' We were very much pressed by, and I feel the difficulty of, the decision in *In re Howell* (1915), 1 Ch. 241, but I think as Eve, J. thought, that that case is capable of being distinguished. It is very near this case, but the words are not the same. The words there were 'After the aforesaid legacies have been duly paid the remainder or residue of my property (if any) shall be at the discretion of my executor and at his own disposal.' There is a material difference between those words and the words here. The latter are, 'to be retained by my executor for such objects and such purposes as he may in his discretion select.' Those words 'to be retained by my executor' do not appear in *In re Howell*, but when it is said by the learned judge there 'Those words "at his own disposal" afford the key to the construction of the gift,' it must not be taken that wherever those words occur in any other will they necessarily shew that the gift is to be construed as a beneficial one."

At pp. 486-7 Warrington, L.J. said:

"I now come to the second point: Is the executor intended to take beneficially? If he is to take beneficially the testatrix must, by this codicil, have had an intention different from that which she had when she made her will. The first, and I think a very important, point to be noticed is that the estate is to be retained by the executor. There is no gift to the executor at all. It comes to him *virtute officili*, and in no other capacity. It is to be retained by him, and it is to be retained for certain objects and purposes. I am clearly of opinion that when the testatrix directs her executor to retain for certain objects and purposes to be selected by him she is pointing to objects and purposes external to himself. It is impossible to suppose that if she intended that the executor should retain the property for his own benefit she would direct that it should be retained for objects and purposes to be selected by himself. It seems to me the objects and purposes pointed at are external to himself. The objects and purposes are to be selected by him at his discretion. So far, there is nothing said as to what he is to do with those portions of the property when he has selected the objects and the purposes, except that they are to be for those objects and purposes. She therefore adds to the discretion of selection, which she has given him, the power of disposing of the property, by the words, 'at his own disposal,' and I think that those words must be read to mean: 'at his disposal amongst the objects and purposes which he selects.' The result of that is that he has a right not only to select the objects and purposes, but to dispose of the property amongst them in such way as he may think fit. In my opinion that gives a much more natural construction to the will than that which would impute to the testatrix the intention that the executor, to whom no gift has been made, is to retain the property for his own benefit. Like the Master of the Rolls, I have been somewhat puzzled by *In re Howell*, which undoubtedly comes very near the present case, but in my opinion it is clearly distinguishable when it is carefully examined. In the first place, as was pointed out by the only two of the judges in the Court of Appeal

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who gave their reasons for their judgment in *In re Howell*, there was no trust at all imposed upon the executor, either expressly or by implication, with regard to the residue of the estate. The words there were: 'The residue of my property (if any) shall be at the discretion of my executor, and at his own disposal,' and, as was pointed out by Lord Cozens-Hardy, M.R. and Swinfen Eady, L.J., there was no trust whatever imposed upon the executor. That seems to me to be one very material distinction, and, further than that, there were no words, such as there are here, pointing to objects and purposes external to the executor. It was simply to be at his discretion, and at his disposal. What the judges there said was that giving to those words their natural interpretation, they led to the conclusion that he might dispose of the estate for his own benefit, and if he had that discretion then it was, in effect, to give him a beneficial interest."

In *Williams* v. *Arkle* (1875), L.R. 7 H.L. 606, Lord Hatherley considering the English statute said (p. 630):

"Before this statute, the burden was cast, upon those who wished to make him a trustee, of shewing that he was so from clear indications on the face of the will; and all such indications were laid hold of, especially the word "trustee" used with reference to the appointment of an executor, and with reference to the disposition of the property, that he took by virtue of that appointment. But the Legislature felt that testators were frequently not aware of the consequences of their own act; and that, therefore, if they intended that the executor should take beneficially, it would be right to invert the onus of proof and to throw upon the executor, when so appointed, the necessity of shewing that the testator intended something more than a trust, and indeed something to the contrary. Accordingly the Legislature said: Your merely being appointed executor shall not carry any portion of the personal estate whatever for your own benefit, unless you shew clearly an indication to that effect on the face of the will. It was not intended to lay down any new rule of construction with regard to the words used by testators, but simply to say that the word 'executor' alone should not have the effect it up to that time had, and that you must have some other words besides in order to shew that an executor is entitled to take in some other capacity, that is to say, beneficially."

MCPHILLIPS, J.A.

I would also upon this point refer to the case of *Re Magnus Brown* (1891), 8 Man. L.R. 391, a judgment of Sir Thomas Wardlaw Taylor, Chief Justice of Manitoba, a most eminent Canadian jurist, a master of the law. At pp. 397, 398, 399, we have the learned Chief Justice saying:

"In *Williams* v. *Arkle* [(1875)], L.R. 7 H.L. 606, there was a direct plain gift of the residue and Lord Cairns said, 'If the residue is given by the will to the executor, the Court must decide the effect of the gift upon the construction of the will and upon general principles applicable to that construction' and again, 'Where an express devise of residue is found, the meaning of that residuary bequest must be ascertained by the ordinary rules of construction.' Clearly then that there is in terms a direct plain gift is not conclusive of the question.

"Then there is the provision that this residue is to be 'applied and

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disposed of' by the trustees. May it not be said of these words, that they are neither usual nor apt words of absolute gift and that they indicate an intention to impose a trust to distribute the fund among persons other than, or at all events in addition to themselves, just as was said of the words, 'may apply and distribute,' in *Neo* v. *Neo* (1875), L.R. 6 P.C. 381, 388.

"Neither does the provision that they may deal with it, 'as to them in their uncontrolled and absolute discretion shall seem best' prevent a trust from attaching. In *In re Dean. Cooper-Dean* v. *Stevens* [(1889)], 41 Ch. D. 552, no doubt the main question discussed was whether an annuity given to the executors and trustees in trust for the maintenance of the testator's horses and hounds was a valid trust or not, but it was also contended that the gift was an absolute beneficial one to the trustees, coupled with a statement of the testator's motive for making it, and that they were entitled for their own benefit to any surplus not employed in the maintenance of the animals.

"The will provided that, 'my trustees shall not be bound to render any account of the application or expenditure of the said sum of £750, and any part thereof remaining unapplied shall be dealt with by them at their sole discretion,' and it was held they had no beneficial interest, but that any surplus belonged to the devisee of the freehold estate or to the testator's heir at law. North, J., after saying that they were described throughout as trustees and the annuity given to them as trustees, quoted the words of the will as to their discretion in dealing with any surplus. He then said, 'If the testator had meant them to take beneficially, it would have been very easy to say that "any surplus after satisfying the aforesaid purposes, shall be divided among them for their own use." But the testator does nothing of the sort. He treats them as having a joint interest. The annuity is to be applied by them, it is to be subject to a discretion to be exercised by them, and, in my opinion, looking at the whole will, it was not intended to vest the annuity in them beneficially, but only to give them a discretion with respect to it as trustees.'

"In my opinion it must be held that, under the will now in question, the executors and trustees have not an absolute disposing power over the residuary estate, but hold it in trust."

MCPHILLIPS, J.A.

It follows that in my opinion the executor and trustee in the present case cannot be held to take the residue beneficially, but it goes to the next of kin. I would therefore allow the appeal.

MACDONALD, J.A.

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

Appeal allowed.

Solicitors for appellants: *Heisterman & Tait.*

Solicitors for respondent Greenshields: *Elliott, Maclean & Shandley.*

Solicitors for respondent Reifel: *Yarwood & Durrant.*

JACKSON & JACKSON v. SHELL OIL COMPANY OF BRITISH COLUMBIA, LIMITED.

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JACKSON v. SHELL OIL COMPANY OF BRITISH COLUMBIA, LTD.

Contract—Sale of gasoline—Discount—"Usual and current trade discount allowed dealers"—Interpretation.

The plaintiffs, proprietors of a gas station entered into an agreement with the defendant to purchase from it exclusively for three years, gasoline, distillate and other pertoleum products, in consideration for which the defendant paid the plaintiffs $1,500 in cash and they agreed to furnish the petroleum products at the same current market price as furnished to the trade generally, and in addition to the usual and current trade discount allowed to dealers of the Company an additional sum of one cent per gallon of gasoline sold. At the time the contract was entered into the current trade discount was four cents per gallon, but shortly after the defendant Company entered into contracts with other dealers who agreed to purchase from them exclusively whereby they allowed them the usual discount of four cents and an additional discount of two cents per gallon. The plaintiffs brought this action for specific performance, claiming that by virtue of this the current discount was raised to six cents per gallon. The action was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J., that the Company may enter into special contracts with retailers who agree to buy from it exclusively as to the discount to be allowed, this does not affect the "usual and trade discount allowed to dealers" and the action was properly dismissed.

APPEAL by plaintiffs from the decision of MCDONALD, J. of the 10th of March, 1930, dismissing an action for specific performance and of a contract entered into between the plaintiffs and the defendant Company on the 15th of January, 1929, whereby in consideration of the plaintiff Ray Jackson covenanting to handle and sell gasoline, distillate and other petroleum products of defendant exclusively, the defendant paid Ray Jackson $1,500 in cash and covenanted to supply him with the aforesaid products for a period of three years, the Company agreeing to furnish him with petroleum products at the same current market prices and of the same quality as furnished to the trade generally, and in addition to the usual and current trade discount allowed to dealers the Company would allow him an additional sum of one cent per gallon of gasoline sold and delivered by the Company to the plaintiff during the term of

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the agreement. At the time the agreement was entered into the "usual and current trade discount allowed to dealers" was four cents per gallon of gasoline, and the defendant Company, in accordance with the contract allowed the plaintiff a discount of five cents per gallon. The plaintiff claims that the "usual and current trade discount allowed to dealers" has since been increased to six cents per gallon, and he claims that from the time of the increase he was entitled to a discount of seven cents per gallon purchased, which the defendant Company refused to allow. The evidence disclosed that subsequent to the agreement the defendant Company entered into contracts with other dealers, who gave them the exclusive right to supply gasoline, to give them the usual discount of four cents and an additional discount of two cents. It was held by the learned trial judge that the defendant Company was entitled to enter into special contracts with buyers who purchased exclusively from them and allow an additional discount but this did not affect the "usual and current trade discount allowed to dealers" and he dismissed the action.

The appeal was argued at Vancouver on the 12th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Brown, K.C., for appellant: The father, Alfred C. Jackson owned the property, and the son, Ray Jackson, ran the garage and gas station. When the defendant allowed the additional two cents per gallon it allowed it to 90 per cent. of its customers. The current trade discount varies from time to time, and shortly after January, 1929, it changed to six cents per gallon.

A. M. Whiteside, for respondent: The two cents additional discount was given for a consideration, namely, the exclusive right of sale of gasoline to those customers who received it, also the right to advertise at their respective stations. It in no way affected the "usual and current trade discount" which always remained at four cents per gallon.

Brown, replied. *Cur. adv. vult.*

6th January, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The bargain between the parties was

that plaintiff purchasing gasoline from the defendant should be allowed the price to the retail trade less 4 cents per gallon. The price to dealers known as "the tank wagon price" was 4 cents less than the retail price, so that by reason of the plaintiff and his father having entered into an agreement with the defendant plaintiff was entitled to discount of an extra 1 cent off the retail or tank wagon price. The defendant agreed to furnish plaintiff with gasoline "at the same current market price and of the same quality as furnished to the trade generally" and because of plaintiff agreeing to buy his gasoline from defendant for a term of three years he was to get an extra discount of 1 cent making in all 5 cents. Subsequent to this agreement the defendant entered into contracts with other dealers giving them the exclusive right to supply gasoline to the dealers subject to the usual discount of 4 cents and an additional discount of 2 cents. This is what the plaintiff complains of. He says now the general market price ought to be regarded as 6 cents below the retail price and that he is entitled to a discount of 7 cents below retail price, by his said contract. Now it appears from the evidence that no change was made in the aforesaid discount of 4 cents to dealers in the trade. The usual and current trade discount is 4 cents below the retail price, which was the usual and current price at the time the contract was entered into and has remained the same ever since. The special contracts made with other retailers for a further discount of 2 cents does not apply to any but those retailers who have made contracts giving the Company the exclusive sale to them for a period of years. The effect of these contracts is that the dealer is to have the usual and current discount of 4 cents and a second discount of 2 cents for giving the defendant the exclusive right to sell to him during this period of years.

MACDONALD, C.J.B.C.

This seems to me to be the true construction of the agreement and of the term "usual or current price to the trade." If the dealer should refuse to enter into the agreement giving the Company the exclusive right to sell to him he would have to pay the retail price less only the usual and current discount to those in the trade, which is 4 cents.

We have been referred to a number of definitions of the words

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"current price" in the dictionaries. These definitions are general definitions while the words in question here "the usual and current price" must be interpreted according to the text of the contract and so interpreted I think the appellant must fail.

MARTIN, J.A.

MARTIN, J.A.: The learned judge below has, in my opinion, taken the correct view of this contract, which, in brief, is that the subsequent system of special contracts which a large majority of dealers entered into with the defendant and other wholesalers, has not displaced the original "current market price" as the foundation of plaintiff's rights under said prior contract, and therefore the appeal must be dismissed. It might be otherwise if all the dealers had entered into such special contracts with the result that there was no longer a "current market" outside of them.

GALLIHER, J.A.

GALLIHER, J.A.: My learned brothers are all of the opinion that this appeal should be dismissed and while I am not quite clear on the matter I will not dissent though expressing some doubt as to the correctness of the judgment below.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal fails.

MACDONALD, J.A.

MACDONALD, J.A.: Upon the interpretation of the contract in question we cannot take into consideration a special price allowed to dealers as a consideration for entering into special contracts with exclusive features. The contract obligates the Company to furnish appellant with petroleum products at the same "current market prices" as furnished to the trade generally (clause 2). Then in addition to the "usual" (not extra-usual) current trade discount allowed to dealers respondent Company was to allow appellant a further sum of 1 cent per gallon. It transpired later that by entering into special contracts on special terms, a further discount was allowed to other dealers. These dealers representetd 90 per cent. of the trade. Whatever might be said if 100 per cent. of the trade signed special contracts we cannot say that a current market price or current trade discount is established by special contracts entered into because of special inducements. The appellant Company

by ill-advised contracts might offer to sell at less than cost. That would not affect the "current market price."

I would dismiss the appeal.

Appeal dismissed.

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Solicitors for appellants: *Brown & Woodburn.*

Solicitors for respondent: *Whiteside, Wilson & White.*

MAINLAND POTATO COMMITTEE OF DIRECTION v. TOM YEE.

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Practice—Time for appealing—Interlocutory or final order—Marginal rules 867 and 879—B.C. Stats. 1926-27, Cap. 54, Sec. 3 (3).

MAINLAND POTATO COMMITTEE OF DIRECTION v. TOM YEE

Pursuant to the powers conferred by the Produce Marketing Act, one McLelan was appointed sole member of the Mainland Potato Committee of Direction on October 26th, 1928. In pursuance of the powers delegated to said Committee, this action was instituted against Tom Yee to recover moneys owing the Committee and judgment was given in the County Court in Vancouver in the plaintiff's favour. The defendant appealed to the Court of Appeal, and on April 2nd, 1930, the appeal was allowed with costs. On the 7th of June, 1930, a warrant of execution was issued against McLelan personally for the costs incurred. An application by McLelan for an order that the warrant of execution issued against him be set aside was dismissed on the 31st of July, 1930, and notice of appeal was filed on the 6th of September following. On preliminary objection taken by the respondent that the order is interlocutory and the appeal is therefore out of time:—

Held (MARTIN and MCPHILLIPS, JJ.A. dissenting), that although McLelan's name does not appear as a party he is sued in his representative name and is therefore a party before the Court. The order is therefore interlocutory and the appeal should be quashed.

APPEAL by A. W. McLelan from an order of HOWAY, Co. J. of the 31st of July, 1930, dismissing an application of McLelan, sole member of the respondent the Mainland Potato Committee of Direction, to set aside a warrant of execution issued against him to realize on a judgment for the costs of the defendant obtained in this action in which, after trial and appeal, the Mainland Potato Committee of Direction were ordered to pay, McLelan claiming that he was never a party to the action and is not subject to execution. Preliminary objection was taken

Statement

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that the Act appealed from is interlocutory and notice of appeal having been given on the 6th of September, the appeal is out of time and should be quashed.

The appeal was argued at Vancouver on the 12th and 13th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Bray, for appellant.

Wood, K.C., for respondent, took the preliminary objection that the appeal was out of time, it being an interlocutory order. The date of the order was July 31st, 1930, and the notice of appeal was filed on the 6th of September following: see Annual Practice, 1931, pp. 1247-8; *Blakey* v. *Latham* (1889), 43 Ch. D. 23; *Norton* v. *Norton* (1908), 99 L.T. 709.

Bray, contra: We are strangers to this judgment: see *Boslund* v. *Abbotsford Lumber, Mining & Development Co.* (1925), 36 B.C. 386; Annual Practice, 1931, p. 1231. The true test is that irrespective of the result the order terminates the matter: see Halsbury's Laws of England, Vol. 11, p. 179, sec. 490; *In re Compton. Norton* v. *Compton* (1884), 27 Ch. D. 392; Archbold's Q.B. Practice, 13th Ed., Vol. 1, p. 513.

Argument

Wood, in reply, referred to *Frumento* v. *Shortt, Hill & Duncan, Ltd.* (1916), 22 B.C. 427; *Mason and Son* v. *Mogridge* (1892), 8 T.L.R. 805. He is not a stranger to the action, but the order is interlocutory even if he were: see *Fisher* v. *Magnay* (1843), 5 Man. & G. 778. The fact that a stranger is drawn in does not alter the practice that it is interlocutory: see *Pheysey* v. *Pheysey* (1879), 12 Ch. D. 305; *In re Lewis. Lewis* v. *Williams* (1886), 31 Ch. D. 623.

Cur. adv. vult.

6th January, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C: The order is interlocutory and the appeal should be quashed.

MARTIN, J.A.

MARTIN, J.A.: My opinion on the preliminary objection raised to the hearing of this appeal as not being brought within the prescribed time, is that it is not an interlocutory, but a final one, and therefore it should be heard, because, in brief, I do not regard the proceedings taken by A. W. McLelan, as the sole

member of the local Mainland Potato Committee of Direction, as being personal but as the nominated officer of the Interior Committee of Direction under section 4 of the Produce Marketing Act, Cap. 54, 1926-27, as amended by Cap. 39 of 1928. That statute is a complicated and confused enactment and very difficult to construe satisfactorily in view of its inconsistent provisions; reference should also be had to sections 6 and 12 in particular as specially bearing on the attempt to elucidate the present question.

GALLIHER, J.A.: Colonel A. W. McLelan, who had been duly appointed as sole member of the Mainland Potato Committee of Direction, brought action in the name of the Committee to recover certain levies made upon the defendant under the Produce Marketing Act of British Columbia.

He succeeded in the County Court but on appeal to this Court the decision was reversed and costs were taxed at some $380. These costs were not paid and a warrant of execution was taken out directed to the sheriff of the County of Westminster requiring him to make and levy by distress of the goods and chattels of A. W. McLelan, calling himself for the purposes of this action The Mainland Potato Committee of Direction. The goods of McLelan were seized but by an order of ELLIS, Co. J. the sheriff was ordered to withdraw and execution was stayed until further order. An application was then made by McLelan to set aside the warrant of execution but was refused by HOWAY, Co. J., who ordered the sheriff to proceed under the warrant of execution and this appeal is taken against that order. Mr. *Wood* of counsel for Tom Yee raised the preliminary objection that the order was interlocutory and the appeal had not been taken in time. It was admitted that if this is an interlocutory order the appeal must fail. It seems to me that this is an interlocutory order if it can be said to be an order for the purpose of working out the rights given by the final judgment.

In *Blakey* v. *Latham* (1889), 43 Ch. D. 23 at p. 26, Fry, L.J. says:

"I am glad I am not called upon to give anything like an exhaustive definition of the word 'interlocutory,' but of this I am clear—that where a final judgment has been pronounced in an action, and subsequently an order has been obtained for the purpose of working out the rights given

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by the final judgment, that order has always been deemed, and rightly deemed, to be interlocutory."

Mr. *Bray's* point is in answer to this that it is not a working out of the proceedings between the parties as A. W. McLelan was not a party to the proceedings upon which judgment was obtained.

While the name of A. W. McLelan does not appear as a party he has sued in his representative name and is therefore a party and before the Court.

I would sustain the preliminary objection and quash the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: My opinion is that the appeal is in time, being an order final in its nature. Being of that view my opinion is that the appeal should be heard and I would deny the motion to quash.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from an order of His Honour Judge HOWAY dismissing an application made by one A. W. McLelan, sole member of respondent Mainland Potato Committee of Direction, to set aside a warrant of execution issued against him to realize a judgment for costs obtained in this action in which after trial and appeal the Mainland Potato Committee of Direction were ordered to pay the costs of the respondent Tom Yee. The ground of appeal is that the said A. W. McLelan never was a party to the action and that execution cannot be issued nor levy by distress made against his goods and chattels.

It was objected that the order appealed from is interlocutory and, if so, the appeal was not launched in time and should be quashed. On the other hand it was urged that the appellant A. W. McLelan was brought into the proceedings for the first time when execution was issued against his property and in his unsuccessful effort to set it aside, against which he appeals, his rights were finally determined. The question in dispute is the right, if any, to issue execution against one, not a named party to the action. In point of form it would appear to be interlocutory but may yet be treated as final if it is conclusive against McLelan and finally decided the rights of the parties.

If, however, McLelan is so identified with the Mainland

Potato Committee of Direction that he was in reality the plaintiff in that action the order now under appeal was made in working out the rights of the parties and therefore interlocutory. McLelan was the only member of the Mainland Potato Committee of Direction when the action was launched. In *Mason and Son* v. *Mogridge* (1892), 8 T.L.R. 805 it was held that a single person cannot sue in a firm name. There should be a party to every suit. It might have been corrected in the course of the proceedings but now that the action was carried on in this manner and judgment against a name obtained, can execution be issued against the real party concerned? By B.C. Stats. 1928, Cap. 39, Sec. 4, Subsec. (3) the "Committee" in question is deemed to represent the "Interior Committee" a larger body but if the latter do not voluntarily assume liability, as I think it should, the successful defendant in the action is without recourse unless the member of the "Committee" launching the action is held liable for costs. A search for the "Committee" would be fruitless. It is a name only. Could a sole trader, using a descriptive name avoid an execution for costs because of the style of cause in the action? Here the debtor is known by two names, one "Mainland Potato Committee of Direction," the other "A. W. McLelan." The question of whether or not McLelan and the "Committee" are identical is one of evidence and that fact is established. The Committee had no authority to sue and as McLelan is the only party immediately identified with it the defendant may proceed against him. He chose to sue under the name of the Committee. He appeared before the Court. He was there not merely as a witness but as a party.

MACDONALD, J.A.

It follows that McLelan being, in reality, a party to the action, the *alter ego* of the Mainland Potato Committee of Direction, the order appealed from was made in working out the rights of the parties and is interlocutory. The appeal should, therefore, be quashed.

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

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

Solicitors for respondent: *Wood, Hogg & Bird.*

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THE KING v. LEE MOON KOO.

Practice—Habeas corpus—Affidavit of applicant in support filed after writ issued—Order to cross-examine—Appeal—R.S.C. 1927, Cap. 95, Sec. 13.

THE KING v. LEE MOON KOO

Section 13 of the Chinese Immigration Act provides: "Pending the decision of the Minister, the appellant and those dependent upon him shall be kept in custody at an Immigration Station unless released upon security as provided for in the next succeeding section of this Act."

The defendant having been detained at the immigration building in Victoria for deportation to China pursuant to an order of the controller of Chinese immigration, he applied for and obtained a writ of *habeas corpus*. On the return of the writ the applicant was ordered to make an affidavit of his own in support of the application for the writ and the hearing was adjourned. The applicant filed his affidavit and on the application again coming on for hearing, it was ordered at the instance of counsel for the controller of Chinese immigration that the applicant submit himself for cross-examination on his affidavit.

Held, on appeal, that as it appears that an appeal had been taken to the minister that had not yet been disposed of, section 13 of the Chinese Immigration Act is tantamount to a stay of proceedings for his release, and as this Court would only be doing a futile act in dismissing or allowing the cross-examination in a proceeding that has no foundation, the appeal should be quashed.

APPEAL by defendant from the order of MURPHY, J. of the 17th of November, 1930. The defendant applied for and obtained a writ of *habeas corpus*, having been detained at the immigration building in Victoria for deportation to China, pursuant to the order of the controller. On the return of the writ an order was made that the applicant file an affidavit of his own in support of his application for the writ, and the hearing was adjourned. The applicant filed his affidavit as ordered, and on the application again coming on for hearing, it was ordered at the instance of counsel for the controller of Chinese immigration that the applicant submit himself to cross-examination on his affidavit.

Statement

The appeal was argued at Vancouver on the 27th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

R. D. Harvey, for appellant: The order was made and the writ issued. No good purpose is served by having the defendant examined. There was no application to set aside the order: see *Rex* v. *Banniti* (1925), 45 Can. C.C. 75; *The Catholic Publishing Co.* v. *Wyman* (1863), 11 W.R. 399; *Clindinning* v. *Varcoe* (1876), 7 Pr. 61; *Imperial Bank of Canada* v. *Taylor* (1884), 1 Man. L.R. 244; Short & Mellor's Crown Office Practice, 2nd Ed., 324; *Rex* v. *Sands* (1915), 25 Can. C.C. 116; *In re Melina Trepanier* (1885), 12 S.C.R. 111; *Rex* v. *Chin Sack* (1927), 39 B.C. 223.

Argument

Moresby, K.C., for the Crown: The accused must make an affidavit in support of an application for a writ unless it can be shewn he is coerced or restrained from doing so: see *Rex* v. *Murrell* (1923), 40 Can. C.C. 298; *Canadian Prisoners' Case* (1839), 5 M. & W. 32; *In re Chinese Immigration Act and Lee Chow Ying* (1928), 39 B.C. 322.

Harvey, replied.

Cur. adv. vult.

On the 6th of January, 1931, the judgment of the Court was delivered by

MACDONALD, C.J.B.C.: After the order for deportation Lee Moon Koo appealed to the minister against it and the following day made an application for a writ of *habeas corpus* which was granted as now alleged on insufficient material. The matter came up for argument on return of the writ when counsel for the Crown objected that the material on which the order was granted was ineffective. The learned judge, contrary to objection, ordered the applicant to file another affidavit in support of the order already made and subsequently ordered examination upon said affidavit. Objection was taken to the order for the examination on the ground that the only question counsel for the applicant wished to argue was that the Board of Inquiry or the comptroller had no authority to make his order. Nevertheless the order was made for the examination of the applicant and from that order he appealed. At that time the sheriff had not filed his return. He, however, made it a day or two afterwards and the facts that I have stated appeared from that

Judgment

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return. The appeal was taken to the minister and has not yet been disposed of. Section 13 of the Chinese Immigration Act reads as follows:

"Pending the decision of the Minister the appellant and those dependent upon him shall be kept in custody at an Immigration Station unless released upon security as provided for in the next succeeding section of this Act."

That section is tantamount to a stay of proceedings for his release. Had it been called to the attention of the learned judge the writ would not have been ordered.

Judgment

I think it also disposes of this appeal. Since we have no power to do anything but a futile act, namely, to dismiss or allow the cross-examination in a proceeding which has no foundation, I would therefore quash the appeal and since the motion for the appellant's discharge had not been reached or disposed of fully and still stands for hearing I would leave it to the learned judge to dispose of the case in view of the said section 13.

Appeal quashed.

Solicitors for appellant: *O'Halloran & Harvey.*
Solicitors for respondent: *Moresby, O'Reilly & Lowe.*

PARRY v. THOMSON.

CAYLEY, CO. J.

1931

Jan. 9.

PARRY v. THOMSON

Courts—Small debts—Appeal to County Court—"Nearest County Court"—Jurisdiction—R.S.B.C. 1924, Cap. 57, Sec. 48.

Section 48 of the Small Debts Courts Act provides that an appeal from the decision of a magistrate shall lie either to the nearest County Court or to a judge of the Supreme Court.

An appeal from a decision of the Small Debts Court at Powell River taken in the County Court at Vancouver was quashed for want of jurisdiction, as there are other County Courts closer to where the trial took place than Vancouver.

Held, further, that as the section reads "nearest County Court" it refers to the Court itself and not to the "County Court District."

PRELIMINARY objection on an appeal from a decision of the Small Debts Court at Powell River, that there is no jurisdiction to hear the appeal under section 48 of the Small Debts Courts Act. Statement

Heard by CAYLEY, Co. J. at Vancouver on the 9th of January, 1931.

W. C. Thomson, for appellant.
Hogg, for respondent.

CAYLEY, Co. J.: Preliminary objection was taken by the respondent in this matter that the County Court of Vancouver has no jurisdiction to hear the appeal, because of the wording of section 48 of the Small Debts Courts Act which reads as follows:

"The appeal shall lie either to the nearest County Court or to a judge of the Supreme Court."

The nearest County Court to Powell River is not the County Court of Vancouver. The nearest County Court to Powell River might be, I am told, one of three, Cumberland, Courtenay and Nanaimo. The County Court of Vancouver is 76 miles, as I am informed, from Powell River, and it is evident that Nanaimo at all events is much closer to Powell River than Vancouver. Judgment

The section mentioned does not say "County Court District," it says the nearest "County Court." And for interpretation of

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these words I am referred to the interpretation put upon section 77 of the Summary Convictions Act, where the words used are "to the County Courts at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose." These words were interpreted by the Court of Appeal in *Rex* v. *Holt* (1925), 36 B.C. 391, as meaning there is no jurisdiction in any Court other than the one which is nearest the place where a conviction took place. The same decision was given in *Rex* v. *Canadian Robert Dollar Co.* (1926), 37 B.C. 264. It is true that these two cases of an interpretation of the Summary Convictions Act are not an interpretation of the Small Debts Courts Act, but I think we may interpret by analogy the Small Debts section involved. I think it is a matter which ought to be referred to the Court of Appeal for decision in any case. For the time being, I have come to the conclusion that this Court has no jurisdiction to hear the appeal.

Judgment

Preliminary objection sustained.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND HOFFMAN.

MURPHY, J.

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Jan. 29.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND HOFFMAN

Testator's Family Maintenance Act—No provision in will for two daughters —"Proper maintenance and support"—Construction of—R.S.B.C. 1924, Cap. 256.

One Hoffman died in January, 1930, leaving a net estate of $12,769.25. By his will he left $1 to his wife from whom he was divorced in 1926, and $1 to each of his two daughters, Catherine who is of age, and Mary a minor. The residue of his estate he left to Mary E. Bernhard to whom he was not related, but he had, with others, lodged in her various lodging-houses for over 20 years. Both daughters were without means and were brought up at the expense of their maternal grandfather and maternal uncles. Catherine attended a college from which she was to graduate in the following June with the intention of becoming a teacher, and Mary who was 19 years old had a serious incurable heart condition, precluding her from earning a livelihood. Deceased's estate included a one-half interest in a lodging-house that Mrs. Bernhard was running, valued at $2,800. On an application by Mrs. Hoffman under the Testator's Family Maintenance Act to make adequate provision from the estate for the proper maintenance and support of herself and her two daughters:—

Held, that Mrs. Hoffman having obtained a decree of absolute divorce from deceased had no *status* to make an application on her own behalf but was competent to make application under section 9 (1) of said Act for her daughter Catherine, also for Mary as her guardian. That Mrs. Bernhard be allowed to retain the half interest in the lodging-house, that the daughter Catherine receive $1,000 and the balance of the estate be utilized to purchase an annuity for life for the daughter Mary.

APPLICATION by Mary Margaret Hoffman on behalf of herself and her two daughters under the Testator's Family Maintenance Act that adequate provision for the proper maintenance and support of herself and her two daughters be made out of the estate of her deceased husband. The facts are set out in the reasons for judgment. Heard by MURPHY, J. at Vancouver on the 21st of January, 1931. Statement

Raines, for applicants.
Gibson, for the administrator and Mrs. Bernhard.

29th January, 1931.

MURPHY, J.: Deceased died in Vancouver on January 27th, Judgment

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IN RE TESTATOR'S FAMILY MAINTENANCE ACT AND HOFFMAN

1930, leaving an estate which it is agreed was of the net value of $12,769.25. By his will dated September 5th, 1923, he bequeathed $1 to Mary Margaret Hoffman, his then wife, and $1 to each of his daughters, Catherine Josephine Hoffman and Mary Hoffman. He gave the whole of the residue of his property to Mary E. Bernhard to whom he was in no way related by blood. In 1926 Mary Margaret Hoffman obtained a decree of absolute divorce from deceased from a Wisconsin Court. The validity of this decree was not, and I think could not be, questioned in these proceedings. It was therefore conceded that Mary Margaret Hoffman has no *status* to make an application on her own behalf under the provisions of the above Act. Inasmuch however as under our law she is the guardian of the minor Mary Hoffman and inasmuch as the assets of the estate are in this jurisdiction, I think she is competent to make an application under the said Act on said minor's behalf. She purported to apply likewise on behalf of the daughter Catherine but the latter is of age. By subsection (1) of section 9 of the Act however an application on behalf of one person may be treated as an application on behalf of all persons who might apply. On the facts of this case I think I should give Catherine Hoffman the benefit of this section.

Judgment

In *Walker* v. *McDermott* (as yet unreported *) the Supreme Court of Canada dealt with an application under said Act in the following language (Duff, J., pp. 95-6):

"The pertinent enactments of the Testator's Family Maintenance Act of British Columbia, c. 256, R.S.B.C., 1924, are these:

"'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.

"'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.'

* Since reported (1931), S.C.R. 94.

"The provision which the Court is authorized to make in the circumstances stated in the section, is, 'such provision as the Court thinks adequate, just and equitable.' The conditions upon which this authority rests are that the person whose estate is in question has died leaving a will, and has not made, by that will, in the opinion of the judge, adequate provision for the 'proper maintenance and support' of the wife, husband or children, as the case may be, on whose behalf the application is made.

"What constitutes 'proper maintenance and support' is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the Court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view), consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the Court comes to the decision that adequate provision has not been made, then the Court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account."

In my opinion deceased has not made adequate provision for the proper maintenance and support of his two daughters. He has in fact made no provision whatever. They are both without any means and have been brought up and educated at the expense of their maternal grandfather and maternal uncles. At the date of deceased's death Catherine was a student at Mount Mary College which seems to be an institution giving an education somewhat equivalent to a college course. The annual cost of this education was about $1,000 a year paid by her maternal grandfather and/or maternal uncles. She was to graduate in June and purposed becoming a teacher. A judicious father, with an estate of over $12,000, seeking to discharge towards her his parental duty, considering her situation, the standard of living to which she was accustomed and the fact that she was to graduate in June and must then look for employment, which might not be immediately obtainable—certainly not before the autumn when schools would open—and the further fact that she was entirely dependent on her maternal relatives could not, in my opinion, give her less than $1,000. I would feel that he should give her more under the circumstances were it not that, in my opinion, his second daughter Mary had a paramount

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Judgment

claim upon him when her situation is considered in the light of the language of the Supreme Court of Canada. She, like her sister, has been since infancy entirely dependent upon the bounty of her maternal relatives. She is 19 years old. She has a serious incurable heart condition which practically precludes her from ever earning a livelihood and which makes marriage, unless it be of the ultra modern kind, a highly dangerous state of life for her to enter upon. A judicious father seeking to discharge his parental duty towards her would, in my opinion, feel compelled to make fairly adequate provision for her throughout her expectancy of life. A judicious father as aforesaid would I think not regard marriage even of the suggested type as a possible future solution of the question of her maintenance and support for whatever his views of its morality might be he would realize that, if she married, the inherent danger to her life would always be present. Deceased, as is evident from his will, desired to make Mrs. Bernhard the object of his bounty. She had no claim upon him either because of blood ties or because of money transactions. He had with others lodged in her various lodging-houses for over 20 years. I find the suggestion that she caused differences between deceased and his wife and the further suggestion—hinted at rather than made—that improper relations existed between her and deceased to be entirely unfounded. Mrs. Bernhard was called at the hearing and made a very favourable impression upon me. She put forward no claim of any kind in reference to deceased. She stated she had been kind to him during his long residence with her but not more so than she had been to her other lodgers. This statement was corroborated by two persons who had lodged with her for a number of years and who are still with her (though one is temporarily absent in England) and I accept it as true. The deceased evidently felt gratitude towards her else he would not have designated her as his sole beneficiary even if, as I hold to be the case, he was actuated by ill-will towards his wife and family in cutting them off with a dollar each. So far at any rate as the children are concerned this ill-will was unmerited for he had deserted them in their infancy, had never fulfilled any of his duties as a father to them and had never made any attempt to regain the custody of them or in any way concerned

himself with their welfare. Weighing his sense of gratitude towards Mrs. Bernhard—which I think was deservedly felt—against the claims of his daughter Mary when disposing of his estate other than the $1,000 that I consider he should have given his daughter Catherine, I am of opinion that, if he acted as a judicious father seeking to discharge his parental duty, he could not have given to Mrs. Bernhard more than his undivided half interest in the lodging-house she is now running, the value of which, according to Inventory "X" is $2,800. In view of his daughter Mary's physical condition and of the relatively small sum remaining to be disposed of, I think a judicious father would direct that such residue be expended in the purchase of an annuity for life for her. There is power in the Court under section 8 of the Act to make such direction. I direct that the daughter Catherine receive $1,000 and that the balance of the estate, other than the undivided half-interest in the east half of lot 12, block 34, D.L. 185 be first applied to payment of the costs of all parties, taxed on a solicitor and client basis, and the balance be utilized to purchase an annuity for life for the daughter Mary.

Judgment

I realize that the effect of this order is virtually to write a new will for deceased but on the facts of this case, and on my understanding of the quotation from the judgment of the Supreme Court of Canada above set out, I see no other course open to me.

Application granted.

SWANSON, CO. J.

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Feb. 4.

LISTER v. BURNS & CO., LTD. AND PALM DAIRIES, LTD.

Contract—Management of farm for one year—Dismissal—Agreement made on a Sunday—Validity—R.S.C. 1927, Cap. 123, Sec. 4.

LISTER v. BURNS & CO. LTD.

The defendants, through an agent, one Skelley, entered into an agreement with the plaintiff on Sunday the 23rd of March, 1930, to employ the plaintiff as manager of their dairy farm for one year at a salary of $100 per month, the plaintiff also to receive 10 per cent. of the profits earned during his management. The plaintiff took over the management of the farm at once, remaining there until the 16th of October following, when he was dismissed. In an action for damages for wrongful dismissal and for six months' salary:—

Held, that the hiring of the plaintiff on a Sunday was a "transaction in connection with the ordinary calling" of the defendants and so within the prohibition of the Lord's Day Act, and the action should be dismissed.

Held, further that although the Lord's Day Act is not pleaded it is the duty of the Court to take cognizance of the statute and to raise the point *ex mero motu* even if not pleaded or raised by counsel.

Statement

ACTION for damages for wrongful dismissal, for six months' salary and 10 per cent. of the profits during his management of the defendants' dairy farm, situate five miles east of Kamloops, pursuant to agreement made between the plaintiff and one Skelley representing the defendants, on Sunday the 23rd of March, 1930. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Kamloops on the 4th and 5th of February, 1931.

A. D. Macintyre, and *Kidston,* for plaintiff.
G. W. Black, for defendants.

Judgment

SWANSON, Co. J.: At the close of the plaintiff's case Mr. *Black,* counsel for defendants, moved for the dismissal of this action on the grounds: (a) That there is no sufficient memorandum to satisfy section 4 of the Statute of Frands, in the case of an agreement that is not to be performed within the space of one year from the making thereof as here alleged, (b) that the agreement set up in this action is illegal having been made on

Sunday, March 23rd, 1930, in contravention of section 4 of the Lord's Day Act, R.S.C. 1927, Cap. 123.

I will confine my judgment to the second objection raised under the Lord's Day Act, which after careful consideration of the matter at my limited disposal overnight I hold to be fatal to the plaintiff's action.

The plaint as amended alleges that the contract was made on March 23rd, 1930, a Sunday. The plaintiff's evidence clearly bears out that the whole transaction on which plaintiff founds his argument herein was made on the Lord's Day. With considerable wealth of detail plaintiff outlined his case culminating in the arrangement made on Sunday, March 23rd, 1930, by Skelley representing the defendants to employ plaintiff to manage defendants' dairy farm some 5 miles east of Kamloops in this County for one year as stated by plaintiff at a monthly salary of $100, and with an arrangement that he would also receive 10 per cent. of the profits earned by the dairy farm during the period of his management. It was an express term of plaintiff's engagement, as alleged in paragraph 6 of the plaint, and as borne out by plaintiff's evidence that the defendants were to take over (that is to buy) from plaintiff his herd of pure bred Jersey cows, which he then had at his ranch at Chilliwack. This was all agreed to, and the bargain orally completed on the said Sunday. On the same day the plaintiff says that he received an order from Skelley to go out and buy enough cows (Jerseys) to make up two car-loads. Pursuant to this concluded arrangement plaintiff left Kamloops the same Sunday night for his home in Chilliwack. The next day, Monday, March 24th, he proceeded to Vancouver Island (Saanich) and secured 5 pure-bred Jerseys for defendants. He later brought these and two others, one bought at Ladner and another received in exchange for two grade animals at Agassiz, together with his own herd with him to defendants' dairy farm, leaving on the 4th of April and taking over the management of the dairy farm of defendants from April 5th on until he received notice of his dismissal on or about October 16th, 1930. It is in respect to this alleged wrongful dismissal that he brings his action for damages for six months' salary as manager at the rate of $100 per month and for alleged share of profits at the rate of 10 per cent. from March

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24th, 1930, to date of plaint. If this arrangement made on March 23rd last is in contravention of section 4 of the Lord's Day Act it is illegal, and no valid cause of action can be founded upon it. The whole contract would be tainted with illegality. It is a maxim of the common law, *Ex turpi causa non oritur actio.* The defendants' solicitor did not in the dispute note plead the Lord's Day Act as a defence. It is however laid down by a distinguished authority that this makes no difference, that it is indeed the duty of the Court to take cognizance of the statute, and to raise the point *ex mero motu* even if not pleaded or raised by counsel for defendants. This was admitted in the able argument of the junior counsel for the plaintiff, Mr. *Kidston.* It was so held by the Supreme Court of Canada in *L'Association St. Jean-Baptiste de Montreal* v. *Brault* (1900), 30 S.C.R. 598. It was held that the contract there was illegal, and that it was the duty of the Court *ex mero motu* to notice the illegality at any stage of the case, and without pleading. The duty of the Court was discussed at length in *The Consumers Cordage Company* v. *Connolly* (1901), 31 S.C.R. 244. At p. 297 Girouard, J. said:

Judgment

"These decisions, and the language of all the judges in the other cases proceed upon the ground that if, from the statements of one of the parties, either in the Courts below or in appeal, or otherwise, the cause of action appears to arise *ex turpi causa,* or out of the transgression of a positive law, 'there,' continues Lord Mansfield, 'the Court says he has no right to be assisted. It is upon that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.'"

Mr. Justice Lamont (now of the Supreme Court of Canada) took this same position when sitting as a judge of the Court of Appeal of Saskatchewan in the case of *Bronfman* v. *Dutchzesan* (1919), 3 W.W.R. 565 at p. 568. I think the whole agreement in the case at Bar is in open violation of the spirit and letter of section 4 of the Lord's Day Act. Section 4 reads as follows:

"It shall not be lawful for any person on the Lord's Day except as provided herein, or in any Provincial Act or law now or hereafter in force, to sell or offer for sale or purchase any goods chattels or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling or in connection with such calling, or for gain to do, or employ any other person to do on that day, any work business or labour."

An old English case is strongly pressed by plaintiff's counsel. *The King* v. *The Inhabitants of Whitnash* (1827), 7 B. & C.

596; 108 E.R. 845. That however is a decision under quite a different statute, the Sunday Observance Act passed in the 29th year of Charles 2nd, chapter 7, section 5. The head-note to that case reads as follows:

"The statute 29 Car. 2, c. 7, s. 5, enacts, that no tradesman, artificer, workman, labourer, or any person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary calling on the Lord's Day, and subjects parties offending to a penalty: *Held*, that this statute only prohibits labour, business, or work done in the course of a man's ordinary calling, and, therefore, that a contract of hiring made on a Sunday between a farmer and a labourer for a year, was valid, and that service under it conferred a settlement."

Bayley, J., at p. 600 says:

"The hiring of a servant seems to fall properly within the meaning of the word 'business.'"

Later the learned judge states:

"I am of opinion that this Act of Parliament does not prohibit labour, business, or work of every description; and that the hiring of a servant by a farmer on a Sunday is not work or business within the meaning of the Act of Parliament. I also think that it is not labour, business, or work of the ordinary calling of the farmer. He, like every other person who requires servants, must hire them. The true construction of the words 'ordinary calling,' seems to me to be, not that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily or weekly in the course of trade or business are parts of the ordinary calling of a man exercising such trade or calling, but the hiring of a servant once in the year does not come within the meaning of those words. For these reasons, I am of opinion that the contract of hiring in this case was valid."

Judgment

Similarly Holroyd, J., at p. 601.

It is always fallacious to rely upon a judgment given upon a statute quite different in many respects from the Act before us Lord's Day Act of Canada. It is true that our Act which is in force in British Columbia as well as in other parts of Canada states:

"It shall not be lawful for any person on the Lord's Day, . . . to carry on or transact any business of his ordinary calling."

But it does not stop there, but adds immediately thereto "or in connection with such calling," words which are entirely missing from the statute of Charles 2nd, which I submit make the above decision in the *Witnash* case quite inapplicable. It is to be noted that the learned judge, Bayley, J. stated (as above quoted): "The hiring of a servant seems to fall properly within the meaning of the word 'business.'" Surely then one who hires

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a servant must be transacting business in connection with such calling (that is his ordinary calling). The Lord's Day Act as I have said does not stop short (as does the old statute of Charles) with "transacting business of his ordinary calling," but goes on to amplify that thus: "Transacting any business in connection with his ordinary calling." I would hold that the hiring of a servant on Sunday (as here) is a "transaction in connection with the ordinary calling" of defendants and so within the prohibition of the statute before me.

If anything further were required to invalidate and render illegal the whole contract it is the transaction in connection with the sale by plaintiff to defendants of plaintiff's substantial herd of pure-bred Jersey cows (running into some $5,200) on the Sunday in question. The plaintiff maintains throughout that it was a clear and essential term of the whole agreement which he made with defendants that they should take over (that is buy) from him his herd of Jersey cows. He says that he would not have entered into the agreement with defendants to become their dairy farm manager on any other condition. Therefore it is an essential part of the agreement that day concluded between the parties. The matter seems so clear that it requires a refinement of reasoning to answer such a legal proposition. It is submitted by Mr. *Kidston* that there was no "sale" on Sunday of plaintiff's herd of cows. He submits that there was no cash passed between the parties that day, and that no delivery took place, and that no memo. in writing was made to satisfy the section 11 of our Sale of Goods Act, Cap. 225, R.S.B.C. 1924 (being a remodelling of the old section 17 of the Statute of Frauds). But that is no answer. Section 17 of the Statute of Frauds is a matter merely of evidence required to maintain the "enforceability by action" of a contract for the sale of goods over 10 pounds. A "sale" of goods may in fact be effected, but if the statutory requirements as to evidence to support the enforceability of an action respecting same are not forthcoming no legal enforcement in the Courts by action can be effected.

Judgment

In the case before me the plaintiff is not seeking to "enforce by action" the agreement respecting sale of his Jersey herd. There is indeed no occasion for that as the plaintiff has received his money in full for all his Jersey cows. But that does not

answer the point at issue under section 4 of the Lord's Day Act. What we are seeking to ascertain is this: Was there on that Sunday a "sale or offer for sale or purchase" of the Jersey cows in question? It will be noticed that the section penalizes not only the "sale" but the "offering for sale or purchase." Surely there was a completed contract to sell made on that day, a contract which the common law would respect, even if plaintiff could not enforce it by action if he were so minded. The very object which Parliament must have had in mind was to prohibit and penalize just such a commercial transaction (one indeed of considerable magnitude) made on the Lord's Day.

If there is illegality in this phase of the contract, the whole contract must go by the board and be declared "unlawful" or illegal. If the contract is illegal the Court solely on the grounds of public policy will decline to recognize it, or any rights or claims alleged to be possessed by plaintiff for any alleged breach of it.

Judgment

At the opening of the case I felt it my duty to call the attention of counsel to the provisions of the Lord's Day Act although the Act was not pleaded by defendants. I have read over a large number of authorities which I do not propose to discuss: *Demchenko* v. *Fricke* (1926), 2 W.W.R. 221; *Merkel* v. *McKendry, ib.* 7; *Cote* v. *Friesen* (1921), 3 W.W.R. 436; *Lord's Day Alliance of Canada* v. *Attorney-General for Manitoba* (1925), 1 W.W.R. 297; *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524; *Rex* v. *Laity* (1913), 18 B.C. 443.

For these reasons I hold that this action must be dismissed with costs.

Action dismissed.

MACDONALD, J. (In Chambers)

1931

Jan. 15.

REX v. DALBERGH.

Criminal law—Intoxicating liquors—Procedure before magistrate—Conviction—Second offence—Proof of—Certificate of registrar of Court—Sufficiency of—R.S.B.C. 1924, Cap. 146, Sec. 93.

REX v. DALBERGH

Where an information for an offence under the Government Liquor Act alleges a previous conviction the magistrate may read the whole of the information to the accused before proceeding with the hearing of the charge of the subsequent offence.

Held, further, that as the certificate of the registrar of the County Court, produced as evidence of a previous conviction, contained no proof or statement that his office is one in which convictions are returned or a statement that a conviction of the nature referred to was so returned, nor does it afford any proof that "His Honour F. McB. Young" is or was a judge of the County Court or of any Court entitled to convict Dalbergh, said certificate does not comply with the requirements of section 93 (*b*) of the Government Liquor Act as proof of a previous conviction.

APPEAL by accused by way of case stated from his conviction by the police magistrate at Prince Rupert for a second offence under the Government Liquor Act. The facts are set out in the reasons for judgment. Argued before MACDONALD, J. in Chambers at Vancouver on the 19th of December, 1930.

Statement

Burritt, for the Crown.

McTaggart, for accused.

15th January, 1931.

MACDONALD, J.: The police magistrate of the City of Prince Rupert convicted John Dalbergh, for a second offence under the Government Liquor Act (R.S.B.C. 1924), Cap. 146 and sentenced him to six months' imprisonment. He then, by a case stated, submitted two questions for the opinion of the Court, as follows:

Judgment

"(1) Was I right in personally reading to the accused at the commencement of the case the whole of the information containing both charges before reading to him the charge of the subsequent offence only, to which I asked him to plead?

"(2) Was I right in accepting the said certificate of the registrar of the County Court as being sufficient proof that the accused had been so previously convicted, in view of the fact that no evidence was given denying the charge that he had been so previously convicted?"

When Dalbergh appeared for trial upon this second offence,

the police magistrate, before proceeding with the hearing of the charge and before Dalbergh had pleaded, read the whole of the information to him. He remarked that he did so, in order that the accused might be informed that he was about to be tried for a second offence. He then said "I will now read to you again the first part of the information dealing with the present charge."

Upon a plea of not guilty being entered and evidence submitted, by both the prosecution and defence, Dalbergh was found guilty of the second or subsequent offence and the magistrate so stated to him. That part of the information, which contained an allegation of a previous conviction, was then read to the accused and, pursuant to section 93 of the said Act, he was asked if he had been so convicted. In response his counsel stated that he had nothing to say. Proof of such previous conviction was then afforded, which satisfied the magistrate and he found the accused guilty and imposed the sentence mentioned. The point to be determined is whether this course of procedure invalidated the trial.

It is contended that it was contrary to the provisions of said section 93. The objection, as I understand it, is that the whole information should not, even if he was not called upon to plead, have been read to the accused before the trial proceeded, with reference to the charge thus being investigated. Further, that it was wrong for the magistrate to have acquired knowledge that the prosecution alleged a previous conviction for a similar offence to the one he was then proceeding to try. I think these contentions are not tenable. The magistrate, in practice, at any rate outside the large cities, usually has a knowledge of prosecutions through the information being before him. He would thus likely know in advance of the actual hearing, that he was required to try the accused person for a second offence and should so inform the accused. He did nothing wrong in acquainting the accused of this fact. To have proceeded otherwise would appear unfair as it was a graver offence, through the penalty imposed for a second offence being more severe than a first offence. The magistrate even if he had not taken the information himself, was bound, in the ordinary course, to have a knowledge of the nature of the charge, so about to be investi-

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gated and he would not be in the same position as a jury, who might be trying an accused person for a second offence. He would, like a judge, simply try the charge brought before him for determination, irrespective of the previous conviction or character of the accused. There was, in my opinion, no violation of the letter or spirit of said section 93. The first question will thus be answered in the affirmative.

Then as to the second question, said section 93 provides that where a second offence is being tried, proof of previous convictions may be afforded as follows:

"(*b.*) Such previous convictions may be proved *prima facie* by the production of a certificate purporting to be under the hand of the convicting justice or the registrar of the County Court to whose office the conviction has been returned, without proof of signature or official character."

The certificate purporting to be utilized under this subsection reads as follows:

"County Court, Prince Rupert,
"November 19, 1930.
"Prince Rupert Registry.

"Prince Rupert, B. C.
"November 19th, 1930.

"This is to certify that John Dalberg of Prince Rupert, B.C., was convicted for violation of Sec. 28 of the Government Liquor Act of British Columbia, before His Honour, Judge F. McB. Young at Prince Rupert, B.C., on October 14th, 1929, and fined $300, or in default forthwith, three months imprisonment in the common gaol of the County of Prince Rupert.

Judgment

"The Seal of the County Court of Prince Rupert holden at Prince Rupert."

"H. F. MacLeod,
"Registrar of the County Court of Prince Rupert holden at Prince Rupert and Clerk of the Peace."

It is contended that this certificate does not comply with the said statutory provisions as to proving a previous conviction. While a strict construction should not be placed upon an enactment of this nature, still its essentials should be complied with. If a certificate is not produced, from a convicting magistrate, then the only other source by which proof under the statute can be obtained, is by a certificate of the registrar of the County Court, to whose office the conviction has been returned. Even if the signature H. F. McLeod be accepted, as that of the registrar of the County Court at Prince Rupert and his official character as such registrar be recognized, there was no proof nor even statement that his office is one to which convictions are returned nor is there any statement in the certificate that a conviction of the nature referred to, in his certificate, was so

returned. Further the said certificate does not afford any proof that "His Honour F. McB. Young" is or was a judge of the County Court or of any Court entitled to convict Dalbergh. To put it shortly the certificate is not a compliance with the statutory provisions and does not afford proof of Dalbergh having been previously convicted under the Government Liquor Act. There is an objection also taken to the certificate, that it did not refer to a person of exactly the same name as that mentioned in the information upon which the conviction was based. It says "Dalberg" and not "Dalbergh" as in the conviction. Similarity of names imputes similarity of persons. I do not think the slight variance should vary this rule. It is not necessary, however, to express a decided opinion in this respect, in view of the conclusion I have reached as to the insufficiency of the certificate.

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REX v. DALBERGH

Judgment

The second question will thus be answered in the negative.

Pursuant to section 94 of the Summary Convictions Act I remit the matter to the magistrate with a direction that he modify the conviction, so as to find Dalbergh guilty of a first offence under the Act and impose the proper punishment.

Success of the application being divided there will be no order as to costs.

Order accordingly.

IN RE CAMPBELL RIVER MILLS LIMITED. DINNING v. INGHAM.

MCDONALD, J.

1931

April 2.

IN RE CAMPBELL RIVER MILLS, LTD.

DINNING v. INGHAM

Bankruptcy—Company—Moneys received on fire-insurance policies—Claimants—Priorities—Assignment of moneys payable on insurance policies—Non-registration of—Effect on claim—R.S.B.C. 1924, Cap. 16, Sec. 3—B.C. Stats. 1930, Cap. 4, Sec. 2.

The property of the Campbell River Mills Limited was destroyed by fire in July, 1930, and on the 27th of August following the Company became bankrupt. Twenty-nine thousand, four hundred and four dollars and twenty cents was received on certain fire-insurance policies held by the Company. On an issue to ascertain priorities of various claimants it appeared that one Ingham had previously sold certain timber to the Company in which he still retained an interest. When the fire occurred Ingham advanced $15,000 to the Company on July 30th and by agree-

MCDONALD, J.

1931

April 2.

IN RE CAMPBELL RIVER MILLS, LTD.

DINNING v. INGHAM

ment with the Company took as security therefor an assignment of the first $15,000 which should become payable to the Company on the insurance policies. The assignment was not registered under the Assignment of Book Accounts Act.

Held, that in view of section 2 of the 1930 amendment to said Act registration was not necessary, as the money in question was "growing due under a specified contract or contracts" as recited in said section and Ingham was entitled to priority in respect to this sum of $15,000.

ACTION by the trustee for the debenture-holders of the Campbell River Mills Limited against the various claimants of said Company in order to ascertain the various priorities to which the parties are entitled in respect to $29,404.20 received on certain fire-insurance policies held by the Company. The Company's property was destroyed by fire in July, 1930, and on the 27th of August following the Company became bankrupt. The further facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 6th of March, 1931.

Statement

Alfred Bull, for trustee for debenture-holders.
G. S. Clark, for W. F. Ingham.
Locke, for D. C. Pounds.
Fleishman, for wage claimants.
Wismer, for wage claimants.
H. C. Green, for Provincial Government.
R. M. Macdonald, for Municipality of Chilliwack.
Ghent Davis, for Workmen's Compensation Board.

2nd April, 1931.

MCDONALD, J.: This is an issue in which the plaintiff as trustee for debenture-holders sues various claimants with a view to its being ascertained what are the various priorities to which the parties are entitled in respect of a sum of $29,404.20, being the proceeds of certain fire-insurance policies held by the Campbell River Mills Limited, which Company became bankrupt 27th August, 1930.

Judgment

In the first place it will be conceded by all that, as quoted by Mr. *Bull* in his argument, the definition of a floating charge given by Buckley, L.J. in *Evans* v. *Rival Granite Quarries, Limited* (1910), 2 K.B. 979 at p. 1,000 is not to be questioned, and that hence the floating charge crystallized into a specific

charge on the date when bankruptcy occurred, and the priorities must be ascertained as at that date, and with that fact in view.

The largest of the claims is that of W. H. Ingham who claims priority over all others to the amount of $15,000. His claim arises in this way: He had sold certain timber to the debtor and still retained an interest therein, when in July, 1930, a fire occurred on the debtor's property and Ingham advanced to the debtor $15,000 on 30th July and by agreement with the debtor took as security therefor an assignment of the first $15,000 which should become payable to the debtor in respect of the insurance policies in question. The assignment was not registered under the Assignment of Book Accounts Act. In my opinion such registration was not necessary, particularly in view of the amendment to the Act by Cap. 4 of the statutes of 1930, as the money in question was "growing due under a specified contract or contracts." This is the only really serious attack made upon this assignment, and I hold that Ingham is entitled in priority to all others to this sum of $15,000 this being his own money and never having formed a part of the bankrupt estate.

Judgment

The claim next in priority, in my opinion, is that of the Workmen's Compensation Board. Upon analysis of the statutes and authorities cited by counsel it seems finally clear that the situation is this: Section 46 of the Workmen's Compensation Act provides that the amount due to the Board shall have priority over all liens, charges or mortgages; and section 125 of the Bankruptcy Act provides that nothing in the "four last preceding sections" shall interfere with the collection of any taxes, rates or assessments payable by the debtor under any law of the Province. For a proper understanding of the effect of these two sections I am content to be guided by the opinion of Mr. Justice Orde as expressed at page 11 of the report in *In re West & Co.* (1921), 2 C.B.R. 3. It is true that in that case the learned judge disallowed the claim of the Board, but his reasons for doing so are quite plain and do not interfere with the opinion he expressed as to the effect of the legislation. I therefore hold that the Board is entitled to priority over all others except Ingham for the amount of its claim.

MCDONALD, J.

1931

April 2.

IN RE CAMPBELL RIVER MILLS, LTD.

DINNING v. INGHAM

The Corporation of Chilliwack claims poll-tax collected by the debtor. No claim is made for any lien or charge on the property of the debtor and inasmuch as the claim of the plaintiff far exceeds the amount available for distribution, this claim need not be further considered.

As to the claims of wage-earners I think they are out of Court upon the simple ground that they did not file their claims for lien within the time limited by the Woodmen's Lien for Wages Act. That statute provides that no lien shall attach unless and until the necessary affidavit has been filed. It has been suggested that section 24 of the Bankruptcy Act prevented the wage-earners from taking proceedings after the bankruptcy. This is not so; even if the filing of the affidavit be a "proceeding," still all that was necessary to be done was to obtain leave of the Court to take the "proceeding." I have examined with care all the arguments submitted by counsel, as one must naturally be anxious to preserve the rights of these wage-earners to the utmost limit of the law; but keeping clearly in mind the distinction between "priorities" on the one hand and "liens or charges" on the other, I can find no authority giving these wage-claims priority over the plaintiff's charge.

Judgment

The Provincial Government claims for royalties in respect of timber; for income and personal property tax; for poll-tax and for inspection fees. Counsel for the Government has made a most exhaustive search and submitted a carefully prepared argument but no substantial ground is put forth on which to base a finding that any of these claims constitute a lien or charge upon the fund in question, in priority to the plaintiff's charge.

In the result the fund will be disposed of as follows:

To Ingham the first $15,000; to the Workmen's Compensation Board the amount of its claim; to the plaintiff the remainder of the fund.

The question of costs may be somewhat complicated. Counsel for the trustee in bankruptcy has been requested to be heard and I shall hear all counsel interested, on any day they may find convenient.

Judgment accordingly.

[IN BANKRUPTCY.]

MCDONALD, J.

1931

Jan. 15.

IN RE BRITISH COLUMBIA BOND CORPORATION AND LANG.

IN RE BRITISH COLUMBIA BOND CORPORATION AND LANG

Companies—Contract made through managing director—Binding effect of—Presumption of authority—Bona-fide advance and taking of security—Subsequent insolvency—R.S.C. 1927, Cap. 11, Sec. 64.

In dealing with a company in the ordinary course of business through its general manager, it may be assumed that he has authority to act for the company if under the articles of association of the company such powers can be conferred upon him.

One who makes an advance to a company which happens to be on the eve of bankruptcy and takes security therefor does not thereby come within the provisions of section 64 of the Bankruptcy Act if he is not at the time already a creditor; and even if he is already a creditor, he may, in special circumstances, make such an advance and take a valid security therefor as well as for his pre-existing debt. Further, if a preferred creditor within the meaning of the Act, did not take his security with the intent of procuring a preference to himself over other creditors the transaction stands.

APPLICATION by the Trustee in Bankruptcy of the British Columbia Bond Corporation, Limited, to set aside securities given to one Norman McK. Lang to secure a loan of $15,000 given by Lang to the Company. The facts are set out in the reasons for judgment. Heard by MCDONALD, J. at Victoria on the 17th of December, 1930. Statement

Jackson, K.C., for Trustee in Bankruptcy.
Hossie, for Lang.

15th January, 1931.

MCDONALD, J.: Prior to October 9th, 1930, British Columbia Bond Corporation, Limited, the debtor, carried on business as a stock-broker at Victoria. Upon the evidence I think I must hold that at least from September 1st, 1930, the Company was unable to meet its obligations as they respectively became due and was therefore insolvent. On 15th September Lang, the creditor, whose securities are now impeached by the Trustee in Bankruptcy resigned from the directorate of the Com- Judgment

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pany as he then intended shortly to take a trip abroad. He had been a director of the Company for a considerable time but as a fact took no very active interest in the Company's affairs which affairs were in fact almost wholly conducted by the president and managing director, Boorman. In the latter days of September some six or seven customers of the Company, of whom one Angus Campbell was one, requested delivery of their securities and a transfer of their respective accounts to another Company. With this demand the Company was unable to comply for the reason that its customers' securities were pledged with Logan & Bryan, its New York brokers, and with its banker, The Royal Bank of Canada. Of these customers Campbell was by far the most extensive trader and Boorman, thinking that if he could make a satisfactory arrangement with Campbell the Company would be able to continue in business, arranged with Campbell to endeavour to procure a loan of $15,000 which sum Campbell agreed to accept on account, it being understood that his securities would be sold and he would give the Company time for payment of the balance accruing due to him. Boorman thereupon on 2nd October telephoned to one Fraser, the Company's agent in Vancouver, instructing him to endeavour to obtain a loan of $15,000 from Lang, upon the Company's undertaking to give to Lang, as security for such advance, certain securities held by the Company, the most important of which were represented by the Company's interests in two certain "Rockgas" Companies carrying on business in Victoria and Vancouver. Lang agreed to make the advance and Fraser drafted a document to be executed by the Company for the purpose of securing Lang as agreed. This document was forwarded to Victoria and the seal of the Company was affixed in the presence of Boorman as president and managing director and of one Neelands, the Company's secretary. This document and the securities mentioned therein were handed to Lang on 3rd October and, as directed by Boorman, he paid the $15,000 into the Bank of Montreal which money was transferred to that Bank's branch in Victoria and placed to the credit of Campbell. A day or two later the manager of the Company's Bank began to press for payment; a meeting of the Company's creditors was held on the evening of October 7th and on October 9th an assignment in bankruptcy

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was filed. Meanwhile on October 8th, at a meeting of the directors of the Company, the transaction entered into by Boorman and Lang was confirmed by a resolution of the directors.

It is argued for the Trustee in the first place that the document of October 2nd, inasmuch as it had not been authorized by the directors, is invalid. This contention I think cannot be maintained. Under its Articles of Association the Company's managing director might have had the power which he purported to exercise and Lang was entitled to assume that he actually did have such power. The rule in *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; 25 L.J., Q.B. 317 applies here as it was held to apply in our own Courts in *Doctor* v. *The People's Trust Co.* (1913), 18 B.C. 382 and in *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374. The fact that the directors on October 8th affirmed the action of their managing director cannot in any event weaken Lang's position even though it may be held that his position was not thereby strengthened.

In the next place it is contended that Lang by taking security for his advance became a "preferred creditor" and that the transaction is avoided by section 64 of the Bankruptcy Act. I put it to counsel during the argument to cite a case which holds that one who makes an advance to a Company which happens to be on the eve of bankruptcy and takes security therefor comes within the provisions of any Bankruptcy Act relating to "preferred creditors." Counsel for both parties have made the most exhaustive search and have filed most able and helpful arguments and no such case is cited nor have I been able to find one. I am putting the case as simply and baldly as I can of course in order if possible to extract the principle involved. I have always understood, rightly or wrongly, that a "preferred creditor" was one of two or more creditors to whom a debtor owes money (or who are defined as creditors by the Bankruptcy Act), and who procures to himself a preference over his fellows. I have never understood that it was forbidden to make an advance for the assistance of a debtor who was insolvent and to take security therefor. As stated by counsel for the trustee everyone knows that the purpose of Bankruptcy Acts is to secure the distribution of the debtor's assets *pari passu* among the creditors. That purpose is not involved in the case of one who,

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not being a creditor becomes such for the first time, when he makes his advance and takes security for such advance. Cases must indeed arise from day to day where a debtor in financial distress obtains a loan, gives security and is thereby enabled to weather the storm and in the end to proceed successfully in his business.

An examination of the authorities in fact shews that one who is already a creditor may in special circumstances make a *bona fide* advance and take a valid security for such advance as well as for his pre-existing debt. The case of *Burns* v. *Royal Bank of Canada* (1922), 51 O.L.R. 564; (1922), 53 O.L.R. 226 cited by Mr. *Hossie* was a much stronger case for the trustee than is the present case and yet the transaction was upheld even in favour of one who was already a creditor of the bankrupt company. In the present case the creditor is not required to go so far and I hold that he is not affected by the Act. In my opinion he is not a "preferred creditor" within the meaning of the Act but even if he were he did not take his security with the intent to procure to himself a preference over other creditors and in the absence of such intent on his part the transaction stands.

Finally it is argued that nevertheless the transaction is impeachable inasmuch as Boorman contrived to fraudulently prefer Campbell and Lang must be held to have fraudulently conspired with Boorman to effect that purpose. In this connection it should be observed that no attack has been made upon Campbell. I am dealing only with the attack made upon Lang. Charges of fraud have been made against Lang but, in my opinion, these charges are entirely without foundation. I think he was a truthful witness and that he honestly thought that by making the loan, Campbell, one of the Company's most important customers, would be thereby satisfied for the time being at least and the Company would be able to carry on. He got nothing of advantage to himself; he advanced his money to the Company, paid it in the manner directed by the Company, and took securities which now in fact turn out to be worth about one-third of the amount of the loan; he did not know Campbell, was not interested in Campbell, but was only interested in assisting the Company in which he was a shareholder in a consider-

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able amount. Whatever knowledge must by law be imputed to him by virtue of the fact that he had been a director until September 15th, I am of opinion that he made his loan in the honest belief that he was aiding the Company to tide over its difficulties and not from any sinister or ulterior motive.

The trustee's application to set aside the securities in question is therefore dismissed and Lang's application for a declaration that his security was intended to include all of the Company's interests in the Rockgas Companies is allowed.

Application dismissed.

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Criminal law—Conviction by magistrate—Fine—Paid without waiving rights of appeal—Costs of appeal fixed by magistrate on following day—Costs paid to County Court registry at request of magistrate—Appeal—Jurisdiction—R.S.B.C. 1924, Cap. 245, Sec. 78 (c).

The accused was convicted before a magistrate of driving to the common danger, and fined $10. Accused paid the fine at the time of the hearing to the magistrate, stating that it was paid "under protest and without waiving any of his rights as to an appeal." On the following day the amount that the magistrate deemed sufficient to cover the costs of the appeal was fixed by him at $100. This amount was then paid by the accused at the request of the magistrate to the registrar of the County Court. *Held* by the County Court judge to be a sufficient compliance with section 78 (*c*) of the Summary Convictions Act, and on the facts the conviction was quashed.

Held, on appeal, affirming the decision of NISBET, Co. J. that as the deposit was made with the registrar, who in any case would have been entitled to receive it from the magistrate and was authorized by him to receive it direct from the accused there was a sufficient compliance with section 78 (*c*) of the Summary Convictions Act and there was jurisdiction to hear the appeal.

APPEAL by the Crown from the decision of NISBET, Co. J. of the 13th of October, 1930, on appeal from a conviction by the stipendiary magistrate at Trail for driving to the common danger, contrary to the provisions of the Motor-vehicle Act. The accused was fined $10 and this sum was paid by accused to

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the magistrate at the time of the hearing "under protest and without waiving any of his rights as to an appeal." On the following day $100 was fixed by the magistrate as sufficient to cover the costs of the appeal, and at the request of the magistrate the accused paid this sum to the registrar of the County Court. It was held by the County Court judge that there was a substantial compliance with subsection (*c*) of section 78 of the Summary Convictions Act by the accused and that on the facts the appeal should be allowed and the conviction quashed.

The appeal was argued at Victoria on the 6th of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

G. A. Cameron, for the Crown: My submission is this case differs from *Rex* v. *Sutherland* (1928), [*ante*, p. 277]. There was not a compliance with section 78 (*c*) of the Summary Convictions Act and he was precluded from the right of appeal. He paid the fine one day and the costs the next day. My submission is that in order to comply with the above section of the Act he must pay both fine and costs at the same time.

E. G. Mathew, for respondent: Paying the fine does not preclude the right of appeal: see *Rex* v. *Woo Tuck* (1928), 51 Can. C.C. 365. There was a compliance with section 78 (*c*) of the Summary Convictions Act: see *Rex* v. *Neuberger* (1902), 9 B.C. 272; *Rex* v. *Tucker* (1905), 10 Can. C.C. 217; *In re Justices of York and Peel; Ex parte Mason* (1863), 13 U.C.C.P. 159. This case is substantially the same as *Rex* v. *Sutherland* (1928), [*ante*] 277.

Cameron, replied.

Cur. adv. vult.

19th February, 1931.

MACDONALD, C.J.B.C.: This is an appeal by the Crown from the decision of NISBET, Co. J. setting aside the accused's conviction by a magistrate.

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Two questions only were argued—(1) that the accused having paid his fine had waived his right of appealing to the County Court judge who consequently had no jurisdiction to hear the appeal, and (2) that accused had deposited the security

for the appeal with the registrar of the County Court at Rossland instead of with the magistrate, and that therefore the County Court judge had no jurisdiction to hear it, since section 78 of the Summary Convictions Act requires the deposit to be made to the magistrate. There is no difficulty about the first question since the "respondent paid his fine with the declaration that it was without waiving any of his rights as to an appeal." That objection therefore fails. It requires only slight evidence of the expressed intention of the convicted person to preserve his right to appeal and to prevent waiver by payment of the fine. *Rex* v. *Tucker* (1905), 10 O.L.R. 506; 10 Can. C.C. 217; *In re Justices of York and Peel; Ex parte Mason* (1863), 13 U.C.C.P. 159, wherein Draper, C.J. held that the accused had not waived his right of appeal when he paid his fine but said he "would see further about it."

In *Rex* v. *Sutherland* (1928), [*ante,* p. 277] this Court did not decide that mere payment of the fine would estop an appeal. In that case there was no indication at all of the intention to appeal at the time the fine was paid. This was the point in issue. In such a case the appellant, to my mind, waives the right to appeal if he fails to give any indication, however slight, of an intention to appeal.

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On the second point the County Court judge in his reasons for judgment had said that the amount of the security "was paid by the respondent at the request of the magistrate to the registrar of the County Court at Rossland." That finding, considering that the trial was held without a stenographer being present and that the evidence was taken in the form of longhand notes and was therefore possibly incomplete, I think ought to have been accepted by the Court as supplementing his notes but other opinions prevailed and the learned judge was requested to tell us what the evidence was on that point which he has since done by reaffirming the said statement quoted above from his reasons. The reaffirmation of that question adds nothing to its strength. In *McCord* v. *The Alberta & Great Waterways Ry. Co.* (1918), 3 W.W.R. 622 where only the judge's notes in longhand were available Anglin, now C.J.C. said (p. 627):

"I agree with Hyndman, J., that with 'only the very meagre notes of the learned trial judge' before us his findings of fact should be regarded as

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practically conclusive in an Appellate Court unless his notes of evidence themselves shew that he was undoubtedly in error."

The other two judges, Idington and Brodeur, JJ., without specifically referring to the point, upheld the judge.

Since the Crown rested its appeal on these two objections and since the deposit was made with the registrar who in any case would have been entitled to receive it from the magistrate and was authorized by him to receive it direct from the accused I think there was a sufficient compliance with section 78 of the Summary Convictions Act.

The appeal should be dismissed.

MARTIN, J.A.: This is an appeal by the Crown from a judgment of His Honour Judge NISBET of the County Court of West Kootenay pronounced on an appeal taken to that Court under section 77 of our Provincial Summary Convictions Act, Cap. 245, R.S.B.C. 1924, whereby he quashed a conviction, by the stipendiary magistrate for the County of Kootenay, of the respondent, Talbot, for driving to the common danger.

In supporting this appeal it was submitted that the appeal below, from the conviction, had not been properly launched and the said County Court had no jurisdiction to hear it because the provisions of section 78 had not been complied with, in that the costs of that appeal (fixed by the stipendiary magistrate at $100) had not been "deposited . . . together with," subsection (*c*), the amount of the fine $10 "adjudged to be paid" forthwith, or imprisonment for 14 days in default thereof, and it was submitted that "together with" means simultaneously, and as, admittedly, that had not been done at the time, but later when the notice of appeal was served upon the magistrate, the deposit, therefore, had not been made in accordance with the statute. No authority, however, was cited to support that narrow construction and as it is contrary to the reasonable carrying out of the practice provided by the statute in perfecting such an appeal, it should not be adopted.

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Second, it was submitted that the fine had been paid merely under protest and without any expression of an intention to save the right of appeal, and therefore the County Court had no jurisdiction to entertain it. If it were the fact that the con-

victed person had paid the fine while protesting against it and nothing more, no appeal would lie as has long been settled in this Province and adopted in a case before me nearly 30 years ago on the corresponding sections of the Criminal Code, *viz.*, *Rex* v. *Neuberger* (1902), 9 B.C. 272 wherein I said:

"Further, in my opinion, the objection should prevail, that the defendant having paid his fine with the intention of so doing, this appeal does not come within the purview of section 880."

The reason for that opinion is the obvious one (which has been overlooked below) *viz.*, that a mere protest is not inconsistent with an intention to pay the fine, small or large, as the case may be, and have done with the matter as not worth further trouble or expense, or otherwise, though protesting for good, or bad, or no reasons at all, against being compelled to pay it.

But on the other hand, if an unequivocal indication of an immediate intention to appeal, or to preserve the right to do so within the stipulated time, may fairly be gathered from what occurred when the fine was paid, that is sufficient to retain the right.

Our recent decision in *Rex* v. *Sutherland* (4th July, 1928) [*ante*, p. 277] is an illustration of the former situation wherein there was a mere protest only, which amounts to nothing, because, as I put it, with the concurrence of my brother GALLIHER, the payment of a fine,

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"with or without protest makes no difference. 'Under protest' is an improper expression because fines cannot be paid in that way; they are paid or they are not paid. It is a growing practice which should be sharply discountenanced. . . ."

In the present case the record of the stipendiary magistrate before us shews that at the time of his conviction the respondent said:

"I hereby pay my fine of $10 and costs under protest without waiving any of my legal rights of future trials and appeals."

That is an unequivocal indication of an intention to preserve his right and therefore our said decision in *Rex* v. *Sutherland* has no application to this case, and it would not be necessary to refer to it were it not for the fact that in his reasons, which have been reported in (1930), 3 W.W.R. 299, the learned judge appealed from has unhappily, with all due respect, misconceived its scope and effect and the law upon the subject and therefore,

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since it has been invoked, it becomes necessary for us to prevent further misconception and misapplication below, with unfortunate consequences, by giving the correct view of its effect and relevant application as aforesaid. The law in this Province is the same as in Ontario in this respect as appears by the judgment of MacMahon, J. in *Rex* v. *Tucker* (1905), 10 O.L.R. 506, wherein, it should be noted, at p. 509, my said decision in *Rex* v. *Neuberger* is properly applied; and *cf. Rex* v. *The Justices of the West Riding of Yorkshire* (1815), 3 M. & S. 493.

Third, it was submitted by counsel for the Crown that the appellant did not "deposit with the justice" the "amount sufficient," under subsection (*c*) for security for appeal, but had wrongly paid it to the registrar of the County Court appealed to, and that the statement in the learned county judge's reasons for judgment that the said amount "was paid by the appellant at the request of the magistrate to the registrar" was contrary to fact, and that there was no evidence to support that finding in the full notes of evidence taken by the learned judge, covering eleven pages of the appeal book, and that it was based upon an error of memory occurring when the reasons were written more than a month after judgment had been reserved at the conclusion of the trial.

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It is the fact that, strangely, there is no evidence in the record on that important point, which would have decided this appeal if the Crown counsel were correct, and also, doubtless avoided its being brought at all, but as a dispute arose between counsel respecting what had been deposed to, we deemed it proper in the endeavour to ascertain the truth to follow the long established and salutary practice in force in this Province when a dispute arises as to what evidence was before the trial judge, to refer the matter to him, for our certain enlightenment, if possible (if that proper course has not already been adopted by the litigants), as has been done in numerous cases reported and unreported by this Court and its predecessor the old Full Court; the reported cases on the practice are many and include *Clabon* v. *Lawry* (1898), 2 M.M. C. 38 (n); *Rendell* v. *McLellan* (1902), 9 B.C. 328; *C. W. Stancliffe & Co.* v. *City of Vancouver* (1912), 18 B.C. 629; *Robertson* v. *Latta* (1915),

21 B.C. 597; *Northern Pacific Ry. Co.* v. *Fallerton Lumber & Shingle Co.* (1919), 27 B.C. 36; and *Dockendorff* v. *Johnston* (1924), 34 B.C. 97. In the *Northern Pacific Ry.* case, the Court held, *per* the Chief Justice, that (pp. 37-8):

"It seems to me that there is an idea on the part of the learned County Court judges that they should decline to take down notes, that is, to do the duty which the statute imposes upon them, to take down the evidence. Whether they could get through their work or not is not a matter that affects this Court. Their business is to do their duty, and to take down a full note of the evidence.

"What I have said is with no disrespect to the learned County Court judge; but there have been a number of cases before us where the same complaint has been made of the failure to take down the evidence, and at least the full effect of all the evidence should be taken."

The dispute in question was referred to the learned judge below by counsel pursuant to our direction and he reported to us in writing that though (for unexplained reasons) his notes "are an inadequate and imperfect record of what was said by the various witnesses" yet "fortunately, however, I am able to supplement my notes from my memory of what took place at the hearing," and goes on to say that:

"When Talbot was recalled, I remember asking him how it was he came to pay the money to the registrar (in Rossland) instead of to the magistrate (Bedford) and he replied that he asked Mr. Bedford whether he should pay the money to him or at Rossland, and that Mr. Bedford had said 'you had better pay it in Rossland.'"

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Under all these circumstances, though they are unsatisfactory, the recollection of the learned judge will have to be accepted with the result that the fact must now be taken to be that the appellant paid the proper amount to the nominee of the magistrate which is equivalent to paying it to himself (*Bezancon* v. *Grand Trunk Pacific Development Co.* (1916), 10 Alta. L.R. 288) and so this third ground fails also, with the result that the appeal should be dismissed.

Our attention was drawn to the decision of the Supreme Court in *McCord* v. *Alberta & Great Waterways Ry. Co.* (1918), 3 W.W.R. 622; 59 S.C.R. 667; but there is nothing in some individual observations therein to suggest our departing from our long established prudent and beneficial practice, because it was an extreme case decided in exceptional circumstances during the war and must be read in that light, and that the notes of the stenographer who reported the case could not

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be obtained because of his absence on active service. The unfortunate state of affairs before the Supreme Court is thus described by Mr. Justice Brodeur, p. 628 of W.W.R.:

> "This case comes up before us in a condition which is not at all satisfactory. It is a question of evidence and the notes have not been transcribed. The shorthand writer has gone to the front and in spite of the efforts of the parties it has been impossible to get them transcribed. We have to rely on very meagre notes taken by the trial judge during the *enquete*. In such circumstances, I would be of opinion that we should accept the findings of the trial judge who had the advantage of hearing the witnesses and forming an opinion on all the evidence adduced and not only on the few notes we have before us."

It was, doubtless, because of the presence of the official stenographer to report that case that the learned trial judge (Simmons, J. (1918), 13 Alta. L.R. 476) took only "very meagre notes" and therefore it must have become apparent in some way to the Court of Appeal in Alberta that it would be useless to apply to him for any further information otherwise it is inexplicable why that Court did not with the means of knowledge at hand avail itself of the opportunity to obtain from him then and there all the evidence that was in existence to make clear a "condition (which) is not at all satisfactory," as Mr. Justice Brodeur described it, and "in such circumstances" the Court was reluctantly compelled to make the best of a bad situation, then beyond redemption, because it was not open to the Supreme Court to introduce fresh evidence after the Court of Appeal of Alberta had given judgment upon the only evidence that was before it though other evidence could have been obtained for its use—*Evans* v. *Evans* (1912), Cameron's Supreme Court Practice, 3rd Ed., 343. It is, moreover, significant, that in the later official report of the case, to be found in 59 S.C.R. at 667, the reasons given in the earlier report in W.W.R. have been omitted, and as the former is a real official report (*i.e.*, published by the registrar of the Court itself "pursuant to the statute," *vide* title page) it is a manifest indication of the intention that the decision is to be regarded as one of special and not general application; furthermore the Chief Justice and Mr. Justice Idington based their decision on the notes actually taken by the judge saying, "We must rely upon the trial judge's notes," and "The brief notes of the learned trial judge are all that the Court

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below and we have to go upon in the way of evidence"—pp. 623, 625, and as Mr. Justice Davies dissented, there was, in any event, no judgment of the Court sanctioning the said individual observations on the point of its being concluded by the trial judge's findings not based on notes, even in the exceptional circumstances of the case.

It would, indeed, lead to strange results if appeals to this Court on questions of fact could be nullified because the trial judge had made findings in his reasons though there was no evidence in the record before us to support them: such a state of affairs would greatly lighten the work of this Court, but it would not be justice.

Finally, in connection with the question of incomplete judge's notes on vital points of evidence or charge to the jury in a criminal case, and the unreliability of mere recollection, the following unanimous observations of the Supreme Court of Canada in the recent case of *Baron* v. *Regem* (1930), S.C.R. 194 at p. 197 merit attention:

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"Justice requires that a conviction where there is such grave uncertainty as to the propriety of the direction under which it was made should not be allowed to stand.

"That such uncertainty exists in this case is obvious, since, against the accuracy of the note made at the moment of utterance by a careful, sworn stenographer, acting in the discharge of his usual functions, there is nothing but the recollection by a judge, however eminent and careful, of the precise language used by him some two or three months before."

In the case at Bar there was no note of evidence by judge or stenographer on a decisive point of fact, and so if we had not adopted our usual course of prudent inquiry the convicted appellant below would have lost this appeal instead of winning it.

GALLIHER, MCPHILLIPS, MACDONALD, JJ.A.

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

Appeal dismissed.

Solicitor for appellant: *R. J. Clegg.*
Solicitor for respondent: *E. G. Mathew.*

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1930

Oct. 3.

THE KING v. THE "SUNRISE."
THE KING v. THE "TILLIE M."
THE KING v. THE "QUEEN CITY."

THE KING v. THE "SUNRISE"

Admiralty law — Ship — Foreign fishing-vessels—Within three-mile limit—Seizure—Engine of vessel—Claim under conditional sale agreement—R.S.C. 1927, Cap. 42, Secs. 183 and 193, Cap. 43, Sec. 10.

Judgment was given against three fishing-vessels declaring them with their tackle, rigging, apparel, furniture, stores and cargo forfeited to His Majesty for violation of the provisions of section 10 of the Customs and Fisheries Protection Act.

On a claim for $1,900 by the Atlas Imperial Engine Co. of Oakland, California, under a conditional sale contract and mortgage on the engine of the vessel "Sunrise":—

Held, that such a claim cannot be asserted against a vessel in these proceedings directed to her forfeiture for violation of "statutes passed for the protection of the revenue or of public property" for in such cases the vessel itself is the offender.

[Affirmed by Supreme Court of Canada.]

Statement

ACTIONS for the forfeiture of the schooners "Sunrise," "Tillie M." and "Queen City," foreign fishing-vessels seized off the coast of British Columbia because of alleged infractions of the Customs and Fisheries Protection Act. Tried by MARTIN, Lo. J.A. at Victoria on the 2nd to the 5th of September, 1930.

J. W. deB. Farris, K.C., for the Crown.
Savage, for the ships.

3rd October, 1930.

Judgment

MARTIN, Lo. J.A.: After a very careful consideration of all the evidence and the numerous authorities bearing upon the questions in issue I can only come to the conclusion that these three foreign fishing-vessels have violated section 10 of the Customs and Fisheries Protection Act of Canada, Cap. 43, R.S.C. 1927, in that they have entered the territorial waters of Canada for a purpose not permitted by that statute nor by section 193 of the Customs Act, Cap. 42, R.S.C. 1927, because under the particular circumstances, there was no "stress of weather or other unavoidable cause" within the true meaning of section 183 warranting such entry.

Such being the case the only course open to this Court under said statutes is to pronounce judgment against them and declare them, their tackle, rigging, apparel, furniture, stores and cargo forfeited to His Majesty.

In so deciding I have not overlooked the plea for mitigation of penalty, in case of an adverse judgment, advanced by their counsel, Mr. *Savage,* who ably presented their case to the best advantage, but as Mr. Justice King pointed out in the Supreme Court in *The Queen* v. *The Ship Frederick Gerring, Jr.* (1897), 27 S.C.R. 271, at p. 298, "the remedy for cases of hardship lies in the pardoning power of the Crown." I do not, however, feel it inconsistent with my judicial duty to say that if it were within my power to inflict a lesser penalty than the extreme one of forfeiture I should be disposed to do so, because there are some mitigating circumstances in these cases and there is room for the view that violation of the statute has been occasioned more by misconception of rights than by deliberate intention.

Judgment

With respect to the claim of the Atlas Imperial Engine Co. of Oakland, California, to the engine of The "Sunrise" under the conditional sale contract and mortgage put in evidence, it is proper to state that evidence was adduced proving the claim to the extent of $1,900 due with interest from the 1st of August, 1929, but it is clear that such a claim cannot be asserted against a vessel in these proceedings directed to her forfeiture for violation of "statutes passed for the protection of the revenue or of public property," as Mr. Justice Sedgewick said in *The Queen* v. *The Ship Frederick Gerring, Jr., supra,* pp. 284-5 for in such cases the *res,* "the vessel itself is the offender," and *cf. The Wampatuck* (1870), Young's Ad. Dec. 75.

It follows, therefore, that this claim cannot be recognized by this Court and must be dismissed.

Actions dismissed.

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STUBBERT *ET AL.* v. SCOTT AND TEMPLE.

Chattel mortgage—Inventory attached after mortgage signed—Filling in of blanks—Validity.

STUBBERT v. SCOTT

Where the inventory of goods and chattels referred to in a chattel mortgage was not attached thereto when the mortgagor signed the mortgage, but was attached later under instructions of the mortgagor before the mortgage was delivered to the mortgagee, and before the mortgagor had obtained possession of the goods under a bill of sale from the mortgagee:—

Held, not to invalidate the mortgage.

Statement

ACTION to recover on a chattel mortgage and the covenants therein contained. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 13th of January, 1931.

J. E. Bird, for plaintiff.

E. R. Thomson, for defendant Scott.

A. H. Miller, for defendant Temple.

5th February, 1931.

Judgment

FISHER, J.: One of the issues raised herein arises from the fact that at the time the defendant Scott signed the chattel mortgage to the plaintiffs (Exhibit 1) the inventory of goods and chattels referred to therein as attached was not then so attached but was attached subsequently and, as I find, before delivery to plaintiffs who then had it registered. It is strenuously contended on behalf of the defendant Temple that the mortgage is not a charge on the goods and chattels set out in the inventory though it is and must be admitted that the inventory correctly sets out the goods and chattels apparently intended by the parties to be charged. *Weeks* v. *Maillardet* (1811), 14 East 568; *Sellin* v. *Price* (1867), L.R. 2 Ex. 189 and *Hibblewhite* v. *M'Morine* (1839), 5 M. & W. 462 are relied upon by counsel for said defendant. In the *Weeks* case the side-note reads as follows:

"Where by articles under seal the defendant bound himself under a penalty to deliver to the plaintiff, by a certain day, 'the whole of his mechanical pieces, as per schedule annexed;' the schedule forms part of the

deed, which, without it, would be insensible; and therefore in covenant for the breach of the contract in not delivering the pieces; in which the plaintiff, after setting out the articles executed by the defendant, averred that to the said articles there was then and there annexed and subscribed a certain schedule of the said several pieces of mechanism agreed to be delivered, &c.; upon *non est factum* pleaded, it is competent to the defendant to shew in his defence, that at the time of the execution of the articles the schedule was not annexed, but that in fact it was afterwards subscribed and annexed by the witness to the articles who was the agent of both parties, immediately after the execution of the articles, and after one of the parties had left the room: though the pieces mentioned in the schedule so annexed were such as had been agreed upon by the parties before the execution of the articles."

At p. 574 Lord Ellenborough, C.J. says:

"The schedule alone designates the subject-matters to be delivered up by the one party and paid for by the other. The whole deed was inoperative, unless the schedule was co-existing with it, and forming part of the obligation. Taken by itself, the deed is insensible, and has no object to operate upon: therefore it is not the defendant's deed without the schedule, which gives effect and meaning to the whole of the duties to be performed on either side. The articles assume that at the time of their execution the schedule was annexed; and if there was then no schedule, there was no deed for any sensible purpose; for no duty could be demanded on the one side, or performed on the other, without the schedule."

It seems to me, however, that a careful perusal of this case will shew that it was largely a matter of pleading. At p. 575 Le Blanc, J. says:

Judgment

"The difficulty arises on the form of the plea . . . the declaration in effect avers that the defendant executed a deed with such a schedule annexed at the time; and the proof being that he executed the instrument without any such schedule annexed, it is not the instrument which he is charged with having executed."

At pp. 575-6 Bayley, J. says:

"The plaintiff declares in substance that the defendant executed a scheduled instrument; which the defendant by his general plea denies; and it is part of the issue, the proof of which lies on the plaintiff, to shew that the defendant executed a scheduled instrument: this he has failed to prove."

As to the facts of the present case I accept the evidence of the witness Tiderington and find as a fact that it was understood by Scott at the time he signed the chattel mortgage that an inventory would be taken later in the day and that the inventory would be handed to Tiderington who would extend it and put it in the bill of sale from the plaintiffs and in the chattel mortgage back. In the afternoon of the same day the inventory was taken and handed to Tiderington either by Scott himself

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or in his presence and Scott instructed Tiderington to have the papers completed and registered and paid Tiderington for doing so. Tiderington had the inventory typewritten and attached to at least one copy of the bill of sale and one copy of the chattel mortgage. The bill of sale to Scott was immediately executed and a few days later one of the plaintiffs called for and obtained the chattel mortgage and had it duly registered. In the meantime three days after the signing of the chattel mortgage the plaintiffs had allowed the defendant Scott to take possession of the goods. Under these circumstances it seems to me that the present case is similar to *Hudson* v. *Revett* (1829), 5 Bing. 368, where the facts were that,

"The defendant executed a deed, conveying his property to trustees to sell for the benefit of creditors, the particulars of whose demand were stated in the deed; a blank was left for one of the principal debts, the exact amount of which, being subsequently ascertained, was inserted in the blank the next day, in the defendant's presence, and with his assent. He afterwards recognized the deed as valid in various ways, particularly by being present when it was executed by his wife, and by joining her in a fine to enure to the uses of the deed: Held, that the deed was valid, notwithstanding the filling up of the blank after execution."

Judgment

In Ashburner on Mortgages, 2nd Ed., 8, the *Hudson* v. *Revett* case, *supra,* is cited as authority for the proposition that where blanks in a deed are filled in in the presence and with the assent of the grantor, a redelivery may be inferred. In the present case the inventory was attached before the chattel mortgage was actually delivered to the plaintiffs and before the defendant obtained possession from the plaintiffs.

My conclusion is that, the defendant having authorized Tiderington to do what was done (even though such authority was not in writing), either the act completed was his own or under all the circumstances he is estopped from availing himself of the plea of *non est factum* against the plaintiffs who innocently acted upon the faith of the deed being valid. Is the defendant Temple in any better position? His evidence is in part as follows:

"I was in . . . and while I was there . . the case was explained to me, and I said well I would like to see Mr. Scott, and I said 'Where can I get hold of him.' And I got his telephone number and I telephoned . . . and asked him if he would come up and see me, I would like to talk matters over with him. He came up the next day. I might say that before doing that, I knew there was a case pending, that the validity of

the chattel mortgage was challenged and it was considered invalid, and I got Mr. Scott to come up and see me, and I sat down and talked the thing over with him and discussed the situation generally, and I told him that if he was so disgusted with the thing that he was going to pull out altogether I would take it off his hands and give him something in the future for it, rather than drop it altogether. Well he said, 'Anything to get out of the bother of that.' . . . I discussed it with him and I told him that the situation was that I would deal with him and give him a note if he cared to deal in that way. That would give him a chance of getting something in the future, instead of dropping everything as he was proposing to do. And he knew perfectly well that as the situation was he could do nothing and he agreed to my proposal; and he drew up a bill of sale. It was carefully explained to him that the bill of sale didn't—the sale to me didn't let him off his covenant. That was most carefully explained to him. . . .

"A. It wouldn't release him from any covenant that he might have, but that considering the bill of sale was in dispute I took—I bought under—knowing that was the case, and that he understood that the bill of sale was invalid.

"What? The bill of sale was invalid.

"Do you mean the bill of sale or the chattel mortgage? The chattel mortgage. I beg your pardon.

"When you say it was invalid, do you mean— I mean to say that it was worthless owing to alterations and additions that had been put into it after being executed.

"Now, that was what led up to your receiving from Mr. Scott that bill of sale which is in evidence as one of the exhibits? Yes.

Judgment

"And you delivered to him the note? I did.

"What date was that? That was the 12th November.

"And when did you actually take over the premises? On the 15th. I was in the premises the following day but I didn't take over, because I wanted to get a housekeeper, and I asked Mr. Scott to stay there for a day or two until I could get a housekeeper, and I took over on the 15th with a housekeeper.

"Now, was there any agreement whatever between you and Mr. Scott that you would hand back all this to him? Absolutely not.

"No agreement or no consideration whatever except the promissory note? Absolutely none."

The said defendant Temple did become tenant of the premises where such goods and chattels were but the plaintiffs contend that he had no real interest in the said goods and went on the premises for and as agent in the employ of and for the defendant Scott for the purpose of assisting him in recovering the alleged claim of $400 against the plaintiffs hereinafter referred to. Certainly the transaction as put forward by Temple does not look to be a likely one for Scott to enter into if he were acting as a reasonable man and anticipating liability on his

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covenant to pay. It may be however that Scott having acted in the beginning apparently without taking much time for consideration continued to so act and that Temple, who appears to be a man of more deliberation and was obviously indifferent to the interest of the plaintiffs, thought he saw a chance of making a substantial profit and was equally indifferent to the welfare of Scott who up to that time was a stranger to him. My conclusion is that there is ground for suspicion but not sufficient proof that the transaction was as contended for by the plaintiffs. Under the circumstances however I would hold that Temple, having taken his bill of sale with actual notice of a prior mortgage or what purported to be such is not a "*bona fide* purchaser" entitled to rely on the Bills of Sale Act, R.S.B.C. 1924, Cap. 22. See judgment of Trueman, J. in *Banque d'Hochelaga* v. *Brownstone* (1925), 35 Man. L.R. 62 at pp. 70-72 and cases therein referred to. I also find that Holtz was present at the time the chattel mortgage was signed as sworn to in his affidavit attached to same and that the mistake in the affidavit of *bona fides* neither has actually misled nor was likely to mislead anyone interested and therefore does not invalidate the same (see section 28 of the Bills of Sale Act).

Judgment

I cannot see that the remedies of the plaintiffs under the chattel mortgage are barred and forfeited by the writ of *capias* proceedings.

I find therefore that the chattel mortgage so duly attested and registered was the chattel mortgage executed and delivered by Scott and is a valid charge on the said goods and chattels. I also find that, there being default in payment of the mortgage, the plaintiffs have rightfully repossessed themselves of the said goods and chattels and having done so and pleaded accordingly they have, in my opinion, no further claim on the covenant to pay against the defendant Scott who pleaded release from the covenant on the ground of the repossession and such claim against him should be dismissed.

So far as the defendant Temple is concerned however if he should wish to be heard further on the question of the right to redeem, the matter may be spoken to.

As to the counterclaim of defendant Scott for $400 damages for fraudulent misrepresentation and breach of warranty on the

sale of said goods and chattels I find that there was no fraudulent misrepresentation or breach of warranty and in any case the complaint made was settled at $50 as contended by plaintiffs. The counterclaim of the defendant Scott is therefore dismissed with costs but there will be no costs to either party with respect to the claim against him by the plaintiffs.

As to the counterclaim of the defendant Temple, I find that the plaintiffs were entitled to take possession of the said goods and chattels or contents of the rooming-house. I do not think however that the plaintiffs were entitled to insist on one of them remaining on the premises of which Temple was obviously tenant, after a reasonable time for removal of the goods or in any event after Temple had made it clear on or about the 24th of December, 1930, after consenting to the immediate sale of part of the goods for rent, that he did not want either of them on the premises even as sub-tenants. I find that the plaintiffs became trespassers on the premises and continued to be such up to the date of trial. I also find that the plaintiffs by such trespassing and wilful disregard of Temple's rights in connection with the premises are liable in damages to the said defendant and I estimate same up to the time of the trial at $250 for which amount the defendant Temple will have judgment on his counterclaim with costs against the plaintiffs.

Judgment

The plaintiffs are entitled to the costs of the action with respect to the claim against the defendant Temple.

Order accordingly.

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REX v. ZARELLI AND NEWELL.

Criminal law—Charge under Game Act—Appeal to County Court—No return of magistrate's order—Jurisdiction to hear appeal—Non-disclosure of place where complaint arose—Nearest County Court—R.S.B.C. 1924, Cap. 98, Sec. 11 (2); Cap. 245, Secs. 77, 80 and 85—B.C. Stats. 1925, Cap. 13, Sec. 6.

Section 77 of the Summary Convictions Act provides that any person who thinks himself aggrieved by any conviction or order made by a justice may appeal to the County Court at the sittings thereof nearest to the place where the cause of the information or complaint arose. On appeal by the Crown from the dismissal of an information laid for a contravention of the Game Act to the County Court at Victoria the evidence shewed that the offence was committed at Goldstream in the County of Victoria.

Held, that Goldstream is sufficiently notorious for its situation to be taken judicial notice of by the judge in whose county it is situate, that the only sittings in his county are held at Victoria, that Goldstream is only about 12 miles from Victoria and the northern boundary of the County (there being no other adjoining county except north) is many miles further away. The inevitable evidentiary inference being that the "nearest sitting" is at Victoria.

The magistrate did not, as directed by section 85 of the Summary Convictions Act transmit the order dismissing the information to the Court to which the appeal is by the Act given.

Held, that this provision is merely directory and non-compliance with it by the magistrate does not deprive an appellant of his appeal properly brought by notice duly given.

Rex v. *Hornby* (1923), 32 B.C. 505 applied.

Statement

APPEAL by accused from a conviction by LAMPMAN, Co. J. of the 4th of November, 1930, on appeal by the Crown under the Summary Convictions Act from the dismissal by George Jay, Esquire, police magistrate, of an information laid for contravention of the Game Act by hunting deer with a spot-light.

The appeal was argued at Victoria on the 16th and 17th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Stuart Henderson, for appellants: The acquittal by the magistrate was never filed as required by section 85 of the Summary Convictions Act and when this section is read in conjunction with section 80 of the Act there is no appeal: see *In re*

Ryer and Plows (1881), 46 U.C.Q.B. 206; Paley on Summary Convictions, 9th Ed., 707; *Rex* v. *Curran* (1914), 19 D.L.R. 120 at p. 124. There is nothing to shew where the offence occurred: see *Rex* v. *Oberlander* (1910), 15 B.C. 134 at p. 139. There is no evidence that the Victoria County Court is nearest to the place where the cause of the information arose as required by section 77 of the Summary Convictions Act: see *Rex* v. *Holt* (1925), 36 B.C. 391; Paley on Summary Convictions, 9th Ed., 475 and 477-8; *Collison* v. *Kokatt* (1915), 24 Can. C.C. 151; *Rex* v. *Canadian Robert Dollar Co.* (1926), 37 B.C. 264.

Argument

Johnson, K.C., for the Crown: The requirement to file the conviction is directory only and does not preclude the appeal: see *Rex* v. *Hornby* (1923), 32 B.C. 505; *Rex* v. *Holaychuk* (1929), 1 W.W.R. 278. He pleaded to the indictment and attorned to the jurisdiction. We do not have to prove we are in the right Court. In any case judicial notice can be taken of the respective localities: see *Rex* v. *Irwin* (1919), 27 B.C. 226; *Harwood* v. *Williamson* (1908), 1 Sask. L.R. 58.

Henderson, in reply: Judicial notice cannot be taken of the place where the offence took place: see *In re Legge* (1922), 55 N.S.R. 110; *In re Joseph* (1924), 57 N.S.R. 95; *Rex* v. *Conway* (1929), 52 Can. C.C. 161; *Reg.* v. *Young* (1884), 5 Ont. 184 (a). As to the necessity of complying with sections 80 and 85 of the Summary Convictions Act see *Reg.* v. *King* (1900), 7 B.C. 401; *Rex* v. *Picard* (1913), 21 Can. C.C. 250; *Rex* v. *Reedy* (1908), 14 Can. C.C. 256; *Ex parte Cowan* (1904), 9 Can. C.C. 454.

Cur. adv. vult.

On the 19th of February, 1931, the judgment of the Court was delivered by

Judgment

MARTIN, J.A.: This is an appeal from a conviction by His Honour Judge LAMPMAN of the County Court of Victoria, on an appeal brought by the Crown to that Court under the Summary Convictions Act, Cap. 245, R.S.B.C. 1924, from the dismissal by a magistrate of an information laid for contravention of the Game Act, R.S.B.C. 1924, Cap. 98 and amendments by hunting deer with a spot-light. Several grounds of appeal

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were advanced of which the most substantial, requiring further consideration, was that the learned judge had no jurisdiction to entertain the appeal because it did not appear that it was taken pursuant to section 77 of that Act, *viz.*:

"77. Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal to the County Court, at the sittings thereof which shall be held nearest to the place where the cause of the information or complaint arose."

It was submitted for appellant that there was no evidence to shew that the sittings of the County Court of Victoria, and held at Victoria, was the sittings of the County Court which was "held nearest to the place where the cause of the information or complaint arose," but for respondent it was urged that this question of fact was settled by the most patent kind of evidence, *viz.*, judicial notice, in that the direct evidence shewed that the offence was committed near Goldstream in the County of Victoria, and that the judge of that county must take judicial notice of the fact that the only sittings in his county was held at Victoria, the capital of the Province, and the seat of his Court, and also must take the like notice of the statutory boundaries of his county situate in the southern part of Vancouver Island, with the result that Goldstream, which is distant about 12 miles from Victoria, is also several miles more distant from the northerly boundary of his county than it is from Victoria, and as there is no other County Court on this Island of Vancouver except to the northward the inevitable evidentiary inference is that the "nearest sittings," measured in a straight line (*Rex* v. *Canadian Robert Dollar Co.* (1926), 37 B.C. 264) was in fact that which had heard the appeal.

Judgment

It is, as a matter of judicial notice, combined with the said direct evidence, impossible to avoid this conclusion because Goldstream is, unquestionably, a place "sufficiently notorious" for its situation to be taken judicial notice of by, at least, the judge in whose county it is situate within the principle of *Rex* v. *Irwin* (1919), 27 B.C. 226, which has been adopted and applied by this Court in other cases, unreported, such as *Rex* v. *Payette* on 10th December, 1924, a capital case, in which we

held unanimously, in regard to the situation of Notch Hill, that the Court will take judicial notice of principal geographic features and well-known places within its jurisdiction; and also *McLellan* v. *Fletcher* on 14th January, 1930, wherein we held, also unanimously, that the Courts can take judicial notice that "Vancouver" is in the county of that name. The Supreme Court of Canada also in *In re Henderson* (1930), S.C.R. 45, 53, 62, held that "Courts would take judicial notice of the 'local divisions of their country,' " and, finally, it is to be noted, as a general indication of the intention of the Legislature to expand local judicial knowledge that section 103 of our said Summary Convictions Act permits judicial notice to be taken of certain public documents which are not included in the general provisions of the Evidence Act, R.S.B.C. 1924, Cap. 82.

Then as to the further objection that the convicting justice did not, as directed by section 85, "transmit the conviction or order to the Court to which the appeal is by this Act given," it is now beyond question in this Province that this provision is merely directory and in fact has been so held to be for 38 years —*Re Kwong Wo* (1893), 2 B.C. 336, on an essentially identical section of the then Summary Convictions Act, and that non-compliance with it by the magistrate does not deprive an appellant of his appeal properly brought by notice duly given and perfected under sections 77-8-9-80, as amended, and our decision in *Rex* v. *Hornby* (1923), 32 B.C. 505 is in principle to the same effect. In *Re Kwong Wo* it was said by Chief Justice BEGBIE, in language which has received repeated approval, *e.g.*, *Rex* v. *Perro* (1924), 34 B.C. 169, that the appeal to the County Court is a "trial of the case *de novo* on the merits as if the information were now brought first to be tried by myself" and he proceeded to consider and deal with it, the charge, accordingly. It is clear that the original information was before the county judge on this appeal, and as no objection is taken to the notice of appeal from the conviction thereupon, or to any failure to comply with section 78, therefore the appeal must be regarded as duly brought.

Judgment

It is, moreover, to be noted that the conviction by said County Court recites the dismissal of the charge by the justice, so that Court must have been apprised of it, and though much assist-

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ance cannot be now obtained from English cases owing to vital differences in the English statutes from ours yet it is said in Paley on Convictions, 9th Ed., 707, that now the practice of reading the conviction appealed from is "very generally dispensed with unless it is desired to raise any issues upon it."

This appeal to us, it should be borne in mind, is on a Provincial statute and therefore our ordinary rules of appeal apply *mutatis mutandis* (*cf. Rex* v. *Perro, supra*) and not the provisions of the National Criminal Code, and so if there were any substantial merit in the objection that the justice had not transmitted the conviction to the County Court it should have been taken before that Court so as to give it the opportunity to remedy it in the way pointed out by the Court of Appeal of Saskatchewan in *Kowalenko* v. *Lewis and Lepine* (1921), 3 W.W.R. 648 at pp. 652 and 656, and as we have the same power in this respect as the Court below and should make the order it should have made "in order that substantial justice may be done between the parties" (Turgeon, J.A., 656) it would be open for us to make the appropriate order to cure a technical, at best, omission, but seeing that the respondents have suffered no prejudice whatever by such irregularity no order is, in the present circumstances, necessary. The recent general observations of the Supreme Court of Canada in *In re Henderson, supra,* p. 62, on the desirability of resorting to "curative provisions" and "judicial remedies . . . in the interests of justice" even under the stricter Criminal Code, are worthy of note and the guiding principle of section 1014 (2) of that Code in dismissing appeals thereunder, unless some substantial wrong or miscarriage of justice has actually occurred, is also to be kept in mind.

Judgment

There remains only the submission that as a point of law (*cf.* Court of Appeal Act, R.S.B.C. 1924, Cap. 52, Sec. 6 (*d*)) the evidence disclosed no offence under the said Game Act but a close perusal of the testimony before us does not support that ground, and therefore on all grounds the appeal should, in my opinion, be dismissed.

Appeal dismissed.

Solicitor for appellant: *Stuart Henderson.*

Solicitor for respondent: *G. A. Cameron.*

REX v. BOWEN.

Criminal law—Companies—Managing directors and promoters—Publishing false statement with intention that it should be acted upon—Criminal intent—Essentials of offence—Conviction set aside—Criminal Code, Sec. 414.

A conviction under section 414 of the Criminal Code which deals with false statements by directors and promoters of companies can only be secured if proof is given that (1) the statements are in themselves false in some material particular (2) and not only so but false to the knowledge of the accused and (3) made with intent to defraud.

APPEAL by accused from the decision of CAYLEY, Co. J. of the 20th of February, 1930, convicting accused on six counts, namely:

"(1) That being a promoter of a company intended to be formed and known as Bowen Utilities Corporation Limited, did unlawfully publish a written statement which he knew to be false in a material particular, to wit: that it was therein falsely stated that 'I completed the purchase of the charter from The Investors Guarantee Corporation of Canada' with intent to deceive members of the said intended Company. (2) Being an officer of an incorporated company, the Bowen Utilities Corporation Limited, did unlawfully publish a written statement which he knew to be false in a material particular, to wit: that it was therein falsely stated that 'The Bowen Utilities Corporation Limited, had the charter of The Investors Guarantee Corporation of Canada, and that this gave the Bowen Utilities Corporation Limited, the right to construct and operate railroads,' knowing the said statement to be false . . . with the intent to deceive the shareholders of such Company. (3) Being an officer of an incorporated company, the Bowen Utilities Corporation Limited, did unlawfully publish a written statement which he knew to be false in a material particular, to wit: 'That the Bowen Utilities Company, during 1928, purchased an old railway charter,' 'That the Bowen Utilities Corporation Limited, owned a railway charter,' 'That the rolling stock which the company was building, and the company's present work was for the benefit of a colonization company, which is incorporated to carry out the undertaking in Alberta,' knowing the statement was false . . . with intent to deceive the shareholders of such company. (4) That being a promoter of a company intended to be formed and known as Bowen Utilities Corporation Limited, did unlawfully publish a written statement which he knew to be false in a material particular, to wit: That it was therein falsely stated that 'I completed the purchase of the charter from the Investors Guarantee Company of Canada' with intent to induce divers persons unknown to become shareholders in the said company. (5) Being an officer of an incorporated

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company, the Bowen Utilities Corporation Limited, did unlawfully publish a written statement which he knew to be false in a material particular, to wit: that it was therein falsely stated that 'The Bowen Utilities Corporation Limited had the charter of The Investors Guarantee Corporation of Canada, and that this gave the Bowen Utilities Corporation Limited, the right to construct and operate railroads,' knowing the said statement to be false with the intent to induce divers persons unknown to become shareholders in said company. (6) Being an officer of an incorporated company, the Bowen Utilities Corporation Limited, did unlawfully concur in publishing a written statement issued by the Bowen Utilities Underwriters and bearing on the outside cover the title, 'Developing of a New Empire,' which he knew to be false, to wit: that it was therein falsely stated 'That the Company had acquired 320 acres of land overlooking the Smoky and Wapiti Rivers for a townsite,' 'That this land is the property of the company,' 'That the company is engaged in promoting and building a line of motor operated truckways from the town of Grande Prairie eastward for a distance of 25 miles to Smoky River,' knowing the said statement to be false with intent to induce divers persons unknown to become shareholders of the said company."

Statement

The accused was a promoter of a company intended to be formed and known as Bowen Utilities Corporation Limited, the objects of the company being to build light railways from Grande Prairie in the Province of Alberta into the Peace River District, to acquire property and establish townsites. He entered into an agreement with The Investors Guarantee Corporation of Canada, whereby said company was to incorporate a company for the purpose of obtaining a charter to build light railways from Grande Prairie into the Peace River District. They were, however, never able to get the charter from the Government, although both companies endeavoured to acquire it. Bowen wrote a letter to his associates on June 20th, 1928, saying:

"While North, I began the necessary surveys, and established permanent headquarters at Grande Prairie, completed the purchase of charter from Investors Guarantee Corporation of Canada."

He also distributed a folder entitled "Developing of a New Empire" in which the words were used:

"The New Town of Riverton. The Bowen Utilities Corporation Limited, have acquired 320 acres of excellent land overlooking the Smoky and Wapiti Rivers, for a townsite."

Further in a "Progress Report" that was issued February 4th, 1929, he used the words:

"You will recall that we, in an effort to get an early start on construction during 1928, purchased an old railway charter."

The appeal was argued at Vancouver on the 17th and 20th

of October, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Killam, for appellant: The charge is for giving false information to associates and other persons as to the progress of the Company of which he was managing director, under section 414 of the Criminal Code. There were six counts. We submit, first, that he had acquired a charter, secondly, that if he had not he thought he had acquired it, and thirdly he had no intention of deceiving anyone. An ordinance was passed in 1904 in the old North-West Territories incorporating The Investors Guarantee Corporation, Limited (see Cap. 35 of Ordinances of 1904). He impliedly had acquired a charter: see Maxwell on Statutes, 7th Ed., 304. Under section 414 of the Criminal Code the essential elements to create an offence are wanting: see *Rex* v. *Harcourt* (1929), 52 Can. C.C. 342. There was no criminal intent here: see *Lanier* v. *The King* (1914), A.C. 221.

Argument

DesBrisay: There are here a number of false statements and if a statement is false the intent is inferred: see *Reg.* v. *Birt* (1899), 63 J.P. 328.

Killam, replied.

Cur. adv. vult.

24th October, 1930.

MACDONALD, C.J.B.C.: I base my opinion upon the following facts which are not in dispute or have been fully proven:

The appellant in a written report to his company, a company formed for the purpose of constructing a light railway, stated that they had acquired an old railway charter. In the same report he told the shareholders that an application was being made to the Alberta Legislature for a charter on behalf of his company to build the said railway but that it had not yet been granted. I infer from this that he really meant to tell them as follows:

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"We are applying for a charter which we may or may not get but in any event we have secured an old charter to build the railway."

Now the fact is that the appellant had made an agreement with one Eager of Grande Prairie in the Province of Alberta by which Eager agreed to assist in procuring a charter, to build the railway, from the Alberta Government. Whether or not the

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old charter, which was referred to in the report, gave the power to build the railway is immaterial because none of the powers of the company which claimed the right to build railways in the locality had been transferred to the appellant company. Now a charter was the first essential thing upon which the Company could carry on its business. It was a most important statement to make to shareholders. Unless they had the charter no railway could be built. The appellant knew this as he had promoted the company and had carried on the negotiations with Eager and with the Alberta Government. He knew the exact truth and when he represented that the company had acquired the charter to build the railway he must have known the falsity of the statement. If he had acquired for his company the powers of Eager's company it might be possible for the Court to say that he believed, with good reason for his statement, that it was true but he must have known, having signed the agreement with Eager that it was absolutely false.

Prosecution was brought under section 414 of the Criminal Code. There were six counts in the indictment. In addition to the one above referred to there was a count charging that he had made a false statement with respect to certain lands which he said had been acquired by him for his company. I do not propose to consider whether that was a false statement or not as it will not affect the sentence.

MACDONALD, C.J.B.C.

A strong plea was made to the Court for leniency on the ground that the appellant is 65 years of age; the more reason, however, that he should have stated truthfully the real facts of his case, and as I am convinced from the evidence that he knew the falsity of his statement, I think I am bound to maintain the statute which was passed for the protection of shareholders and others from fraudulent statements which might influence their conduct. I have as much sympathy as anyone for the appellant but I do not think sympathy has anything to do with the case.

Moreover the learned trial judge heard the appellant's witnesses and saw the documents which proved the false statements made. He may have been very materially influenced by the conduct and demeanour of the appellant in the witness box, and, if there were any reasonable doubt about his guilt, and I think

there was none, I should not interfere with the trial judge's judgment.

The appeal should be dismissed.

MARTIN, J.A. (oral): This appeal, in my opinion, should be allowed, but not without considerable doubt for I share to a substantial extent the opinions expressed by my brother the Chief Justice, but I am unable to go to the length that he does, although I can readily understand why he should entertain those views. I say so with respect, because the case is one upon the line and it is peculiar in two aspects: first, that there is no conflict of evidence upon essentials, and therefore we are freed from that element; and, second, that the learned trial judge has given a certificate of its being "a fit case for appeal," and that, so far as I am concerned, is the turning point of it. If he had not given that certificate (which of course must not have undue importance attached to it although in some cases it is of considerable importance)—I say again, that it is only owing to the fact that he gave it that the scale is turned, to my mind, under the circumstances before us.

I shall content myself by saying, therefore, that I think upon the established facts he should have given the appellant the benefit of the doubt, because although he, I am inclined to think, made false statements that he knew to be false, and that he intended to deceive thereby, yet unquestionably there is also the fair opportunity here for taking another and more lenient view, *viz.*, that what he did was owing to a misconception of the legal position of affairs and an innocent, if loose, misuse of language to describe that position. He may consider himself fortunate that the majority of the Court is able to take this more charitable view of his actions, and I hope it will be a warning to him and that he will be more careful in future in what he says.

MARTIN, J.A.

There is an aspect of this case which it is a pleasure to refer to, because it is a great deal more pleasant to commend than to criticize, and that is the very nice way in which it was presented by Mr. *DesBrisay,* the counsel before the learned judge below and at this Bar. It was a difficult case to handle, and the facts and the law also have been submitted in a way which I have noted with much pleasure.

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GALLIHER, J.A.: In my opinion this case comes down to the consideration of whether the learned trial judge was justified in finding *mens rea*, an element which is always present in criminal offences.

In determining the question of *mens rea* one should look at the acts and conduct of the accused throughout. It may well be that taking an isolated act it might tend to indicate an evil mind but taken in conjunction with the general trend of acts and conduct throughout that might entirely disappear.

The principal acts complained of here are contained in a letter dated June 20th, 1928 (Exhibit 1) in which these words are used by the accused:

"While North, I began the necessary surveys, and established permanent headquarters at Grand Prairie."

and particularly these words: "completed the purchase of charter from Investors Guarantee Corporation of Canada."

A folder (Exhibit 4), "Developing of a New Empire" in which these words are used:

"The New Town of Riverton. The Bowen Utilities Corporation Limited, have acquired 320 acres of excellent land overlooking the Smoky and Wapiti Rivers for a townsite."

and a "Progress Report," dated February 4th, 1929, in which these words appear:

"You will recall that we, in an effort to get an early start on construction during 1928, purchased an old railway charter."

practically repeating what was stated in the letter first above referred to.

The letter and these two folders, which I will call them, were sent to the associates of Bowen and the then existing shareholders, and were used in canvassing for subscriptions to the stock of the Utilities Company.

Now while the agreement, Exhibit No. 7, does not constitute a purchase of the charter, one thing is certain that the owners of that charter and the Utilities Company Limited were working together and endeavouring to procure from the Government of Alberta and using this charter to induce them to grant power to construct and operate the Truckway Lines, as they are called, which was one of the principal objects of their enterprise. The Alberta Government would not grant them the privilege of operating and building under this old charter and the suggestion

was made that the Utilities Company or the owners of the old charter apply at the next Session of the Legislature for a special charter to enable them to build and operate the line. I think it can be said that these two companies used every reasonable endeavour to have this proposal carried out until it became apparent that the Alberta Government would not grant their request.

At the time the application was first made the Alberta Government was in negotiations with the Canadian Pacific and the Canadian National Railways for the purchase of the Edmonton Dunvegan & British Columbia Railway then owned by the Alberta Government which negotiations ended in the purchase of the railway at a later date. This created a new situation and the Alberta Government for reasons best known to themselves, and these may have been weighty reasons, finally declined to approve the plans which had been submitted to them. This is part of the history of the transaction and I only refer to it for consideration in so far as it may be considered as pointing to the *bona fides* of the scheme—that it was not a mere will-o'-the-wisp with no foundation and no merit and with a view to obtaining money from deluded shareholders.

GALLIHER, J.A.

Considering the situation as regards transportation up in that country and discounting the optimism of promoters generally it would suggest to me that there was merit in the undertaking, as it appears by the evidence it did others better able to judge of that than I am. Of course all this does not make the statement true respecting the purchase of the old charter but is something I think which can be considered in determining the question of *mens rea*. It is noticeable that most of the Crown witnesses speak well of the accused and as to his sincerity and while he used the words in the letter (Exhibit 1) and the folder (Exhibit 4) which were not in strict accordance with the facts it does not seem to me, upon reading the whole evidence, including the exhibits, that *mens rea* has been established. Whatever may be their rights in a civil action the element necessary to establish a crime seems to me to be lacking.

With regard to the statement as to "acquiring the lands" my remarks above apply and perhaps with greater force as a layman might very well consider he was justified in using the word

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"acquired" when he had obtained an option on one piece and an agreement for sale of the other.

I would, with the greatest deference to the views of the learned judge below, quash the conviction.

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MCPHILLIPS, J.A. (oral): This case is one in which three essentials have to be found, the falsity of the statement, the knowledge of the falsity, and the intention to defraud. That is laid down in the case of *Rex* v. *Harcourt* (1929), 52 Can. C.C. 342. In that case, which was elaborately considered, Mr. Justice Middleton gave a judgment recounting all the facts and circumstances which arose in that case, but I do not propose to go as elaborately into the facts in this case, but will content myself by giving one or two of the salient features of it.

In Alberta, at the time when these occurrences took place there was a great demand for railway transportation. Farmers were 40, 50 and more miles away from any market town where elevators were, and naturally there was strong public opinion that perhaps it would be possible to obtain a light railway system rather than the standard system of construction which to them seemed interminable in coming.

MCPHILLIPS, J.A.

Now, Bowen, the accused, got in touch with a practising solicitor who laid before him a certain charter passed in the time of the North-West Territories Assembly, and he was influenced to believe that there was the right to build railways. There was a transfer or delegation of powers granted under seal executed by the company and the solicitor as the proper officer of the company executed the document. Bowen was not a lawyer, under the circumstances he could reasonably believe that there was merit in this charter, and he said that the charter was purchased, always being advised by the solicitor. To say that an old railway charter was purchased was not really the true artistic term, but he went on in his representations and said that the matter had been taken up with the Alberta Government, and it is to be observed that the Alberta Government did not say "You have no charter"; on the other hand everything proceeded on the premise that there were statutory powers, and capable of being exercised. The members of the Government merely pointed out that the Province of Alberta had passed a general

Railway Act since the Province was constituted out of the North-West Territories and that that Act would have to be conformed with in the exercise of any railway powers and that it might be necessary to get a private bill, at any rate you must come to the Government for approval of your plans. And not for a very considerable time did the Government of Alberta indicate that there was no merit in the contemplated scheme, and negotiations continued. Mr. Eager, the solicitor, was very prominent in the matter, interviewing the Prime Minister and the Attorney-General, and interviewing various officers of the Government.

The truth is that the Alberta Government had a railway policy that would conflict with this proposed undertaking, and delays took place, but no breaking off of any connection, and during all this time Bowen assumed, and in my opinion was fairly entitled to assume he had valuable rights, when you consider his situation and the fact that he was not a lawyer, but associated with a lawyer who was supporting him throughout—a lawyer apparently of standing in the community.

Now, with all these surrounding facts I fail to see that the Crown made out a case, that is to say that there was falsity of statement, that there was knowledge of the falsity, and that there was the intention to defraud. This case would have a very slender position even in a Civil Court, much less in a Criminal Court. It is to be deprecated that people, when they find that they have not made a success of their speculation, will hie themselves off to the Criminal Court and lay an information. The Courts of the land must be jealous of the rights and privileges of the citizens and see to it that that which is nothing more than a commercial venture—which has proved to have been disastrous—is not to be made into a crime. That is exactly this case, it has all the features of that. I fail to find the evidence in this case establishing the three necessary essentials to establish crime. The duty of this Court is to rehear the case and to apply its mind to all these facts and circumstances and I fail to find that there is anything in the evidence which would entitle the learned judge, with great respect, to take the view which he did in the Court below. MCPHILLIPS, J.A.

Further I might say that this case is unique in one feature,

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and that is this, that the Crown very properly was willing to call witnesses, that Mr. *Killam,* the counsel for the accused, said he would like called, and witness after witness, men of substantiality, went into the box and spoke of Mr. Bowen in the highest terms; and Mr. *DesBrisay,* who was the learned counsel for the Crown, when the accused himself went into the box, traversed all these statements that I have been dealing with, and in true forensic style cross-examined the accused, and reading that cross-examination one must be impressed with the fact that the learned counsel for the Crown was unable to shake the accused, was unable to establish that any crime had been committed.

MCPHILLIPS, J.A.

In my opinion the conviction cannot be sustained. It can be likened to the case in the Privy Council, *Lanier* v. *The King* (1914), A.C. 221, where it is stated in the head-note:

"The facts did not on any just or legal view warrant a conviction, and that justice had gravely and injuriously miscarried."

The above language appearing in the head-note is taken from the judgment of their Lordships of the Privy Council delivered by Lord Shaw of Dunfermline, who delivered the judgment.

I would set aside the conviction and allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A. (oral): I agree with the reasons of my brother GALLIHER. I also share the views expressed by my brother MARTIN.

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

Solicitors for appellant: *Killam & Shakespeare.*
Solicitor for respondent: *A. C. DesBrisay.*

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BURNS & COMPANY, LIMITED *ET AL.* v. MARCUS & DIMOR.

PALMER & COMPANY v. DIMOR, MARCUS & DIMOR.

Partnership—Dissolution—A former with new partner continue business—Debts contracted—Liability of retiring partners—Notice of change—Course of conduct—Evidence of—R.S.B.C. 1924, Cap. 191, Sec. 20.

Certain creditors of a partnership, having received notice that it had been dissolved and that the business was continued by one of the former partners with a new partner, and it appearing from the evidence that their dealing with the new firm was such that they had adopted it as their debtors with respect to the debts incurred both before and after the dissolution:—

Held, that they had thereby discharged the retiring partners from liability.

Held, further, that other creditors who had not received notice of the change and did not shew in the course of their dealing that they had adopted the new firm as their sole creditors, were entitled to recover from the former partners.

ACTIONS to recover certain claims from the defendants Milton Marcus and Stephanie Dimor, claiming that said defendants are liable for debts contracted and remaining unpaid at the time when John Dimor, their former partner, became bankrupt. Statement

Tried by MACDONALD, J. at Revelstoke on the 20th of November, 1930.

McCarter, for plaintiff.

E. A. Boyle, for defendant.

9th January, 1931.

MACDONALD, J.: The plaintiffs, joining together in their actions, seek to recover from the defendants, Milton Marcus and Stephanie Dimor, their respective claims, on the ground that such defendants are liable, for the debts contracted and remaining unpaid at the time when John Dimor, their former partner, became bankrupt. Judgment

These defendants entered into partnership with said John Dimor in April, 1929. They purchased, under an agreement with deferred payments, the Revelstoke Hotel and contents and

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continued in partnership until the 6th of November, 1929. It was then agreed that the partnership be dissolved and John Dimor, with an incoming partner, Chris Morris, would take over and operate the "cafe," separate from the rest of the hotel and he would quit claim any interest he possessed in the real estate. This agreement of dissolution was implemented by necessary documents, including a lease by the defendants, Milton Marcus and Stephanie Dimor, to the said John Dimor of the restaurant or cafe business. These defendants, in furtherance of such division of the property, continued ever since to operate the hotel separate from the cafe. They were well aware, at the time, that the dissolution would not relieve them from their then existing indebtedness, with respect to both the hotel and the cafe. Mr. *McCarter,* as solicitor for the parties, protected such defendants as far as he could by inserting clauses in one of the quit-claim deeds and also in the lease, that the said John Dimor would assume and pay such indebtedness and indemnify them from any liability. There was also incorporated in the partnership agreement entered into between said Chris Morris and said John Dimor, a proviso that such partnership should, out of the profits of the business, assume and pay the debts incurred in connection with the operation of the cafe, theretofore carried on in the premises by John Dimor and Milton Dimor and Stephanie Dimor. This agreement, as to the payment of debts, would not affect the rights of any of the creditors of the old partnership, unless it was assented to by them in such a manner as to change the liability, or payments were subsequently made specifically of any of the accounts so outstanding at the time which would operate as payment. The said John Dimor, who is defendant in one of the actions, carried on the cafe business, with his partner Chris Morris, for some time and then Morris retired leaving John Dimor as sole proprietor. He subsequently became bankrupt and all the plaintiffs in these actions proved their claims against him as a bankrupt. They contend, however, that they can still hold the defendants Milton Marcus and Stephanie Dimor liable for all debts owing to them and existing at the time of the bankruptcy. They submit, that the business established in April, 1929, continued under the name of Revelstoke Hotel, without

notice of any change in the partnership, and thus that the original partners are not relieved from liability. It is further contended that such liability existed, not only with respect to the debts owing at the time of the dissolution but also as to those which arose afterwards. Their position is sought to be strengthened by the fact that these defendants as well as the said John Dimor remained on the premises and that there was no apparent difference in the operation of the Revelstoke Hotel after the dissolution.

The claims sought to be recovered are all in connection with the cafe business.

The first question to be determined is whether these plaintiffs, or any of them, had notice of the dissolution and of the new partnership being formed, to carry on the cafe business separate from the rest of the hotel. Defendant Milton Marcus states that when the dissolution took place Mr. *McCarter* as the solicitor acting in the matter, advised them that notice should be given to the creditors of the change. I accept this statement, especially as it was not contradicted, though it could not be properly advertised, as there was only a weekly newspaper published in Revelstoke. It is probable that this defendant, through the solicitor now acting as counsel for the plaintiffs, would, in order to relieve himself from future liability, follow the instructions thus given, as to personally notifying the creditors. As to the probability of a client acting on advice of his solicitor the remarks of Earl Loreburn in *Woods* v. *Wilson, Sons & Co. Lim.* (1915), 84 L.J., K.B. 1067 at p. 1070 might be applied, as follows:

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> "It is quite true that every case must be proved, and something more is needed than a state of facts which is consistent with one view or the other. That something more is supplied, if there is a probability one way or other. No one can frame a formula by which you can measure probabilities. We must judge in each case as we should in other affairs of life."

Defendant Marcus stated that, pursuant to advice he notified all, except two of the plaintiffs of the change and the new partnership and this statement is corroborated by witnesses on his behalf. It is, however, flatly denied by some of the plaintiffs, half contradicted by others, and practically admitted by one of the plaintiffs, that such notice was given.

In considering contradictory evidence the rule of presumption is that a witness who testifies to an affirmative is ordinarily

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credited in preference to one who testifies to a negative, the reason being that the latter person may have forgotten that the thing happened "but it is not possible to remember a thing that never existed": *vide* Taschereau, J. in *Lefeunteum* v. *Beaudoin* (1897), 28 S.C.R. 89 at p. 94. Compare Baron Parke in *Chowdry D. Pesard* v. *Chowdry D. Sing* (1844), 3 Moore, Ind. App. 347 at p. 357; 18 E.R. 531 at pp. 534-5:

"In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place, is of more value than that of one who says that it did not, because the evidence of the latter may be explained, by supposing that his attention was not drawn to the conversation at the time."

On the same point, the Master of the Rolls in *Lane* v. *Jackson* (1855), 20 Beav. 535 at pp. 539-40 said:

"I have frequently stated, that where the positive fact of a particular conversation is said to have taken place between two persons of equal credibility, and one states positively that it took place and the other as positively denies it, I believe that the words were said, and that the person who denies their having been said has forgotten the circumstances. By this means I give full credit to both parties."

If the inference from these circumstances be that these defendants were discharged from liability, it is not necessarily conclusive. There may be facts proven to shew that such was not the intention.

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There is, aside from verbal notice, corroboration of the change, not only having taken place, but that those dealing with the hotel, being aware of the fact, through the bank account being changed and cheques received by these plaintiffs on the Canadian Bank of Commerce, signed "Revelstoke Cafe, John Dimor —C. Morris" whereas previously, the cheques that they had been receiving were on the Bank of Montreal, signed, "Revelstoke Hotel, John Dimor—M. Marcus." Plaintiffs so receiving cheques would thus become aware that they were being paid for goods supplied by the cafe, as distinguished from the hotel as a whole, and also that the parties paying them differed, in the manner outlined. While it would only be binding upon the particular plaintiff, still it gives information, as to who were the partners in the cafe business by the fact, that Ramsden, the bookkeeper for Burns & Co., inserted their names in the ledger register account. There was a mistake in this respect in describing as Morris, the name Marcus, now sought to be held

liable, does not appear in such register account. Under the circumstances I feel satisfied that the plaintiffs supplying goods, for use of the cafe, in connection with the Revelstoke Hotel, became well aware of the change and that Mrs. Dimor and Marcus had retired from the cafe business, leaving John Dimor to carry it on, with the new partner Morris. This finding, however, does not apply to two of the plaintiffs, Delia McKinnon and Dickson Importing Company Ltd. These plaintiffs neither received notice nor did their actions after the dissolution prevent them from now recovering their claims against the defendants Marcus and Stephanie Dimor.

As to the other plaintiffs, having found that they received notice of the dissolution, the point to be determined is whether they have as a fact either expressly or inferentially, from their course of dealing with the new partnership, adopted such firm as their debtors and thereby discharged these defendants from liability. The Partnership Act (R.S.B.C. 1924, Cap. 191, Sec. 20) in this respect, is as follows:

"(2.) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

"(3.) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted."

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In practically all of the cases the accounts for goods supplied continued after the dissolution of partnership to be rendered in the same manner as before it took place. The plaintiffs were not parties to any express agreement by which these defendants were discharged from any liabilities existing at the time of the dissolution. Then did their course of dealing thereafter, constitute an agreement coming within the purview of the statute and the decided cases on the subject?

In *Pitner Lighting Co.* v. *Geddis and Pickering* (1912), 2 I.R. 163 where a limited company had taken over the business of a partnership, the plaintiffs divided and rearranged the account in their books and made certain appropriations, which enabled them to succeed against the defendants as members of the partnership, which had been subsequently incorporated and registered as a limited company. This case is instructive as to

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division of accounts and appropriation of payments. It is cited as supporting the plaintiffs' contention that there was not a novation on the part of the plaintiffs and an acceptance of the new partnership and consequent discharge of these defendants. If the facts in that case were not distinguishable from those here presented, it would be a strong authority in favour of the plaintiffs. In the judgment therein, reference was made to *Thompson* v. *Percival* (1834), 5 B. & Ad. 925 where "a creditor of a partnership, after notice to him of dissolution, and that the continuing partners alone should be looked to for his debt, took from him a negotiable security." This case was referred to, as being as strongly in favour of the plaintiffs as the *Pitner Lighting Co.* case. In the latter case Palles, C.B. in referring to the fact, that the defendants relied upon a continuous account being kept and that bills were rendered, with the addition of the word "limited" after the incorporation of the company and payments made thereon by such company, said that these facts, relied upon by defendants as conclusive evidence of a novation, were not in his opinion conclusive. He then added that the intention of the party is one of the governing elements and that the change in the accounts rendered to the *Simpitrol Lighting Co.* by adding the word "limited," and the plaintiffs' acceptance of payments, after the change, was evidence only and not conclusive. The difficulty presented however is, that in that case there was not, as here, a new partner introduced after a dissolution and that for months afterwards it was apparent that the cafe business in connection with the Revelstoke Hotel, was being carried on by one of the old partners and a new partner. I have found that plaintiffs knew of the change and they not only rendered their accounts with such knowledge, but received payments from time to time.

In *Hart* v. *Alexander* (1837), 7 Car. & P. 746; 2 M. & W. 484 the plaintiff sought to hold the defendant liable, he, having been a partner in the firm and retiring therefrom with due advertisement and notice to the plaintiff. From time to time the new firm accounted with the plaintiff and paid him interest. The case was tried before Lord Abinger, and in Lindley on Partnership, 9th Ed., 321-2 he is reported to have said in part, to the jury as follows:

"To ask you if there was an agreement by the plaintiff to discharge the defendant, is to put the case upon a false issue, the agreement, if any, being an agreement raised by construction of law: the true question being whether the plaintiff did not go on dealing with the new firm, and making up fresh accounts with them, so as to discharge the defendant. I take the law to be this: Where a debtor who is a partner in a firm, leaves that firm, and any person trading with the firm has notice of it, and he goes on dealing with the firm and making fresh contracts, that discharges the retiring partner, though no new partner comes in."

The judgment of Lord Chelmsford in *Rolfe and The Bank of Australasia* v. *Flower, Salting & Co.* (1865), L.R. 1 P.C. 27 is of assistance, not only upon the question of liability, but through the lengthy discussion and weighing of contradictory evidence, coupled with the application of the doctrine of probabilities. The questions there, as here, to be decided were, *vide* p. 38:

"First, whether the insolvent firm of William Rutledge & Co. had assumed the liability to pay this debt; and second, whether Flower, Salting & Co. had agreed to accept the insolvent firm as their debtors, and to discharge the old partnership from its liability."

That portion of the judgment dealing with and deciding as to the assumption of liability, being determined upon "slight circumstances" does not require consideration as there is no doubt that the new firm, carrying on business as "Revelstoke Cafe" became as between themselves and these defendants, liable for the debts of the old partnership. The difficulty arises with respect to the second question. The contest in the *Rolfe* case was between two sets of creditors, as to holding the new partnership liable for the debts of the old partnership. It was the converse of the contention here, but is in point, as there could not be two firms liable at the same time for the same debt: *vide* Lord Abinger in *Hart* v. *Alexander, supra.* The situation in the *Rolfe* case is outlined at pp. 44-5, which I think advisable, to quote at length, as follows:

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"There seems to be no reasonable doubt, upon the facts, that the insolvent partnership, at the time of its formation, assumed the debts and liabilities of the former firm of W. Rutledge & Co., including the debt due to Flower, Salting & Co., and the only remaining question to be considered is whether Flower, Salting & Co., being aware of this arrangement, consented to accept the liability of the new firm, and to discharge their original debtors. Upon this question, as upon that of the agreement of the partners *inter se*, it was said by Lord Eldon, in *Ex parte Williams*, Buck, 13, 'A very little will do to make out an assent by the creditors to the agreement.'

"This case is different from many of the cases mentioned in the course of the argument, where there had been a change in a firm of which a person

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trading with it had notice, and went on dealing with the new firm, and afterwards sought to make the old firm liable, and a question arose whether by his conduct he had not discharged the old firm, and adopted the liability of the new. Here the creditors of the old firm, knowing of the change of partnership, and that the new partners had taken over all the assets, and had agreed to be subject to all the liabilities of the former firm, not only continued their dealings with the new firm upon the same footing as with the old, and received payment of a portion of their debt out of the blended assets of the old and new firms, but themselves proved that from the time when they understood that the new partners took over all the assets, and became subject to all the liabilities of the preceding firm, they 'thenceforth treated the partners in that firm as their debtors, in respect of the debt owing to them at the time of the creation of that firm, or of so much thereof as for the time being remained due.' "

While the facts here presented are dissimilar, in some respects, I think it well, as being applicable to most of the claims, to adopt, with appropriate changes, the next paragraph of such judgment at p. 45, *viz.*:

"If Burns & Company and other plaintiffs had, under these circumstances, endeavoured to enforce payment of their debt from the partners in the old firm operating the Revelstoke Hotel there would be ample evidence to satisfy a jury, that they had discharged the old firm and had accepted the new one, carrying on business as the 'Revelstoke Cafe' as their debtor."

Judgment

This acceptance of the new firm, with a proper appropriation of payments—according to the presumption referred to in Halsbury's Laws of England, Vol. 7, p. 450—discharged the debts of the old firm, existing at the time of the dissolution. It relieved these defendants from debts for which they would otherwise have remained liable. This result would not follow as to those plaintiffs who were unaware of the change in the partnership.

It is a fair and reasonable inference to draw from the facts that the intention of the plaintiffs, who had knowledge of the dissolution of partnership, was to look to them for payment of goods sold both before and after the dissolution and to continue their credit and business with the new firm. From time to time the accounts were so rendered. No evidence was adduced to shew a request for these defendants to make payment of the claims, until the bankruptcy of the remaining partner of the Revelstoke Cafe. Plaintiffs then proved their claim in bankruptcy without reservation or qualification. The attempt to now hold these defendants liable, apparently, only occurred to them after the bankruptcy.

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In coming to a conclusion in the matter, I should remark that the pleadings may require amendment in order to follow the trend of the trial. *Vide Scott* v. *Fernie* (1904), 11 B.C. 91.

I might, to the same effect, apply the principles of equity and it might be contended, that subsection 4 of section 2 of the Laws Declaratory Act (R.S.B.C. 1924, Cap. 135) was applicable.

The plaintiffs, Delia McKinnon and Dickson Importing Company, Limited, are entitled to judgment (respectively) for $390 and $205.82 with costs. The other claims and the Palmer action are dismissed with costs.

Judgment accordingly.

CORPORATION OF THE CITY OF CUMBERLAND v. CUMBERLAND ELECTRIC LIGHT COMPANY, LIMITED.

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CITY OF CUMBERLAND v. CUMBERLAND ELECTRIC LIGHT CO., LTD.

Agreement—Franchise to electric light company from city—Fifty-year term subject to right of city to take over—Arbitration as to value—Profits of unexpired term included in award—"Undertaking property rights and privileges"—Meaning of—Appeal.

On the 19th of December, 1901, the City of Cumberland entered into an agreement with the Cumberland Electric Light Company giving the Company the right to install and operate an electric-light plant within the municipality, such rights to exist for a period of fifty years, subject to the right of the municipality to purchase the undertaking, property rights and privileges of the Company at any time at a price agreed upon, or in default of agreement as found by arbitration. In 1929 the municipality decided to take over the undertaking, and as the parties could not come to terms as to price, arbitrators were appointed and made an award, fixing the value of the undertaking, property rights and privileges of the Company at $74,000, and they found that of this sum of $74,000 the sum of $36,000 was the value of the physical assets, the "physical assets" being defined as made up of the "fixed assets and supplies on hand." A motion to set aside or remit the award as to the remaining sum of $38,000 compensation was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MARTIN, J.A. dissenting), that the agreement gives the City the right to purchase the whole undertaking and the submission was to assess the

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value of the "undertaking, property rights and privileges of the Company." The price to be paid should represent the value of the whole undertaking and is not restricted to the "physical assets" of the Company. There is no error on the face of this award and the appeal should be dismissed.

[Affirmed by Supreme Court of Canada.]

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APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 12th of May, 1930, dismissing a motion on behalf of the Corporation of the City of Cumberland to set aside or remit the award of Frank Sawford and Alfred Douglas Creer, arbitrators in an arbitration before them under a submission between the said Corporation and the Cumberland Electric Light Company, Limited, in so far as the sum of $38,000 compensation for the prospective loss of profits for the balance of the period of the franchise is allowed. Under an agreement between the City and the Company, of the 19th of December, 1901, the Company was granted the exclusive right and privilege of lighting by electricity and supplying electric light to the City of Cumberland. The rights, powers and privileges were conferred for a period of 50 years. The agreement provided that the Corporation was at liberty at any time to purchase the said undertaking, property rights and privileges at such price as could be agreed upon, and in the case of difference as to such price, to be determined by arbitration. The Company complied with the agreement in all its terms and was in active operation of its undertaking and works when, in 1929, the City exercised its right of purchase and offered the Company $25,000 "for the purchase of your property, rights and privileges." Failure to agree led to the appointment of arbitrators, and the material parts of the award are:

Statement

"We find that the value of the undertaking, property rights and privileges of the Cumberland Electric Light Company Limited, both within and without the corporate limits of the City of Cumberland, is a sum of Seventy-four Thousand Dollars ($74,000) as at the 1st day of August, 1929.

"We find that of such sum of Seventy-four Thousand Dollars ($74,000) the sum of Thirty-six Thousand Dollars ($36,000) is the value of the physical assets, and for the purpose of this award the term "Physical Assets" is defined as being made up of the fixed assets and supplies on hand as set out on page 1, Exhibit 15, produced before us at the hearing of the said reference."

No objection was taken to the award of $36,000 for the

"physical assets" of the Company, but the City objected to the award of $38,000 for the prospective profits for the unexpired term of the franchise to which the Company contends it is entitled under the original agreement.

The appeal was argued at Vancouver on the 22nd of October, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, K.C., for appellant: The motion was to correct an award on the ground of error in law on its face. The sum in dispute is $38,000 for the loss of profits by the Company during the balance of the term of 50 years. We submit that this is not within the scope of the arbitration at all: see *Toronto Street Railway Co.* v. *Corporation of the City of Toronto* (1892), 22 Ont. 374; (1893), 20 A.R. 125; (1893), A.C. 511; *Bruner* v. *Moore* (1903), 20 T.L.R. 125; *Hamilton Gas Co.* v. *Hamilton Corporation* (1910), 79 L.J., P.C. 76; *Perth Gas Co.* v. *Perth Corporation* (1911), 80 L.J., P.C. 168.

Argument

J. W. deB. Farris, K.C., for respondent: The Company had a 50-years' franchise, there were 21 years still to run and they are entitled to their prospective profits for that period. This is included in "the undertaking, property rights and privileges." The *Toronto Street Railway Co.* v. *Corporation of the City of Toronto* case does not apply as they had a 30-year franchise and it was at the expiration of the franchise that the city took the street railway over. The other cases referred to do not apply for the same reason.

Mayers, replied.

Cur. adv. vult.

19th February, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The municipal council of the City of Cumberland entered into an agreement with George Wilt Clinton as trustee of a company to be formed (the respondent) giving him the right to install and operate an electric-light plant in the municipality, such rights to exist for the period of 50 years, subject to the privilege of the municipality to purchase the undertaking, property and rights of Clinton at any time at a price to be agreed upon, or in default of agreement, found by arbitrators under the Arbitration Act. The by-law received the

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assent of the electors. The municipality elected to take over the undertaking and an arbitration ensued in which an award was made allowing the corporation $38,000 for their estimated profits for the balance of the 50-year term. The municipality appeals against that part of the award. The arbitrators computed the value of the physical assets and there is no appeal from that. We have been referred to *Toronto Street Railway Co.* v. *Corporation of the City of Toronto* (1893), A.C. 511; *Hamilton Gas Co.* v. *Hamilton Corporation* (1910), 79 L.J., P.C. 76, and *Perth Gas Co.* v. *Perth Corporation* (1911), 80 L.J., P.C. 168.

In *Toronto Street Railway Co.* v. *The Corporation of the City of Toronto, supra,* the franchise had expired and it was therefore held that only the value of the physical assets could be take into account by the arbitrators.

It is true that the appellant does not need the balance of the term since they have by virtue of the Municipal Act power to construct works of the kind. Here it is the "undertaking, property and rights" of the corporation which may be purchased. There is no separation of the physical assets from the franchise and therefore the whole must be purchased if the appellant takes any. They cannot take one member and leave the others. In *Toronto Street Railway Co.* v. *The Corporation of the City of Toronto, supra,* the franchise had expired and it was therefore held that only the value of the physical assets could be taken into account by the arbitrators. There was nothing else to value.

MACDONALD, C.J.B.C.

Hamilton Gas Co. v. *Hamilton Corporation, supra,* raised the question analogous to that in the present appeal. The municipal corporation was empowered at the end of twelve years to purchase the "gas works and plant" of the company at a price to be assessed by arbitrators and the question raised there was the right of the company to compensation for the commercial value of the works as a going concern. The respective contentions of the parties were much the same as in this case. The municipal corporation was not permitted by the Municipal Corporation Act, 1886, to compete with the existing gas companies though it was given power to purchase such as were in existence. In this the case differs from ours since the corporation here is per-

mitted by our laws to erect their own works. It was held that that case was not dependent upon any principle of law but upon the direct language of the company's agreement and on the particular facts of the case. Reference was there made to *Stockton and Middlesbrough Water Board* v. *Kirkleatham Local Board* (1893), A.C. 444, where the conclusion arrived at by the board was that only the physical assets of that part of the works sold could be taken into consideration and that therefore part only of the undertaking was sold which was an important factor in the decision. *Edinburgh Street Tramways Company* v. *Lord Provost, &c., of Edinburgh* (1894), A.C. 456 was referred to. That case is of importance on the question of the meaning of "undertaking" which was held to be wide enough to include the franchise as well as the physical assets. In *Perth Gas Company* v. *Perth Corporation, supra,* similar questions were under consideration though the facts were more complicated than here. The neat question there was "What was the thing sold?" Was it the physical assets or the whole undertaking? Many objections were there presented against holding that the "thing sold" was merely the physical assets and their Lordships held as in *Hamilton Gas Co.* v. *Hamilton Corporation, supra,* that the price to be paid ought to represent the commercial value of the respondent company's whole undertaking.

MACDONALD, C.J.B.C.

There is nothing in the agreement or in the facts of this case which would lead me to the conclusion that the appellants had the right to purchase anything but the whole undertaking of the respondent, the undertaking, property and rights of the Corporation. It is true that the Municipality does not need the franchise within its own limits but the Corporation have extended their operations beyond the municipal limits and while they have not anything in the form of a franchise for such extensions from the districts in which they are operating, they have in fact purchased such physical assets though outside the municipal boundaries. *Prima facie* the agreement gives the appellants the right to purchase the whole undertaking. The arbitrators were therefore right in assessing to the respondents the value of the franchise and since no question has been raised as to the amount of the award the appeal must be dismissed.

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MARTIN, J.A.

MARTIN, J.A.: With every respect I find myself unable to take the same view of this appeal as my learned brothers, and am of opinion that it should be allowed, because, briefly put, the arbitrators went outside the scope of the arbitration in making an award for profits as thus defined in the letters exchanged between the solicitors for the purpose of this appeal, *viz.*:

"(b) Thirty-eight thousand dollars compensation for the prospective profits for the balance of the period of the franchise."

My view of the matter is that under this particular contract the City could terminate it at will, and upon the exercise of that right of determination nothing was left to the Company except its physical assets; the City itself, in truth, already had the same lighting franchise because it could use its own streets for all practical purposes of the undertaking in question, and it had no power, under the relevant statutes to grant an "exclusive right liberty and privilege" and so debar itself from competition, in the public interest, with the defendant company in carrying out the object of its undertaking which is stated to be "the supplying of electric light to the said City of Cumberland and its inhabitants." There is, to my mind, no practical difference between the right of the City to "be at liberty at any time to purchase the said undertaking" at a price to be agreed upon or fixed by arbitration, and a right to declare a termination of the undertaking, because a right to purchase at any time puts, *ex necessitate,* when exercised, an immediate end to the undertaking just as effectually as a declaration that it has terminated it does so.

I have carefully examined the cases cited to us with the result that, when they are read in the light of their individual circumstances, there is nothing in them, to my mind, that conflicts with the view above expressed.

It is to be noted that, in considering cases of this description, the Privy Council said in the somewhat similar one of *Hamilton Gas Co.* v. *Hamilton Corporation* (1910), A.C. 300 at p. 305:

"Their Lordships, however, are of opinion that each of these cases and also the present case depended and depends, not upon any rule or principle of law of general application, but solely and entirely upon what is the just construction of the language, whether of statute or agreement, regulating the measure and nature of the claim."

And in that case the town "corporation were prohibited from

establishing rival works"; and the later case of *Perth Gas Co.* v. *Perth Corporation* (1911), 80 L.J., P.C. 168, turned upon the construction of a special section concerning which it was said, p. 169:

"It would seem to have been inserted as an afterthought without any attempt having been made to reconcile its provisions with those of the other sections of the Act, or with the general principles of the law affecting incorporated joint-stock companies. Hence the difficulty of putting any meaning, consistent with common sense and justice, on its inapt and ambiguous language. In order to solve that difficulty it is necessary to consider some of the other provisions of the Act."

And at p. 172 it was pointed out that:

"They [the gas company] are empowered, if indeed not bound, by the exigencies of that business, to enter into contracts for the supply of gas to the inhabitants of the vast area over which the respondents have no jurisdiction or control whatever."

The circumstances in both these cases are radically different from those before us and hence the decisions based thereon do not support the company's position herein.

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

MCPHILLIPS, J.A.: This is an appeal as against an award made in respect of the sum found by the arbitrators, as being due and payable by the City of Cumberland (the appellant) to the Cumberland Electric Light Company, Limited (the respondent) for the acquirement of the undertaking, property rights and privileges of the Company, the sum found being $74,000 as at the 1st of August, 1929. The amount found is particularized as follows by the arbitrators:

"We find that of such sum of Seventy-four Thousand Dollars ($74,000) the sum of Thirty-six Thousand Dollars ($36,000) is the value of the physical assets, and for the purpose of this award the term 'Physical Assets' is defined as being made up of the fixed assets and supplies on hand as set out on page 1, Exhibit 15, produced before us at the hearing of the said reference."

The appeal is from a judgment of the learned Chief Justice of the Supreme Court of British Columbia refusing to set aside or remit the award to the arbitrators. No objection was advanced at this Bar to that portion of the award allowing the sum of $36,000 for the physical assets so that the appeal is confined to the balance, *viz.*: $38,000. The appellant is a municipal corporation and the respondent a company incorporated

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under the Companies Act, 1897 (British Columbia), and amongst other objects the company was formed to adopt and carry into effect the agreement recited in a certain by-law finally passed after ratification by the electors of the municipality by the municipal council of the Corporation of the City of Cumberland on the 20th of January, 1902, known as The Cumberland Electric Lighting By-Law, 1902."

Under the agreement so approved by the electorate and made and entered into between the Corporation and the Company of date the 19th of December, 1901, the Company was granted the exclusive right, liberty and privilege of lighting by electricity and supplying electric light to the City of Cumberland and its inhabitants and of erecting poles and wires along the streets and highways and all the general powers to effectually carry on its works and operations and the powers conferred were to continue for a period of 50 years from the date of the agreement, *viz.*: until 1951, and clauses 7, 9, and 10 read as follows:

"7. The Corporation shall be at liberty at any time to purchase the said undertaking, property rights and privileges at such price as may be agreed upon by them and the Company and in case of difference at such a price as shall be determined by two arbitrators, one to be appointed by each party in difference or their umpire subject to the provisions of the Arbitration Act or any then subsisting statutory modification or re-enactment thereof."

MCPHILLIPS, J.A.

"9. The poles, wires and other appliances shall be the property of the said Company and shall be exempt from taxation for ten years from the date hereof.

"10. The rights, powers and privileges hereby conferred shall continue for a period of fifty (50) years from the date hereof."

The Company complied with the agreement in all its terms and was in active operation of its undertaking and works at the time the corporation elected to purchase the undertaking property rights and privileges, having a well developed business extensive in area and with good business contracts outstanding, as well as all usual and necessary plant and equipment to well carry on the undertaking as a going concern.

The privileges granted by the corporation to the Company were conferred in pursuance of section 64 of the Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, section 64 reading as follows:

"64. Notwithstanding any law to the contrary, a Municipal Council shall not have the power to grant to any person or corporation any particular privilege or immunity or exemption from the ordinary jurisdiction

of the corporation or to grant any charter bestowing a right, franchise, or privilege, or give any bonus or exemption from any tax, rate, or rent, or remit any tax or rate levied or rent chargeable unless the same is embodied in a by-law which, before the final passage thereof, has been submitted to the electors of the municipality who are entitled to vote upon a by-law to contract a debt, and which has received the assent of a majority of the electors who shall vote upon such by-law. Any such by-law which does not receive the assent of the electors as aforesaid shall not be valid."

The Corporation duly passed on the 10th of June, 1929, a by-law to provide for the purchase of the undertaking, property rights and privileges of the Company—which recited clause 7 of the agreement hereinbefore set forth—which received the assent of the electorate on the 25th of June, 1929, and finally reconsidered and adopted on the 2nd of July, 1929, and thereafter on the 18th of July, 1929, received the assent of the Lieutenant-Governor in Council.

The Corporation on the 27th of December, 1929, made an offer of purchase to the Company of its "undertaking, property rights and privileges" offering the sum of $25,000. This offer was rejected by the Company. On the 30th of July, 1929, a formal notice of purchase was given by the Corporation under the hands of the mayor and city clerk, reading as follows:

MCPHILLIPS, J.A.

"PLEASE TAKE NOTICE that in the agreement bearing date the 19th day of December, 1901, made between the Municipal Corporation of the City of Cumberland and George Wilt Clinton as trustee for a corporation to be formed, and yourselves, being the corporation so formed, it was provided that the Corporation of the City of Cumberland should be at liberty at any time to purchase the undertaking, property rights and privileges belonging to your Company, at such price as may be agreed upon by them and the Company, and further providing for the fixing of a price by arbitration in case of difference.

"AND FURTHER TAKE NOTICE that the Corporation of the City of Cumberland has by its by-law 84 passed by the Municipal Council approved by the electors of the said Corporation and also approved on the 18th day of July, 1929, by His Honour the Lieutenant-Governor in Council, and being thereby fully authorized, do hereby offer you the sum of Twenty-five Thousand Dollars ($25,000) in full for the purchase of your undertaking, property rights and privileges, the said sum to be payable immediately on the preparation and completion of the necessary conveyances vesting the title of the same in the Municipal Corporation of the City of Cumberland."

and this offer was also rejected by the Company. It is to be noticed that again that which was proposed to be purchased was "the undertaking, property rights and privileges." There being a difference between the Corporation and the Company as to the

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price it remained for steps to be taken to bring about a submission to arbitration and the submission to arbitration was had in the terms of clause 7, *viz.*: to determine by arbitration the purchase price the Corporation should pay to the Company for the undertaking, property rights and privileges.

Turning to the points pressed upon the appeal I cannot agree that there was no right in the Corporation to grant an "exclusive right liberty and privilege of lighting by electricity or supplying electric light to the said City of Cumberland and its inhabitants." There is no statutory inhibition and that exclusive right was given extending for a period of 50 years and the Company is rightly entitled to maintain that it has that right.

It was strongly submitted by counsel for the appellant that there was error on the face of the award. I fail to see that any such error exists; the award is plain in its terms and follows the submission. "The value of the undertaking, property rights and privileges of the Cumberland Electric Light Company Limited both within and without the corporate limits of the City of Cumberland is a sum of $74,000 as at the 1st of August, 1929," that $36,000 of the said sum of $74,000 is stated to be for the physical assets leaves the difference, *viz.*: $38,000, not necessarily or at all confined to prospective future profits. The award is precise in its terms, the value found is $74,000 and found as "the value of this undertaking, property rights and privileges" being expressly within the terms of the submission. Here we have a completed award. There was a time of course in the course of the proceedings to have any question of law submitted to the Court for its opinion—that was not done. The physical assets could be valued separately by the arbitrators although the submission is inclusive as we have seen of "the undertaking, property rights and privileges" and the value, under the language of the submission, that has been found, in the whole is at $74,000; there is no error upon the face of the award. In my opinion no exception is now open to question the award. The Lord Chancellor said in *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298 at p. 302:

MCPHILLIPS, J.A.

"I think the object of section 19 of the Arbitration Act 1889 [section 22 Arbitration Act of B.C., R.S.B.C. 1924] though in one sense it may be said to have for its object the same result, was rather to hold a control

over the arbitration while it was proceeding by the Courts, and not to allow the parties to be concluded by the award, when, as it is said, parties may be precluded by the arbitrator's bad law once the award is made, although they might have had a right to repudiate the arbitrator if they had done so before the completion of the award."

The case of *London Dock Company* v. *Shadwell* (1862), 7 L.T. 381 is very much in point in principle. That was before the English Arbitration Act, 1889. There the submission contained a clause giving either party power to call upon the umpire to state a case. The parties allowed the umpire to make his award without asking him to state a case and after the award was made the umpire stated the principle upon which he had gone. There, a Court consisting of Cockburn, C.J., Blackburn and Wightman, JJ., discharged the rule. Cockburn, C.J. said (p. 382):

"You allow the opportunity to go by and take your chance, and then come here, putting all the parties to great expense. It can't be permitted."

In the report of the same case (*London Dock Company* v. *Shadwell, supra*) in 32 L.J., Q.B. 30, *Jones* v. *Cory* (1839), 7 Scott 106 was disapproved of and the judgment of Cockburn, C.J. is given as follows (p. 32):

"This is an attempt to get a case stated by the umpire. The appellants had an opportunity of getting this done by making an application to the umpire at the reference. Instead of doing so, they took the chance of having the award made in their favour, and I think they have no right now to come to the Court because they are dissatisfied with the amount fixed by the umpire. If we allowed this to be done, we should be multiplying proceedings improperly and the rule must therefore be discharged."

MCPHILLIPS, J.A.

This case is exactly the same in principle; a chance was taken of obtaining a favourable award and now complaint is made. In my opinion it is now too late to question the award in this case.

Were the matter open and the question of what could be the scope of the arbitration and what the Company should be allowed on the arbitration for its undertaking, property rights and privileges I would refer to *Hamilton Gas Co.* v. *Hamilton Corporation* (1910), 79 L.J., P.C. 76, Lord Shaw at pp. 79-80. There it was held that the price to be paid by the respondents ought to represent the commercial value of the appellants' whole undertaking including good will and was not restricted to the present value of the gas works and plant *in situ*. In the present case there was a 50-year franchise, the fact that the Corporation

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could by purchase end the franchise does not mean that the unexpired period of the franchise is not to be valued; to extinguish the franchise has its corresponding obligation to allow for it in the purchase price and it must be considered upon the arbitration, and the submission is "undertaking, property rights and privileges."

The case of the *Perth Gas Co.* v. *Perth Corporation* (1911), 80 L.J., P.C. 168, affords support to the position claimed here by the Company. There it was held that the price to be paid was the value of the commercial undertaking of the Company as a going concern not only the physical apparatus by which the Company carried on their business but their powers to use that apparatus for the purposes of carrying it on. The contention upon the part of the Corporation is that only the physical assets are to be paid for, and to that extent the award is approved. That there was no jurisdiction to award anything further these contentions are answered in my opinion effectively on the decided cases in the following way: (1) The award follows the submission and is final and conclusive, not being open to appeal, no error appearing on its face. (2) Even if it were open for review upon appeal the arbitrators had jurisdiction to proceed as they did and find as they did—that they were not confined to finding only the value of the physical assets—as plainly the submission was as in its terms as set forth "the value of the undertaking, property rights and privileges."

MCPHILLIPS, J.A.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: On December 19th, 1901, the City of Cumberland (appellant) entered into an agreement with respondent, Cumberland Electric Light Company, Limited (hereinafter referred to as the City and the Company) to provide for the lighting of the City and "in order to assist and encourage such undertaking" the latter agreed "to grant the franchise and privileges" in said agreement referred to. The material parts of the agreement follow:

"(1) The Company shall have subject to the provisions hereinafter contained the exclusive right, liberty and privilege of lighting by electricity and supplying electric light to the said City of Cumberland and its inhabitants and of erecting, placing, maintaining and re-erecting or renewing from time to time as required all necessary poles, wires, conduits and

appliances upon, in, along or under the streets, highways, alleys, thoroughfares and other public places of the said City and the right of free access to such appliances and conduits without let or hindrance."

"(7) The Corporation shall be at liberty at any time to purchase the said undertaking, property rights and privileges at such price as may be agreed upon by them and the Company and in case of difference at such a price as shall be determined by two arbitrators, one to be appointed by such party in difference or their umpire subject to the provisions of the Arbitration Act or any then subsisting statutory modification or re-enactment thereof."

"(10) The rights, powers and privileges hereby conferred shall continue for a period of fifty (50) years from the date hereof."

In 1929 the City exercised its right of purchase and offered the Company $25,000 "for the purchase of your undertaking, property rights and privileges." Failure to agree led to the appointment of arbitrators resulting in the award under review. The material parts of the award are: [already set out in statement].

No objection is taken to the award of $36,000 for the "physical assets" but as to the balance, *viz.*, $38,000 awarded for "the value of the undertaking, property rights and privileges," appellant submits that such an allowance is not within the scope of the arbitration. An application to set aside the ward in so far as this sum is concerned was dismissed by MORRISON, C.J.S.C.: hence this appeal.

MACDONALD, J.A.

Appellant contends that, as the contract contains terms for its own dissolution upon its termination by purchase the privileges and franchise of the Company ceased and profits for the balance of the term cannot be taken into account in estimating the alleged value of the "undertaking, property rights and privileges" of that Company; in other words, once the right to purchase was exercised, respondent Company had nothing to dispose of except its plant, apparatus *in situ*, etc. There was a chance that the franchise might have been enjoyed for a further period of twenty-two years but that possibility cannot be regarded as "property." That is appellant's contention.

I do not think it is strictly accurate to say that the sum allowed was for prospective profits for the remaining period of the 50-year grant. The general sum of $74,000 was an allowance for the value of the "undertaking, property rights and privileges" of the Company including in that sum $36,000 for physical assets. The balance of $38,000 in dispute therefore

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should not be described as an allowance for prospective profits. The arbitrators did not so define it and I prefer to adhere to the words used in their award. Letters were exchanged between the solicitors engaged and in one of them respondent's solicitor states:

"It is understood between us that the arbitrators' award is divided into two distinct allowances (a) an allowance of $36,000 compensation for physical assets, etc. (b) $38,000 compensation for the prospective profits for the balance of the period of the franchise."

This is I think strictly speaking a misdescription of the terms of the award. We should decide the real point raised by the award itself. However in argument before us the $38,000 was variously described as an allowance for "rights," "privileges," "undertaking," "prospective profits," etc.

In *Toronto Street Railway Co.* v. *Corporation of the City of Toronto* (1892), 22 Ont. 374; (1893), 20 A.R. 125; (1893), A.C. 511, and *Re Kingston Arbitration* (1902), 3 O.L.R. 637; (1903), 5 O.L.R. 348; (1904), 20 T.L.R. 448 were relied upon in support of appellant's viewpoint. There are, however, distinguishing features based upon the different terms contained in the agreements. In the *Toronto Street Railway* case the important clause in part is as follows:

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"The privileges granted by the present agreement [*i.e.*, to the Street Railway Company] shall extend over a period of thirty years from this date, but at the expiration thereof the corporation [the City of Toronto] may, after giving six months' notice . . . assume the ownership of the railway and all real and personal property in connection with the working thereof, on payment of their value, to be determined by arbitration, and in case the corporation should fail in exercising the right of assuming the ownership of the said railway at the expiration of thirty years as aforesaid, the corporation may, at the expiration of every five years to elapse after the first thirty years, exercise the same right of assuming the ownership of the said railway, and of all real and personal estate thereto appertaining, after one year's notice . . . and . . . on payment of their value to be determined by arbitration."

In the case at Bar the Company had the "exclusive right, liberty and privilege of lighting streets," etc., for 50 years subject to the city's right to purchase the "undertaking property rights and privileges" of the Company. In the *Toronto* case the grant was for a fixed term of 30 years with a right to purchase, not within, but at the end of that term or at intervals of five years thereafter. By clause 7 of our agreement the City

had the right, not to "assume the ownership" but to "purchase" the "undertaking, property rights and privileges." It had the right to purchase what it granted (whatever that might be). Counsel for respondent illustrated it thus: Lease of freehold for ten years certain, with power to landlord to repurchase at any time. If he repurchased at the end of five years would the purchase price be the same as if the lease originally was for that period? I do not say the illustration is wholly analogous but it suggests an element that is material. In the *Toronto* case the contention of the Street Railway Company was that its privileges should be valued and paid for as one of perpetual duration. Arbitration ensuing the arbitrators held that the rights, privileges, etc., were granted for the period of 30 years, not in perpetuity, and did not allow anything for any alleged privilege or franchise extending beyond that time. That decision depended upon its own facts. Agreements differing in terms connot be construed alike.

It is suggested that a right or privilege forever gone cannot have a value. The point however is its value, if any, while it was an existing right. The City are purchasing what the Company had; not what it ceased to hold. An extinguished right is not capable of valuation unless provision is made for the payment of compensation. But that is not the question as I view it. We are concerned with the value, if any, of the "undertaking, property rights and privileges" before extinction. A possible purchaser from the Company, selling with the consent of the City, before the right to purchase was exercised, would offer a price based upon reasonable expectation, a speculative assumption that the grant might last for 50 years, or for a much shorter period depending largely upon the local situation. It would doubtless be a hazardous investment but a purchaser would from all the surrounding circumstances—the likelihood of the City stepping in, etc.—estimate its value. It would at least include more than the value of the physical assets. Indeed the latter would have little value without the privileges incidental thereto. The arbitrators therefore did not solely award $38,000 for loss of prospective profits based upon the assumption that the City deprived the Company of a right from which profits might have accrued in the remaining 22 years of the term. That would be

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an element in damages if the Company was unlawfully dispossessed. True the continuance of the right depended solely upon the will of the grantor but, as the grantor willed that it should last for 28 years, and might have willed that it should last for 50 years, the valuation should bear some relationship to the original grant less a deduction—perhaps a very substantial one—for uncertainty of tenure.

In *Re Kingston Arbitration, supra,* the city had the option of acquiring the "works, plant, appliances and property of the Company used for light, heat and power purposes both gas and electric." The words employed are important. They appear to be confined to physical assets. It is works, plant, etc., used for a certain purpose. Nothing was allowed by the arbitrators "for the earning power or franchise and rights of the Company" but that was because of the terms of the agreement. Allowances for "earning power" in the *Kingston* case could only arise, if at all, from the use of the word "property" but the subsequent clause "used for light, heat and power purposes" shewed that the "property" referred to was physical assets used for defined physical purposes. By clause 15 of the Kingston agreement (judgment of Lount, J. 643) it was provided that upon the City acquiring the plant the Company should surrender, assign and transfer to the City all their "rights, franchises, privileges and immunities." But there was no provision that the City should purchase and pay for these intangible assets. The City was obliged only to pay for the "works, plant, appliances and property of the Company." In the case at Bar the City do covenant to purchase "property rights and privileges." That is the distinction. Moss, C.J.O. says (1903), 5 O.L.R. at p. 350:

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> "Its meaning [*i.e.*, the word "property"] is restricted by the words which precede it, as well as by those which follow it. It was evidently not intended to comprehend everything the company possessed."

In the case at Bar the right of the City was to purchase "everything the Company possessed" and it had "rights and privileges" however uncertain they might be. It is too narrow an interpretation to confine the word "privileges" to physical assets and "privileges" is part of what the City agreed to purchase if it exercised the right reserved. It did not agree to purchase a material thing only, but an undertaking. In the

Kingston case Lount, J. could not hold that the word "property" included the franchise or goodwill, basing his opinion upon the words employed and that view is readily understood. Clauses 11 and 12 referred to by Lount, J., at p. 644, correspond to our clause 7 and do not include the words "rights, franchises, privileges and immunities" found in clause 15 to which he also referred. Had the words "rights, franchises, privileges and immunities" been added to clauses 11 and 12 I think a further allowance would have been made. Manifestly the case turns on the words employed.

In any case the Company must purchase not only the undertaking but also "property rights and privileges" or else not exercise the right to purchase at all—it could not purchase piecemeal. To restrict these words to "physical assets" is to rob them of their primary meaning. As Moss, C.J.O. states, at p. 351, "the real question on the construction of the agreement is for what did the City agree to pay?"

To return to the *Toronto* case the important clause considered is found in the judgment of Robertson, J. (1893), 22 Ont. at p. 394 under the heading "eighteenthly." The word "privileges" is there used in a descriptive way in describing what was granted to the railway company for a period of 30 years but it is not repeated in describing the property the city was to assume ownership of after notice to purchase. It was to assume ownership of "the railway and all real and personal property in connection with the working thereof" on payment of the value fixed by arbitration. Nothing was allowed for any "privilege or franchise" extending beyond the 30-year period because the right was not in perpetuity but they did value the "franchise and privilege" for the 30 years. It was not confined to a valuation of the physical assets. The mere uncertainty of tenure in the case at Bar does not preclude the arbitrators from placing some value upon it. We must assume that in reaching their conclusion they considered all relevant matters, including this uncertainty in fixing a value for intangible assets at $38,000. They may have allowed too much in view of the uncertain nature of the grant but that is not the point nor is it the position taken in this appeal. It is urged that no sum should be allowed at all. That I think is not tenable. To say a franchise may be

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of brief duration is to limit its value but not to wipe it out. Haggarty, C.J.O. said ((1893), 20 A.R. at p. 127):

"It is most difficult to understand, as the referees evidently considered, that any such privilege or franchise could be a subject for valuation if it were utterly incapable of being used or enjoyed."

But he is referring to a period beyond the fixed term of 30 years. The privileges granted in the case at Bar might be destroyed at any time but many lines of business are subject to exigencies that might impair or even destroy their value.

A further argument was advanced by appellant. It was submitted that the contract did not grant to the Company an exclusive privilege notwithstanding the use of that word; that the City, for example, could install a plant of its own. It had no power to confer a monopoly to supply light, heat or power. The sections of the Municipal Clauses Act applicable in part are R.S.B.C. 1897, Cap. 144, Sec. 64 as follows: [already set out in the judgment of MCPHILLIPS, J.A.]

The necessary by-law was passed and assented to. This section does not give power to grant an exclusive privilege. No right is given to prevent others, if authorized, from erecting poles, etc. There is authority to purchase as provided for in the agreement (R.S.B.C. 1897, Sec. 50, Subsecs. (11) and (12)). It was suggested however that there is no authority to purchase an "undertaking" in the sense of making payment for intangible values. I think however when authority is given (subsection (12)) "for acquiring by purchase . . . any . . . electric lighting plant already constructed or established wholly or partly within the limits of the municipality" it necessarily confers power to pay its full value. It may purchase an "established" business, that is, a going commercial concern. But it was urged that the City had no power to buy back the alleged franchise because the City already had it—never parted with it. The judgment of Lount, J. was referred to where he says (1902), 3 O.L.R. at p. 643:

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"The corporation were not under any necessity to purchase and acquire the franchise of the company; for all purposes necessary, the corporation could and can operate under and by virtue of the Municipal Light and Heat Act, R.S.O. Ch. 191."

An exclusive franchise was not given. The City could establish a rival plant, notwithstanding the agreement, thereby doing

possibly an injury to itself as well as to respondent Company. But the City by the agreement parted with a portion of its powers and it was within its rights in doing so. It granted a right (not an exclusive one) to the Company to erect poles, etc., and to operate for 50 years, subject to earlier determination. It could not extinguish the rights granted, except by purchase, however much it might render them less valuable by competition. It was none the less a right or privilege even though not exclusive. While half a loaf is not as valuable as the whole one it is not without value. To refer again to a possible purchaser from the Company he would use ordinary judgment in determining from the situation presented, the size of the community served, etc., whether or not, while the agreement was in existence, the Company had not the equivalent of an exclusive right to operate, or if not exclusive still a valuable right and pay its commercial value as a going concern. Lord Shaw of Dunfermline in *Hamilton Gas Co.* v. *Hamilton Corporation* (1910), A.C. 300 at p. 309, a case where (dependent of course on its own facts) in the purchase of gas works under somewhat similar circumstances its commercial value was allowed; not merely its structural value, said:

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"It was further argued that the gas company had no franchise of supply or undertaking in the sense of either monopoly or goodwill to dispose of, because of the limitations under which they stood by the Act of Parliament, they being liable to be bought out and taken over at the expiry of twelve years from the date of the Act. Their Lordships think that this argument would have had much weight if the gas company had been incorporated with a twelve years' life. In the present case, however, this was not so. Circumstances might have so shaped themselves in the town and district as to make it unwise for the corporation to take over the scheme of gas supply, and the company as undertakers might have been left—and, had the profit been small or dwindling, probably would have been left—for an indefinite period undisturbed. Such were the risks incident to the undertaking itself. Furthermore, the option to take over the undertaking at the end of twelve years was only open to the corporation upon terms, and those terms were to make payment of a price, not definite, but to be ascertained by arbitration. It does not appear to be legitimate to introduce as a principle of assessment of such a price the fact that the corporation were to acquire at a price to be assessed by arbitration."

I concede that the City in the case at Bar is not in the same position as an outside purchaser. It is a party to the agreement and need only purchase the assets mentioned in the contract itself. It is solely a question of the just interpretation of the

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words used in the agreement and if other words had been used such as "poles, plant, equipment," etc., instead of "undertaking, property rights and privileges" the result would be different. These words were however inserted by the will of the parties; one would almost think intentionally in order to include more than the apparatus *in situ* and we cannot disregard them or refuse to give them their ordinary meaning however much they may be whittled down. It might be urged, if the point was open, that, as the Company while it operated received the profits, a much smaller amount should be allowed for property rights and privileges. As already intimated we are not concerned with the *quantum* awarded.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *McDiarmid & McDiarmid.*
Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

HAYES MANUFACTURING CO. v. PERDUE & COPE.

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Sale of goods—Second-hand motor-truck—"First-class mechanical condition"—Failure of truck to do work contemplated—Breach of warranty.

The defendants purchased from the plaintiff a second-hand motor-truck under a buyer's order signed by the defendants containing a clause providing that "The whole agreement between the parties is contained herein and no representations, warranties or conditions expressed or implied other than those herein contained shall be binding upon the vendor." The defendants required a truck for immediate use on a contract for the construction of a new highway, necessitating a truck in first-class mechanical condition for immediate and continuous use for hauling purposes. All this was known to one Hayes, the plaintiff's representative, who stated to the defendants that the truck was in first-class mechanical condition. The defendants had trouble from the start in keeping the truck running, but they continued to use it, both parties trying to remedy its condition. In an action to recover the purchase price the defendants counterclaimed for damages for breach of warranty.

Held, that in the circumstances both parties understood the order to call for a certain second-hand truck in first-class mechanical condition, and such being the subject-matter of the sale the above recited clause in the order did not give the plaintiff the right to supply something different. The plaintiff failed to provide a truck of the standard contemplated by the parties, and is liable in damages to the defendants for breach of warranty.

ACTION to recover on certain promissory notes given on the purchase of a second-hand motor-truck. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 2nd and 3rd of February, 1931. Statement

Alfred Bull, for plaintiff.

S. S. Tufts, for defendants.

19th February, 1931.

FISHER, J.: I find that the plaintiff, through its representative Paul Hayes, stated to the defendants before or at the time of the purchase that the truck, which was a second-hand one, was in first-class mechanical condition and I also find that this was not so. I find further that the defendants have not proved that this statement was made by Hayes without belief in its truth or recklessly careless whether it was true or false and Judgment

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therefore the defendants cannot rely on fraudulent misrepresentation. The defendants, however, have also pleaded breach of a condition or warranty. In reply to any claim to set up any such breach in extinction or diminution of the price or for damages, the plaintiff seeks to reply on a clause in what is called the buyer's order and agreement signed by the defendants which clause provides as follows:

"The whole agreement between the parties is contained herein and no representations, warranties or conditions expressed or implied other than those herein contained shall be binding upon the vendor."

Counsel on behalf of the plaintiff refers to *Case Threshing Machine Co.* v. *Mitten* (1919), 59 S.C.R. 118 at pp. 119-20 where Duff, J. says:

"The written contract declares in explicit words that the terms of the agreement between the parties are to be found in the writing and in the writing exclusively. In face of this provision it is not, in my opinion, competent for a Court of Law to resort to contemporary conversations or prior conversations or even to the legend on the article for the purpose of discovering a contract differing in its terms from that expressed in the unambiguous language of the instrument."

At p. 120 Anglin, J. says:

"The defendants may have relied on some promises made to them by employees of the plaintiff that the engine would be made satisfactory to them but their contract precludes effect being given to such promises. The provisions of a formal written contract executed without fraud, mistake or surprise, cannot be entirely ignored."

Judgment

In this connection however reference might be made to the case of *Hart-Parr Company* v. *Jones* (1917), 2 W.W.R. 888 at p. 891 where Lamont, J. says:

"I take it as established law that on a contract of sale the parties may stipulate that the rights or obligations which would otherwise attach to a sale should not apply to the sale in question, but a clause altering or limiting the effect of a contract for the sale of a specified article cannot be held to alter the subject-matter of the sale, nor to give the vendor a right to supply any article he may choose, unless clear language to that effect is used."

Reference might also be made to *Bowes* v. *Shand* (1877), 2 App. Cas. 455 where at p. 480 Lord Blackburn, J. says:

"I think, to adopt an illustration which was used a long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty or condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the

article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras. . . . But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice, shipped to this particular region, at that particular time, on board that particular ship. . . ."

It might be argued in the present case that the defendants signed an order for a certain specific truck and got it and therefore are not being obliged to take a different article. The facts however are that the defendants wished to buy a truck for immediate use beginning the following day upon a contract which they had for work to be done on the construction of a new highway and the plaintiff was fully advised as to this. The required necessity was a truck in first-class mechanical condition ready for immediate and continuous use on a hauling contract in hand. All this was well known to Mr. Paul Hayes of the plaintiff Company, which had a truck that had run about 10,000 miles and was apparently capable of being put in first-class mechanical condition. As I have already found, Mr. Hayes stated to the defendants that the truck was in first-class mechanical condition. Under such circumstances I would hold that both parties understood the order to call for a certain second-hand truck in first-class mechanical condition. It is to be noted that in the *Hart-Parr Company* v. *Jones* case, *supra,* there was a written order and yet the Court held that, both parties understanding the order to call for a new engine, the delivery of a second-hand one was not a compliance with the order. It is to be noted also that in the *Hart-Parr Company* v. *Jones* case, at p. 892, the Court, speaking of a clause similar to that here said:

Judgment

"The defendant agreed that this clause should apply to the sale to him by the plaintiffs of a specified article. He did not agree that it should apply upon delivery of any other article."

As suggested in the passage already quoted from p. 891 the clause cannot be held to alter the subject-matter of the sale. In the present case I find the subject-matter of the sale was "a second-hand truck now in first-class mechanical condition" and, in my opinion, the above recited clause in the said order did not give the plaintiff the right to supply something different. The defendants had trouble right from the start in running or keeping the truck running and I am satisfied that the truck was not

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in first-class mechanical condition at the time of delivery. The plaintiff, therefore, was delivering something different from the subject-matter of the sale and I would hold that the said clause did not give the plaintiff such a right or make the delivery of a second-hand truck not in first-class mechanical condition a compliance with an order for the truck in first-class mechanical condition.

In *Behn* v. *Burness* (1863), 3 B. & S. 751 a ship was stated in the contract of charter-party to be "now in the port of Amsterdam" and the fact that the ship was not in that port at the date of the contract discharged the charterer. In the present case however it must be noted that the defendants had a reasonable time and opportunity for testing and rejecting the truck and yet continued to use it from time to time thereafter. It is quite apparent of course that both parties were trying to remedy the condition but also equally so that the defendants continued to take some benefit, keep possession of the truck and make payments thereon months after knowing of its condition, and also had possession when the writ herein was issued. Under the circumstances I think it must be considered that the defendants did accept the truck, so that the breach of a condition must now, in view of the acceptance, be treated as a breach of warranty and the goods cannot be rejected. See *Reevie* v. *The White Company Ltd.* (1929), 41 B.C. 345 and *British America Paint Co.* v. *Fogh* (1915), 22 B.C. 97.

Judgment

In my opinion the plaintiff having failed to perform what it had promised, *viz.*, delivery of a certain second-hand truck in first-class mechanical condition, is liable in damages to the defendants for breach of contract or warranty. As has already been pointed out, the special circumstances under which the contract was being made were communicated to the plaintiff and therefore it is liable for the damages which would ordinarily follow from the breach of contract under the special circumstances so known and communicated. See *Hadley* v. *Baxendale* (1854), 9 Ex. 341 at p. 354. The defendants have attempted to shew that loss of the said hauling contract followed therefrom but I cannot find that this was established or would ordinarily follow. The defendants however have proved a substantial loss of profits sustained through the truck being unable, by reason

of its faulty condition, to perform the work required of it under said hauling contract and they have also proved that they had to give considerable time and labour of their own in an endeavour to get the truck in shape to perform the work. I would estimate such damages to the defendants at $400.

The claim of the defendants for rescission is, therefore, dismissed but they will have judgment on the counterclaim for $400 damages which may be offset against the claim of the plaintiff on the promissory notes sued upon and in the result the plaintiff will have judgment against the defendants for the balance. No costs.

Judgment

Order accordingly.

ANDLER *ET AL.* v. DUKE *ET UX.*

International law—Foreign judgment—Affecting real property in British Columbia—Breach of contract and fraud in connection with title to the property—Action in British Columbia to enforce judgment—Jurisdiction—R.S.B.C. 1924, Cap. 135, Sec. 2 (27).

In an action in the State of California, all the parties being residents of that State, the plaintiffs recovered judgment against the defendants, the judgment affecting a property in the City of Victoria. Questions of breach of contract and fraud were raised on the pleadings in connection with the transaction through which the defendants obtained title to the property in question. In an action to enforce and obtain the benefit of the judgment recovered in the State of California with respect to the property here:—

Held, that as questions of breach of contract and fraud arose in connection with the title to the property in question and the Court of that State found that the allegations of fraud had been proven, the Court had jurisdiction to render the judgment and it was binding and effectual there so far as the parties to that action were concerned.

Held, further, that as the judgment is binding on the parties in California it is binding on the parties here and the judgment of the State of California with the pleadings shewing the issues, and the findings of fact and conclusions of law, having been proved to the satisfaction of this Court, the rights of the plaintiffs under the California judgment should be implemented and rendered effective by a judgment of this Court.

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ACTION to enforce a judgment recovered by the plaintiffs against the defendants in the State of California affecting property in the City of Victoria. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 31st of March and 1st of April, 1931.

Alfred Bull, for plaintiffs.

A. D. Crease, for defendants.

MACDONALD, J.: In this action the plaintiffs seek to enforce and obtain the benefits of a judgment they recovered against the defendants in the State of California. Such judgment affected a valuable piece of property in the City of Victoria. The contention is made that the judgment was rendered without jurisdiction existing in the Court of that State. And further, that, even if binding in California, it is of no avail, to assist the plaintiffs in this Province.

Dealing with the first contention, the law in that respect, without quoting authorities at length, is outlined by Parker, J., in *Deschamps* v. *Miller* (1908), 77 L.J., Ch. 416 at p. 420 as follows:

Judgment

"In my opinion, the general rule is that the Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule; but, without attempting to give an exhaustive statement of those objections, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract, or implied contract, fiduciary relationship, or fraud, or other conduct which, in the view of a Court of equity in this country, would be unconscionable, and do not depend for their existence on the law of the *locus* of the immovable property. Thus in cases of trusts, specific performance of contracts, foreclosure or redemption of mortgages, or in the case of land obtained by the defendant by fraud or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction."

It is submitted on behalf of the plaintiffs that they come within the exceptions, in two instances, namely, with respect to breach of a contract, referred to in the pleadings; and also as to fraud, in connection with a transaction, through which the defendants obtained title to the property in question.

If the plaintiffs adduced evidence in the State of California, which would have come within any of the exceptions to which I

have referred, then in my opinion the Courts of that State had jurisdiction to deal with the cause which was tried; and as between the parties, to render a judgment, which would be binding upon them.

The judgment rendered by the trial judge was appealed, and upon such appeal it was sustained. Evidence has been adduced to shew that this result created a final and decisive judgment between the parties. So I have no hesitation in concluding that this judgment was binding and effectual in California, so far as the parties to that action were concerned.

Then as to the jurisdiction of the Courts of California in the matter being now successfully attacked, as affecting lands outside the State, *viz.*: The case of *Burns* v. *Davidson* (1892), 21 Ont. 547, elucidates the question and draws the distinction between an action, brought by a judgment creditor to set aside as fraudulent a conveyance made by a debtor, of land outside of the jurisdiction of the Court, and an action brought dealing with specific property outside such jurisdiction, in which it is alleged fraud exists in the acquisition or dealing with the property by the defendant.

Judgment

In this case, the course adopted, as appears by the judgment, of Chancellor Boyd, was the same as pursued in the State of California: If fraud be found on part of defendant a judgment should be given ordering conveyance of the property to the person entitled thereto.

The learned Chancellor at the commencement of his judgment refers to the case of *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444, as one of

> "a class of cases in which a plaintiff in England, having an equitable demand against a resident defendant, may enforce it not only personally, but if the circumstances of the contract or dealings between the parties justify it, may have a declaration of lien against the land of the defendant, though it be situate out of the jurisdiction of the Court."

He refers to those cases as depending upon the privity existing between the parties, arising from contract or from some personal obligation, moving directly from one to the other. And this would include fraudulent transactions. Later on in his judgment he specifically refers to the fact that authorities have been cited, shewing that the Court would entertain jurisdiction in cases of fraud, even in cases of foreign lands.

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He then mentioned the judgment of Marshall, Ch. J., in *Massie* v. *Watts* (1810), 6 Cranch 148 at p. 160. He stated as follows (p. 158):

"Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the circuit Court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff, the principles of equity give a Court jurisdiction, wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction."

Boyd, C., also referred to the judgment of Hardwicke, L.C. in *Angus* v. *Angus* (1737), West *temp.* Hard. 23, quoting as follows:

"This had been a good bill as to fraud and discovery if the lands had been in France, if the persons were resident here, for the jurisdiction of this Court as to frauds is upon the conscience of the party."

Judgment

I accept as evidence the formal judgment of the Court of the State of California, coupled with the findings of fact and conclusions of law. There is no doubt whatever, that the Court of that State found that the allegations of fraud had been proven.

Without discussing this feature at any length, I might simply state that it appeared that the defendant, George E. Duke, had, in fraud of the plaintiff, obtained the deed to the property in question; and after registration, conveyed the property to his wife and co-defendant, Margaret E. Duke. The property was heavily mortgaged, and a lease for a term of years was made in favour of Angus Campbell.

Having thus come to the conclusion that the Court of the State of California had jurisdiction to render the judgment sought to be enforced in this Province, and that it was binding on the parties thereto, I have, then, to consider whether such judgment in this action is of any assistance to the plaintiffs, in furtherance of the rights sought to be conferred by such judgment.

As I understand the contention of counsel for the defendants, it is, that so far as any result to be obtained in this action, such judgment of the State of California has no effect whatever. In

other words, so far as this action is concerned, the judgment of the State of California might never have been rendered, and it does not assist the plaintiffs in this Province.

Such a conclusion would, in my opinion, be contrary to the view which must have been entertained by all the parties concerned in the trial, in California. They were all residents of that State, and an appearance was duly entered on the part of the defendants. The jurisdiction being thus constituted, a trial was held in due course. As I have mentioned, the judgment rendered by the trial judge was appealed from and then confirmed. It should be decisive. Willes, J., in *Great Northern Railway Co.* v. *Mossop* (1855), 17 C.B. 130 at p. 140 said:

"The very object of instituting Courts of Justice, is, that litigation should be decided, and decided finally. That has been felt by all jurists."

So far as the findings of fact and conclusions of law by the Courts in California are concerned, I think they were and are completely binding upon the parties to that action.

The case of *Law* v. *Hansen* (1895), 25 S.C.R. 69 was an appeal from the decision of the Supreme Court of Nova Scotia and has an important bearing upon this question. In that Province there was a statute providing that a judgment recovered in a foreign country should not be conclusive, in an action brought upon such judgment in that Province. King, J., delivering the judgment of the Court, and referring to the effect of the judgment sought to be enforced, which had been given in the State of New York, said at p. 72:

Judgment

"It is now established in English law that a judgment of a foreign Court of competent jurisdiction having the force of *res judicata* in the foreign country has the like force in England."

Bank of Australasia v. *Nias* (1851), 16 Q.B. 717, and other cases are cited as supporting that proposition.

To the same effect, Halsbury's Laws of England, Vol. 6, p. 289, states that:

"A foreign judgment *in personam* is conclusive in England as between parties and privies. It is only impeachable for want of jurisdiction of the foreign Court, or on the definite grounds above set forth; it is never impeachable or examinable on the merits, but remains in full force until it is reversed or set aside by the foreign Court itself. It is no longer true that a foreign judgment is merely *prima facie* evidence of a debt, and that the defences available in the foreign action are equally available in an English action on the judgment."

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ANDLER v. DUKE

Then again, King, J., in the *Law* v. *Hansen* case, *supra,* in considering how far the judgment was conclusive, says as follows, at p. 73:

"Next, as to the extent to which the judgment concludes. Judgments *in rem* are conclusive against all the world, not only as to the *rem* itself but also as to the ground on which the tribunal professes to decide, or may be presumed to have decided. As to what constitutes proceedings *in rem* see *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414, *per* Blackburn, J. at p. 429. Judgments *in personam* bind parties and privies, and, generally speaking, are conclusive at least upon the material issues tendered by the plaintiff's complaint. 'The doctrine of estoppel by a former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other.'

"*Per* Miller, J., in *Aurora City* v. *West* [(1868)], 7 Wall. [82 at p.] 105."

It is contended, however, by the defendants, that the judgment of the State of California can only be binding and effective so as to be pursued in this Province, if it had related to the recovery of a debt, or liquidated amounts. This restricted view of the law was not taken by the Court in the *Law* v. *Hansen* case, where the issue of negligence had been decided in the State of New York. It was held binding upon the parties in Nova Scotia.

Judgment

While the point was not before the Court directly, in *Robertson* v. *Robertson* (1875), 22 Gr. 449, still at p. 454, Vice-Chancellor Proudfoot seems to have considered that a judgment of a foreign Court of competent jurisdiction could be enforced in Ontario without any qualification. He said:

"It seems that if a competent Court has jurisdiction over the cause, it is binding, and will be enforced in other countries. If the defendant, for instance, appear and defend the action in the foreign Court, he will not be permitted afterwards to say that it proceeded upon an erroneous view of the law of England: *Godard* v. *Gray* (1870), L.R. 6 Q.B. 139."

Instances are then presented along these lines under the latter authority, where the judgment would have a binding effect, *viz.*:

"(1.) 'If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be enforced against them, we think its laws would have bound them. (2) If the defendants had been at the time when the suit was commenced, resident in the country so as to have the benefit of its laws protecting them, . . . we think its laws would have bound them.'"

The net result would be, if the judgment so rendered in the State of California between parties resident in that State, is to have no effect whatever so far as the plaintiffs might utilize it to implement its rights, this action would require to be pursued, as

if no trial had taken place in the State of California. In other words, it would be a trial *de novo* upon the merits and all benefit from the litigation of the State of California would be at naught. I do not think such a result should follow. It does not seem to have been the view of the House of Lords in the case of *Houlditch* v. *Donegal* (1834), 8 Bligh (N.S.) 301; 5 E.R. 955. In that action, shortly stated, creditors had filed a bill in the Court of Chancery in England and obtained a decree affecting lands in Ireland. It was ordered that the trusts of a certain deed should be executed. It was found, however, to have been impracticable to execute the decree; and a bill was filed in the Court of Chancery in Ireland to carry such decree of the Courts of England into effect, being a somewhat similar proceeding to the one sought to be adopted in this action. It was held in the first instance by the Court in Ireland that the Court had no jurisdiction, but on appeal to the House of Lords it was decided that jurisdiction existed in the Court of Ireland. The order made in the House of Lords shews the course pursued, in order to implement the judgment which had been recovered in England, as affecting lands in Ireland.

Judgment

This case is also instructive as shewing that the decrees and orders of the Court of Chancery in England were received as evidence in support of the plaintiff's position in Ireland. It also affects the contention that foreign judgments can only be enforced where they deal with matters of debt and contract. It pertained to trusts, and breach of contract or fraud creates a trust as against the delinquent.

The judgment of the State of California, coupled with the pleadings shewing the issues, and the findings of fact and conclusions of law, having been proven to my satisfaction, they afford, as I have already intimated, evidence upon which, nothing to the contrary being shewn, the rights of the plaintiffs under the California judgment to that effect should be implemented and rendered effective by a judgment of this Court.

It would appear that the only means which could be adopted for that purpose would be, either to declare that the conveyance executed by the official appointed by the Court of the State of California, should be fully effective and binding, and order its

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registration, or perchance a better course to adopt would be to utilize the provisions of subsection (27) of the Laws Declaratory Act, and vest the property in the plaintiffs, subject to the existing mortgage and to the lease to which I have already referred.

I do not, for the moment, think of anything further which would assist. If the parties, in settling the order, desire to suggest any particular terms which should be inserted therein, I will be prepared to consider them.

The plaintiffs are entitled to their costs.

Judgment accordingly.

MORRISON, C.J.S.C.
1931
March 17.
IN RE CHOW DUCK YUET

IN RE CHOW DUCK YUET.

Criminal law—Habeas corpus—Charge of selling opium—Conviction—Revision of sentence on appeal—Held for deportation—Can. Stats. 1929, Cap. 49, Sec. 26.

Accused was convicted of selling opium and sentenced to imprisonment for one year and one day and fined $200. On appeal by the Crown that the sentence be amended in order to comply with the provisions of section 14 of The Opium and Narcotic Drug Act, the Court of Appeal added to the sentence that in default of payment of the fine he be imprisoned until the fine be paid or for a period of three months, to commence to run at the end of the term of imprisonment awarded. On the expiration of the sentence accused was taken into custody by the immigration authorities and held under a warrant of the deputy minister of immigration, which recited the conviction by the trial judge. On an application for a writ of *habeas corpus* on the ground that the conviction by the trial judge, recited in the deportation order, was wiped out when the Court of Appeal gave judgment and altered the original sentence.

Held, that the Court of Appeal did not make a new conviction but only added to it sufficient to bring the sentence within the requirements of the Act, and the application should be dismissed.

APPLICATION for a writ of *habeas corpus*. The accused was convicted on April 7th, 1930, by MCINTOSH, Co. J. for having opium in possession and sentenced to one year and one day. The learned trial judge also imposed a fine of $200, but neglected to include the penalty of three months in default.

Statement

The Crown appealed to the Court of Appeal on the question

of sentence, and the Court of Appeal made an order providing for three months' imprisonment in default of the fine: see *ante*, p. 152.

This order was dated June 30th, 1930. A Board of Inquiry was held on the 12th of May, 1930, under the Immigration Act, in which it was found that the accused was an alien. Upon expiration of the original sentence the accused was taken into custody by the immigration authorities and held under a warrant of the deputy minister of immigration for deportation dated July 21st, 1930, which warrant recited the conviction of April 7th, 1930. Heard by MORRISON, C.J.S.C. at Victoria on the 17th of March, 1931.

Statement

Stuart Henderson, for applicant: The conviction includes sentence; therefore the conviction of April 7th recited in the order was wiped out when the Court of Appeal gave judgment and altered the original sentence: see *The Queen* v. *Whitechurch* (1881), 7 Q.B.D. 534. The Board of Inquiry was held before the Court of Appeal decision. The default sentence of three months has not been served, and, therefore, the sentence has not expired under section 14.

Argument

Maitland, K.C., for Department of Immigration: Deportation is automatic and no Board is necessary: see *Ex parte Hum Bing You* (1926), 46 Can. C.C. 238; *Rex* v. *Woo Fong Toy* (1926), 38 B.C. 52. Deportation can take place on expiration of a sentence or sooner, under section 26 of The Opium and Narcotic Drug Act.

MORRISON, C.J.S.C.: The Court of Appeal did not make a new conviction. They simply added a little more to the sentence in compliance with the Act. The Act provides for sooner determination of the sentence.

Courts and Legislatures are reaching out their hands, one to the other, in an effort to check the illicit trafficking in drugs. The problem has become an international one and legislation of the most stringent nature has been brought down in an effort to deal with the situation.

Judgment

The application is refused.

Application refused.

MORRISON, C.J.S.C.

1931

May 4.

RHYS v. WRIGHT AND LAMBERT

RHYS v. WRIGHT AND LAMBERT (CONSOLIDATED ACTIONS).

Negligence—Automobiles — Collision — One deflected to sidewalk striking pedestrians—Action against both drivers—One found wholly responsible—Action against other driver dismissed with costs—Costs payable by unsuccessful defendant—"Good cause"—Order LXV., r. 32.

W. and L., while driving their respective automobiles, collided, and L.'s car deflecting to the sidewalk struck and injured both plaintiffs. In an action for damages the jury found that W. was wholly to blame and the action against L. was dismissed with costs. On application to settle the judgment as to who should pay L.'s costs:—

Held, that the defendant L. recover from the defendant W. his costs of the action brought by the plaintiffs.

APPLICATION to settle the judgment following the verdict in an action for damages resulting from injuries received by Mrs. Rhys and her infant daughter while walking on the sidewalk in the suburbs of Vancouver, when they were struck by a car driven by the defendant Lambert that was thrown on to the sidewalk owing to a collision with the car of the defendant Wright. On the trial of the action against both defendants the jury found that the defendant Wright was solely to blame and the action as against Lambert was dismissed with costs. The question arose as to whether the defendant Lambert should recover his costs from the plaintiffs who could then recover them over against the other defendant, or whether they should be paid directly by the unsuccessful defendant to the successful one. Heard by MORRISON, C.J.S.C. at Vancouver on the 23rd of April, 1931.

Statement

Collins, for plaintiffs.
Burton, for defendant Wright.
Bray, for defendant Lambert.

4th May, 1931.

MORRISON, C.J.S.C.: Mrs. Rhys, the plaintiff, and her infant daughter, whilst walking along the sidewalk in the suburbs of Vancouver, were unexpectedly struck by a car driven by the

Judgment

defendant Lambert which had been deflected from the street owing to a collision with the car of the defendant Wright. The plaintiff was unable to determine before action brought which of the two defendants who was admittedly involved in the collision she had a right to sue, and so she joined them both. The jury found that the defendant Wright was solely to blame and Lambert was dismissed from the suit with costs. Upon settlement of the judgment following the verdict the form of order submitted on behalf of the plaintiff contains this paragraph:

"AND IT IS FURTHER ADJUDGED that both actions as against the defendant Lambert be dismissed and that the defendant, Lambert, recover from the defendant, Wright, his costs of the consolidated actions to be taxed; all costs of the action brought by the plaintiffs, Gwen Mary Rhys and Emrys Rhys, to be taxed on the County Court scale of costs."

The defendant Lambert's form contains this clause:

"It is further ordered that both actions as against the defendant Lambert be dismissed and that the defendant Lambert recover from the plaintiffs his costs of this action to be taxed."

Mr. *Bray,* for defendant Lambert, cited the case of *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75 which is in point in support of his submission. If I comprehend that case aright the learned judge would deprive the plaintiff in a suit of this kind of costs as against the successful defendant. It seems to me that the current of authority is against that view. In the case of *Cuzack* v. *Parker* (1905), 15 Man. L.R. 456 at p. 473 and also *Perry* v. *Perry* (1917), 3 W.W.R. 315 in which latter case the Manitoba Rule No. 942 (which appears to be the same as our Supreme Court Rule, *viz.,* Order LXV., r. 27, subrule 63 now Order LXV., r. 32, referred to in *Green* v. *B.C. Electric Ry. Co., supra,* was held not to give new jurisdiction. Mr. *Collins* on behalf of the plaintiff submits that in the *Green* case the learned judge had not had drawn to his attention either of these cases nor to the Laws Declaratory Act, R.S.B.C. 1924, Cap. 135, Sec. 2, Subsec. (34) which enacts that where "there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter the rules of Equity shall prevail"; that the old Chancery rule referred to in *Man* v. *Ricketts* (1844), 7 Beav. 104 is applicable in this case, *viz.,* where a plaintiff who succeeds against one defendant and fails against another should recover from the unsuccessful

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MORRISON, C.J.S.C.

1931

May 4.

RHYS v. WRIGHT AND LAMBERT

defendant the costs which he had to pay to the successful defendant. What the Master of the Rolls there decided was that "the costs of the co-defendant must be paid by the plaintiffs in the first instance and they to recover them over against the defendant"; that by Order LXV., r. 32 the Court may order that the costs may be paid direct by one defendant to the other defendant instead of through the plaintiff; the word "ought" there being synonymous with "good cause." The Manitoba rule and the British Columbia rule are the same. The British Columbia rule, formerly Supreme Court Rule Order LXV., r. 27, subrule 63 (now Order LXV., r. 32) is as follows:

"32. Where the costs of one defendant ought to be paid by another defendant, the Court may order payment to be made by one defendant to the other directly; and it is not to be necessary to order payment through the plaintiff."

It is submitted that the word "ought" in this rule is synonymous with "good cause." Supreme Court Rules 976 and 977 empower the trial judge to award costs for "good cause." In the present case the plaintiff was obliged to join both defendants.

Judgment

"No closer definition can be given of what will constitute 'good cause,' under Order LXV., r. 1, for making an order in a case tried with a jury that costs shall not follow the event, than that there will be good cause, whenever it is fair and just as between the parties that such an order should be made":

Forster v. *Farquhar* (1893), 1 Q.B. 564, and *per* Bowen, L.J., at p. 272, in *Jones* v. *Curling* (1884), 13 Q.B.D. 262:

"It was felt by the Legislature that justice would best be done in jury trials by leaving the costs to follow the event, but that there might be exceptional cases in which that rule would work injustice, and then that the judge should in furtherance of justice be allowed to make an exceptional order. So 'good cause' really seems to me to mean that there must exist facts which might reasonably lead the judge to think that the rule of the costs following the event would not produce justice as complete as the exceptional order which he himself could make."

The order as to costs will be that the defendant Lambert recover from the defendant Wright his costs of the action brought by the plaintiffs Gwen Mary Rhys and Emrys Rhys to be taxed on the County Court scale of costs.

Order accordingly.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

THE KING v. THE "SUNRISE." THE KING v. THE "TILLIE M." THE KING v. THE "QUEEN CITY" (p. 494).—Affirmed by Supreme Court of Canada, 28th April, 1931. See (1931), S.C.R. 387; (1931), 3 D.L.R. 147.

Cases reported in 42 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

HARRIS v. LINDEBORG (p. 276).—Reversed in part by Supreme Court of Canada, 11th November, 1930. See (1931), S.C.R. 235; (1931), 1 D.L.R. 962.

LAWSON v. INTERIOR FRUIT COMMITTEE (p. 493).—Reversed by Supreme Court of Canada, 16th February, 1931. See (1931), 2 D.L.R. 193.

MACAULAY, NICOLLS, MAITLAND & Co. v. BELL-IRVING (p. 140).—Reversed by Supreme Court of Canada, 10th June, 1930. See (1931), S.C.R. 276; (1931), 1 D.L.R. 381.

MCDERMOTT v. WALKER (p. 184).—Reversed by Supreme Court of Canada, 27th October, 1930. See (1931), S.C.R. 94; (1931), 1 D.L.R. 662.

Cases reported in 41 B.C. and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

BURRARD INLET TUNNEL & BRIDGE COMPANY, THE v. THE S.S. "EURANA" (p. 225).—Decision of the Exchequer Court of Canada affirming the decision of MARTIN, Lo. J.A. reversed by the Judicial Committee of the Privy Council, 13th January, 1931. See (1931), A.C. 300; (1931), 1 D.L.R. 785.

OLSEN (FRED) & Co. v. THE "PRINCESS ADELAIDE" AND CANADIAN PACIFIC RAILWAY COMPANY v. THE "HAMPHOLM" (p. 274).—Decision of the Exchequer Court of Canada reversing the decision of MARTIN, Lo. J.A. affirmed by the Supreme Court of Canada, 10th April, 1930. See (1931), S.C.R. 254.

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officer to take part in a burglary in order to assist the police in bringing a criminal to justice. He informed the police before the burglary as to where and when it was to take place, accompanied the real criminal in his breaking into a house and taking goods, then instructed the police where the goods were to be found and gave information leading to the arrest of the criminal. There was conflict between the evidence of the accused and that of the police officer who instructed him. The magistrate convicted the accused, stating he was relieved from weighing the evidence of the police officer and the other witnesses, as the evidence shewed clearly that the accused helped to commit the crime. *Held*, on appeal, reversing the decision of the magistrate, that if the accused's evidence is believed, what he did was not with the intention of committing a felony but with the intention of assisting the police in bringing the real criminal to trial. The magistrate was bound to weigh the evidence of the witnesses and come to a conclusion, and there being a finding he omitted to make which is essential to the disposal of the appeal, there should be a new trial. REX v. GILMORE. - - **57**

3.——*Charge of being in possession of opium — Conviction — Imprisonment — Deportation — Warrant — Validity — Habeas corpus—R.S.C. 1927, Cap. 93, Sec. 43 (2)—Can. Stats. 1929, Cap. 49, Sec. 4 (d).*] An applicant for a writ of *habeas corpus* had been convicted for having drugs in his possession and sentenced to imprisonment. On the expiration of his term he was brought from Alberta to Vancouver, placed in the custody of the controller of Chinese immigration there and held for deportation on a warrant from the deputy minister of immigration and colonization addressed to "Mr. Thomas Jelley, controller of Chinese immigration, Winnipeg, Man., or any Canadian immigration officer." *Held*, dismissing the application that the applicant was properly detained under the warrant. REX v. MAH FUNG. - - - - - - - - **187**

4.——*Charge of selling opium—Conviction—Revision of sentence—Power of Court of Appeal—Criminal Code, Secs. 1013 (2) and 1015—B.C. Stats. 1929, Cap. 49, Secs. 4 and 14.*] On a charge of selling opium the accused was found guilty and sentenced to imprisonment for one year and one day and fined $200. On appeal by the Crown that the sentence be increased by directing that in default of payment of the fine the accused be imprisoned until the fine be paid or for a period not exceeding twelve months, as required by section 14 of The Opium and Narcotic Drug Act, 1929:—*Held*, that the Court has power to increase the sentence and there should be added thereto a term of imprisonment in default of payment of the fine. REX v. CHOW DUCK YUET. - **152**

5.——*Charge under Game Act—Appeal to County Court—No return of magistrate's order—Jurisdiction to hear appeal—Non-disclosure of place where complaint arose—Nearest County Court—R.S.B.C. 1924, Cap. 98, Sec. 11 (2); Cap. 245, Secs. 77, 80 and 85—B.C. Stats. 1925, Cap. 13, Sec. 6.*] Section 77 of the Summary Convictions Act provides that any person who thinks himself aggrieved by any conviction or order made by a justice may appeal to the County Court at the sittings thereof nearest to the place where the cause of the informatnon or complaint arose. On appeal by the Crown from the dismissal of an information laid for a contravention of the Game Act to the County Court at Victoria the evidence shewed that the offence was committed at Goldstream in the County of Victoria. *Held*, that Goldstream is sufficiently notorious for its situation to be taken judicial notice of by the judge in whose county it is situate, that the only sittings in his county are held at Victoria, that Goldsteam is only about 12 miles from Victoria and the northern boundary of the County (there being no other adjoining county except north) is many miles further away. The inevitable evidentiary inference being that the "nearest sitting" is at Victoria. The magistrate did not, as directed by section 85 of the Summary Convictions Act transmit the order dismissing the information to the Court to which the appeal is by the Act given. *Held*, that this provision is merely directory and non-compliance with it by the magistrate does not deprive an appellant of his appeal properly brought by notice duly given. *Rex* v. *Hornby* (1923), 32 B.C. 505 applied. REX v. ZARELLI AND NEWELL. **502**

6.——*Companies — Managing directors and promoters—Publishing false statement with intention that it should be acted upon —Criminal intent—Essentials of offence—Conviction set aside — Criminal Code, Sec. 414.*] A conviction under section 414 of the Criminal Code which deals with false statements by directors and promoters of companies can only be secured if proof is given that (1) the statements are in themselves false in some material particular (2) and not only so but false to the knowledge of the accused and (3) made with intent to defraud. REX v. BOWEN. - - **507**

CRIMINAL LAW—*Continued.*

7.——*Conviction by magistrate—Fine—Paid without waiving rights of appeal—Costs of appeal fixed by magistrate on following day—Costs paid to County Court registry at request of magistrate—Appeal—Jurisdiction—R.S.B.C. 1924, Cap. 245, Sec. 78 (c).*] The accused was convicted before a magistrate of driving to the common danger, and fined $10. Accused paid the fine at the time of the hearing to the magistrate, stating that it was paid "under protest and without waiving any of his rights as to an appeal." On the following day the amount that the magistrate deemed sufficient to cover the costs of the appeal was fixed by him at $100. This amount was then paid by the accused at the request of the magistrate to the registrar of the County Court. *Held* by the County Court judge to be a sufficient compliance with section 78 (*c*) of the Summary Convictions Act, and on the facts the conviction was quashed. *Held*, on appeal, affirming the decision of NISBET, Co. J. that as the deposit was made with the registrar, who in any case would have been entitled to receive it from the magistrate and was authorized by him to receive it direct from the accused there was a sufficient compliance with section 78 (*c*) of the Summary Convictions Act and there was jurisdiction to hear the appeal. REX v. TALBOT. - **485**

8.——*Conviction by magistrate—Fine—Payment to magistrate under protest—Appeal—Effect of—Jurisdiction—R.S.B.C. 1924, Cap. 245, Sec. 78 (c).*] On appeal from a conviction by a magistrate for selling liquor the County Court judge found in favour of the accused on the merits but reserved judgment on a preliminary objection that the deposit of $300 which accused was fined was not in Court and there was no jurisdiction to hear the appeal. In his reasons for judgment on the preliminary objection the County Court judge found that accused on being arrested was released on cash bail of $300. After conviction by the magistrate this cash bail of $300 was by consent of all parties converted into payment of the fine, the fine being paid under protest to the magistrate. Later the magistrate fixed $50 as the amount required to cover costs of appeal, which was paid. The magistrate then remitted the $50 to the County Court registry but remitted the $300 fine into the treasury of the City of Rossland. The reasons for judgment concluded with the statement that the accused deposited with the justice making the conviction an amount sufficient to cover the sum so adjudged to be paid together with such

CRIMINAL LAW—*Continued.*

further sum as such justice deems sufficient to cover the costs of appeal. There was a sufficient compliance with section 78 of the Summary Convictions Act. The preliminary objection therefore fails and the conviction should be quashed. *Held*, on appeal, affirming the decision of BROWN, Co. J. (MACDONALD, C.J.B.C. dissenting), that although in the reasons of the judge below there is a statement which is in absolute contradiction to his final declaration upon the matter and it being final it should receive the most attention, namely, "that accused deposited with the justice making the conviction an amount sufficient to cover the sum so adjudged," citing the very words of the statute. It must be held there was a substantial compliance with the statute and the appeal should be dismissed. *Per* MARTIN, J.A.: "Under protest" is an improper expression because fines cannot be paid in that way. It is a growing practice which should be sharply discountenanced that such a transaction should take place in the Court as a fine being paid under protest. REX v. SUTHERLAND. - - - - - **277**

9.——*Electing mode of trial—Speedy trial—Effect of subsequent improper election—Notice of appeal—Service on solicitors—Habeas corpus—Criminal Code, Secs. 827 and 1014.*] Where a prisoner is convicted in the County Court Judge's Criminal Court after electing for speedy trial and an entry of this appears on the record it will be presumed on *habeas corpus* proceedings, unless the contrary is shewn, that the consent of the prisoner to be so tried was regularly obtained and that his option to elect was exercised only after the judge stated his right of election in the manner prescribed by section 827 of the Criminal Code. A good election for speedy trial was held not to be affected by the fact that a subsequent election made after a slight amendment in the charge may not have been taken in the proper manner. *Per* MARTIN, J.A.: Upon the County Court judge's Criminal Court becoming a Court of competent jurisdiction with respect to a case before it, the remedy, if any, for irregularities in the subsequent conduct of the proceedings is in section 1014 of the Criminal Code. REX v. WONG CHUEN BEN. (No. 2). - - - - - **188**

10.——*False trade description—Corporation—Procedure—Preliminary investigation—Prohibition—Criminal Code, Secs. 489, 781 and 782—Can. Stats. 1919, Cap. 46, Sec. 13.*] Objection to a magistrate proceeding with a preliminary inquiry against an

HUSBAND AND WIFE—*Wife's funds controlled by husband in wife's lifetime—Death of wife—Presumption of gift.*] Where a wife entrusts to her husband the management of her funds out of which he pays their expenses and makes investments that they from time to time agree upon, the question of whether the law implies a gift to the husband depends on the particular facts in each case. *Bartlett* v. *Bull* (1914), 26 W.L.R. 831 applied. WALKER AND ROBERTS v. SILK. - - - - - **43**

INCOME TAX — *Fire insurance—Use and occupancy insurance — Plant destroyed by fire—Insurance moneys paid for use and occupancy—Whether taxable — "Income"—Definition — Appeal — R.S.B.C. 1924, Cap. 254, Sec. 2.*] The defendant Company, manufacturers and dealers in lumber products, insured in several companies against loss and damage to its plant and property by fire. Further insurance was taken out in 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 in question 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." It was held on the trial that the money so received was subject to taxation. *Held*, on appeal, affirming the decision of MACDONALD, J. (MARTIN, J.A. dissenting), that the money received from "use and occupancy insurance" was taxable income and subject to taxation under the Taxation Act. THE KING v. B.C. FIR & CEDAR LUMBER COMPANY LIMITED. - - - - - - - **227**

INFANT—*Custody—Parental rights—Child brought up from infancy by aunt—Welfare of child paramount consideration—Delivery to father.*] Shortly after the birth of an infant in January, 1921, the mother died and the father who was an engineer in Vancouver having no suitable home gave the infant over to Mrs. H. (the married sister of his late wife who lived with her husband in Ontario) to take charge of her and bring her up as one of her own family, there being evidence of the father stating that his daughter was to be hers for all time. The infant lived with the aunt in Ontario where she was well cared for and received proper instruction until August, 1930, when on the father's invitation the aunt and child visited him in Vancouver. Shortly after their arrival the father took the child away and put her in a convent, refusing to give her back to the aunt. During the child's stay in Ontario the father sent $500 for her maintenance the aunt still retaining $300 of this in a trust account for the infant. The child was unhappy in the convent and wanted to remain with her aunt. An application by the aunt by way of originating summons for custody of the child was granted. *Held*, on appeal, reversing the decision of MCDONALD, J. (MACDONALD, J.A. dissenting), that the father had never surrendered his parental right. There was no suggestion of unfitness in the father and although the welfare of the infant is the paramount consideration it is the settled practice that the claim of the father must prevail unless the Court is judicially satisfied that the welfare of the child required that the parental right should be superseded. *In re* EVA C. JOHNSON, AN INFANT. JOHNSON v. HALL. **328**

INFORMATION—*Quo warranto proceedings —Trial—Onus—Crown Office rule 134.*] On

walk struck and injured both plaintiffs. In an action for damages the jury found that W. was wholly to blame and the action against L. was dismissed with costs. On application to settle the judgment as to who should pay L.'s costs:—*Held*, that the defendant L. recover from the defendant W. his costs of the action brought by the plaintiffs. RHYS *v.* WRIGHT AND LAMBERT. - - - - - - - - - - **558**

2. —— *Collision between automobiles — Intersection—Right of way—Evidence—B.C. Stats. 1925, Cap. 8.*] Shortly after ten o'clock on the evening of the 28th of August, 1929, the plaintiff, driving her car easterly on Twelfth Avenue, in the City of Vancouver, slowed down to 15 miles an hour as she neared the intersection of Oak Street on which was a double street-car line. On reaching the tracks she states she saw the defendant's car about 150 feet to her right coming north on Oak Street. She continued on but the right rear end of her car was struck by the front left wheel of the defendant's car. The defendant, on approaching Twelfth Avenue, saw the plaintiff but thought, from the position of her lights that she was turning north on Oak Street when she suddenly turned back to continue along Twelfth Avenue immediately in front of him. He then turned sharply to the right and put on his brakes, but too late to avoid his left front wheel hitting her. Both cars overturned. The trial judge believed the plaintiff's story, found on the evidence that the defendant was going at an excessive speed when entering the intersection and gave judgment for the plaintiff. *Held*, on appeal, affirming the decision of CAYLEY, Co. J. (GALLIHER, J.A. dissenting), that notwithstanding the evidence being rather extraordinary in several respects on both sides, the trial judge believed the evidence of the plaintiff and her witnesses and would not accept the evidence submitted for the defence, which he is entitled to do, and having found in the circumstances that the defendant by his own conduct brought about the collision and was alone responsible for it, his decision should be upheld. CHISHOLM *v.* AIRD. - - - - - - - - **354**

3. —— *Collision between motor-cars — Driver to whom owner entrusted car—Civil liability of owner — Motor-vehicle Act, R.S.B.C. 1924, Cap. 177.*] At about half-past eight in the evening the plaintiff's son driving a motro-truck easterly on the Pacific Highway came into collision with a motor-car going in the opposite direction driven by the defendant M. to whom it was entrusted by the owner, the defendant S. The paved portion of the road was 18 feet wide and according to the evidence of two policemen who examined the tiremarks on the pavement after the accident the defendant's car was about 18 inches over on the plaintiff's side of the middle line. The trial judge gave full credence to the evidence of the policemen but concluded that the onus on the plaintiff had not been satisfied and dismissed the action. *Held*, on appeal, reversing the decision of MURPHY, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the evidence of the policemen which is uncontradicted and impressed the learned trial judge favourably, should be accepted. From this evidence it appears the defendant's car was 18 inches on the wrong side of the road at the time of the accident and the defendant M. was therefore guilty of negligence. *Held*, further, that the Motor-vehicle Act does not add to the civil liability at common law of an owner of a motor-vehicle who has entrusted it to another person through whose negligence in operating it a third person is injured. *Boyer* v. *Moillet* (1921), 30 B.C. 216 followed. RUFF v. SUTHERLAND AND MOSS. - - **218**

4. —— *Collision between tram-car and automobile—Contributory negligence—Ultimate negligence — Effect of finding — B.C. Stats. 1925, Cap. 8.*] At about seven o'clock on the evening of the 31st of December, 1929, the plaintiff, with her husband and child, was proceeding easterly on 49th Avenue in Vancouver in their automobile, the husband driving. On nearing the track of the defendant Company that crossed the road, and seeing a tram-car approaching from the south he stopped, but as there was a station platform immediately on the south side of the road upon which passengers were standing, evidently thinking the tram-car was to stop, he started up to cross the track, but the tram-car did not stop and proceeding on struck the automobile in the middle. The husband and child were killed and the plaintiff was severely injured. The jury found the servants of the Company were guilty of negligence and that the driver of the automobile was guilty of contributory negligence but that notwithstanding the negligence of the driver of the automobile the driver of the tram-car could have avoided the collision by the exercise of reasonable care and they assessed the damages for which judgment was entered. *Held*, on appeal, affirming the decision of GREGORY, J., that where the jury finds, on sufficient evidence, that notwithstanding the negli-

NEGLIGENCE—*Continued.*

gence which the plaintiff was found guilty of, the defendant could, by the exercise of reasonable care, have avoided the accident, the plaintiff is entitled to recover and the Contributory Negligence Act has no application. KEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED. - - **288**

5.——*Damages — Fall from stairway— Defective construction alleged — Res ipso loquitur—Volenti non fit injuria—Evidence —Jury—View.*] In an action for damages for negligence when specific questions are put to the jury by the Court, the jury need not answer them but may return a general verdict. EVANS v. HUDSON'S BAY COMPANY. - - - - - - - - - - **81**

6.——*Damages—Limitation of action— R.S.B.C. 1924, Cap. 145, Secs. 3, 8 and 11; R.S.B.C. 1911, Cap. 206, Sec. 81.*] On the morning of the 17th of November, 1921, the principal of the Ladysmith High School conducted certain experiments in chemistry before his class. He then went to lunch and left the apparatus for the pupils to clean. During the lunch hour the pupils managed to get the required chemicals from a closet in which they were kept and setting up the apparatus proceeded to repeat the experiments seen in the morning. While so engaged the plaintiff, then 14 years old, came into the room and when approaching the apparatus an explosion took place, a piece of glass entering the plaintiff's right eye in which he lost his sight. The plaintiff reached his majority in November, 1927, and he brought action for damages in April, 1929. The jury returned a verdict in defendant's favour and the action was dismissed. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C., *per* MACDONALD, C.J.B.C., and GALLIHER, J.A., that section 81 of the Public Schools Act provides that "No action shall be brought against any school trustee, . . . unless within three months after the act committed," etc., and as the action was not brought within the time so fixed the appeal must be dismissed. *Per* MARTIN, J.A.: That the action is barred by section 11 of the Statute of Limitations and the appeal should be dismissed. DUNCAN v. THE BOARD OF SCHOOL TRUSTEES OF LADYSMITH. - - - - - - **154**

7.——*Dentistry—Extracting teeth—Unskilful work—Test of negligence.*] The doctrine in the case of a physician that treatment is to be tested by the principles of the physicians' school is not applicable to the mechanical manipulative labour entailed in the pulling of teeth. The rule in such a case

NEGLIGENCE—*Continued.*

is that applicable to all skilled labourers, namely, that if your position implies skill you must use it. When, therefore, injury has been sustained that could not have arisen except from the absence of reasonable skill or negligence, there is liability. DRINNEN v. DOUGLAS. - - - - - **362**

8.——*Injury to invitee—Res ipsa loquitur Motion for non-suit reserved — Verdict— Finding of contributory negligence—Special damages allowed as claimed but no general damages—Motion for non-suit then granted —Appeal—New trial—B.C. Stats. 1925, Cap. 8.*] The defendant Company operated amusement devices in Hastings Park, Vancouver, B.C., one of which was known as "The Old Mill," a circular tunnel through which water runs in sufficient force and volume to carry through small boats with seats for passengers. The plaintiff, an infant, purchased a ticket from an employee and took a seat in one of the boats. As he was proceeding through the tunnel his right hand came in contact with the side or ledge of the tunnel and caught on a nail or some other projection. His finger was so badly torn that it had to be amputated. In an action for damages judgment was reserved on the defendant's motion for non-suit and after the defence was in the jury found contributory negligence, gave special damages for the amount claimed but no general damages. The motion for non-suit was then granted and the action dismissed. *Held*, on appeal, reversing the decision of MORRISON, C.J.S.C., that it was the duty of the jury to pass upon general damages as well as special damages, they having made no allowance for pain and suffering, loss of finger and the attendant inconvenience for life; further, having found contributory negligence it was their duty after finding the whole of the damages to apportion them between the parties in the manner specified by the Contributory Negligence Act: there should therefore be a new trial. JAMIESON AND JAMIESON v. B.C. AMUSEMENTS COMPANY LIMITED. - - - - - **317**

9.——*Motor-vehicles — Collision — Intersection—Right of way—Damages.*] At about five o'clock in the evening the plaintiff was proceeding east on 10th Avenue. On nearing Alma Road where there was a "slow" sign he slowed down to ten miles an hour. He then saw the defendant close to the intersection coming south in his car on Alma Road, but he proceeded across the intersection and his rear left wheel was struck by the defendant and his car overturned. The plaintiff recovered judgment in an action

SALE OF GOODS—*Conditional sale agreement—Illegal seizure by vendor—Damages—Measure of—R.S.B.C. 1924, Cap. 44, Sec. 10.*] The plaintiff purchased a motor-car from the defendant Company under a conditional sale agreement, one of the terms being that he was not to take the car out of the Province. About seven months later, wishing to go to Aurora in the Province of Ontario, he obtained leave from the vendor to take the car to Ontario and then proceeded on his trip. All payments on the car had been made but on arrival at Aurora his car was seized by a bailiff and sent back to Vancouver where, after being reconditioned, it was sold by the defendant. At the time of seizure the plaintiff had paid $685 on the purchase price. In an action for damages for illegal seizure and conversion of the car the plaintiff recovered $1,000. *Held*, on appeal, affirming the decision of RUGGLES, Co. J. (MACDONALD, C.J.B.C. would reduce the exemplary damages), that there was sufficient evidence to support the award in the unusual circumstances of the case. GRIFFITHS v. FORDYCE MOTORS LIMITED. - - - - - - - - - - **119**

SALE OF GOODS—*Continued.*

2.——*Motor-car—Conditional sale agreement—Assignment thereof—Car left in possession of assignor as mercantile agent—Resale of car—Title of subsequent buyer—R.S.B.C. 1924, Cap. 225, Sec. 60 (1).*] S. the general manager of the Pacific Motors, Limited, purchased a car from his own company under a conditional sale agreement. The agreement was executed for the company by S. who also signed the same on his own behalf as purchaser. S. then on behalf of his company assigned the agreement to the plaintiff, a financing company, the agreement and the assignment being duly registered. The plaintiff left the car on the premises of the Pacific Motors, Limited, knowing that it was left there for the purpose of resale. S. then sold the car to the defendant who paid for it believing he was buying from the Pacific Motors, Limited and knowing nothing as to the plaintiff's claim. In an action for conversion:—*Held*, that under section 60 (1) of the Sale of Goods Act the defendant has a good title to the car. *W. J. Albutt & Co.* v. *Continental Guaranty Corporation of Canada* (1929), 41 B.C. 537 distinguished. [Affirmed by Court of Appeal.] COMMERCIAL SECURITIES (BRITISH COLUMBIA) LIMITED v. JOHNSON. - - - - - - - - - **61, 381**

3.——*Second-hand motor-truck—"First-class mechanical condition"—Failure of truck to do work contemplated—Breach of warranty.*] The defendants purchased from the plaintiff a second-hand motor-truck under a buyer's order signed by the defendants containing a clause providing that "The whole agreement between the parties is contained herein and no representations, warranties or conditions expressed or implied other than those herein contained shall be binding upon the vendor." The defendants required a truck for immediate use on a contract for the construction of a

STOCK—*Instruction to broker to sell at not less than certain price—Stock sold at lower price—Local usage—Return of certificate—Right to original certificate.*] An agent of the defendant Company advised the plaintiff to purchase Weymarn Petroleum stock. The plaintiff had no money but delivered the agent a certificate for 500 shares of Silver Cup (Hazelton) Mining Co. Ltd. with instructions to sell it at not less than 30 cents per share and then buy with the proceeds 100 shares of Weymarn Petroleum at $1.50 per share, the certificate to be returned to him in case the shares were not sold at the named price. The stock was at