THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

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

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA

BY

E. C. SENKLER, K. C.

VOLUME XLIV.

VICTORIA, B. C.
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1932.

JUDGES

OF THE

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

During the period of this Volume.

CHIEF JUSTICE OF BRITISH COLUMBIA:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

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

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. AULAY MORRISON.

PUISNE JUDGES:

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

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

DEPUTY LOCAL JUDGE IN ADMIRALTY:

THE HON. WILLIAM ALFRED GALLIHER.

COUNTY COURT JUDGES:

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

ATTORNEY-GENERAL:

THE HON. ROBERT HENRY POOLEY, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

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TABLE OF CASES CITED

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"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, in pursuance of the "Court Rules of Practice Act" and of all other powers thereunto enabling, Order XXII. of the "Supreme Court Rules, 1925," be amended by adding thereto as Rule 18A the following:—

"18A. Where the estate of a deceased person who has died intestate is entitled to a fund or to a share of a fund in Court not exceeding $500, and it is proved to the satisfaction of the Court or a Judge that no administration has been taken out to such deceased person, and that his assets do not exceed the value of $500, including the amount of the fund or share to which the estate of such deceased person is entitled, and that all the debts of the deceased person have been paid, the Court or a Judge may direct that such fund or share of a fund shall be paid, transferred, or delivered to the person who, being a widower, widow, child, father, mother, brother, or sister of the deceased, would be entitled to take out administration to the estate of such deceased person. The Registrar before acting upon the order for payment out under this Rule shall require the production of a receipt from the proper official showing the payment of succession and probate duties in respect of the estate of such deceased person or a certificate that no such duties are payable."

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., February 3rd, 1932.

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, pursuant to section 3 of the "Court Rules of Practice Act" and of all other powers thereunto enabling, the "County Court Rules, 1932," be amended by inserting after Item 27, Schedule E, Appendix B, the following:—

	"Copies."	A.	B.	C.
"27A.	Necessary copies, where allowed, per folio	.10	.10	.10"

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., February 3rd, 1932.

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, in pursuance of the "Court Rules of Practice Act," chapter 224 of the "Revised Statutes of British Columbia, 1924," and all other powers thereunto enabling, Schedule No. 1 of Appendix M of the Supreme Court Rules, 1925, be amended by inserting after the word "engineers," in the first line of Item 14 of said Schedule, the words "chartered accountants."

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., March 15th, 1932.

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, in pursuance of section 3 of the "Court Rules of Practice Act," and of all other powers thereunto enabling, Rule 2E of Order I. of the "County Court Rules, 1932," be repealed, and the following substituted therefor:—

"2E. No summons for service out of the Province, or of which notice shall be given out of the Province, shall be issued without the leave of the Judge."

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., March 15th, 1932.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

McKNIGHT v. GENERAL CASUALTY INSURANCE COMPANY OF PARIS, FRANCE.

COURT OF APPEAL

1931

March 3.

McKNIGHT v. GENERAL CASUALTY INSURANCE CO. of PARIS, FRANCE

Insurance, automobile—Accident—Death of passenger—Action by parents—Defence undertaken by insurer — Evidence of intoxication — Insurer withdraws and repudiates—Judgment against insured—Action against insurer—Statutory conditions—Failure to comply with—Estoppel—B.C. Stats. 1924, Cap. 20, Sec. 24.

The plaintiff, the owner of an automobile, was insured in the defendant Company against liability for injury to another. While the plaintiff was driving his automobile with a woman passenger an accident occurred and the woman was killed. The woman's parents brought action against the plaintiff for negligence and recovered judgment. The defendant Company undertook the plaintiff's defence of that action and continued to do so down to the time of the trial, when they professed to have discovered that McKnight was intoxicated when the accident took place. They then repudiated liability and withdrew from that action. The defences raised in this action included (1) Intoxication at the time of the accident; (2) refusal to co-operate with the defendants in the prosecution of the defence of the first action; (3) failure of the plaintiff to give the notices and statutory declaration required by sections 8 and 9 of the statutory conditions in the policy. The plaintiff recovered judgment on the trial.

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Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that on the evidence the learned trial judge properly held that the plaintiff was not intoxicated at the time of the accident and that his failure to co-operate in the defence of the former trial only applied to the defendant's efforts to escape liability by proving intoxication. As to the plaintiff's failure to comply with the statutory conditions the defendant, with full knowledge from the beginning of these defects, having undertaken the burden of defence and repudiated in the middle of the litigation, not because of want of notice, but because they suspected that the respondent was intoxicated at the time of the accident and withdrew from the defence on that account only, it is therefore estopped from alleging failure to comply with the statutory conditions.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. in an action to recover $2,039.75 upon a policy of insurance made between the defendant and the plaintiff in June, 1928, in which the defendant, the insurer, covenanted to indemnify the plaintiff, the insured:

"(a) For all loss or damage 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, collision with another object, either moving or stationary, or by upset."

Statement

On the 6th of August, 1928, the plaintiff's automobile was upset while the plaintiff was driving about eight miles west of Kamloops, one Beatrice Latremouille being a passenger in his car. She was killed and the automobile was damaged, necessitating repairs that cost $235. On the 12th of June, 1929, the girl's parents recovered judgment against the plaintiff for $1,500 damages owing to the death of their daughter and $304.70 taxed costs. The Insurance Company undertook the defence of the action against the plaintiff and proceeded with the defence down to the time of the trial when it alleges it found out that the plaintiff was intoxicated when the accident took place. It then repudiated liability and the plaintiff had to proceed with his own defence. The plaintiff also claims $218.85 for damages resulting from the defendant's breach of the insurance policy entered into with himself in payment of solicitor and counsel for defending said action. Judgment was given in favour of the plaintiff for the sums claimed.

The appeal was argued at Victoria on the 4th and 5th of Feb-

ruary, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

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Bray, for appellant: Criminal proceedings were first taken against Knight when we discovered there was evidence of his being intoxicated at the time of the accident. We then repudiated and took no part in the civil action. He did not plead or prove he paid the amount of the judgment. This is an action of indemnity and the statement of claim discloses no cause of action. He has not complied with section 24 of the Insurance Act: see *Continental Casualty Co.* v. *Yorke* (1930), S.C.R. 180; *In re Tottenham* (1896), 1 Ch. 628. It was proved on the trial that he was intoxicated: see *General Casualty Insurance Co. of Paris* v. *Lambert* (1930), 43 B.C. 133 at pp. 138-9; *In re Abraham Mallory Dillet* (1887), 12 App. Cas. 459 at p. 469. The plaintiff failed to comply with the statutory conditions in the policy. The notices required by sections 8 and 9 (*a*) were never given and the statutory declaration required by section 9 (*b*) was never delivered. These requirements are conditions precedent to the plaintiff's right of action.

Argument

H. Alan Maclean, for respondent: The plaintiff sues on the policy and section 24 of the Insurance Act has no application to this action: see *Barlow* v. *Merchants' Casualty Ins. Co.* (1929), 41 B.C. 427. There was no proof of intoxication and the learned judge below so found: see (1927), 71 Sol. Jo. 625. As to specific performance of the contract of indemnity, we can be freed from the judgment that is recovered against us: see *Wooldridge* v. *Norris* (1868), L.R. 6 Eq. 410; *Johnston* v. *Salvage Association* (1887), 19 Q.B.D. 458. We are entitled to equitable relief: see *Wolmershausen* v. *Gullick* (1893), 2 Ch. 514 at pp. 525 and 527; *Boyd* v. *Robinson* (1891), 20 Ont. 404 at p. 409. Payment of the judgment against us is not a condition precedent: see *Mewburn* v. *Mackelcan* (1892), 19 A.R. 729; *McDonald* v. *Peuchen* (1918), 42 O.L.R. 18 at p. 26; *Williams* v. *Baltic Insurance Association of London, Ld.* (1924), 2 K.B. 282. Having taken up the case and having by their own volition given up the defence they are estopped from raising the question of non-compliance with the statutory conditions: see *Vandepitte* v. *The Preferred Accident Ins. Co. of*

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New York (1930), 43 B.C. 161; *Duffield* v. *Scott* (1789), 3 Term Rep. 374; *Jones* v. *Williams* (1841), 7 M. & W. 493 at p. 500; *Parker* v. *Lewis* (1873), 8 Chy. App. 1035 at p. 1058; *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan, and Agency Company* (1894), 1 Ch. 578; *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110. The Company was not prejudiced in any way by lack of compliance with the statutory conditions as they knew the following morning of the accident: see *Prairie City Oil Co.* v. *Standard Mutual Fire Insurance Co.* (1910), 44 S.C.R. 40 at p. 63; *Beury* v. *Canada National Fire Insurance Co.* (1917), 38 O.L.R. 596; *Mount Royal Insurance Company* v. *Bevoit* (1906), 15 Que. K.B. 90; *Bell Brothers* v. *Hudson Bay Ins. Co.* (1911), 44 S.C.R. 419 at p. 432.

Bray, in reply: There were two reasons for withdrawing from the defence: (a) He would not tell us the facts and (b) the discovery of his intoxication. Then we withdrew. He did not prove the judgment in the Court below.

Cur. adv. vult.

3rd March, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff was driving with a passenger Beatrice Latremouille when his car ran off the road at a curve and overturned causing the death of the girl. Action was brought by her parents against McKnight for negligence and a judgment was recovered against him. The appellant in this action was an insurer of respondent against such actions and undertook his defence of that action, which it was bound to do under its policy unless it was brought about by defendant's intoxication. It prosecuted the defence down to the time of trial when it professed to have discovered that the defendant was intoxicated though that question had been gone into at the preliminary investigation some time before, of which appellant was apprised. It procured an adjournment of the trial and immediately repudiated liability necessitating the respondent engaging other counsel to prosecute his defence to judgment.

The defences in this action are plaintiff's intoxication at the time of the accident; refusal to co-operate with defendant in

the prosecution of the defence to the first action. These two defences were found against the defendant by the learned trial judge and I think he was right. The alleged refusal to co-operate was I think not a refusal to co-operate in the defence of that action but, if it was a refusal at all, it was a refusal to co-operate in the defendant's effort to escape from liability by proving intoxication. The third defence was based upon sections 8 and 9 of the automobile statutory conditions. Section 8 provides that on an accident occurring involving bodily injuries or death or damage to property of others the insured shall give written notices thereof with full information to the insurer. Section 9 (*a*) provides for a like notice to the insurer with the fullest information obtainable at the time and clause (*b*) to deliver to the insurer within 90 days a statutory declaration stating the place, time and cause of the damage so far as the insured knows or believes. Clause (10) provides that neither the insurer nor the insured shall be deemed to have waived any provision of this policy by any act relating to the appraisal or the delivery on completion of proof of loss or the investigation of the adjustment of the claim. These notices and the statutory declaration were not given to the insurer.

The contention of respondent's counsel is that there was an estoppel by reason of the assumption of the defence and the carrying of it on until trial in the case of their knowledge that these particulars had not been given. It appears from the evidence that the insurers became immediately aware of the accident and of the particulars aforesaid although not by written notice although that may be immaterial. In *Western Canada Accident and Guarantee Insurance Company* v. *Parrott* (1921), 61 S.C.R. where the insurance company proceeded to judgment with the defence in an action brought against the insured after discovering that the machine which caused the accident was unguarded contrary to statute which entitled the insurance company to terminate the contract it was held that they were estopped from so doing when they proceeded with the defence after discovering their want of liability. Idington, J. held that the defendant was estopped from setting up the excepted risk; Duff, J. held that the company had by their conduct agreed to accept the responsibility and Anglin, J. said that the company

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in defending the action against the insured had assumed liability under the policy. The other learned judges came to a like conclusion.

The facts there differed somewhat from the ones here. The machine which caused the plaintiff's injury was unguarded contrary to law and was excluded from the terms of the policy. Yet by the action of the company it was held to have assumed or was estopped from disputing liability under the policy because of their action in defending after discovery of the unguarded condition of the machine. In the case at Bar the liability under the policy never ceased since the respondent has been exonerated from the charge of intoxication. The appellant with full knowledge from the beginning of the defects aforesaid undertook the burden of defence notwithstanding that they might have objected to the want of notice or the statutory declaration. They repudiated in the middle of the litigation not because of want of notice but because they suspected that the respondent had been intoxicated at the time of the accident and they withdrew from his defence on that account only, thus bringing about a postponement of the trial and its continuance at respondent's expense. In my opinion they are estopped from alleging the want of notice and of the statutory declaration. Though these were not given they undertook and continued in the defence up to trial.

MACDONALD, C.J.B.C.

I would therefore dismiss the appeal.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one that essentially illustrates the care with which the Court of Appeal must approach the facts, and the learned trial judge, the Chief Justice of the Supreme Court, gave very careful attention to all the conflicting evidence adduced at the trial and I cannot persuade myself that the learned Chief Justice arrived at other than the proper conclusion and upon principle the conclusions of fact of the learned trial judge should not in a case of the present character, in my opinion, be disturbed by the Court of Appeal (*S.S. Hontestroom*

v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8—Lord Sumner). Then as to the many points of law raised and ably pressed by Mr. *Bray,* the learned counsel for the appellant, they were effectively met by the learned counsel for the respondent, Mr. *H. Alan Maclean,* in his very able argument. I do not propose to travel over the whole case in all its aspects or refer specifically to the authorities cited but to merely indicate in general terms my conclusions. The action is a simple one arising on a policy of insurance and it in terms is one of indemnification to the plaintiff (respondent) against loss or damage which the plaintiff might become liable to pay and all costs the plaintiff might be liable to pay in any civil action defended by the plaintiff (the insurer) consequent upon the plaintiff's automobile causing bodily injury or death. That which occurred was the death of one Beatrice Latremouille a passenger in the automobile when being driven by the plaintiff. Following the accident a judgment was recovered by the parents of Beatrice Latremouille in the Supreme Court against the plaintiff for $1,804.75 and suit was brought by plaintiff to recover that sum and the further sums of $218.85 and $235 for respectively costs incurred in defending the action and costs for repairs to the automobile consequent upon the accident. That there is a clear contractual obligation upon the defendant (appellant) there is no doubt—the policy of insurance fully establishes this. It was strongly urged that the plaintiff was not entitled to succeed in the action until he had paid or satisfied the judgment against him. This is not the law, there must be compliance with the contractual obligation by the defendant independent of and before payment by the plaintiff. Lindley, L.J. in *Johnston* v. *Salvage Association* (1887), 19 Q.B.D. 458 at pp. 460-61, said:

MCPHILLIPS, J.A.

> "In equity a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay and perhaps ruin himself before seeking relief. He is entitled to be relieved from liability."

(Also see *Wolmershausen* v. *Guillick* (1893), 2 Ch. 514 at pp. 525, 527). There is nothing in the contention that there was any imperfect compliance with the conditions of the policy of insurance; there was ample notice to the agent of the Company. I would in this connection refer to what Anglin, J. (now Chief Justice of Canada) said in *Prairie City Oil Co.* v. *Standard*

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Mutual Fire Insurance Co. (1910), 44 S.C.R. 41 at pp. 63-4:

"Its officers had, through the telegram from its own agents, all the benefit which they could derive from a notice in writing given personally by the insured."

(Also see *Bell Brothers* v. *Hudson Bay Ins. Co.* (1911), *ib.* 420, Idington, J. at pp. 431-2).

With respect to the moneys that are payable to the parents of the late Beatrice Latremouille—represented by the judgment against the plaintiff—whilst I am satisfied that the plaintiff is entitled to the judgment therefor yet, as I understood, counsel at this Bar was willing that a direction might be made that the moneys be paid into Court. The plaintiff in receiving such moneys would in any case be a trustee of the moneys for the judgment creditors, *viz.*: the parents of the late Beatrice Latremouille.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: Judgment was obtained against respondent in the present action by the parents of Anatole Latremouille and Marie P. Latremouille for damages under the Families' Compensation Act (R.S.B.C. 1924, Cap. 85) arising out of the death of their daughter while riding in respondent's automobile. By a policy of insurance between respondent and appellant herein the former was indemnified "against all loss or damage" which he "shall become legally liable to pay for bodily injury (including death resulting therefrom) caused to any person or persons by . . . the use of the automobile"; also against all loss or damage to the car itself. Respondent having incurred liability in the action referred to and without payment of said judgment brought this action against appellant Insurance Company for $1,804.75, the amount of the judgment; $218.85 for costs incurred therein and $253 for repairs to his car.

Appellant resists payment on several grounds. It alleges that at the time of the accident in respect to which damages were awarded against him respondent was intoxicated. Statutory condition No. 5 in the Insurance Act (B.C. Stats. 1925, Cap. 20) reads as follows:

"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 a person under the age limit fixed by law, or, . . . by an intoxicated person."

The trial judge found respondent was not intoxicated. Unless we can say he was clearly wrong we should not interfere. I think the word "intoxicated" should be interpreted in relation to the Act in which it is found and the purpose for which it was inserted. There are degrees of intoxication and pliable definitions of the word. One is, in my view, "intoxicated" within the meaning of this statutory condition when not in a fit state to drive a car because of the too free use of liquor.

The evidence is conflicting. One witness, however (Baxter) saw respondent shortly after the accident and when within a foot or a foot and a half from him placed his hands on respondent's shoulder to examine cuts on the face and found no odour from liquor. A doctor too stated that on the suggestion of a police officer he "approached him [respondent] rather closely" and "did not either smell anything or notice anything out of the way." This may be negative evidence but as intoxication may be determined by the senses the trial judge might conclude from this evidence that respondent was not intoxicated.

Appellant further submits that respondent did not co-operate with it or aid in securing information and evidence necessary for the defence of the action brought by the Latremouilles against respondent. Part of statutory condition 8 (2) reads:

"Whenever requested by the insurer, [respondent] shall aid in securing information and evidence and the attendance of any witnesses, and shall co-operate with the insurer, except in a pecuniary way, in all matters which the insurer deems necessary in the defence of any action or proceeding or in the prosecution of any appeal."

Defence of that action was undertaken by appellant. The writ was given to appellant and all reasonable information furnished, respondent submitting to examination by appellant's agents and its solicitor. At a later stage when appellant sought to obtain evidence as to his alleged intoxication, not to assist in defending that action, but to enable it to withdraw from it and to dispute liability under the policy, respondent refused to submit to questioning (beyond denying intoxication) and made contradictory and possibly misleading statements. The refusal to give information on this point is not within the condition referred to nor is it a refusal to co-operate in the defence of that action.

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A further complaint is that respondent did not furnish appellant with notice in writing of the accident giving the fullest information obtainable at the time (applicable only to damage to the car) and also did not deliver within 90 days a statutory declaration giving particulars, relying on statutory condition 9 (1) (*a*) and (*b*) found in section 154 of the Act (B.C. Stats. 1925, Cap. 20). Appellant, however, continued to act for respondent and elected to proceed without said written notice and declaration after the 90 days expired. In *Cadeddu* v. *Mount Royal Assurance Co.* (1929), 41 B.C. 110 at p. 120 I said:

"However, once the breach came to the knowledge of the appellant, it had to take a stand. The solicitor by continuing to defend after knowledge could only do so on the assumption that the policy was valid and subsisting."

And again at p. 121:

"If he had repudiated liability electing to stand on the breach of conditions the respondent would naturally reconsider his position. He might seek a settlement knowing that he was in jeopardy and succeed in doing so for a less amount than the judgment finally obtained, or at all events, save further costs."

MACDONALD, J.A.

Appellant further submits (1) that respondent has no right to sue on its contract of indemnity before payment of the judgment obtained against him or the return of an execution *nulla bona;* (2) that it would have no defence to an action brought by the Latremouilles under section 24 of the Insurance Act (B.C. Stats. 1925, Cap. 20); (3) that the formal judgment in this action improperly contains the clause "as trustee for," etc.:

"This Court doth order and adjudge that the defendant [appellant] do forthwith pay to the plaintiff [respondent] as trustee for Anatole and Marie P. Latremouille the sum of $1,804.75,"

and (4) that respondent as the formal judgment indicates, sues in a representative capacity and did not frame his action aright. The representative capacity was not shewn in the title or endorsement on the writ.

We are not troubled by section 24. On the facts at present the Latremouilles could not sue appellant. A condition precedent is not only failure to satisfy the judgment but also a fruitless execution. If the rights of all parties can be protected in the present action no difficulties should arise. Respondent sues on the insurance policy without waiting for execution

against him. By clause 8 subclause (3) of the statutory conditions

"No action to recover the amount of a claim under this policy shall lie against the insurer unless the foregoing requirements [*i.e.*, notice and co-operation] are complied with and such action is brought after the amount of the loss has been ascertained either by a judgment against the insured after trial of the issue or by agreement between the parties with the written consent of the insurer, and no such action shall lie in either event unless brought within one year thereafter."

These are conditions as between insurer and insured (respondent and appellant) and contemplates action after the loss has been ascertained by judgment. Section 24 deals with the rights of third parties who have recovered a judgment. If the latter should fail to realize on the judgment within a year and the insured deferred action beyond that time he could not sue at all. Further if a *bona-fide* agreement was entered into for the settlement of the damage claim between appellant and respondent and the damages due the Latremouilles paid, the latter could not sue appellant under section 24 (*Barlow* v. *Merchants Casualty Insurance Co.* (1929), 41 B.C. 427).

Continental Casualty Co. v. *Yorke* (1930), S.C.R. 180 was relied upon by appellant on two grounds (a) that it must be established that respondent legally incurred a liability by reason of his negligence and (b) that the production of the judgment obtained is not sufficient proof of that fact. These contentions are said to rest on the judgment of Lamont, J. at p. 185. In dealing with the prerequisites when the insured sues the insurer he states:

MACDONALD, J.A.

"She must, in my opinion, in order to succeed, have established (1) the agreement to indemnify; (2) that the bodily injury to another insured against had been inflicted by her automobile, and (3) that she was legally liable in damages to the respondent for the injuries received by her."

Respondent established the contract to indemnify by production of the policy. As to Nos. (2) and (3) paragraph 4 of the statement of claim alleges that injuries were received, death ensuing, while in respondent's automobile and that is admitted in the statement of defence. Paragraph 5 alleges the judgment was obtained "for damages" and that too is admitted.

"A person who has covenanted to indemnify another against liabilities and actions in respect thereof is, as between himself and the party indemnified, estopped from disputing the judgment in an action against the

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latter, not because he is a privy, but because that is the true meaning of the contract":

Halsbury's Laws of England, Vol. 13, p. 347.

In the *Yorke* case the action was, not by the insured but by the judgment creditor, between whom and the insurer there was no privity of contract. She had a bare right to sue conferred only by the statute and there was no contractual relation between the parties to the suit. If it is necessary to establish any further respondent's liability, *i.e.*, that the judgment was obtained because of negligence, I think the fact that appellant took over the conduct of the defence, acted for respondent until the adjourned hearing, obtained knowledge of all the facts and then retired on the ground, not that respondent was not liable because of negligence, but that he was intoxicated (thus affirming the policy except as to one point) it cannot now be heard to insist that in the present action all the facts in the former action should be traversed to shew that the judgment secured properly followed from the evidence adduced. In *Parker* v. *Lewis* (1873), 8 Chy. App. 1056 at p. 1059 Sir G. Mellish, L.J. stated at p. 1059:

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"It is obvious that when a person has entered into a bond, or bought land, or altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard, indeed, if, when he came to claim the indemnity, the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first."

However, I do not think that the *Yorke* case, concerned with different parties, in different relations, intended to decide that this requirement is necessary where there is a contract between the parties to the suit to indemnify against a legal liability such as the judgment against respondent represents. The terms of the policy govern and it discloses a contract to indemnify.

"The insurer agrees to indemnify the insured against all loss or damage which the insured shall become legally liable to pay for bodily injury caused to any person or persons by the ownership, maintenance or use of the automobile."

It is "shall become legally liable to pay" not "paid."

As to the submission that respondent cannot maintain this action in the form in which it was instituted nor maintain the judgment in the form already referred to, *viz.*, "judgment for

$1,804.75 as trustee for Anatole and Marie P. Latremouille" it may be pointed out that in the statement of claim as amended he claims specific performance of the insurance contract. In effect he asks that he should be freed from, or indemnified against, a judgment obtained against him alleging an agreement so to indemnify. The plaintiff (respondent) claims against the defendant (appellant) the sum of $1,804.75 not for himself but for a "judgment due" to others. The contract of indemnity is not so framed as to preclude the insured from any right to sue before he pays the judgment. He may obtain a declaration to be relieved of the obligation and the Court may impose terms to protect all parties although the party for whose benefit, in part, the judgment is obtained is not a party to the action. A Court of Equity may intervene before an actual injury has been suffered in the way of execution or payments. Wright, J., in *Wolmershausen* v. *Gullick* (1893), 2 Ch. 514 dealing with the right of a surety against whom a judgment was obtained by the principal creditor (no part of it being paid) to maintain an action against a co-surety for contribution said at pp. 527-8 quoting from Lord Justice Lindley's work on Partnership, 5th Ed., at p. 374:

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"But in equity it was very reasonably held, that even in the absence of any special agreement, a person who was entitled to contribution or indemnity from another could enforce his right before he had sustained actual loss, provided loss was imminent; and this principle will now prevail in all divisions of the High Court. Therefore a person who is entitled to be thus indemnified against loss is not obliged to wait until he has suffered, and perhaps been ruined before having recourse to judicial aid. Thus in the ordinary case of principal and surety, as soon as the creditor has acquired a right to immediate payment from the surety, the latter is entitled to call upon the principal debtor to pay the amount of the debt guaranteed, so as to relieve the surety from his obligation; and where one person has covenanted to indemnify another, an action for specific performance may be sustained before the plaintiff has actually been damnified."

The action therefore may be maintained as framed, and the contract of indemnity specifically enforced by payment to the party entitled thus relieving respondent of his obligation.

I would dismiss the appeal.

Appeal dismissed.

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

Solicitor for respondent: *H. Alan Maclean.*

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CARLSON v. DUNCAN AND GREEN.

Sale of timber—Interest in land—Registration—R.S.B.C. 1924, Cap. 127, Sec. 34—Cap. 145, Secs. 16 and 41.

In January, 1908, H. sold all the timber standing, growing or lying upon certain lands to K., who was to have as much time as he desired to remove it, including right of entry upon the lands for that purpose. The instrument was duly registered against the lands but K. never exercised his right and died intestate in 1916. In June, 1910, H. sold the lands to A., subject to the conveyance of the timber, and in October, 1929, A. sold the lands to the plaintiff subject to reservations expressed in the original grant from the Crown and subsequent registered conveyances. After K.'s death his heirs joined in a quit-claim deed to the defendants of all their interest in said lands under the agreement respecting timber from H. to K. This instrument was never registered. The defendants entered upon the said lands to cut the timber in March, 1930. An action for an injunction to restrain the defendants from cutting and removing the timber and for damages was dismissed.

Held, on appeal, reversing the decision of MCDONALD, J., that the sale of the timber for the removal of which the purchaser was to have as much time as he desired, was the sale of an interest in land. Section 34 of the Land Registry Act provides that no instrument shall become operative to pass any interest in land until it is registered, and as the quit-claim deed from K.'s heirs to the defendants was not registered they were trespassers on said lands at the time of the commission of the acts complained of.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 16th of October, 1930, in an action for an injunction to restrain the defendants from cutting down and removing from 121 acres of the south-east quarter of section 27, township 3, range 28, west of the sixth meridian, registered in the name of the plaintiff in the Land Registry office at Kamloops, the timber and other trees standing, growing and being thereon. The land in question was owned by one Gustavus Herrling, who on the 17th of January, 1908, entered into an agreement with Alfred T. Kelliher, whereby in consideration of a payment of $100 he did grant, bargain, sell and assign to Kelliher all the cottonwood, fir, cedar and spruce timber standing, growing, lying or being upon said lands, the purchaser to have as much time as he desired to remove said trees and timber from said lands, with the

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right of entering for the purpose of cutting until the timber should be removed. This agreement was duly registered against the land in the Land Registry office. Kelliher never exercised his right and died in 1916. In June, 1910, Herrling conveyed the lands to one L. A. Agassiz, subject to a conveyance of timber being a registered charge against the land. In October, 1929, Agassiz conveyed the property to the plaintiff, subject to reservations expressed in the original grant thereof from the Crown or subsequent registered conveyances. After Kelliher's death his heirs joined in a quit-claim deed by which they "granted, released and quitted claim" to the defendants all the estate, right, title, interest, claim and demand that they had in said lands under the original agreement respecting timber from Herrling to Kelliher. The quit-claim from H.'s heirs to the defendants was never registered in the Land Registry office.

Statement

The appeal was argued at Victoria on the 8th of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Reid, K.C., for appellant: A sale of timber is a contract for sale of real estate. It is an interest in land and the deeds must be registered: see *Laidlow* v. *Vaughan-Rhys* (1911), 44 S.C.R. 458 at pp. 463 and 466; *Ford* v. *Hodgson* (1902), 3 O.L.R. 526; *Bridge* v. *Johnston* (1903), 6 O.L.R. 370, and on appeal (1904), 8 O.L.R. 196. Over 22 years have elapsed and sections 16 and 41 of the Statute of Limitations apply. No time was fixed for taking off the timber and the law implies that it shall be done in a reasonable time: see *Johnson* v. *Dunn* (1905), 11 B.C. 372; *Patterson* v. *McPherson* (1875), 10 N.S.R. 116.

Argument

Edith L. Paterson, for respondents: The abstract shews a conveyance from Herrling to Kelliher of the timber and the conveyance to Agassiz in 1910 is expressly subject to the transfer of the timber to Kelliher. That this was a chattel interest and not subject to registration see *Ramsay* v. *Margrett* (1894), 2 Q.B. 18; *James Jones & Sons, Limited* v. *Tankerville (Earl)* (1909), 2 Ch. 440 at p. 442; *Wilson* v. *McClure* (1910), 16 B.C. 82 at p. 90; *Vaughan-Rhys* v. *Clary* (1911), 15 B.C. 9. As to the work being carried out in a reasonable time see *Llanelly Railway and Dock Co.* v. *London and North Western Rail-*

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way Co. (1875), L.R. 7 H.L. 550 at p. 559; *Crediton Gas Co.* v. *Crediton Urban Council* (1928), Ch. 447 at p. 461.

Reid, in reply, referred to *Morgan* v. *Russell & Sons* (1909), 1 K.B. 357; *Seguin* v. *Boyle* (1922), 1 A.C. 462.

Cur. adv. vult.

3rd March, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I have had the privilege of reading the reasons to be handed down by MACDONALD, J.A., and am in entire agreement with them and with his conclusion.

There should be judgment as prayed for.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: If the property sold is an interest in land which I hold it is the judgment below cannot stand.

The timber here was sold out and out for a specified consideration with lien or licence to enter upon the land for the purpose of cutting and removing same.

My brother M. A. MACDONALD has referred to the evidence quite fully and also the authorities which bear out his conclusions and as they are in accord with my own views it is unnecessary to repeat them.

I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal in my opinion must succeed. The learned judge, with great respect, erred in holding that the defendants (respondents) were not guilty of trespass in entering upon the land of the plaintiff (appellant) and cutting down standing timber and carrying the same away. Firstly, because the defendants did not establish any right in law to enter upon the lands of the plaintiff, the plaintiff being the holder of a certificate of indefeasible title to the lands in question, being certificate of title No. 53138 issued out of the Land Registry office at the City of Kamloops, British Columbia, under date the 7th of December, 1929. Secondly, that the defendants failed upon the evidence adduced at the trial to establish any interest in the land entitling them to enter upon the land and cut down standing timber and carry it away. The defendants attempted to justify under an agreement which was not shewn to have been

executed by the legal heirs at law of Kelliher who held the right to cut the standing timber from one Herrling, the then owner of the land and a predecessor in title to that of the plaintiff. Thirdly, if it could be successfully contended that the rights and privileges granted to the said Kelliher passed to the said defendants, there was failure to shew due registration in the Land Registry office of title thereunder in that the right contended for would be an interest in land and with the lack of registration of that right the Court was disentitled to take notice of any such right as evidence or proof of the title of the defendants to cut down standing timber and to carry it away as against the title of the plaintiff to the land in question: see Land Registry Act, R.S.B.C. 1924, Cap. 127, Secs. 34 and 35, which read as follows:

"34. Except as against the person making the same, no instrument executed before the first day of July, 1905, to take effect after the thirtieth day of June, 1905, and no instrument executed and taking effect after the thirtieth day of June, 1905, purporting to transfer, charge, deal with, or affect land or any estate or interest therein, shall become operative to pass any estate or interest, either at law or in equity, in the land (except a leasehold interest in possession for a term not exceeding three years) until the instrument is registered in compliance with the provisions of this Act; but every such instrument shall confer on each person benefited thereby, and on every person claiming through or under him, whether by descent, purchase or otherwise, the right to apply to have the instrument registered, and to use the names of all parties to the instrument in any proceedings incidental or auxiliary to registration, and that whether or not a party has since died or become legally incapacitated.

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"35. Instruments executed before and taking effect before the first day of July, 1905, transferring, charging, dealing with, or affecting land or any estate or interest therein, unless registered before the said date (except a leasehold interest in possession for a term not exceeding three years), shall not be receivable by any Court or any registrar as evidence or proof of the title of any person to such land, as against the title of any person to the same land, registered on or after the first day of July, 1905, except in an action before the Court questioning the registered title to such land on the ground of fraud wherein the registered owner has participated or colluded."

It is unnecessary to deal with the question of the Statute of Limitations as affecting the alleged right of the defendants to enter upon the land as no right has been established upon the evidence. Further, through the lack of registration, the Court is inhibited from taking notice of any such claimed right through failure to register the same.

The learned trial judge, with great respect, erred in law in

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holding that the alleged right sought to be set up by the defendants to cut standing timber and carry it away was not an interest in land and in this connection I would refer to *Laidlaw* v. *Vaughan-Rhys* (1911), 44 S.C.R. 458 where at p. 463 Idington, J. said:

"Can this sale of a licence to cut timber mean anything but a sale of real property? In principle it seems clear. In some cases the bargain may be relative to the price of timber when cut and, hence, have no relation to the land. I think confusion apt to arise, and has in some cases arisen, out of a non-observance of this distinction."

The point has received most careful attention in the Courts of Ontario and I would refer to the following cases: *Bridge* v. *Johnston* (1903), 6 O.L.R. 370, Ferguson, J. at pp. 372-3; *Hoeffler* v. *Irwin* (1904), 8 O.L.R. 740, and at pp. 745-6, Osler, J.A. said:

"It is unnecessary to examine or attempt to reconcile the numerous and not altogether consistent decisions bearing upon the question under what circumstances an ordinary contract for the sale of growing timber or trees, or other things usually treated as part of the realty, to be cut or pulled down and taken away, will be regarded as a contract for the sale of an interest in land, or for the sale of goods and chattels. See *Marshall* v. *Green* (1875), 1 C.P.D. 35, which was considered in *The Saint Catharines Milling and Lumber Company* v. *The Queen* (1890), 2 Ex. C.R. 202, 229, and *Bulmer* v. *The Queen* (1893), 3 Ex. C.R. 184, at pp. 217, 218, affirmed (1894), 23 S.C.R. 488, at p. 495. See also *Lavery* v. *Pursell* [(1888)], 39 Ch. D. 508, and *Summers* v. *Cook* [(1880)], 28 Gr. 179. . . .

MCPHILLIPS, J.A.

"In *Macdonell* v. *McKay* [(1868)], 15 Gr. 391, it was held by Spragge, V.-C., that an agreement to transfer an interest in a timber limit was an agreement relating to an interest in land within the Statute of Frauds, and in the same case in appeal (1871), 18 Gr. 98, Draper, C.J., was of the same opinion, holding that the provisions of the Crown Timber Act were conclusive upon the question. The judgment below was reversed upon another ground, but no member of the Court as then constituted intimated any dissent from this view.

"To the same effect are the cases above referred to of *The Saint Catharines Milling and Lumber Company* v. *The Queen*, and *Bulmer* v. *The Queen*. And see *Breckenridge* v. *Woolner* (1856), 3 Allen N.B. 303; *Sinnott* v. *Scoble* (1884), 11 S.C.R. 571, at pp. 581, 584. The recent case of *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405, is a decision of the Judicial Committee upon the same point under a provision of a Newfoundland Act similar to our own.

"I have not overlooked the case of *Bennet* v. *O'Meara* (1868), which is also a decision of Spragge, V.-C., reported in 15 Gr. 396, immediately after *Macdonell* v. *McKay*. The question there, however, was one of representation of parties only, and the two cases are not inconsistent, as may be seen from the reasoning in the judgment in the latter."

The question as to whether the defendants' alleged right to cut and carry away the timber was in its nature or not irrevocable as pressed by the learned counsel for the defendants is not a necessary matter for consideration in view of the conclusion that I have arrived at that the defendants in any case failed to establish a legal chain of title to the defendants of the right granted to Kelliher to cut and carry away the timber. Further, there is the insuperable difficulty in the way of the defendants consequent upon the non-compliance with the provisions of the Land Registry Act.

Then as to the question of the Sale of Goods Act (R.S.B.C. 1924, Cap. 225) and that the right to cut and carry away timber is within the purview of that statute, which was advanced by the learned counsel for the defendants, I would call attention to *Morgan* v. *Russell & Sons* (1909), 1 K.B. 357 and I may say that the statute law is analogous. Lord Parmoor in *City of London Corporation* v. *Associated Newspapers, Limited* (1915), A.C. 764 at p. 704 said:

"I do not think that cases decided on other Acts have much bearing on the construction of the Acts or sections on which the present case depends. So far, however, as it is allowable to be guided by decisions in analogous cases I agree with Swinfen Eady, L.J." MCPHILLIPS, J.A.

There it was held where it was the sale of slag on the demised premises that it was not a contract for the sale of goods within the meaning of section 62 of the Sale of Goods Act, 1893, but that the agreement was a contract to grant an interest in land and that as the vendor's failure to perform his contract was due solely to a defect in his title the purchasers could not recover any damages for the loss of their bargain. Lord Alverstone, C.J. at p. 365 said:

"The case for the appellants was rested upon two grounds: it was first said that this was a contract for the sale of goods within s. 62 of the Sale of Goods Act, 1893, and therefore the ordinary rule of damages applies; and secondly that, even assuming that the cinders and slag were not goods, the principle of *Bain* v. *Fothergill* [(1874)], L.R. 7 H.L. 158 would not apply, and the appellants were entitled to general damages. I am clearly of opinion that this was not a contract for the sale of goods. The respondent Morgan did not contract to sell any definite quantity of mineral, nor was it a contract for the sale of a heap of earth which could be said to be a separate thing. In my view the contract was a contract to give free access to certain tips for the purpose of removing cinders and slag which formed part of the soil at the price of 2*s.* 3*d.* per ton, to include the value of the

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slag so taken, for so long as the appellants chose to exercise their option to take. The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick earth or coal on payment of a price per ton."

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In my opinion, therefore, the plaintiff is entitled to a perpetual injunction restraining the defendants from cutting and carrying away timber from the lands in question, an account of the waste already committed upon the lands and judgment for the amount found due by reason thereof, damages for trespass upon the lands, and the plaintiff should have the costs of the action and costs of the assessment of damages for waste and trespass. There should be a new trial confined to the assessment of the damages: that is the appeal, in my opinion, should be allowed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Respondents claim the right to cut and remove timber from appellant's land by virtue of an agreement entered into on the 17th of January, 1908—over twenty years ago—between appellant's predecessor in title, Gustavus Herrling and one Kelliher by which the former did "grant, bargain, sell and assign" to the latter for a consideration of $110

"all the cottonwood, fir, cedar and spruce timber, now standing, growing, lying or being in and upon those certain parcels of land [describing it] to hold the said trees and timber and every part thereof to the purchaser his heirs and assigns to and for his and their sole and only use, the purchaser [Kelliher] to have as much time as he desires to remove said trees of timber from the said land."

with right of entry for the purpose of cutting until the timber should be removed.

Kelliher having "as much time as he desires" to remove the timber, never exercised that right, and died in 1916. This agreement was registered against the land in the Land Registry office. In June, 1910, Gustavus Herrling conveyed the land to one L. A. Agassiz subject, however, "to the reservations, limitations, provisions, and conditions expressed in the original grant thereof from the Crown and a conveyance of timber being a registered charge against" the land (describing it), and in October, 1929, Agassiz conveyed it to this appellant again subject to "subsequent registered conveyances."

After Kelliher's death intestate, his heirs joined in a quit-

claim deed by which they "granted, released, and quitted claim" to the respondents of all "the estate, right, title, interest, claim and demand" that they or each of them had in and over said lands under the original agreement respecting timber from Herrling to Kelliher, and no doubt to the surprise of appellant who thought the agreement referred to passed into the limbo of forgotten things respondents proceeded to exercise their alleged rights acquired from said heirs to cut and remove the timber on appellant's land. Respondents claim to exercise all the rights acquired by Kelliher in 1908 although the transfer or quit claim from said heirs to them was not registered in the Land Registry office or elsewhere.

Appellant sued for an injunction to prevent a trespass, damages and for an accounting. The learned trial judge, holding that the Kelliher agreement related to chattels and granted a perpetual right—a licence irrevocable and in perpetuity—to cut and carry away timber dismissed the action. He held that the Kelliher agreement was not one in respect to an interest in land.

What is the nature of the interest transferred by the Kelliher agreement? If it is a transfer of chattels it should not have been registered in the Land Registry office. If it relates to an interest in land section 34 of the Land Registry Act (R.S.B.C. 1924, Cap. 127) provides that such an agreement is not operative to pass any estate or interest in the land until the instrument is registered and as the transfer or quit-claim deed from the heirs of Kelliher to these respondents was not registered they would be trespassers at the time of the commission of the acts complained of.

MACDONALD, J.A.

In *Ford* v. *Hodgson* (1901), 3 O.L.R. 526, an agreement to sell "all the timber of every kind on lot 23 . . . for the sum of $400" with three years to remove it, was held to be a sale of an interest in land. If by the transfer property in the timber was to pass while attached to the freehold (as in the case at Bar) and not after it was severed it is an interest in land. It is a contract for the sale of growing timber "standing, growing, lying or being in and upon said lands," etc., not to be severed immediately. Boyd, C. (Ferguson, J. concurring), held that "the sale of the timber, to be removed in three years by the purchaser was" the sale "of an interest in land." In the case at

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Bar the purchaser was to have, not three years but "as much time as he desires" to remove it. The form of conveyancing used properly enough was not one applicable to a sale of chattels. It was not a mere chattel interest that was transferred. The thing sold, *viz.*, standing timber as it stood at the time of sale is an hereditament. There was no intention to treat the timber as a chattel. It is not as if the owner was to cut and then sell: the purchaser was to enter, cut and remove it. There is authority for saying that where the parties agree that the thing sold shall be immediately withdrawn, the land is to be considered as a mere warehouse for the thing sold and the contract a sale of goods. That is not the character of the contract in question. It is similar in principle to the contract considered in *Lavery* v. *Pursell* (1888), 39 Ch. D. 508, except that in the case at Bar to make it stronger an indefinite time was given for the removal of the timber. If it is to be interpreted literally the purchaser and his heirs could use his and their own judgment in respect to the time for removing it; or perhaps never remove it at all. Such a contract in my opinion relates to an interest in land.

MACDONALD, J.A.

Other authorities dealing with the sale of timber where the contracts were held to be in respect to an interest in land are *McNeill* v. *Haines* (1889), 17 Ont. 479. Proudfoot, J., at p. 490 says:

> "I continue to hold the opinion I expressed in *Summers* v. *Cook* [(1880)], 28 Gr. 179, that a contract for standing timber to be cut and removed is a contract for a chattel, even though a considerable time may be given for the removal. But in this opinion it seems that I am in a hopeless minority. The cases referred to in the argument shew that it must be considered an interest in land, and not a chattel."

It was submitted that "timber," such as we are considering in the Kelliher agreement, is within the definition of "goods" in section 2 of the Sale of Goods Act (Cap. 225, R.S.B.C. 1924) and must therefore be treated as a chattel. The definition is:

> "The term [goods] includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

But the agreement did not provide that the timber should be "severed before sale" nor "under contract of sale." In the meantime before severance he has title to an interest in the timber which is part of the land. This point was considered in

Morgan v. *Russell & Sons* (1909), 1 K.B. 357, where it was contended that a contract for the sale of slags and cinders attached to or forming part of the land was "goods" within the meaning of a section of the English Act corresponding to our own. Lord Alverstone, C.J., dealing with this contention and rejecting it said (p. 365):

"The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth *in situ* so much gravel or brick earth or coal on payment of a price per ton."

Whether a contract relating to timber constitutes a sale of chattels or relates to an interest in land depends upon the terms of the contract. Because of the special terms of the contract we are considering it is not one for the sale of goods.

Other points were raised on this appeal, *viz.*, (1) the right of appellant to sue in view of the fact that he obtained title to the land, subject to the Kelliher agreement and could only (it was submitted) obtain title to the timber from Kelliher or his successors; (2) the effect, if any, of the Statute of Limitations, as affecting an agreement under which no entry was made for over twenty years: (3) whether the right to have "as much time as he desires" to remove the timber meant a reasonable or an unlimited time; (4) and whether or not by reason of certain acts appellant was estopped from maintaining an action of trespass. On the latter point the evidence fails to establish estoppel; and as to the others they are of no moment once it is determined that the contract relates to an interest in land. With that finding the unregistered transfer from the heirs of Kelliher to respondents conveyed no estate or interest in the land by reason of section 34 of the Land Registry Act and they as trespassers committed waste upon appellant's land when they unlawfully entered upon it and cut timber.

MACDONALD, J.A.

The appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Reid, Wallbridge, Gibson & Sutton.*
Solicitors for respondents: *Hamilton Read & Paterson.*

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PRICE
v.
B.C. MOTOR TRANSPORTATION LTD.

PRICE *ET AL.* v. B.C. MOTOR TRANSPORTATION LIMITED AND LEDBURY.

Automobiles — Collision — Negligence — Damages—Families' Compensation Act—Contributory negligence—Evidence—R.S.B.C. 1924, Cap. 85—B.C. Stats. 1925, Cap. 8.

At about 8.30 in the morning P. was driving his car southerly and entering on the Connaught Bridge in Vancouver. At the same time the defendant L. was driving a motor-bus of the defendant Company northerly through the span of said bridge. When emerging from the span L. saw P. about 60 feet away turning out to pass a car that was in front of him. P., then seeing the motor-bus, attempted to return to his former position but the roadway being slippery his car skidded over to the east side in front of the motor-bus. When L. first saw the car skidding he thought he could still get past on its east side, but as the car continued to skid easterly he then turned sharply to the west but too late to avoid hitting the car. L. lost control and the bus went through the railing on the west side of the bridge overturning, and P.'s car continued to skid, crashing into the west span of the drawbridge. P. was thrown out and received injuries from which he died. The plaintiffs recovered judgment in an action under the Families' Compensation Act.

Held, on appeal, reversing the decision of MCDONALD, J. (MACDONALD, J.A. dissenting), that P. in so driving his motor-car, precipitated a situation that resulted in inevitable accident and there was no evidence that the driver of the motor-bus could, by the exercise of reasonable care, have prevented the accident from taking place.

APPEAL by defendants from the decision of MCDONALD, J. of the 10th of October, 1930, in an action for damages under the Families' Compensation Act, the plaintiff, Marjorie Price, suing on behalf of herself and as next friend of the six children of Andrew F. Price, deceased. At about 8.30 in the morning of the 1st of September, 1929, Andrew F. Price, the husband of Marjorie Price, was driving a "Star" touring-car southerly and entering upon the Connaught Bridge. At the same time a motor-bus of the defendant's, driven by the defendant Ledbury, was proceeding north through the drawbridge of said bridge. Ledbury was the only witness who saw the accident, and according to his evidence, as he was emerging from the north end of the draw, Price's car came out from behind another car going in the same direction (south) evidently trying to pass

Statement

it, but seeing the defendant motor-bus about 60 or 70 feet away he then attempted to stop and again get behind the car in front of him. His car then skidded over to the easterly side of the bridge and right in front of the defendant's motor-bus. Ledbury on seeing the car skid, still thought he could go on the easterly side of it, but as the skidding continued he saw that he could not do so and turned sharply to the left, trying to clear the car on its west side, but he was then too close and the cars collided. Ledbury then lost control and the bus went through the railing on the west side and fell into the mud in a shallow spot in False Creek. Ledbury was severely injured, but was pulled out from under the bus. Price's car, after the impact, proceeded on and struck a girdle of the drawbridge. Price was thrown out and received injuries from which he died.

Statement

The appeal was argued at Victoria on the 22nd and 23rd of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Maitland, K.C., for appellants: The judgment was for $24,000 damages. The learned judge stated there was a great deal of room for doubt in the case, and we submit the judgment was against the evidence and weight of evidence. If a driver turns out to pass a car going in the same direction it is his duty to see the road is clear of traffic coming in the opposite direction: see *Kenzie* v. *Hart* (1927), 3 D.L.R. 839; *McDonald* v. *Bezanson* (1928), 60 N.S.R. 333; *Tait* v. *B.C. Electric Ry. Co.* (1916), 22 B.C. 571; *Thomas* v. *Ward* (1913), 11 D.L.R. 231; *Gastle* v. *Brown* (1927), 32 O.W.N. 349. Deceased was guilty of contributory negligence that continued to the moment of the accident, there could not therefore be any ultimate negligence: see Annotations (1927), 4 D.L.R. 8; *Elliott* v. *Toronto Transportation Commission* (1927), 32 O.W.N. 118. As to whether the Contributory Negligence Act applied in an action under Lord Campbell's Act see *McLaughlin* v. *Long* (1927), S.C.R. 303; *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129; *Nichols Chemical Co. of Canada* v. *Lefebvre* (1909), 42 S.C.R. 402.

Argument

Sinnott, for respondents: The evidence shews that Ledbury was going at a high rate of speed. This was really the cause of

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the accident, as he saw the deceased's car skidding in time to stop if he had been going at a reasonable speed. We submit there was no car in front of deceased's car as stated by Ledbury. The evidence of Bennett, the bridge tender, should be accepted as to this. We submit the damages awarded are not excessive in the circumstances. The wife is left with six small children. In an action based upon an accident the production of an eye-witness is not necessary: see *Longman* v. *Cottingham* (1913), 5 W.W.R. 969.

Argument

Maitland, replied.

Cur. adv. vult.

3rd March, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: With every respect for the learned judge appealed from I would set aside his judgment. There is no evidence upon which the judgment can be supported. This is the conclusion to which I came at the hearing of the appeal and I have found nothing in the appeal book to shake that conclusion. The appeal should be allowed.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: The learned judge seems to have based his judgment on the evidence of Ledbury as follows:

"So at 15 miles [an hour] on that pavement that morning, if you wanted to stop, within what distance could you stop? I judge that morning an emergency stop at 15 miles an hour, it would be the length of the bus if not maybe a little more.

"That would be 30 or 35 feet? Yes."

When Price pulled out at a distance of 100 feet from the span the cars were, according to the evidence, approaching each other at about the same speed and it was not until they were much closer than that Ledbury realized there was danger, turned to the right to avoid and, finding Price's car was still coming in front of him and an accident was inevitable that he swung sharply to the left to avoid but could not clear.

In considering the effect of the evidence upon which the learned judge makes his finding we must not lose sight of the situation before the impact. Attempting to pass the other car so close to the span with the condition of the pavement as it was on that morning was dangerous, and the way the picture pre-

sents itself to me from the evidence is, that Price attempted to pass this other car and upon seeing the bus in the way applied his brake to slow down so as to draw back behind the car and in so doing his car got into a skid which gradually carried it over in front of the bus and it was only at that point Ledbury realized the danger and attempted to avoid it. Had there been no skid the evidence is that there would have been ample room to pass without danger, unless Price made too wide a turn, so that as I think from the evidence Ledbury did not realize or anticipate the danger until Price's car was almost over in front of him. He realized it was getting dangerous when the other car continued coming over in front of him and not straightening out at a time too late to take effective action and I do not think he can be held blameable under all the circumstances.

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His answer as to stopping within 30 or 35 feet at 15 miles an hour should not be taken with regard to the situation as it had arisen as deposed to but that if called upon to come to a stop ordinarily under the condition of the pavement that morning he could do so in that distance.

If liability cannot be fixed upon Ledbury on his own testimony then I consider no case is made out by plaintiff. It is true there is evidence based on theory as to the position of the Price car after the accident and the manner in which the bus left the bridge, but my view is that it is a bold man who will undertake to say just what a skidding car will do under any circumstances. They would seem to do at times what would be considered almost impossible things.

I am with great respect of the view that the learned judge below misconceived the effect that should be given to the answer as to distance in which Ledbury could have stopped his car as I have above outlined and would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal in respect of a collision between a motor-bus and a motor-car on Connaught Bridge in the City of Vancouver. There was but one eye witness—Bennett the bridge tender on the bridge—of the accident other than one of the participants in the accident the driver of the motor-bus, the other participant, the driver of the motor-car, being killed. The bridge tender really saw nothing that avails in

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determining the liability for the accident, he merely casually looking up, reading a newspaper at the time, and hearing the crash saw that a collision had taken place. The bridge tender does say though that it had rained and the surface of the bridge was slippery with oil and rain. The learned trial judge found in favour of the plaintiffs (respondents) the action being brought under the Families' Compensation Act, R.S.B.C. 1924, Cap. 85—Lord Campbell's Act.

The learned trial judge in his reasons for judgment said this, being an excerpt therefrom:

"There are some cases in which a trial judge is able to feel at the conclusion of the evidence that his conclusions are almost beyond peradventure the right conclusions. This is not such a case. I recognize that there is a great deal of room for doubt and yet I have to decide the case some time and I do not feel that any further consideration of it will assist me. The plaintiff is unfortunate in the paucity of her evidence. The fact that Price is dead and there are no actual eye witnesses makes her case very difficult."

Therefore the case is to be viewed as one in which the learned trial judge was affected by the knowledge borne in upon him that it was a case where there was "a great deal of room for doubt," and this is to be remembered that in a negligence action the *onus probandi* rested upon the plaintiffs to make out their case beyond any reasonable doubt. The mere fact that an accident takes place does not in itself establish that any actionable wrong has been committed by either party. Certainly in this case the weight of evidence is not upon the side of the plaintiffs but is unquestionably upon the side of the defendants. The motor-bus was proceeding north on the bridge on its way into the centre of the city, the motor-car was proceeding south away from the centre of the city. The motor-bus was on the span of the bridge or about emerging therefrom upon its proper side—the east side—the motor-car was, when first seen, upon its proper side following another motor-car and when the vehicles were somewhere about 50 or 60 feet apart the deceased driving the motor-car turned out to pass the motor-car ahead of him. Seeing the motor-bus he attempted to return to his former place but owing to the state of the roadway—oily and slippery—his motor-car skidded over to the east right in front of the motor-bus so much so that the driver of the motor-bus was placed immediately in the "agony of collision" and he vainly in an attempt

MCPHILLIPS, J.A.

to avoid a collision turned sharply to the west, but in so doing struck the motor-car a glancing blow on its right side. This indicates how far over the motor-car had got and upon its wrong side and in the way of the motor-bus. The motor-bus, in thus attempting to avoid the motor-car, mounted the board walk which runs along the west side of the bridge and crashed through the bridge rail and went down a great distance to False Creek an arm of the sea, turned over and imbedded itself in the mud and water there present, the driver of the motor-bus being buried thereunder. Miraculously the driver of the motor-bus was not killed, but was very seriously injured; the driver of the motor-car suffering injuries from which he died. Upon these facts must be gleaned some sufficient piece of evidence which can reasonably establish that the driver of the motor-bus was reasonably at fault and was guilty of some negligence that can be said to have been the proximate cause of the accident or rather was it upon all the facts inevitable accident produced by the conduct of the driver of the motor-car? I cannot persuade myself—much as I sympathize with the plaintiffs—that the driver of the motor-bus was guilty of any act of negligence that would constitute an actionable wrong and entitle the plaintiffs to succeed, as they have succeeded, before the learned trial judge. In arriving at this conclusion I do so with the greatest respect to the learned trial judge who on his part arrived at the conclusion that legal liability had been established against the defendants for negligent conduct of the driver of the motor-bus. I fail to see what evidence there was which entitled the learned judge to hold that at the time of the accident the motor-bus was out of control or that it was possible for the motor-bus to be handled in any more effectual way than it was when the negligent conduct of the driver of the motor-car presented a situation of imminent peril to the driver of the motor-bus—the motor-car precipitated right across his front, then being upon an oily and slippery roadway as evidenced by the skidding of the motor-car. It was too late to apply brakes to bring the motor-bus to a stop, there was not sufficient space to effect this, the only thing to do was to attempt to get out of the way of the motor-car by a sharp turn to the west. This he did and he took grave chances and nearly lost his life in his attempt to save the

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life of the driver of the motor-car who unfortunately lost his life. Upon the facts of the case the driver of the motor-car was the author of his own death and it cannot be attributed to the driver of the motor-bus or his employers. This accident is as it occurs to me one of the most illuminative cases illustrative of the "agony of collision." It is in my opinion idle to attempt to place blame upon the driver of the motor-bus for that which was brought about by the gross negligence of the driver of the motor-car. Visualize for the moment this which might well have been the case—the motor-bus full of passengers. What a tragedy that would have been. As it was it was tragedy enough. In saying this I do not want to and it is far from my thoughts to wound the feelings of the relatives of the driver of the motor-car, they have my deepest sympathy, but judges cannot shrink from doing their duty no matter how unpalatable it may be. I would refer to what Lindley, M.R. (afterwards Lord Lindley), said in giving the judgment of the Court of Appeal in England in *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402:

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"The case was not tried with a jury, and the appeal from the decision of the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge, with such other materials, if any, as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong."

After the most careful consideration of this case I cannot advise myself that the judgment arrived at by the learned trial judge is supportable upon the evidence adduced at the trial and I find myself in the position of being driven to the conclusion that the learned trial judge went wholly wrong when he found in favour of the plaintiffs and that the defendants were answerable for this regrettable accident—one which was inevitable owing to the negligence of the driver of the motor-car, precipitating as he did, a situation resulting in inevitable accident, and no evidence whatever that the driver of the motor-bus could, by the exercise of reasonable care, notwithstanding the negligence of the driver of the motor-car, have prevented the accident

occurring. Having this view it follows that in my opinion the appeal should be allowed and the action dismissed.

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MACDONALD, J.A.: This is an appeal from the decision of Mr. Justice D. A. McDONALD awarding damages against appellant in the sum of $15,000 for the widow and $1,500 for each of the six children of the deceased ranging in age from five months to 14 years. The action was brought by the widow under the Families' Compensation Act, R.S.B.C. 1924, Cap. 85, because of the alleged negligence of appellant's driver in failing to avoid a serious accident on the Connaught Bridge, Vancouver. Plaintiff's husband, driving a motor-car, was killed in a collision with a large motor-bus belonging to appellant Company and driven by its servant. This motor-bus after colliding with deceased's car plunged through the railing of the bridge and fell from a great height into an arm of the sea. Fortunately the driver escaped death. The total amount awarded, $24,000, while generous, should not, I think, be interfered with on the ground that it is excessive.

It was strenuously urged that the judgment should not stand and it must, I think, be conceded that the case is not altogether free from difficulty. The learned trial judge stated that "there is a great deal of room for doubt." However, after hearing the evidence and taking a view, he decided that if the driver of appellant's large motor-bus had it under control shortly before the impact occurred he could have stopped his car in time to avoid it. I cannot find evidence to support the view that the motor-bus was "out of control" in the ordinary sense in which that term is employed, but apart from that, there is the best possible evidence, *viz.*, that of appellant's driver, that had he stopped his car the accident would not have happened. He stated that with the motor-bus travelling 15 or 20 miles an hour he could bring it to a stop within 30 or 35 feet; in fact he testified that if travelling at a higher speed (25 to 30 miles) he could on a wet highway stop it within that distance. I think, with a motor-bus weighing nearly six tons, he was too sanguine in stating that he could stop it on a wet street, within so short a distance—a distance only six feet more than the length of the

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bus itself. However, he gave that evidence and appellant cannot complain if it is accepted.

The learned trial judge also found—or at all events that inference may be drawn from his judgment—that had appellant's driver checked his speed the accident would have been averted: in other words the impact would be so slight that serious consequences would not ensue. To quote from the reasons for judgment "he ought to have slowed his car down and he could have done so on his own evidence." The trial judge also suggested that if, as some evidence, not entirely satisfactory, indicated, the driver of appellant's car was travelling at a higher rate of speed than he admitted it was because of it that the accident could not be avoided.

Two rival views, as to what occurred, were submitted to us in argument. According to the evidence of appellant's driver he was travelling north on the proper side of the bridge. He entered upon a span or draw-bridge, 264 feet in length, and when about half way through it, noticed a car (not deceased's) coming south on the right-hand side about 200 feet distant from him. These distances are necessarily approximate. When the appellant's driver was about to emerge from the draw and the car sighted was about 100 feet from the north end of it another car driven by deceased (noticed now for the first time by appellant's driver) turned out to pass the car ahead of him. Noticing, however, that it was not prudent to do so because of the proximity of the on-coming bus, he suddenly checked his speed to resume his place behind the car he attempted to pass. This action doubtless involved a sharp application of the brakes. At all events the car of the deceased skidded or drifted at an angle to the other side of the roadway in front of appellant's motor-bus now only 50 or 60 feet away.

MACDONALD, J.A.

Appellant's driver was not called upon to take precautions (beyond ordinary care in driving) until deceased's car drifted over to his side of the road. He was not obliged to take precautions when he saw deceased turn out to pass the car in front of him as that manœuvre could and should be executed without danger to anyone. If it could not, it should not have been attempted. When, however, deceased's car skidded to the east

side of the roadway the motor-bus driver was called upon to act and a failure to take reasonable precautions at that time would amount to negligence. First, believing that he could pass to the right of deceased's car appellant's driver turned his motor-bus slightly to the right but finding that the car was apparently still slowly moving obliquely in front of him, thus leaving insufficient space to pass on that side, he turned sharply to the left, too late however to avoid hitting the right side of deceased's car. The impact caused the smaller car to circle and finally to dash ahead in a southerly direction coming in contact with the girders on the west side of the draw. Appellant's motor-bus mounted a sidewalk, broke through the railing and fell off the bridge. It is curious, on the assumption that the accident took place in the way described, that the smaller car should be found at the draw. One would expect to find it driven the other way. It is, however, not at all improbable from the angle of impact that it proceeded in the way described.

On the foregoing facts, accepting the evidence of appellant's driver, was his negligence (if any) the substantial cause of the accident? First as to the alleged negligence of the deceased. He should not have turned out to pass the car in front of him, seeing, as he should, that the motor-bus was approaching between the girders of the draw; or if he did so, he should have so controlled his car that upon seeing the on-coming motor-bus he could get back behind the car ahead of him without skidding. On a wet street one should look about carefully before attempting to pass another car. It was, too, because of the negligent driving of the deceased that his car skidded or drifted in front of the motor-bus. He should, on a wet street, making a turn which made it necessary to cross over rails, particularly with the old style of tires (not balloon tires) that skid more readily, have driven so carefully that his car would not skid.

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After the deceased skidded in front of the on-coming bus, however, he was helpless: he could not do anything to avoid the accident. His original negligence was exhausted. Only one person could avoid it, *viz.*, appellant's driver 50 or 60 feet away. By his own evidence, as stated, he might easily have stopped within that distance—he said he could stop in 30 or 35 feet—and if he had done so the accident would not have occurred. He

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negligently adopted a course which did not prevent the accident, a course which if successful would allow him to proceed without loss of time (and there was some slight evidence that he was in a hurry) whereas he might have adopted another course, *viz.*, to stop, that would effectually prevent it. Even if he only reduced his speed the impact would be slight. One cannot speak of the agony of collision with a space of 50 or 60 feet between the two cars. It is a question of fact at what point that principle should be applied. Events happen so quickly in motor accidents that the driver must be on the alert at all times. Serious errors of judgment, or even wrong decisions honestly made, may in all the circumstances be regarded as negligence. The learned trial judge evidently did not believe that the driver of the motor-bus, with at least 50 feet to operate in, should be acquitted of negligence in failing to stop and we should not say that he was clearly wrong in so finding. The first duty in such an emergency would be to stop or to try to stop (unless the attempt to do so would cause a skid) at the same time veering to the left to avoid the impact, if possible, should the attempt to stop wholly fail. In this case, however, by his own evidence it would not have failed.

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Viewing the accident therefore as outlined and bearing in mind that the deceased could not at the crucial time make any contribution to the task of averting a collision the ultimate negligence causing this accident must be attributed to the driver of appellant's car. The question of contributory negligence therefore disappears and the possible application of the Contributory Negligence Act, B.C. Stats. 1925, Cap.8, to cases arising under Lord Campbell's Act does not arise.

In respect to the other submission, as to how the accident occurred, *viz.*, that appellant's driver emerged from the span wrongly turning to the left side of the road, in other words invaded the territory reserved to cars travelling south, and while there collided with deceased's car (no car being ahead of him at all) I do not think the trial judge accepted that view. If he thought the accident occurred in that way he would have no difficulty in concluding that appellant's driver was wholly to blame and would not have expressed doubt as to ultimate liability. It is surprising, if there was a car ahead of deceased, that its driver

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did not stop when he heard or possibly should have heard the crash, to offer assistance. Perhaps the noise of his car prevented him from hearing it. At all events, if, as I think, there was a car ahead it has not been located. I do not think the accident occurred in that way. The learned trial judge based his judgment largely on the account given by appellant's driver as to how the accident occurred and I prefer to accept that view.

I would dismiss the appeal.

Appeal allowed, Macdonald, J.A. dissenting.

Solicitors for appellants: *Maitland & Maitland.*
Solicitor for respondent: *P. J. Sinnott.*

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MCDONALD, J. (In Chambers)

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Case stated — By-law—Regulating stands for vehicles—Classifying automobiles used for hire—Validity of by-law—By-law of City of Vancouver, No. 2095—B.C. Stats. 1918, Cap. 104, Sec. 7—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163, Subsec. 135 (j).

Accused was charged with having unlawfully permitted a vehicle used for hire to remain standing in a public place, said place not being one of those public places expressly allowed and designated as a stand for such vehicles. The vehicle in question was an automobile used for hire and not provided with a meter for measuring the distance travelled. The by-law distinguishes between metered and non-metered cars for hire and provides metered cars with much more parking space than non-metered cars. The charge was dismissed on the ground that the sections of the by-law under which the charge was laid were *ultra vires.*

Held, on appeal, by way of case stated, affirming the decision of the deputy police magistrate that under the Vancouver Incorporation Act the licensing by-law was passed dividing motor-vehicles into seven classes one of which (Class "C") includes "every motor-vehicle used exclusively as a taxi-cab or touring-car," etc. The by-law in question purports to reclassify the taxi-cabs and touring-cars included in Class "C" by distinguishing between metered cars and non-metered cars and allowing more parking space for the former. No such power is given the council by the Vancouver Incorporation Act and the sections of the by-law so reclassifying the cars included in Class "C" are *ultra vires.*

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Statement

APPEAL by way of case stated by deputy police magistrate Kerr of the City of Vancouver from his dismissal of a charge against the accused for having unlawfully permitted a vehicle used for hire to remain standing in a public place, namely, on Abbott Street, said place not being one of those public places expressly allowed and designated as a stand for such vehicles. The charge was dismissed on the ground that the sections of By-law No. 2095 under which the charge was laid are *ultra vires* the City Council. The question was whether the deputy police magistrate was right in so deciding. Argued before MCDONALD, J. in Chambers at Vancouver on the 16th of April, 1931.

McCrossan, K.C., for City of Vancouver.
J. E. Bird, for Johnston.

17th April, 1931.

Judgment

MCDONALD, J.: This is a case stated by Paul McD. Kerr, Esquire, deputy police magistrate of the City of Vancouver. The respondent was charged before the magistrate with having unlawfully permitted a vehicle used for hire to remain standing in a public place to wit: on Abbott Street, said place not being one of those public places expressly allowed and designated as a stand for such vehicles. The vehicle in question was an automobile used for hire and not provided with a meter for measuring the distance travelled. The charge was dismissed, the learned magistrate holding that the sections of the by-law under which this charge was laid were *ultra vires* the said council. It is common ground that there are in the City of Vancouver two classes of automobiles used for hire—those equipped with a meter and those not so equipped—and it is suggested that the council has adopted the policy of discriminating in favour of metered cars; such policy being effectuated by providing such metered cars with vastly more parking space in proportion to their number than is provided for non-metered cars. It is suggested that such legislation is unreasonable, unfair and unjust. With such questions the Court has nothing to do. It is too late now in the history of municipal jurisprudence, not only in view of the express words contained in section 339 of the city charter but also in view of the authorities in this and other Provinces,

to suggest that the Courts will, in the absence of fraud, assume to interfere with any policy which the council sees fit to adopt.

The sole question for consideration therefore is, whether or not the sections of By-law No. 2095, under which the charge was laid, are *ultra vires* the city council. My conclusion is that this question must be answered in the affirmative and that the learned magistrate was right in dismissing the charge.

Under section 163 of the city charter various powers of legislation are bestowed upon the corporation. By subsection (130) of that section the council may license persons using carts, wagons, trucks, automobiles or other conveyances and may classify such wagons, trucks or automobiles. By subsection (131) the council may license owners of automobiles and other conveyances or vehicles used for hire . . . and may assign stands for same in the public streets and may provide the kind or class of vehicle which may stand in any particular place so assigned and may prohibit any other class or kind of vehicle from occupying such stand. By subsection (135) (*j*) the council may arrange all motor-vehicles in classes . . . and differentiate in the conditions contained in licences granted and the licence fees imposed on the owners of motor-vehicles coming within different classes or prohibit the operation on any or all its streets of all motor-vehicles coming within any of such classes. By subsection (138) the council may allot areas for parking all varieties of vehicles including vehicles for hire, and may prohibit parking of vehicles except in such places so designated and may classify the same and may designate what classes of vehicles may or may not use such areas for parking purposes and may prohibit all other vehicles from using such areas other than such classes as are permitted by by-law. It will be seen therefore that power is given to the council to classify vehicles used for hire and in its licensing By-law No. 1510 it has done so, there being a distinction made in that by-law between cabs provided with meters and those not so provided. There being the power to classify vehicles the question arises, is there power (if we may use the expression) to sub-classify. I think considerable assistance is gained by a reference to a short history of the legislation. As the statute stood in 1918 (see Vancouver

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Incorporation Act Amendment Act, 1918, Cap. 104, Sec. 7) the council had power to

"arrange all motor-vehicles in classes and differentiate in the conditions contained in licences granted and the licence fees imposed on the owners of motor-vehicles coming within one and the same class and on owners of motor-vehicles coming within different classes, or prohibit the operation on any or all of its streets of all motor-vehicles coming within any of such classes."

When the city charter was consolidated by the Legislature in 1921 the words "one and the same class and on owners of motor-vehicles" were omitted and it seems clear to me at least that the Legislature thereby intended to withdraw the power theretofore granted to the city council to make a distinction among vehicles coming within one and the same class. While this statute stood as it was in 1918 the case of *Rex* v. *Calbic* (1920), 28 B.C. 113 was decided by the Court of Appeal. The exact point now for consideration was not before the Court but I think some assistance may be gained from a consideration of that case. There the Court was considering the licensing by-law which provided, and still provides, that motor-vehicles shall be divided into classes "A" to "G"; among which class (C) includes every motor-vehicle used exclusively as a taxi-cab or touring-car and having no specified route of travel and the distinction or route of which is under the direction of the passenger or passengers transported therein and which is rented only from a fixed stand on a public street specified by the council or from a garage, etc. Mr. Justice MARTIN at p. 116 of the report in the *Calbic* case points out that the city had made a classification of a reasonable kind under Class "C," as his Lordship says:

Judgment

"Dealing with a particular style of motor-vehicle, *viz.*, 'taxi-cabs or touring cars,' hired from public stands or garages, operating on unspecified routes and charging a minimum fare of 25 cents."

And his Lordship continues:

"Now this is a classification upon four distinct bases, *viz.*, the vehicle itself, the place of hiring, the route of operation and the fare charged."

Such a classification was held to be a proper classification under the charter as it stood in 1918 and, in my opinion, would be a good classification under the statute even as it stands now but I do not think the power has been given to the Council to reclassify the taxi-cabs and touring-cars mentioned in class

"C." If the council can do so then it follows as counsel for the city admits that the council has power to classify taxi-cabs and touring-cars according to either make, model, weight, size, colour, power, tires, wheels and so on practically *ad infinitum*. It would seem to me that if any such power is claimed there must be very clear evidence of its having been granted and I find no such evidence in this case.

Appeal dismissed.

MCDONALD, J. (In Chambers)

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April 17.

REX v. JOHNSTON

MIKKELSEN v. DUFF.

MORRISON, C.J.S.C.

1931

April 4.

MIKKELSEN v. DUFF

Practice—Taxation of party and party costs—Witness fees—Appendix N—"Disbursements," meaning of—Affidavit of disbursements.

On the taxation of party and party costs under Appendix N of the Supreme Court Rules, witness fees not actually paid on at or before the taxation cannot be allowed.

APPEAL by defendant from the decision of the deputy registrar of the Supreme Court at Vancouver on the taxation of a bill of costs by which he allowed as disbursements fees to witnesses which were not actually paid before the bill of costs was presented for taxation. The plaintiff claimed that he was financially unable to pay the said witness fees amounting to $392.75 in respect of which he had rendered himself liable to pay. On objection being taken the learned deputy registrar allowed these items following an unreported decision of the late Chief Justice of British Columbia in *Morrison* v. *Commissioners of Dewdney Dyking District.*

Statement

The appeal was argued before MORRISON, C.J.S.C. at Vancouver on the 15th and 19th of January, 1931.

Wyness, for appellant: The learned deputy registrar should have disallowed these items as the same were not disbursements: see Appendix N. [He referred to *Cross* v. *Durrell* (1860), 29 L.J., Ex. 473; *Harbin* v. *Gordon* (1914), 2 K.B. 577 at

Argument

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584; *Barnato* v. *Joel* (1928), 45 T.L.R. 167; *In re Remnant* (1849), 11 Beav. 603 at 613; Cameron's Law of Costs in Canada, p. 272; *Ham et ux.* v. *Lasher et al.* (1865), 24 U.C.Q.B. 357; *Harding* v. *Knust* (1892), 15 Pr. 80; *Mulcahy* v. *Edmonton Dunvegan & B.C.R. Co.* (1919), 46 D.L.R. 654; *Grindle* v. *Gillman* (1899), 4 Terr. L.R. 180; *Paulson* v. *Canadian Pacific Ry. Co.* (1919), 26 B.C. 440; *Freeman* v. *Rosher* (1849), 6 D. & L. 517; *Tait* v. *Burns* (1892), 8 Man. L.R. 20.]

Argument

Ian A. Shaw, for respondent, referred to marginal rule 1002, sub-rule 9, and the unreported decision of HUNTER, C.J.B.C. in *Morrison* v. *Commissioners of Dewdney Dyking District*. In the cases relied upon by the defendant there was some suggestion of fraud or concealment or they were decided under special orders and rules distinguishable from our own. In view of local conditions the English decisions should not be followed.

4th April, 1931.

Judgment

MORRISON, C.J.S.C.: Witness fees which have not actually been paid on at or before the time of taxation cannot be allowed on such taxation. The way to shew this is by means of an affidavit of disbursements: see the cases referred to in argument and in addition *Lopes* v. *De Tastet* (1822), 2 Br. & B. 292; *Smith* v. *Day* (1881), 16 Ch. D. 726. That the liability for witness fees is only a contingent one see *Pell* v. *Daubeny* (1850), 5 Ex. 955; *Hallet* v. *Mears* (1810), 13 East 15; *Trent* v. *Harrison* (1845), 2 D. & L. 941; 14 L.J., Q.B. 210.

Appeal allowed.

BLUMBERGER v. SOLLOWAY, MILLS & CO. LIMITED.

MCDONALD, J. (In Chambers)

1931

April 21.

BLUMBERGER v. SOLLOWAY, MILLS & CO. LTD.

Practice — Discovery — Interrogatories—Questions tending to criminate— Right to refuse to answer—R.S.B.C. 1924, Cap. 82, Sec. 5.

Under the English practice relating to interrogatories the defendant is excused from answering questions that may tend to criminate him. Section 5 of the British Columbia Evidence Act provides that no witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him. On an application to compel the defendant to answer interrogatories:—

Held, that a party being examined on interrogatories is not treated as a witness and is in the same position as a party being examined on interrogatories in England and is protected.

APPLICATION to compel the defendant to answer interrogatories. He had declined to answer on the ground that it might tend to incriminate him. Heard by MCDONALD, J. in Chambers at Vancouver on the 20th of April, 1931.

Statement

J. A. MacInnes, for plaintiff.
Sloan, for defendant.

21st April, 1931.

MCDONALD, J.: The plaintiff sues for damages for conversion of certain stock certificates. Certain interrogatories were under order of the Court submitted to the defendant Mills which interrogatories the defendant declines to answer upon the ground that his answers might tend to criminate him. Plaintiff moves to compel the answers to be made and the defendant relies upon the Alberta decisions *Harrison* v. *King* (1925), 2 W.W.R. 407 and *Webster and Kirkness* v. *Solloway Mills & Co. Ltd.* (1930), 3 W.W.R. 445. It is clear that under the English practice relating to interrogatories the defendant would be excused from answering and that is the practice in Alberta. Under our rule relating to examination for discovery the immunity has been taken away inasmuch as Order XXXIA., r. (1) provides that "a party . . . may . . . be orally examined before the trial . . . and may be compelled to attend and testify in the same manner, upon the same terms,

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and subject to the same rules of examination of (*sic*) a witness." This rule thus provides that a party being examined for discovery is in the same position as a witness called upon the trial and such a witness loses his immunity by virtue of section 5 of our Evidence Act which provides that no witness shall be excused from answering any question upon the ground that the answer to the question may tend to criminate him. The position appears to be this therefore: In Alberta the Evidence Act does not apply either to a witness being examined for discovery or upon interrogatories while in this Province a party being examined for discovery is to be treated as a witness and is, therefore, not protected, while a party being examined on interrogatories is not treated as a witness and is in the same position as a party being examined on interrogatories in England and is protected.

The application to compel the defendant to answer the interrogatories in question is therefore dismissed.

Application dismissed.

FISHER, J. (In Chambers)

1931

March 9.

MACKEE v. SOLLOWAY, MILLS & CO. LIMITED.

Practice — Discovery — Affidavit of documents — "Possession or power"— Documents voluntarily delivered to Attorney-General's agent.

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It appearing from the affidavits filed on an application by the plaintiffs for an order that the defendants file a further and better affidavit of documents, that the books and documents in question had been voluntarily turned over to the duly authorized representative of the Attorney-General of British Columbia and that the documents are now in the sole possession and power of said representative. The application was refused.

Statement

APPLICATION by plaintiff for an order that the defendants make and file a further and better affidavit of documents. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 2nd of March, 1931.

G. L. Fraser, for plaintiff.
Sloan, for defendant.

9th March, 1931.

FISHER, J.: Application by plaintiff for an order that the defendant make and file a further and better affidavit, fully and sufficiently stating what documents are or have been in its possession or power relating to the matters in question in this action.

As to the meaning of the expression "possession or power" counsel on behalf of applicant has referred me to the note *re* such expression at pp. 529-30 of the Annual Practice, 1931, reading as follows:

"These words do not here bear the limited meaning which they bear for the purpose of an order for production; all documents must be included in which the party has any possession or property jointly with others, or even in which he has no property at all if they are in his corporeal possession. . . ."

Judgment

My attention has been called particularly to the affidavits of Mr. *Farris* and Mr. *Murphy*. I have perused such affidavits and carefully considered the whole matter and, though there is before me material to the effect that the books and documents were not seized by Mr. *Cosgrove,* the duly authorized representative of the Attorney-General for the Province of British Columbia, but were voluntarily turned over to him by the defendants, nevertheless I think it is a fair inference from all the circumstances as set out in the material including paragraphs 2 and 3 of the affidavit of Mr. *Cosgrove,* that the books and documents are now in the sole possession and power of Mr. *Cosgrove* as the duly authorized representative of the Attorney-General for British Columbia.

My conclusion therefore is that I should not make the order asked for and the application is dismissed.

Application dismissed.

MCDONALD, J. 1931

April 13.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. JOHNSTON

CANADIAN CREDIT MEN'S TRUST ASSOCIATION, LIMITED v. JOHNSTON *ET AL.*

Trespass—Loss of profits—Prevented from carrying on business under certain sections of Fisheries Act—Sections subsequently declared ultra vires—Section 9 of Magistrates Act—"Officer"—Interpretation—Marginal rules 283 and 284.

The defendants who were respectively the deputy minister of marine and fisheries for Canada, director of fisheries, inspector of fisheries for British Columbia and fisheries officer for the District of Prince Rupert, prevented the plaintiff from carrying on his business as a salmon-canner in 1926 by reason of his having operated in breach of certain sections of the Fisheries Act that were later declared *ultra vires* of the Dominion Parliament. In an action for trespass and loss of profits by reason thereof, the defendants moved for dismissal of the action under marginal rules 283 and 284 on the ground that they were protected from such an action by section 9 of the Magistrates Act which provides that "No action shall be brought against any judge, stipendiary or police magistrate, justice of the peace, or officer," etc.

Held, that in deciding as to the scope of the words "an officer" in said section, the *ejusdem generis* rule should be applied and that the *genus* is a judicial officer presiding as such, no other officer therefore is protected by the Act except such an officer as comes within that class.

Statement

ACTION for trespass and loss of profits through the defendants preventing the plaintiff from carrying on the business of salmon-canner in the year 1926. The facts are set out in the reasons for judgment. Tried by MCDONALD, J. at Vancouver on the 8th of April, 1931.

Williams, K.C., and *Gonzales*, for plaintiff.
Burns, K.C., and *Lundell*, for defendants.

13th April, 1931.

Judgment

MCDONALD, J.: This action is brought against the defendants for trespass and loss of profits incurred by reason of the defendants having, in the year 1926, prevented the plaintiff from carrying on the business of salmon-canner. The defendant Johnston is the deputy minister of marine and fisheries for Canada; the defendant Pound is the director of fisheries; the defendant Motherwell is inspector of fisheries for British

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Columbia and the defendant Mackie is a fisheries officer for the District of Prince Rupert. The acts of the defendants which are complained of in this action were performed by them in the execution of their respective offices, and as a result of the plaintiff having operated in breach of certain sections of the Fisheries Act, which sections were later declared to be *ultra vires* the Dominion Parliament. The defendants move under Order XXV., rr. 2 and 3 for a decision upon a point of law raised by their pleading, *viz.*, that they are protected from an action such as this by reason of the provisions of section 9 of the Magistrates Act being Cap. 150, R.S.B.C. 1924, which section reads as follows:

"9. No action shall be brought against any judge, stipendiary or police magistrate, justice of the peace, or officer, for any act or thing by him done under the supposed authority of a statute or statutory provision of the Province or of the Dominion, which statute or statutory provision was beyond the legislative jurisdiction of the Legislature of the Province or of the Parliament of Canada, as the case may be, provided such action would not lie against him if the said statute or statutory provision had been within the legislative jurisdiction of the Parliament or Legislature which assumed to enact the same."

Judgment

The point which counsel have fully argued before me is whether or not the words "or officer" are to be read as being confined to mean a judicial officer acting judicially and presiding over a Court or other similar judicial inquiry. It is suggested that they would, for example, include such officers as a coroner, a Court registrar, a committee of the Benchers of the Law Society or members of a Court of Inquiry under the Immigration Act, or under the Merchant Shipping Act, but would not include such officers as the defendants, who, though clothed with some discretionary powers, are essentially ministerial and not judicial officers.

Counsel for the defendants contends with much force that the words "or officer" are not to be so confined but must be given their ordinary sense and hence include officers such as the defendants who are appointed under a statute and endowed with wide statutory powers. At the conclusion of a lengthy argument I expressed myself as being in the greatest doubt and I confess that after perusing the authorities cited by counsel that doubt has not been satisfactorily removed. In the first place it must be noted that the Act in question is defined as the Magis-

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trates Act. The Act has come down practically in its present form since 1888 when two previous statutes, one passed in 1877 respecting the appointment of magistrates and another in 1879 respecting "The Magistracy," were combined in one statute entitled an Act respecting "justices of the peace and other magistrates" which is the title which the present statute bears, its short title being the Magistrates Act. The statute throughout, though various minor changes in form have been made from time to time, has always been confined to questions relating to the appointment, powers, oaths and duties of justices of the peace and magistrates. In no other section of the statute are any other officers or persons dealt with and it is argued that the statute was never intended to apply to any other than such judicial officers. On the other hand, it is pointed out that section 9 refers also to judges and that notwithstanding its title the statute was not intended to be confined and is not confined to questions relating only to magistrates and justices of the peace; and it is argued with considerable force that if the immunity extended to judges is to be dealt with in a statute entitled the Magistrates Act there is no reason why other officers who are not magistrates or judicial officers should not be included in the same statute. I have been unable to gain any assistance either way from a consideration of the title given by the Legislature to the statute.

Judgment

Counsel have examined similar statutes in other Provinces of the Dominion but no authority has been cited to indicate that in any of the Provinces has it been held that officers, such as those in question, are protected under such a statute. True there appears to be no authority to the contrary so it may well be that no assistance is gained from a study of these statutes.

Upon the best consideration which I have been able to give the matter I am of opinion that the real question to be decided is whether or not the rule *ejusdem generis* is to be applied and that the answer to that question must be in the affirmative. Giving the defendants the benefit of every argument which Mr. *Burns* has made I have reached the conclusion that the *genus* is a judicial officer presiding as such and that no officer is protected by the Act except such an officer as comes within that class.

OVERN v. STRAND *ET AL.*

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Damages—Illegal seizure of goods and chattels—Conversion—Solicitors—Authority to act—Ratification—Costs.

Prior to 1928 the plaintiff and one Weisner traded with the trappers and natives in the district about Deserters Canyon, a post well north of Prince George. Weisner had borrowed money from the defendant Strand from time to time, and in the spring of 1928 when Weisner was in ill health and decided to go outside, he owed Strand $2,280. Before going out he entered into an agreement with the plaintiff to sell her his store and supplies at Whitewater (a post near Deserters Canyon) and his freighting outfit including boats and machinery. Weisner, with the plaintiff, then came out to Prince George. On the way Weisner was served with a writ in an action brought by Strand for the money owing him. On reaching Prince George a formal bill of sale drawn in the offices of *Wilson & Wilson* was executed, transferring Weisner's said property to Mrs. Overn. Mrs. Overn then purchased goods in Edmonton and Prince George, and took them back to Deserters Canyon and Whitewater, bringing back Weisner with her as a river pilot. In the meantime Strand obtained judgment against Weisner, and as Mrs. Overn and Weisner were on their way in they were served with a writ in an action by Strand to set aside the sale from Weisner to Mrs. Overn. After arriving at Deserters Canyon Weisner again went out to Prince George and instructed *Wilson & Wilson* to defend in the second action. The action was brought in the Supreme Court, but the solicitors agreed that the action be tried before ROBERTSON, Co. J., who gave judgment in favour of Strand. Writs of *fi. fa.* were issued in both actions and a sheriff's bailiff proceeded north and sold all Mrs. Overn's goods and chattels, including the store she purchased from Weisner at Whitewater, to the Hudson's Bay Company. Mrs. Overn appealed from the judgment in the second action but the appeal was quashed on the ground that the County Court judge had no jurisdiction to entertain the action, and could only on the facts disclosed act as an arbitrator. Mrs. Overn then brought this action for damages for conversion against the sheriff, against the Hudson's Bay Company for illegal purchase and loss of profits, and against *Wilson & Wilson* for purporting to act as solicitors and counsel for the plaintiff without instructions. On the trial with a jury she recovered judgment for $10,000.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C. (MCPHILLIPS, J.A. dissenting), that as to the solicitors, assuming no authority was given them to act for her, their action was ratified by subsequent proceedings, as with full knowledge of what had happened and without repudiating, she retained other solicitors to appeal from the judgment given against her.

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Held, further, that though the misconceived consent proceedings before the County Court judge did not result in a judgment of any Court, they did result in a binding award by process of arbitration, the result of which was to determine as between the parties interested, that the goods in question were those of Weisner and the plaintiff has therefore no right of action against the other defendants.

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 9th of December, 1929, in an action against the defendants other than Messrs. *Wilson & Wilson* for $25,000 damages for wrongful and illegal seizure and conversion of the plaintiff's goods and chattels at a trading post at Whitewater, B.C., between the 14th of September and the 15th of October, 1928, and against Messrs. *Wilson & Wilson* for damages for wrongfully and without any lawful authority purporting to act for the plaintiff in an action brought by John Strand suing on behalf of himself and the creditors of John H. Weisner against John H. Weisner and Elizabeth Overn. In 1925 the plaintiff went to a place called Deserters Canyon about 500 miles north of Prince George where she had dealings with two traders and trappers named J. J. Weisner and Charles Overn. Shortly afterwards she married Charles Overn. Weisner had a store at Whitewater, a place a short distance beyond Deserters Canyon. The defendant Strand traded there and loaned money from time to time to Weisner. In the spring of 1928 Weisner owed Strand $2,280. About this time Weisner was in poor health and deciding to go out he sold his trading post at Whitewater with his freighting outfit to Mrs. Overn, who intended to continue the trading post on her own account. Mrs. Overn, her husband and Weisner then came 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.

Statement

Overn and Weisner were on the way in to Whitewater 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 Mrs. Overn'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. Shortly after counsel on both sides at Prince George agreed that the action be tried by ROBERTSON, Co. J. at Prince George, when judgment was given in Strand's favour. Mrs. Overn claims she was unaware as to what happened, as she remained at Whitewater and that she never gave any instructions to Messrs. *Wilson & Wilson* to act for her or defend the action on her behalf. A writ of *fi. fa.* was issued in the first action against Weisner for $2,705, 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 writs, 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, said company having a post near by. Mrs. Overn appealed from ROBERTSON, Co. J.'s decision, but it was held the proceedings before him only amounted to an arbitration, as he had no jurisdiction to try the action, even with the consent of the parties, and there was no appeal from his decision. Mrs. Overn then brought this action and recovered judgment for $10,000 for loss of stock-in-trade and $1,000 in general damages.

Statement

The appeal was argued at Vancouver on the 29th of October to the 4th of November, 1930, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for appellants *Wilson & Wilson*: I am going to ask the Court to overrule the finding of a jury. They cannot take the proceeds and repudiate the judgment: see *Wood* v. *Reesor* (1895), 22 A.R. 57. The dismissing of the appeal in the first action is binding on all points argued: see *Haystead* v. *Commissioner of Taxation* (1926), A.C. 155. The invoices

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for the goods alleged to be purchased by Mrs. Overn were changed deliberately and in a number of cases the names to whom they were addressed were torn out. ROBERTSON, Co. J.'s judgment is *res judicata,* as objection to the solicitor's authority might have been raised before: see *Abbott* v. *McDougall & Cowans* (1927), 2 D.L.R. 1031, and on appeal (1928), 1 D.L.R. 295; *Ancona* v. *Marks* (1862), 7 H. & N. 686. When a thing is done without authority and afterwards ratified it is ratified from the beginning: see Bowstead on Agency, 7th Ed., p. 57. There was evidence upon which it might have been found there was ratification and the jury should have been so instructed.

Argument

J. A. MacInnes, for respondent: On the question of ratification there is evidence upon which the jury could find there was no ratification and they so found. She did not ratify her solicitor's authority by taking the appeal: see *Nickle* v. *Douglas* (1875), 37 U.C.Q.B. 51 at p. 68. There is no ratification unless there is an intention to ratify: see *Marsh* v. *Joseph* (1897), 1 Ch. 213 at pp. 245-6; *Wall* v. *Cockerell* (1863), 10 H.L. Cas. 229 at p. 245.

Craig, in reply, referred to *Reynolds* v. *Howell* (1873), L.R. 8 Q.B. 398 at p. 400 and *Ruthenian Catholic Mission* v. *Mundare School District* (1924), S.C.R. 620. The evidence shews it was not the lawyer who wanted to appeal but the woman herself.

30th October, 1930.

MACDONALD, C.J.B.C. (oral): I think there was ratification of the action of the solicitors *Wilson & Wilson* evidenced by the fact that the plaintiff, with full knowledge that they had acted for her in the proceedings, appealed against the judgment rendered by His Honour Judge ROBERTSON.

MACDONALD, C.J.B.C.

It is said that she did not intend to ratify it. We can best judge the plaintiff's intentions by her actions. If her contention is right, as her counsel has put it, the so-called judgment (really an award) was a nullity, and she was not bound to take any action to set it aside, yet she chose to treat it as something from which she could appeal. She sets out her grounds of appeal in an elaborate notice of appeal, setting up, I think, nine or ten

grounds of merits, without any reference to this crucial one that she did not authorize the solicitors to appear for her at all. She comes to this Court and asked this Court to set that judgment aside and to enter another judgment for her.

It is pretty difficult to understand how anyone can contend that she did not intend to ratify the action of her solicitors, whose action was responsible for the judgment against which she appealed.

I think the case is very clear, and that this appeal should be allowed as against the solicitors. There is no question of damages as far as they are concerned.

MACDONALD, C.J.B.C.

The other parties to the action, of course, may not be so fortunate on the other matters which may enable this Court to say that relief should be given to the respondent.

MARTIN, J.A. (oral): In my opinion the point taken by the appellants on behalf of the solicitors must succeed so far as they are concerned and we must decide the appeal in their favour. There is in the disposition of this matter but one point to consider, severable from all the other points on ratification, and it is this—Was the absence of the retainer (which we may assume to be admitted) ratified by the subsequent proceedings? There is no conflict of evidence whatever upon this point, and it is something entirely distinct and therefore the adjudications of the jury upon the other points do not touch this one, because, as I say again, it is distinct and severable from all the other points, and upon it alone the action may be determined. It is well to keep that in mind.

MARTIN, J.A.

It is conceded by the plaintiff—it must be conceded because it is as clear as it is possible to have upon the record—that the plaintiff knew when she came to Prince George, she found out when she came there, that these solicitors had been acting on her behalf. Then was the time for her to decide as to what her attitude should be in regard to their conduct. I cited during the course of the argument the expression of Lord Blackburn upon that point in *Reynolds* v. *Hall* (1873), L.R. 8 Q.B. 398 at p. 400, where Mr. Justice Blackburn (as he then was) said, in the Queen's Bench Division:

"I may add that, in my opinion, if a plaintiff have action brought in

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his name by an attorney without authority hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's act."

And Mr. Justice Archibald concurred in making the rule absolute.

In the Chancery Court that expression was adopted by Mr. Justice Kekewich in *Geilinger* v. *Gibbs* (1897), 66 L.J., Ch. 230 at p. 232, where he cites Lord Blackburn's *dictum*. But that is not all. In the Court of Appeal in the case of *In re Beckett. Furnell* v. *Paine* (1918), 2 Ch. 72 at p. 80, the Lords Justices, through Lord Justice Swinfen Eady, unanimously concurred in this expression as to the other case of *Reynolds* v. *Hall* it is clear that if the plaintiff, knowing that the action is brought in his name, not having authorized it, does not repudiate it, he may be supposed to have ratified the action.

Now, that ends this matter. But she did more than that, she did not only repudiate but she actually retained another firm of solicitors to come to this Court and invite a judgment in her behalf. Now, that application was not successful, but the fact that she chose to make it places the matter not only beyond the lack of repudiation, but as an act of ratification, and upon that ground alone, as I said before, this appeal must be, I think, decided in favour of the solicitors.

MARTIN, J.A.

I just wish to add a case upon that aspect of the argument, which fortifies the impression I ventured to enunciate, that the proceedings in the Court below were not a nullity, even though the solicitor had acted without authority, *viz.*, the decision of the Court of Exchequer, in Trinity Term, in *Hill* v. *Mills* (1834), 2 Dowl. 696, where the Court said:

"Though the pleading had been put in without authority, the plaintiff was not justified in treating that plea as a nullity."

GALLIHER, J.A.

GALLIHER, J.A. (oral): The views expressed by my learned brother the Chief Justice and my brother MARTIN are so much in accord with my own views in the matter that I shall content myself by concurring.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): I find myself unable to agree with my learned brothers who have preceded me in giving judgment. This case is somewhat unique in its features, which should not be lost sight of. This is a case where all the damage had been

done when this lady became aware of the fact that some solicitors had presumed to act for her and entered an appearance in the cause. That the solicitors could have thought they were entitled to do, it seems to me to be beyond explanation. There is one writing in this very voluminous book in which she says she was not employing any solicitors in Prince George. Nevertheless, they did it; and all the damage was then done. This lady's goods were taken, in this very wild section 500 miles north of Prince George, seized by the sheriff, and her goods sold, not the goods of the defendant in the writ. Apparently she went to solicitors in Vancouver, and these solicitors took steps by way of appeal.

Now, on that appeal, if the Court had had jurisdiction, the Court would have been enabled to set aside the judgment. But the Court had no jurisdiction, owing to the fact that the County Court judge was in effect an arbitrator, and there was no appeal.

There can only be ratification when there is a full and complete knowledge of all the facts and circumstances. I cannot see, upon the evidence here, that this lady had any full and complete knowledge of all the facts and circumstances.

Then she goes to other solicitors, and in the end this action was brought and a trial taking several days before a jury, and all questions were litigated and all fully charged upon both as to law and fact, and no exception taken to the charge of the learned trial judge (the Chief Justice of the Supreme Court). He charged them upon every one of the issues, and the jury by its general verdict found all the issues in favour of the plaintiff, and in the result the judgment attacked was set aside. Therefore, the sheriff cannot justify under any process based upon the judgment, as all the proceedings must be held to have been set aside; the consequence is this lady has to be put in the same position by the Court, as if her goods were extant today; and if they are not extant then the proper remedy is damages. But again, supposing there is any fallacy in the line of reasoning that I have pursued, the insuperable difficulty that Messrs. *Wilson & Wilson,* the solicitors who acted without authority, are in, and the other defendants are also in, is this: They go down to a trial (no matter what the anterior proceedings were) to try out all these issues, and they have failed. A much better

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course to have pursued would have been to have applied to have the case set down upon a point of law, and all this tremendous expense would have been prevented. The parties go to trial, before a jury, and all the issues are submitted to the jury and charged upon by the learned judge, and no exception is taken, the verdict is not in their favour, they then appeal on a point of law and say that all this trial and all these proceedings and the determination of all these issues are abortive.

I cannot agree that the defendants *Wilson & Wilson* should at this stage be dismissed from the appeal. It must remain in my opinion to be a determination as to liability or no liability when the whole appeal is disposed of. If nothing more, it is highly inconvenient and embrarrassing to have parties dismissed from the appeal during the pendency of the appeal, and it may result in a miscarriage of justice especially in such an involved action as we have here.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MACDONALD, J.A.: It might be well to place on record that we have considered at this stage only one point based upon the assumption, without admitting it, that there was no authority given by the respondent to the appellant solicitors to act for her. On that assumption, the appeal of the solicitors, in my opinion, should be allowed because of acts amounting to subsequent ratification. That being so, there is no justification for criticism of the actions of the solicitors, for the reason that all the evidence necessary to reach a conclusion on that point was not discussed.

Appeal allowed, McPhillips, J.A. dissenting.

Argument

Pepler, for appellant sheriff: The order by ROBERTSON, Co.J. was taken as a Supreme Court order. The award was regular and all proceedings taken under it are regular: see Chitty's Archbold's Q.B. Practice, 14th Ed., Vol. 1, p. 832; *Perkin* v. *Proctor* (1768), 2 Wils. 382; *Andrews* v. *Marris* (1841), 10 L.J., Q.B. 225 at p. 230; *Brown* v. *Watson* (1871), 23 L.T. 745; *Ives* v. *Lucas* (1823), 1 Car. & P. 7; *Parsons* v. *Lloyd* (1773), 2 W. Bl. 845; *Bradley* v. *Copley* (1845), 14 L.J., C.P. 222.

Hossie, for appellant Hudson's Bay Company, adopted the

argument of counsel for appellants *Wilson & Wilson.* The sale of goods on a *fi. fa.* is not avoided by a subsequent reversal: see *Hoe's Case* (1600), 3 Co. Rep. 181; *Manning's Case* (1609), 4 Co. Rep. 329; *Imray* v. *Magnay* (1843), 11 M. & W. 267; *Doe dem. Hagerman* v. *Strong* (1847), 4 U.C.Q.B. 510; *Fletcher* v. *Pendray* (1916), 22 B.C. 566. They must look to the money in the hands of the sheriff: see *Jeanes* v. *Wilkins* (1749), 1 Ves. Sen. 195; *Doe dem. Emmett* v. *Thorn* (1813), 1 M. & S. 425. This is a claim arising out of want of authority and ratification has been found: see Bowstead on Agency, 7th Ed., 63 *et seq.* Assuming there was no ratification she is limited to an action against her solicitor: see *Bayly* v. *Buckland* (1847), 16 L.J., Ex. 204; Yearly Practice, 1930, p. 48; *Nurse* v. *Durnford* (1879), 13 Ch. D. 764; *Porter* v. *Fraser* (1912), 29 T.L.R. 91; *Kerr* v. *Malpus et al.* (1857), 2 Pr. 135; *Moran et al.* v. *Schermerhorn* (1858), *ib.* 261; *Warely* v. *Poapst* (1861), 7 U.C.L.J. (o.s.) 294.

MacInnes, for respondent: The judgment was *coram non judice*: see *Mayor, &c., of London* v. *Cox* (1867), L.R. 2 H.L. 239 at p. 254; *McLeod* v. *Noble* (1897), 28 Ont. 528 at p. 548; *The Leonor* (1917), 3 W.W.R. 861; *Marshalsea Case* (1613), 5 Co. Rep. 68; *Dye and Olives Case* (1641), March 117; 82 E.R. 437; *Smith* v. *Dr. Bouchier et al.* (1734), 2 Str. 993; *Cooper* v. *Chitty and Blackiston* (1756), 1 Burr. 20; *Morse* v. *James* (1738), Willes 122. Assuming he had a writ of the Supreme Court on its face he joins in the defence and can then only rely on the validity of the judgment: see *Philips* v. *Biron et al.* (1722), 1 Str. 509; *Andrews* v. *Marris* (1841), 1 Q.B. 3 at p. 17; *Johnson* v. *McDonald* (1863), 23 U.C.Q.B. 183; Addison on Torts, 8th Ed., 584; *M'Combie* v. *Davies* (1805), 6 East 538; *Glasspoole* v. *Young* (1829), 7 L.J., K.B. (o.s.) 305; *Kirby* v. *Cahill* (1843), 6 U.C.Q.B. (o.s.) 510. Now as to the Hudson's Bay Company who purchased. It has only such title as the execution creditor has: see *Farrant* v. *Thompson* (1822), 2 D. & R. 1; Addison on Contracts, 10th Ed., 521; *Chapman* v. *Speller* (1850), 14 Q.B. 621; *Crane & Sons* v. *Omerod* (1903), 2 K.B. 37; *Fletcher* v. *Pendray* (1916), 22 B.C. 566; *Groves* v. *Cowham* (1833), 10 Bing. 5 at p. 9. After the sheriff receives notice that the goods are in

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another than the execution debtor he is liable for his illegal action.

Pepler, in reply, referred to *White* v. *Morris* (1852), 11 C.B. 1015.

Hossie, in reply, referred to *McLeod* v. *Noble* (1897), 28 Ont. 528; *Morse* v. *James* (1738), Willes 122; 125 E.R. 1089; *Hill* v. *Bateman* (1726), 2 Str. 710; *Shergold* v. *Holloway* (1734), *ib.* 1002; *Morrell* v. *Martin* (1841), 3 Man. & G. 581.

Cur. adv. vult.

19th January, 1931.

MACDONALD, C.J.B.C.: An action was commenced on the 22nd of June, 1928, by said defendant John Strand as plaintiff against John H. Weisner and Elizabeth Overn defendants for a declaration that an agreement between defendant of the 9th of April, 1928, for the sale of defendant Weisner's stock-in-trade was fraudulent and should be set aside and that a bill of sale dated the 22nd of May, 1928, by which the said Weisner transferred the goodwill and assets of his business to Elizabeth Overn was null and void under the Bulk Sales Act and the Fraudulent Conveyance Act.

The defendants *P. E. Wilson* and *J. O. Wilson* are a firm of solicitors, who purported to act for defendant Overn in the said suit. She afterwards disputed their authority and that question, *inter alia*, came up before this Court in the present appeal when it was held that though she had not retained them she had subsequently ratified their authority and was bound by what they had done. That action was commenced in the Supreme Court but afterwards and before trial an agreement in writing was arrived at between the solicitors of all parties that His Honour H. E. A. ROBERTSON the judge of the County Court of the County of Cariboo should try the action in the County Court. There was no transfer of it made from the Supreme Court to the County Court and the trial was heard before him. He gave judgment in favour of the plaintiff setting aside the said documents as fraudulent and void. The judgment while in form a judgment of the Supreme Court must be regarded I think as merely an award in an arbitration. One clause of it reads as follows:

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"This Court doth declare that all stock-in-trade in possession of the defendant Elizabeth Overn is in law the property of the defendant John H. Weisner and subject to the claims of his creditors."

No order to enforce it was obtained.

Some time before this Strand had sued Weisner alone for debt and recovered judgment for upwards of $2,200. This suit was duly tried by the Supreme Court and is regular in all respects. On the 15th of September, 1928, Strand caused execution to be issued thereon against Wesiner and about the same time caused execution to be issued on the said award for $444.10, costs of the said action against Weisner and Overn. The latter execution was *ex facie* valid though erroneously issued out of the Supreme Court, the award being erroneously treated as a judgment of that Court.

Elizabeth Overn in May, 1928, purchased from wholesale dealers a considerable quantity of goods which she then collected at Prince George in the first week of June, 1928, and transported to her store at Whitewater by boat. These were the goods seized by the sheriff on the Weisner *fi. fa.* and sold, the defendants the Hudson's Bay Company being the purchaser. The sheriff made the seizure under both writs. The money realized is more than sufficient to satisfy both writs of *fi. fa.*

The present action was brought to set aside the appearance entered by *Wilson & Wilson* and all proceedings in the action subsequent thereto including the alleged consent to have it tried before His Honour Judge ROBERTSON, the purported judgment entered in the action against the plaintiff, the writ of *fi. fa.* issued thereon and all proceedings thereunder, and assessed as damages against the defendants the sum of $11,000.

The learned judge's charge to the jury was confined almost wholly to the question of *Wilson & Wilson's* retainer. The jury found that there was no retainer. That was the first question argued in this appeal and the Court upheld the solicitor's actions on the ground that the plaintiff had as hereinbefore mentioned estopped herself from disputing their authority. The question was not as I see it one for the jury at all; the ratification was declared upon undisputed evidence, the principal fact being that the plaintiff had appealed from the award on the merits and made no complaint whatever against the solicitors

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and having appealed on the footing that the award was a valid one she therefore must be assumed to have adopted it and the action of the solicitors was ratified or approved. The other questions involved in the appeal were reserved and I now deal with them.

I think our previous decision disposes of the whole case. Since the award which was published to the parties on the 28th of August has not been moved against as it must have been within two months and therefore cannot now be questioned on any ground, and therefore is a good and subsisting disposition of the questions submitted that all the stock-in-trade of the said Elizabeth Overn was in law the property of the said defendant Weisner and therefore subject to be seized under the valid Supreme Court judgment and execution thereon issued by the defendant Strand against Weisner, and thus they were duly sold thereunder. These questions were all questions of law and based upon undisputed evidence and should also have been disposed of by the learned judge.

MACDONALD, C.J.B.C.

In this view of the case the appeal should be allowed and the action dismissed as against the said three defendants with costs to the defendant *Wilson & Wilson,* to the defendant Peters, and the defendant Hudson's Bay Company.

Strand served notice of appeal but no counsel appeared for him in the argument.

With respect to the invalid writ of execution for $444.10, while it may have brought about an excessive sale that however has not been complained of since the goods were the goods of Weisner who is not a party to the action or to the appeal.

I have not overlooked *Dawson* v. *Dumont* (1891), 20 S.C.R. 709 and *Dawson* v. *McDonald* (1880), Cassel's Supreme Court Digest, 1875-1893, p. 586, to which we were referred by respondent's counsel after the argument. These cases in my opinion have no application to the facts of this case.

The motion by appellants by way of appeal from the taxation of the costs which she was awarded in the judgment appealed from has by reason of the above judgment ceased to have any importance, and is therefore allowed.

MARTIN, J.A.

MARTIN, J.A. (oral): I would say, briefly (as I intend to hand

down reasons at an early date, if the present congestion of business before us permits), that the ground upon which I proceed is this,—that the judgment, given by consent of the parties, of the County Court judge, purporting, though illegally, to act as a Supreme Court judge, is absolutely null and void, and so the so-called judgment is, as has been said in such circumstances, "a thing of naught which could not be disobeyed"; following *The Leonor* (1916), 3 P. Cas. 91, 104; (1917), 3 W.W.R. 861, and the cases there cited. And the result of that is that the plaintiff is not the owner of the goods, and therefore she cannot have judgment in her favour, because though the misconceived consent proceedings did not result in a judgment of any Court, they did result in a binding award, by a process of arbitration, the result of which was to determine, as between the only parties interested, that the goods now in question were those of Weisner and not of the plaintiff.

I refrain from expressing any opinion on the other aspects of the case, as, for example, that relating to the sheriff, and his justification under the apparent process of the Court, because there are many cases which have not been cited to us on the point, and I think it undesirable to express an opinion which is not necessary. And it may be, though we do not know, that other action will be taken by Weisner, who has now been declared to be the sole owner of the goods in question, in which case further light will be thrown on that difficult question. I have found a number of relevant cases, not cited to us, one of which is remarkable, a unanimous decision of the Supreme Court of Massachusetts in 1854, *viz., Fisher* v. *McGirr,* 67 Mass. 1; 61 Am. Dec. 381, which throws great light upon the question; and there are also decisions of the Federal Courts of the United States in which the matter has been pursued and investigated much more than it has in our own Court, *e.g., Wise* v. *Withers* (1806), 3 Cranch 331 (Marshall, Ch. J. at p. 337) and *Booth* v. *Lloyd* (1887), 33 Fed. 593; and *cf.* also the leading case of *Savacool* v. *Boughton* (N.Y.) (1830), 21 Am. Dec. 181, and the cases cited in Murfree on Sheriffs (1890), sec. 101a, and sec. 103a, and *Kendall* v. *Clark* (1858), 10 Cal. 17; 70 Am. Dec. 691; and *Ramanathan Chetty* v. *Meera Sabio Marikar* (1931), A.C. 77.

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

MCPHILLIPS, J.A.: I am of the opinion with great respect to my learned brothers, who have taken a contrary view, that the learned Chief Justice in the Court below arrived at the right conclusion when he directed that judgment be entered upon the general verdict of the jury against all the defendants. The general verdict must be—in accordance with controlling authority—held to be the finding of all relevant and necessary issues in favour of the plaintiff. Here we have a trial before the Chief Justice of the Supreme Court and a jury extending over five days with a mass of evidence, the appeal book to this Court being 522 pages. In view of this when it is considered that the facts were exhaustively gone into with a verdict unanimous in its nature from the jury, it would only be in an extreme case that a Court of Appeal would intervene, and disturb the verdict. The grounds pressed for the entry of judgment for the defendants (appellants)—*non abstante veridicto*—may be shortly stated as follows:

(1) That the plaintiff is estopped from contending that Messrs. *Wilson & Wilson* had authority to enter an appearance on her behalf in the action brought against her and upon which judgment was entered against her and that the judgment against her must be held to be a valid judgment, or more properly a valid award as this Court held on appeal that in that His Honour Judge ROBERTSON could not be held to have acted other than as an arbitrator he having presumed to give a judgment in the Supreme Court of British Columbia—the estoppel or ratification of the action of the solicitors, Messrs. *Wilson & Wilson* arising owing to the plaintiff (respondent) taking steps to set aside the judgment by appeal to this Court.

(2) That the writs of execution being regular on their face that that justified the sheriff (one of the appellants) seizing the goods of the plaintiff (respondent) and selling the same, as the judgment, to be read as an award, determines that the bill of sale under which the plaintiff (respondent) acquired the goods from one Weisner was fraudulent and void as against creditors —and that all of the goods even those acquired after the execution of the bill of sale executed by Weisner to the plaintiff

(respondent) were declared to be the goods not of the plaintiff (respondent) but of Weisner and exigible under writs of execution and a sale being had the purchaser at the sale, The Governor and Company of Adventurers of England Trading into Hudson's Bay, was rightly entitled to purchase and justified in so purchasing the goods.

Now the goods sold by the sheriff were goods admittedly bought by the plaintiff (respondent) at wholesale centres, Vancouver and Edmonton, with her own money and the invoices shew that the goods were sold to her and paid for by her with no relationship whatever with Weisner, who had gone out of business, and the goods were so purchased long after the bill of sale from Weisner to the plaintiff (respondent) and these goods were sold by the sheriff under a writ of execution against Weisner alone. It is true that there was also an execution against the appellant for costs but it would appear to be impossible to justify under that writ as the award was never made a rule of Court and that writ must be considered a nullity. Now if it is that there was no ratification by conduct upon the part of the plaintiff of the entry of appearance by Messrs. *Wilson & Wilson* for the plaintiff (respondent) it follows that the sale of the goods of the plaintiff (respondent) under a writ of execution against Weisner was a void sale and the purchasers could not acquire title to the goods as against the plaintiff (respondent). I am unhesitatingly of the opinion that there was no ratification of the action of Messrs. *Wilson & Wilson* in entering an appearance for the plaintiff (respondent) all that she did was to appeal to this Court and every step taken was an endeavour to set aside a judgment—held to be an award—upon proceedings taking place and appearance entered wholly unauthorized by her and it would be contrary to natural justice to hold otherwise, in my opinion, with, of course, great respect to all contrary opinion.

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The extraordinary effect of the award in its terms was that not only was it declared that the goods originally sold by Weisner to the plaintiff (respondent) were not the goods of the plaintiff (respondent), but that the goods subsequently bought by her were the goods of Weisner and subject to be levied upon, were levied upon and sold under express instructions from the

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judgment creditor the defendant Strand (one of the appellants but who did not attend either in person or by counsel to prosecute his appeal).

Then we have in the present case all those matters debated and examined into and submitted to a jury, all parties being present and represented by counsel and a general verdict is given in favour of the plaintiff (respondent) and the damages allowed to the plaintiff were fixed and assessed at $11,000. The learned Chief Justice in the Court below in a very careful judgment reviews all the relevant facts and in the course of his judgment said:

"Weisner wrote his solicitors the defendants *Wilson & Wilson* to defend the action and also asked Mrs. Overn to write them. That she did on the 29th of June saying: 'Mr. Weisner has instructed me to write you. I am not taking this case up with any lawyers in Prince George. . . .' On July 26th *Wilson & Wilson* wrote to Weisner: 'We have your letter also Mrs. Overn's letter and from what she says we take it that she does not wish us to defend this action on her behalf. . . .'"

Now is it possible in the face of this to justify the entry of appearance by *Wilson & Wilson* for the plaintiff? It is clear that the entry of appearance was without authority and the plaintiff (respondent) was never a party to the action and cannot be said to have been a party to any submission or bound by any award made.

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It is significant that Mr. *Pattullo,* counsel for the defendants, *Wilson & Wilson,* at the trial and at the time of the learned Chief Justice's charge to the jury referred to the question of ratification which is really the turning point of the case and desired that that matter should be fully explained to the jury, which meant, of course, that it was a fact to be passed upon by the jury and it went specifically to the jury and the general verdict of course means that the jury found that there was no ratification upon the part of the plaintiff (respondent).

I would refer to that portion of the transcript setting forth the charge to the jury where the question of ratification came up:

"*Pattullo*: I would ask you to direct the jury on the question of the subsequent ratification by Mrs. Overn.

"THE COURT: I left that to them, perhaps not as specifically as you put it now.

"*Pattullo*: That is one thing that I suggest, and there is one other point.

"THE COURT: They plead in the defence, they use the word estopped, and that she is estopped and should have been more vigilant in the remedy she

is now seeking. That is the way I put it, that she said nothing about the main point and did not confront *Wilson & Wilson* and did not tell her counsel in Vancouver, and it was not brought in the Court of Appeal, and letting that time elapse, a year now, can she be heard, to come in and complain and raise the point? Mr. *Pattullo* calls it ratification; that she ratified what had been done. That is substantially it?

"*Pattullo*: Yes.

"THE COURT: I thought I covered it."

Upon the whole case my opinion is that all the questions agitated in the action were fully and completely put to the jury by the learned Chief Justice in compliance with the statutory requirement. The Supreme Court Act (Cap. 51, Sec. 60, R.S.B.C. 1924) reads as follows:

"60. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to the issues; and the said right may be enforced by appeal, as provided by the 'Court of Appeal Act,' this Act, or Rules of Court, without any exception having been taken at the trial; but in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the Court."

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and the jury finding a general verdict it is conclusive and should not be disturbed. I would refer to what Loreburn, then the Lord Chancellor, said in *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326:

"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."

In the present case, with a general verdict, it must be held that ratification of the act of *Wilson & Wilson* in entering an appearance for the plaintiff was rejected by the jury and with non-ratification the whole fabric of the award and execution following upon it and sale of the goods was a tortious act and all the participants therein are liable and none of the defendants (appellants) can justify in respect of anything done in connection therewith as everything necessarily falls, the edifice so falsely built up vanishes. The judgment creditor Strand is responsible, he even gave specific instructions to the sheriff to seize the goods of the plaintiff (respondent) well knowing they

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were her goods under an execution against Weisner alone. The Hudson's Bay Company being purchasers at a sheriff's sale have no indemnity or covenant for title to the goods wrongfully seized and sold. *Wilson & Wilson* the solicitors entering an appearance without authority and bringing about the calamitous results have no answer—the verdict of the jury imposes all of these liabilities upon the defendants (appellants). That the question of ratification was a proper one for the jury to pass on, not this Court, is first met by the fact that Mr. *Pattullo* as we have seen specifically desired the question to go to the jury. It did, and the jury rejected it, that is, there was no ratification, the general verdict means that. Further ratification was a question for the jury and was properly left to the jury, it was not a matter to be passed upon by this Court independent of the jury. This is well demonstrated by turning to *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43. There the question was *Volenti non fit injuria* in my opinion of analogous nature to what we have here, a question of fact. I would refer to what Mr. Justice Duff said at pp. 52-5:

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"There was no evidence of express consent or agreement on the part of the plaintiff, and the question for the jury, therefore, was whether in all the circumstances the conduct of the plaintiff amounted to such consent. It was argued by Mr. Taylor that this is a question upon which the jury alone is competent to pass; in other words, that where consent is to be inferred from a course of conduct the employer must, in order to make good this defence, obtain a verdict from a jury or other primary tribunal of fact affirming it. I am quite unable to agree with this contention. There are, undoubtedly, expressions in text-books and judgments which seem to give some countenance to it; but it appears to me to be entirely opposed to principle. By the law of British Columbia, the Court of Appeal in that Province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.

"The power given by O. 58, r. 4, 'to draw inferences of fact . . . and to make such further or other order as the case may require,' enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.

"This jurisdiction is one which, of course, ought to be and, no doubt,

always will be exercised both sparingly and cautiously; *Paquin* v. *Beauclerk* (1906), A.C. 148, at p. 161; and *Skeate* v. *Slaters* [(1914)], 30 T.L.R. 290.

"The important thing to remember is that the question for the jury is whether there was, in fact, consent; while the question for the Court is whether the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation. In passing upon this last mentioned question judicial opinions given in relation to particular states of fact may be valuable as illustrations, but the question whether a particular conclusion is the only reasonably possible inference from a given state of facts is a question of law in the sense only that it is a question for the Court; it is a question for the solution of which (in the very nature of things) the law itself can afford no rule of universal application.

"It was argued by Mr. Hellmuth, on the authority of *Clarke* v. *Holmes*, [(1862)], 7 H. & N. 937, and *Woodley* v. *Metropolitan District Railway Co.* [(1877)], 2 Ex. D. 384, that, since, according to the plaintiff's own admissions, he entered upon his employment with a full appreciation of the danger occasioned by the lack of a guard and of the risk of injury arising therefrom and, as was contended, according to his own admission, with notice that his employers would not correct the defect, the appellant must be taken to have consented to his assumption of the risk as a term of his employment. I do not think it is necessary to examine the cases referred to minutely. When these cases were decided the doctrine of *volenti non fit injuria* had not undergone the elaborate examination to which it was afterwards subjected by the Law Lords in *Smith* v. *Baker & Sons* (1891), A.C. 325, and I think that in so far as any argument founded upon the earlier cases is inconsistent with the doctrine laid down in *Smith* v. *Baker & Sons*, as explained in *Williams* v. *Birmingham Battery Hotel Co.* (1899), 2 Q.B. 338, and in *Canada Foundry Co.* v. *Mitchell* [(1904)], 35 S.C.R. 452, that argument ought to be rejected. In *Williams'* case it is expressly stated by Romer, L.J., at p. 345, that the circumstance that the servant has entered into or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him; and that statement of the law was adopted by this Court in *Canada Foundry Co.* v. *Mitchell.*

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"Whether the circumstances in any particular case amount to consent must depend upon the facts of that particular case looked at as a whole; and, considering the facts of this case as a whole, I cannot agree that the construction of them adopted by the Court of Appeal is the only construction they will reasonably bear.

"I think, however, the respondents are entitled to a new trial on the ground that their plea *volenti non fit injuria* was not passed upon by the jury."

In the present case the jury have passed upon the question of ratification, the general verdict means that there was no ratification, it further means that all the proceedings were void *ab inito* and must be set aside.

I would affirm the judgment of the learned Chief Justice of

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the Supreme Court following upon the general verdict of the jury in favour of the plaintiff (respondent). It follows that in my opinion the appeals should be dismissed.

MACDONALD, J.A.: In June, 1928, John Strand, who some time before recovered a judgment against John H. Weisner for $2,286, brought an action against the said Weisner and Elizabeth Overn (the respondent herein) for a declaration that a certain agreement dated April 9th, 1928, between the said defendants, for the sale by Weisner to Elizabeth Overn of the business and assets of the said Weisner was void under the Fraudulent Conveyances Act; also that a bill of sale dated May 22nd, 1928, transferring the assets of a business carried on at Finley River, B.C., was void and that all stock-in-trade in possession of the said Elizabeth Overn, as a result of said transfers, was in law the property of the said defendant, John H. Weisner, subject to the claims of the said judgment creditor John Strand and other creditors. This latter action of *Strand* v. *Weisner and Overn* was tried before His Honour Judge ROBERTSON at Prince George on the 22nd of August, 1928. Judgment was given for the plaintiff declaring among other things "that all stock-in-trade in the possession of the defendant Elizabeth Overn is in law the property of the defendant John H. Weisner and subject to the claims of his creditors."

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The plaintiff and defendants in that action, by their solicitors, signed a consent to trial in the County Court, agreeing that the County Court judge should "have power and jurisdiction to try this action." Unfortunately they did not follow the provisions of the County Courts Act and Rules of Court. The action was commenced in the Supreme Court of British Columbia and judgment entered in that Court. From this mistake consequences of the most serious character might possibly follow shewing that in the practice of law vigilance is the price of safety. An appeal was taken to the Court of Appeal by the two defendants and upon the point being taken that the County Court judge had no jurisdiction to entertain an action in the Supreme Court, and could only under the facts disclosed act as an arbitrator, the appeal was quashed.

Two writs of *fi. fa.* were issued on September 15th, 1928, the first one against Weisner only, based upon the action in which

Strand recovered judgment against Weisner for $2,286; and another against the said Weisner and Elizabeth Overn arising out of said action brought by Strand, as a judgment creditor, against Weisner and Elizabeth Overn (tried as stated by His Honour Judge ROBERTSON) for the sum of $444.10 taxed costs therein. The first writ originated in an action in the Supreme Court and justified an execution against Weisner's chattels and if as a result of the proceedings before ROBERTSON, Co. J. the goods of the respondent Elizabeth Overn must be treated as the property of Weisner they too could be seized and sold under this admittedly good writ of execution against him for $2,286. It would appear that levy was made under said two writs of *fi. fa.* on the assumption that the judgment of His Honour Judge ROBERTSON, was a valid judgment. Under these two writs goods and chattels were sold by the sheriff of the County of Cariboo, the respondent Peters, to the respondent Hudson's Bay Company for $4,850. The goods were said to have a value of $12,000 and respondent Elizabeth Overn in the present action claimed $12,000 damages for conversion against the sheriff for an unauthorized sale and against the Hudson's Bay Company for an illegal purchase also loss of profits on prospective resales. A jury awarded her $11,000 damages against all the defendants and from that judgment this appeal was launched by the sheriff and the Hudson's Bay Company. Respondent submits that the sheriff acted under a so-called judgment of no validity and the purchaser Hudson's Bay Company are without title to the goods. As to the first writ against Weisner, admittedly good, it was submitted that the sheriff really seized the respondent Elizabeth Overn's property, Weisner having no chattels of his own; while, as to the second for $444.10 under which the same goods were seized, it was based upon a proceeding *coram non judice* and therefore void. Argument therefore was addressed to us on the premise that the second writ of *fi. fa.* was a void writ and as to the other Weisner had no goods to seize, on the assumption—I fear a wrong one—that the "judgment" of the County Court judge declaring in the widest possible language that all of the respondent's goods belonged to Weisner must be disregarded.

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We are not dealing therefore with a writ of execution irregular or void. Even were we concerned with a writ merely irregu-

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larly issued the sheriff executing it might not be without protection so long as it is not void *ex facie* or did not issue from a Court acting without jurisdiction over the subject-matter of the suit. A *bona fide* purchaser too, will obtain title from the sheriff unless the writ is void, or the goods purchased were not those of the execution creditor but of a stranger to the process. If stranger's goods are sold the true owner can recover from a *bona fide* purchaser for value. The sheriff is justified if he has in his possession the King's writ but the question would arise—may we look behind it to see, if in fact it was the King's writ or merely "a thing of naught." The writs of *fi. fa.* were issued at the instance of a judgment creditor John Strand, one of the defendants in the present action against whom judgment was obtained by the present respondent but no appeal therefrom was pressed on his behalf. I mention this in passing because cases arise where an officer executing a writ may not be liable although the party at whose instance it was issued may be. The same distinction is made between officers executing a writ and parties to the suit in *Parsons* v. *Lloyd* (1773), 2 W. Bl. 845). The sheriff (or his officer) who had to obey it was protected. We are not however dealing with a void writ of *fi. fa.* in respect to the first execution. It was regularly issued in a Superior Court action against Weisner the only question being, were the goods of a stranger seized under it? That question must be answered in the negative because of the award.

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As to the respondent Hudson's Bay Company, a *bona fide* purchaser for value, to hold it liable would be to withdraw the protection which the law affords to those who buy openly, without collusion, property sold under the process of the Court. "Executions which are the life of the law are to be favoured." (Bridgman, C.J. *Harwood* v. *Phillips* (1663), Bridgman 464 at p. 469). However from the views outlined it follows that its purchase may be sustained under the first writ of *fi. fa.* against Weisner. True the sheriff sold under both writs but he did not sell part of the goods under one writ and part under the other. All the goods belonged to Weisner under the award and the second writ of *fi. fa.* may be disregarded. We were referred to *Farrant* v. *Thompson* (1822), 2 D. & R. 1, shewing that if the creditor had no right to sell the goods a purchaser cannot acquire

title. There, mill machinery owned by the landlord was sold by the sheriff at the instance of a creditor of the tenant. "The sheriff is a wrong-doer in taking the property of the plaintiff (landlord) and therefore the defendant (the purchaser) could not under him acquire any title to it." (Abbott, C.J., p. 4). It would not follow that if by consent of the parties an arbitration was held as to title to the machinery and it was awarded to the tenant that the landlord having consented to this procedure could be heard to say that title still rested in him.

As stated the proceedings before ROBERTSON, Co. J. constituted a valid award. No steps were taken to set it aside. It is binding on the parties to the submission. We must therefore treat the chattels as the property of Weisner. Further that award included goods—perhaps the larger portion of the goods seized and sold—said to have been purchased by the respondent for her own use after the bills of sale were executed. A clause in said judgment or award is as follows:

"And this Court doth declare that all stock-in-trade in the possession of the defendant, Elizabeth Overn, is in law the property of the defendant, John H. Weisner, and subject to the claims of his creditors."

Whether or not adjudication in respect to said goods was within or without the scope of the submission an award was made concerning them and as it has not been set aside on that, or any other ground, it must now be taken as binding and conclusive on the parties thereto. It follows from this view that we are not in any respect dealing with the goods of a stranger.

In the action tried by ROBERTSON, Co. J. *Wilson & Wilson,* solicitors, for one of the appellants herein appeared for the respondent Elizabeth Overn, one of the defendants in that action, but the latter disavowed their authority to act for her. We held during the argument of this appeal, however, that, assuming (without deciding it) that the solicitors did not have authority, the respondent ratified their action by launching an appeal from that decision and by other steps. She took further steps, not on the ground of lack of authority to act for her (in *Dawson* v. *Dumont* (1892), 20 S.C.R. 709 to which we were referred, after said decision was rendered, the proceedings taken, held not to amount to ratification were based upon disavowal of authority) but on the ground that the judgment should be set

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aside for other reasons. That appeal was quashed. The respondent Elizabeth Overn ratified the action of the solicitors and was therefore properly represented by counsel on the hearing before ROBERTSON, Co. J. It is not open to her, being represented at the hearing, to object to the proceedings before him. The ratification of a solicitor's authority or the appearance before ROBERTSON, Co. J., by consent, would not confer any new authority or jurisdiction upon him. But the award is conclusive against her. As to the suggestion that the jury found that the appellants *Wilson & Wilson* did not have authority to act for her and presumably also found that there was no ratification such a finding cannot stand. The evidence which in law amounted to ratification was not disputed and even if disputed on minor points no reasonable evidence can be found to support a finding of the jury adverse to this view.

If the provisions of section 15 of the Arbitration Act, Cap. 13, R.S.B.C. 1924, had been followed no difficulty would arise in respect to the second writ of *fi. fa.* It is as follows:

"An award or a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect."

MACDONALD, J.A.

Had an order been obtained under this section execution thereon might issue. However, as intimated, we do not need to rely on the second writ. We have therefore a case where, as a result of an arbitration, not set aside, title to all the goods in issue—no matter when purchased by the respondent—is vested in Weisner and we have a valid execution against him for $2,286. It was suggested that under this writ of *fi. fa.* against Weisner more goods were seized and sold than necessary to satisfy that judgment. That may be so but the only one, *viz.*, Weisner, who might complain of an excessive seizure is not before the Court. It was (because of the award) his goods that were sold.

I think therefore that because of the award the goods sold must be treated as the property of Weisner; that no action lies against the appellant sheriff and the Hudson's Bay Company and that the appeal should be allowed.

Appeal allowed, McPhillips, J.A. dissenting.

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Mines and minerals—Adverse action—Location—Validity—Location posts —Rock monuments — Location line—Calculated to mislead—R.S.B.C. 1924, Cap. 167, Secs. 29 (3), 32, 36, 80 and 82.

The defendants while prospecting in October, 1927, found mineral in place on the ground in dispute at an elevation of 5,000 feet on the hills to the west of American Creek in the Portland Canal District, and on the 20th of February following they returned to the ground and staked six claims known as the Lucky Jim group. The ground staked is about 1,000 feet above the timber line and they carried up the necessary posts for location. They claim to have done the necessary assessment work on said claims, have had them surveyed, and on October 17th, 1928, published in the B.C. Gazette notice of intention to apply for a certificate of improvements. The plaintiffs found the same mineral in place in the early part of July, 1928, and claim there was no indication of the ground having been previously staked. On the 10th of July they staked four claims known as the American Creek group. They used monuments of stone as location posts. They recorded their claims and returned to the ground on July 17th, when they found monuments had been erected with the defendants' notices inserted therein, that were not there on July 10th. When the defendants gave notice of applying for certificate of improvements the plaintiffs brought an adverse action in so far as Lucky Jim claim No. 5 and Lucky Jim claim No. 6 conflicted with the American Creek group. The action was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that as to the American Creek group there were no legal location posts set up but unauthorized rock monuments were substituted therefor; there was no evidence of the marking of the location lines as required by the Act and as the non-observance of these formalities were of a character calculated to mislead other persons desiring to locate claims in the vicinity, the claims were therefore on these grounds invalid.

Held, further, reversing the decision of MORRISON, C.J.S.C. (GALLIHER and MACDONALD, JJ.A. dissenting), that section 82 of the Mineral Act should be applied and on their own admissions the defendants did not comply with the Act in properly marking the lines between their location posts and are not protected by section 36 of the Act, as a *bona fide* attempt to comply with the provisions of the Act is lacking and the non-observance of the formalities therein contained was of a character calculated to, and did in fact, mislead other persons desiring to locate claims in the vicinity. Judgment must therefore be given declaring their claims invalid.

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Statement

APPEAL by plaintiffs from the decision of MORRISON, C.J.S.C. of the 18th of September, 1930, dismissing an action to establish an adverse right to possession of the ground purporting to be covered by the "Lucky Jim No. 5" and "Lucky Jim No. 6" mineral claims situate in the Portland Canal Mining Division in respect of which the defendants have advertised their intention to apply for a certificate of improvements, in so far as said claims conflict with the "American Creek," "American Creek No. 1," "American Creek No. 2" and "American Creek No. 3" mineral claims, the property of the plaintiffs. The plaintiffs located the American Creek mineral claims on the 10th of July, 1928, and recorded them on the 13th of July. The defendants claim that they staked the Lucky Jim group of mineral claims on the 20th of February, 1928, and recorded them on the 6th of March following. They claim that they had found the mineral in place on the ground in the month of October, 1927, when they were prospecting. The ground in question is at an elevation of about 5,000 feet, and about 1,000 feet above the timber line. The plaintiffs admit the American Creek group was staked with monuments alleging that in that locality it was the custom to stake claims above the timber line in this way. The plaintiffs claim that owing to the snow it was impossible to stake claims in that vicinity in the month of February, and the plaintiff McLeod who staked plaintiffs' claims on the 10th of July states there were no stakes on the ground when he staked, and in this he is corroborated by Berg who was with him. After recording on the 13th of July McLeod and Berg went back to the ground, arriving there on the 17th of July, when close to the place where they claim they had found mineral in place, they found monuments indicating the No. 2 posts of Lucky Jim No. 5 and Lucky Jim No. 6, and they state positively these monuments were not there when they staked on the 10th of July. It was held on the trial that the defendants were the lawful owners of Lucky Jim No. 5 and the Lucky Jim No. 6 mineral claims and the action was dismissed.

The appeal was argued at Victoria on the 29th of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

D. S. Tait, for appellant: Bosence and Bray did the alleged staking for the defendants and their accounts of what took place are very different. It is admitted we used monuments in staking our claims but we submit that this is the custom when locating above the timber line: see *Callanan* v. *George* (1898), 8 B.C. 146; 1 M.M.C. 242; *Manley* v. *Collom* (1902), *ib.* 487 at p. 504. Under section 80 of the Act a certificate of work cures defects: see *Dunlop* v. *Haney* (1899), 7 B.C. 1; 1 M.M.C. 369 at p. 371. We claim the benefit of section 82 of the Act.

A. M. Whiteside, for respondent: They have not properly pleaded good title to their claims. They must prove that they had Free Miners' certificates unexpired and that they have located in accordance with the Mineral Act. They did not stake with legal posts, they admit they used monuments only: see *Bleeker* v. *Chisholm* (1896), 8 B.C. 148; 1 M.M.C. 112. They were allowed to prove certificates of work after the defence was in; this was wrong: see *Aldous* v. *Hall Mines* (1897), 6 B.C. 394; 1 M.M.C. 213; *Voight* v. *Groves* (1906), 12 B.C. 170. They did not put in legal posts or mark the location lines: see *Gelinas* v. *Clark* (1901), 8 B.C. 42; 1 M.M.C. 428. On the question of erecting monuments instead of posts see *Bleeker* v. *Chisholm* (1896), 1 M.M.C. 112; *Waterhouse* v. *Liftchild* (1897), 6 B.C. 424; 1 M.M.C. 153; *Schomberg* v. *Holden* (1899), 6 B.C. 419; 1 M.M.C. 290; *Caldwell* v. *Davis* (1900), 1 M.M.C. 387. They must give us notice of what we are to meet and their pleadings do not do so: see *Gelinas* v. *Clark* (1901), 1 M.M.C. 428 at p. 433; *Hogg* v. *Farrell* (1895), 6 B.C. 387; 1 M.M.C. 79; *Aldous* v. *Hall Mines* (1897); 1 M.M.C. 213; *Hanna* v. *Morgan* (1904), 2 M.M.C. 142; *Voight* v. *Groves* (1906), 12 B.C. 170; *Cleary* v. *Boscowitz* (1902), 8 B.C. 225; 1 M.M.C. 506. Bosence and Bray found the mineral in place in October, 1927, and knew where to find it in February following. The discrepancies in their evidence shews they did not make up their story of the case.

Argument

Tait, in reply: As to putting No. 1 post on another existing claim see *Clark* v. *Docksteader* (1905), 36 S.C.R. 622; 2

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M.M.C. 312. The plan we put in should be accepted: see *Paulson* v. *Beaman* (1902), 32 S.C.R. 655; 2 M.M.C. 1.

Cur. adv. vult.

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3rd March, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: In my opinion both parties have failed to make out title to the ground in question. The evidence of the defendants as to the winter staking is so vague, unsatisfactory and inconclusive that it would be a mere guess to say that the ground had been staked by them in pursuance of the Mineral Act. The plaintiffs on their part failed to prove a necessary link in their chain of title.

MARTIN, J.A.: This is an appeal by plaintiffs from a judgment of Chief Justice MORRISON, in an adverse action under Part VI. of the Mineral Act, Cap. 167, R.S.B.C. 1924, dismissing their action to have their title declared valid to the American Creek group of four mineral claims in the Portland Canal Mining Division, as against the two overlapping claims of the defendants, the Lucky Jim, Nos. 5 and 6, and also from the declaration in the said judgment that the said Lucky Jim claims are valid locations.

MARTIN, J.A.

So far as the first branch of the appeal is concerned no good cause has been shewn for disturbing the judgment holding that the plaintiffs' said claims—the American Creek group—are invalid locations on several grounds, *e.g.*, no legal No. 1 or No. 2 or discovery posts were set up, but unauthorized rock monuments substituted therefor (as to which *cf. Callanan* v. *George* (1898), 1 M.M.C. 242; and *Partridge* v. *Hamilton* (1900), *ib.* 246 (n)) and no evidence was given of the marking of the location line as required by section 29 (3) of said Act, nor of even attempted compliance with section 32 in lieu of the requirements of section 29, and hence it is clear beyond reasonable doubt that the "non-observance of the formalities . . . (of location) were of a character calculated to mislead other persons desiring to locate claims in the vicinity" within the meaning of section 36 of said Act, as defined in many other cases collected in M.M.C., Vols. 1 and 2, as hereinafter noted.

That, however, does not dispose of this special class of adverse action because section 82 of the said Act declares that:

"82. In any adverse proceedings brought before the Court under this Act, each party to the proceedings shall give affirmative evidence of title to the ground in controversy, and if the title is not established by either party the judge shall so find, and judgment shall be entered according to such finding without costs to either party."

When this exceptional provision was first passed (in, essentially the Mineral Act of 1898, Cap. 33, Sec. 11), it imposed a novel and important duty upon the Court, primarily for the assistance of the Crown and with the effect, also, of benefiting "free miners" at large in the exercise of their rights, under section 14, over the "waste lands of the Crown," as therein defined, and in the subsequent cancellation by the mining recorder under section 84, of many really invalid, yet embarrassing *de facto* locations, the doubtful existence of which prevented valid location and mining development by other free miners.

Many decisions have been given upon this important section, of which the first is *Ryan* v. *McQuillan* (1899), 1 M.M.C. 289; by myself at Nelson on 8th February, 1899, followed three days after by *Schomberg* v. *Holden, ib.* 290 which, as the note states on page 291, "has been repeatedly followed at *nisi prius*"; and *Dunlop* v. *Haney, ib.* 369, and 372 (note); *Caldwell* v. *Davys* (1900), *ib.* 387, 389 (note); *Gelinas* v. *Clark* (1901), 1 M.M.C. 428 (approving *Schomberg* v. *Holden* and *Dunlop* v. *Haney*); *Rammelmeyer* v. *Curtis* (1900), *ib.* 401; *Cook* v. *Denholm* (1901), *ib.* 447; *Clery* v. *Boscowitz* (1902), *ib.* 506; *Windsor* v. *Copp* (1906), 2 M.M.C. 318, 324; and *Voight* v. *Groves* (1906), *ib.* 357, and only partly reported in 12 B.C. 170: as was said in *Dunlop* v. *Haney,* at p. 371, "in reality in the great majority of instances, two cases have to be tried."

MARTIN, J.A.

The appellants now ask us to make the declaration that should have been made, it is submitted, by the learned judge below, *viz.*, that the defendants have not "given affirmative evidence of title to the ground in controversy" and, therefore, as "the title is not established by either party . . . judgment (should) be entered according to such finding" as the statute directs.

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It was objected by the respondents that this course was not, in the circumstances of this case, proper to adopt because it was submitted, it came within the scope of the decision of the old Full Court in *Voight* v. *Groves, supra,* wherein the present section 82 (then, essentially, section 11 of 1898) was held to be inapplicable, but, as we informed counsel during the course of this argument, that decision cannot be invoked in the present case because herein there is a real controversy whereas therein the proceedings were a sham and so the Court would not lend itself to them: the peculiar circumstances of that case are correctly set out in the head-note in M.M.C., and it is a decision which should be restricted to its special facts because of the equal difference in opinion of the learned judges sitting on it, *viz.,* Chief Justice HUNTER and Mr. Justice DUFF taking one view, and Mr. Justice IRVING and myself another.

MARTIN, J.A.

Proceeding, then, to discharge our duty to consider the "affirmative evidence" submitted by the defendants to establish their title, it is at once apparent that their original location was invalid for one reason at least, in that, like the plaintiffs, they did not, as required by said section 29(3), "mark the (location) line between posts Nos. 1 and 2 so that it can be distinctly seen" in the manner directed, and no real attempt was made to "set legal posts or erect monuments . . . " though their own evidence is that timber was available for that purpose as it was for putting in the other legal posts which they testify they did at the time. Bray their own witness of the location says, on this point "We done the best we could on the line blazing, we put down a few rocks here and there . . . small monuments." This obviously does not fulfil the statute which requires that such monuments shall be "not less than two feet high and two feet in diameter at base so that the line can be distinctly seen," and when it is considered that this was done in the winter time, 20th February, 1928, at a high altitude, about 5,000 feet, with at least two feet of snow along the line, the insufficiency of such casual proceedings becomes more apparent. It is conceded that the marking of the location line is one of those imperative provisions (set out conveniently in the note to the leading case of *Manley* v. *Collom* (1902), 1 M.M.C. 487, 504) the neglect of

which would be fatal were it not for the curative provisions of section 36 of said Act, which are invoked to save this location, as follows:

"36. The failure on the part of the locator of a mineral claim to comply with the provisions of sections 29, 30, 31 and 32 shall not be deemed to invalidate the location, if upon the facts it appears that the locator has actually discovered rock in place on the location, and that there has been on his part a *bona-fide* attempt to comply with the provisions of this Act, and that the non-observance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity."

The cases on this section (which is essentially the same as section 16, as amended by the Mineral Act Amendment Act, 1898, Cap. 33) are numerous but it will be sufficient to refer to the four leading decisions of the Supreme Court of Canada in *Callahan* v. *Coplen* (1900), 1 M.M.C. 348; *Manley* v. *Collom, supra; Sandberg* v. *Ferguson* (1904), 2 M.M.C. 165; and *Docksteader* v. *Clark* (1905), *ib.* 302, and cases cited therein, to which may be added *Rutherford* v. *Morgan* (1904), 2 M.M.C. 214 (the appeal in which, it should be noted, was settled and therefore no judgment was delivered by the Full Court after judgment reserved as stated on page 231 (note) in which there is an instruction, at pages 223-4, to the first jury that sat to apply this section and a practical consideration of the expression "of a character calculated to mislead other persons desiring to locate claims in the vicinity" which, I may say, as the presiding judge, the jury had no difficulty in satisfactorily applying to the facts before them.

MARTIN, J.A.

In the appellate determination of the three conjoint questions raised by said section 28, *viz.*: (1) actual discovery, (2) *bona fide* attempt to comply, and (3) calculation to mislead, it has been the rule that the finding of fact thereon by the trial judge will not be disturbed unless it can be said that he was "clearly wrong" in the view he took of the facts before him and to that rule we should adhere. But after a careful consideration of all the evidence in this appeal book the only inference, in my opinion, and with all due respect, that can properly be drawn from it on the defendants' own shewing is that though the actual discovery is sufficiently, if somewhat weakly established, yet the *bona fide* attempt to comply is lacking as regards the location

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line at least (after giving the defendants the benefit of serious doubts in other aspects of location), and also that the non-observance of that "formality" was of a character calculated to, and did in fact mislead other persons desiring to locate claims in the vicinity, and therefore the defendants have failed to establish their title to their claims and consequently judgment must be given declaring said claims to be invalid as well as those of the plaintiffs, which judgment, as section 82 directs, "shall be entered . . . without costs to either party."

My close investigation of this somewhat peculiar case leads me to say that it would have looked better, and been better for the defendants if Bosence had acted more reasonably at the time plaintiffs Berg and McLeod came to his camp on the evening (10th July) of their staking, and asked for information respecting the situation of the prior locations that Bosence claimed to have made thereabouts in February, instead of refusing, as he admits, to say anything at all about them, and, worse than uselessly, telling said plaintiffs to go down to the mining recorder's office (many miles away on the sea-coast at Stewart) "and find that out" for themselves. Such ill-advised conduct creates suspicion and invites disputes and litigation, and, moreover, strongly supports the plaintiffs' submission that the defendants' activities on the ground in controversy were of a nature calculated to mislead.

MARTIN, J.A.

The judgment entered below in favour of the defendants should, therefore, be set aside and the appeal allowed to that major extent with costs following the result in the usual way.

GALLIHER, J.A.: In my view the learned trial judge has very aptly dealt with the evidence of these witnesses and in a manner which appeals to me from my knowledge of the class of witnesses such as these.

GALLIHER, J.A.

I must confess that it at first struck me as a case of what is usually termed snow staking but on going carefully through all the evidence which I have done and trying to understand such evidence it would be difficult to conclude that these claims Nos. 5 and 6 of the Lucky Jim group were not staked as stated in February and it would be still more difficult to determine that

the learned Chief Justice below was wrong in his conclusions upon that evidence.

There are some discrepancies between the defendants in their evidence also as between the evidence of Bosence upon discovery and at the trial, but making due allowance for such discrepancies the evidence as a whole is strong enough to support the judge's finding that these claims were staked by defendants in February in the manner they contend for. Take for instance the camp incident—it is quite clear to me that what they did was stay at night at the Mountain Boy Cabin, come over to the ground in the morning, bring their lunch, boil their tea or coffee in an improvised lean-to and return to the cabin for the night. This would account for Mr. Green whose evidence I would pay the greatest respect to not finding traces of what he would consider camping (in the Summer when he was on the ground).

I pay little attention to the alleged conversation between MacLeod and Bosence at the camp on the 11th of July. News of a strike on the Mountain Boy close by had got out. These men who had staked in February were camped in the vicinity of the ground and any enquiries made by others as to where or whether they had staked would be regarded with suspicion and meet with scant information or even with evasion if I rightly understand prospectors.

GALLIHER, J.A.

One instance might be given when a Mr. Ernest said the ground belonged to the Chris claim and Bray's answer was "Well if it belongs to the Chris it doesn't belong to us." On the whole I agree with the learned Chief Justice and would dismiss the appeal. Moreover, in my view, the plaintiffs have not established on their own shewing a case of a proper location and staking within the meaning of the Act.

McPHILLIPS, J.A.: I am of the same opinion as that expressed by my brother the learned Chief Justice and I entirely concur in the judgment proposed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Unless we set aside the findings on pure questions of fact of the learned trial judge, apart from the doubtful question as to whether or not appellants (plaintiffs in the action) have established their own claims, this appeal must

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be dismissed. There are, I confess, grounds for casting doubt upon the evidence of respondents and their witnesses as to the actual locating of the ground in dispute in February as alleged; but the trial judge, at closer range, was in a better position than this Court to properly appraise that evidence and while not without misgiving, I am not convinced that we should depart from the usual rule and say that his findings were clearly wrong.

I would dismiss the appeal.

Appeal allowed in part, Galliher and Macdonald, JJ.A. dissenting.

Solicitors for appellants: *Tait & Marchant.*

Solicitors for respondents: *Whiteside, Wilson & White.*

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Banks and banking—Local manager—Money left with him for investment —Misappropriated by him—Authority—Liability of bank.

The plaintiff who for some years had been a customer of the branch of the defendant Bank at Kelowna, received $4,500 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. Shortly after receipt of this money the local manager of the Bank, with whom he had been well acquainted for many years, made representations to him as to the investment of this money at 8 per cent., and induced him to withdraw $2,500 of this money and hand it over for investment. The local manager drew up two cheques for $1,850 and $650 respectively, one payable to "self" and the other to bearer. The plaintiff signed the cheques and endorsed the one payable to "self" and handed them over to the 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 60 customers of the Bank to the extent of $80,000. In an action to recover the $2,500 it was held that the Bank was liable.

Held, on appeal, affirming the decision of MACDONALD, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that the local manager had authority on behalf of the Bank to purchase securities for the plaintiff by way of investment and the plaintiff thought he was dealing with the Bank. The dishonest acts complained of were committed in the course of the local manager's agency and the Bank is liable.

APPEAL by defendant from the decision of MACDONALD, J. of the 17th of December, 1930 (reported, 43 B.C. 371), in an action to recover $2,500 that he claimed he deposited with the Bank for investment. For some years prior to 1928 the plaintiff had been a 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

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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, communicated with the plaintiff, and upon his coming to the Bank made representations as to an investment at 8 per cent. The plaintiff was thereby induced 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: "This will acknowledge receipt of Twenty-five Hundred Dollars advanced at 8 per cent. for your account." He then put the receipt in a sealed envelope and placed it in the plaintiff's safety-deposit box. When the plaintiff needed this money later 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 for the money required and later it would be retired by the moneys which had been invested. The plaintiff enquired from time to time as to the money invested, but having confidence in Rees did not press the matter until July, 1930, when through investigations made by one of the Bank's inspectors it was found that Rees, during a number of the previous years, had defrauded over 60 of the Bank's customers, the amount involved being over $80,000. On the trial the Bank was held to be liable and the plaintiff recovered judgment.

Statement

The appeal was argued at Victoria on the 12th of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellant: Rees started to borrow from the Bank's customers in 1912 and continued to do so up to 1930. We submit (1) That this was a matter between Mack and Rees and had nothing to do with the Bank; (2) Rees was not acting

Argument

within the scope of his authority from the Bank when undertaking to lend out Mack's money: see *Ontario Bank* v. *McAllister* (1910), 43 S.C.R. 338 at p. 358; *Baroness Wenlock* v. *River Dee Company* (1887), 36 Ch. D. 674 at p. 685; *Banbury* v. *Bank of Montreal* (1918), A.C. 626 at pp. 683 and 702-3; *Richards* v. *The Bank of Nova Scotia* (1896), 26 S.C.R. 381 at pp. 285-6; *Cheshire* v. *Bailey* (1905), 1 K.B. 237; *Giblin* v. *McMullen* (1868), L.R. 2 P.C. 317. The case of *Thompson* v. *Bell* (1854), 10 Ex. 10 can be distinguished as the Bank itself was involved in the transaction. See also *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716; *Barwick* v. *English Joint-Stock Bank* (1867), L.R. 2 Ex. 259.

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Norris, for respondent: The judgment below was strongly in our favour. When Rees cashed the cheques he stole money that was in the hands of the Bank. He had power to deal in securities but he did not do so. The mere fact that the transaction was fraudulent does not protect the Bank: see *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at p. 730; *Stevens* v. *Merchants' Bank of Canada* (1918), 42 D.L.R. 171; *Banbury* v. *Bank of Montreal* (1918), A.C. 626 at p. 682.

Cur. adv. vult.

25th March, 1931.

MACDONALD, C.J.B.C.: The manager, one Rees, of a branch of appellant's bank at Vernon induced the respondent to withdraw money from the bank and give it to him for the following purpose:

"This will acknowledge receipt of Twenty-five Hundred Dollars advanced at 8 per cent. for your account."

Rees represented to the plaintiff (respondent) that he would get 8 per cent. for it. Who was to invest and pay him 8 per cent.? Respondent says the Bank. Appellant says Rees. The onus as to which was on the respondent and I think he has given no evidence to shew that Rees had authority to enter into such an undertaking on behalf of the Bank. There is no evidence of express authority and I can find nothing in the evidence to disclose that the defendant had held Rees out as having authority to enter into a transaction of this kind or that it was incidental to his authority as manager of the branch. No doubt Rees held

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himself out as acting for the Bank and that the plaintiff believed that he was acting for the Bank, but apart from his own representations there is nothing to connect the Bank with the transaction except the fact that it was made by their manager, and involved money which had been deposited in their branch office. Rees's evidence, of course, with regard to his authority is not of any value as against his principals. What evidence there is respecting the holding out of Rees or of his incidental connection with the transaction are inferences to be drawn from the circumstances.

The powers of Canadian Banks are limited by the Bank Act, Cap. 12, R.S.C. 1927, Sec. 79, Subsecs. (*c*) and (*d*). This section does not authorize transactions of the kind here involved. The arrangement entered into between Rees and the respondent is not within either one of said subsections (*c*) or (*d*) and are therefore not such as the Bank itself could lawfully do or render itself liable for.

It was argued that subsection (*c*) authorizes banks to deal in negotiable securities, bonds, etc., and while that is true this authority relates to the banks' own dealings in such securities. To hold that a bank could deal in securities for the profit of the respondent or other customers would be tantamount to holding that they could carry on a brokerage business which would be contrary to subsection 2 (*a*) of said section 75, which declares that a bank shall not engage or be engaged in any business whatsoever except such as is authorized by the Act.

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Thompson v. *Bell* (1854), 10 Ex. 10; and *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716, were referred to by counsel for respondent in support of their contention that the bank must make good the respondent's loss. In *Thompson* v. *Bell, supra,* the manager of the bank had authority to assign and deal with equitable liens of the bank. He induced Mrs. Thompson to transfer her deposits in the bank and to purchase certain other properties therewith, and the manager by fraud converted her money to his own use. If it had been an honest transaction it would have been in the interest of the bank and therefore within the scope of the manager's authority, and while not questioning the decision in the special circumstances mentioned in the reasons for judgment delivered I do not think it analogous to

this case. While that case can have no application to one where the authority of the principal is denied yet I find it difficult to appreciate how money which is checked out by the depositor to Rees for the purpose of their bargain can be regarded as still in the bank. In *Lloyd* v. *Grace, Smith & Co., supra,* a dishonest clerk was held to have acted within the scope of his authority, therefore his principal was held liable to make good the loss.

In my opinion the present case falls rather within the principle of the decision in *Banbury* v. *The Bank of Montreal* (1918), A.C. 626. It was held there that the giving of advice to a customer in respect of investments was not part of the business of banking. There were other reasons, of course, for the decision but that was one reason I think why the bank was relieved of responsibility.

MACDONALD, C.J.B.C.

With great reluctance I am driven to allow the appeal.

MARTIN, J.A.: I would dismiss this appeal, being of opinion that the learned judge below has on the facts reached the right conclusion in a difficult case which is upon the line.

MARTIN, J.A.

GALLIHER, J.A.: I agree with the learned trial judge after a careful consideration of the authorities and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal calls for the consideration of the scope of employment of a manager of a bank in Canada the bank operating under the Bank Act (Cap. 12, R.S.C. 1927). It is to be at once noted that managers of banks in Canada do not occupy the same position as managers of banks in England where it may be said that banks transact a great deal of business for their customers that is wholly outside of and not within the powers of the banks in Canada to engage in and not permissible to managers of banks operating under the Bank Act. Here we have a sum of $2,500 paid to one Rees the manager of the Royal Bank of Canada not made payable to the Bank or to him as manager by the plaintiff (respondent) in two cheques of $1,850 and $650 respectively, one cheque payable to cash or bearer, the other to himself which did not require any endorsement by Rees and were not endorsed. A receipt for the total of the two

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cheques was given by Rees, not upon any form of letter paper of the Bank, reading as follows:

"This will acknowledge receipt of Twenty-five Hundred Dollars advanced at 8 per cent. for your account."

Now this receipt on its face rebuts any idea that it was given by Rees in his capacity of manager of The Royal Bank. The plaintiff says the moneys were for investment. The Bank has no power to accept money for investment (section 75) other than on deposit in current account, which bears no interest or in savings account which ordinarily never exceeds 3 per cent. and in many cases no interest at all. Palpably the receipt carries with it the complexion of a transaction *dehors* regular and allowable business in which a bank may engage. That is, the transaction must be looked at as one between the plaintiff and Rees quite outside of the business of the Bank.

The receipt on its face bears an ear-mark that indicates it was not a banking transaction, *i.e.*, a rate of interest of 8 per cent. is mentioned. The Bank is not by statute admitted to charge more than 7 per cent. (section 91) in banking business. At a later date the plaintiff being desirous of utilizing this $2,500 calls upon Rees and is desirous of obtaining the money. The answer is that being invested the money is not available. If the money was on deposit or held by the Bank to the plaintiff's credit it would have been available. It is clear that the plaintiff knowing that the money was to be invested at 8 per cent. could not reasonably expect that he could walk into the Bank at any time and have his $2,500. He exhibits no surprise but falls into line with the suggestion of Rees that the money should be obtained by the plaintiff giving promissory notes in favour of the Bank which were discounted by Rees in the ordinary course of business and renewed from time to time and in the counterclaim of the defendant (appellant) there is an indebtedness sued for on promissory notes and interest thereon in amount $3,222, that is, the indebtedness upon these two promissory notes is still outstanding and unpaid. The very course adopted by the plaintiff of obtaining the needed money through the Bank in the usual way of banking business is evidence that the transaction he had with Rees was had with Rees personally and not in relation to the Bank at all or that

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the Bank was to make any investment on his account. The reasonable remark the plaintiff would have made had he the belief that the investment was a banking investment, such as the purchase of Government bonds or approved stocks, that the securities be converted into cash. One feature that stands out prominently is this—could the plaintiff for a moment have any reasonable belief that any securities the Bank would hold for him would bear 8 per cent.? The very mention of 8 per cent. was a plain intimation that the plaintiff understood that Rees would obtain some mortgage security upon real estate that would bear interest at 8 per cent. and the money would not be available when he, the plaintiff, asked for it. He asked Rees not as manager of the Bank—as I would view it—but as Rees personally to get him (the plaintiff) an investment at 8 per cent. Everything indicates this and it is only reasonable to so view the evidence. In passing I might say—with the greatest respect to the learned trial judge and all contrary opinion—to admit of the contention here made would be the acknowledgment of a course of action that would wreck the very admirable and staunch banking system of Canada, based upon the statute law of the Parliament of Canada as exemplified in the Bank Act, which places the chartered banks of Canada in a well-defined position and indicating in the plainest of terms the scope and limitations upon banking business, and one provision is that the banks are not permitted to loan upon real estate. It is idle to contend that the plaintiff could have reasonably expected that the $2,500 was taken from him by the Bank for investment at 8 per cent. That could only import that an investment was to be made for him by the Bank on real estate and would bear 8 per cent. Certainly any such agreement by Rees would be a transaction beyond the scope of the employment of Rees as manager for the Bank. To impose liability upon the Bank for any such case as the plaintiff attempts to maintain is repellent to all reason and would be in my view contrary to the principles of law, and would be subjecting banks to a risk that the Parliament of Canada has carefully guarded against and the plaintiff in common with all others must be held to know the statute law and must be bound by the limitations which the principles of law impose upon agents—that they cannot contract so as to bind

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their principals beyond the scope of their employment. To admit of any such liability would in its resultant effect be nothing less than chaos. To illustrate the confining lines of a chartered bank in Canada I would refer to the very illuminative judgment of Mr. Justice Duff in *Ontario Bank* v. *McAllister* (1910), 43 S.C.R. 338 at pp. 358-61. There that learned judge refers to the governing statute law as affecting the chartered banks of Canada and refers to *Baroness Wenlock* v. *River Dee Company* (1887), 36 Ch. D. 674 at p. 685 and (1885), 10 App. Cas. 354 at p. 362. The leading House of Lords decisions indicating the legal scope of authority of corporations are referred to: *Amalgamated Society of Railway Servants* v. *Osborne* (1910), A.C. 87 at pp. 94, 97; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1875), L.R. 7 H.L. 653; *Attorney-General* v. *Great Eastern Railway Co.* (1880), 5 App. Cas. 473, and *Murray* v. *Scott* (1884), 9 App. Cas. 519. It is true Mr. Justice Duff as well as Mr. Justice Anglin (now Chief Justice of Canada, whose judgment is from page 368 to 378) dissented in the *Ontario Bank* case upon the particular facts of the case, but I refer to their judgments upon the general principles of the law governing chartered banks in Canada and in that respect most valuable in considering the legal position of the Bank in the present case. At p. 358 Mr. Justice Duff, before proceeding to cite the House of Lords decisions, said:

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> "The principles therefore which govern the construction of the powers of statutory corporations are those which must be applied for the determination of the question at issue."

In the *Amalgamated Society* case Lord Macnaghten at p. 94 said:

> "The principle, I think, is nowhere stated more clearly than it is by Lord Watson in *Baroness Wenlock* v. *River Dee Co.* [(1885)], 10 App. Cas. 354, at p. 362 in the following passage: 'Whenever a corporation is created by Act of Parliament with reference to the purposes of the Act, and solely with a view to carrying those purposes into execution I am of opinion not only that the objects which the corporation may legitimately pursue must be ascertained from the Act itself, but that the powers which the corporation may lawfully use in furtherance of these objects must either be expressly conferred or derived by reasonable implication from its provisions.'"

It is difficult in this case to appreciate how it can reasonably be contended that Rees had or could have any authority to bind the Bank in that which took place in the present case—it is a

truism that the agent of the bank could only act within the scope of authority conferred by statute upon the principal—the bank—not outside it. Can it be successfully argued that it is the part of the ordinary business of a chartered bank to engage in a transaction such as we have here? In my opinion there is but one answer and that is a most positive negative. It therefore reasonably follows that what Rees did here was something beyond the scope of his employment and therefore imposes no liability upon the Bank. In this case the holding-out principle does not apply as I view it, but in any case there is not a scintilla of evidence of any holding out—further Rees with great ingenuity so arranged matters that absolutely nothing was in evidence or capable of being discovered that would put the inspection officers on enquiry or anything whatever which would call attention to this transaction. In truth it was in fact anyway a transaction between the plaintiff and Rees absolutely disassociated from the Bank. The plaintiff took the receipt given him by Rees and as we have noticed not a receipt by Rees as manager and placed it in a safety-deposit box, to which, of course, none of the officers of the Bank would have access, not even Rees himself.

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We have Lord Atkinson in his speech in the House of Lords in *Banbury* v. *Bank of Montreal* (1918), A.C. 626 at pp. 683-4, saying:

"Moreover, so far from there being anything to shew that the bank and its officers are in fact, or hold themselves out as being, persons skilled in advising upon investment, though they are by the Revised Statutes of Canada, 1906, c. 27, by s. 76 authorized to engage in and carry on such business as generally appertains to the business of banking, yet they are, except so far as authorized by that Act, prohibited from lending money or making advances on the security of or by the hypothecation of land. Sect. 80 no doubt empowers them to hold mortgages of real or personal property as security for debts due to the bank by their customers. These provisions would tend to shew that these officers have not the opportunity or training to become skilled persons in such matters, but rather the contrary. It was not, however, contended in this case, as I understand the evidence, that it was within the scope of the employment of every local manager, or even of the general manager of the bank, to advise all their customers gratuitously, or at all, upon the subject of investment; but that, owing to certain special facts and circumstances proved in evidence in this particular case, it might be inferred that Galletly, as manager of the Victoria branch of the defendant bank, was acting within the scope of his authority and in the course of his employment, in recommending the appel-

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lant to make a loan to this company on the security of a second mortgage of the portions of their property mentioned in the schedules annexed to the deed of mortgage."

There is here as there was in the *Banbury* case the question of the authority in the bank manager. Lord Wrenbury at p. 715 is reported to have said in his speech:

"The point, then, is this. To the question 'Had Mr. Galletly authority as a manager of a branch of defendant bank to advise the plaintiff, &c.,' the jury have answered Yes. The respondents say there was no evidence to support that finding. The Court of Appeal have held that there was no evidence. In my opinion that is right."

In the present case there is no evidence that Rees the manager had any authority to do what he did and no such authority could have been conferred by the Bank or any officer thereof in my opinion. Further on in his speech Lord Wrenbury at pp. 715-16 said:

"Being of this opinion, it is unnecessary to say whether, if the general manager had by the letter given authority to give assistance or advice in such a matter as advising upon investments, it would have been within his own authority either himself to bind the bank in such a matter or to give a like authority to a local manager. It is obvious that that is a question which lies at the root of the whole matter, but it seems that that general question was not raised at the trial, and, if it had been raised, it would, of course, have been properly the subject of evidence. I may add, however, that the case seems to me to have proceeded throughout upon the footing that advising upon investments was not in such manner part of the business of bankers as that it would fall without more within the scope of the authority of a manager of the business. Throughout the argument I have been unable to see that the following dilemma was ever recognized or met at the trial. Either advising upon investments was within the business of bankers or it was not. If it was, then not the head manager only but the local manager within his district would also hold authority to do that business so as to bind his principals. If it was not, then the head manager could not do it, neither could he authorize the local manager to do it. The question whether it was within the scope of the business, therefore, lay at the root of the matter. But assuming (without at all suggesting that it is the fact) that the general manager could have given such authority, the letter in my opinion, upon its true construction, did not purport to give it."

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It is not difficult to see from what Lord Wrenbury said that in his opinion there could not be the authority in the manager to do what was done in that case nor could it even be done by the general manager nor could he authorize the local manager. Now in the present case no evidence whatever was led by the plaintiff to shew that Rees the local manager had any authority to accept money from a customer of the Bank and advise on the

investment thereof or in any way engage with the customer to attend to any such business nor was it shewn that it was within the business powers of the Bank.

Unquestionably upon the facts of the present case no authority was shewn in Rees to do what he did—further if any such authority had been attempted to have been given by the general manager to Rees it would have been ineffective in law in my opinion and would not have been binding on the Bank. So that our whole enquiry comes to this—was Rees the manager acting within the scope of the banking business in accepting the money from the plaintiff and agreeing to make an investment at 8 per cent.? Something which he did not do. He later absconded and failed to account for the money, and it is to be remembered the money never reached the Bank as it would appear, Rees, putting it mildly, misappropriated the money. The plaintiff has left the case in the air so to speak, there is no evidence of any authority, nor is there any evidence that it was within the business of bankers to engage in any such business. Besides and above all there is in my opinion no statutory authority in the Bank to engage in any such business.

Now in the *Banbury* case we have Lord Wrenbury proceeding and saying at p. 716:

"As regards the oral evidence the matter stands as follows: Mr. Gordon Hewart, who appeared for the plaintiff, disclaimed a general authority in Mr. Galletly to advise at large about investments. He had not cross-examined, he said, for the purpose of suggesting that there were any general instructions to the branch managers to advise about investments or that it was part of their normal duty to advise about investments in general. But, said he, he was putting it to the witness that if in the negotiations dealing with the water company, in which the bank had an interest, the local manager recommends somebody to put his money in, he is doing that in the course of his employment as manager. The proposition is to my mind impossible. The question here is whether from a particular state of facts there is to be implied an authority which was not given expressly. The fact from which the implication is sought to be raised is that the transaction was one in which the bank itself had an interest. The contention, therefore, is that in a case in which the duty and interest of the bank were in conflict there is a presumption that the agent of the bank had authority to advise because the bank itself was interested in a successful issue of the advice. The presumption, of course, is exactly the other way. The jury ought to have been told that the evidence that the bank was itself interested in the matter was evidence against, and not in favour of, an implied authority. At any rate, that is the view which I take of this

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evidence. There remains only the evidence of Sir F. Williams Taylor. He says that in recommending investments the manager would be exceeding his authority. My Lords, in this state of things, I am of opinion that there was no evidence of authority, and that the Court of Appeal were right in holding that judgment ought to be entered for the defendants."

In *Richards* v. *The Bank of Nova Scotia* (1896), 26 S.C.R. 381 at p. 386 Mr. Justice King said:

"When a person is acting outside of the apparent scope of his authority and makes a representation to advance his own private ends (or what is the same thing the private ends of some one other than his principal) it can in no sense be called the representation of the principal. In other words it is not a representation by him as agent. In such case the belief of the person acting upon it is immaterial as against such obvious want of authority."

The language of Mr. Justice King above quoted is particularly applicable to the facts of the present case. I would again refer to the *Banbury* case, *supra*. At pp. 702-3 Lord Parker of Waddington is reported to have said:

"My Lords, in the course of the trial counsel for the appellant admitted that the manager had no general authority to advise—in other words, that it was not within the scope of the bank's business to advise on investments at large. I take this to include Canadian investments; otherwise there would be no point in the admission. It does not appear why the admission was made. It may have been because the powers of the bank were by statute confined to carrying on a banking business; and it would be difficult to establish that advising on investments was part of the business of banking. . . . Unfortunately the bank, being a corporate body governed by statute and not a natural person, were incapable of conferring, through their general manager or otherwise, authority to do anything outside the scope of their authorized business, and, inasmuch as the branch manager had already a general authority to transact on behalf of the bank all the bank's business in connection with his branch, no further authority was necessary. The real question must, therefore, be whether the special circumstances of the case made it part of the bank's business to advise on this particular investment. If they did, the manager's general authority was amply sufficient to bind the bank. If they did not, no special authority could, even if proved, be of any avail."

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In my opinion there were no special circumstances in the present case "that made it part of the bank's business to advise this particular investment"—*i.e.*, to accept the money of the plaintiff and make the investment. In truth to do so was stepping outside the scope of the Bank's authorized business and the doing of it by the agent was in excess of the authority to the agent (Rees) and cannot be held to be binding on the principal the Royal Bank. There is this, of course, to be never lost sight of in this case that it is not established that Rees did presume

to act as the agent of the Bank—the receipt given does not shew it—further Rees undoubtedly knew he had no authority and knew he was acting outside his authority—he did not pass the money into the treasury of the Bank or make any report of the transaction. It was a transaction outside the authority that Rees had as manager of the Bank and it cannot be viewed as other than a transaction between the plaintiff and Rees absolutely disassociated from the business of the Bank and in any case "outside the scope of their authorized business." That being so it follows that the defendant the Bank cannot have imposed against it any liability in respect of the transaction.

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In my opinion the judgment of the learned trial judge should be reversed and the action dismissed, that is, the appeal should be allowed.

MACDONALD, J.A.: Respondent, a farmer residing near Kelowna, B.C., had for many years banking business relations with one Rees, manager of appellant Bank. In 1928 he had a balance of about $3,000 to his credit in the Bank and planned to hold it for a year to make a payment on a land purchase. Rees said to respondent "Why not invest your money: you will not be using this money until the year is up—you will get 8 per cent. for it." Respondent said "If I should have the chance to buy the property before the year is up can I have the money?" Rees replied "Yes, if you give me ten days' notice when you decide to buy it will be all right." Rees drew two cheques, one for $1,850 payable to "cash or bearer"; the other for $650 payable to "self" and respondent signed both of them and endorsed the second one. He trusted Rees implicitly and relied upon his good faith. Respondent was then given the following document prepared by Rees on plain paper:

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"This will acknowledge receipt of Twenty-five Hundred Dollars advanced at eight per cent. for your account."

It was put into a sealed envelope and placed by respondent and Rees in a box kept in the Bank by respondent. These cheques were subsequently cashed by Rees and he stole the proceeds.

Later when respondent asked for his money he was put off, presumably on the implied suggestion that it would take some

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time to liquidate this mythical "investment." Finally to provide for his immediate needs Rees persuaded respondent to borrow about $3,000 from the Bank on two notes, taking title deeds as security, so that with the proceeds he might complete the purchase before his own money was available. Rees finally left the country after defrauding many others, in amounts aggregating over $80,000.

Respondent brought this action to recover from the appellant Bank $2,500, because of the fraud of Rees alleging that he had given it, not to Rees, but to the Bank to "invest" for his benefit, and that so far as respondent was concerned in law the money never left the Bank. Appellant submits that it was a personal transaction between the parties: or alternatively if Rees made any representations leading respondent to believe that he was acting on behalf of the Bank it was beyond the scope of the Bank manager's authority. It was also suggested that when respondent signed the two cheques referred to aggregating $2,500 he furnished the Bank with vouchers for the discharge of the Bank's indebtedness to him. I do not agree. The procuring of the cheques was part of the scheme to defraud and should not be treated as isolated transactions.

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The Bank manager might carry on a personal business on his own behalf. He is not prohibited from doing so. I think there is no doubt however that he took advantage of his position to perpetrate this fraud. The respondent did not think it was a personal arrangement with Rees. He believed Rees purported to act and he did pretend to act on behalf of the Bank in procuring this money from respondent presumably for investment purposes. That finding is justified by the evidence.

Banbury v. *Bank of Montreal* (1918), A.C. 626 was referred to. It was suggested that if respondent acting upon the advice of Rees invested $2,500 in securities that proved unsound the Bank would not be liable for the alleged negligence of its manager in failing to advise with care. It has I think no bearing on the point in issue. This is not a case of advising a client as to an investment apart from a banking transaction. Rees, as manager, pretended to speak on its behalf the better to mislead his intended victim while in reality he spoke to advance his own scheme to steal respondent's money. It is not therefore a

case of advising respondent as to an investment although the element of advice is present.

In addition to actual authority—later discussed—there was a representation by conduct that he (Rees) had authority as a banker to invest this sum in securities of some sort in which the Bank might deal. The actual language used is meagre but its purport is clear. Had he asked respondent to lend it to him personally I am satisfied he would not have done so. Respondent expected to have the weight and prestige of the Bank behind the contemplated "investment." I do not overlook the fact that the receipt was given on plain paper and was signed by Rees personally. His conduct in retaining it, and the hurried manner in which cheques were secured and the receipt placed in a sealed envelope and deposited in a box kept in the Bank bears the imprint of a fraudulent scheme to prevent respondent from discovering that he was not signing as Bank manager. If respondent did not notice the peculiar methods followed it was because he was innocent and without suspicion. It should not fairly be held that he was put upon enquiry.

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The learned trial judge found that respondent "thought he had been dealing with the Bank alone"; also that Rees intended respondent to believe and he did believe that Rees was acting for the Bank. This is equivalent to a finding by a jury and it should not be disturbed. It would be open to a jury on the evidence and inferences therefrom to reach that conclusion. This finding in effect means that Rees represented that he would use the money in a manner authorized by the Bank Act. If as a result of the few imperfect words used by the parties it would not be possible to give effect to them by an "investment," or its equivalent, *viz.*, the purchase of securities in which banks might lawfully deal it would not avail respondent that he wrongly thought the Bank had authority. I think, however, that the Bank manager could on the fair and liberal interpretation that ought to be given to the words used (as between banker and customer) carry out the mandate given to him without offending against the provisions of the Bank Act. I feel that in deciding whether or no the Bank might legally carry out respondent's consent to an "investment" of his funds we should interpret the words used in the widest sense possible to enable us to say that

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Rees could legally carry out his undertaking within the authority conferred by section 75 of the Bank Act. He intended that respondent should believe that he could do so and respondent did believe it. By the Bank Act, R.S.C. 1927, Cap. 12, Sec. 75 (*c*) the bank may:

"(*c*) deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, Provincial, British, Foreign, and other public securities; and

"(*d*) engage in and carry on such business generally as appertains to the business of banking."

Could Rees acting honestly carry out instructions by making a purchase of securities within the scope of this section? I think he could. Banks may "deal" in securities of different kinds. If one agreed with a bank manager's suggestion to "invest" a bank balance in the purchase, *e.g.*, of victory bonds or municipal debentures it would be a legitimate banking transaction. A bank manager with his customers' consent could buy them: in other words turn the customers' money into bonds or securities enumerated in the section quoted. If he told his customer that he would "invest" his money in securities he would understand him to mean (without stating it) that he would purchase a class of securities warranted by section 75 of the Bank Act. It was suggested that a layman should know that the securities mentioned in this section would not yield 8 per cent. interest, and therefore should know that such an investment would be beyond the scope of the Bank's powers. That does not follow. Banks are not prohibited from dealing in securities yielding that rate of interest if such securities can be found. For aught we know Rees, if honest, acting on behalf of the Bank, might have purchased securities yielding 8 per cent. within the meaning of the section referred to. Appellant did not shew that he could not do so. As to authority, it might also be mentioned that the Bank's inspector giving evidence said:

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"Well they [*i.e.*, managers] are not supposed to recommend them; we may suggest to them."

Rees suggested an "investment" and according to this witness who dealt with general instructions to bank managers he had authority to do so.

It was submitted that it is immaterial whether or not the person to whom a representation is made believed the Bank manager had authority to make it and *Richards* v. *Bank of Nova Scotia* (1896), 26 S.C.R. 381 was referred to. We are not however dealing with the premise "if he had authority." There, the representations were not within the apparent scope of the authority of the agent of the bank. There were too such suspicious circumstances in connection with the representations as to put the party aggrieved upon enquiry. Here the circumstances lulled all suspicion having regard to the respective character of the deceiver and the deceived. The case was referred to by appellant's counsel chiefly because of the following observations of King, J., on p. 385:

"The extent of the liability of a principal for the wrongful or fraudulent act of his agent is considered in *Barwick* v. *English Joint Stock Bank* [(1867)], L.R. 2 Ex. 259; *Mackay* v. *Commercial Bank of New Brunswick* [(1874)], L.R. 5 P.C. 394; and *British Mutual Banking Co.* v. *Charnwood Forest Railway Co.* [(1887)], 18 Q.B.D. 714. In the former of these cases it is said that the general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, and that the principal's or master's responsibility extends to the manner in which the agent or servant has conducted himself in doing the class of acts which he is put into position to do."

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Because it is stated that from the cases referred to a general rule is drawn it does not follow that in all cases where the fraud is for the benefit of the wrongdoer and not for the master's benefit the latter can escape liability. Such a view would be opposed to many authorities. And again on p. 386:

"When a person is acting outside of the apparent scope of his authority and makes a representation to advance his own private ends (or what is the same thing the private ends of some one other than his principal) it can in no sense be called the representation of the principal. In other words it is not a representation by him as agent. In such case the belief of the person acting upon it is immaterial as against such obvious want of authority."

In the case at Bar Rees was not acting outside of the apparent scope of his authority.

True the principal is not liable for a criminal act committed by his servant if not done within the scope of his employment (*Cheshire* v. *Bailey* (1905), 1 K.B. 237). That does not solve the problem as to whether when the agent "undertakes" to do an act his principal might lawfully do (and therefore within the

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scope of his employment) if he in the act of doing so criminally turns it to his own account the principal is not liable. He, as well as the plaintiff, is a sufferer. One may suffer: not both. Of the two innocent parties where should the burden fall?

Thompson v. *Bell* (1854), 10 Ex. 10; 156 E.R. 334, would appear to be in point. The plaintiff kept a deposit with defendant bank. Its agent Kerr induced the plaintiff to purchase some property in which the bank was interested. His statements were untrue and he absconded with plaintiff's money withdrawn for this purpose. Evidence was adduced by the defendant to shew that Kerr had no authority from the directors to sell any property of the bank. The jury found Kerr had authority to assign securities which the bank held on real property and that Kerr intended the plaintiff to believe, and she did believe, that Kerr was acting as agent for the bank in assigning the property. Both these findings with necessary variations may be made in the case at Bar. The latter finding was expressly made by the trial judge and as to the former I have already pointed out that Rees could "invest" by buying securities within section 75 of the Bank Act. The word "invest" was used in a general sense and should not be given a restricted meaning. Pollock, C.B. said at p. 13:

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"We all agree that the rule ought to be discharged. The jury have found that the manager of the bank intended to make the plaintiff's wife believe, and that she did believe, that he was acting in this transaction as agent for the bank. 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. 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."

And Alderson, B., on pp. 13-14:

"The question resolves itself into one of fact, *viz.*—Was the money paid to the bank, or to the manager individually? Now it appears that the plaintiff's wife had a sum of money in the bank on a deposit account, when it was suggested to her by the manager of the bank that she might employ a part of it more profitably by investing it in a particular way. She accedes to that, and is desirous of withdrawing her money as a deposit, and

receiving in exchange for it certain houses. For that purpose it was necessary that 400*l.* should be paid in discharge of a mortgage, and that 195*l.* should be paid to the bank, in order to get rid of their equitable lien. Therefore she gives up her deposit notes, and pays to the manager of the bank 595*l.*, in order that he, as such manager, may so dispose of it. But he does not, and therefore the bank are responsible. It is a payment of money into the bank, in order that their agent may dispose of it in a certain way, which he does not do. Then the money is still in the hands of the bank."

I rely on *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716, because I think the principles enunciated are applicable. A firm of solicitors were held liable for the fraud of its agent acting within the scope of his authority whether or not the fraud was committed for the benefit of the principal or of the agent. A widow, owner of two cottages and a sum of money secured by a mortgage, being dissatisfied with the income therefrom, consulted a firm of solicitors and was by them referred to their managing clerk who conducted the conveyancing business of the firm. Fraudulently he procured from her deeds of the property (which she signed without reading) to himself. She thought it was necessary to execute them to effect a sale of the properties. The respondent signed cheques, in effect, for the same reason. The clerk disposed of the property for his own benefit. He had authority to conduct business of the class referred to. It was within the scope of his work. Rees as already stated, in my view, had authority on behalf of the Bank to purchase securities for the respondent by way of investment. His conduct in converting them fraudulently to his own use was similar to the conduct of the clerk. The jury found that the clerk acted on his own behalf and for his own benefit. It is on the ground among others, that Rees acted on his own behalf and for his own benefit that the Bank disputes liability in this case. That, however, is immaterial. The business in hand, in both cases, if honestly conducted was for the benefit of the principal. The jury also found that the plaintiff believed she was dealing with the firm of solicitors. The respondent believed he was dealing with the Bank. Earl Loreburn said at pp. 724-5:

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"He [the clerk] took advantage of the opportunity so afforded him as the defendant's representative to get her to sign away all that she possessed and put the proceeds in his own pocket. In my opinion there is an end of the case. It was a breach by the defendant's agent of a contract made by him as defendant's agent to apply diligence and honesty in carrying through a business within his delegated powers and entrusted to him in that

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capacity. It was also a tortious act committed by the clerk in conducting business which he had a right to conduct honestly, and was instructed to conduct, on behalf of his principal."

Rees, in effect, was instructed by the Bank to conduct this class of business honestly. And again at p. 725:

"If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it."

As to the suggestion erroneously said to be warranted by the decision in *Richards* v. *Bank of Nova Scotia* (1896), 26 S.C.R. 381, that the act must in all cases be for the master's benefit the Earl of Halsbury in explaining the decision in *Barwick* v. *English Joint Stock Bank* (1867), L.R. 2 Ex. 259, said at p. 726:

"So far from giving any authority for the proposition in favour of which it is quoted, the Court went out of its way to disclaim there being any doubt about the rule that the principal is answerable for the act of his agent in the course of his master's business, and the words added, 'and for his benefit,' obviously mean that it is something in the master's business."

Also on page 727 in discussing *Hern* v. *Nichols* (1700), 1 Salk. 289 His Lordship says:

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"Holt, C.J., was of opinion that the merchant was accountable for the deceit of his factor, though not *criminaliter*, yet *civiliter*, 'for seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

The defence was advanced, as in the case at Bar, that the fraud was committed, not for the benefit of the firm, but for the benefit of the clerk. Lord Macnaghten at p. 731 said:

"A principal must be liable for the fraud of his agent committed in the course of the agent's employment and not beyond the scope of his agency, whether the fraud be committed for the principal's benefit or not."

What is meant by "in the course of the agent's employment" is that the work in hand in respect to which the fraud was committed was business he was authorized to transact. The Bank did not authorize Rees to commit this fraudulent act but it did authorize him to do that class of acts and it "must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in"—page 733. He quotes Lord Blackburn's view of the judgment in *Barwick's* case as follows, pp. 735-6:

" 'The substantial point decided was, as I think, that an innocent prin-

cipal 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.'" and adds:

"That, my Lords, I think is the true principle."

Lord Shaw of Dunfermline at pp. 739-40 says:

"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."

I am unable to discover any difference in principle between this case and the one at Bar, if I am right in assuming that Rees could honestly and legally do what he promised to do for the respondent. The firm of solicitors had authority to transact practically an unlimited class of business but it would not affect the principle if by statute they were confined to a special class of business, as banks are, so long as the transaction in question was within its statutory powers. If therefore I am right in the basic assumption that reasonably interpreting the mandate given by respondent to Rees to "invest" his money the agent of the Bank could do so without overstepping the powers conferred upon banks in general this decision is high authority favourable to respondent's views.

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The Bank for its own purposes armed its agent with wide powers conferred upon it by Parliament and the misuse of these powers should enure to its detriment. The agent may abuse the authority conferred upon him yet the principal will be liable. As stated by Story in a passage approved in the House of Lords in *Lloyd* v. *Grace, Smith & Co., supra,* at p. 737:

"The principal is liable to third persons in a civil suit 'for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent in the course of his employment, although the principal did not authorize, or justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them.'"

There is a wide sense in which fraud and deceit form no part of the agency: the agent is not authorized to commit them, nor

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is it part of his agency work to do so. If however it is committed in the course of his agency the master is liable.

The appeal should be dismissed.

Appeal dismissed, Macdonald C.J.B.C. and McPhillips, J.A. dissenting.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitor for respondent: *T. G. Norris.*

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VANCOUVER ISLAND COACH LINES LIMITED v. E. LEBUS & COMPANY LIMITED.

Negligence — Contributory negligence — Road collision—Intersection—Restricted vision of drivers by street-car—Duty of drivers—Right of way —Damages—B.C. Stats. 1925, Cap. 8.

As a motor-coach of the plaintiff Company was being driven westerly on Cormorant Street in the City of Victoria, and approaching the intersection at Douglas Street, a motor-truck of the defendant Company going southerly on Douglas Street was approaching the intersection parallel with and to the left of a street-car going in the same direction. The coach entered the intersection first, and the driver, thinking the street-car was slowing down for passengers before entering the intersection, proceeded to cross in front of it. The street-car did not stop but entered the intersection at the same time as the truck to its left, the motor-man slowing down to let the coach go across in front, the coach clearing the street-car by from five to six feet. The driver of the truck not seeing the coach owing to the street-car restricting his vision, until it was partly across the tracks, was then too close to stop and avoid running into the coach. It was held on the trial that the driver of the truck was negligent, and the plaintiff recovered judgment.

Held, on appeal, varying the decision of LAMPMAN, Co. J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the drivers of both coach and truck were equally to blame in bringing about the accident and the damages should be equally divided between them.

Statement

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 11th of October, 1930, in an action for damages for negli-

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gence resulting in a collision between a bus of the plaintiff Company and a truck belonging to the defendant. On the 24th of June, at about 11 a.m., one Edward LeBus was driving a truck of the defendant Company southerly on Douglas Street, and approaching the intersection on Cormorant Street. As he approached the intersection a street-car was proceeding in the same direction on Douglas just to his left, and they both entered the intersection practically at the same time. The driver of the plaintiff's motor-bus was on Cormorant Street approaching the intersection from the east. He was on the intersection before the street-car, and as the street-car appeared to be slowing down to stop at the corner he proceeded to pass in front of it, not seeing the defendant's truck which was on the other side of the street-car. When he passed in front of the street-car it was only five or six feet away from him, the motor-man slowing down to let him pass, but he had just cleared the railway tracks when he was struck by the truck whose driver saw him coming across too late to avoid striking him. On the trial it was found the driver of the truck was at fault, and judgment was given for the plaintiff.

Statement

The appeal was argued at Victoria on the 18th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Macfarlane, K.C., for appellant: The truck and the street-car had the right of way. It is true the coach was first on the intersection, but even then the street-car had to ease up to allow him to pass in front, and the driver of the coach should have anticipated possible danger from traffic on the other side of the street-car, and having taken that risk against traffic that had the right of way over him, he is to blame.

Argument

Maclean, K.C., for respondent: It was held in the Court below that the defendant was negligent, and on the evidence he was justified in so finding: see *Swadling* v. *Cooper* (1931), A.C. 1; *Stanley* v. *National Fruit Co., Ld.* (1931), S.C.R. 60; *Carter* v. *Van Camp* (1930), S.C.R. 156 at p. 164. As to the propriety of crossing when the other vehicle has the right of way see *Collins* v. *General Service Transport Ltd.* (1926),

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38 B.C. 512 at p. 514; *Anderson* v. *Parney* (1930), 66 O.L.R. 112.

Macfarlane, replied.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: The situation in this case as I see it is as follows: A street-car was proceeding southerly along Douglas Street approaching the intersection of Douglas with Cormorant Street. The defendant (appellant) was driving his truck in the same direction, parallel with the street-car, on the west side of the street. The plaintiff's driver with a large bus was about to cross said intersection from the east branch of Cormorant. He thought he could cross ahead of the street-car which had the right of way as had also the defendant. The street-car it is said was then 100 feet from the intersection. Neither driver could see the other owing to the obstruction of their view by the street-car. Each, however, ought to have foreseen the possibility of accident if they continued in their respective courses. I think both were guilty of negligence—one in hiding at the side of the street-car—a dangerous and too common practice; the other in crossing ahead of the street-car which was obliged to slow up to avoid him. Each I think was bent upon avoiding stopping for the street-car. Plaintiff's driver thought he could get ahead of it while the defendant thought he could pass ahead before the car stopped. The result was that a collision occurred between them. I think both were equally guilty of negligence and applying the provisions of the Contributory Negligence Act the damages should be borne equally by the plaintiff and defendant.

The plaintiff's damages were assessed below at $455. The defendant appears to have abandoned the $20 which he claimed by counterclaim. Plaintiff therefore should recover $277.50 and the costs should be borne equally.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed because the learned judge below has reached the right conclusion on the facts before him, and has properly applied the principles governing the situation in accordance with the

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decision of this Court in *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512, as we explained it last term in *Lloyd* v. *Hanafin* (1931), [43 B.C. 401]; 1 W.W.R. 415. Under that decision the plaintiff's passenger bus had acquired the right of way to cross the intersection ahead of the defendant's truck because it had wholly entered upon such crossing, and was proceeding at an admittedly slow speed, at the time when the truck was about half or a quarter of a short block away from the intersection but hidden from the plaintiff's view because it was coming on close to and parallel with a tram-car, coming south on Douglas Street, which tram-car the plaintiff saw was slowing down, and not "clanging its gong" or giving any other indication of going ahead, as it approached Cormorant Street, so he sounded his horn and proceeded on his crossing and had practically passed the tram-car on the west track when he was almost immediately struck by the defendant's truck which came suddenly and unexpectedly upon him from behind and ahead of the tram-car, instead of also slowing down like the tram did. The bus driver's important statement that the approaching tram was slowing down is confirmed by the defendant's driver himself who says that the tram began to do so when about half a block or 100 feet from the intersection in question, and that he was travelling along parallel with it and cheek by jowl, so to speak ("front wheels to front end" as he describes it), and when the tram stopped very suddenly he could not do so, but continued to advance, as he admits, at the rate of ten miles an hour, and so "crashed into the bus" as he also describes it. The collision he further admits "was so quick it was impossible to do anything."

MARTIN, J.A.

No excuse was, or could be, reasonably offered for this rash conduct of the truck-driver, for it is, obviously, a most dangerous thing for a driver of a vehicle to keep so close to a tram-car that he deliberately blocks out his view of the state of the traffic at crossings, but it is submitted that the bus-driver was also negligent in attempting to cross the intersection in the circumstances. In my opinion, however, the learned judge took the right view of the whole matter in holding that the coach-driver's conduct was reasonable, and it is difficult to see how he could have foreseen that the driver of a vehicle who had deliberately hidden himself behind a tram-car would be so unreasonable as to go

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forward after the tram-car he was clinging to had slowed down. To act in such a way is simply to play dangerous tricks upon sensible users of the highway and the author of such tricks should bear the loss occasioned by their almost inevitable consequences.

It is to be observed that the driver of the tram-car acted in a sensible way, saying that he saw the bus coming across Douglas Street as he approached the intersection of Cormorant and "eased up some on account of seeing it coming"; in other words recognizing that the bus had acquired the right of way and acting reasonably thereafter in "easing up" to let it pass him, and, without putting on the emergency brake but "just putting the air on," it cleared him by about five or six feet.

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An independent witness, Brooker, a passenger in the bus, said that the truck came so quickly, "right upon us" when the driver was "pulling up" to let off a passenger at the north-west corner (as Mrs. Carson another passenger also describes at pp. 22-3) that it was impossible for the driver to have done anything to avoid the collision, which confirms the driver's story, and the truck-driver's also, so no question of ultimate negligence arises.

Therefore the appeal should, I think, be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: As I read the evidence both were equally in fault in bringing about the accident and I would, applying the provisions of the Contributory Neligence Act, divide the damages equally.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The appeal raises a pure question of fact and as I am so fully in agreement with the reasons for judgment of the learned trial judge, I really do not think that any useful purpose can be gained by adding anything, save to remark that the driver of the truck may well thank Providence that he was not answerable as he well might have been for the lives of the passengers in the coach. The case was one that might well have resulted—had loss of life taken place—in a verdict of manslaughter.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: No doubt the trial judge may select the evidence of one witness to the exclusion of others but the question

would arise on appeal if on the whole case the evidence selected is inconsistent with the true situation. I confess there is evidence to support the trial judge's finding but when, with deference, I think he proceeded on a wrong principle and failed to appreciate the overriding element in the case, *viz.*, the crossing in front of the street-car, by respondent's driver, I feel free to review the decision at which he arrived.

That wrong principle is stated in the judgment in these words "the motor-car [meaning appellant's car] must be kept from getting ahead of the street-car until past or almost past the intersection." That means that appellant's driver should not pass the street-car along which he is running side by side until it is "almost past [in other words nearly across] the intersection." This apparently is to prevent a collision with some one foolish enough to cross in front of the street-car. I am not aware of any such rule of safety nor should a rule be laid down that in such a case the driver of a motor-car must regulate his speed by that of the street-car. The street-car may be moving across at eight miles an hour. The motor-driver may, if the way is clear, cross at twice that speed.

The fault of the real culprit was I think overlooked. The attempt to cross in front of a street-car while it is in the act, not of stopping to take on passengers, but actually crossing the intersection is a fruitful source of danger from negligent drivers. All motor-car drivers are familiar with this road pest who suddenly looms up before them when there is no time to stop. In such a case the driver of another car (like appellant) travelling parallel with the street-car and going in the same direction will, in all likelihood, be struck if the street-car (as in this case) is wrongly compelled to check its speed either to permit the persistent driver referred to, to pass in front, or to avoid hitting him.

The weight of evidence shews that the collision occurred because of the negligent act outlined on the part of respondent's driver. The street-car prevented the drivers of the two cars concerned in the collision from seeing each other when approaching the intersection. Any driver should assume that, if he passes in front of a car crossing the intersection, concealed traffic

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may be encountered. Independent evidence called by respondent itself shewed that the conductor on the street-car stopped, or at all events slowed down, not to take on or let off passengers (if that were so the case would be different: it had passed that point) but because respondent's driver with a bus over 20 feet long was ten feet in front of him or, as respondent's driver put it, only five feet in front of him; and unless he stopped or slowed down a collision would take place. I am aware that the respondent's driver placed a different construction on the order of events. He said the street-car slowed down before it reached the intersection as if to take on or discharge passengers. But his evidence, as to being only five feet in front, is not in harmony with this suggestion. Cars stop to take on passengers at an appreciable distance back from the intersection. The evidence of their own witness, the motor-man, should be accepted. Respondent's driver had no right to compel the motor-man to slacken his speed to permit him to pass on and endanger the lives or property of others properly on the other side of the street-car. That is a rule of safety that should be strictly enforced.

MACDONALD, J.A.

Respondent contends that it was because appellant's driver drove on at a high rate of speed that the accident occurred. He should have reduced his speed—it was submitted—when he saw, or should have seen that the street-car either stopped or checked its speed to avoid hitting respondent's bus. This is passing the burden of one committing a fault to another who has committed no fault, assuming for the moment that the latter used ordinary care. Appellant's driver had a right to assume when the street-car did not stop to take on passengers, or to allow passengers to alight at the usual place and after it had entered upon the intersection, that he could proceed across in perfect safety in so far as traffic from his left was concerned. Such a driver is not bound to stop or slacken his speed until the street-car passes across the intersection, or partly across it, as the trial judge thought, for fear someone like respondent's driver will pass in front of it. He must drive along carefully, as at all times, to avoid danger to others but he is not obliged to anticipate the negligent and foolish act of one crossing in front of the street-car.

As to the alleged undue speed on appellant's part. Even if true it might be urged that speed was not the real cause of the

accident. In any event the evidence of high speed is very faint. All the facts shew that his speed was little greater than that of the street-car. The street-car stopped or slowed up in the middle of the block and apparently appellant's driver drove along parallel with it. There is no credible evidence of undue speed and what little evidence there is is inconsistent with the known facts. The substantial cause of this accident was the wrongful act of respondent's driver in driving in front of the street-car, wrongfully compelling the street-car to slacken its speed for his accommodation. That street-car was to his right; and apart from other considerations respondent's evidence shews that in such a case the custom was that the street-car should have the right of way. That custom was not observed. His negligence caused the collision with appellant's driver properly proceeding on his own side of the street. While still adhering to these views because of a divided Court I will agree with the judgment of the Chief Justice and my brother GALLIHER and apportion the damages equally.

Judgment varied, Martin and McPhillips, JJ.A. dissenting.

Solicitor for appellant: *A. D. Macfarlane.*
Solicitor for respondent: *H. H. Shandley.*

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WALKER v. WOODYATT

WALKER v. WOODYATT.

Sale of goods—Mortgage—Sale by mortgagor subject to mortgage—Mortgage part of purchase price and partly paid by purchaser—Judgment against mortgagor for balance—Action against purchaser.

The plaintiff, owner of goods subject to a chattel mortgage, sold the goods under a bill of sale, subject to the mortgage, to the defendant for $2,500. Payment was made by the plaintiff accepting certain property valued at $700, the defendant assuming the mortgage of $850, and giving a second mortgage to the plaintiff for $950. There was no covenant on the part of the defendant in the bill of sale to pay the first mortgage, but she made certain payments on it and when the balance remaining due was $397.67 the holder of the mortgage sued the plaintiff for said sum and recovered judgment, which was paid. The plaintiff then brought action against the defendant for the sum so paid and recovered judgment.

Held, on appeal, affirming the decision of CAYLEY, Co. J., that if an estate is sold subject to a mortgage the purchaser taking it with knowledge of the mortgage, is liable in equity to indemnify his vendor against the encumbrance.

APPEAL by defendant from the judgment of CAYLEY, Co. J. of the 6th of November, 1930, in an action to recover $463.42, being the principal sum secured by a chattel mortgage of the 10th of April, 1929, on certain goods in the possession of Annie Woodyatt. The plaintiff purchased the chattels in question from one Polly Howarth and executed in her favour the said chattel mortgage for the balance of the purchase price. He then sold the chattels to the defendant, subject to the mortgage, for $2,500. This sum was made up by Walker, taking in exchange certain property valued at $700 by the purchaser taking over the chattel mortgage for $850, and giving a second mortgage to Walker for $950. Polly Howarth assigned the first mortgage to one Clara Glover, and after Annie Woodyatt had made certain payments on said mortgage, there still remaining due the sum of $397.67, Clara Glover on the 9th of May, 1930, brought action against Walker for this sum and obtained judgment. The bill of sale from Walker to Woodyatt did not contain a covenant on the part of the purchaser to pay the mortgage, but the plaintiff contends that by reason of the covenant in the bill of

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sale to pay him $2,500 as the total purchase price, Annie Woodyatt must pay the amount he was obliged to pay Clara Glover on the chattel mortgage of April 10th, 1929, as it was part of the purchase price agreed upon at the time of the sale.

The appeal was argued at Victoria on the 9th of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Jeremy, for appellant: When Glover sues Walker the right to seize the goods is gone, and Walker having paid the amount of the judgment against him the assignment of the mortgage by Glover back to Walker is an assignment of a non-existent mortgage: *Hamill* v. *Gillespie* (1872), 48 N.Y. 556; *In re Errington: Ex parte Mason* (1894), 1 Q.B. 11; *Mills* v. *United Counties Bank* (1911), 104 L.T. 632.

Argument

P. McD. Kerr, for respondent: The cases referred to do not apply as in this case the sum claimed was part of the purchase price of the goods: see *Hamilton Provident Loan Co.* v. *Smith* (1888), 17 Ont. 1; Bell and Dunn's Mortgages of Real Estate, 409; *Clarkson* v. *Scott* (1878), 25 Gr. 373; *Walker* v. *Dickson* (1892), 20 A.R. 96.

Jeremy, replied.

Cur. adv. vult.

3rd March, 1931.

MACDONALD, C.J.B.C.: The contest in this action turns upon this—the vendor of chattels sold them to appellant for the consideration of $2,500 the purchaser to assume the existing mortgage for $850. This $850 formed part of the purchase price and the mortgage not having been paid off in full the plaintiff sues the appellant for the unpaid portion thereof. The rule of law is that if an estate be sold subject to a mortgage the purchaser taking it with knowledge of the mortgage is liable in equity to indemnify his vendor against the encumbrance. *Walker* v. *Dickson* (1892), 20 A.R. 96 and cases therein referred to. The amount to which the plaintiff was held to be entitled to indemnity from the defendant was found to be $463.42, together with certain costs, to which sum $317.15 was added being the amount admitted to be due by the appellant on

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another issue. The judgment appealed from is therefore right and should be affirmed.

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

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

I think the matter is concluded by the decisions in the cases of *Waring* v. *Ward* (1802), 7 Ves. 332, and *Walker* v. *Dickson* (1892), 20 A.R. 96.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I do not find it necessary to enter into any details in reference to the appeal in that I am in full accord with the judgment of His Honour Judge CAYLEY who has elaborately set forth the facts and with whose conclusions of law I wholly agree. The principal point in the appeal was the question as to whether it could be said in law that the appellant had assumed the mortgage. With the facts here present, and as found by the learned trial judge, the following authorities fully establish the liability of the appellant upon the mortgage: *Hamilton Provident Loan Co.* v. *Smith* (1888), 17 Ont. 1 and *Walker* v. *Dickson* (1892), 20 A.R. 96, Burton, J.A. at p. 102.

I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal from the judgment of His Honour Judge CAYLEY. On May 10th, 1929, respondent Walker by bill of sale transferred to appellant Woodyatt certain chattels. It provided:

> "Whereas, the said grantor is possessed of the goods, chattels and personal effects hereinafter set forth, described and enumerated, and hath contracted and agreed with the said grantee for the absolute sale to her of the same, for the sum of Twenty-five Hundred Dollars . . . the grantor . . . sold, assigned, transferred and set over . . . unto the said grantee [certain] furniture and effects in [a rooming-house] subject to a certain chattel mortgage for the sum of Eight Hundred and Fifty Dollars in favour of Polly Howarth and dated the 10th day of April, 1929."

Walker purchased these chattels from Polly Howarth and executed in her favour the chattel mortgage referred to. He then sold to appellant subject to that encumbrance.

It is not necessary to outline the series of transactions in respect to these chattels to expose the point in issue, except to say that the purchase price of $2,500 was made up by an exchange of property valued at $700; said chattel mortgage for

$850, and a further chattel mortgage for $950 given by the grantee to the grantor. Respondent Walker was compelled to pay the chattel mortgage to Polly Howarth and now claims that by reason of the covenant in the bill of sale to pay to him $2,500 as the total purchase price, the appellant Woodyatt must pay the amount he was obliged to pay to Polly Howarth. Part of this sum was otherwise provided for—all but $397.67 which is sued for in this action.

The respondent therefore contends that the purchase price of $2,500 was made up of three distinct items, *viz.*: (1) A property valued at $700; (2) a chattel mortgage from the grantee for $950; and (3) the assumption of the Howarth chattel mortgage and because the latter was a part of the consideration there is an implied covenant to pay it. Appellant on the other hand submits that although she purchased subject to the Howarth chattel mortgage she did not covenant to pay it. In the result if respondent does not succeed in recovering this amount from appellant he will to that extent fail to procure the full sale price of $2,500.

MACDONALD, J.A.

In *Hamill* v. *Gillespie* (1872), 48 N.Y. 556, it was held that:

"An announcement made upon an auction sale of personal property, that it is sold subject to a chattel mortgage and that the purchaser will have to comply with the conditions thereof, does not impose a personal obligation upon a purchaser who hears and assents to the announcement, and an action cannot be maintained against him to recover the amount carried by the mortgage."

The facts however differ in the case at Bar. There is, it is true, no covenant by appellant to pay the amount due under the Howarth chattel mortgage nor privity of contract in respect thereto, unless it can be inferred from the fact that the purchase price was $2,500. The respondent Walker, not the appellant, covenanted to pay it. What appellant sold to respondent was an equity of redemption in the chattels. Must the purchaser be taken to have covenanted with the vendor to indemnify him against his personal obligation to pay this money due to a third party? I confess one would expect that the vendor to secure himself would have to obtain from the purchaser a covenant to pay it, or to save him harmless. However, in *Waring* v. *Ward* (1802), 7 Ves. 332 at p. 337, Lord Eldon says:

"The same principle applies to the purchase of an equity of redemption;

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for the party means at the time of the contract to buy the estate subject to that mortgage; in relation to which mortgage the personal contract was entered into; and that was not his. If he enters into no obligation with the party, from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

Again, in *Walker* v. *Dickson* (1892), 20 A.R. 96 at p. 102, Burton, J.A. says:

"It is familiar law, scarcely at this day requiring a reference to authorities, that where a person purchases an estate which is subject to a mortgage, meaning at the time of the contract to buy the estate subject to that encumbrance, he is liable in equity to indemnify his vendor against the encumbrance; it is in effect part of the purchase-money. But Mr. Bain attempted to carry the doctrine very far beyond the decided cases, and contended that the bare fact that there is a deed absolute on its face from the defendant Rogers to the appellant brings the latter within the rule applicable to the ordinary position of a purchaser buying an estate *cum onere*.

MACDONALD, J.A.

"I trust that the law is not in so unsatisfactory state, and I think a very little reflection will shew that it cannot be so.

"The person to be affected by such an equity must be a purchaser, he must necessarily have intended to indemnify his vendor; in such a case the original mortgage becomes part of the purchase-money."

I think therefore that where, as in the case at Bar, the appellant agreed to pay the full purchase price of $2,500 by a transfer of property; a chattel mortgage back, and what virtually amounts to an assumption of the chattel mortgage in question (otherwise the purchase price would be less than $2,500) she "must necessarily have intended to indemnify her vendor" and the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Carter & Co.*

Solicitors for respondent: *Mackenzie, Kerr & Boyd.*

REX v. BLACKMAN AND SMITH.

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REX v. BLACKMAN AND SMITH

Criminal law—Attempt to steal—Penalty—Criminal Code, Secs. 287, 773, Subsecs. (a) and (b), and 778.

The accused were charged with an attempted theft of about $9,000 under section 773 (*b*) of the Criminal Code and sentenced to three years' imprisonment. On appeal the conviction was affirmed, but on the question of sentence:—

Held (MARTIN, J.A. dissenting), that although the penalty under section 778 for a conviction under section 773 (*b*) is limited to six months' imprisonment, as the sum attempted to be stolen exceeds $200, section 387 applies, bringing the maximum penalty up to two years and six months. The sentence of three years should therefore be reduced to two years and six months.

APPEAL by defendants from the decision of George Jay, Esquire, police magistrate, Victoria, of the 4th of December, 1930, convicting the accused on a charge of attempting to steal under section 773 (*b*) of the Criminal Code. The accused were found guilty and sentenced to three years' imprisonment. The accused Smith had become acquainted with one Pierce in a boarding-house in Victoria. Smith took Pierce for automobile drives, and on one occasion they stopped and found a wallet or purse under their car. There was $40 in the purse with certain stock quotations and other documents with Blackman's name and address. They found Blackman at Glenshiel Inn. He was apparently gratified on receiving his wallet, and becoming friendly with Pierce offered to give him tips on certain stocks. Pierce became interested and stated he had about $9,000 in cash here and certain securities in England. Proposed purchases in stock were discussed between the three men, but before any deal was actually made Pierce became suspicious and Blackman and Smith were arrested and charged with attempt to steal. Statement

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.

Bray, for appellant: Up to the time the charge was made Pierce's money was in the bank, and it was physically and legally impossible to steal it: see *Reg.* v. *Collins* (1864), 33 Argument

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L.J., M.C. 177; *Kelly* v. *Regem* (1916), 54 S.C.R. 220 at pp. 238 and 254. The charge is an attempt to do what is legally impossible: see *Reg.* v. *Brown* (1889), 59 L.J., M.C. 47; *Welch* v. *Russell* (1918), 87 L.J., K.B. 1038 at p. 1039. As to what is an attempt see *Rex* v. *Snyder* (1915), 24 Can. C.C. 101. This was not an attempt but merely preparatory to: see *Reg.* v. *Ring* (1892), 61 L.J., M.C. 116; 17 Cox, C.C. 491. To convict you must come to the point where the actual stealing could take place: see *Rex* v. *Ross* (1924), 43 Can. C.C. 14; *Rex* v. *Rump* (1929), 41 B.C. 36; Russell on Crimes, 8th Ed., 1120 and 1124; *Rex* v. *Thompson* (1911), 1 W.W.R. 277; *Reg.* v. *Button* (1900), 69 L.J., Q.B. 901; *Reg.* v. *Prince* (1868), 38 L.J., M.C. 8; *Reg.* v. *Hensler* (1870), 11 Cox, C.C. 570. There is no power of substitution as the right of election has been swept away: see *Rex* v. *Ross* (1924), 43 Can. C.C. 14; *Rex* v. *Townsend* (1924), 18 Cr. App. R. 117; *Rex* v. *Cronan* (1924), 41 Can. C.C. 320. As to the penalty, he was sentenced to three years but the maximum penalty is six months. Section 387 does not apply as the penalty would not be the same if they had stolen $9,000.

C. L. Harrison, for the Crown: The charge as laid is correct. There is sufficient evidence to support a charge of an attempt to take the money by false pretences: see Stephen's Digest of Criminal Law, 7th Ed., 311; *Moore's Case* (1784), 1 Leach, C.C. 314; *Marsh's Case, ib.* 345; *Watson's Case* (1794), 2 Leach, C.C. 640; Russell on Crimes, 8th Ed., 1146; *Reg.* v. *Solomons* (1890), 17 Cox, C.C. 93 at p. 96.

Bray, in reply: The cases in Leach's Crown Cases do not apply as in all of them the accused got the money. In this case it was in the bank. Section 571 of the Code does not apply as in that section the words "no express provision is made" applies. In this case express provision is made by section 778.

Cur. adv. vult.

3rd March, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: These men were tried before Magistrate George Jay on a charge of attempted theft. They appeal from the conviction and also from sentence which was to three years' imprisonment. The Court confirmed the conviction but

reserved the question of sentence. By section 773 (*b*) of the Criminal Code the magistrate was empowered to try the prisoners and if he found them guilty he could direct imprisonment for six months under section 778 which permits the imposition of the same punishment for stealing up to $10 and for an attempt to steal which does not appear to be confined to an attempt to steal $10. This is the only section which imposes the same penalty for an attempt to steal as that imposed for the actual stealing and when we turn to section 387 of the Code we find that,—

"If the value of any thing stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, [which I take it would include an attempt to steal] exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence."

Now he was otherwise liable for the offence under section 778 to six months' imprisonment and since the sum attempted to be stolen exceeds $200 I think that the sentence which could be imposed upon the accused would be a sentence to two years and six months' imprisonment.

I think, therefore, that the sentence imposed by the magistrate should be reduced to two years and six months.

The crime which the prisoners attempted to commit was of a particularly heinous character and therefore I think the greatest punishment which the law permits should be imposed upon them.

MARTIN, J.A.: This is an appeal from a sentence of three years' imprisonment for an attempted theft of nearly $9,000 imposed by the police magistrate of Victoria, on the trial by him by consent of a charge against the accused under section 773 (*b*) of the Criminal Code, and it is submitted that where such a consent trial is had the maximum sentence that can be imposed is "for any term not exceeding six months" as specifically provided by section 778, and that resort cannot be had to the general provisions of section 387, *viz.*:

"387. If the value of any thing stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence."

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It is also submitted that the omnibus penalty provided by section 571 for attempts in general to commit indictable offences is excluded from this case because there is herein "an express provision made by law for the punishment of" this particular attempt by said section 778.

It was submitted by the Crown counsel that the offence specified by said subsection (*b*) must be read together with (*a*) and both restricted to offences under $10, and hence attempts to steal a larger sum would come under the general punitive sections of the Code, when, as here, the accused has consented that "the magistrate may . . . hear and determine the charge in a summary way" under said section 773.

In my opinion, however, after a careful consideration of all the relevant sections of the Code, and in the absence of any authority to the contrary, each of the various classes of offences, nine in number, dealt with by said section 773 is distinct and cannot be incorporated with the other classes, from which it follows that the attempted thefts in (*b*) are not governed by the theft, or false pretences, or receipt of stolen property in (*a*) which three distinct offences in that first class are restricted to a value of $10 in the property wrongfully acquired under any one of those distinct offences, and it is also to be noted that (*b*) is confined to attempts to commit theft alone, and not otherwise to obtain or receive property wrongfully.

MARTIN, J.A.

Such being the case, the penalty for offences under (*b*) is expressly provided for by section 778 as being "imprisonment with or without hard labour for any term not exceeding six months," and I can only, with every respect to contrary and happily prevailing views, reach the conclusion (not without proper reluctance having regard to the gravity of this offence) that Mr. *Bray* is right in his submission that said section 387 cannot be invoked to impose an additional penalty of two years to the said six months, because, on the short ground, under said subsection (*b*), and the construction that should be placed upon it, this offender is not "liable to the same punishment as if he had stolen" the money in question herein.

The appeal therefore should in my opinion be allowed and the sentence reduced to six months' imprisonment.

GALLIHER, J.A.: The appellants were tried summarily under section 773 (*b*) of the Criminal Code, R.S.C. 1927, Cap. 36, Part XVI., and were found guilty and sentenced to three years' imprisonment. Mr. *Bray's* contention is that the sentence should be six months.

The penalty prescribed for offences (*a*) and (*b*) under section 773 is to be found in section 778 and is imprisonment for a term not exceeding six months, and it is to be noted that the offence for theft (*a*) and for attempt to commit theft (*b*) subjects the offender to the same punishment and in such case under section 387 where the value of the article stolen or in respect of which any offence is committed for which the offender is liable to the same punishment (*e.g.* 778) where the value of the article exceeds $200 (here some $9,000) the offender is liable to two years' imprisonment in addition to any punishment to which he is otherwise liable (section 778) for such offence.

GALLIHER, J.A.

I am of the opinion that the proper sentence here is two years and six months and I would reduce the sentence of three years accordingly.

MCPHILLIPS, J.A.: I agree in reducing the sentence but only to two years and six months.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree for the reasons given by my brother GALLIHER.

MACDONALD, J.A.

Conviction affirmed and sentence reduced.

Solicitor for appellant: *H. R. Bray.*
Solicitor for respondent: *C. L. Harrison.*

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March 25.

FAMOUS CLOAK & SUIT CO. LTD. v. PHŒNIX ASSURANCE CO. LTD.

FAMOUS CLOAK & SUIT COMPANY LIMITED v. PHŒNIX ASSURANCE COMPANY LIMITED.

Insurance, fire—Policy containing arbitration clause—Question of law—Motion to stay action—Discretion—R.S.B.C. 1924, Cap. 13, Sec. 6—B.C. Stats. 1925, Cap. 20, Sec. 142.

On an application for a stay of proceedings in an action on an insurance policy covering loss of profits suffered by reason of a fire which destroyed the plaintiffs' merchandise, on the ground that the instrument upon which the action was brought contained a stipulation that "If any difference arises as to the value of the property insured, the property saved, or the amount of the loss, such value and amount and the proportion thereof, if any, to be paid by the insurer shall, whether the right to recover on the policy is disputed or not, and independently of all other questions, be submitted to arbitration," etc., an order was made staying proceedings in the action until completion of an arbitration pursuant to said stipulation.

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.B.C. dissenting), that it was the intention of the parties to refer to arbitration not only the disputes between them but also the question whether these disputes fell within the arbitration clause, and in the circumstances of this case where no serious question of law arises, the issues ought to be determined by arbitration.

APPEAL by plaintiff from the order of MCDONALD, J. of the 16th of March, 1931, staying proceedings in this action until the completion of an arbitration pursuant to statutory condition No. 17 in a policy of insurance for ascertaining the amount of loss to be paid by the defendant Company to the plaintiff under said policy. The policy was for $10,000 on profits on finished merchandise sold or unsold all contained in a certain building in Vancouver. It then provided that:

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"If during the term of this policy, such merchandise or any portion thereof, shall be destroyed or damaged by fire, this Company shall be liable for any loss of profits . . . in respect of such merchandise, which may result from such fire, to be ascertained as follows; namely,

"(a) The amount of the 'Fire Loss' occasioned by damage to or destruction of the merchandise for which the company or companies insuring same are liable shall first be ascertained as determined by adjustment, or in the case of no fire insurance being carried by the assured on said merchandise then such loss shall be determined by appraisal or arbitration as provided for in the statutory conditions governing the policy, in either case the

result of any salvage-handling operations whether same be completed before or after said adjustment or appraisal shall be taken into consideration.

"(b) The loss of profits insured under this policy shall be based on the amount of said 'fire' loss as determined under the above paragraph (a).

"(c) The loss of profits as determined under paragraph (b) shall not exceed the amount of profits which the assured would have realized immediately preceding the fire in the ordinary course of the assured's business from or out of the sale of such merchandise which has been damaged or destroyed.

"(d) The liability of this Company hereunder shall not exceed the amount of insurance by this policy nor a greater proportion of any loss than the insurance hereunder shall bear to all insurance covering the loss insured against by this policy."

The policy also contained statutory condition No. 17 set forth in section 142 of the Insurance Act providing for arbitration of differences between the parties as to the amount of the loss.

Statement

The appeal was argued at Vancouver on the 24th and 25th of March, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sloan, for appellant: The learned judge below did not exercise his discretion. The point here is the construction of the policy. It is a question of law and should be decided by the Courts. There is no dispute as to the amount of loss, the only question is what method should be applied in determining the amount of loss. There is the difficulty of determining what is meant by "immediately preceding the fire." On the question of discretion see *Vawdrey* v. *Simpson* (1896), 1 Ch. 166 at p. 169. As to why the action should proceed and that there be no submission to arbitration see *Lyon* v. *Johnson* (1889), 58 L.J., Ch. 626 at p. 629; *In re Carlisle* (1890), 59 L.J., Ch. 520 at p. 521; *Barnes* v. *Youngs* (1898), 67 L.J., Ch. 263 at p. 265; *Workman* v. *Belfast Harbour Commissioners* (1899), 2 I.R. 234; *Bonnin* v. *Neame* (1910), 79 L.J., Ch. 388 at p. 391; *G. Freeman & Sons* v. *Chester Rural Council* (1911), 1 K.B. 783 at pp. 790-1; *Clough* v. *County Live Stock Insurance Association* (1916), 85 L.J., K.B. 1185; *Stokes-Stephens Oil Co.* v. *McNaught* (1918), 57 S.C.R. 549 at pp. 554, 558-9; *Bulger* v. *Home Insurance Co.* (1927), 38 B.C. 270; *Swift* v. *David* (1910), 15 B.C. 70; 44 S.C.R. 179; *Brand* v. *National Life Assurance Company of Canada* (1918), 3 W.W.R. 858 at p.

Argument

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860; *Bulger* v. *The Home Insurance Co.* (1928), S.C.R. 436 at p. 437.

Donaghy, K.C., for respondent: The case of *Stokes-Stephens Oil Co.* v. *McNaught* (1918), 57 S.C.R. 549 at p. 558 lays down the law on this question; also *Bulger* v. *The Home Insurance Co.* (1928), S.C.R. 436. There is no serious question of law to be decided here, the arbitrators are competent to deal with the question at issue.

Sloan, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I am of the opinion that the appeal should be allowed. I have the misfortune to disagree with my brothers on that, but it seems to me there is a question of law, a question of the construction of the policy, upon which the assessment of damages depends and the first thing the arbitrators would have to do would be to construe that policy and decide upon what factors the loss of profits shall be determined. That being so, it seems to me eminently fitting that the Court itself should do that and there ought not to have been a stay of the action to enable them to submit it to laymen who are not competent to construe the written contract.

MARTIN, J.A.

MARTIN, J.A.: After carefully reading the leading case upon this subject, namely, the decision of the Supreme Court of our country in *Stokes-Stephens Oil Co.* v. *McNaught* (1918), 57 S.C.R. 549 in which the Chief Justice and Mr. Justice Anglin concurred in the judgment—Mr. Justice Brodeur takes also the same view—and in which the principal cases are reviewed, I think Mr. *Donaghy* is right in his submission that it concludes this appeal both on principle and in the exercise of judicial discretion and as I think that is the effect of the case I shall not presume to add to it. The English cases are collected in the Yearly Practice, 1931, Vol. 2.

The appeal, I think, should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be dismissed. Looking at the policy itself it would not appear to me that there are any abstruse questions of law apparent at all, nor

do I see how they can arise, and again if there is any variance of opinion as to the plain and ordinary language, it would be the consensus of opinion we might say of business men who could best speak to the matter. When profits in business are mentioned it means clear profits on the turnover of the merchandise deducting all overhead charges.

Now, suppose we advance to the position of the arbitrators being assembled and proceeding to discharge their duty in the matter. According to the submission, it would be right and proper to call business men who are acquainted with the particular business. The arbitrators constitute the tribunal of decision. I cannot see how an academic discussion before judges is of much value in determining that which is plain and understandable from the language used in the policy. I think even apart from the business world people understand what profits are, clear net profits after having allowed for all overhead charges and, eminently, men of business are the people who are best able to determine that point. I do not see with deference to all that Mr. *Sloan* has submitted, that any case has been made out to disturb the order made by the learned judge. And then further, when the learned trial judge has exercised his discretion in the matter, the Court of Appeal will always hesitate to disturb that exercise of discretion. Therefore, on the whole I think the appeal should stand dismissed.

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

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondent: *Donaghy & Donaghy.*

COURT OF APPEAL

1931

March 25.

CLAY
v.
S. P. POWELL & CO. LTD.

CLAY AND CLAY v. S. P. POWELL & COMPANY, LIMITED, AND POWELL.

Stock-broker—Two accounts, one in husband's name another in wife's—Authority of husband over wife's account—Broker's refusal to transfer wife's account on husband's order—Damages—Proof of—Remoteness—Covering on "short" transactions — Breach as to — Rules of stock exchange—Alleged order to buy treasury shares—Failure to prove.

The plaintiffs (husband and wife) carried two trading accounts, one in each of their names with the defendant, a brokerage firm. The husband instructed the defendant by cable to transfer the accounts to another broker. The defendant delayed in doing so on the ground that no instructions were received from the wife to make the transfer. The plaintiffs recovered judgment in an action for damages alleged to have been sustained in the meantime in respect to the wife's account.

Held, on appeal, reversing the decision of MCDONALD, J. that although it was properly found that the defendant knew the husband had authority to deal with both accounts, and the defendant wrongfully refused to obey his instructions, the plaintiffs failed to prove that damages had ensued because of the refusal to make the transfer.

The plaintiffs also recovered judgment for breach of an alleged agreement not to cover in respect to certain short sales until the stocks so sold reached a certain low point.

Held, that assuming there was such an agreement, under the rules of the stock exchange the defendant had to return the stock borrowed with respect to the short transactions before the shares had dropped to the covering point fixed by the plaintiffs, and the defendant's evidence had not been refuted that other stock could not be secured to take their place and the defendant had to buy "to cover," the claim therefore fails.

Statement

APPEAL by defendants from the decision of MCDONALD, J. of the 15th of October, 1930, in an action arising out of the business done by the defendant Company as brokers for the plaintiffs in relation to dealings on the stock market. For some time prior to March, 1930, the defendant Company acted as stock-brokers for the plaintiffs, and during that period sold and purchased certain stock for the plaintiffs on commission. At this time one V. G. Ley was a director of the defendant Company and assisted in carrying on the business. The plaintiffs kept two accounts with the defendants, one in the name of the husband for dealing in local stocks and another in the name of the wife for dealing in New York stocks, but the husband

handled both accounts either as owner of both or agent for his wife. The plaintiff claims that in the early part of January he agreed to buy 20 shares of the capital stock of the defendant Company at $100 per share, and his account in the Company was debited $2,000 in payment thereof on February 6th, 1930. He understood that this was treasury stock but in May, 1930, he found out that he received the stock of S. P. Powell, and he then repudiated the transaction and demanded the return of the purchase price, namely, $2,000. About the 15th of February, on the plaintiff's instructions, the defendant sold short on plaintiff's account 500 shares of Pend Oreille stock, and on February 21st they sold short 5,000 shares of Noble Five stock, and on March 7th following the plaintiff gave instructions not to purchase to cover the Pend Oreille stock until it reached $100 per share, or the Noble Five stock until it reached 10 cents per share. The plaintiff and his wife went to the Orient on the 13th of March, 1930, and returned on the 14th of May. In April the defendant without further instructions from the plaintiff bought Pend Oreille and Noble Five to cover the plaintiff's sales of these stocks, the former at about $2.60 per share and the latter at about 14 cents per share, whereas if he had waited he could have purchased Pend Oreille at $1.03 per share and Noble Five at 10 cents per share. The plaintiff claims that by reason of the defendant not following his instructions as to these stocks he suffered a loss of $780. While the plaintiffs were in the Orient Ley had a disagreement with Powell, and he left the firm and formed a new company of stock-brokers. On April 15th the husband cabled instructions to V. G. Ley & Co. to take over the two accounts from Powell & Co. On Ley advising Powell of the cable Powell refused to comply until formal instructions were received from the clients. On April 30th plaintiff cabled Powell to hand over both accounts immediately to Ley. Powell still refused to hand over the accounts on the grounds that he had no instructions from Mrs. Clay and that the information supplied the Clays was not in accordance with the facts. He eventually handed over the accounts on May 15th. The cable instructions from Clay to Ley in April were to take over both accounts and "reinvest as instructed subject to your discretion." The plaintiffs claim that if the transfer of the accounts had been

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made when instructions were first given, Ley would have avoided a loss of $4 per share on the sale of two stocks (Atlantic Refinery and Goodyear Tire) held by the wife, as there was a drop to this extent in the prices of these stocks between April 30th and May 15th. It was found by the learned trial judge that Clay thought he was getting treasury stock but he did not communicate that fact to Powell, that Clay instructed Powell & Co. not to cover on Pend Oreille until it reached $1 per share, or on Noble Five until it reached 10 cents per share, and he was entitled to damages as to these stocks, that Powell & Co. should have handed over the accounts to Ley when instructed by wire from Clay to do so and the plaintiffs were entitled to damages on this ground. The defendants appealed and the plaintiffs cross-appealed with respect to their claim that they were buying treasury stock in Powell & Co.

The appeal was argued at Victoria on the 12th, 13th and 14th of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellants: Clay had two accounts in Powell & Co., one in Mrs. Clay's name for dealing in New York stocks and one in his own name for local stocks. In the early part of 1930 Powell was away and one Ley, who had an interest in the firm looked after sales for Clay, who gave instructions as to both accounts. Ley quarrelled with Powell on his return, and Ley left the firm, starting up as a broker himself. At this time the Clays were in the Orient and Clay instructed Powell to hand over his accounts to Ley. The learned judge below says the plaintiff was entitled to $2,800 damages, owing to Powell's refusal to hand over the accounts immediately on receipt of the reply, but Mrs. Clay never gave any instructions. We were justified in holding the account: see *Aikman* v. *Burdick Bros., Ltd.* (1923), 33 B.C. 23. In any case there is no proof of damages owing to delay in handing over the accounts: see *Waddell* v. *Blockey* (1879), 4 Q.B.D. 678; *Michael* v. *Hart & Co.* (1902), 1 K.B. 482 at p. 487; *Taylor* v. *Caldwell* (1863), 32 L.J., Q.B. 164. There is no evidence justifying the finding that the broker was not to buy Pend Oreille and Noble Five to cover until they reached $1 and 10 cents respectively. They have to

cover within certain periods on short sales: see *Taylor* v. *Caldwell, supra;* Leake on Contracts, 7th Ed., 518. As to costs they succeeded on two issues and we succeeded on one, but they were given two-thirds of their costs and we received nothing.

J. A. MacInnes, for respondents, as to cross-appeal: We were to get treasury stock. Powell took $2,000 from Clay's account to pay for it, and we repudiated before the transfer was actually put through: see *Smith* v. *Hughes* (1871), L.R. 6 Q.B. 597; *Reg.* v. *Bowerman* (1890), 7 T.L.R. 47. The learned judge overlooked the fact that there were two different points of view by each of the parties: see *Van Praagh* v. *Everidge* (1903), 1 Ch. 434; *Raffles* v. *Wickelhaus* (1864), 2 H. & C. 986; *Megaw* v. *Molloy* (1878), 2 L.R. Ir. 530; *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108. Instructions from Mrs. Clay to hand over stock was not necessary as Clay had control of both accounts and they knew it. The full amount was rightly allowed as to this: see *McKay's Case* (1875), 2 Ch. D. 1; Mayne on Damages, 10th Ed., 539. The broker is not forced to cover a short sale. He should only cover on receiving instructions to do so. The decision as to costs is in accordance with marginal rule 977.

Argument

Bull, in reply, referred to *Brydges* v. *Dominion Trust Co.* (1919), 27 B.C. 214; *American Seamless Tube Corporation* v. *Goward* (1930), 42 B.C. 551; *International Casualty Co.* v. *Thomson* (1913), 48 S.C.R. 167 at p. 195.

Cur. adv. vult.

25th March, 1931.

MACDONALD, C.J.B.C.: I am of opinion that the defendants S. P. Powell & Co. Ltd. were obliged to transfer the plaintiffs' securities, consisting of stocks and bonds to broker Ley on receipt of plaintiff R. K. Clay's instructions to do so received by wire on or about the 28th or 30th of April, 1929 (both dates are given as that of the receipt of the wire). In the result it does not matter which is the correct date. I think R. K. Clay had control of the securities standing in A. K. Clay's name either as owner or agent. The defendant Company wrongly refused to obey these instructions and are liable to pay the plaintiffs the damages caused thereby. These have not been specifically proved. The evidence is vague and inconclusive.

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Therefore, I must estimate them in accordance with the principle adopted in *Chaplin* v. *Hicks* (1911), 2 K.B. 786. Ley was not definitely instructed to sell the securities but he said in evidence that he would have sold them had they been transferred to him, and would have saved some money for his customers, the plaintiffs. He thought he would have sold them even without instructions; at what price has not been fixed. There is, however, nothing but the mere chance that he would have sold them at a profit beyond that obtained after the delayed transfer and for the loss on this chance I would award $100 damages.

Another branch of the case was a claim by the plaintiff for damages concerning a short sale of shares made by the defendant Company for the plaintiffs and which it is alleged the defendant Company was instructed to hold until the shares had declined to a certain price at which defendant Company was to cover. In my view of the evidence no definite price was fixed. Several other transactions had been made previously by defendant Company for the plaintiffs without restrictions as to covering prices and I do not believe there was a restriction in this case. Moreover, the nature of the transaction precludes the notion that there was a restriction. By the rules of the Stock Exchange and indeed by the nature of the transaction itself the brokers must borrow shares equal to those sold and when this borrowing is impossible or the borrowed shares must be returned, the broker is forced to buy and cover his short sale. In this case he borrowed the shares but before they reached the covering point as alleged by plaintiffs the defendant Company was forced to return the borrowed shares and after efforts to borrow other shares to take their place had failed the broker bought and covered at a price slightly above that which plaintiffs alleged they had instructed the defendant Company to purchase. This branch of the plaintiffs' claim I think fails.

MACDONALD, C.J.B.C.

The only other issue in the proceedings was as to the purchase by the plaintiff R. K. Clay from the defendant S. P. Powell of 20 shares in defendant Company's stock. These shares were duly transferred to him and payment therefor was taken out of moneys of his which defendant Company had in hand. The said plaintiff now claims he had agreed to purchase treasury shares only and not shares which had been issued by defendant

Company to defendant Powell, but R. K. Clay is by his own evidence shewn to have received from Powell no representation or hint that the shares to be purchased were to be treasury shares of the Company.

Clay cross-appealed against the disallowance of his claim to recover the said purchase-money. The cross-appeal should I think be dismissed.

MARTIN, J.A.: I agree for the reasons given by my brother M. A. MACDONALD.

MARTIN, J.A.

GALLIHER, J.A.: I agree in the reasons for judgment of my brother M. A. MACDONALD.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I was upon the argument of the appeal of the opinion that the appeal should be allowed and the cross-appeal dismissed. Since then I have had the advantage of reading and considering the very careful reasons for judgment of my learned brother M. A. MACDONALD. I am in entire and complete agreement with the conclusions arrived at by my learned brother. Therefore in my opinion the appeal should be allowed and the cross-appeal dismissed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Several separate issues arise in the appeal and cross-appeal herein:

(1) It is alleged that plaintiffs (husand and wife) travelling in Japan, instructed defendants (brokers) by cable to transfer two trading accounts carried in their respective names to V. G. Ley & Company. One Ley was formerly a director in defendant Company but severed his connection with it and formed a new competitive company. The instructions to transfer came from plaintiff R. K. Clay only (the husband) and it is in respect to the wife's trading account (A. K. Clay) that damages are claimed for failure to transfer. Defendant Company contest the claim because it had no instructions to transfer from her. The learned trial judge awarded the plaintiff A. K. Clay $2,800 damages holding that the two accounts were carried in separate names for convenience only and that the husband had authority to give instructions on behalf of both. Damages were awarded on the basis that if the transfer had been made when directed

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Ley of V. G. Ley & Company would have averted a loss of $4 per share on the sale of two stocks held by the wife (Atlantic Refinery and Goodyear Tire).

Defendant Company submits (a) that it was justified in declining to recognize the plaintiff R. K. Clay as agent for his wife to order the transfer and (b) in any event no damages accrued. The plaintiff husband cabled instructions to V. G. Ley & Company to take over the accounts on April 15th, 1928, and on April 24th the latter wrote defendant Company advising it of said cabled instructions received "from A. K. Clay and Alice Clay to take over their accounts from your firm." Copies of the cables were enclosed. The following day defendant refused to comply, "until formal instructions are received from the clients." Instructions by a later cable to V. G. Ley & Company were to take over both accounts and "reinvest as instructed subject to your discretion." On April 25th defendant cabled plaintiff R. K. Clay as follows:

"Most unwise take any action until you return and made aware of circumstances and actual position. Suggest you instruct your account remain dormant, otherwise all losses your entire responsibility."

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Defendant did not object on the ground that instructions from the wife were necessary. R. K. Clay replied on April 28th saying:

"Cable not understood especially regarding losses. Explain otherwise instructions stand."

He followed this with a mandatory cable on April 30th as follows:

"Hand over both accounts immediately to Ley."

Defendant wrote to V. G. Ley & Co. on May 2nd saying:

"I shall be pleased to hand over this account when I receive formal instructions from Mr. and Mrs. Clay but I am not prepared to accept the responsibility on cabled instructions only more particularly as information supplied to them was not in accordance with the facts."

From the foregoing (unless not obliged to act upon instructions from the husband in respect to the wife's account) he should have made the transfer on April 30th when the cable last referred to was received. The learned trial judge fixed April 24th as the date (receipt of letter by defendants from V. G. Ley & Company) but I think defendants were justified in waiting for the direct advice received on April 30th. Defend-

ants did not transfer, however, until May 15th. Damages are claimed for alleged losses in the meantime.

Defendants did not raise the point, now relied upon, until May 2nd and then not clearly. Ley testified in regard to "the Clay accounts" that "we [meaning defendant Company] dealt with Mr. Clay." He refers to the period when he was a director in that Company. Powell too for defendants testified as follows:

"Mr. Clay handled his accounts with your office, one in his own name and one in Mrs. Clay's name? Correct."

If defendant recognized that R. K. Clay "handled" both accounts he was, if not owner of both, agent for his wife and the "handling" would include a transfer. The accounts were carried separately "to avoid confusion." One account was simply "operated" in the wife's name. Mrs. Clay left it "entirely in my husband's hands." From this evidence the trial judge was justified in inferring that defendant Company knew that R. K. Clay had authority to deal with both accounts. There was therefore wrongful refusal to transfer on April 30th.

The point arises, however, did damages ensue because of wrongful refusal to transfer, depriving plaintiffs of the services of their new agent V. G. Ley & Company for a limited period in operating these accounts? There is no definite evidence of loss in respect to the two stocks involved, *viz.*, Atlantic Refinery and Goodyear Tire. The suggestion is that if transferred Ley would have so operated as to avoid the loss caused by a drop in prices between April 30th and May 15th. Such a claim is too illusory in view of this evidence given by plaintiff R. K. Clay:

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"*Bull*: Now, assuming as a fact that you hadn't been sold out at 50, but you still held the stock, if the account had been transferred to Ley on the 24th April or on the 1st of May, what difference would it have made to you? Well, Mr. Ley would have more than likely covered me.

"You mean sold? Sold.

"Now, how do you know he would? Well, he has since told me.

"And you are relying on what he told you? I am.

"Yes, that if he had control of these shares he would have sold out? Yes.

"Yes. Do you feel that he would have done so? I do.

"Without any instructions from you? I do."

Also the following cables sent by plaintiff R. K. Clay to Ley:

"April 15th, 1930.

"Regret news please take over our accounts suggest immediate reinvestment same stocks hope Atlantic still held cable ship Kobe or Yokohama."

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"April 23rd, 1930.

"Take over both accounts reinvest as instructed subject your discretion presume shares in Powell available as cash for margin Yokohama twenty-eight twentynine."

It is suggested after the event that Ley in his discretion would have sold these stocks. Plaintiff R. K. Clay did not intend that they should be sold. He suggested "reinvestment same stocks," apparently being mistakenly under the impression that the stocks would have to be sold before transfer to V. G. Ley & Company and, if so, the instructions were to reinvest in the same stocks. As to one of the stocks his instructions were to sell "around 50," meaning he said "nothing less than 50," although it does not mean that. If as he now suggests Ley had sold at 47 and thus avoided the loss occasioned by a drop to 43 on May 15th it would be contrary to his instructions.

Again in respect to Goodyear stock plaintiff R. K. Clay said:

"Now I want to ask you about the Goodyear stock, that is the only other stock in which you claim that you might have suffered damage. Is that not so? That is so.

"What? That is so.

"Now, what is your damage about the Goodyear? Well, I think that that is a question for Mr. Ley too.

"You can't answer that? No."

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He relies on Ley—a very willing witness—to use his ingenuity, with after-acquired knowledge, to shew that if he controlled plaintiff's accounts these stocks would have been handled profitably. He would do it by averaging plaintiffs' holdings, buying more stock at a lower price so that the average price of all would be less, a method not contemplated by instructions. Ley gave a detailed explanation of what he would do, based upon market fluctuations known after the event. This after-acquired knowledge supports his theories. Damages in law cannot be computed on this nebulous foundation. True, by refusing to transfer on April 30th defendants deprived plaintiff of the right to have his selected agent use his ingenuity in dealing with stocks subject to fluctuation and were it not for plaintiff's instructions a case for damages, if clearly established, might be made out. These instructions contain the words "subject your discretion" yet read as a whole including the words "suggest immediate reinvestment" and "hope Atlantic still held" it cannot be said that any direct instructions were given to Ley to sell or to manipulate the stocks by averaging and in the absence

of such instructions damages cannot be claimed. Instructions were not given to handle the accounts as Ley saw fit. That is an after-thought. The damages claimed are too remote: they are not consequent upon the refusal to transfer. I would allow the appeal on this item.

(2) The next item is in respect to an alleged agreement to carry certain stocks, *viz.*, Pend Oreille and Noble Five until they reached $1 and 10 cents respectively, and to maintain plaintiff in a short position in respect thereto. It is difficult to find from the evidence any definite agreement to do so but that contract, if made, could not have been performed unless defendants could retain the stock borrowed from the Stock Exchange. It was necessary to return it and there is no credible evidence to refute defendants' allegation that other stock could not be secured. The appeal on this item should be allowed.

(3) Plaintiff R. K. Clay alleges that he was asked by defendant S. P. Powell to buy 20 shares of the treasury stock of defendant Company and he agreed to do so. Powell transferred to plaintiff 20 shares owned by himself debiting plaintiff's account with $2,000. Plaintiff demands return of this amount. The trial judge refused to entertain this claim and plaintiff cross-appeals. Was there a contract to buy 20 shares and if so what class of shares? The trial judge found that plaintiff thought he was buying treasury stock but did not say so to Powell and the latter did not know that plaintiff thought he was to get treasury stock. No representation was made that treasury stock would be delivered. Nothing was said as to whether it was to be personal stock or treasury stock. If plaintiff bargained for treasury stock and defendant bargained to sell his own stock no contract would eventuate. But each bargained for the purchase and sale of stock without reference to its nature. There was no mistake as to the subject-matter of the contract. They were *ad idem* as to the parties, the consideration and the thing bargained for. There was no substantial error in regard to the essentials. Stock was bargained for: not any particular kind.

MACDONALD, J.A.

I would dismiss this cross-appeal.

Appeal allowed and cross-appeal dismissed.

Solicitors for appellants: *Walsh, Bull, Housser & Tupper.*
Solicitors for respondents: *MacInnes & Arnold.*

FISHER, J.

1931

April 9, 27.

CHAMBERS v. SAMPSON

CHAMBERS, CLARK AND CRIGHTON v. SAMPSON.

Negligence—Motor-vehicles—Collision at intersection—Right of way—Both at fault—Apportionment of damages—Passengers co-plaintiffs—Right to contribution—Costs—B.C. Stats. 1925, Cap. 8—Marginal rule 977.

Where two cars on different streets approach an intersection and the one to the left of the other is substantially on the intersection first and its rear wheel is hit by the latter, the right of way which the latter would otherwise have had is displaced in the circumstances.

In an action for damages resulting from a collision between motor-vehicles it was held that the joint negligence of both drivers was the cause of the accident, and the apportionment of fault should be two-thirds on the defendant and one-third on the plaintiff who was driving the car.

The co-plaintiffs being passengers in Chambers's car, it was held that the defendant was entitled to contribution from Chambers against the amount allowed the co-plaintiffs to the extent of one-third.

Held, further, exercising the power given under marginal rule 977, that the whole costs of the plaintiffs be taxed and two-thirds thereof be paid by the defendant to the plaintiffs, the defendant not to be entitled to any costs from the plaintiffs in respect to either claim or contribution.

Statement

ACTION for damages for negligence resulting from a collision at an intersection between automobiles, one driven by the plaintiff Mrs. Chambers and the other by the defendant. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 2nd of April, 1931.

H. I. Bird, for plaintiff Chambers.
A. M. Whiteside, for plaintiff Clark.
P. A. White, for plaintiff Crighton.
Stockton, for defendant.

9th April, 1931.

Judgment

FISHER, J. (oral): In this matter I have conflicting evidence as to which car first entered upon the crossing of the intersection. The word "intersection" has been used continuously throughout the trial and a certain meaning has been given to it, but I note in *Lloyd* v. *Hanafin* (1931), [43 B.C. 401]; 1 W.W.R. 415, that MARTIN, J.A. says, at p. 416 that "intersection" means at the property lines. It might also be noted in the same case MCPHILLIPS, J.A. says one "would not be in the intersection

until he was upon the travelled way, that is, beyond the outer side of the sidewalk line."

As I will have occasion to speak of the property line, I think for the time being I will speak of the intersection as being at the property lines.

I might say that I have received a favourable impression from the evidence of Mrs. Clark as to her ability to visualize, or reconstruct the scene for me, although one might concede that she may be wrong as to the exact number of feet, in saying that the Sampson car was 100 feet from her at the time she first observed it or as she put it, two fifty-foot lots away, when she first saw Sampson's car—when she says the front of the car in which she was riding (if not all of it) was into the intersection, or over the curb line produced as she says elsewhere.

Taking this evidence with the evidence of Mr. Perraton who said he picked up some dirt or dry mud and it had apparently fallen from the Sampson car and was lying on the pavement; he puts it about four feet south of the manhole, and considering the point of impact on the Chambers car was on the rear wheel, and considering the length of the Chambers car, my finding is that the right of way which the Sampson car would otherwise have had was displaced under the circumstances by the Chambers car having made a reasonable and substantial entry upon the crossing of the intersection.

Judgment

In this connection one might note in passing what was said by MACDONALD, C.J.A. in *Collins* v. *General Service Transport Ltd.* (1926), 38 B.C. 512 at p. 514, where he says:

"That is to say, if these parties had come to the street line at the same time, the plaintiff would have had the right of way under the Act. But the defendant came there first [that is the defendant in that action], I do not say within a second or two, but reasonably first, he then had the right of way by reason of his being there first; and having got almost across the intersection, the front of his motor being almost to the opposite street line, he was struck in the rear axle by the plaintiff."

In this case, assuming the point of impact to have been near the spot where the dirt was picked up, it might be said that this present case is somewhat similar to, or might be referred to as being somewhat in the same position as the *Collins* case: The car of Mrs. Chambers (that is the rear part of her car) having got almost four feet south of the manhole; and the front of her

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car being at least ten feet further south, her car was struck in the rear, as I find, by the car of the defendant, Mr. Sampson, crashing directly into the rear wheel of the Chambers car.

I have some difficulty in coming to a conclusion as to the speed at which these two cars were travelling. But considering the matters referred to, I would say that the Sampson car entered the intersection at a substantially faster rate than the Chambers car.

One difficulty I find in this case arises from the fact that Mrs. Chambers says that she did not see the defendant's car until she was right in the middle of the street. She uses different expressions and this matter was placed before her in different parts of her examination for discovery, which were read in the course of her cross-examination, and also during her examination at the trial. But it may be noted that she does say in one part as follows, in answer to certain questions:

"You were pointing to a circle in the centre of the intersection which is marked 'M.H.' meaning manhole? Yes.

"And you say the front end of your car had reached that point? It was across that point.

Judgment

"How far? Well, I imagine I would be about the centre—about half ways across it.

"That is, it would be about the centre of your car? Yes.

"When you first saw Mr. Sampson's car? Yes.

"Now, what part of Blenheim Street were you travelling on—more or less in the centre, or one side or the other? No, I was to the centre.

"So that your car would be practically over the manhole when you first saw Mr. Sampson's car? Yes, yes, I was about part ways across."

And in another place she is asked:

"Where was Mr. Sampson's car when you saw it?"

And she says:

"Well, he seemed to be coming right into the side of my car when I first saw it."

And in another place she is asked:

"Did you observe Mr. Sampson's car as you entered the intersection? What do you mean by observe?

"Did you see Mr. Sampson's car coming along 14th Avenue? No, I didn't. I didn't see him until I was right at the intersection, in the middle of the street. That was the first I seen of him."

I have the evidence of Mrs. Christian and Mrs. Clark, from which one would infer that each of them had seen the Sampson car before the driver.

It is submitted by counsel on behalf of the plaintiffs that

Mrs. Chambers had taken a look to her right when she was so far back from the property line that her view was obstructed; and so she didn't see and was unable to see the Sampson car.

That seems to involve the submission that Mrs. Chambers did not take a further look as she approached and entered on the intersection at the property line, or at the curb line.

I cannot find, therefore, that Mrs. Chambers should be deemed to be a driver that was keeping a very keen look-out.

I also find that Mr. Sampson was not keeping a proper look-out and that he did not give to Mrs. Chambers the right of way to which she was entitled, by having made a reasonable and substantial entry upon the intersection before the Sampson car.

I am apparently asked by each counsel under these circumstances to find the driver of the other car guilty of ultimate negligence causing this accident.

I note in *Harper* v. *McLean* (1928), 39 B.C. 426 at pp. 428-9, my brother Mr. Justice D. A. McDONALD, in referring to our Contributory Negligence Act, said as follows:

"Except in the title our statute makes no reference whatever to 'contributory negligence' while the Ontario statute does and I can well understand that cases may arise where, on the same facts, a different decision might be reached in the different Provinces. With the greatest respect to those learned judges who have dealt with various phases of these statutes, I suggest that in our Act the Legislature intended to do away with all the old difficulties which have been so long the nightmare of judges and juries, and which arose from the use of the words 'contribtuory negligence' and 'ultimate negligence.' As a matter of fact, the word 'negligence' is not used except in the title. The simple word 'fault' is used, and I suggest that the intention was that a judge or a jury in trying one of these cases should eliminate, as far as possible, the very difficult questions which formerly arose and apply the simple questions: By whose fault was the accident caused? by one of the parties alone? or by both parties and, if so, in what proportions?"

Judgment

Since the decision in that case, however, we have our own Court of Appeal decision in the case of *Key* v. *British Columbia Electric Ry. Co.* (1930), [43 B.C. 288]; 3 W.W.R. 569, in which the case of *Swadling* v. *Cooper* (1930), 1 K.B. 403; 46 T.L.R. 597, is referred to. And in a current issue of the Canadian Bar Review, Vol. 9, p. 49, we have an article on contributory negligence referring to that case and other cases. And there is also another article referring to a recent decision of the B.C. Court of Appeal in the case of *W. L. Morgan Fuel Co.* v. *British*

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Columbia Electric Ry. Co. (1930), 42 B.C. 382, and some of the cases that have been referred to in the argument in the present case, such as *Walker* v. *Forbes* (1925), 56 O.L.R. 532.

For myself I may say that I am impressed by the view expressed in Lord Birkenhead's judgment in the case of *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at p. 144 in which he says:

"Upon the whole I think that the question of contributory negligence must be dealt with somewhat broadly, and upon common-sense principles as a jury would probably deal with it."

And then he goes on to speak of where a clear line can be drawn.

Where I can draw what appears to me to be a perfectly clear line, I am prepared to give effect, as I must, on the authorities, to the doctrine of ultimate negligence. But in this case I am not prepared to find that the line is perfectly clear and that either party had the last chance to avoid the accident and failed to take advantage of it and I find the joint negligence of both Mrs. Chambers and the defendant Sampson was the efficient cause of the damage sustained.

Judgment

And then I come to the question of the degrees of fault. It might be noted, that in *Lloyd* v. *Hanafin* (1930), [43 B.C. 401]; 1 W.W.R. 415 at p. 418, MACDONALD, J.A. says:

"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 six feet away from it."

In this case I do not think either Mrs. Chambers or Mr. Sampson was keeping a proper look-out, but in view of my finding that Mrs. Chambers had the right to cross the intersection ahead of the Sampson car, I apportion the liability or degrees of fault as two-thirds on the part of the defendant Sampson and one-third on the part of the plaintiff, Mrs. Chambers.

This does not affect the question of liability of the defendant Sampson to the plaintiffs, Edith M. Clark and Ann Milne Crighton, as I find the defendant guilty of negligence—causing or contributing to the damage done to these plaintiffs.

The matter of the counterclaim, I will not deal with, as

between Mr. Sampson and Mrs. Chambers and it may be further spoken to.

I think the matter of the damages suffered by Mrs. Chambers and Mr. Sampson respectively as between themselves, and without reference to the liabilities with regard to Mrs. Clark, and Mrs. Crighton might be disposed of on this finding, but if counsel think otherwise the matter might be spoken to later.

I will fix the damages of Mrs. Chambers at $100 general damages, and the special damages as set out in the statement of claim; but if there is any dispute between counsel and they wish to speak about it later, they may do so. In the case of Edith M. Clark and Ann Milne Crighton, they are each entitled to damages against the defendant in the amount of the special damages claimed, as set out in the statement of claim as amended, but if there is any substantial dispute between counsel on that, it can also be spoken to again.

Then I come to the general damages. It is always, or in most cases, difficult.

As to the damage sustained by Mrs. Crighton—to estimate those damages has given me serious concern. I do not think that I should ignore the evidence of the husband, Mr. Crighton (although it is not medical evidence, of course) as to the dazed condition in which he says he found Mrs. Crighton for some hours after the accident in which she sustained serious injury. Where memory or mentality might be affected, one would concede the seriousness of such, and having questioned her myself, and having had the advantage of counsel questioning her and also the doctors' evidence, I am inclined to the view and I find accordingly that there is some little mental or memory upset yet. I note that Dr. Brodie says she should make a complete recovery in a month to a year. I must do the best I can in estimating the damages and I will allow her $2,000 general damages and I will allow Mrs. Clark $1,500 general damages.

Judgment

Judgment for plaintiffs.

27th April, 1931.

FISHER, J.: The defendant, R. C. Sampson, is entitled to be indemnified by the plaintiff, Gertrude E. Chambers, against

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payment of more than two-thirds of the amount allowed for damages, *i.e.*, to contribution from the said Gertrude E. Chambers to the extent of one-third.

As to costs I have carefully considered the matter with reference to both the claim and the counterclaim. If the action had been brought by the two plaintiffs, Edith M. Clark and Ann Milne Crighton against the said Gertrude E. Chambers and R. C. Sampson as defendants I think it would have been fair, as between such defendants, to direct that the defendant Gertrude E. Chambers should pay one-third and the defendant R. C. Sampson two-thirds of the costs of the plaintiffs Edith M. Clark and Ann Milne Crighton or that there should be contribution accordingly. The said two plaintiffs, however, have made the said Gertrude E. Chambers a co-plaintiff with them and have not been successful on the issue raised as to the said accident being due solely to the negligence of the said R. C. Sampson.

The defendant R. C. Sampson filed a counterclaim for contribution from the said Gertrude E. Chambers and has been found entitled to such contribution but has not been successful on the issue raised by him as to the accident being caused solely by the negligence of the said Gertrude E. Chambers. The latter resisted the claim for contribution but on my finding she would have been entitled in an action of her own against the said R. C. Sampson to recover a certain amount for damages and, in my opinion, also one-half of her costs of such action.

Judgment

Under all the circumstances, which are somewhat unusual, I think justice will be done to all the parties if I exercise the power given under marginal rule 977 and direct, as I do, taxation of the whole costs of the plaintiffs with respect to the claim and payment of two-thirds thereof by the defendant (R. C. Sampson) to the plaintiffs and the said defendant shall not be entitled to any costs against the plaintiffs or any of them with respect to either claim or counterclaim.

I think this disposes of the whole matter but, if not, counsel may speak to same again.

Order accordingly.

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Negligence—High tension transmission line—Easement for strip of land on ranch—Power line running through—Licensee on lands—Comes in contact with wire—Severely injured—Damages—Liability—R.S.B.C. 1924, Cap. 77, Sec. 14.

The defendant Company obtained an easement for a right of way over a strip of land 100 feet wide through D.'s ranch, for erecting and operating a high tension transmission line. It was agreed that the grantor should have the right to enter upon the right of way and that the Company would not fence it. Later P. obtained a lease of the whole ranch from D. The plaintiff, with two companions, started out in an automobile for the purpose of fishing in a lake on the other side of the ranch. On reaching the ranch they met P. who shewed them the easiest way across the ranch to reach the lake. The plaintiff then proceeded with the automobile as far as the power line, where they left the car and, carrying their rods and supplies, went along a path under the power line until they reached the lake. The poles upon which the transmission line was carried across the ranch were over 340 feet apart and the line between the poles sagged at the middle to within ten feet of the ground. The plaintiff knew of the danger of contact with the wire as he warned one of his companions of it on the way over, but there was no evidence that he knew the electricity would jump to a steel rod if it came within five inches of the wire. The plaintiff and his companions came back from the lake on the following day along the path under the power line, and as they were nearing the place where they left the automobile (the plaintiff, owing to the load he was carrying being very tired), a steel fishing-rod which was in his right hand and was not taken apart, either touched or came so close to the high-power wire that the electricity jumped to it and he fell unconscious. Later his right arm was taken off below the elbow and his right side and right leg were badly burned. The jury found the defendant guilty of negligence and the plaintiff guilty of contributory negligence and apportioned the fault 30 per cent. to the plaintiff and 70 per cent. to the defendant, assessing the damages $12,500 net to the plaintiff. The learned trial judge then dismissed the action holding that the plaintiff was a trespasser and the defendant Company owed no duty to him to construct the power line in any particular way as to safety.

Held, on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that whether the plaintiff be regarded either as a trespasser or a bare licensee, he was well aware from previous local knowledge of the danger he was incurring in carrying a steel rod under a low strung high-voltage wire, there was nothing in the nature of a

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concealed danger or "trap." The defendants owed no duty to the plaintiff to have the wire strung at a greater height and the action was properly dismissed.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. of the 9th of September, 1930, in an action for damages owing to injuries sustained through contact with an electric power line of the defendant Company near Bull River in East Kootenay. The transmission line ran through what is known as the Douglas Ranch, the defendant Company having obtained from the owner thereof a grant and easement to a strip of land 100 feet wide for its full length, over which the transmission line was erected on poles over 300 feet apart, the wire sagging between them to within ten feet of the ground. Under the easement the Company was not to fence the strip of land and the owner was at all times to have the right of access to the strip. At the time of the accident the Douglas Ranch was under lease to one Parsons. On the day previous to the accident the plaintiff with two companions started out in an automobile, intending to go fishing in a lake beyond the Douglas Ranch. On reaching the ranch Parsons told them the best way to go and they went on until they reached the power line where they left the car and proceeded on a path under the power line to the lake, where they fished until the next day. On their return when the plaintiff was carrying his blankets, a fishing-basket and a pail, with a steel rod in his right hand, and when nearing the spot where they had left the car, he by that time being fairly exhausted from the load he was carrying, his rod came in contact with the transmission wire and he fell unconscious. Later his right arm was taken off below the elbow and his right side and right leg were badly burned. The plaintiff knew of the danger of the rods coming in contact with the transmission line, as he had warned one of his companions of this on the previous day. The evidence disclosed that the electricity would jump from the wire to the fishing rod if its tip came within five inches of the wire, but it did not appear that the plaintiff had any knowledge of this. The transmission line carried about 66,000 volts.

The appeal was argued at Vancouver on the 3rd and 4th of March, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Sinclair, for appellant: The defendant had an easement for this 100 foot strip across the Douglas Ranch upon which to erect poles and run its transmission line across. It was a condition of the easement that they were not to fence the strip and the owners had the right of entry thereon. The plaintiff could not be a trespasser so far as the Power Company is concerned, and he got leave from the lessee of the ranch to go upon the property: see *Latham* v. *R. Johnson & Nephew, Limited* (1913), 1 K.B. 398 at p. 410; 7 Can. B.R. 667. We had as much right to be there as the Power Company. As to touching the wire or being so close as to draw the electricity, *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 applies. See also *Stanley* v. *National Fruit Co. Ltd.* (1931), S.C.R. 60. There is a well-beaten path under the power wire, and people were in the habit of walking there. The wire was ten feet short of the distance it should be from the ground to insure ordinary safety. The learned judge below found the plaintiff was a trespasser but there was evidence upon which the jury could infer he had leave to go on this ground: see *Gloster* v. *Toronto Electric Light Co.* (1906), 38 S.C.R. 27; *Reid* v. *Linnell* (1923), S.C.R. 594 at p. 609. Coming back from fishing packing a load he was tired and he did not think of the danger above him.

Argument

R. M. Macdonald, for respondent: This action is for breach of a statutory duty and there is no other case here: see *Scott* v. *Fernie* (1904), 11 B.C. 91 at p. 96; *Banbury* v. *Bank of Montreal* (1918), A.C. 626. The plaintiff is a trespasser as far as the defendant is concerned: see *Latham* v. *R. Johnson & Nephew, Limited* (1913), 1 K.B. 398; *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358; *Bettles* v. *C.N.R.* (1929), 4 D.L.R. 175; *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361.

Sinclair, in reply: The statement of claim discloses a cause of action irrespective of the statute. The defence put the common law issue before the Court: see *Excelsior Wire Rope Co.* v. *Callan* (1930), A.C. 404; *Mourton* v. *Poulter* (1930), 2 K.B. 183.

Cur. adv. vult.

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2nd June, 1931.

MACDONALD, C.J.B.C.: The defendant was given the right of way through the Douglas Ranch by the owner thereof on which to carry an electrical transmission wire which was in operation at the time of the injury herein sued for. The wire carried 66,000 volts of electricity and was strung on poles on the right of way. The infant plaintiff was walking under the wire with a steel fishing pole in his possession when it is supposed to have come in contact with the wire thereby severely injuring him. The wire at the point of contact was ten feet above the ground which the jury found was negligently low and they awarded damages to the plaintiff. The defendant was not the owner of the ground occupied by its line and the Douglas Ranch was at the time of the injury in the possession of a tenant. The plaintiff I think had the implied assent of the tenant to go on the ranch although he did not know that the infant plaintiff intended to walk on the transmission line or to cross it, but this, having regard to other facts proved, is immaterial. He was not, therefore, an invitee but at most a mere licensee. He was aware of the danger from the said wire and knew that it was dangerous to let his fishing rod come in contact with it. He had in fact previously warned his companion against that danger. I think the defendant owed no duty to the plaintiff to have its wire strung at a greater height. The place was not in any sense a place where the public were entitled to or were allowed to walk but in any case the unfortunate young man knowing the danger took no care to avoid it.

MACDONALD, C.J.B.C.

The action I think was properly dismissed.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed because in its unusual circumstances no cause of action lies upon the plaintiff's own evidence, however he may be regarded, as trespasser or bare licensee, and whatever may be the defendant's rights by way of an easement or otherwise for the right of way for its high power line over the land in question (involving a limited and partial, though unfenced, occupation at least) because he was exceptionally well aware from previous local knowledge of the grave danger (indicated by the sign he saw: "Danger, 66,000 V. Keep away.") he was incurring

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from the obvious low stringing (10 feet) of the high-voltage wires, to such an extent indeed that the day before he had warned a boy who was with him of the danger he ran from the low wires by carelessly carrying his fishing-rod, one-half bamboo and one-half steel, too high and yet coming back the same way in daylight (on 4th August, 1929) he did the same thing with an all-steel rod (about 11½ feet long) and brought the almost inevitable and lamentable consequences upon himself. The only explanation he can give for his folly in not taking down his rod is that it was "pretty late" he was tired and wished to get home "at a certain time which I wanted to be, and I didn't think what would happen with the pole, and we just packed [carried] it the same way as Mr. Lindholm"—*i.e.*, in short, tired and careless, and "just going right along to make time," as he puts it.

On the facts before us there is no distinction in principle between this situation and that in the recent case of *Coleshill* v. *Manchester Corporation* (1928), 1 K.B. 776, wherein the leading cases are reviewed by Lord Justice Scrutton who thus concludes in language appropriate to the case at Bar at pp. 789-90:

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"Approaching the case from this point of view, the question at the end of the plaintiff's case appears to be: Is there any evidence on which the jury could reasonably find that the defendants had exposed the plaintiff to a danger not obvious or reasonably to be expected under the circumstances? And having regard to the fact that the plaintiff entered the road in daylight, and that on the evidence of his own witnesses it was obviously an unfinished and unlighted road, I cannot see any evidence on which a jury could find a concealed danger. . . .

"For these reasons, I think Acton, J. at the end of the plaintiff's case should have withdrawn the case from the jury on the ground that the danger to which the plaintiff was exposed was on his own evidence obvious to a reasonable man, and one reasonably to be expected under the circumstances, and that the plaintiff being at the best a bare licensee (and I doubt if he was that by night), the defendants owed no duty to him in respect to such a danger."

There is no element here, as there was in the still later case of *Mourton* v. *Poulter* (1930), 2 K.B. 183, of a special duty to the trespasser owing to a change in the circumstances brought about by the act of the owner or occupier without giving due warning to those liable to be endangered thereby.

GALLIHER, J.A.: I am in agreement with the learned trial judge and would dismiss the appeal.

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McPHILLIPS, J.A.: This appeal presents some very extraordinary features. Notwithstanding that the case was presented to the jury and a somewhat exhaustive charge to the jury both upon the law and the evidence—a requirement by statute (section 60 Supreme Court Act, Cap. 51, R.S.B.C. 1924)—and the jury answering the questions submitted to them by the learned trial judge—which in their result constituted a verdict for the plaintiff for $12,500—the learned trial judge dismissed the action proceeding upon the view that the cause of action as set up in the pleadings was confined to allegations of breach of regulations for overhead electric line construction passed by order in council under the Electric Energy Inspection Act (Cap. 77, R.S.B.C. 1924). Upon reading the statement of claim and the particulars of negligence which according to the practice are to be read as part of the pleadings, it cannot be at all supported in my opinion that the cause of action was so confined. It would appear that at the trial counsel for the plaintiff was not able to prove in evidence the regulations relied upon in that they had not duly appeared in the Gazette pursuant to statutory requirement (section 14 (1), (2), (3)). However, that in no way prevented the plaintiff proceeding as he had the right to do to establish a common law right of action and the particulars of negligence fully establish this. I would particularly refer to paragraphs 4, 5 and 6.

It would seem that at one stage the learned counsel for the plaintiff made a motion to amend the statement of claim but later abandoned it, being of the opinion—and in this I agree—that a cause of action for common law negligence was sufficiently stated. When the learned trial judge's charge to the jury is read it is perfectly plain that he submitted to the jury a common law action of negligence presenting both the law and the evidence. At a certain part of the charge the learned trial judge said this:

> "That form of action was not, as it developed, through any breach of a statutory duty, but eventually through evidence addressed to the jury, particularly on the part of the plaintiff, became what is known as a common law action. The defendant Company, I might say incidentally, feels itself aggrieved by the course in which this trial has come to this state. However, it has got to this stage and I have to deal with and interpret the fact to the jury being present to that extent at any rate."

At another point in the charge the learned trial judge said:

"That involves a consideration of the law with respect to trespassers, and I am going to instruct you that, for the purpose of this action, you may assume that the plaintiff was legally and properly upon that land."

I do not propose to quote at any further length from the charge, it is very lengthy and very complete and canvasses all the points that were in issue. The course of the trial was undoubtedly one of the trial of a common law action of negligence causing serious personal injuries to the plaintiff from the electric energy carried in the overhead wire which ordinarily was 19 feet 1 inch above the ground but at the point where the plaintiff suffered the accident owing to the contour of the ground the wire carrying 66,000 volts was within 9 feet 2 inches of the ground, *i.e.*, that close to the pathway upon which the plaintiff was walking and carrying a pail containing some fish and his fishing-rod at an angle which would not have reached the wire above him if it was at the regular height (19 ft. 1 inch) and as a matter of fact it may never have actually come in contract with the high-voltage wire. Being within two or three inches of the wire would have been sufficient to make contact according to the evidence adduced at the trial on the part of the plaintiff and the defendant offered no evidence in contradiction thereto. It is really scientifically conceivable that the zone of danger extends a very much greater distance than two or three inches. However, there is this express evidence that went before the jury and it is not shewn in any way that the plaintiff was aware of any such danger. All that it can be said the plaintiff knew was that he was not to touch the wire with his fishing-pole and the probability may well be that he did not touch the wire with the fishing-pole but it in some way got within the danger zone two or three inches from the wire. This is clear that were it not for the negligent construction of the pole line carrying the wire—oblivious of the contour of the ground—the accident would not have happened; that is, if the wire had been strung throughout at a distance of 19 feet 1 inch from the surface of the ground. It was a wanton act (*Excelsior Wire Rope Co.* v. *Callan* (1930), A.C. 404; *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358), even if the plaintiff here a mere youth was a trespasser. Note what Viscount Hailsham said in *Addie's*

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case—the appellants' servants acted "with reckless disregard of the presence of the trespasser," *i.e.*, was in its nature acting maliciously, to string a wire in this negligent manner and endangering the safety of those passing underneath it.

The questions that the learned trial judge put to the jury were as follows—with the answers made thereto:

"(1) Was the defendant Company guilty of negligence causing the accident? Yes.

"(2) If so, in what did such negligence consist? Wire too low.

"(3) Was the plaintiff guilty of contributory negligence? Yes.

"(4) If so, in what did such contributory negligence consist? Carrying a fully extended steel pole.

"(5) Did the plaintiff know the danger of walking along the defendant's right of way with his steel rod in his hand fully extended and fully appreciate the risk of accident? Knew the danger to a certain extent. Did not fully appreciate the risk of accident.

"(6) If the last question be answered in the affirmative; then did the plaintiff voluntarily assume to take such risk upon himself? Yes, he voluntarily incurred the risk as far as he knew it.

"(7) Was there a safer way for the plaintiff to go to and from the fishing-ground? Yes.

"(8) Did the condition of the pole line at the time of the accident constitute a concealed trap? Yes.

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"(9) If both the plaintiff and defendant were negligent, then was there anything which could have been done by the defendant immediately prior to the accident to avoid its occurrence? Yes.

"If so, in what manner? Power line could have been constructed at a higher elevation.

"(10) If both the plaintiff and defendant were guilty of negligence contributing to the accident, then in what proportion were they at fault? State this on percentage basis. Plaintiff 30 per cent.; defendant 70 per cent.

"(11) Damages? Twelve thousand five hundred dollars net to the plaintiff."

Now we have the case put to the jury and the specific answers to the questions put. It does seem astounding that after all this has occurred that the labours of the jury and all that took place at the trial should be frustrated and the action dismissed. The learned trial judge refers to some authorities which in his opinion entitled him to proceed as he did. With the greatest respect I cannot agree with the conclusion at which he arrived or that the course adopted here is supported by the authorities referred to; further we have much more recent authority from the Supreme Court of Canada upon the point. I would refer to *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at pp. 53-4. Mr. Justice Duff said:

"By the law of British Columbia, the Court of Appeal in that Province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.

"The power given by O. 58, r. 4, 'to draw inferences of fact . . . and to make such further or other order as the case may require,' enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained, and no reasonable view of that evidence could justify a verdict for the plaintiff.

"This jurisdiction is one which, of course, ought to be and, no doubt, always will be exercised both sparingly and cautiously; *Paquin, Limited* v. *Beauclerk* (1906), A.C. 148, at p. 161; and *Skeate* v. *Slaters Limited* [(1914)], 30 T.L.R. 290.

"The important thing to remember is that the question for the jury is whether there was, in fact, consent; while the question for the Court is whether the acts from which it is argued consent ought to be inferred are reasonably capable of any other interpretation. In passing upon this last-mentioned question judicial opinions given in relation to particular states of fact may be valuable as illustrations, but the question whether a particular conclusion is the only reasonably possible inference from a given state of facts is a question of law in the sense only that it is a question for the Court; it is a question for the solution of which (in the very nature of things) the law itself can afford no rule of universal application."

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Here there was admittedly "some evidence for the jury," therefore as I view it the learned trial judge erred in dismissing the action. The verdict upon the questions and answers as returned by the jury undoubtedly amounted to a verdict for the plaintiff and with great respect to the learned trial judge judgment should have been entered for the plaintiff.

The learned trial judge in his reasons for judgment dismissing the action harked back to the question of there being no cause of action at common law set up in the pleading of the plaintiff. With great respect it would seem to me that that was at an end when he submitted the case to the jury as a common law action for negligence which he did in terms and as I consider rightly; further, it was the whole course of the trial. It is really idle in these days to speak of any deficiency in pleadings when the parties litigant at the trial follow a course only consistent with the form of action tried out; in short, the course of the trial is the determining factor of what was being litigated. In this

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connection I would refer to what Lord Parker of Waddington said in his speech in the House of Lords in *Banbury* v. *Bank of Montreal* (1918), 87 L.J., K.B. 1158 at pp. 1194-5:

"The fault lies in the system which permits a plaintiff to set up at the trial, without amending his pleadings, a case other than that put forward in the statement of claim. When this is done, the new case cannot possibly be formulated with the precision necessary to elucidate either the principles of law which may be applicable or the issues of fact which may be involved. Both the counsel and the judge labour under great disadvantages, and a miscarriage of justice is all too likely to occur. The system of pleading introduced by the Judicature Acts was, no doubt, intended as a compromise between the rigid system which prevailed in the common law Courts and the loose prolixity of the bill in Chancery. The bill stated all the facts at great length, and prayed such relief as the petitioner might be entitled to in the premises. The Chancellor, or Vice-Chancellor, had to find out for himself what might be the equities between the parties. For this he could take what time he liked, and often took a very long time. The present practice appears to me to have most of the vices of the old procedure in Chancery. There are pleadings, it is true, but the pleadings are all for practical purposes disregarded. The plaintiff is allowed to prove what he likes and to set up any case he can. The judge has no longer to deal with a case formulated on the pleadings, but to make up his mind whether, on the facts proved, there is any and what case at all. This disadvantage is accentuated when there is a jury, for the judge cannot take time to consider the matter, and counsel have not considered it as they would have done had they been compelled to embody their case in a statement of claim. Under these circumstances there is little wonder that a judge should misdirect a jury, and that the real questions of law or fact should, as in this case, emerge only after prolonged discussion on appeal."

We find the learned trial judge in a portion of his reasons for judgment saying:

"It is quite clear from the statement of claim that this action was based upon an alleged breach by the defendant, of a statutory duty. The foundation thus created, presumably was intended, if proved, to shew that negligence on the part of the defendant might be presumed. It would then be contended that plaintiff had a remedy in damages for his injuries. There was, however, no evidence of any statute, or regulation thereunder, afforded. Counsel for the plaintiff appreciating its absence during the course of the trial, and before the case was concluded on the part of the plaintiff, sought to amend the statement of claim by alleging negligence at common law. This was opposed by counsel for the defendant and considerable discussion ensued. Counsel for the plaintiff, after consideration, decided to abandon the application for such amendment and to proceed with the trial. The plaintiff was thus confined to the statement of claim as it stood, with a slight amendment, and it thus became a common law action. At the close of the plaintiff's case defendant applied for dismissal, which was refused with leave to renew the application. After the defendant had adduced some evidence, principally of a documentary nature, the application for dismissal

was thereafter renewed by counsel for the defendant. After a lengthy argument on his part, I thought it well to follow the course which was adopted by the trial judge, in *Wood* v. *Canadian Pacific Railway Company* (1899), 6 B.C. 561, so I refused to withdraw the case from the jury and submitted questions for their consideration. At the same time I gave leave to counsel for the defendant to renew his application after the findings of the jury were rendered.

"Plaintiff now moved for judgment on the findings of the jury, and the defendant renews the application for dismissal of the action. Notwithstanding the opposition of the defendant, the trial, under the circumstances I have shortly outlined, necessarily proceeded as a common law action.

"I have first to consider whether it was so framed. I do not think so. It is not in accordance with such forms, in works upon pleading. I refer particularly to Bullen & Leake, and Odgers on Pleading. However, aside from the question of pleading, which I have shortly discussed, the defendant contends that upon the evidence and admitted facts, I should find, as a matter of law, that the plaintiff was a trespasser and thus not in a position to seek any redress through his unfortunate accident. In submitting the questions to the jury I felt compelled to instruct the jury that they should assume that the plaintiff was not a trespasser. If I had instructed the jury that he was a trespasser, then some of the questions would have been futile, and in view of the law, it would have been my duty to have then withdraw the case from the jury, and so I placed the matter before them in the light of the plaintiff being properly upon the right of way of the defendant.

"It is not apparent from the statement of claim that the plaintiff had any rights as a pedestrian, outside the allegations dependent upon the unproved statute and regulations. There has been no evidence afforded to shew that plaintiff had any rights which would deprive the defendant of the right to contend that he was a trespasser upon the right of way, which it had secured for the purpose of their pole line. Thus I am of the opinion that the plaintiff was a trespasser upon such right of way at the time when the accident occurred. If so, the defendant does not owe him any duty to construct the electric pole line in any particular way as to safety or otherwise."

What the learned trial judge really did in this case was to usurp the authority of this Court. His duty was to have entered judgment for the plaintiff upon the verdict of the jury and left it to this Court (the Court of Appeal), if there was an appeal, to further deal with the subject-matter of the action and as to whether the judgment for the plaintiff should stand. In saying this I do so with the greatest respect to the learned trial judge. What has occurred here is only an illuminative illustration of what Lord Parker above quoted referred to and this case got into the same dilemma as *Banbury* v. *Bank of Montreal, supra*—"And that the real questions of law or fact

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should as in this case emerge only after prolonged discussion on appeal."

Now there were some admissions of facts put in at the trial by the defendant, the learned counsel for the defendant (Mr. *Macdonald*) at the trial saying:

"Now, I am proposing to put in some admissions of facts. I may say that we served a demand to admit facts in seven paragraphs. They were all admitted with the exception of paragraphs (4) and (7). So I shall just read those that were admitted.

"1. It is admitted that William Welsh Douglas, of Bull River, British Columbia, was on the 28th day of June, 1921, the owner of sublot 37 of lot 4590, plan X28, and of lots 4824 and 6671, all in Kootenay District, in the Province of British Columbia.

"2. It is admitted that the said William Welsh Douglas had the right to grant and did grant to the British Columbia & Alberta Power Company, Limited, a grant and easement dated the 28th day of June, 1921.

"3. It is admitted that the British Columbia & Alberta Power Company, Limited, did on the 1st day of June, 1922, assign and transfer to the East Kootenay Power Company, Limited, the said grant and easement dated the 28th day of June, 1921, and all its rights thereunder.

"The fourth was not admitted, so I am not reading it.

"5. It is admitted that the alleged accident to the plaintiff took place at a point in the said transmission line covered by the said grant and easement dated the 28th day of June, 1921.

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"6. It is admitted that the said grant and easement covers land at least 25 feet on each side of the transmission line in question.

"Seven was not admitted, so I do not read it."

The easement is in the following terms: [After setting out the easement his Lordship continued]:

Now it is apparent that the easement does not give any exclusive right of way at all. The right of way was not to be fenced and further the grantor, his heirs, executors, administrators, successors and assigns had the right to cross, recross and enter upon the said right of way. The fee simple in the land remained in the grantor. The land was leased at the time of the accident and the evidence establishes that the plaintiff had permission to be upon the land. Further, there was a beaten pathway at the point of accident and the 66,000 volts carried by the wire whilst ordinarily it was 20 feet from the surface of the land at the point of the accident owing to the contour of the land the wire with this terribly dangerous voltage was but nine feet two inches above the surface of the land, that is, nine feet two inches was the clearance above the surface of the pathway and the plaintiff lawfully and rightfully following along the

pathway carrying his fishing-rod at a slope must have brought the fishing-rod—a metal one—against the wire or within the zone of danger in the evidence led by the plaintiff shewn to be two or three inches out from the wire. This zone of danger was unknown to the plaintiff and constituted a concealed trap and the jury so found. The jury further found that the power line could have been constructed at a higher elevation. There is, it is true, some evidence that the plaintiff, a mere youth though, was aware that there was some danger; that was that the wire should not be touched, *i.e.*, contact with the wire but no evidence that he knew that the voltage was liable to jump or strike at anything within two or three inches thereof. Then it would not occur to the plaintiff that owing to the changing contour of the land, passing along the pathway that contract was at all possible with the wire carrying the fishing-rod at an angle —certainly were it not for the lowness of the wire down to nine feet two inches the fishing-rod would not have touched the wire or come within the danger zone, it must in some way have either touched the wire or come within the zone of danger and the voltage 66,000 volts was carried into this youth's body leaving him seriously maimed for life, with the loss of his right arm below the elbow. Certainly the plaintiff was not aware that such a high voltage was capable of striking two or three inches away from the wire and that was evidently what happened. It was an understood thing at the trial that admittedly the power being transmitted through the wire, *viz.*, 66,000 volts, was the *causa causans* of the injuries sustained by the plaintiff. The jury have found the defendant guilty of negligence causing the accident and that the negligence was that the wire was too low and the jury have also found the plaintiff guilty of contributory negligence stating that the contributory negligence consisted in carrying a fully extended steel pole. Then there is the finding that he voluntarily incurred the risk as far as he knew it. It is clear that he did not know of what the jury found, a concealed trap. Question 9 with the answer thereto is in its nature a question of ultimate negligence or more properly within the principle of *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719. There the car was brought out upon the railway and being run thereon with a defective

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brake; here there was a defective and dangerous condition of things created by the defendant in constructing the power line at too low an elevation. In the *Loach* case there was contributory negligence nevertheless the action succeeded. In short, the holding of their Lordships of the Privy Council was that failure to provide a proper brake was "ultimate negligence" as distinguished from "original negligence" and the plaintiff was held to be entitled to recover.

I think it well to now set forth Questions 9, 10 and 11 with the answers thereto. They read as follow: [already set out at p. 148].

From the reading of the above questions and answers it is at once apparent that the findings of the jury bring this action within the ambit of the Contributory Negligence Act (Cap. 8, B.C. Stats. 1925). I think it well to set forth the sections of the Act which require consideration. They are:

"2. Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault:

"Provided that:—

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"(*a.*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

"(*b.*) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.

"3. In actions tried with a jury the amount of damage, the fault (if any), and the degrees of fault shall be questions of fact for the jury.

"4. Unless the judge otherwise directs, the liability for costs of the parties shall be in the same proportion as the liability to make good the loss or damage."

In view of this legislation it is a matter for very serious thought as to the relevancy of many of the negligence cases in jurisdictions where such legislation does not exist. It would appear that the Legislature, save in the title of the Act, uses words of no scientific legal meaning notably "where by the fault of." It cannot be said that fault is synonymous with negligence in its legal meaning. In the Oxford Dictionary, the most authoritative work we have, "fault" is defined as follows:

"With reference to persons: Culpability; the blame or responsibility of causing or permitting some untoward occurrence; the wrongdoing or negligence to which a specified evil is attributable. To be in fault: to be to blame. To lay, put fault in, upon: to impute blame to. To bear the fault: to bear the blame. It is my (his, etc.) fault: I am (he is, etc.) the person to blame for what has happened."

It will be seen that the Legislature has given a statutory right of action in cases of damages or loss occurring owing to the fault of two or more persons and when the action is tried with a jury the amount of the damage, the fault (if any) and the degrees of fault shall be questions of fact for the jury. Here we have a trial by jury and the fault found and the degrees of the fault, also found, *viz.*: Plaintiff 30 per cent., defendant 70 per cent., and upon that basis the jury have assessed the damages and awarded to the plaintiff $12,500 net. Unquestionably the learned trial judge in view of the statute law and even apart from it and at common law erred in not entering judgment for the plaintiff according to the verdict of the jury. It is I consider idle—with great respect to the learned trial judge—to direct the jury that they should assume that the plaintiff was not a trespasser and to later and after the verdict hold that the plaintiff was a trespasser and to dismiss the action *non obstante veredicto*. This was contrary to the statute (Contributory Negligence Act) and contrary to the express decision of the Supreme Court of Canada, independent of the statute in *McPhee* v. *Esquimalt and Nanaimo Railway Company, supra.* The jury, as it is seen by statute, are clothed with the statutory right to assess the damage, find the fault and the degrees of fault, being questions of fact for the jury alone. The jury did its duty and having done its duty it was beyond the power of the learned trial judge to disregard the verdict of the jury. The learned trial judge had the statutory bounden duty to enter judgment in the terms of the verdict of the jury but that was not done. Now the attempt is made in this Court to reagitate the whole subject-matter of the trial and to have this Court give its approval to what—with great respect to the learned trial judge—I cannot regard as other in its effect than a departure from the plain statutory duty imposed upon the learned trial judge and even apart from the statute as we have seen the practice does not admit of the verdict being ignored "there being some evidence for the jury" (Duff, J. in *McPhee* v. *Esquimalt and Nanaimo Rway. Co., supra,* at p. 53). That there was some evidence for the jury in the present case is too clear to need recital. It is only necessary to visualize matters—a jury trial before a special jury extending over three days with senior

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counsel on both sides with a very complete charge to the jury both upon the law and the evidence with eleven questions submitted to the jury and all duly answered, and after all this takes place the learned trial judge dismisses the action. In the result the whole trial ended as unprofitably as the deliberations of a moot Court. I may also remark that the special jury called upon to undergo such profitless labours apparently and no doubt rightly commended themselves to the learned trial judge as in his charge to the jury he made use of this language:

"Viewing the standing of this jury I deem it unnecessary to dwell upon the desirability of your not allowing sympathy to move you in any direction either for or against the plaintiff."

A little later the learned judge told the jury:

"You have a duty to perform which is to remember that according to your oaths you are required to give your verdict according to the evidence."

How idle it would have been to so charge the jury and to later hold that there was no evidence before the jury upon which they could make a finding or, as in this case, answer specifically no less than eleven questions put by the learned judge himself. In my opinion there is really but one order that this Court can properly make and that is to give effect to the verdict of the jury and that judgment be entered accordingly. The plaintiff in this case was an invitee in my opinion but if not a licensee and even if it could be said that he was the latter there is the express finding that there was a concealed trap, and this in law carried liability (*Corby* v. *Hill* (1858), 4 C.B. (N.S.) 556; 27 L.J., C.P. 318; 144 R.R. 849; *Kimber* v. *Gas Light and Coke Company* (1918), 1 K.B. 439; 87 L.J., K.B. 651).

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The defendant here cannot be accorded the position of the occupier of the land and the cases as against trespassers and licensees are not available as all the defendant had was an easement for the erection of the power line—nothing more—and there was the duty upon the defendant to so construct and maintain the power line so as not to do injury to persons lawfully upon the land even within the right of way accorded for the erection of the pole line. I will later deal with this point. I would now refer to the most recent case in the House of Lords that brings in review much of the law to be considered in this case—that of *Jones* v. *Great Western Railway Co.* (1930), 47 T.L.R. 39—and in this case the question was whether there was

evidence on which a jury could properly find that the defendants by their servants were guilty of negligence and that such negligence was the cause of or contributed to, the death of the husband of the first plaintiff (and the case of *Wakelin* v. *London and South Western Railway Co.* (1886), 3 T.L.R. 233; 12 App. Cas. 41 was distinguished) the point of the case really was as stated in the judgment of Viscount Hailsham (p. 41) that there was an absence of warning and that a jury is entitled to infer that the injury was due to the absence of warning. Here all the warning was "Danger 66,000 V." upon a pole near to the place of the accident but that warning was on the further side of the pole carrying the wire and would not be apparent to the plaintiff proceeding in the direction he was. The warning on the pole in any case does not advise that there is a zone of danger by mere proximity to the wire, *i.e.*, two or three inches, which constituted the concealed trap. I would specifically refer to the following language in the judgment of Viscount Hailsham —which I think is applicable to the facts of the present case— at p. 41, 47 T.L.R.:

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"It was argued that the case was covered by the decision of this House in *Wakelin* v. *London and South Western Railway Company* (3 Times L.R. 233; 12 App. Cas. 41). That case, as explained in *Craig* v. *Glasgow Corporation* (1919), S.C. (H.L.), 1, decided that, if all that a plaintiff proved was a set of facts equally consistent with the wrong of which he complained having been caused by the deceased's own negligence or that of the defendants, he cannot have established that it was caused by the defendant's negligence. It is not enough that the evidence affords material for conjecturing, that the death may have been occasioned by the defendants' negligence unless it furnishes *data* from which an inference can reasonably be drawn that, as a matter of fact, it was so occasioned.

"In my opinion, for the reasons which I have given, I think that the plaintiffs' evidence in the present case does take us beyond the region of conjecture into that of legal inference, and accordingly that the plaintiffs have given evidence which entitled the jury to hold that their case was established."

In the same case Lord Warrington of Clyffe at p. 44 said:

"On the whole I come to the conclusion that there were *data* from which an inference could be reasonably drawn that, as a matter of fact, the accident was occasioned by the negligence of the respondents, and that the verdict of the jury must stand."

Equally in the present case the facts are so complete that the installation of the power line in such a way as to bring the wire down to as close as nine feet two inches to the surface of a

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known pathway was gross negligence; further, with no proper warning and no warning at all that there was a zone of danger even within two or three inches of the wire—without actually touching the wire—constituting as the jury have found a concealed trap.

I would refer to what Lord Atkin said at pp. 384-5 in the House of Lords in *Excelsior Wire Rope Co.* v. *Callan* (1930), 99 L.J., K.B. 380, as it covers the situation of the present case in that the defendant was not the owner of the land upon which the power line was carried, but there was a duty in the present case to people lawfully on the land as the plaintiff was, as there was in the case dealt with by Lord Atkin. It was true in the one case it was the case of children; here a youth of some eighteen years:

"I agree with the reasons which have been put before your Lordships by the noble Lord on the Woolsack.

"In cases of a similar kind questions have arisen in respect to the duty owed by owners of property or occupiers of property in relation to dangers which exist upon that property, whether they are dangers which are adherent to the nature of the soil, or whether they are the result of an interference with it by the owner or occupier either by placing machinery upon it or otherwise. There has arisen in respect to the duties of owners and occupiers of land an elaborated series of decisions which have involved the consideration of the precise difference between invitees of the occupiers, licensees of the occupiers, or trespassers upon the land. In my view in this case none of those questions is relevant, and that particular branch of the law which deals with the obligations of occupiers of land towards those persons who come upon the land is not at issue at all in this particular case. The appellants in this case were not occupiers of the land in question. They had had a right from the Marquess of Bute, who in fact owned the land, and as far as I can see on the evidence was the occupier of the land, to place a line of rails upon it, and there was specially reserved, if reservation is the right phrase. but, at any rate, it was expressly made clear in the lease that the Marquess of Bute retained the right to make what use he pleased of the land upon which the siding was placed, subject to there being no unreasonable interference with the use of the siding. A similar position existed in reference to the erection of this particular hauling machinery that was placed upon this siding. In those circumstances, the only question that appears to me to arise is: what was the obligation on the owners of this hauling machinery to persons who might be endangered by its use? When once the facts which have been stated by my noble and learned friend on the Woolsack have been ascertained, the question of the duty is undisputable. There was a swarm of children frequenting the spot where this machine was used, and frequenting it to the knowledge of the owners of the machine, and it appears to me that they owed a duty to these children to take reasonable precautions to see that the children were

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not injured by the occasional use to which the owners put that dangerous machine. It follows from that that the judgment appealed from was right. I myself would feel a difficulty in putting the case precisely upon the ground upon which it was put by the learned trial judge, because I think he has been rather led to consider the case from the point of view of the liability of the occupiers of the land, which these appellants were not. On the facts as they now emerge it appears to me quite plain that the appellants committed a breach of their duty to these children, and that the judgment against them was right."

If it could be said that the plaintiff was a trespasser in the present case vastly different considerations would arise, but I do not consider that I am called to go into that view of the matter as the evidence is to my mind conclusive that the plaintiff was rightfully on the land.

I would refer to *Lowery* v. *Walker* (1910), 80 L.J., K.B. 138. There it was a savage horse, in the present case it was 66,000 volts of electric energy carried upon a wire in a reckless and dangerous manner too near to the ground and, as found by the jury as well, a concealed trap. Lord Atkinson at pp. 140-1 said:

" . . . it is clear that the plaintiff was lawfully in the place where the injury happened to him. That being so, it is clear, I think, upon authority that the respondent owed a duty to him to take care of this dangerous animal which the respondent put there and which injured the plaintiff by the very vices of which the respondent was well aware."

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Even were it possible to say that the plaintiff was a trespasser which in my opinion it was clear he was not—and in this case the evidence shews he was not, and the learned trial judge charged the jury he was not—upon the facts of the present case I am disposed to say there would be liability. I would refer to the judgment of Viscount Dunedin in *Excelsior Wire Rope Co.* v. *Callan* (1930), A.C. 404 at pp. 410-11:

"My Lords, I agree. In *Addie's* case (1929), A.C. 358 I called attention to the necessity, in order to find the criterion of duty, to fix within which of the three classes of invitees, licensees, or trespassers a person falls; but the negligence here was such that, inasmuch as the greater always includes the less, it does not matter in which class you find him. Assuming, as did Scrutton, L.J., that the children were trespassers, I think that, to use the words of Viscount Hailsham in *Addie's* case, the appellants' servants acted 'with reckless disregard of the presence of the trespasser'; or, to use my own, 'that the acting was so reckless as to amount to malicious acting.' But I wish emphatically to state that the mere fact that the appellants were not occupiers of the land on which the sheave was placed does not in my judgment remove the case from the category of those cases where the land

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was in the occupation of the person owning the dangerous machine. The appellants here had the right to keep children away from the sheave, and if it had been necessary I would have been prepared to find that the children were licensees in the sense of the decided cases, because I think that the word 'licensee' in the cases that have to do with this subject, though not probably a perfectly accurate word, is certainly intended to include another class, if you so call it, which I may coin a word to represent—namely, a permittee. And, though the ground on which the post stood did not belong to the appellants, yet the post was in their charge and it was they who permitted the children to use the post as they did."

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Upon the whole case I am of the opinion that the appeal should be allowed and judgment entered for the plaintiff in conformity with the verdict of the jury, the learned trial judge being wholly wrong in refusing to enter judgment in accordance with the findings of the jury and nothing in my opinion has been advanced at this Bar which would entitle this Court to reverse the findings of the jury or enter judgment for the defendant *non obstante veredicto* (*McPhee* v. *Esquimalt and Nanaimo Rway. Co., supra*). Further, the situation is one of statute law —section 3 of the Contributory Negligence Act, B.C. Stats. 1925, Cap. 8):

"3. In actions tried with a jury the amount of the damage, the fault (if any), and the degrees of fault shall be questions of fact for the jury."

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *G. J. Spreull.*

Solicitors for respondent: *Herchmer & Mitchell.*

ANDLER, EXECUTOR OF PROMIS, *ET AL.* v. DUKE *ET AL.*

MACDONALD, J. (In Chambers)

1931

April 15.

ANDLER v. DUKE

Practice—Stay of proceedings upon judgment pending appeal—Jurisdiction of trial judge.

Once notice of appeal to the Court of Appeal has been given a judge of the Supreme Court cannot stay proceedings upon his judgment pending appeal, except where a statute or statutory rule expressly gives the power.

Section 29 (3) of the Court of Appeal Act, as re-enacted in 1930 does not operate to stay proceedings upon a judgment that declares a plaintiff to be entitled to certain lands registered in the name of the defendant, and vests the title thereto in the plaintiff.

Semble, the appellant can only obtain a stay from such judgment by application to the Court of Appeal.

APPLICATION by defendants for an order staying the registration by the plaintiffs of a judgment of MACDONALD, J., dated the 1st of April, 1931, whereby it was declared that the plaintiffs were entitled to certain realty in the City of Victoria and that said lands were declared to be vested in the plaintiffs. This judgment was founded upon a judgment of the Superior Court of California, decreeing rescission of a contract whereby one of the defendants had acquired said lands and ordering reconveyance to the plaintiffs. The defendants filed notice of appeal from said judgment. Heard by MACDONALD, J. in Chambers at Victoria on the 15th of April, 1931. Statement

A. D. Crease, for applicants: We ask that all proceedings on this judgment, except as to payment of costs, be stayed pending our appeal. If the plaintiffs are allowed to register their title in the meantime, they may sell or otherwise deal with the title, so that even if we succeed on appeal, we may be deprived of all the fruits of victory. Under marginal rule 659 the Court can make any order necessary for the *interim* preservation of property. This rule covers preservation during an appeal: *Polini* v. *Gray* (1879), 12 Ch. D. 438, where the English Court of Appeal acted on rule 659. Argument

MACDONALD, J. (In Chambers)

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ANDLER v. DUKE

[MACDONALD, J.: I am not satisfied that in England there is any provision similar to section 9 of our Court of Appeal Act, which says that after notice of appeal is given, subsequent proceedings shall be taken in the Court of Appeal.]

Maclean, K.C., for plaintiffs: This application is unnecessary. Section 29 (3) of the Court of Appeal Act as re-enacted in 1930 provides for an automatic stay of proceedings on certain conditions being complied with. The defendants need only comply with them.

Argument

[MACDONALD, J.: Is the section applicable? It provides for a stay under certain enumerated circumstances, but the situation here does not come within any of these enumerations.]

Crease, replied.

15th April, 1931.

MACDONALD, J.: In this action the defendants, who have admittedly served a notice of appeal from the judgment herein, seek to utilize the provisions of marginal rule 659. The sidenote to this rule reads as follows:

Detention, preservation or inspection of property, the subject of an action.

I have already expressed considerable doubt, as to this rule being of any benefit to the defendants, in securing what is practically a stay of a judgment so rendered against them. I am referred to the case of *Polini* v. *Gray* (1879), 12 Ch. D. 438 as an authority supporting the defendants' position, even although an appeal has been launched. I cannot agree to the proposition that the facts therein outlined are similar to those here presented. I am fully aware of the contest, as I tried the case and rendered the judgment sought to be appealed from. Marginal rule 659, to my mind, gives power to preserve the property, which is the subject of the litigation; it has no reference to a case of the kind now being considered, where the title has been vested according to the order of the trial judge, in the plaintiffs. I am assuming that the appeal from such judgment is *bona fide,* and will be prosecuted in due course, and that the security for costs will, upon application, or otherwise, be given by such appellants. They fear, however, that should the formal order for judgment be approved of by the trial judge, and duly entered, that it may then be registered in the Registry office,

Judgment

and the title, thus being in the plaintiffs, there might be some conveyance, or charge, placed upon the property, which, in the event of the success of the defendants in their appeal, would render such result fruitless. I can appreciate this position; and I think the Court should assist in some way, in protecting the defendants, in the event of their success.

Aside, then, from marginal rule 659, is there any mode in which I can assist the defendants along the lines mentioned? Counsel appearing in opposition to this application submit that the whole procedure is outlined in an amendment to the Court of Appeal Act, being B.C. Stats. 1930, Cap. 10. It appears that this amendment does outline certain procedure that may be adopted in the event of appellants desiring to have a stay of proceedings upon a judgment. It is an amendment to section 29 of the Court of Appeal Act; and section 3 of such amendment reads as follows:

> Upon the perfecting of such security, execution shall be stayed in the original cause.

Then follow three provisoes curtailing the effect of such stay of execution, unless certain provisions are complied with. Subsection (*a*) of said section 3 provides for the execution not being stayed where the judgment appealed from directs an assignment or delivery of documents, until the thing so directed to be assigned or delivered is brought into the Court appealed from, or placed in the custody of the officer. This subsection is inapplicable to the facts of this case. Then subsection (*b*) provides that if the judgment appealed from directs execution of a conveyance, or any other instrument, that execution shall be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the order or judgment of the Court of Appeal.

Judgment

This involves statement on my part as to the form of the judgment sought to be appealed from. During the course of the trial, and argument that ensued, it was pointed out by counsel for the plaintiffs, that the Court might consider pursuing the practice which was adopted in the State of California, as to requiring a conveyance to be executed by the defendants, and in default thereof, by an officer of the Court, and our statute might be utilized, allowing the Court to vest the property directly in

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April 15.

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Judgment

the party, which it considered was entitled thereto. In the form of the order that has been agreed upon between counsel, such course was adopted; so that the property in question in the litigation has been vested in the plaintiffs, without a conveyance being executed; the result of this proceeding being that the said subsection (*b*) becomes, if strictly adopted, ineffectual. Then the question arises whether, under such circumstances, the Court should thus adopt a course which might destroy the result of the success of the appellants. In effect, by the vesting order, a conveyance has been executed, and deposited with the proper officer of the Court.

Then subsection (*c*) of said subsection (3) is referred to by counsel for the plaintiffs. It is contended that it should be complied with before a stay becomes operative. I do not think, strictly speaking, it is applicable. It provides that, if the judgment appealed from, directs the sale, delivery or possession of real proporty, the execution shall not be stayed until the security has been entered to the satisfaction of the Court appealed from, or a judge thereof. But while the vesting order to which I have referred has the effect of not only dealing with the title, but also the possession, still I do not think that this subsection meets the situation. It then proceeds to deal with the appellant being required to give security that it will not commit or suffer to be committed any waste of the property. It is stated by counsel, and, if I remember aright, there was evidence at the trial, that waste could not very well occur, because a receiver appointed by this Court in another action, is in control and possession of the property. And then, again, the next provision is inapplicable, because the appellant should be called upon to pay the value of the use and occupation, as that has been settled, and a lease, that is not sought to be attacked, is in existence, under which the lessee pays rent to the receiver, so appointed.

My doubt in connection with the matter, is as to whether I have jurisdiction, and can thus apply this statute, in order to assist the appellants along the lines that I have indicated. I would have no hesitation in doing so if such jurisdiction exists. It is proposed that certain terms, if acceded to on the part of the appellants, would remove the opposition entertained by the

respondents to an order being made. Still, if I have no jurisdiction, an order cannot be made after the appeal has been launched, even if by consent. The action is now pending in another Court. There is no doubt that if the facts came within this amendment to the Court of Appeal Act, that as a judge of the Court appealed from I would have jurisdiction. I hesitate, without clear statutory authority, to make an order which would operate as a stay of the judgment. It would have the effect, if filed in the Registry office, of rendering the vesting order inoperative, until the appeal is decided.

Judgment

I have thus extended my remarks at length, so that the applicants for this order may have whatever benefit they can derive therefrom. I refuse the application, in the meantime, with liberty to apply again, should an application be made to a judge of the Court of Appeal, and be refused—I express a desire, that the grounds of such a refusal might be given, so that it would prove of assistance in my further dealing with the matter, should it come before me later on.

Application refused.

FISHER, J.

1931

May 5.

MORRIS v. MORRIS

MORRIS v. MORRIS *ET AL.*

Husband and wife—Land purchased with wife's money—Conveyance to husband duly registered — Judgment against husband — Registered against lands — Resulting trust — R.S.B.C. 1924, Cap. 127, Secs. 34, 37 (2), 40, 42, 43, 44 and 147.

In November, 1927, the plaintiff purchased certain lands that she paid for with $600 of her own money. The conveyance of the land was made to her husband and duly registered. In November, 1930, one French obtained a judgment against the husband and registered the judgment in the Land Registry office against said lands. In an action against her husband and French for a declaration that there was a resulting trust in her favour:—

Held, that under section 40 of the Land Registry Act the registered owner of a charge is entitled to the estate or interest in respect of which he is registered with liberty to sell the property registered in the name of the judgment debtor, subject only to such exceptions and registered charges as appear on the register, and section 37 (2) of the Land Registry Act does not assist the plaintiff as she was not adversely in actual possession of the land at any time.

Statement

ACTION for a declaration of a resulting trust in favour of the plaintiff in respect to a property purchased from one Isabell Prime by moneys alleged to have been advanced by the plaintiff. The conveyance dated the 10th of November, 1927, was made to the plaintiff husband and duly registered. On the 13th of November, 1930, the defendant French recovered judgment against the husband, said judgment being duly registered in the Land Registry office against the said lands. Tried by FISHER, J. at Vancouver on the 4th of March, 1931.

Oliver, for plaintiff.
C. F. MacLean, for defendants.

5th May, 1931.

Judgment

FISHER, J.: In this matter it is quite apparent that payment for the land purchased from Isabell Prime, being the land in question herein, was made at the time by cheque dated November 9th, 1927, for $600 signed by the plaintiff Alice Morris and drawn on a bank account standing in the name of the plaintiff at the Bank of Montreal, Vancouver, B.C., which cheque was in

due course paid. The conveyance, dated the 10th November, 1927, and duly registered was made not to the plaintiff but to her husband James Morris. On the 13th of November, 1930, the defendant J. F. French recovered a judgment against the said James Morris and on the 23rd of December, 1930, caused the said judgment to be duly registered in the Land Registry office against the said land whereof the said James Morris appeared as the registered owner and the said defendant J. F. French pleads the benefit of sections 40, 42, 43, 44 and 147 of the Land Registry Act, R.S.B.C. 1924, Cap. 127. Counsel on behalf of the plaintiff submits that there was a resulting trust in favour of the plaintiff (wife) and cites, *inter alia, Dyer* v. *Dyer* (1788), 2 Cox 92 where Chief Baron Eyre, at p. 93, says:

> The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees, being a child or children of the purchaser, is to operate by rebutting the resulting trust.

Judgment

In this connection reference may be made to *Dudgeon* v. *Dudgeon and Parsons* (1907), 13 B.C. 179. This was an action by a husband against his wife for a declaration of trust, the evidence shewing that the wife had received from the husband the money for the purchase of a homestead, the conveyance of which was taken in the wife's name. IRVING, J., at p. 186, says:

> I come to the conclusion, therefore, that the money with which this property was purchased was the plaintiff's money, purchased for his own benefit, and a resulting trust arises in his favour.

In the present case I find that the money first deposited in the plaintiff's said bank account in December, 1919, was her own money and that she also from time to time thereafter deposited some of her own money in such account. I also find that some of the money deposited in the account was earned by

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the husband. The account however remained in the name of the plaintiff and under all the circumstances I think the presumption arises that the $600 was her money and that such presumption has not been rebutted. My conclusion therefore is that it was the plaintiff's money that purchased the property.

The issue therefore is whether or not a resulting trust arises in favour of the plaintiff as against the said defendant J. F. French. Reference has been made by counsel to sections 7 and 8 of the Statute of Frauds Act being Cap. 95, R.S.B.C. 1924, reading as follows:

> 7. All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.
>
> 8. Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore contained to the contrary notwithstanding.

Judgment

It was contended by counsel on behalf of the said defendant that in any event said section 7 applied and that the alleged trust not being in writing was therefore utterly void but in this connection reference might be made to the case of *Vaselenak* v. *Vaselenak* (1921), 1 W.W.R. 889 which seems to me to be conclusive against such contention. Referring to similar sections, Stuart, J., at p. 894, says:

> There is here no suggestion of what may properly be called a declaration or creation of trust. It seems to me that those words must be held to refer to a declaration or creation made after the declarant or creator has acquired title. But where the trust arises out of clearly proven facts and circumstances in the way of agreement and negotiation between the parties before the defendant has acquired title or concurrently therewith, such as the payment of the purchase price, then the trust is not one "declared" or "created" by the defendant but one arising or resulting by implication or construction of law and it will therefore come within the words of section 8 and not of section 7.

As already stated, however, counsel for the defendant relies also on the Land Registry Act. The effect of the statutory provisions of the Land Registry Act was considered in the case of *Gregory* v. *Princeton Collieries* (1918), 25 B.C. 180 where the Court following *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 held that:

where judgment is recovered against a defendant who had previously executed a trust deed covering all his lands, his only interest remaining being an equity of redemption in said lands, such equity only is liable to satisfy the judgment, notwithstanding the fact that the trust deed was not registered.

In *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 at pp. 288-9 the Court said:

> No proposition of law can be more amply supported by authority than that which the respondents invoke as the basis of the judgment under appeal, namely, that an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor. . . . The rule thus well established must have become the law of the territories unless it has been displaced by some statutory provision to the contrary.

Counsel for the defendant, however, has pointed out that *Entwisle* v. *Lenz & Leiser* was not followed, though not actually overruled, in *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338 where, at p. 345, Anglin, J. said:

> Only because the Legislature has re-enacted section 74 *in ipsissimis verbis* in the revision of 1911 as section 104, and because we are here dealing not with a deed or transfer but with a mortgage or charge, do I hesitate to hold that *Entwisle* v. *Lenz & Leiser* [(1908)], 14 B.C. 51, should be overruled, unless, indeed, it can be distinguished on the ground that the transfer in that case was actually deposited for registration but owing to a mistake in the description was not recorded against the debtor's land. When a statute declares that an instrument "shall [not] pass any estate or interest either at law or in equity" until registered, the reasoning by which the conclusion is reached that the transferor in an unregistered deed to which that statute applies is nevertheless merely a dry legal trustee and that he retains no estate or interest, but that the entire beneficial interest is vested in the transferee, is, I confess, quite too subtle for me to follow.
>
> But the case now before us may, I think, be disposed of under section 27 of the Execution Act and section 73 of the Land Registry Act without actually overruling *Entwisle* v. *Lenz & Leiser* [(1908)], 14 B.C. 51, by merely declining to apply it to facts not absolutely identical with those there dealt with.

Judgment

In the same case, at p. 347, Brodeur, J., speaking of the provisions of our Land Registry Act, says:

> And there is no distinction made in that statute with regard to the beneficial interest of the judgment debtor or not as it was under the common law.

Under section 34 of our Land Registry Act, being somewhat the same as section 104 referred to by Anglin, J. as above, the said conveyance from the said Isabell Prime to the said James Morris did not pass any estate or interest either at law or in equity to anybody until registration except as against the person

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making the same. So soon as registration took place it seems to me that the entire interest, beneficial as well as otherwise, passed subject to the statute and section 40 of the Land Registry Act reads as follows:

> The registered owner of a charge shall be deemed to be entitled to the estate or interest in respect of which he is registered, subject only to such exceptions and registered charges as appear existing on the register.

At the time of the decision in *Gregory* v. *Princeton Collieries, supra,* the said section provided that the registered owner should be *prima facie* entitled but the words *"prima facie"* are no longer found in the section and my opinion is that registration has been made conclusive as to the title in such a case as this and that the judgment creditor being the registered owner of a charge must be deemed to be entitled to the estate or interest in respect of which he is registered with liberty to sell the property registered in the name of the judgment debtor subject only to such exceptions and registered charges as appear existing on the register and that section 37 (2) of the Land Registry Act does not assist the plaintiff as suggested by her counsel as she was not adversely in actual possession of the land at any time. Therefore, whether the trust alleged is one declared in writing by the declarant after he has acquired title or one arising by implication of law from the circumstances of the transaction, it seems to me that as the Act now stands in the light of the decisions above referred to it may rightly be said, as was said by the late Chief Justice in *Levy* v. *Gleason* (1907), 13 B.C. 357 at p. 359:

Judgment

> The new Act now makes it no concern of any stranger to the transaction as to what its real nature may be; for all purposes *quoad* such stranger the registered owner is the only owner, beneficial or otherwise.

My conclusion therefore is that as against the defendant French there is no resulting trust in favour of the plaintiff and the action against him is dismissed with costs.

Action dismissed.

GILROY v. THE CORPORATION OF THE DISTRICT OF BURNABY.

COURT OF APPEAL

1931

June 2.

GILROY v. CORPORATION OF THE DISTRICT OF BURNABY

Negligence—Municipal corporation—Construction of sidewalk—No by-law authorizing—Obligation to repair—R.S.B.C. 1911, Cap. 170, Sec. 53, Subsecs. (176) and (179).

A three-plank sidewalk was constructed on a street within the defendant Municipality in 1912, repairs being made from time to time by a foreman who filled in holes in the sidewalk with sand or gravel. The Municipal Act empowered the corporation to construct the sidewalk but no by-law was produced authorizing its construction and the Act imposed no obligation on the corporation to repair. In October, 1929, the plaintiff, a young girl, coming home from school caught her foot in a hole between the planks, caused by the rotting of a supporting cross-piece below, and falling she broke her thigh. In an action for damages for negligence it was held that the case was one of non-feasance and the plaintiff could not recover.

Held, on appeal, affirming the decision of MURPHY, J., that as no obligation to repair is imposed by the statute and there is no evidence of original faulty construction the corporation is not liable for the consequence of inevitable decay of the material properly used in construction and the appeal should be dismissed.

APPEAL by plaintiff from the decision of MURPHY, J. of the 15th of December, 1930, dismissing an action for damages for injuries sustained through the defendant's negligence in failing to repair a sidewalk. On the 17th of October, 1929, the plaintiff was walking home from school at the noon hour on a sidewalk on Gray Avenue in the defendant Municipality when her foot caught in a hole between the planks on said sidewalk, causing her to fall when her right thigh was broken. The sidewalk had been constructed in 1912 by the Municipality, it being a three-plank sidewalk, the planks being twenty feet long and laid lengthwise. Repairs were made to the sidewalk from time to time by a foreman of the Municipality by filling in with sand and gravel wherever he found a break. It was found that where the accident took place the cross-piece below supporting the planks had rotted sufficiently to leave a hole between the planks large enough to allow the plaintiff's foot to slip through. The action for damages was dismissed.

Statement

The appeal was argued at Vancouver on the 10th of March,

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GILROY v. CORPORATION OF THE DISTRICT OF BURNABY

1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Edith L. Paterson, for appellant: No by-law was ever passed authorizing the construction of this sidewalk. They built it in 1912 and never kept it in repair. The cross-piece below to which the planks were nailed had rotted away, also one of the planks above sufficient to leave a hole through which the child's foot slipped. That the corporation must exercise its power by by-law see *Gooderham* v. *Corporation of Toronto* (1891), 21 Ont. 120 at p. 133; *Ayers* v. *The Corporation of Windsor* (1887), 14 Ont. 682 at p. 685; *Croft* v. *The Town Council of Peterborough* (1856), 5 U.C.C.P. 35 and 141; *Taylor* v. *Gage* (1913), 30 O.L.R. 75 at p. 85; *McLean* v. *Sault Ste. Marie* (1910), 16 O.W.R. 966; *Liverpool and Milton Rway. Co.* v. *Town of Liverpool* (1903), 33 S.C.R. 180; Robson & Hugg's Municipal Manual, 1009. We say they maintained a nuisance: see *Von Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198 at p. 208.

Argument

Alfred Bull, for respondent: The one point raised is that this was a nuisance, but this is not open to them as it was never raised on the pleadings. There was no obligation on the municipality to repair. This is a case of mere non-feasance and the learned judge below properly followed *Clarke* v. *Corporation of Chilliwack* (1922), 31 B.C. 316. See also *City of Halifax* v. *Tobin* (1914), 50 S.C.R. 404.

Paterson, in reply, referred to *Barker* v. *Herbert* (1911), 2 K.B. 633.

Cur. adv. vult.

2nd June, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This action is brought for injury occasioned by the infant plaintiff stepping into a hole in defendant's sidewalk thereby injuring herself. The sidewalk had been built some sixteen years ago by the defendant. It was empowered by the Municipal Act to construct it but after diligent search no by-law was found authorizing its construction. By the Municipal Act no duty is imposed upon the defendant to keep the sidewalk in repair. The learned judge held that notwithstanding the defendant had not been shewn to have

wrongly constructed the sidewalk and that it was not bound by law to repair it. He applied the maxim *omnia præsumuntur rite esse acta* which I think was applicable to the case, and dismissed the action.

I would dismiss the appeal.

MARTIN, J.A.: In my opinion the learned judge below reached the correct conclusion in dismissing this action and in regarding it (as well as can be derived from the obscure and uncertain allegations in the statement of claim) as in substance one of alleged negligence in failure to repair a sidewalk of three parallel 2-inch planks (20 feet long) so that the rotting of a supporting cross-piece had caused a hole to form in one spot into which the plaintiff's foot slipped and she fell and broke her leg.

It appears that the sidewalk which was about half a block long, 650 feet, had been put down about 16 years before the trial by the servants of the Municipality, in which the possession of the highway is vested (section 370, Municipal Act, Cap. 170, R.S.B.C. 1911) and that the only repairs to it were made by the "foreman who would go round wherever there was a break and fill it in with a little bit of gravel." No by-law or resolution was put in evidence authorizing the work to be done and by interrogatories to the clerk of the municipality, put in by the plaintiff, it appears that "there is no record of the authority under which the said sidewalk was constructed" and that "the sidewalk generally has been repaired from time to time prior to 16th September, 1929, by filling holes in the said sidewalk with sand and gravel." The defendant adduced no evidence and properly relied on the submission that as there is admittedly no obligation to repair imposed on it by statute, and also no evidence of originally faulty construction it is not liable for the usual consequence of the inevitable decay of the materials properly used in such construction, which does not constitute a legal nuisance in the appropriate sense of that term even though the sidewalk might become dangerous to pedestrians—*Mackensen* v. *Corporation of Surrey* (1915), 21 B.C. 198, 207.

It was submitted by the plaintiff that this plank sidewalk could only have been lawfully laid down by the authority of a by-law passed under subsection (176) of section 53 of said

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Municipal Act, then controlling the matter, but that subsection whatever it may include in the large powers it confers, does not primarily relate to the ordinary laying down of sidewalks in such places as the council should deem best in the public interest in highways which, as here, are in its own possession and I should require some direct authority before I am compelled to go to the extreme of holding that a municipal council acts illegally when without any by-law it makes a foot-path either of gravel, planks, or otherwise, or digs a ditch, by and through, for example, the instrumentality and under the supervision of its engineer or road-foreman in his local discretion in the expenditure of a general fund for those minor works which are constantly in hand and may often require immediate attention owing to rains, frost, snow, etc. In the statute to which we have been referred the only case where a by-law is required for the "construction or alteration of any sidewalk" is under sub-section (186) and that confers power on the council to "order" the owners of land abutting upon streets to construct or alter sidewalks, because otherwise it would be trespassing if it interfered with private owners. It is to be noted that in *Gooderham* v. *Corporation of Toronto* (1891), 21 Ont. 120 (affirmed (1892), 19 A.R. 641) Rose, J. at p. 151 said he did "not see very clearly the necessity for a by-law to enable the corporation to open up the streets," but said subsection (176) makes a by-law necessary in "opening" streets in this Province; after they are opened they become vested in the municipality as aforesaid.

MARTIN, J.A.

It follows that the appeal should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitors for appellant: *Hamilton Read & Paterson.*
Solicitors for respondent: *Walsh, Bull, Housser & Tupper.*

MAY v. IMPERIAL OIL LIMITED.

COURT OF APPEAL

1931

June 2.

MAY v. IMPERIAL OIL LIMITED

Practice—Costs—Claim and counterclaim—Taxation where plaintiff recovers and the counterclaim is dismissed—Appendix N.

Where the plaintiff recovers judgment in the action with costs and the counterclaim is dismissed with costs, two sets of costs cannot be allowed for claim and counterclaim under the present tariff. One set of costs only are allowed on the scale applicable to the action and to this is added under tariff items 2 or 19 of Appendix N the difference between that scale and the scale applicable to the counterclaim, unless otherwise ordered.

APPEAL by plaintiff from the order of MCDONALD, J. of the 28th of January, 1931, dismissing the plaintiff's application to review the registrar's taxation of costs in the action. The action was for wrongful dispossession under a lease and the defendant counterclaimed for damages to the property demised. The plaintiff recovered judgment for $50 damages, the learned judge certifying that the action was a proper one to be brought in the Supreme Court and the plaintiff was entitled to his costs of suit on the appropriate Supreme Court scale. The counterclaim was dismissed with costs. The plaintiff taxed the costs of the action under column one under the appropriate items and submitted a further bill of costs for the counterclaim under practically the same items but under the higher scale of column two. The registrar disallowed all the costs of the counterclaim.

Statement

The appeal was argued at Vancouver on the 10th, 18th and 19th of March, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Jeremy, for appellant: The plaintiff is entitled to costs of both claim and counterclaim, as if they were separate actions: see *Atlas Metal Co.* v. *Miller* (1898), 67 L.J., Q.B. 815 at p. 818. The registrar has no discretion under the tariff.

T. E. H. Ellis, for respondent: There is no substantial difference in the issues at trial. The counterclaim is not treated as a separate action: see *Medway Oil and Storage Co.* v. *Continental Contractors* (1929), A.C. 88, where the cases on this

Argument

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1931

June 2.

MAY v. IMPERIAL OIL LIMITED

Argument

question are collected. The plaintiff is not entitled to any costs under the counterclaim as the tariff now includes all matters relating to action and counterclaim. This is apparent as tariff item (2) includes all pleadings for action and reply to counterclaim, while item (5) includes all pleadings for defence to the action and counterclaim. Items common to both claim and counterclaim should be disallowed: see *Middleton* v. *Black* (1912), 2 W.W.R. 869. It makes no difference if the counterclaim is for a sum which would place it in a higher scale of tariff: see *Leonard* v. *Whittlesea* (1918), 3 W.W.R. 215.

Jeremy, replied.

Cur. adv. vult.

2nd June, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appeal is as to costs. The judgment at the trial ordered the defendant to pay to the plaintiff the sum of $50 and costs and dismissed the counterclaim with costs. The case falls under the tariff Appendix N, and the appellant's claim is that he is entitled to tax two bills of costs one in the action and the other in the counterclaim, but if not he is entitled to tax item No. 2 in the second column whereas he had been allowed only the $50 mentioned in the first column. By the second column he is entitled to $75. I think this claim is correct and should be allowed. He is entitled to tax that item at $75. The appeal is therefore allowed to this extent.

MARTIN, J.A.

MARTIN, J.A.: This appeal raises an important question respecting the application of the new Tariff of Costs, in Appendix N, to counterclaims in all cases and in particular in the present wherein the plaintiff recovered judgment on his claim for $50 and also on the counterclaim which was dismissed with costs, such counterclaim raising an entirely distinct course of action from that on which the plaintiff succeeded. If it were not for said tariff no difficulty would be experienced because the situation would be within *Atlas Metal Co.* v. *Miller* (1898), 2 Q.B. 500, but great uncertainty is created by the language used in the 2nd and 5th items and it would be impossible to give a satisfactory meaning to the language of those items without

doing an injustice in some cases which have been postulated by Mr. *Jeremy*. My learned brothers are of opinion that there is an error in principle in the taxation appealed from in that under appropriate item 19 ("Trial of action in all other cases . . .") $75 should have been allowed instead of $50 and to that extent at least we all agree that the appeal should be allowed. Personally I felt somewhat disposed to go further in giving effect to Mr. *Jeremy's* submissions, but in view of the manifest uncertainty of the matter I do not feel justified in dissenting from this disposition of the appeal and the more so because I feel that, in its particular and small circumstances, no injustice will be occasioned thereby.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A. would allow the appeal.

MCPHILLIPS, J.A.

Appeal allowed.

Solicitors for appellant: *Carter & Co.*
Solicitors for respondent: *Buell, Lawrance & Johannson.*

COURT OF APPEAL

1931

June 2.

J. W. KELLY PIANO CO. LTD. v. NASH

J. W. KELLY PIANO COMPANY LIMITED v. NASH.

Agreement for sale—Piano—Purchase price payable in instalments—Subsequent agreement reducing balance due—Effect on original agreement.

The defendant purchased a piano from one Ross under an agreement for sale on August 28th, 1922, for $700. The defendant to pay $25 cash, $5 per month for six months, $10 per month for twelve months, then $20 per month until balance paid, with interest on deferred payments at 8% per annum. Ross died in 1925 and the account was assigned to the Ross Piano Company. This company went into liquidation in August, 1928, and the account was assigned to the plaintiff. On June 7th, 1928, the defendant having then paid only $277 on account, he saw one Thompson who was in charge of the Ross Piano Company, and finding that owing to the accumulation of interest he still owed nearly $700 on the piano, he stated he would make no further payments and would hand the piano back to the company. Thompson then made an offer which was noted on the company's ledger and accepted as follows: "Arranged principal of $400, no further interest providing account is paid regularly and not allowed to go in arrears." The defendant's subsequent monthly payments, although at times allowed to go in arrears, were later made up and the money accepted. In August, 1930, the plaintiff repudiated the subsequent agreement and demanded $636 as due under the first agreement. The defendant then tendered him $170 as the balance due under the subsequent agreement. An action claiming that the original agreement came into operation and that $636 was payable, was dismissed.

Held, on appeal, affirming the decision of RUGGLES, Co. J., that the proper construction of the later agreement is that in default of prompt payment of instalments the principal sum of $400 remains the same but interest would be chargeable, and the plaintiffs' claim that the original agreement as to principal again came into force was properly dismissed. There was, however, a substantial compliance with the subsequent agreement and the plaintiff should have accepted the tender of $170 as payment in full.

Statement

APPEAL by plaintiff from the decision of RUGGLES, Co. J. of the 5th of February, 1931, in an action for the balance due on the purchase of a piano. The plaintiff purchased the piano under a conditional sale agreement on the 28th of August, 1922, from one T. H. Ross, carrying on business as the Ross Piano House. The purchase price was $700, $25 to be paid in cash, then $5 a month for six months, $10 a month for the next twelve months, and then $20 per month until the full amount was paid,

eight per cent. being charged on deferred payments. T. H. Ross died in 1925 and the account was assigned to the Ross Piano Company. This company went into liquidation and the account was assigned to the plaintiff Company on the 12th April, 1929. In June, 1928, there still being a large amount due the defendant told one Thompson who was in charge of the Ross Piano Company that he could not continue the payments and would have to return the piano. Thompson then offered to reduce the "principal due to $400, no further interest providing account is paid regularly and not allowed to go into arrears." There was a dispute as to the amount of the monthly payment, the defendant claiming it was $10 per month. From June, 1928, to August, 1930, the defendant made monthly payments amounting to $230, and was to pay $20 in August, but the plaintiff demanded $636 under the original agreement. The defendant then tendered the plaintiff $170 in full settlement of all moneys due on the piano. The plaintiff's action for the balance due under the original agreement was dismissed.

Statement

The appeal was argued at Vancouver on the 6th and 9th of March, 1931, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Hogg, for appellant: The original agreement is still in force. The condition under which the $400 offer was made has not been complied with so we are entitled to the full amount due under the original agreement: see Leake on Contracts, 7th Ed., 596. The subsequent agreement was conditional upon punctual payment.

Locke (*Eric R. Thomson,* with him), for respondent: The agreement of June 7th, 1928, was that $400 would be accepted without interest if payments were made regularly and not allowed to go into arrears. This was substantially complied with up to July, 1930, and the trial judge has so found. The balance of $170 should be accepted as payment in full.

Argument

Hogg, replied.

Cur. adv. vult.

2nd June, 1931.

MARTIN, J.A.: I would dismiss the appeal for the reasons given by my brother GALLIHER.

MARTIN, J.A.

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GALLIHER, J.A.

GALLIHER, J.A.: As Mr. *Hogg,* counsel for the plaintiff (appellant) stated to the Court below the whole case turns on the interpretation to be given to an agreement that was entered into on the 7th of June, 1928.

It appears that the defendant Nash on August 28th, 1922, purchased from one T. H. Ross a piano and bench for the sum of $700 on the terms as set out in Exhibit 1. During the currency of the agreement Ross died and the Ross Piano House was incorporated and this account among others was assigned to that Company, which later went into liquidation and this account was assigned to The Kelly Piano Company, the present plaintiff. Prior to this latter assignment, however, the agreement first above mentioned had been come to. Up to the time of this agreement certain payments had been made by Nash under the original contract but after applying these in payment of interest and insurance the original purchase price on the 7th of June, 1928, remained at practically $700. Nash saw Thompson the manager of the Ross Piano Company and on learning that he still practically owed the original amount wanted Thompson to take back the piano as he found the load too heavy to carry. Thompson made the following proposition which he noted at the time in their (the Company's) ledger account with Nash in these words: "Arranged principal of $400 and no further interest providing amount is paid regularly and not allowed to go into arrears."

There is some doubt as to whether the word used was "price" or an abbreviation of the word "principal" as it is difficult to decipher from the original notation. I am inclined to the view that it is "principal" as it is immediately followed by a reference to interest.

We are asked to determine the effect of that notation there being no dispute as to Thompson's authority to make this adjustment of the account or that such agreement was entered into. The way it strikes me is this, that while there was a change made as to the amount to be paid and in respect of interest; the other terms of the original agreement were not altered or dispensed with, so that there was not a doing away with the old agreement entirely and a substitution of an entirely new agree-

ment except in so far as it altered the principal amount and affected the payment of interest. When one considers the safeguards which have been invoked by the vendors in these agreements of sale for their protection I do not think we should assume that they were all abandoned in the new arrangements that were made between Thompson and Nash. But assuming all this to be so, was the fixing of the principal sum due at $400 contingent on the monthly payments upon that amount being made promptly or was the balance due fixed at $400 and that no interest would be charged on that amount if instalments were paid as due? I am inclined to the latter view and for this reason. When the agreement was made Nash had given up hope of being able to carry out the original contract—he desired that they should take back the piano—and Thompson realizing under the circumstances as disclosed the difficulty Nash was experiencing viewed it in this light—I do not want to take back the piano—I will make it lighter for you—I will only require you to pay a further sum of $400 and that without interest providing you make your monthly payments of that amount promptly, in other words the $400 balance remained fixed with no interest if paid promptly. Thompson says:

GALLIHER, J.A.

> So there was an arrangement come to between you and Dennis Nash that this account would be settled at $400, and the notation made in the ledger and initialled by you contained the arrangement that was come to? Yes.

But further on he says:

> The agreement entered into between Mr. Nash and myself was this, I agreed to reduce the account to $400 and I would not charge him any further interest provided he paid $20 every month regularly to get the account cleaned up. That was the agreement. Otherwise, the original amount stood.

"Otherwise the original amount stood" is not in the notation which he says above contained the arrangement that was come to. While that may or may not have been in Thompson's mind, I regard those words not as words uttered at the time but as his understanding of what the notation meant disassociated as they are from what he describes as the agreement by being contained in a new sentence. I do not like to be too critical in examining words but I cannot help thinking that if these words "otherwise the original amount stood" had been mentioned at the time and were to form a part of the agreement there is not much likeli-

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hood that Nash would have accepted it; however, there is nothing in the notation to indicate they were used.

There is a conflict between Thompson and Nash as to the amount of the monthly payments. Thompson says $20 per month and Nash says $10. As the ledger shews these payments were sometimes $10, sometimes $20, and once $30, shewing no uniform amount, the learned judge below has accepted Nash's statement. In some of the exhibits filed payments are called for at $20 per month but this may be either taking the amount called for under the original agreement or the amount Thompson told them was to be paid under the new agreement which would be in conflict with the evidence of Nash and as well in one instance Exhibit 3, payment of $10 on August 25th, 1930, was called for. So I do not think I should interfere with the learned judge's finding.

GALLIHER, J.A.

Taking it then as found by him at $10 per month Nash has paid in 25 months the sum of $250. It is true at times he was in arrears but made it up later and the money was accepted. In any event the plaintiff's point is not that interest should be paid on the $400 but that by reason of not making prompt payments the agreement of June, 1928, disappeared and they were back on the original contract, but that, as already stated, is not the view I take of the agreement of June, 1928, and I think the sum of $170 admittedly tendered the plaintiff on the 6th of September, 1930, represented the amount then due, and so I would not disturb the judgment below.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree in dismissing the appeal for the reasons given by my brother GALLIHER.

Appeal dismissed.

Solicitors for appellant: *Hunter & Owen.*
Solicitor for respondent: *Eric R. Thomson.*

KEEN AND KEEN v. B.C. ELECTRIC RAILWAY COMPANY LIMITED.

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KEEN v. B.C. ELECTRIC RY. CO. LTD.

Negligence—Damages—Irrelevant statement by witness—Charge to jury—Non-direction—Effect of appeal.

The plaintiff, a passenger in a street car, fell as she was about to get off and injured her hip, owing, as she alleged, to the car suddenly starting as she got up and then suddenly stopping again. A witness for the defence, after giving evidence that the plaintiff had hip trouble prior to the accident, suddenly volunteered the statement without being questioned that she came there voluntarily on account of the man who was driving the car; she didn't like the idea of his having to bear the blame for the accident which she knew was through Mrs. Keen's physical condition. Counsel for the plaintiff objected to the speech but nothing further was said by either counsel or the Court. The jury found that negligence was not proven and the action was dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that the statement made by the witness had no bearing on the question of whether the defendant was negligent or not. After counsel for the plaintiff objected the matter was dropped, as it was manifestly such an irresponsible and voluntary statement that no one attached any importance to it and the plaintiff did not suffer any prejudice thereby.

APPEAL by plaintiffs from the decision of MURPHY, J. of the 26th of November, 1930. On March 13th, 1930, the plaintiff Mrs. Keen and her daughter were passengers on a street-car in Victoria intending to get off at the corner of Douglas and Yates Streets. The plaintiff claims that when the car stopped she got up to go out when the car suddenly started again and then as suddenly stopped, she lost her balance and fell to the floor, her hip being broken. The evidence was conflicting as to the violence of the stopping of the car. The jury found no negligence was proven and the action was dismissed. The plaintiffs appealed on the grounds of misdirection and improper admission of evidence.

Statement

The appeal was argued at Vancouver on the 6th of March, 1931, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Maclean, K.C., for appellants: This is an application for a new trial. We submit there was misdirection in the charge and

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a substantial wrong has been done the plaintiffs: see *Perry* v. *Woodward's Ltd.* (1929), 41 B.C. 404; *Jones* v. *Spencer* (1897), 77 L.T. 536; *Sanatorium, Limited* v. *Marshall* (1916), 2 K.B. 57; Phipson on Evidence, 7th Ed., 463. Improper evidence was given that was objected to and the jury was not instructed to pay no attention to it. This is ground for a new trial: see *Smith* v. *The Midland Railway Company* (1887), 57 L.T. 813 at p. 814; *Hales* v. *Kerr* (1908), 2 K.B. 601.

Argument

Harold B. Robertson, K.C., for respondent: We deny negligence. There was evidence that the plaintiff had an injured hip before the accident and this the jury believed. The irrelevant remark made by a witness was not objected to and was not of material importance: see *Wand* v. *Mainland Transfer Company* (1919), 27 B.C. 340 at p. 345. Where objection is not taken and intervention of the trial judge claimed the Court of Appeal will not interfere: see *Craig* v. *Hamre* (1925), 36 B.C. 1 at p. 3; *Sornberger* v. *Canadian Pacific R.W. Co.* (1897), 24 A.R. 263; *Robertson* v. *Dumaresq* (1864), 2 Moore, P.C. (N.S.) 66; *Jacker* v. *International Cable Company (Limited)* (1888), 5 T.L.R. 13; *Gilbert* v. *Endean* (1878), 9 Ch. D. 259; *Bradshaw* v. *Widdrington & Cust* (1902), 86 L.T. 726; *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460 at p. 464. There is ample evidence to warrant the finding of the jury and there is no ground for a new trial.

MacLean, in reply, referred to *Jones* v. *Spencer* (1897), 77 L.T. 536 and *Sanatorium, Limited* v. *Marshall* (1916), 2 K.B. 57.

Cur. adv. vult.

2nd June, 1931.

MARTIN, J.A.

MARTIN, J.A.: This appeal comes before us in the shape of an application for a new trial on the grounds of non-direction, amounting to misdirection in the charge to the jury, and the improper admission of evidence. The plaintiff's case was that she was injured by the sudden stopping of the defendant's tram-car which threw her off her feet when she was properly preparing to alight therefrom. The learned judge properly instructed the jury that if the car was "stopped with a sudden

jolt, unnecessarily sudden, that is negligence," and on that short and clear point he spoke as follows:

The second [question] is, that the defendant was guilty of negligence. And there, as I told you, there is a controversy which you have to decide on the evidence, remembering particularly that the onus is on the plaintiff, that she must adduce evidence to you that affirmatively convinces you that the defendant was negligent. It has been decided, as counsel has stated, that if a car is stopped with a sudden jolt, unnecessarily sudden, that it is negligence. But you have to use your common sense on the facts as you find them and determine whether the motorman here did something which under all the circumstances a reasonable man would not do. Because what is alleged against him here is not an omission but an act. And remember, you judge the case on the evidence before you.

The case for the plaintiffs here is that the car was started and then suddenly stopped, after it had been first stopped. Now that is the evidence you have to find affirmatively proven. It won't do for you to say, Well, this lady was hurt, and whilst we cannot say that we believe affirmatively the story that is told, still, she must have been hurt in some way, and therefore the defendant must be liable. That is not the way to approach your duty. You will remember the oath you took to decide the case according to the evidence. So you must deal with the evidence, and with the evidence only; not on suppositions apart from the evidence.

And he further said by way of precaution:

Now if you do not fully understand what I have said in that connection [*i.e.*, damages], gentlemen of the jury, or in any connection, be sure to come back, and I will try to make myself clear.

MARTIN, J.A.

The "controversy on the evidence" on this prime question of negligence was that the plaintiff and her daughter swore that there was a sudden stop, while the car-driver and another passenger swore there was nothing more than the usual one, and the jury chose to believe the two latter witnesses. It is true the learned judge did not refer to the witnesses individually or enlarge upon their evidence, all of which was, relevantly, embraced in a few sentences, doubtless thinking that, on the exceptionally short and clear point of fact which the special jury had before them, they must be fully apprised of it, and hence it was almost superfluous to do so; and the fact that no objection was taken to the charge at the time is an indication that the case was a special one in which that course could be safely adopted without giving that fuller direction which would be requisite in most cases as contemplated by section 60 of the Supreme Court Act, which requires "a proper and complete direction to the jury upon the law and as to the evidence applicable to the issues. . . ." That provision must be

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applied to the particular circumstances of each case and after carefully considering it in the light of those at Bar I find myself unable to say that the statute has not in essentials been satisfied. Compare *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473; 35 S.C.R. 362; and *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460; 39 S.C.R. 390; (1909), A.C. 361.

Then as to the admission of improper evidence. That relates to an irrelevant statement blurted out by the witness Mrs. Harmar, that she knew the accident "was through Mrs. Keen's physical condition." This "speech," as plaintiffs' counsel properly styled it, was promptly objected to by him and the matter dropped without further remark by counsel or judge, doubtless because it was manifestly such an irresponsive and voluntary statement that no one attached any importance to it, and there can be no reasonable doubt that the plaintiff did not suffer any prejudice thereby.

On the whole case, therefore, the new trial should not be granted because there has been no substantial miscarriage of justice and therefore the appeal should be dismissed.

GALLIHER, J.A.: Unless I am prepared to say that the finding of the jury is perverse (which I do not feel I would be justified in doing) this appeal must fail unless there was error which would entitle the plaintiffs to a new trial.

The error relied upon as set out in the notice of appeal is: (1) The learned judge erred in admitting the testimony of the witness Harmar, and part of the testimony of the witness West. (2) In failing to direct the jury not to regard the testimony given by the witness Harmar and part of the testimony given by the witness West.

GALLIHER, J.A.

I have read the evidence of West and Harmar carefully and I fail to see in what respect their evidence or any part of it was inadmissible or that the learned judge erred in failing to direct the jury to disregard it. It is true Mrs. Harmar blurted out a statement as to why she was there as a witness after her testimony was given by which she might be regarded as a prejudiced witness but as this statement or her evidence had nothing to do with the negligence or want of negligence of the defendants and

was not elicited by them, but the contrary, it does not, in my opinion, form grounds for a new trial.

A point was raised although not taken in the notice of appeal that the learned judge failed to bring the evidence to the attention of the jury.

It is true the learned judge at one place says: "You are the judges of the facts and therefore I say nothing about them," meaning I think that he expresses no opinion upon them and later the learned judge says this:

> The case for the plaintiffs here is that the car was started and then suddenly stopped after it had been first stopped.

That was a correct summary of the plaintiffs' evidence on that point.

The evidence was short and that it was in the minds of the jury is evidence I think by their verdict in these words:

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> Foreman: Your Lordship, on the evidence produced we do not find that negligence has been proven against the defendant.

The judge pointed out the vital fact—what the plaintiffs' case was. The jury dealt with it finding against that contention on the whole evidence adduced. Under the circumstances of this case that does not appear to me to furnish ground for a new trial.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

Appeal dismissed.

Solicitor for appellants: *H. H. Shandley.*

Solicitors for respondent: *Heisterman & Tait.*

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BATTISTONI v. THOMAS

G. BATTISTONI AND L. BATTISTONI v. C. M. THOMAS AND C. THOMAS.

Master and servant—Negligence of servant—Liability of master—Scope of employment—Evidence—B.C. Stats. 1925, Cap. 8.

The defendant C. who was in the employ of his father the co-defendant as a truck-driver was instructed on Christmas Day 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 to have 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 down-town 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 on Union Street, and when nearing Jackson Avenue the plaintiff, Mrs. Battistoni was walking northerly across Union Street on the east side of Jackson Avenue. When she was slightly over half way across, C. speeded up and tried to pass in front of her close to the northern curb of Union Street. His left fender struck her, she fell under the rear wheel and was very severely injured. It was held on the trial that C. was grossly negligent, but that Mrs. Battistoni was at fault in not looking up the street, and the damages were assessed four-fifths to the plaintiff C. and one-fifth to Mrs. Battistoni. Held, further, that at the time of the accident C. was on his way home and therefore acting within the scope of his employment, and his father was liable.

Held, on appeal, reversing the decision of MCDONALD, J., that C., who was driving and in charge of the milk truck of his father at the time of the collision, was not at that time in the employment of his father "but going on a frolic of his own without being at all on his master's business," and the action as against the master should be dismissed.

APPEAL by defendant C. M. Thomas from the decision of MCDONALD, J. of the 28th of November, 1930 (reported, 43 B.C. 273), in an action for damages resulting from the negligent driving of an automobile by the defendant Claude Thomas.

Statement

On Christmas Day, 1929, the defendant Claude Thomas, son of the defendant Morgan Thomas, being in 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 was to return home with the empty cans.

The father stated that although on occasions he permitted his son to drive the truck on other errands in the city, on this day he told his son to return home for Christmas dinner with the family at 3 o'clock. The son, having unloaded the milk and then loaded the truck with the empty cans, proceeded in the truck to a down-town cafe. He then picked up a friend Reggy and they spent the afternoon together. Shortly after five o'clock in the afternoon when darkness was falling they proceeded in the truck westerly on Union Street approaching Jackson Avenue. At this time the plaintiff, Mrs. Battistoni, the wife of the co-plaintiff, was crossing to the north side of Union Street on foot on the east side of Jackson Avenue (from curb to curb on Union Street being 39 feet wide) when she was slightly beyond the middle of the street Claude Thomas saw her, but without giving any signal he proceeded on, swerving slightly to his right in order to pass between her and the north curb of Union Street. The woman was knocked down by the left front fender of the truck, fell under the rear wheel and was very severely injured. It was held on the trial that the cause of the injuries was the inexcusable negligence of the driver, and assessed the damages at $15,000. He found that the plaintiff was to some degree at fault in not having looked up the street before crossing, and that she should be assessed to the extent of one-fifth of the damages. He further found that the driver at the time of the accident was acting within the scope of his employment and the employer was liable. The husband C. Battistoni's damages were assessed at $3,000.

Statement

The appeal was argued at Vancouver on the 5th of March, 1931, before MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

W. B. Farris, K.C., for appellant: The whole question here is whether Claude was engaged in his father's business at the time of the accident. The evidence shews that at five o'clock Claude with a friend started out to see another friend of theirs named Smith, and they were going in the direction of a hotel where they expected to find him when the accident occurred. Claude disobeyed his father's instructions to come home at 3 o'clock in the afternoon: see *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150; *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422;

Argument

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Mitchell v. *Crassweller* (1853), 22 L.J., C.P. 100; *Storey* v. *Ashton* (1869), 38 L.J., Q.B. 223.

J. A. MacInnes, for respondents, referred to *Winnipeg Electric Ry. Co.* v. *Wald* (1909), 41 S.C.R. 431; *Merritt* v. *Hepenstal* (1895), 25 S.C.R. 150, and *McKay* v. *Drysdale* (1921), 30 B.C. 81.

Farris, in reply, referred to *Halparin* v. *Bulling* (1914), 50 S.C.R. 471 at p. 474.

Cur. adv. vult.

2nd June, 1931.

MARTIN, J.A.: This appeal should in my opinion be allowed because on the particular facts of this case, on which alone it can be decided, the defendant Claude Thomas, who was driving and in charge of the milk truck of his co-defendant and father at the time of the collision, was not at that time in the employment of his father, "but going on a frolic of his own, without being at all upon his master's business," as Baron Parke put it nearly a hundred years ago in *Joel* v. *Morison* (1834), 6 Car. & P. 501, and again (p. 502):

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> He is liable if they were going *extra viam* in going from Burton Crescent Mews to Finchley; but if they chose to go of their own accord to see a friend, when they were not on their master's business, he is not liable.

This terse and apt definition has been followed down to the present day, *e.g.*, in the leading case of *Mitchell* v. *Crassweller* (1853), 13 C.B. 237, and by Scrutton, L.J., in *Harringston* v. *Shuttleworth & Co. Ltd.* (9th December last) noted in 171 L.T. Jo. 71 (24th January, 1931) but not yet reported.

As pointed out by Jervis, C.J., in *Mitchell's* case, *supra,* 245, "each case must depend on its own particular circumstances" and that, as properly pointed out in said article in the Law Times, "ought to remain the guiding principle in cases of this kind where the servant has started out on his master's business."

GALLIHER, J.A.: I think the appeal must be allowed.

GALLIHER, J.A.

The cases shew that a mere deviation from the route where the servant is executing his master's orders or a temporary cessation and a renewal of his employment does not protect the master from liability but as here where the servant had delivered the milk at the place specified and his duty was then to return

to where he started from and instead of doing so drove into town away from the route home, picked up his friend at the Dominion Hotel and drove round through the city for some hours (as it is put in one of the cases on a frolic of their own) in no way connected with the master's business and while returning to bring his friend back to the Dominion Hotel whence they had started and in a direction not towards but away from home the accident occurred. It is a question of degree and I think the circumstances here bring it well within the principle of *Mitchell* v. *Crassweller* (1853), 22 L.J., C.P. 100.

GALLIHER, J.A.

The other and later cases cited to us do not detract from the principle there laid down.

McPHILLIPS, J.A.: The question that has to be considered and passed upon in this appeal is whether upon the facts of the case and the law applicable thereto the appellant Morgan Thomas is relieved from liability in respect to the accident that took place to the respondent who suffered severe personal injuries consequent upon being struck by a motor-truck, the property of the appellant, driven at the time by Claude Thomas the son of the appellant who was in the employ of the appellant. The learned trial judge found both the father and son liable and responsible to the respondent. The father appeals, the son does not. Shortly the facts are that the appellant had a contract with the Fraser Valley Dairies to collect milk in cans from the farmers and deliver the filled cans to the dairy premises at 8th Avenue and Yukon Street on the south side of the Cambie Street Bridge. That would mean driving the truck from Steveston to the point of delivery for the milk cans and to bring back the empty cans. On the day of the accident, Christmas Day, 1929, Claude Thomas drove the motor-truck with the filled milk cans to the premises of the Fraser Valley Dairies driving in, as usual, in the morning, and it was understood between himself and his father that he would return home to partake of Christmas dinner at three o'clock in the afternoon. Claude Thomas, however, did not do this. Arriving at the premises of the Fraser Valley Dairies with the truck loaded with the full cans he made delivery of them and took aboard the truck the empty cans. Then he proceeded to change his attire taking off

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his working clothes and putting on street clothes and in the truck proceeded into the centre of the city and looked up a friend at the Dominion Hotel and proceeded out east on Hastings Street and drove about generally to the extent of several miles in the way of sight-seeing and passing the afternoon in the company of his friend and whilst so driving about drove in such a negligent manner as to injure the respondent, and at the time of the accident the truck was being driven not in the direction of returning to Steveston but in quite another direction; in fact both young men, Claude Thomas and his friend, were engaged on what is aptly termed a "frolic" in a case that I will later refer to. The question of law that arises is: Was Claude Thomas at the time of the accident really acting within the scope of his employment and about his master's business? The learned judge was of the opinion that Claude Thomas was at the time of the accident acting within the scope of his employment and upon his master's business. Upon careful consideration of the facts of the case and examination of the relevant authorities I feel constrained to take a contrary view. It is plainly evident that Claude Thomas at the time of the accident was acting outside of the scope of his employment and in pursuit of pleasure on his own account and away in a remote part of the City of Vancouver and at the time of the accident was not even proceeding in the direction that would take him back to Steveston but in an entirely different direction; he was, in fact, then on his way in the truck to take his companion home to the Dominion Hotel. In *Joel* v. *Morison* (1834), 6 Car. & P. 501 at p. 503 (40 R.R. 814 at p. 816) Parke, B. said:

> If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable.

Now assuredly Claude Thomas was on a "frolic" of his own accompanied by a friend for whom he went in the truck going in an absolutely different direction from that of returning home and travelling about generally for miles—not about his master's business—and neglecting to return home in time for the Christmas dinner which he had been told to do by his father the appellant. Upon a close study of the authorities I am satisfied that

upon the special facts of this case it cannot be reasonably said that Claude Thomas at the time of the accident was acting within the scope of his employment or about his master's business; on the contrary was disporting himself in a distant part of the City of Vancouver not even proceeding in the direction he was called upon to take to return home. It is clear to me that Claude Thomas at the time of the accident was acting outside the general scope of his employment and that being the case the master is not responsible. The following authorities may be usefully referred to when considering the point of law here arising:

Mitchell v. *Crassweller* (1853), 13 C.B. 237; 22 L.J., C.P. 100; *Whitman* v. *Pearson* (1868), L.R. 3 C.P. 422; 37 L.J., C.P. 156; *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476; 38 L.J., Q.B. 223; *Burns* v. *Poulson* (1873), L.R. 8 C.P. 563; 42 L.J., C.P. 302; *Rayner* v. *Mitchell* (1877), 2 C.P.D. 357; *Coupe* v. *Maddick* (1891), 2 Q.B. 413; 60 L.J., Q.B. 676; *Sanderson* v. *Collins* (1904), 1 K.B. 628; 73 L.J., K.B. 358; *Harris* v. *Fiat Motors Limited* (1906), 22 T.L.R. 556 (reversed on ground that point relied on had not been properly taken) (1907), 23 T.L.R 504; *Lloyd* v. *Grace, Smith & Co.* (1912), A.C. 716 at p. 737; 81 L.J., K.B. 1140 at pp. 1147-9; *Britt* v. *Galmoye* (1928), 44 T.L.R. 294.

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I would allow the appeal, the judgment against the appellant Morgan Thomas should be reversed and the action be dismissed as against him.

Appeal allowed.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondents: *C. S. Arnold.*

MACDONALD, J. (In Chambers)

1931

IN RE ARBITRATION BETWEEN HUNTER AND ELDRIDGE, AND THE CORPORATION OF THE DISTRICT OF SUMAS.

June 19.

Arbitration — Award — Application to set aside — Costs of arbitration— Power to deal with—R.S.B.C. 1924, Cap. 179, Sec. 332.

IN RE ARBITRATION BETWEEN HUNTER AND ELDRIDGE AND THE CORPORATION OF THE DISTRICT OF SUMAS

Where on an application under section 332 of the Municipal Act the applicants succeeded in having an award set aside, there is no power in the Court to order the unsuccessful party to pay the costs of the applicants in connection with the arbitration proceedings.

Statement

APPLICATION to set aside an award under the provisions of section 332 of the Municipal Act. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Vancouver on the 10th of June, 1931.

McTaggart, for plaintiffs.
A. M. Whiteside, for defendant.

19th June, 1931.

MACDONALD, J.: Upon the application of the owners of certain lands in the District of Sumas, to set aside an award under the provisions of section 332 of the Municipal Act (R.S.B.C. 1924, Cap. 179) I made an order to that effect with costs. It was conceded by counsel for the District that he could not successfully oppose the application which was brought under a portion of said section reading as follows:

Judgment

> Provided always that any award under this Act shall be subject to be set aside on application to the Supreme Court on the following grounds, and no others, namely: That the arbitrators have been guilty of misconduct, or have awarded the compensation on a wrong principle, in which case reference shall be made again to arbitration as hereinbefore provided.

The applicants seek to incorporate in their order a provision for any costs which they may have incurred, in connection with the arbitration proceedings, so rendered abortive, through the award being set aside.

It is submitted that the Arbitration Act is applicable and supports this position. Further that the decision as to costs in *Canadian Northern Western Ry.* v. *Moore* (1915), 7 W.W.R.

1327 at p. 1338 should be followed. A portion of the judgment therein reads as follows:

The respondents should pay the costs of the appeal. I think also that the terms of s. 114 of The Railway Act are wide enough to give us jurisdiction to dispose of the cost of the first arbitration. The Judicial Committee in the judgment in *Cedar Rapids Manufacturing Co.* v. *Lacoste, ubi supra,* quite clearly considered that there was jurisdiction to deal with the costs of the first arbitration because they made a direct order that there should be no costs to either party of that proceeding. In the present instance I think the costs of the first arbitration should be paid by the respondents.

I do not agree with either of these submissions. The Arbitration Act, even if it applied to the arbitration in question, in dealing with costs, gives discretion to the arbitrators in that respect, but this provision is not of assistance in determining as to the additional costs sought to be recovered.

Then as to the *Canadian Northern* case, *supra,* supporting the contention of the applicants, the Court there, in considering the costs of setting aside an award, attached weight to section 114 of the Alberta Railway Act reading in part as follows:

Judgment

114. (2) Upon such appeal the practice and proceedings shall be as nearly as may be the same as upon an appeal from the decision of an inferior Court to the said Court subject to any general rules or orders from time to time made by the said last mentioned Court in respect to such appeals; which orders may amongst other things provide that any such appeal may be heard and determined by a single judge.

(3) The right of appeal hereby given shall not affect the existing law or practice in the Province as to setting aside awards.

There is no similar provision in the Municipal Act, which provided the machinery for the arbitration between the parties hereto, so I do not think I have any authority to order that the District of Sumas should pay the costs of the applicants in connection with the arbitration proceedings.

There will be an order allowing them the costs of the application to set aside the award; such costs to be payable by the District of Sumas forthwith after taxation.

Order accordingly.

MACDONALD, J.

1931

June 10.

IN RE ESTATE OF J. M. YALE, DECEASED

IN RE ESTATE OF J. M. YALE, DECEASED.

Will — Construction — Vesting of legacies — Direction to divide at future time.

A testator's will, amongst other bequests directed that his trustee should stand possessed of $10,000 in trust, as to one moiety thereof for the sole and separate use of a daughter Aurelia and as to the other moiety for a daughter Isabella, and after the decease of said daughters or either of them the trustee to stand possessed of the share of the daughter so dying in trust to be divided between all the children of said daughter in equal shares on their respectively attaining the age of twenty-one years. The moiety held in trust for Isabella was fully and finally distributed. Aurelia died in January, 1931. She had four children, Isabella, Annie, John and Flora. Of these Isabella only survived her mother. Flora died in infancy and by will John left all his estate to his sister Isabella. Annie was survived by two children, Cecil and Pearl Baynton. On application for disposition of the balance of the trust fund:—

Held, that there are no words of present gift in favour of Annie's children to be found in the will and no language to interpret which can, consistently with the will, be made effective to vest any portion of the trust fund in them. The granddaughter Isabella therefore becomes entitled to all the trust fund still on hand awaiting distribution.

Statement

ORIGINATING summons by the trustee under the will of the late James Murray Yale to determine the disposition to be made of the balance of the trust fund in his hands. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Victoria on the 1st of May, 1931.

C. G. White, for the trustee.
J. Stuart Yates, for Mrs. Grant.
Moresby, K.C., for Bayntons.

10th June, 1931.

Judgment

MACDONALD, J.: Rupert Cecil Hall, as a trustee under the will of the late James Murray Yale, seeks the determination of certain questions, arising thereunder. Amongst other bequests in such will it was directed that his trustee or trustees

should stand possessed of the sum of Ten thousand dollars in trust, as to one moiety thereof for the sole and separate use of my daughter Aurelia the wife of John D. Manson and as to the other moiety thereof in trust for

Isabella the wife of George Simpson and I direct that the receipts of such daughters shall be sufficient discharges for the interest, dividends and annual produce which shall become due during her or their coverture or respective covertures and after the decease of my said daughters or either of them the said trustees or trustee for the time being of my will shall stand possessed of the share of the daughter so dying in trust to be divided between or amongst all the children of my said daughter in equal shares to be paid to them on their respectively attaining the age of twenty-one years.

This direction as to the $10,000 was complied with and the amount has been held in trust for years. The moiety thereof, held in trust for the said Isabella Simpson, has been fully distributed and no difficulty has arisen in connection therewith. The trustee, with a view of disposing of the balance of the said trust fund, submits the following questions for the consideration of the Court:

1. Whether under the true construction of the last will and testament of James Murray Yale, late of the City of Victoria, in the Province of British Columbia, deceased, any of the children of Aurelia Manson who died in the lifetime of the said Aurelia Manson and under the age of twenty-one years, are entitled to share in the capital of the moiety of the sum of Ten Thousand Dollars ($10,000) held by the trustee as the share of the said Aurelia Manson under the terms of the said will, and if so to what amount?

Judgment

2. Whether under the true construction of the said will any of the children of the said Aurelia Manson who died in the lifetime of the said Aurelia Manson but who attained the age of twenty-one (21) years, are entitled to share in the said capital, and if so to what amount?

3. Whether under the true construction of the said last will any of the children of the said Aurelia Manson who survived the said Aurelia Manson and attained the age of twenty-one (21) years, are entitled to share in the said capital and if so to what amount?

Aurelia, the wife of John D. Manson, died on the 17th of January, 1931. She had four children, Isabella Maria, Annie Elizabeth, John Duncan and Flora. All these children, except Isabella Maria predeceased their mother. Flora died in infancy, while John Duncan died in 1920 and by his will bequeathed any interest, he might have in the estate of his grandfather, to his sister Isabella Maria. Annie Elizabeth, who by marriage had become Mrs. Baynton, died in the lifetime of her mother and left two children, Cecil Joseph Baynton and Pearl Yale Allison (*nee* Baynton). Said Isabella Maria Manson (now Grant) claims to be entitled to all the moneys yet to be distributed, of the said $10,000, irrespective of any interest she

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might obtain under the said will of her brother John Duncan Manson; while the said Cecil Joseph Baynton and Pearl Yale Allison claim to be entitled to one-third of such moneys. In other words the contest between the parties and the real question to be determined is, whether Isabella Maria Grant should receive all the moneys, so held in trust, or only two-thirds thereof. This involves construction of the will. The intention of the testator, if it can be ascertained, should prevail. The testator, after denoting his desire to benefit his two daughters, Aurelia and Isabella, by the creation of the trust fund of $10,000, then displayed a like feeling in a similar manner towards his four grandchildren, daughters of Henry N. Peer deceased as follows:

> I direct my said trustees or trustee to stand possessed of the sum of $2,000 in trust for my four grandchildren Minnie, Brenda, Elizabeth and Maria, daughters of Henry N. Peer deceased. The interest dividends and annual produce thereof to be applied by the trustee or trustees of this my will for the maintenance and education of my said granddaughters and the principal money to be equally divided between such of my said grandchildren before named who shall live to attain twenty-one years.

Judgment

If the moiety of the $10,000, which is held for distribution, were held in trust to be disposed of, in the same manner as the said $2,000, no difficulty would arise. The intention of the testator is thereby clearly indicated, but it is contended that as the wording of the will, as to the $10,000 is different, it should not be construed, as creating any trust or vesting any interest in the children of Aurelia, until after her death. So if any of her children predeceased her, then he or she did not acquire any interest in the trust fund. It is quite apparent that there is a difference in the terms of these two bequests. In the latter one, a trust is specifically declared by the testator in favour of certain grandchildren. Then, notwithstanding this difference, can I decide that it was intended by the testator that his grandchildren, who were the children of his daughter Aurelia, should have a vested interest in the trust fund prior to the death of their mother?

> This intention must be discovered from the words of the will itself, and not from extrinsic circumstances; and the Court must proceed upon known principles and established rules, not on loose conjectural interpretations or by considering what a man may be imagined to do in the testator's circumstances.

Vide Jarman on Wills, 7th Ed., Vol. 3, p. 2142. Compare Cotton, L.J. in *Ralph* v. *Carrick* (1879), 11 Ch. D. 873 at p. 878:

> We are bound to have regard to any rules of construction which have been established by the Courts, and subject to that we are bound to construe the will as trained legal minds would do. . . . We therefore must construe the will as we should construe any other document, subject to this, that in wills, if the intention is shewn, it is not necessary that the technical words which are necessary in some instruments should be used for the purpose of giving effect to it.

I do not think that other portions of the will afford any assistance in construing its terms, as while the two bequests so created by trust are worthy of consideration to some extent, by way of comparison, still they take effect irrespective of one another. It would appear that I must come to a conclusion as to the construction and effect of the $10,000 bequest, simply upon its own wording. A number of authorities were cited in support of the contention, that a vested interest was acquired by the two children of Annie Elizabeth Baynton. In that event, if such vesting took place at any time, there would not be any divesting afterwards. Amongst other cases *Bubb* v. *Padwick* (1880), 13 Ch. D. 517 was cited in support of this proposition. While this statement of the law is not controverted, still it is worthy of comment, that, in that particular case, the decision that the children took an absolute vested interest, was disapproved of by Fry, J. in *In re Chaston. Chaston* v. *Seago* (1881), 18 Ch. D. 218.

Judgment

A discussion of the numerous authorities cited by counsel for the Bayntons would not be beneficial, unless the case of *Busch* v. *Eastern Trust Co.* (1928), S.C.R. 479, cited by counsel for Mrs. Grant, is inapplicable and should not be followed. While I was impressed with the argument presented by counsel for the Bayntons with the object of distinguishing such case, still I think the admitted facts are so similar to those here presented, that the principles of law there stated are applicable and binding.

James Murray Yale by his will clearly directed that the $10,000 should be held in trust and that the interest and dividends should be paid to his daughters until they or either of them died. Then, and then only, the share of the daughter so

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dying was to be held in trust and divided between or amongst all the children of such daughter in equal shares. It was to be paid to them on their respectively attaining the age of twenty-one years. In this connection, in the *Busch* case (1927), 59 N.S.R. 486) Mellish, J. at p. 494, in a dissenting judgment, said:

> I think the testator was careful not to vest absolutely any of the property in his children at the time of his death, or indeed at any time. It was to be held by the trustees to be disposed of by them . . . in accordance with such [conditions] as might arise on the death of the widow. There is no absolute bequest to the children, and the language of the will, I think, precludes any such intention.

Here also there was no direct bequest by the testator of the $10,000 to his two daughters. It was to be held in trust for them and "to be disposed of by the trustees in accordance with conditions," one of these being that on the death of either of the daughters there should then be a trust created with a new *cestui que trust* and a division, as I have mentioned. The clause which directs such a trust and division is the only expression in the will which gives the children of these daughters an interest in the fund of $10,000. It does not, however, according to my interpretation, in the grammatical and ordinary sense of the language used, operate before the time so specified. It is, in the words of the *Busch* judgment (p. 486) "on the death of my wife that the whole of my property shall be divided," etc. It is then that "the issue of any deceased child shall be entitled."

Judgment

A quotation from Williams on Executors, 11th Ed., 981 there appears as follows:

> Where there is no gift but by a direction to pay, or divide and pay, at a future time, or on a given event, or to transfer "from and after" a given event, the vesting will be postponed till after that time has arrived, or that event has happened, unless, from particular circumstances, a contrary intention is to be collected.

Utilizing a portion of the *Busch* judgment with appropriate changes, I find that there are no words of present gift, in favour of the children of Annie Elizabeth Baynton, to be found in the will, and no language to interpret which can, consistently with the will, be made effective to vest any portion of the trust fund in them. The construction to be placed upon the will, in my opinion, is, that the portion of the trust fund intended by the testator to benefit his daughter Aurelia, did not vest any interest

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in her children until her death. At that time her children who might then be living obtained a vested interest to be paid upon their attaining the age of twenty-one years. There would be no trust in favour of children of a deceased child of Aurelia nor would they have any interest in the $10,000. The result is that Isabella Maria Grant becomes entitled to all the trust fund, still awaiting distribution.

Answering the questions submitted for determination categorically:

(1) The answer to the first question is, in the negative.

(2) The answer to the second question is, in the negative.

Judgment

(3) The answer to the first portion of the third question is in the affirmative and as to the latter portion thereof, as previously stated, Isabella Maria Grant is entitled to all the trust fund still to be distributed.

All parties are entitled to their costs out of the estate.

Order accordingly.

ANDLER, EXECUTOR OF PROMIS *ET AL.* v. DUKE *ET AL.* (No. 2).

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

1931

April 21.

ANDLER v. DUKE

Practice—Injunction to restrain disposition of subject-matter of action pending appeal—Judge of Appeal Court may grant when Court not sitting.

Appellant is entitled to an injunction restraining the respondent from dealing with the subject-matter of an action pending appeal, if the appellant might otherwise be deprived of the fruits of a successful appeal.

A judge of the Court of Appeal can grant such an injunction unless the Court is in session.

It is vacation in the Court of Appeal whenever the Court is not in session.

APPLICATION by defendants (appellants) for an order restraining the plaintiffs from dealing with the title to certain lands forming the subject-matter of an appeal from the decision of MACDONALD, J. until said appeal should be disposed of. Heard by MACDONALD, C.J.B.C. in Chambers at Victoria on the 21st of April, 1931.

Statement

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

1931

April 21.

ANDLER v. DUKE

A. D. Crease, for defendants: We ask for an injunction restraining the plaintiffs from dealing with the title to the property pending this appeal. We applied to the trial judge and he would have granted us relief but he held that his hands were tied by our having given notice of appeal. Section 29 (3) of the Court of Appeal Act is inapplicable and does not help us. But this Court can grant an injunction: *A. R. Williams Machinery Co.* v. *Graham* (1916), 23 B.C. 481; *Prevedoros* v. *Prevedoros* (1927), 3 W.W.R. 755; *Polini* v. *Gray* (1879), 12 Ch. D. 438; and so can a judge when the Court is not sitting.

Maclean, K.C., for plaintiffs: This application can only be made to the Court. Under section 10 of the Court of Appeal Act a single judge can make such an order only in vacation.

Argument

[MACDONALD, C.J.B.C.: The Court of Appeal has ruled that it is vacation in that Court whenever the Court is not in session.]

This application is unnecessary. Now that the appellants have deposited security, section 29 (3) of the Court of Appeal Act as re-enacted in 1930 creates a stay of execution automatically.

Crease, in reply: Section 29 (3) is inapplicable. What is asked for is not a stay of execution, but an injunction to preserve the subject-matter of appeal until the appeal is decided. The property is in the hands of a receiver, who will collect the rents and otherwise look after the property.

MACDONALD, C.J.B.C.: You may have your injunction upon giving the usual undertaking as to damages. This will restrain the respondents from registering their title under the judgment appealed from, or otherwise dealing with any interest in the property pending disposition of the appeal. The respondents may file a *lis pendens* to protect any interests acquired under their judgment.

Judgment

Application granted.

IN RE ROSEN.

MACDONALD, J. (In Chambers)

1931

June 11.

IN RE ROSEN

Criminal law—Extradition—Obtaining goods by false pretences—Procedure —"Money, valuable security or other property"—Ejusdem generis rule —R.S.C. 1927, Cap. 37.

A prisoner was committed for extradition on the charge that in the City of Baltimore, in the State of Maryland, by a certain false pretence he obtained from one Engle and others with intent to defraud 2,140 stockings. The schedule to the extradition containing extraditable offences includes: "7. Obtaining money, valuable security or other property by false pretences." On motion for release through *habeas corpus* proceedings:—

Held, that the *ejusdem generis* rule applies and the words "other property" used in the crime of "obtaining money, valuable security or other property by false pretences" must be construed as covering other property of the same kind as "money" or "valuable security" and would not include "goods." The applicant is therefore discharged from custody.

MOTION for the discharge of a prisoner committed for extradition under the Extradition Act. The facts are set out in the reasons for judgment. Argued before MACDONALD, J. in Chambers at Vancouver on the 11th of June, 1931.

Statement

Orr, for State of Maryland.

J. W. deB. Farris, K.C., and *C. L. McAlpine,* for accused.

MACDONALD, J.: Harry S. Rosen, *alias* Samuel Memielstein, *alias* Sam Merrin, seeks, through *habeas corpus* proceedings, to be released from detention under an extradition order made by the Honourable Chief Justice MORRISON, acting as a judge under the Extradition Act.

The offence for which he has been so ordered to be extradited was, that at the City of Baltimore, in the State of Maryland, on the 26th of May, 1926, by a certain false pretence then and there made by the said Rosen he did obtain from one Engle and others, with intent to defraud, 2,160 stockings. The offence, shortly stated, was one of obtaining goods by false pretences.

Judgment

It would seem a startling proposition that such an offence, so often punished in Canada, would not be extraditable, so that

MACDONALD, J. (In Chambers)

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the offender might be tried and dealt with under the laws of the State of Maryland. It is contended, however, that the offence of obtaining goods under false pretences is not extraditable, and thus that there was no jurisdiction to make the order for detention under the Extradition Act.

The jurisdiction must when an extradition order has been made, be attacked successfully, speaking broadly, otherwise the order becomes effective for the purpose intended. In fact, it has been decided in many cases that the only question to be considered is that of jurisdiction. On this point, amongst others, I refer to the case of *Rex* v. *Holloway Prison (Governor)* (1902), 71 L.J., K.B. 935.

Before, however, dealing with the question as to whether the crime alleged is extraditable or not, I think it well to refer to the difference between the "procedure" in extradition matters or the sufficiency of the evidence of guilt of a certain offence, and arriving at a decision, as to whether a certain crime comes within the purview of the Treaty between the high contracting parties.

Judgment

I refer to this because during the argument considerable discussion arose, as to whether I had not already, in a previous application of a like nature, decided this point. I refer to *In re Sieman (No. 4)* (1930), 2 W.W.R. 412. In that case I referred, somewhat at length, to the view taken by the Courts with respect to the Extradition Treaty, coupled with the Extradition Act passed for the purpose of carrying it into effect.

I read from a portion of the judgment of Mr. Justice Duff in *In re Collins* (1905), 11 B.C. 436 at p. 445 as follows:

> The view of the Queen's Bench Division, in the case referred to—the view twice repeated by the Supreme Court of the United States in the cases I am about to read from—is that the technicalities of the criminal practice should not be allowed to smother or encumber the administration of the procedure prescribed by these modern statutes for the purpose of carrying out the obligations we have assumed under this vastly salutary international arrangement.

Then in the same judgment the learned judge refers to the judgment of Mr. Justice Brown in the case of *Grin* v. *Shine* (1902), 187 U.S. 181 at p. 184, as follows:

> 'These treaties should be faithfully observed, and interpreted with a view to fulfil our just obligations to other powers without sacrificing the legal or constitutional rights of the accused. In the construction and

carrying out of such treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused.'

I might add that this feature of the effect of the Extradition Treaty, coupled with the Extradition Act, was referred to by Mr. Justice Middleton in the case of *Rex* v. *Nesbitt* (1913), 11 D.L.R. 708; 21 Can. C.C. 250, and the reference to that case in Crankshaw, 5th Ed., p. 1386, is as follows:

> Where the accused has been brought from a foreign country, under extradition proceedings, to answer an alleged extraditable crime, an indictment against him which does not shew an extraditable crime cannot be sustained until after the accused has been returned to or has the opportunity of returning to the foreign country from which he was extradited.

One further reference as to extradition. Chief Justice Hagarty in *Re Phipps* (1882), 1 Ont. 586 at p. 606, said as follows:

> I cannot bring myself to admit that our Extradition Treaty with the United States, confessedly defective as it is, can be so hopelessly useless as to protect this prisoner from being sent to answer this charge before the Courts of his own country.
>
> I have often marvelled at the astuteness that has been displayed in endeavouring to defeat the plain design and scope of this Extradition Treaty, as if we placed the very highest value on our right to the presence of fugitives from the laws of other countries.
>
> It has, and always will be, the honest pride of our country to offer an inviolate asylum to mere political fugitives. But we best fulfil our treaty obligations by adherence to plain intelligible principles in the reception and construing of evidence fairly bringing the fugitive within the meaning of some one of the crimes for which his extradition is provided.
>
> We are of course bound to see that in such a case as this the reasonable presumption of guilt is raised on the evidence, sufficient at least to warrant his being held for trial for forgery.
>
> According to the view I have always held on this subject, we should always lean in favour of sending him for trial in his own country unless it be plain that under no view of the evidence can a charge of forgery be fairly made.

Judgment

I have read these extracts, although somewhat lengthy, for the purpose of emphasizing the point I was endeavouring to make, that is, that there is a difference between procedure, in the sense of administering the law relating to extradition, and finding whether a certain offence, alleged to have occurred, comes within the Extradition Treaty.

Then I have to consider whether this alleged offence is cov-

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ered by the Extradition Treaty. Lord Russell, C.J. in *Re Arton (No. 2)* (1896), 18 Cox, C.C. 277 at p. 281, outlines the conditions of extradition as follows:

"The conditions of extradition, the fulfilment of which we have to consider, are the following: (1) The imputed crime must be within the treaty; (2) it must be a crime against the law of the country demanding extradition; (3) it must be a crime within the English Extradition Acts, 1870 and 1875; and (4) there must be such evidence before the committing magistrate as would warrant him in sending the case for trial if it were an ordinary case in this country."

I need only consider the first-mentioned condition, namely, that the imputed crime must be within the treaty. It becomes of prime importance, before the others are considered. So the sole point to be decided, as I have mentioned, is as to whether the offence alleged to have been committed by Rosen comes within the provision as to false pretences, referred to in the schedule to the Extradition Treaty as follows:

7. Obtaining money, valuable security or other property by false pretences.

It must be conceded, and the argument proceeded upon the basis, that the offence to be so included must come within the words "or other property," and that these words must apply in order to render obtaining goods by false pretences an extraditable offence.

Judgment

It is submitted by the applicant for *habeas corpus* that the maxim of construction, termed "*ejusdem generis,*" applies, and that the prior words "money" and "valuable security" govern to such an extent as to restrict the meaning of the words "other property," and that thus prevent any extended construction and application of these words. This maxim of construction is referred to in 19 C.J., p. 1255, as follows:

EJUSDEM GENERIS. Literally, "Of the same kind or species." A well-known maxim of construction, to aid in ascertaining the meaning of a statute or other written instrument, the doctrine being that, where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind.

Then an explanatory definition is given at the foot of the same page, as follows:

'When an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet

when thus used, embraces only things "*ejusdem generis*"—that is, of the same kind or species—with those comprehended by the preceding limited and confined terms.'

A great number of American cases are cited in supporting this statement of the law, but it is submitted that a contrary view is taken by the English Courts. Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., is referred to as supporting this contention. At p. 64 it states as follows:

'Two rules of construction now firmly established as part of our law may be considered as limiting those words. One is that words, however general, may be limited with respect to the subject-matter in relation to which they are used. The other is that general words may be restricted to the same genus as the specific words that precede them,'

citing cases in support of that statement.

Then the author at p. 65 discusses these rules and quotes with approval from the judgment of Lord Esher in *Anderson* v. *Anderson* (1895), 1 Q.B. 749 at pp. 753-4, as follows:

'Nothing can well be plainer than that to shew that *prima facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before. . . . I entirely adopt the canon of construction which was laid down by Knight Bruce, V.-C., in *Parker* v. *Marchant* [(1842) 11 L.J., Ch. 223], and I reject the supposed rule that general words are *prima facie* to be taken in a restricted sense.'

Judgment

A discussion then follows upon this statement of the law.

I was impressed with the argument based on these quotations from such a well-known text-book, but was faced with this difficulty that, to give this argument effect, it seemed clear that I must decline to follow the judgment of Anglin, J. (now Chief Justice of the Supreme Court of Canada), in the case of *In re Cohen* (1904), 8 O.L.R. 143. That case was decided in 1904, and so far as I have been informed and with any search that I have made, I find that it has not in the meantime been questioned in our Courts. It is referred to in Crankshaw at p. 1395, as follows:

It has been held that merchandise is not "other property" within the meaning of the phrase "receiving any money, valuable security or other property knowing the same to have been embezzled, stolen or fraudulently obtained," contained in the Extradition Convention with the United States, that these words "other property" refer only to property *ejusdem generis* with "money" and "valuable security," and that extradition does not lie for

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the offence of receiving any article of merchandise knowing it to have been stolen.

This is also referred to, as being the law on the subject, in the English & Empire Digest. In the *Cohen* case the learned judge was considering an application to set aside an extradition order, being a similar application to the one I am now dealing with. The applicant had been charged with receiving stolen goods. The provision in the schedule to the Extradition Treaty which was invoked for the purpose of obtaining the extradition order reads as follows:

> Embezzlement; Larceny; Receiving any money, valuable security or other property knowing the same to have been embezzled, stolen or fraudulently obtained.

The exact similarity in this respect of the wording of the offence in that case, sought to be declared extraditable, with that used with respect to false pretences is apparent. There the learned judge, in a considered judgment, after citing many cases, held that the maxim of *ejusdem generis* applied, with the result that the words used, namely, "other property," were restricted and controlled by the prior words "money" and "valuable security," and did not include goods. It was thus decided that receiving goods, knowing them to have been stolen, was not an extraditable offence. It is here submitted by the applicant, as I have already intimated, that in view of the similarity of the wording this case constitutes an authority, which, while not necessarily binding, I should follow, unless fully satisfied that it is wrong.

Judgment

As to the application of the maxim of *"ejusdem generis,"* I refer only to one point in connection with an argument made in that connection—I do not think, in order to determine whether the genus or species has been exhausted thus bringing the words "other property" into operation and effect, that you can obtain or extend the meaning of "valuable security" by reference to the Criminal Code. In other words, that to obtain the meaning of words in a treaty or contract between Great Britain and the United States, you cannot resort to the definition of such words in a statute, subsequently passed by a State affected by, but not a party to such treaty. Further, that words should bear their natural and ordinary meaning, as between the

parties to a treaty or contract. However, in view of the judgment in *In re Cohen,* I do not deem it advisable to further discuss this phase of the situation. It was there held that the genus or species was not exhausted in using the words "money" and "valuable security." The learned judge gave the matter fullest consideration, and whether the cases referred to in Beal were as ably argued and brought to his attention as they were before me, I cannot determine. At any rate, he took the view and so expresses himself, that the maxim was applicable and that the words "other property" simply became an adjunct, as it were, to the previous specific words. I take his judgment to mean that the words "other property" only gave colour to the previous words and were intended to cover other property of the same kind as those already mentioned, and thus would not include goods.

Judgment

As I have come to this conclusion, and intend to follow the judgment in the *Cohen* case, I deemed it advisable, not to postpone my decision. Had I more time at my disposal, I might have given a more extended judgment, but I cannot see that any good purpose would thus be served.

I might add that I am not unmindful of the fact that there is an abundance of judicial pronouncement, as to the desirability of having uniformity of decisions throughout Canada in criminal matters. This may well be applied to extradition, and thus avoid the confusion which would follow should there be different views of the law, in that respect, held in different portions of the Dominion.

The applicant is discharged from custody.

Motion granted.

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REX v. MATIJA NECEMBER

REX v. MATIJA NECEMBER.

Criminal law—Speedy trial—Two counts tried together—Conviction on one—Habeas corpus—Criminal Code, Secs. 506, 856 and 857.

A warrant of commitment contained two counts, first, that accused unlawfully did obtain by false pretences from the Corporation of the City of Cranbrook a certain order to have meals supplied to him, with intent to defraud, contrary to section 405 of the Criminal Code, second, that he unlawfully with intent to defraud did induce employees of the Corporation of the City of Cranbrook in the course of their duty to make valuable security, to wit: a certain order to have meals supplied to him out of the funds of said Corporation, contrary to section 506 of the Criminal Code. The accused elected to take speedy trial. He was then tried on both counts in one trial and convicted on the second count. On an application for a writ of *habeas corpus* on the ground that he was tried on the two counts at the same time without his consent and that he was not consulted as to which charge should be tried first:—

Held, that the provisions of sections 856 and 857 as to the joinder of counts applies to proceedings under the Speedy Trials Part. The proper procedure was followed and the application should be dismissed.

Statement

APPLICATION for a writ of *habeas corpus*. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 19th of May, 1931.

Adam Smith Johnston, for the application.
J. H. MacLeod, for the Crown.

4th June, 1931.

Judgment

FISHER, J.: The application herein is one for an order that a writ of *habeas corpus* should issue in a matter in which my brother MURPHY has previously refused an application for discharge of the prisoner on return to a writ of *habeas corpus*.

The present application is based upon the allegation made in par. 8 of the affidavit of the prisoner, reading in part as follows:

> That on the 16th of March, A.D. 1931, the presiding judge proceeded with and tried me on the said two separate and distinct charges or counts set out in the record of conviction and warrant of commitment at one and the same time, as if they were one charge, and I was not consulted as to which of the charges would be tried first, and that no consent was given by me or on my behalf to try the two charges aforesaid together, and that after trial, the said presiding judge stated that he found me guilty on the second count set out in the record of conviction and warrant of commitment and that I was not represented by legal counsel on my trial herein.

The record sets out two counts as follows:

First count:

For that he the said Matija November on or about the 26th day of January, 1931, at the said City of Cranbrook in the aforesaid County and Province, unlawfully did obtain by false pretences from the Corporation of the City of Cranbrook a certain order to have meals supplied to him, with "intent to defraud, contrary to section 405 of the Criminal Code."

Second count:

For that he the said Matija November on or about the 26th day of January, A.D. 1931, at Cranbrook aforesaid in the said County and Province unlawfully, with intent to defraud, did induce employees of the Corporation of the City of Cranbrook in the course of their duty to make valuable security, to wit:—a certain order to have meals supplied to him out of the funds of said Corporation, contrary to section 406 of the Criminal Code.

The applicant relies upon the case of *Rex* v. *Simpson* (1923), 3 W.W.R. 1095 referred to in Tremeear's Criminal Code, 4th Ed., 1185 where one finds the following note:

Release on *habeas corpus* was granted where two counts, one of theft and one of receiving were tried together under Part XVIII. Section 857 was not referred to. *Rex* v. *Simpson* (1923), 3 W.W.R. 1095.

In Tremeear we have also the following note, at p. 1181:

Sections 856-860 are applicable to "speedy trials" under Part XVIII. *Rex* v. *Cross* (1909), 14 Can. C.C. 171, 43 N.S.R. 320.

And, at p. 1151, in the notes to Part XVIII., section 827 Tremeear, referring to the charge mentioned in the said section, cites the same case (*Rex* v. *Cross*) as authority for the proposition stated as follows:

Judgment

Sections 856 and 857 will apply to the joinder of counts in the charge in like manner as they do to joinder of counts in an indictment.

Said sections read as follow:

856. Any number of counts for any offences whatever may be joined in the same indictment, and shall be distinguished in the manner shewn in form 63, or to the like effect: Provided that to a count charging murder no count charging any offence other than murder shall be joined.

857. When there are more counts than one in an indictment each count may be treated as a separate indictment.

2. If the Court thinks it conducive to the ends of justice to do so, it may direct that the accused shall be tried upon any one or more of such counts separately: Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of theft, not exceeding three, alleged to have been committed within six months from the first to the last of such offences, whether against the same person or not.

In the *Cross* case, *supra,* after an election for a speedy trial certain points were raised on the trial and reserved for the opinion of the Court of Appeal, one of them being stated as follows (p. 176):

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Had I jurisdiction to try together the three charges . . . , namely, charges 16, 29 and 38? Does section 856, Criminal Code, apply to trials had under the Speedy Trials Act?

The question was answered by the Court in the affirmative, with Graham, J. dissenting.

Referring to the question, Townshend, C.J. says, at p. 180:

I understand that the rules or enactments in the Code regulating procedure, under the Speedy Trials Act so far as applicable govern the procedure in trials before the County Court judge, especially as regards the sufficiency of the charges, and evidence under which the accused is to be tried, and in that view I think the provisions of section 856 and the following sections on the same subject must govern him. Now under that section it is provided that except in cases of murder any number of offences may be alleged on the same indictment and tried. This merely affirms the common law practice, but in such cases the Crown was compelled to elect for which offence it would proceed.

Section 857 however provides that the judge may, if in the interests of justice, order such offences to be tried separately, but makes one exception, that is to say, in cases of theft, unless for special reasons, no such order shall be made preventing trial at the same time of any number of distinct charges of theft not exceeding three, alleged to have been committed within six months from the first to the last of such offences whether against the same person or not. Now here there is no allegation in any of these charges against the prisoner which were tried together, that they were committed within six months from the first to the last of such offences. So far as the record before us speaks it does not appear that the judge made any order at all, but simply entered on the trial of the charges brought before him. The valid objection was made that he had no jurisdiction to try three separate offences charged against the prisoner at the same time, but in view of section 856 it appears to me had the whole 62 charges been tried together he had full authority to try and dispose of them. Section 857 merely restricts his power in cases of theft, except for special cause, when alleged to have been committed within six months.

In the present case it is clear we have only separate counts or in other words the charges are at most simply counts. I think that it is a fair inference from the case of *Rex* v. *Stanyer* (1923), 33 B.C. 223 that such counts can be tried together. See also *Rex* v. *Relf* (1926), 47 Can. C.C. 38. In any event I think the decision in *Rex* v. *Cross, supra,* covers the point and, in view of such decision, I cannot, with all respect, follow the decision in *Rex* v. *Simpson.*

My conclusion, therefore, is that the procedure followed in the present case cannot be questioned on the ground suggested and the application is refused.

Application refused.

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GORDON v. THE CANADIAN BANK OF COMMERCE

Negligence—Master and servant—Evidence—Statement of servant—Scope of authority—Invitee and licensee—Measure of damages—Liability of landlord—Res ipsa loquitur—Remoteness of damage—R.S.B.C. 1924, Cap. 51, Sec. 60.

The plaintiff, who had desk room in a tenant's office on the fourth floor of the defendant's building, left the office and rang the elevator bell. The elevator came down from above and stopped. After the door was opened and the plaintiff was about to enter the elevator started down, and on the emergency brake being applied by the elevator man, it stopped about six feet below the floor. The plaintiff, losing his balance, fell forward, landing on his hands and knees on the floor of the elevator. He was badly shaken up, but beyond a slightly injured ankle suffered no bodily injury, and on the elevator reaching the ground floor he walked out without assistance. Nine months later a foreign substance getting into one of his eyes an abscess formed, which became so severe he lost his eye. In an action for damages there was medical testimony that his health was so run down owing to the elevator accident that he had not the power to resist disease and the loss of his eye was indirectly due to the accident and the plaintiff recovered judgment.

Held, on appeal, varying the decision of MURPHY, J. (MACDONALD, C.J.B.C. holding that the appeal should be allowed), that the *quantum* of damages should be reassessed, and reduced by the sum allowed for the loss of plaintiff's eye, as the inflammation and abscess which appeared nine months after the accident and the resultant loss of the eye, was not the natural and probable consequence of the defendant's negligence.

APPEAL by defendant from the decision of MURPHY, J. and the verdict of a jury in an action for damages resulting from an accident in an elevator on the defendant's premises at 698 Hastings Street West in the City of Vancouver. One Erskine rented certain offices on the 4th floor of said building from the Bank and the plaintiff, under arrangement with Erskine, had desk room in his offices. On the 21st of March, 1929, the plaintiff left his room on the 4th floor of the building, and rang for the elevator. The elevator came down from the 6th floor and stopped. After the door of the elevator was opened and as the plaintiff was about to step in, the elevator suddenly started to go down and the elevator man applying the emergency brake it stopped about six feet below the floor. The plaintiff losing

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his balance fell forward into the elevator on to his hands and knees. He was badly shaken up and injured one of his ankles slightly, but apparently received no further bodily injury and when the elevator arrived at the ground floor he walked out into the street. Nine months later some foreign substance got into the plaintiff's eye which caused irritation and developed into an abscess that became so bad that he lost his eye. Medical evidence was given to the effect that his general tone of health was so run down owing to the elevator accident nine months previously that he had not the power to throw off the inflammation in his eye and the loss of his eye was indirectly due to that accident.

The appeal was argued at Vancouver on the 19th, 20th and 23rd of March, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Craig, K.C. (*C. L. McAlpine,* with him), for appellant: The plaintiff had desk room in the office of one Erskine who rented the office from the Bank. There was no contractual relationship between the plaintiff and the Bank. The office was on the 4th floor. He fell six feet on his hands and knees on the floor of the elevator. His injuries were slight, as he walked out after the elevator got to the ground floor. Nine months later he developed an abscess in his eye, but this would not have occurred if he had not got some foreign substance in his eye. They claim the fall was the indirect cause of the trouble, as through loss of vitality he had not the power to resist the disease. There was no evidence of what caused the accident and it is not a case where *res ipsa loquitur* applies, as there is no presumption that the defendant knew the elevator was out of order. The learned judge said he was an invitee, but see *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274 and on appeal (1867), L.R. 2 C.P. 311. The evidence of the elevator boy as to the elevator being out of order is not admissible and it makes no difference that objection to it was not taken: see *Forman* v. *Union Trust Co.* (1927), S.C.R. 1; *Down* v. *Lee* (1887), 4 Man. L.R. 177; *Johnson* v. *Lindsay* (1889), 23 Q.B.D. 508; *Rainnie* v. *Saint John City Railway Co.* (1891), 31 N.B.R. 552; *Small* v. *Belyea* (1883), 24 N.B.R. 16; *Garth* v. *Howard* (1832), 8 Bing. 451; *Wright* v. *Cassidy* (1898), 17 N.Z.L.R. 193; *Kirkstall Brewery Co.* v.

Furness Railway Co. (1874), L.R. 9 Q.B. 468; *Tustin* v. *Arnold & Sons* (1915), 84 L.J., K.B. 2214; *Erdman* v. *Consolidated Mining & Smelting Co. Ltd.* (1914), 7 W.W.R. 1121 at p. 1124. The evidence attempting to attach the injury to the eye to this accident is too remote: see *Hobbs* v. *London and South Western Railway Co.* (1875), L.R. 10 Q.B. 111. Whether damages are too remote is a question of law. There must be continuity between the accident and the disease complained of and mere loss of power of resistance may not be considered as a link between an accident and a disease subsequently developed: see *Gray* v. *Chicago & N.W. Ry. Co.* (1913), 142 N.W. 505; *Anton* v. *Chicago, M. & St. P. Ry. Co.* (1916), 159 Pac. 115; *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; *In re Polemis and Furness, Withy & Co.* (1921), 3 K.B. 560; *In re Etherington and the Lancashire and Yorkshire Accident Insurance Company* (1909), 1 K.B. 591. As to whether the plaintiff was an invitee: see *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74; *Cavalier* v. *Pope* (1906), A.C. 428; *Malone* v. *Laskey* (1907), 2 K.B. 141 at p. 154. The plaintiff was a mere licensee and the defendant is not responsible for hidden defects of which it had no knowledge: see *Sutcliffe* v. *Clients Investment Co.* (1924), 2 K.B. 746 at p. 752; *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371; *Graham* v. *Commissioners Niagara Falls Park* (1896), 28 Ont. 1; Salmond on Torts, 7th Ed., 457. Section 60 of the Supreme Court Act was not complied with in the charge: see *Brooks* v. *Regem* (1927), S.C.R. 633; Pollock on Torts, 13th Ed., 533-4; *Fraser* v. *Pearce* (1928), 39 B.C. 338.

Argument

Maitland, K.C., for respondent: This is a straight case of negligence and the question of invitee and licensee does not arise. We rely on *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263; *Grand Trunk Rway. Co.* v. *Griffith* (1911), 45 S.C.R. 380; and *The Schwalbe* (1859), Swabey 521. There is clear evidence that the eye trouble was due to the accident: see *Isitt* v. *Railway Passengers Assurance Company* (1889), 22 Q.B.D. 504; Beven on Negligence, 4th Ed., 103; *Smith* v. *London and South Western Railway Co.* (1870), L.R. 6 C.P. 14 at p. 21; *Ystradowen Colliery Company, Limited* v. *Griffiths* (1909), 2 K.B. 533; Mayne on Damages, 8th Ed., 62.

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Argument

We say he was an invitee: see *Hawley* v. *Wright* (1902), 32 S.C.R. 40; *Byrd* v. *Atlanta Nat. Bank* (1915), 84 S.E. 219; *Quimby* v. *Bee Bldg. Co.* (1910), 127 N.W. 118; *Goodsell* v. *Taylor* (1889), 42 N.W. 873; *Austin* v. *Great Western Railway Co.* (1867), L.R. 2 Q.B. 442 at p. 446; *Harris* v. *Perry & Co.* (1903), 2 K.B. 219; *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65. That *res ipsa loquitur* applies here see *Armand* v. *Carr* (1926), S.C.R. 575 at p. 581; *Karavias* v. *Callinicos* (1917), W.N. 323; *Pyne* v. *Canadian Pacific Railway* (1919), 3 W.W.R. 125 at pp. 126 and 128; *Canadian Northern Railway Co.* v. *Horner* (1921), 61 S.C.R. 547; *Johnson* v. *Halifax Electric Tramway Co.* (1917), 36 D.L.R. 56. As to charging the jury: see *Seaton* v. *Burnand* (1900), A.C. 135.

Craig, in reply: A jury cannot ignore uncontradicted credible evidence: see *Rex* v. *Francis and Barber* (1929), 2 W.W.R. 104; *Hobbs* v. *Nottingham Journal* (1929), 2 K.B. 1 at p. 8; *Allen* v. *Regem* (1911), 44 S.C.R. 331. As to elevators see *Powell* v. *Thorndike* (1910), 102 L.T. 600; *Siner* v. *Great Western Railway Co.* (1869), L.R. 4 EX. 117.

Cur. adv. vult.

2nd June, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The respondent was awarded damages for injury occurring to him in an elevator. At the time of the injury he occupied a desk in the office of one Erskine who was the appellant's tenant. He had used this elevator for a period of ten and one-half years with the implied permission of the appellant. On the morning in question he stepped into it when it stopped at the floor on which he was. The elevator of its own accord slid down about six feet just as respondent stepped into it throwing him to his knees on the floor of the elevator. It was examined by an expert immediately after the accident and found in excellent condition. On cross-examination the operator said that he had not touched the starting lever. The expert who examined it said that elevators would sometimes act in ways which could not be foreseen. The respondent has been in poor health ever since and among his alleged injuries is the loss of one of his eyes which became adversely affected

nine months after the accident. Two questions are raised in the appeal—first, was there a breach of any duty which the appellant, the owner of the elevator, owed to the respondent entitling him to any damages at all in the circumstances? and secondly, if there was such a breach, could the loss of the eye be regarded as sufficiently proximate to justify the award of damages? In my opinion the respondent was a bare licensee and entered the elevator at his own risk except as to unusual danger known to the appellant. The duty of a licensor to a bare licensee is well settled by the highest authority and was canvassed in the recent case of *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358, wherein it was said that the only duty owed by a licensor to a bare licensee was to warn him of any unusual danger which might be encountered on the premises. In *Sutcliffe* v. *Clients Investment Co.* (1924), 2 K.B. 746, the *dicta* of Lord Atkinson and Lord Wrenbury in *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74 concerning the words "or ought to have known" were very much canvassed and those words were rejected from the definition by the Court as a factor in the duty of a licensor to a bare licensee. It was there pointed out that the inclusion of these words in the definition was putting the bare licensee in the same category as an invitee. That case also held that a lodger of a tenant using a common stairway is in relation to the licensor a bare licensee and not entitled to damages for injury suffered upon it. Lord Atkinson, quoting Willes, J. in *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, 288, said at p. 86:

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> The class [invitees] to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

The plaintiff in this case did not use the elevator on business which concerned the appellant and is, I think, in no better position than the lodger of the tenant. In *Sutcliffe's* case, *supra,* the law is laid down in similar terms and in *Addie's* case, *supra,* the *dictum* of Lord Sumner, at that time Hamilton, L.J., in *Latham* v. *R. Johnson & Nephew, Limited* (1913), 1 K.B. 398 at p. 411 was quoted by Viscount Dunedin at p. 371 with approval. Lord Sumner said:

> The rule as to licensees, too, is that they must take the premises as they

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find them apart from concealed sources of danger; where dangers are obvious they must run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk they walk at their peril.

In *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371 Willes, J., who wrote the classic judgment in *Indermaur* v. *Dames,* said (pp. 375-6):

> To bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or do any act which may place them in danger. It may be, as in *Corby* v. *Hill* [(1858)], 4 C.B. (N.S.) 556, that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way; but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair. For these reasons, I think these declarations disclose no cause of action against the defendants. . . .

MACDONALD, C.J.B.C.

There seems, therefore, to be no doubt about the duty which a licensor is under to a bare licensee when going upon land and even when in a conveyance and it does not appear to me to make any difference what length of time the licensee has been enjoying the licence. The respondent in this case had no business which concerned the appellant and the appellant owed no duty to him except to protect him from unusual danger. In this case there was no unusual danger. The danger would be either the negligence of the operator or the happening of some unforeseen accident which would be as little known to the licensor as to the licensee and which I think the licensee took the risk of. The contention that the elevator is a modern contrivance and should be viewed differently from a common stairway would appear to me not to affect the licensor's obligations to the bare licensee. As Lord Sumner said, *supra,* that if "in darkness they will walk they walk at their peril." If the respondent would go as a volunteer in the elevator he went at his peril except as to unusual danger known to the appellant.

There are cases analogous to elevator cases, cases in which volunteer passengers in a carriage or other conveyance have suffered injury. *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115 is an example of this. In that case it was held that the plaintiff who was invited to drive with the defendant and who was held

to be a bare licensee and was injured on the journey was bound to prove gross negligence in order to succeed. This was followed in *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65, where a gratuitous passenger was allowed to ride on a railway engine and was injured by the collapse of a defective bridge. In a more recent case in the Supreme Court of Canada of *Armand* v. *Carr* (1926), S.C.R. 575 the Court said (p. 581):

> If there was any error on his [defendant's] 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 . . . 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.*

I think the Court must have taken it that the plaintiffs in that case were invitees not bare licensees otherwise the decision is opposed to that in *Moffatt* v. *Bateman, supra,* and the other cases to which I have referred where the duty to the bare licensee is clearly defined.

There was no negligence of any kind proved in the present case, unless it be that of the operator of the elevator, whose competency was not questioned, he being positive that he had not started the elevator on its downward course. The expert who gave evidence also said that the elevator acted in the way it did for reasons which were not discernible since it was in apparent good order. There is no evidence whatever that the operator did anything wrong and in my opinion it is not a case for the application of the maxim *res ipsa loquitur*. Moreover the appellant having engaged a competent operator who had operated this elevator for eight years without any accident was not wanting in his duty to the bare licensee to protect him from concealed dangers. The danger of riding in an elevator was just as obvious to him as to the licensor. After the accident and while the respondent was still in the elevator and in response to a question by him to the operator the operator is said to have replied "It is this elevator. I reported it yesterday out of order." It was contended that he had no authority to make any admission for his employer; that he was not an agent to make an admission of that sort, and I agree that the objection to this

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evidence was well taken. It is perhaps immaterial but the operator denied having made that statement. I, therefore, conclude that the appeal should be allowed and in this result it is unnecessary for me to consider the other branch of the case.

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MARTIN, J.A.: This is an appeal by the defendant Bank from a judgment entered against it upon a verdict of a jury for $8,649.50 damages occasioned by personal injuries suffered by the plaintiff in an electric passenger elevator operated by the defendant in its office building in Vancouver, B.C., on the 21st of March, 1929.

It appears that the elevator operator, Skidmore, when at the sixth floor, where he had picked up a passenger in descending, got a signal to stop at the fourth floor and did stop and opened the gate of the elevator, whereupon the plaintiff, who had given the signal, began to enter the cage, and just as he did so it began to "slide" or move slowly down with gradually increasing speed, with the result that he fell forward suddenly and sustained a fall so severe that he was momentarily stunned. Skidmore says that he did not start the elevator and that when he felt it descending he applied the emergency disconnecting switch or brake as quickly as possible and stopped its descent when it was about six feet below the level of the floor from which the plaintiff had stepped into it.

Before going further it is necessary to determine the contested question as to whether the plaintiff was an invitee of the defendant or a licensee, which often difficult question depends upon the facts of each particular case and the difference between the two classes is hard to define because, as is truly said in Salmond on Torts, 7th Ed., 453, "that this difference exists is undoubted, but it is not possible in the present confused state of the authorities to state its precise nature with any definiteness or confidence." And *cf.* pp. 461-4.

The circumstances of the present case are that the plaintiff for ten and a half years had carried on his trustee and estate business in an office room on the fourth floor which he shared with one Erskine, an old friend and business associate, the arrangement being that the plaintiff paid half the rent to Erskine who leased from the defendant, and they also afforded

each other mutual business assistance as thus described by the plaintiff in answer to the Court at the instance of the defendant's counsel:

> . . . We occupy the same office. We have been friends for 35 years. Prior to the first accident we were each looking after the other's business. If he were out of the city I collected for him and passed it over to him. Since my accident he has simply carried on without any definite arrangement or agreement. I am paying half the rental, but so far as any definite arrangement there is no definite arrangement with Mr. Erskine as to what he is to charge for the work done.

In view of these long standing and intimate business relationships the circumstances of this case are essentially different from those considered in the House of Lords in the leading and much canvassed one of *Fairman* v. *Perpetual Investment Building Society* (1923), A.C. 74 wherein it was decided, by a bare majority of a bench of five judges, that the sister-in-law of a tenant of a residential flat who had lodged with her sister there for eighteen months and made use of a common staircase was only a licensee of the landlord though she was the invitee of the tenant. But it is to be noted that in coming to this decision Lord Atkinson was careful to point out, pp. 85-6, that the lodger simply occupied the flat with the tenant's family as a visitor or guest and "apparently it was not contemplated by either landlord or tenant when the letting was made that the tenant should take in lodgers," and he went on to say:

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> There is not even any evidence that the tenant, by taking the plaintiff as a lodger, was thereby helped to pay the landlord his rent or to discharge any duty he owed to the landlord.

The circumstances at Bar are, on the contrary, that for a long period of years the plaintiff had "helped to pay the landlord his rent" to the extent of one-half of it, and there is no evidence at all from which it is "apparent" or can be reasonably inferred that the landlord did not "contemplate" the tenant making the very common business arrangement of sharing his office with another business man upon terms of mutual advantage and common assistance. In short, in *Fairman's* case the relationship was purely domestic in a home while in this one it is purely business in an office.

Lord Sumner (p. 92) and Lord Wrenbury (p. 95) reached the same conclusion as Lord Atkinson though upon grounds which are somewhat obscure and at variance with him in respect

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to the tenant's right to sublet. But even upon the facts of that case Lord Buckmaster (pp. 80, 83-84) and Lord Carson (p. 98) took the opposite view that the plaintiff was an invitee of the landlord because she was a person invited to the premises by the owner or occupier for the purposes of her "material interest" therein, as distinguished from "a mere guest or casual visitor." At p. 80 Lord Buckmaster said:

> . . . the duty varies; being lowest to the trespasser; next to a licensee; and greatest to a person whose position owing to the deficiencies of the English language is described by lawyers as an "invitee," meaning persons invited to the premises by the owner or occupier for purposes of business or of material interest.

This is in accordance with the passage from *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, 288, cited by Lord Atkinson to define the rights of the "class of invitees" at p. 86, *viz.*:

> "The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied. And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." . . .

The full meaning of the word "unusual" was explained by the Court of Appeal in *Norman* v. *Great Western Railway* (1915), 1 K.B. 584.

In *Sutcliffe* v. *Clients Investment Co.* (1924), 2 K.B. 746 the Court of Appeal pointed out (pp. 754-5) the difficulty which had arisen from certain *dicta* of Lord Atkinson and Lord Wrenbury in the *Fairman* case respecting a bare licensee, which expressions this Court "ought not to take as affecting an alteration in the law" (and *cf.* Salmond on Torts, *supra*, 457) and Lord Justice Scrutton said (p. 757) that a licensee with an interest has the same rights as an invitee and, speaking of the plaintiff therein, proceeds, p. 758:

> He was a licensee with an interest. Now I will do nothing to interfere with the classical judgment of Willes, J. in *Indermaur* v. *Dames* [(1866)], L.R. 1 C.P. 274, 288. "With respect to such a visitor at least," said that very learned judge, "we consider it settled law, that he, using reasonable

care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know."

And again, p. 757:

"A licensee who is on premises on the business of the owners, or with a common interest with them, is not a bare or mere licensee, but a licensee with an interest, and has the same rights as an invitee." . . .

Recently the subject has again been considered by the House of Lords in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358; 98 L.J., P.C. 119, wherein Lord Chancellor Hailsham said, p. 121:

The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier. Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser.

This declaration of the duty of the occupier to the invitee at last clears up the "unfortunate ambiguity" in *Indermaur* v. *Dames, supra,* pointed out by Salmond, *supra,* p. 461. In the *Addie* case the House upheld the view that upon the facts as found the plaintiff was a trespasser, and the Privy Council took the same view in *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361, wherein the plaintiff without a ticket wrongfully boarded a train not being used for passengers, and laid down the duty regarding them in terms similar to those adopted by the House of Lords, though as Lord Dunedin pointed out in the *Addie* case, *supra,* p. 126, their judgment was "a little confused as to *Lowery* v. *Walker* [(1909), 79 L.J., K.B. 310], but that does not affect the judgment." Likewise in *Letang* v. *Ottawa Electric Ry. Co.* (1926), A.C. 725, 732, the Privy

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Council declared that it was the duty of that company to "keep reasonably safe" a way of access for the use of its invitees.

In the instructive case of *Hardy* v. *Central London Railway* (1920), 89 L.J., K.B. 1187, the Court of Appeal held that the infant plaintiff was a trespasser upon the moving staircase in the defendant's station. The latest case upon the subject, and wherein it was found by the House of Lords that there was no "invitation," is *Humphreys* v. *Dreamland (Margate), Ltd.* (1930), 100 L.J., K.B. 137; and *Coleshill* v. *Manchester Corporation* (1928), 1 K.B. 776 is an important case on a bare licensee which we are giving effect to in our judgment today in *Sale* v. *The East Kootenay Power Co. Ltd.* [*ante*, p. 141]. The decisions, also, in *Mersey Docks and Harbour Board* v. *Hay* (1923), A.C. 345, 490; 92 L.J., K.B. 479; *Knight* v. *Grand Trunk Pacific Development Co.* (1926), S.C.R. 674; *Drinkwalter* v. *Morand* (1929), 64 O.L.R. 124; *Bettles* v. *Canadian National Railway Co., ib.* 211; *Excelsior Wire Rope Co.* v. *Callan* (1930), A.C. 404 (H.L., considering *Addie's* case); *Mourton* v. *Poulter* (1930), 2 K.B. 183; 99 L.J., K.B. 289; *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229; *Nightingale* v. *Union Colliery Co.* (1903), 9 B.C. 453; (1904), 35 S.C.R. 65; *United Zinc Co.* v. *Britt* (1922), 258 U.S. 268; and *City of Verdun* v. *Yeoman* (1925), S.C.R. 177 may be profitably referred to.

With respect to the meaning of the "common interest" of the occupier and the invitee the following language of Baron Cleasby in *Holmes* v. *North Eastern Railway Co.* (1869), L.R. 4 Ex. 254; (1871), L.R. 6 Ex. 123 (which Lord Coleridge, C.J. said in *Wright* v. *London and North Western Railway Co.* (1876), 1 Q.B.D. 252, 255, was a case of "the greatest authority") is very apt, *viz.*:

> As soon as you introduce the element of business, which has its exigencies and its necessities, all idea of mere voluntariness vanishes.

These words were quoted with approval by Lord Shaw in the *Mersey Docks* case, *supra*, at p. 487.

Upon the facts of the case before us it must be taken on the footing that the plaintiff was an invitee and so "the highest duty exists towards" him which is that "of taking reasonable care that the premises are safe." What is "reasonable care"

varies, of course, with the circumstances and as Lord Collins pointed out in *Cooke* v. *Midland Great Western Railway of Ireland, supra,* at p. 241, the facts of that case

> fixed the defendants with a high responsibility towards those people to whom such an invitation would mainly appeal, namely, those who from their tender age would be deemed incapable of caution and therefore of contributory negligence.

This language is quoted with approval by the Lord Chancellor in *Addie's* case, *supra,* at p. 122. And in *Harris* v. *Perry & Co.* (1903), 2 K.B. 219, Lord Collins also said in delivering the unanimous judgment of the Court of Appeal, at p. 226:

> The principle in all cases of this class is that care exercised must be reasonable; and the standard of reasonableness naturally must vary according to the circumstances of the case, the trust reposed, and the skill and appliances at the disposal of the person to whom another confides a duty. There is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation.

In that case the plaintiff had been permitted to ride upon the electric locomotive of a temporary contractor's railway employed in excavating work, and, p. 225, "there was evidence upon which the jury might have found that a trap within the meaning of the authorities might have been set for the plaintiff." That decision was unanimously followed by the Court of Appeal in *Karavias* v. *Callinicos* (1917), W.N. 323, a case of a gratuitous passenger in a motor-car, wherein Lord Justice Pickford relied upon the language above quoted, and Lord Justice Bankes said "the law was settled by the case of *Harris* v. *Perry & Co.* so far as this Court is concerned.

The well-known decision of the Privy Council in *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115, arising out of a carriage accident, was cited to the Court, and that case, largely because of its insistence upon "gross negligence" has given difficulty, but the key to it may be found in the language of Lord Chelmsford at pp. 122-3, as applied to its circumstances, *viz.*:

> But this case is very different. There is nothing more usual than for accidents to happen in driving without any want of care or skill on the part of the driver, and, therefore, no *prima facie* presumption of negligence having been raised, their Lordships think that it was necessary for the plaintiff in the case (the respondent) to give affirmative evidence of there being gross negligence on the part of the appellant occasioning the accident.

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Horse accident cases, indeed, are in a class by themselves, because such animals are an "animate" cause of injury often arising from their own "power of motion" and "unforeseen impulses," as is well pointed out in Beven on Negligence, 4th Ed., Vol. 1, p. 124, and in note (*q*) some of the cases wherein another judgment of the Privy Council by Lord Chelmsford on negligence (onus of proof) has been criticized and repudiated are set out.

The Supreme Court of Canada in *Nightingale* v. *Union Colliery Co., supra* (the leading case in Canada on the subject), did not view *Harris* v. *Perry & Co.* as a departure from *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371, and based it on a trap or gross negligence, and, in affirming and agreeing with the judgment of the old Full Court of this Province, said that "the highest that the position of the deceased can be put is that he was riding on the engine in question by tacit permission." The *Harris* case is really that of an invitee, and is so treated in Beven on Negligence, *supra,* p. 570.

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In the case of *Warmington* v. *Palmer* (1901), 8 B.C. 344; (1902), 32 S.C.R. 126, which was an appeal from our old Full Court, a workman was injured while being lowered in a bucket down a mine shaft owing to the negligence of the engineer in not starting and controlling the bucket in the proper way, and therefore it is very close to the circumstances of the present plaintiff in the defendant's cage. In that case the Supreme Court of Canada upheld my dissenting judgment affirming the verdict of the jury, wherein it was said, p. 349:

> As regards the efficiency and safety of any appliance under consideration, that is a question which must be decided in relation to the particular circumstances. A clumsy contrivance carefully used by a careful man may never cause an accident, but it is still clumsy and cannot from the nature of things be, in ordinary and everyday use, as safe or as efficient as a simple and handy appliance for accomplishing the same object. It comes, then, to a question of degree as applied to different facts, and who so competent to decide that question as a special jury?

An interesting case on the negligent operation of passenger elevators is *Hawley* v. *Wright* (1902), 32 S.C.R. 40, but as the Court came to the conclusion that the fatal accident was entirely owing to the passenger having "madly attempted an exit" from the cage no general principle can be derived from it. More

instructive is *Mathieson's Tutor* v. *Aikman's Trustees* (1910), S.C. 11, but still not in point, as it mainly turned upon a demurrer respecting the landlord's control over a lift with a defective gate. Lord Kinnear said, pp. 13-14:

> I think that the case ought to go to a jury. I agree that it will be necessary for the pursuer to prove that, when the tenement was let out, as he says, in offices to business men and traders, the proprietors still remained in the occupation and control of the lift, which was intended to supply the whole tenement, and not any particular part of the tenement. Of course he must prove that the accident was due to the fault of the proprietors, and the only fault alleged is that they have failed to remedy a defect which they knew to exist, or which they were bound to know if they had performed the duty which is assumed to be imposed upon them of keeping the lift in good order. The proof of that duty, of course, depends upon satisfactory evidence upon the first part, that they were really in the control of the lift.

The King's Bench Division in *Powell* v. *Thorndike* (1910), 102 L.T. 600, considered a case of alleged negligent installation of a defective hand-power lift for goods individually operated and temporarily controlled by those who wished to make use of it, and it was held (p. 602) that, under the circumstances, "any reasonable person using this lift ought to have known that if he pulled it down there might be someone who ought to be warned," and that the lift, which was of the usual pattern, installed by the landlord was not of itself a "source of danger."

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It is obvious that very different considerations arise in the case of a lift for passengers which, as here, is controlled and operated by the landlord himself and to whose care and custody those to whom he opens his gates absolutely surrender themselves. Though as pointed out in Salmond on Torts, *supra,* 29, the sole standard of negligence "is the care that would be shewn in the circumstances by a reasonably careful man" yet

> It is true, indeed, that this amount will be different in different cases, for a reasonable man will not shew the same anxious care when handling an umbrella as when handling a sword. But this is a different thing from recognizing different legal standards of care; the test of negligence is the same in all cases.

Now, *ex facie,* the construction and operation of an electric passenger elevator in a building is something that requires "anxious care" because the passengers in its cage are completely under the control and in the custody of the person who is carrying them vertically through a narrow shaft, just in the same

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way as though they were being carried by an electric street railway through a horizontal tunnel; though the former, indeed, is the more restricted confinement, and there is no real comparison between persons in that position and those who are making use of an inanimate stairway in their own way as they may see fit, and the duty of those who employ modern agencies of *e.g.*, electricity and internal combustion engines corresponds with that which was rightly imposed upon those who first invoked the power of steam, as is well pointed out in Beven, *supra*, p. 25:

> Once more—in that vast class of cases in which the power of steam is applied to providing for human requirements, the duty to take care imposed on those using it is far in excess of that required of those concerned with the feebler agencies of former times: this is also and still more emphatically the case as regards the immense number of vehicles propelled by the internal-combustion engine which during recent years have been licensed by statute to ply upon public highways used of necessity by the public at large, including the blind, the deaf and the lame, and also the very young and the very old.

And again, p. 1143 (Vol. 2):

> The cases in the earlier part of the century were concerned with accidents happening to coaches merely, and were not of widely reaching importance; but, as in the other branches of carrier's law so also in this, the general construction of railways and the revolution thereby effected in the amount and methods of travelling immensely increased the need for authoritative legal decision.

The manner in which the Courts of common law moulded the law to adapt itself "to the ever changing needs of new commercial concerns," and the foundation of our modern system by Lord Mansfield to meet new conditions, are well and frequently pointed out in that very fine work, Holdsworth's History of English Law, *e.g.*, in Vol. IV., p. 293; Vol. VI., p. 640; Vol. VIII., p. 146 *et seq.* In Vol. IV. it is said speaking of the influence of Roman law:

> It has been naturalized and assimilated; and with its assistance, our wholly independent system has, like the Roman law itself, been gradually and continuously built up, by the development of old and the creation of new rules to meet the needs of a changing civilization and an expanding empire.

And in Vol. VI.:

> This summary shews us that the two most striking features in the development of those parts of the common law which regulate the relations of private persons are, firstly, the decay of the real actions and the decline in importance of the mediæval land law; and, secondly, the growth of mercantile law and of the two branches of law most closely related thereto

—the law of contract and the law of tort. These two features shew us that the development of the common law faithfully reflected the fact that mediæval had finally given place to modern conditions. Nor is it surprising that it should thus faithfully reflect this change. Although the common law has been tenacious of mediæval doctrines and mediæval forms, its development by means of decided cases has always enabled it to keep in more or less close touch with the dominant needs and opinions of the day; . . .

Lord Justice Bankes, in *Rex* v. *Electricity Commissioners* (1924), 1 K.B. 171 at p. 192, said:

> It has, however, always been the boast of our common law that it will, whenever possible . . . apply existing principles to new sets of circumstances.

And to take another very recent example in *Oakley* v. *Lyster* (1931), 1 K.B. 148 at p. 153, Lord Justice Scrutton pointed out that the action of "conversion has been very much extended in the last two hundred years"; and Lord Justice Greer said, p. 154:

> It would afford ground of criticism of the law which has developed in this country during a long series of years if the respondent were without a remedy.

The Privy Council likewise said in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 at p. 617: "The law must adapt itself to the conditions of modern society and trade"; and *cf.* also our decision in *Welch* v. *Kracovsky* (1919), 27 B.C. 170 applying that principle.

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No Canadian or English cases have been cited to us on this exact point of the duty to passenger-invitees in elevators, so we may profitably turn (like the Court of Appeal in England in *Mourton* v. *Poulter, supra,* the "American case" therein cited by Scrutton, L.J. being *United Zinc Co.* v. *Britt* (1922), 258 U.S. 268; also noted in *Addie's* case, *supra,* 381) to American decisions which are numerous on the point owing doubtless to the almost universal use of elevators on this continent as indispensable facilities to modern business buildings. Space forbids a notice of them in the different States of the Union with their not invariable harmony but one of the earliest and leading cases, often quoted with approval, is that in the Supreme Court of California in *Treadwell* v. *Whittier* (1889), 80 Cal. 266; 22 Pac. 266, wherein a judgment was upheld for damages caused by the falling of an elevator, operated by defendants in their

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store, in which the plaintiff was a passenger. Thornton, J., Sharpstein, J. concurring, delivered the main judgment of the Court and at p. 271 (Pac.) he gives the basis of it, *viz.*:

> Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments, to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence. We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery the hurt is always serious, frequently fatal; and the law should and does bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public in Courts to abate in any degree from this high degree of care.

This language was quoted and unanimously approved by the seven judges of the Supreme Court of Pennsylvania in another leading case of *Fox* v. *City of Philadelphia* (1904), 57 Atl. 356, and the Court went on to say, p. 359:

> The foregoing rule is peculiarly applicable to those operating elevators like the one in the present case. The Courts of Philadelphia are not on the first floor of the city hall. They are reached on the upper stories by stairways and elevators. When summoned to attend them, suitors and witnesses must go, and, on reaching the public buildings, they find two means of ascending to them—stairways and elevators, finished, and, as already shewn, subject to the control and management of the city. Either means of reaching the Courts may be adopted, though, to one who climbs the staircase, the elevators carry hundreds; and it sometimes happens, as here, that the halt and the lame are summoned to these upper stories, and they cannot mount the stairways, but must be carried by the elevators. To them, to those who attend them in their helplessness, and to all others who, from choice or necessity, use these elevators, there must be given the utmost protection which human knowledge, human skill, and human foresight and care can provide. In case of injury, without fault or negligence by the one injured, the presumption is that such protection had not been

afforded, and that there had been negligence on the part of those operating the elevators.

The same Court later reviewed the whole question in the light of many other decisions in *McKnight* v. *S. S. Kresge Co.* (1926), 132 Atl. 575 and said that "the doctrine of Pennsylvania is in accord with the great weight of authority" and affirmed the *Fox* case, *supra,* and proceeded, p. 577:

> Since the owner of an elevator is not the insurer of the safety of persons carried on the elevator, the burden of proving negligence is on the plaintiff. In this, as stated in *Fox* v. *Philadelphia, supra* [(1904), 57 Atl. 356], and in *Riland* v. *Hirshler, supra* [7 Pa. Super. Ct. 384], he is aided by a presumption of negligence similar to that arising in the case of common carriers. Where that which causes the injury is under the sole management and control of the owner or his representative, and is an agency wherein the slightest negligence will be followed by injuries of the most frightful consequences to those within the agency, who are utterly ignorant of what ought to be done for their safety and in a position of passive helplessness, and an accident happens that in the ordinary course would not happen had those in control used proper care or which human knowledge, skill, and foresight could have guarded against, it affords reasonable evidence, in the absence of an explanation, that the accident happened as a result of the want of care. 9 R.C.L. 1259; 10 C.J. 1039. Those who use elevators (and they number a large percentage of the people) are absolutely at the mercy of the owners and operators, and are entitled to the benefit of this rigid rule of law where an injury occurs either through the operation of the car, defect in its machinery, or improper maintenance of its parts.

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Still later in *Petrie* v. *Kaufmann & Baer Co.* (1927), 139 Atl. 878-9, the same Court said, in extending the rule to escalators:

> While a carrier is not an insurer of the safety of the passengers, he is bound to exercise the highest practical degree of care for their safety, and where a passenger is injured through some defect in the means of transportation or the manner of operation, the burden is upon the carrier to shew it could not have been prevented by human foresight.

The main heads of negligence alleged herein are that the elevator had become unsafe and was defective in its controlling mechanism and was improperly operated by the man in charge by starting it downward before the plaintiff had completed the invitation to enter it given by opening the gate of the cage in answer to his signal. There is no suggestion that the plaintiff acted negligently nor is his account of what happened at the time of the accident disputed except in one important particular, *viz.*: that after he regained consciousness in the cage he had the following conversation with the operator, Joe Skidmore:

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I said "Joe, what are you doing?" I said, "Great Heavens, Joe, you might have killed me!" And his reply was "It is this elevator. I reported it out of order yesterday."

Not only was no objection taken to this evidence, but the defendant's counsel cross-examined the plaintiff on it thus:

You said the elevator boy told you that he had reported the elevator "was out of order yesterday"? Yes.

Do you remember my asking what conversation you had with him, on your discovery? No.

And not only this, but Skidmore was called by defendant to deny the statement, and also one Vowles a fellow passenger in the cage, to say he "did not hear" Skidmore say so. Furthermore, the defendant called Harvey the superintendent of the elevators in the building, to say that Skidmore had "not reported it out of order yesterday" to him: "I heard nothing about it."

It was objected at this Bar for the first time, by special leave given to amend the grounds of appeal, that this evidence should not have been admitted, or that the judge should have given a special direction thereupon, and a number of authorities were cited on the point, some of which tend to support it to a certain extent, but others are against the appellant's submission; and it must be, and was admitted, that the evidence was at least admissible on the vital question of Skidmore's credibility because he is charged with having moved the controller too soon and thereby started the car in a most dangerous situation. To those cases cited should be added *Mountney* v. *Smith* (1904), 1 C.L.R. 146; *Treadwell* v. *Whittier, supra*, at 274, and *Stowe* v. *Grand Trunk Pacific Rway. Co.* (1918), 59 S.C.R. 665. But whatever may be said about the other aspect of the full admission of the evidence, not as an admission of liability, but as a statement of fact, not opinion, as to the cause of the accident and made at the time by the person in control of the cage, and so part of the *res gestæ* (and the cases shew there is much at least to be said in favour of it) it is clear that it would be contrary to justice to exclude it now and grant a new trial thereupon after the appellant had deliberately made an issue of it in its widest sense before the jury as one of the cases cited by the appellant shews, *viz.*: *Small* v. *Belyea* (1883), 24 N.B.R. 16 at pp. 32, 36. This is in accord with the recent decision of the Appellate Court of Alberta in *Brody's Ltd.* v. *C.N.R.* (1929),

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24 Alta. L.R. 228; (1929), 4 D.L.R. 397, and also for an additional reason therein stated, and of the decision of the Privy Council in a trial by jury, *Robertson* v. *Dumaresq* (1864), 2 Moore, P.C. (N.S.) 66 at p. 86, *viz.*:

> Much of the evidence might have been excluded, but it having been admitted without objection, the whole of it formed the materials upon which the judgment proceeded, and it must be dealt with upon this appeal to the same extent as in the Court below.

See also *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68, 76; and *Banbury* v. *Bank of Montreal* (1918), A.C. 626, 658-9.

The observations, whatever their effect may be in certain cases, of the Court of Appeal in *Jacker* v. *The International Cable Company (Limited)* (1888), 5 T.L.R. 13 are restricted to non-jury cases as the report is careful to shew; and *cf. Forman* v. *Union Trust Co.* (1927), S.C.R. 1, 8.

In addition to this evidence, the weight of which was for the jury, the plaintiff put in part of the discovery evidence of the said Harvey, the defendant's building superintendent, which shewed that the elevator had been in the building for 18 years since its first erection and was "the old type of car" which is not fitted with the new device which prevents the car being operated until the door is moved though he could not "see any reason why they could not do it," *i.e.*, fit the new device to it. With respect to the vital question of the car "slipping," he gave this evidence:

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> Had it ever done that before? We have had it slip—what I mean to say by 'slip' is this. When we were operating the car and want to bring it to rest instead of pulling up she will slide six or eight feet, perhaps more, a thing which is quite common where an elevator is concerned.

The effect of all this evidence was to make out a case of negligence far stronger than was held to be sufficient by the Irish Court of Exchequer in the leading case of *Flannery* v. *Waterford and Limerick Railway Co.* (1877), Ir. R. 11 C.L. 30, wherein is to be found the fine judgment of the Court, delivered by that truly great judge Lord Chief Baron Palles, to which special attention is directed in Beven on Negligence, *supra*, p. 135, as "well deserving study," and he proceeds to quote at length from it as being a lucid exemplification of the law upon a subject wherein, as the Chief Baron said at p. 38, there is a "chaos of authorities depending on particular facts"

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and "Each judgment must be read with reference to the circumstances of that particular case." It is not necessary to repeat here the quotations from Beven, but it should be noted that in the Court of Appeal in *Cullen* v. *Dublin United Tramways Co.* (1920), 2 I.R. 63, Lord Justice Ronan said at p. 87:

> The fundamental principle on which my entire judgment is based is thus stated by Palles, C.B., in his often-quoted judgment in *Flannery* v. *Waterford and Limerick Railway Co.* [(1877)], Ir. R. 11 C.L. 30: "In applying the rule it must be borne in mind that, before it can lead to a direction against the plaintiff, the Court must assume that every inference of fact which a jury might legitimately draw in favour of the plaintiff has been drawn, and must assume the existence of the fact so inferred, in addition to the facts proved."

And he proceeds to follow the Chief Baron in another important respect, with Lord Justice O'Connor concurring, p. 105, *viz.*:

> In dealing with such a question as this, *i.e.*, whether there is evidence from which a jury could reasonably find a verdict for the plaintiff, we judges, so far as the question is one of fact, "although not jurors, must avail ourselves of our knowledge of the ordinary affairs and incidents of life. Without this knowledge we cannot determine, as we are bound to do, whether a particular inference can reasonably be drawn. Now, applying my own experience of railway travelling, I find it impossible to say that," etc.: *per* Palles, C.B., in his well-known judgment . . .

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The Supreme Court of Canada likewise applied its "common knowledge" to elevators in *Hawley's* case, *supra,* p. 46.

To meet the plaintiff's case the defendant led the evidence of said Harvey and of William Pratt, having long practical experience with electric elevators, to shew that this one was of "standard make at the time" it was installed "known as the E-7 drum type, geared passenger" and that there are very many of them still in use and giving adequate service, though a new type called the "traction type" is the one which for some time has been adopted, *i.e.,* it has superseded the old type. Both of these witnesses say that they together examined and tested the machine carefully immediately after the accident but could find nothing wrong with it, though, according to Pratt, there were at least two ways, through a leaky current, or breakdown in the insulation, in which the car might have moved without being put in motion by the operator, and, after explaining them in detail, he also said:

> These things have been known to happen, but usually in 99 cases out of

100 immediately that they were examined they would almost assuredly show up, or if they did not at that date, very soon after. We have known of cases where the wiring might have been punctured by the insulation breaking down and carrying the current through, and it might go ahead and insulate itself right away and from the flash happening as these two wires touch and break away clear it would carry on for a long time.

That might happen in one of these cables? Yes, or in the car switch or the control that their man operates.

If that were the cause would a reasonable inspection have made it apparent to the person in charge of the car? No, it does not.

Upon cross-examination he said that the only "one thing left" to explain the car having moved was "the negligence of the driver starting too soon, or something of that sort. . . . I have never seen it but I have heard of cases happening."

Harvey says that there had never been an accident in that elevator before this one, and in general supports Pratt, but he does not join with him in his said explanations of the way this one might have moved, nor does he give any explanation of his said discovery evidence about its prior "slipping," and admits that it had been repaired three times within three weeks before the accident (21st of March) *i.e.,* on the 13th and the 5th and on the 1st of that month, as he describes, and once in February, but "didn't think we had any trouble in January"; but "had no record" of how many times it had been repaired in the three months previous to the accident, and it had been inspected "along about the 1st of December," *i.e.,* four months less one week before the accident.

Now it is obvious that it would be open to the jury to regard this evidence upon the state and condition of the elevator as not being satisfactory to a cautious mind having regard to the extremely dangerous consequences of any neglect to use all due and proper care and foresight, and they might well have taken the view that it had at last reached such a stage in its long life that it was not safe under the circumstances to continue to operate it, particularly if they believed, as they had the right to believe, that the plaintiff's account of what Skidmore said about it, was true. Furthermore, having regard to the manner in which Skidmore's evidence was given upon discovery and upon cross-examination, particularly respecting his voluntary statement that "the elevator started without my hand on the controller," and his initial professed ignorance of any repairs

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having been made to it (though he admitted he would know if they had been) or of any slipping that Harvey admitted, the question as to whether he did in truth start it or not was peculiarly one which could best be settled by a jury having the witness before them and watching his demeanour, and if they decided against his credibility about what the plaintiff says he told him, they would have little difficulty in deciding that he did in truth cause the accident by moving the controller too soon. The right of a jury to give credit to no part or some part of the testimony of a witness has long ago been laid down in the Courts of this Province and the jury so directed, *e.g.*, in *Rutherford* v. *Morgan* (1904), 2 M.M.C. 214 at p. 225, and later restated by Mr. Justice Duff in the Supreme Court of Canada in *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263.

The only conclusion therefore that, in accordance with the principles hereinbefore set out, it is possible to reach upon the evidence before us is that upon either of the said two classes of negligence, *i.e.*, (1) defective elevator, and (2) negligent operation thereof, or upon both of them, the jury could reasonably have found their general verdict in favour of the plaintiff, and so upon the ground of the defendant's liability the appeal should be dismissed.

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There is a second ground of appeal, however, *viz.*, that the special and general damages awarded are excessive in that they include an injury to one of the plaintiff's eyes (and medical fees occasioned thereby) which greatly restricts its vision, and is the result of an ulcer of the cornea which was caused by infection from some foreign substance lodging in the eye, but which did not make its definite appearance till the month of January, 1930, following the accident when it was first discovered, on the 28th of that month, by Dr. Parrish an eye specialist who then examined the plaintiff's eyes and is his principal witness on this point.

A considerable body of medical evidence was called on this difficult question but it clearly resolves itself to this—that the direct cause of the ulcer was an infection from some unknown foreign substance, as Dr. Parrish distinctly deposed, and that the impairment of the plaintiff's general health and physical powers had predisposed him, especially at his advanced age of

68 and one-half years in January, 1930 (though unusually well preserved before the accident) to such a disease, and less ability to resist it, but even healthy persons are liable to it especially in their declining years. Many cases were cited to us on the point but none of them is of exact application to the unusual circumstances of this case, particularly in the great length of time, over ten months, that had elapsed when the infection began.

It was not seriously contested that the plaintiff was entitled to reasonable damages for the direct consequences of any negligence established, such as pain, suffering, impairment of health and reduction of physical powers with their direct concomitants of financial loss in the conduct of business affairs and increased personal expenditure, if proven, but it is difficult to understand upon what sound principle the plaintiff should first be fully compensated for his injuries including such impairment and reduction and then be further compensated for all the various ills or accidents which might for an indefinite time be more prone to afflict him than if he had not been injured. If it could have been shewn herein beyond reasonable doubt that the ulcer was the direct result of his injury the case would have presented a different aspect, but upon the evidence it is far from that stage and Dr. Parrish would not go further than to say "I think it [the accident] is an indirect cause"; therefore the damages awarded for "the opacity left after the ulceration" are too remote and the verdict must be reduced to that extent, but unfortunately as they were not segregated by the jury it is impossible for us to do so and therefore the case must be remitted for a new trial to ascertain the damages upon the proper basis.

With respect to the objections to the charge, other than as to damages, they so largely disappear in the view we have taken of the matter that, under the circumstances of the whole case, justice does not require that they should be given effect to.

It should be added, in conclusion, that the consideration and disposition of this unusually difficult and important case, which has caused us much careful consideration, would have been greatly facilitated, and much unnecessary expense avoided, if the usual and proper questions had been submitted to the jury

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and answers obtained thereto, as was, for example, recently done by the Lord Chief Justice of Northern Ireland in an important decision in a negligence action, which went to the House of Lords, *Woods* v. *Davison* (1930), N.I. 161, wherein, as Lord Hailsham recites in his judgment in the Lords, pp. 162-3—the Chief Justice submitted questions to the jury and

> The jury returned into Court and answered the first, second and fourth questions in the affirmative, but returned no answers to questions 3 and 5. The learned Lord Chief Justice directed the jury to retire again and to answer these two questions and thereupon they answered the third question in the affirmative and assessed the damages, if any, at £400.

The result of this appeal is that as regards the application for a new trial to assess damages it is allowed but on all other grounds it is dismissed.

GALLIHER and MCPHILLIPS, JJ.A. agreed with the reasons of MARTIN, J.A.

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

Solicitors for appellant: *McAlpine & McAlpine.*

Solicitors for respondent: *R. L. Maitland* and *J. G. A. Hutcheson.*

GOODELL v. MARRIOTT *ET AL.*

MACDONALD, J.

1929.

Oct. 14.

GOODELL v. MARRIOTT

Negligence—Automobile accident—Jury—Finding against two defendants—No fault attached to two other defendants—Judgment—Payment of costs to successful defendants.

In an action for damages resulting from an automobile collision a jury found the defendant M., driver for the defendant was the party to blame for the accident and that the defendants R. H. and V. H. were not in any way responsible. Judgment was given against the defendants M. and P. and the action was dismissed as against the defendants R. H. and V. H. On the question of costs:—

Held, that the plaintiffs having sued the four defendants, and having failed as against two of them, there was no jurisdiction to order M. and P. to pay directly to R. H. and V. H. the costs to which the latter are entitled as against the plaintiffs.

Green v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75 followed.

ACTION for damages resulting from a collision between automobiles. The jury found that the defendant Marriott, the driver for the defendant Perkins was responsible for the accident and that the defendants Roy Heather and V. G. Heather were not in any way responsible for it. The plaintiffs claimed that the defendants found responsible for the accident should pay the costs of the defendants against whom the action was dismissed. Tried by MACDONALD, J. at Vancouver on the 19th and 20th of September, 1929. Statement

Bray, for plaintiffs.
A. H. MacNeill, K.C., for defendants Marriott and Perkins.
Alfred Bull, for defendants Roy Heather and V. G. Heather.

14th October, 1929.

MACDONALD, J. (oral): In this action, tried with a jury, when the findings of the jury became apparent, the successful defendant Heather moved for dismissal of the action. Then the successful plaintiffs sought to have certain provisions incorporated with respect to costs, endeavouring to apply some decided cases on that point, in England. The matter was reserved and I thought that today, on this motion for judgment, the form of the order, as to costs, was only to be considered, but counsel for the unsuccessful defendant Marriott submitted that Judgment

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he had not yet had an opportunity of dealing with the question of liability or otherwise on the findings of the jury. Argument was thus presented by counsel for the unsuccessful Marriott, he contending that the findings of the jury did not create any liability as against his client. On that point I am quite satisfied that the intention of the jury was to place the blame for this accident upon the defendant Marriott, the driver for the co-defendant Perkins. It may be, that the jury went further than it might have gone, in answering the questions on that point, as to the nature of the negligence on the part of Marriott. I repeat, that from my recollection of the way the jury was instructed, the main question for them to decide was, as to where the blame rested. There was no doubt the plaintiff Margaret Goodell had been seriously injured and the blame for her injury rested upon one or the other of the defendants. The jury by their answers found, as I have already stated, that the defendant Marriott is the party to blame. There will be judgment then for the plaintiffs against the defendants Marriott and Perkins. The action will be dismissed as against the defendants Roy Heather and V. G. Heather.

Judgment

Then as to the question of costs. The defendants Heather and Heather being successful, and none of the findings being against them, are entitled to their costs as against the plaintiffs. It was contended by counsel for the plaintiffs, that these costs should be added to their costs and be collectible against the defendants held liable. As I have already intimated, an argument was presented along these lines and I was impressed with the force of such argument, but in view of a considered judgment of the late Mr. Justice CLEMENT in the case of *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75, I consider that I am bound by such decision, particularly as it is directly upon the point now raised by counsel for the plaintiffs.

The order will then be in the form that was approved of in that action and there will be no recourse by the plaintiffs for the costs which the successful defendants may tax against them. I make myself clear on that point, so that parties may have their remedy if they consider I am wrong in the conclusion I have reached.

Judgment for plaintiffs in part.

SUNDERLAND v. SOLLOWAY, MILLS & CO., LTD.

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SUNDERLAND v. SOLLOWAY, MILLS & CO. LTD.

Stock exchange—Broker and client—Sale of shares for client—Instructions to broker—Onus of proof—Facts peculiarly within knowledge of one party—Damages.

The plaintiff had 1,000 shares in Advance Oils which he had purchased through the defendants. At 9.45 on the morning of February 28th, 1929, he gave the defendants an order to sell 500 shares of Advance Oils at $1.20 per share. At the noon hour, finding that the stock was not sold he cancelled the order, and at 1.45 p.m. gave an order to sell the 1,000 shares at $1.25 per share. As the sales clerk retired to execute the order the plaintiff turned and spoke to a friend as to this stock, and when the sales clerk returned to the counter in less than a minute after leaving it the plaintiff told him to cancel the order to sell, to which the clerk replied, "All right." The stock was sold at $1.35 per share and confirmation slips of the sale were sent to the plaintiff's address, but the address on the envelope had the name "E. Sutherland" instead of "E. Sunderland." The plaintiff denied he ever received these slips but the sales clerk (the same man that took the order) stated in evidence that a few days later Sunderland appeared in the office and produced the slips asking if they were meant for him, and the sales clerk immediately corrected the name on them and instructed the ledger keeper to correct the name in the ledger account. The monthly statements did not shew the sale for the plaintiff until after an entry of April 17th, and on receiving his April statement the plaintiff came to defendants' office with it on the 6th of May to enquire why his instructions to cancel the order to sell had not been carried out. By this time the market value of the stock had increased to $9.50 per share. On the trial the plaintiff's statement that he cancelled his instructions to sell and that he did not receive the confirmation slips was accepted. That the onus was on the defendants to shew that said cancellation was not in time to stop the sale and judgment was given for the plaintiff for the difference between the sum for which the stock was sold and its market value on the 6th of May, 1929, namely, between $1.35 and $9.50 per share.

Held, on appeal, affirming the decision of FISHER, J. (MACDONALD, J.A. dissenting), that as to the plaintiff's denial that he had received the confirmation slips the learned judge below on very contradictory evidence expressly found in his favour and it cannot be said that such findings are clearly wrong. The withdrawal order was made in the defendants' office and if they had any excuse for not obeying the instructions the onus was upon them to disclose it. The brokers made a succession of mistakes in this case and if they have been made to suffer it is because of their own negligence in not providing for proof of their innocence.

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Statement

APPEAL by defendants from the decision of FISHER, J. of the 5th of December, 1930, in an action for damages for failure of the defendants to carry out the terms of its employment as the plaintiff's broker in connection with the sale of 1,000 shares of Advance Oils, and alternatively damages for wrongful conversion of 1,000 shares of Advance Oils. In February, 1929, the plaintiff employed the defendant as his broker to purchase 1,000 shares of Advance Oils, Limited on margin and the defendants acknowledged that they held for the plaintiff the said 1,000 shares of Advance Oils, Limited. At about 9.45 on the morning of the 28th of February the plaintiff placed a verbal order in the defendants' office to sell 500 shares of Advance Oils at $1.20 and at about twelve o'clock, finding that the stock was not sold he cancelled the order and at about half-past one in the afternoon gave an order to sell the 1,000 shares at $1.25. The sales clerk, one Gregg, who received the order, left the plaintiff to execute it, by telephoning the order to the Exchange, and when he returned to the counter the plaintiff, who in the meantime had spoken to some friend about the stock, told Gregg to cancel the order, to which Gregg replied "all right" and he left to carry out the order. Less than a minute elapsed between the time when the order to sell was given and when Gregg was told to cancel the order. It is the practice to forward clients' confirmation slips advising of each sale, and the defendants produced carbon copies of confirmation slips advising E. Sutherland, 806 West 13th Ave. (instead of E. Sunderland, who was the plaintiff and lived at that address) of the sale of 1,000 shares of Advance Oils in two blocks of 500 shares each on February 28th at $1.35. Sunderland denied that he ever received the confirmation slips. Because of the error in the name a new account was opened in the name of E. Sutherland who was credited with the proceeds of the sale of 1,000 shares of Advance Oils. Gregg swore that before the 15th of March following Sunderland brought the confirmation slips (with the name Sutherland on them) into the office and on Gregg seeing them he changed the name and gave instructions to have the ledger account corrected, but through error or pressure of business at the time they were not adjusted until about the 18th of April.

Gregg did not remember receiving any instructions from Sunderland to cancel the order given on the 28th of February. Five months later this stock was up to $18 per share. Sunderland claimed that it was not until he received the April statement of his account that he did not appear to have any Advance Oils, and on going to the office of the defendant Company he found that his 1,000 shares of that stock had been sold on February 28th, and his order cancelling the order to sell had not been complied with. At this time the stock was at $9.50 per share on the market and judgment was given for the plaintiff for the difference between a sale of 1,000 shares at $1.35 per share and a sale at $9.50 per share.

Statement

The appeal was argued at Victoria on the 13th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellants: In this case the plaintiff gave an order to sell. He says he cancelled this order. He who asserts the affirmation the burden of proof lies on him: see Taylor on Evidence, 11th Ed., 273. Assuming the burden is on the defendant to prove a negative, we have amply met that burden in this case: see Taylor on Evidence, 11th Ed., 284-5. This is not particularly within our knowledge, it is on the records of the Stock Exchange, and just as available to them as it is to us. Sunderland says he did not get confirmation notices of the sale but he did get the notices in the name of Sutherland. Gregg's evidence shews that clearly as he brought the notices to defendants' offices. We submit the sale of the shares must have taken place before instructions were received on the floor of the Stock Exchange that the order was cancelled. The learned judge below gave him damages on the basis of market value of the stock on May 6th, 1929, but the plaintiff said it was a month later that he wanted to sell.

Argument

Locke, for respondent: We say the onus is on the defendants, but even if not the plaintiff has given sufficient evidence to shift the burden: see Taylor on Evidence, 11th Ed., Vol. I., 285, note (*h*). The facts are peculiarly within the knowledge of the defendants: see Best on Evidence, 12th Ed., 252; *Hawkins* v. *Pearse* (1903), 9 Com. Cas. 87. On burden of proof see *Dickson* v.

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Evans (1794), 6 Term Rep. 57; *Hibbs* v. *Ross* (1866), 35 L.J., Q.B. 193 at p. 196; *Ashton & Co.* v. *London and North-Western Railway* (1918), 87 L.J., K.B. 1128. On question of damages see *Hooper* v. *Herts* (1906), 1 Ch. 549; *Greening* v. *Wilkinson* (1825), 1 Car. & P. 625; Halsbury's Laws of England, Vol. 27, p. 910, sec. 1603.

Farris, replied.

Cur. adv. vult.

4th May, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The respondent owned 1,000 shares in Advance Oils, which had been bought through appellants. On the morning of February 28th, 1929, respondent instructed the appellants at their office to sell 500 of these shares and in the afternoon of the same day about 1 o'clock again called at appellants' office and learned that the sale had not been made. Shortly afterwards he instructed Gregg, appellants' manager or salesman to sell his whole number of shares, namely, 1,000 at the price of $1.20 or $1.25. This order appears to have been given at about 1.47 p.m. Gregg took these orders across to the order department. Respondent walked with him but stopped midway to speak to a friend and on Gregg's returning from the order department respondent says he stopped him and said he had changed his mind and withdrew his instructions to sell and Gregg said "all right." The practice appears to have been for Gregg to take the order to the order department so that the clerk there could communicate to the representative of the Company on the Stock Exchange the instructions they had received. The shares, however, were sold at $1.35 each; at what time does not appear. The Company professed to have sent notices of the sales but addressed them to "E. Sutherland" instead of "E. Sunderland" but to Sunderland's address. The respondent denies receipt of them or knowledge of them. In the monthly statement sent by appellants to respondent for February no mention is made of this sale. If the shares had been sold the statement would contain a reference thereto. That statement was received in March and would indicate that the shares had not been sold. It was not until the March statement was received in April that respondent was apprised of the sale. He

then went to the appellants' office to ascertain what had been done and was told that the stock had been sold on the 28th of February and had been entered in an account opened for Sutherland and therefore did not appear in respondent's monthly statement. Gregg on the other hand says that respondent did receive the sales notices mailed to Sutherland as aforesaid and brought them in to appellants' office whereupon Gregg instructed the bookkeeper to make the necessary adjustments. These adjustments were not made in the books of the Company until six weeks later, when credit for the proceeds of this sale was given to the respondent out of place in the account. The appellants' counsel contended that the withdrawal of notice of sale on February 28th came too late for communication to their representative on the Exchange. They claimed that the onus was upon the respondent to prove that the notice was in time; in other words, that it was an ineffective withdrawal of instructions. I think the onus was on the appellants to excuse this sale after the withdrawal of the instructions. The withdrawal was made in appellants' office—the proper place to make it—and if appellants had any excuse for not obeying the instructions they then received, the onus is upon them to disclose it. Moreover the evidence and the facts which would excuse appellants was within their own exclusive possession. The clerk in the order department upon receiving the order from Gregg to sell shares would communicate these instructions to appellants' representative on the Exchange and if he had made the communication before the withdrawal he ought immediately to have communicated the withdrawal to him and upon receiving the information as to the withdrawal the representative on the Exchange would not be justified in making the sale. Appellants, however, have not proven that the instructions to sell were communicated to the man on the Exchange or when, if at all, the withdrawal was communicated to him. They have not proven that the man on the Exchange sold before he received notice of the withdrawal. It was suggested that there might be a record in the Exchange of the time of the sale and of the notice of withdrawal, if any. It was suggested that the respondent could have obtained that record as easily as the appellants could and that therefore that evidence, if it existed, was not within the exclusive knowledge

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of the appellants. The appellants were members of the Exchange, the respondent was not, and, if any record was made, it would be made by or on the instructions of appellants' representative there. It is therefore apparent that the above submission is unsound.

Now the first mistake was made by the appellants in crediting the sale and the proceeds thereof to Sutherland and sending these sales slips addressed to him. The next mistake following that was the omission of reference to this alleged sale in the monthly statement for February. Appellants claim that the statement only covered the first 27 days of February and as the sale was made on the 28th that furnished a reason for the mistake in the statement; in other words, that the February statement was not a complete one although it professed to be such.

If Gregg's evidence be true that respondent brought in sales slips shewing that he received them and if Gregg had instructed, as he claimed, the bookkeeper to adjust the matter it seems a little remarkable that that adjustment should have been delayed for six weeks. It was suggested by counsel in the argument that the respondent was endeavouring to get a profit from the transaction, which he was not entitled to: in other words, that his action was fraudulent. It is just as reasonable to assume that the appellants for their own purposes treated the transaction in the way described above and withheld the sale of the shares until they had reached a high price which they afterwards attained and sold them then making for themselves the difference between that price and the price at which they now claim they sold them. I think it would be more reasonable, however, to assume that the clerks having made a mistake or a series of mistakes have endeavoured to cover them up. That assumption would be just as reasonable as that the respondent's action was fraudulent.

MACDONALD, C.J.B.C.

There is some uncertainty about the sales orders. The respondent's idea seems to be this, that he ordered 500 shares to be sold on a slip made out by Gregg at about 9 o'clock in the morning of the 28th and in the afternoon, finding that they had not been sold, he cancelled this and asked that a sales order should be made out for the whole 1,000. It does not appear to me that this affects the matter in the slightest degree except per-

haps the respondent's recollection of it. It is plain from the evidence already referred to that Gregg took instructions to the sales department to sell 1,000 shares and whether the orders to sell these shares were on two separate slips or not seems to me to be immaterial. Assuming that the respondent is in error there is no question about the fact that Gregg understood that he was instructed to sell the 1,000 shares in the afternoon after he had stated that the first 500 shares had not been sold. It is important that brokers acting as agents for others should take particular care as to their instructions, the time of the receipt of these instructions and the time the actual sale takes place, if such were the case. Their bookkeeping should be accurate. This constitutes the protection of the customer as well as the protection of the broker. In this case a succession of mistakes were made by the brokers, not only in respect of orders to sell and withdrawal of instructions but in their books and their notices, which have a direct bearing upon the proofs in connection with this litigation. I therefore think that if appellants have been made to suffer it is because of their own negligence in not providing for proof of their innocence and therefore that the appeal must be dismissed.

MACDONALD, C.J.B.C.

MARTIN, J.A.: Not without considerable doubt do I come to the conclusion reached by a majority of my learned brothers that this appeal should be dismissed because I am not satisfied with the evidence of the plaintiff as it appears upon the notes, and were I deciding the essential questions of fact upon those notes I should disbelieve, for example, the plaintiff's denial that he had received the confirmation slips of the sale. But the learned judge below has expressly found, on "very contradictory evidence," that important fact in his favour and also accepted, in substance, his account of the subsequent interviews with the defendants' clerks in charge of the matter, and therefore I cannot bring myself to say that such findings are clearly wrong, and so we would not be justified in disturbing them.

MARTIN, J.A.

On both sides more evidence could have been adduced to make the course of dealing in such transactions clearer, and even as to the time which it would be reasonable in the circumstances to allow for a cancellation of the order to sell, all that appears

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from Gregg's evidence (for the defendants) to whom the order is found to have been given, is that

> If the stock was active on the Exchange, it might be too late in half a minute, but if the stock was not active an hour might be all right; you might be able to cancel in half an hour.

But though this was the prime point in the case there is no evidence respecting any degree of "activity" at the time the order to cancel was given, though there is evidence that during the course of the whole day in question (28th February, 1929) the stock rose considerably in value, which is, obviously, not of real assistance on this exact point.

The case is an unusual and unsatisfactory one to decide, and my hesitation in reaching a conclusion has been added to by the reasons to the contrary which are so well expressed (if I may be permitted to say so) in the weighty judgment of my brother M. A. MACDONALD.

GALLIHER, J.A.

GALLIHER, J.A.: In approaching this matter I do so without consideration of the unfortunate position in which appellants find themselves in respect of stock transactions generally. Each transaction must stand or fall on its own merits and in that light I propose to examine this transaction. There is no allegation and no evidence of any conspiracy to defraud the public generally or the plaintiff in particular.

The learned judge below has found as a fact that there was a verbal cancellation order put in as to the 1,000 shares of Advance Oils upon which selling orders had been given during the day of February 28th, 1929. I am of the view that the two order slips to sell produced for 500 shares each, the one given at 9.45 a.m. and the other at 1.47 p.m., make up the 1,000 shares which the respondent says he ordered cancelled and not a cancellation of the morning order of 500 and a new verbal order to sell 1,000 in the afternoon, but be that as it may the learned judge has found there was a cancellation order given as to 1,000 shares in the afternoon and with that finding I do not think I can interfere.

There are then but two questions to determine. First, Was a sale of the 1,000 shares of Advance Oils effected on respondent's account on the 28th of February, 1929, and second, Was

such sale made after cancellation of the order or before such cancellation could with all due diligence have been effectively transmitted to the floor of the Stock Exchange where the stock was being traded in (of which trading and the method employed both parties were no doubt aware) and upon whom was the onus cast of establishing these facts. I think the burden cast upon the defendants under the first heading: of shewing the sale of the stock on respondent's account has been satisfied.

That confirmation slips were sent out to the respondent's address though by error addressed "E. Sutherland" instead of "E. Sunderland" and that readjustment was made in the respondent's ledger sheets although at a date some considerable time after the sale date and that respondent knew of this is I think established by the evidence. Moreover if, as I think the evidence establishes that a sale was made on respondent's account the interim error of addressing the confirmation slips to the wrong name though to the right address thus giving rise to respondent's account not shewing a credit balance until adjustment was made explained as it is in the evidence would not alter that fact unless there was evidence which there is not nor can it be implied that any fraud was being practised on the respondent. The respondent throughout his cross-examination kept repeating and seemed to be under the impression that because his account did not shew this sale for a time therefore no sale had been made and that would have considerable weight if no explanation was forthcoming but as I view it a satisfactory explanation is given in the evidence, though more delay than was necessary took place in making the adjustment.

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If I am right in this conclusion there is still the important point to decide, and which in my opinion really will decide this appeal, *viz.*, the second point I have outlined above as to onus of proof. This is not always easy of determination especially as where as often happens the onus shifts during the course of the trial.

It would seem to me that in the first instance it being admitted that the sales order for 1,000 shares was given that the onus would be on the respondent here to shew that there was a cancellation of that order which the learned trial judge finds was satisfied but there would I think also rest upon the respond-

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ent the burden of shewing when that order to cancel was given.

The respondent in his evidence fixes the time at about 1.10 in the afternoon but I think he is in error in that as the last sales slip for 500 shares the balance of the 1,000 shares bears on its face the notation that it was made out by the appellants' clerk at 1.47 p.m. and I think I am justified in concluding that the order to sell the full 1,000 shares was given at that time. The respondent then says when the order to sell the full shares was given he walked with the clerk towards the compartment where the order would be relayed to the appellants' broker on the floor of the Exchange, stopped a few paces from same to speak to a friend who turned out to be Sutherland in which name through error the sale entry in the appellants' books was first made, and by reason of some conversation he had with Sutherland he changed his mind about selling and within half a minute notified the clerk Gregg to cancel the order for sale and that Gregg agreed to do so and turned back to relay the cancellation order to their broker on the floor of the Exchange. Sutherland who was called as a witness by the respondent corroborates this though he does not fix any definite time at which it took place. The respondent having given the order to cancel the sale in the appellants' office the only place where it could be given by him, it then became incumbent on the appellants to transmit this order for cancellation to their broker on the floor of the Exchange and in my view the onus was then on the appellants to shew that such order was so transmitted and that the sale was made at a time prior to such cancellation order being received by the broker on the Exchange. This was, I think, peculiarly within the knowledge of the Exchange broker and he was not called and Gregg's evidence is of a negative character in that he says he would be careful to transmit as was his custom any cancellation order promptly but that he does not recollect any cancellation being requested.

GALLIHER, J.A.

It was suggested that it was equally open to the respondent to obtain evidence as to the time of sale, but I think that cannot be fairly said—he would have to do one of two things—either go into the enemy's camp and call the broker or get the evidence from the records of the Stock Exchange if indeed they would contain any record as to the time of this particular sale. There

is no evidence that anyone not a member of the Exchange would be granted permission to search the records and I would doubt very much if such privilege would be granted and if any such notation of time was made it would be at the instance of the appellants' broker within whose peculiar knowledge it rested.

In that respect it comes very near, if not altogether within, what was decided in the case of *Dixon* v. *Evans* (1794), 6 Term Rep. 57. That was an action by the trustee in bankruptcy upon a promissory note of the defendant payable to the bankrupt. The defendant gave notice of set-off that the bankrupt before and at the time of his bankruptcy was indebted to him to a greater amount upon certain cash notes issued by the bankrupt before his bankruptcy payable to bearer. It was there held that it was necessary to prove whether these notes were received by the defendant prior or subsequent to the bankruptcy and that the onus was upon the defendant to discharge that obligation as being peculiarly within his knowledge.

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In the case at Bar it seems to me it having been shewn that a cancellation order was given the appellants during the hours the Stock Exchange was operating on that day the onus was upon the appellants to shew the cancellation order was received too late to be effective in stopping the sale. Of this we have no evidence and the onus not being satisfied the plaintiff in the action is entitled to succeed.

To what extent is the next question? I have read the evidence and the learned judge's reasons and as I view it I cannot say the damages were assessed on a wrong principle and would not interfere with his conclusions in that respect.

I would dismiss the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: The learned trial judge found that respondent cancelled the instructions he gave appellants to sell 1,000 shares of Advance Oils Limited. With the evidence of two witnesses to support it we cannot interfere with that finding. As to other issues he found the oral evidence "not very convincing" and relied instead upon the documentary evidence. The shares in question, owned by respondent, were selling in Feb-

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ruary, 1929, at around $1 and five months later at $18. Appellant sold on respondent's instructions at $1.35 on February the 28th. Respondent, honestly or because of cupidity, asserts that it was sold unlawfully—that the order was cancelled—and the shares should have been available in June when market values were high. Later (before the writ was issued) the stock collapsed.

There is conflict as to the time and manner the shares were acquired. Respondent testified that in February, 1929, he was long 1,000 shares Advance and placed a verbal order to sell 500 in the morning at $1.20. Finding shortly after that it was not sold he cancelled that selling order, between twelve and one o'clock. He then placed a verbal order after one o'clock for the sale of 1,000 shares at $1.25. Appellants' clerk (Mr. Gregg) left him to execute it (presumably by telephoning the Exchange) and when he returned in about thirty seconds respondent, having apparently obtained advice from a friend, told Gregg to cancel it. Gregg said "all right" and "went away to cancel it." It may be noted from this statement and from the usual course of

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business as disclosed in the evidence that cancellation would not take place at the moment Gregg said "all right." Something further had to be done. Gregg had to go away and execute the order. I am convinced all parties knew that the order to cancel had to be communicated to the Exchange, to be effective, in the same way that it was necessary to communicate the order to sell.

The witness Gregg on the other hand, speaking largely from the records, tells a slightly different story and the difference may be important. He identified two sales slips for 500 shares Advance, dated February 28th, one marked 9.45 a.m. and the other 1.47 p.m. Both the sale slips under the caption "Order Completed" shew a sale at $1.35. It does not follow that the orders were "completed" by sale at the times specified in the slips. They were sold some time during the day. Gregg's statement on the subject of cancellation need not be considered in view of the finding of fact referred to. If, as he stated, however, an order to sell 500 shares was given in the morning (and I would accept that statement) it was placed several hours in advance of any order to cancel and 500 shares at least in all likelihood were sold before any order to cancel was given by

respondent. The market presumably was very active. Gregg states that, if active, it might be too late to cancel a half minute after placing a selling order but if not active an hour might suffice. I think, in interpreting the finding of fact referred to by the learned trial judge, that respondent "cancelled his instructions for the sale of the 1,000 shares of Advance" we need not assume that he meant to find that the whole 1,000 shares were available for sale in the afternoon. He may have accepted the view, borne out by the sales slips, that the order for the sale of the first 500 was given in the forenoon but believing that the onus was on appellants to shew that the cancellation order was not given in time concluded that this alleged burden was not discharged. In the opinion of the trial judge appellant failed to shew affirmatively that the morning as well as the afternoon sale could not have been stopped. He does not reject the documentary evidence: on the contrary turns to it to find "some satisfactory basis from which to start." The sales slips afford that "satisfactory basis." I would not accept therefore respondent's version as to the order of events.

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It was the practice to forward to clients confirmation slips advising of each sale. Appellants produced carbon copies of confirmation slips advising "E. Sutherland, 806 West 13th Ave." (instead of respondent "E. Sunderland" who lived at the same address) of the sale of a 1,000 shares of Advance in two blocks on February 28th, at $1.35. The originals should go to respondent or to "E. Sutherland" if such a person existed. I think this was an obvious error. They were meant for "E. Sunderland" the respondent. No one named "Sutherland" lived at that address. Respondent denied receipt and the trial judge stated that he was "not convinced that the original confirmation slips were received" by him. He is satisfied, however, that "a mistake was made in the office of the defendants" (appellants). I would incline to the view that they were received but, as I regard it, the decisive feature in the case is not affected thereby. All other statements sent out were received by respondent.

Because of this error a new account was opened in the name of "E. Sutherland" and he was credited with the proceeds of the sales, *viz.*, $1,329.70. Gregg told the clerk in the bookkeeping department—when respondent came in—to adjust the ledger

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account and transfer the items to respondent's name. This was not done until some weeks later (April). Gregg did not say that the change was made at that time. He merely stated that he gave the necessary instructions and the learned trial judge with deference is in error in saying that Gregg stated that "the corrections were put through in the month of March." Pressure of work or carelessness might prevent the actual entry until a later date.

However, accepting the finding that respondent might not have received the confirmation slips later knowledge disclosed to respondent the sale of his shares. Monthly statements were sent to him. He received one in March shewing his February account. These statements were not necessarily sent out on (or completed up to) the last day of each month. In the January statement the last date mentioned is January 29th and shews respondent long 1,000 shares Advance stock. The last date on the February statement is the 27th and again shews respondent long because the sale was not made until the 28th. The March statement (last entry being March 25th) should credit him with the proceeds of the sale but, as by the mistake referred to it was wrongly credited to the fictitious "E. Sutherland," it is consistently silent in respect to Advance. The April account, however, does not shew respondent long in this stock. It disappears from the monthly statement. It shews a balance brought forward of $3,679.75 on April 22nd. Turning to respondent's general ledger account we find the same balance on the same date. It also shews an entry out of its regular order (correction of the mistake referred to) of the sale of a 1,000 shares (in two blocks) of Advance on February 28th at $1.35 and the proceeds are included to make the balance of $3,679.75 referred to. The documentary evidence so perfectly fits appellants' case that if it furnishes "a satisfactory basis" we must conclude, not only that the statements as outlined by appellants' witnesses are correct but also the respondent knew at the latest when he received the April statement that his stock was sold. That of course only confirms the finding of the learned trial judge. I think he had knowledge at an earlier date. There was no reason why he should not receive the letter addressed to

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"E. Sutherland." When asked if he received any letters sent to his address under the name of "Sutherland" he said "I might have done."

The evidence of respondent's witness Glass might also be referred to. He had a conversation with respondent early in the summer of 1929. He doesn't know "the exact date" although he adds "possibly the end of May or the beginning of June." But the conversation discloses the date in a better way than his uncertain memory. Respondent asked him to look up his ledger account "and find out if a transaction had gone through recording a sale of 1,000 shares of Advance at $1.35 a share," shewing that he at least suspected that they had been sold. I think he was hopeful that because of the mistake referred to he would still have the benefit of the rapidly advancing prices. Glass told him "there was no record of any transaction of a sale of Advance." He said he "actually looked up his ledger sheet." Now that sheet shews a sale of Advance before April 22nd. The transposed entries from the "Sutherland account" were inserted following the entry of April 17th giving the correct dates of sales, *viz.*, February 28th. As Glass told respondent there was no record of such a sale he must have searched for it on or before April 17th and conversed with respondent before that date. If at a later date, and if he "actually looked up his ledger sheet" it could not escape his attention.

The foregoing is a summary of the facts. I outline them merely to remove any background of suspicion that there was any organized conspiracy on the part of appellants, involving as it would the co-operation of clerks, to injure the respondent or to profit at his expense. True that was not suggested in argument, unless inferentially, but in any event such a suggestion in my view would not be warranted.

The fate of this appeal depends upon the question of onus of proof. In his statement of claim respondent alleges in paragraph 4:

> In or about the same month, approximately the 28th day of February, A.D. 1929, the defendant [appellant] without instructions from the plaintiff [respondent] purported to sell the plaintiff's 1,000 shares of Advance Oils Limited at the then market price of One Dollar and Thirty-five cents

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($1.35), and did not at that time or for four months thereafter advise the plaintiff that it had so sold the plaintiff's stock.

And again in paragraph 6:

Alternatively, the plaintiff says that in or about the month of February, A.D. 1929, the defendant wrongfully converted the said 1,000 shares of Advance Oils Limited to its own use, whereby the plaintiff has suffered damages.

The allegations in paragraph 4 do not quite fit the facts. The real claim must be found in paragraph 6. It alleges that appellants "wrongfully converted the said 1,000 shares of Advance Oils Limited to its own use." This, as I view it, alleges that a conversion by sale took place after an effective cancellation or one that should be effective was made. Ordinarily in an action for conversion such an allegation would have to be established by the respondent. The true basis of the claim, once the order for sale was given, should be that appellants, as respondent's agents, wrongfully (either wilfully or through negligence) ignored the instructions to cancel or negligently failed to act promptly in making the cancellation effective. The *modus operandi* on receiving an order for sale from a client was to communicate it to the Stock Exchange and cancellation would be effected in the same way. A ministerial act had to be performed and if there was negligence in performing it—or failure to perform—appellants would be liable. Proof rests on the party who asserts. Proving a negative is more difficult and that burden is only imposed in special cases. The special case arises when "the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties." In such a case that party must prove it, "whether it be of an affirmative or a negative character": Taylor on Evidence, 11th Ed., 284. Whether that "peculiar knowledge" was known only to the appellants must be a question of fact. The trial judge apparently so found but on the evidence (or lack of it) we are equally free to form an opinion. The submission was, applying it to the facts as I find them, that if respondent established that an order for sale of 500 shares was given in the forenoon and another for the sale of 500 in the afternoon, followed by an order for the cancellation of both thirty seconds after the last sale order was given, a wrongful conversion was established unless appellants affirmatively proved that the sales were made before the cancellation

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order could be communicated to the Exchange. I reject the view that the cancellation was effected when appellants were told to cancel. That only amounted to instructions.

If the facts are of such a nature that only appellants could be cognizant of them the true rule I think is that very slight evidence (not no evidence at all save a mere statement of the facts) may be sufficient to shift the onus. In respect to the first 500 shares if any presumption is raised it should be (in an apparently active market) that they were sold before cancellation. Further as to facts peculiarly within the knowledge of appellants this should be observed. It is suggested that they could shew from records or otherwise that a sale was not made before the order to cancel was received or should have been received by the Exchange. To do so they would have to invade the offices of the Exchange over which they had no control and ascertain the necessary facts. These facts and sources of information were equally available to the respondent. I may transact business with another, as appellants did with the Exchange, but I should not be obliged to prove facts within the knowledge of that other. These would not be facts peculiarly within my own knowledge. It may be that the records of the Stock Exchange (the evidence is silent on the point) would shew the time at which sales were effected together with a notation identifying the shares. If so respondent could secure that evidence as readily as appellants. He could give evidence shewing the time when the order to cancel was given—that is within his own knowledge—and that fact (together with the records of the Exchange) if it did not conclusively prove an effective cancellation, or one that ought to be effective, it would at least enable a jury to say whether or not appellants were negligent in any way or wilfully disregarded the cancellation order. Respondent failed to establish either an effective cancellation or a wilful neglect to cancel although all the relevant facts were within his own knowledge or equally available to him. If on the other hand no records of any value in this inquiry were kept by the Stock Exchange the respondent should not profit by it, nor appellants suffer. In that event respondent would only be able to shew that certain knowledge was not available to either

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party, and the suggestion of the existence of facts peculiarly within the knowledge of appellants would fall to the ground.

The simple facts necessary to arrive at a conclusion (apart from the fact that appellants and the Stock Exchange are two different business entities) are not of such an intricate nature that only one familiar with the business of a broker could have knowledge of them. These facts are two in number (a) exact time of sale and (b) time of cancellation, with deductions to be drawn therefrom. I cannot conceive that these facts are peculiarly associated with the conduct of a business and necessarily known only to one of the parties. The second fact is within respondent's knowledge: the first within the knowledge of a third party. This is an ordinary action for damages in tort. If for any reason not apparent to me, a case arises where there is a shifting of onus, a *prima facie* case of negligence should at least first be established. Even in respect to the second 500 shares that *prima facie* case was hardly made out. The order to sell was given; the order to cancel thirty seconds later and the only evidence we have on the point is that it might be too late to cancel. True if a cancellation order was given, as the trial judge found, Gregg would write it out but no assistance would be obtained from the form of the writing. The important feature was the time.

MACDONALD, J.A.

It was suggested, I think, that appellants might offer proof of the fact of telephoning to the Exchange to cancel the selling order. That was done when respondent was present and he has that evidence. If, as also suggested, it might have been sent by messenger or by letter discovery was available. If this rule as to "peculiar knowledge" is to be applied an indolent plaintiff would have the benefit of it in scores of cases where it was not intended to be applied. In the case at Bar respondent did not attempt to ascertain or to establish the rules of the Stock Exchange. In attempting to place the burden on appellants he fails in two essentials (a) in failing to shew that he had no means of ascertaining the necessary facts to found a case, and (b) that these essential facts were peculiarly within the knowledge of the appellants. If unknown to both respondent fails for lack of proof.

In *Hibbs* v. *Ross* (1866), 35 L.J., Q.B. 193 to which we were referred it was shewn by proof of the register that defendant was described as owner of the ship. That was enough to justify the jury in finding that the defendant employed the negligent servant, *viz.*, a shipkeeper. The register was evidence of title though not conclusive. It was enough to compel the defendant to shew the contrary. Further, negligence (whoever had charge of the ship) was established. Blackburn, J. was of opinion (p. 196) that the register was evidence which would have justified the jury in finding that in fact the defendant employed the shipkeeper. The defendant, if he so elected, was given the right to have a new trial to rebut that presumption. From the facts I do not think it assists us in this inquiry. In *Ashton & Co.* v. *London and North-Western Railway* (1918), 87 L.J., K.B. 1128 also relied on, the plaintiff proved that the goods did not arrive at their destination. They were to be carried partly by land and partly by sea. If the loss occurred during transit by land defendant was protected by the Carriers Act, 1830, Sec. 1; not so if lost while at sea. The cause of action was breach of contract by the non-delivery of the goods that the defendant contracted to deliver. That cause of action was established by evidence. Apart from statute defendants were liable as common carriers. The burden, therefore, was on them to shew that they had the benefit of the Act: in other words that the goods were not lost in transit by sea. It was like an exception contained in a bill of lading. No question of facts peculiarly within the knowledge of the defendants really arose, at least it was not the *ratio decidendi* in the case. I would allow the appeal.

MACDONALD, J.A.

Appeal dismissed, Macdonald, J.A. dissenting.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondent: *E. R. Sugarman.*

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Criminal law — Procuring — Evidence—Corroboration—Hearsay statement tending to influence the jury—New trial—Criminal Code, Secs. 216 (i) and 1002.

On a charge of procuring, a girl gave evidence of the accused taking her in a motor-car from Vancouver to his laundry in New Westminster where, after leaving her in a bedroom upstairs, he sent a number of Chinamen to her room where they had sexual intercourse with her, he collecting the money that the Chinamen were charged in each case of which by arrangement he was to retain one-third. At the end of her examination she was asked by the Court whether she knew the accused before, to which she replied "I have had him pointed out to me, as someone who took girls to where they could make money." The accused was convicted.

Held, on appeal (MCPHILLIPS, J.A. dissenting), that the answer to the learned judge's question was an improper one, creating a reasonable apprehension of prejudice or injustice to the accused. It should have been struck out with a warning to the jury to pay no attention to it and as neither of these safeguards was taken there should be a new trial.

APPEAL by accused from his conviction by MORRISON, C.J.S.C. and a jury at the New Westminster assizes on the 2nd of December, 1930, on a charge of procuring under section 216 (*i*) of the Criminal Code. The evidence disclosed that the accused, a Chinaman, met a woman in Vancouver and drove her in an automobile to his laundry premises in New Westminster, where he put her in a room upstairs and during the two hours following sent fourteen Chinamen to the room, each of them having had sexual intercourse with her, he collecting $2 from each of the men. The girl then came downstairs and they drove away in the car, but after they had gone a short distance a police car overtook them and they were arrested. After the girl had been cross-examined at the trial the learned judge asked her:

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> Did you know this man [the accused] before? I have had him pointed out to me, as someone who took girls to where they could make money.

The accused was found guilty by a jury and was sentenced to three years in the penitentiary.

The appeal was argued at Victoria on the 21st of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Nicholson, for appellant: The evidence is largely that of the girl. She asked the accused if he could take her to a place where she could make money. Corroboration of her evidence is required and there was no corroboration: see *Rex* v. *Baskerville* (1916), 2 K.B. 658 at p. 667; *Rex* v. *Ellerton* (1927), 49 Can. C.C. 94 at p. 95; *Hubin* v. *Regem* (1927), S.C.R. 442; *Rex* v. *McClain* (1915), 7 W.W.R. 1134; *Gouin* v. *Regem* (1926), S.C.R. 539; *Stein* v. *Regem* (1928), S.C.R. 553. The difference between subsections (*a*) and (*i*) of section 216 was not commented on before the jury: see *Rex* v. *Boak* (1925), 36 B.C. 190 at p. 191; *Rex* v. *Truptchuk* (1923), 3 W.W.R. 86; *Rex* v. *Deal* (1923), 32 B.C. 279. The jury was not sufficiently instructed on giving the prisoner the benefit of reasonable doubt accompanied by an explanation of what is "reasonable doubt": see *Rex* v. *Anderson* (1914), 7 Alta. L.R. 102 at p. 114; *Clark* v. *Regem* (1921), 61 S.C.R. 608 at p. 627; *Rex* v. *Payette* (1925), 35 B.C. 81; *Rex* v. *Averill* (1927), 2 W.W.R. 310. The judge asked the girl a question and her answer was hearsay of a nature that was bound to influence the jury: see *Rex* v. *Stonehouse and Pasquale* (1927), 39 B.C. 279. A Crown witness cannot attack the character of the accused.

Argument

McQuarrie, K.C., for the Crown: The learned judge should have warned the jury to pay no attention to the girl's answer to his question but my submission is there was ample evidence upon which the accused should be convicted and there was no miscarriage: see Tremeear's Criminal Code, 4th Ed., 1382; *De Bortoli* v. *Regem* (1927), S.C.R. 454. The issues were fairly put to the jury.

MACDONALD, C.J.B.C.: I think there should be a new trial. There is one ground upon which there can be no doubt at all about what the result ought to be, and that is the last question and answer of the complainant. That was something that ought

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not to have been brought out; but if it was blurted out, as it was said, by the witness, then it ought to have been immediately withdrawn, or withdrawn in the learned judge's address to the jury, from their consideration; he should have told them they must dismiss that from their mind and pay no attention to it. On this ground it seems to me absolutely necessary that there should be a new trial.

As to the other ground that has been urged by Mr. *Nicholson*, the one as to the learned judge's direction, there seems to be a contention, at all events between counsel, as to what the law is upon that; the *Baskerville* case is held up on one side, and the decisions of the Supreme Court of Canada on the other. Whether they are correct or not will be a matter for the Court to decide after consideration of those cases. And if this case depended wholly upon that question I would have to reserve the matter for further consideration before I should decide as to what the Supreme Court decides. But as that becomes unnecessary in view of the fact that the learned judge was wrong in not withdrawing the last answer from the jury, there must be a new trial, and nothing need be said about the other question.

MACDONALD, C.J.B.C.

MARTIN, J.A.: I agree that there must be a new trial upon that one question alone, therefore it becomes unnecessary to express an opinion on the other.

On this main point as to the most unfortunate statement that was made in answer to the learned judge, I think it was so improper that it would have been a proper and wise precaution, immediately that answer was made, to the Court itself—that is the special seriousness of it—that the Court having got that answer, and not counsel, even though inadvertently, the precaution should have been taken to see that it was immediately withdrawn from the jury, as there was an obvious danger, in a charge of this kind, as my brother has expressed, or at least a reasonable apprehension, of prejudice or injustice to the accused which should have been best removed by striking out the answer then and there; and if it was thought necessary, in addition to that, warning the jury to pay no attention to it. But as neither of

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these safeguards was taken, I see no escape from ordering a new trial.

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GALLIHER, J.A.: I agree.

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MCPHILLIPS, J.A.: I would dismiss the appeal upon all the grounds taken. The case was one which was decided conclusively enough, in this sense, that the jury had the whole question put to them; and I consider that the charge to the jury was full and complete. It is an erroneous idea to consider that hearsay, or secondary evidence, is never admissible, and it is only necessary to turn to the history of the matter to find that that is not so. And in this particular case, especially in view of the fact that the learned trial judge asked the question, a question relevant to the matter under consideration, and for submission to the jury. In passing I would refer to Phipson on Evidence, 7th Ed., 54 (other authorities could be referred to):

> Acts, declarations, and incidents which constitute, or accompany and explain, the fact or transaction in issue, are admissible, for or against either party, as forming parts of the *res gestæ*.

Here is a case where the accused is, according to this answer, known to act as a procurer, and the witness was perfectly entitled, to my mind, to answer that question put by the learned judge in the manner in which she did. He was a known personage engaged in this particularly vicious trade, and one of the most terrible things that I ever heard of happened, the woman is brought by the accused to this laundry, and fourteen men, one after the other, have sexual intercourse with her, and save in two instances the accused pockets the illicit gains. Suppose a witness were asked to explain how it came about that he spoke to a lawyer, a doctor, a civil engineer, or architect, would not the natural answer be, Well, I had heard that he was a lawyer, I heard he was a doctor, I heard he was a civil engineer, I heard he was an architect? It was a natural answer, and germane to the subject-matter of the trial. It was of the *res gestæ*. And do we find that this answer is in any way in collision with the evidence adduced and placed before the jury? No, it is in conformity with it. The accused was proved to be a

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procurer. The witness was searching for a man engaged in that particular class of iniquity, and the iniquitous happenings took place, the criminal acts induced by the accused. I consider that the trial was fairly had, and I cannot persuade myself that there was a mistrial, or that anything occurred at the trial which prejudiced the accused, and would warrant a new trial being directed. I am of the contrary opinion. Corroboration was complete.

Therefore I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree that there should be a new trial.

New trial ordered, McPhillips, J.A. dissenting.

REX v. MARINO AND YIPP.

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REX v. MARINO AND YIPP

Criminal law—Distribution of drugs—Two sales to different persons—One of morphine, the other cocaine—Continuous offence—Can. Stats. 1929, Cap. 49, Sec. 4 (f).

S. and B. under instructions from the police made overtures to the accused Marino with a view to arranging a purchase of drugs from him. After some negotiations, Marino received money from S. for the purchase of morphine and from information given S. by Marino, S. and B. went to a rooming-house where S. found a parcel of morphine under a bath in a bathroom, the parcel having been placed there by the accused Yipp under instructions over the telephone from Marino. Two days later S. and B. again interviewed Marino, when B. paid Marino a sum of money for cocaine, being instructed by Marino as on the previous occasion where they were to find the drug. S. and B. went to the same place as on the former sale, where they found a parcel of cocaine under the bath that had been placed there by Yipp. Marino and Yipp were found guilty on a charge that they "unlawfully did distribute a drug, to wit morphine and cocaine."

Held, on appeal, affirming the conviction by MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that in the circumstances of this case the sales of drugs as disclosed by the evidence do not constitute separate and distinct transactions and the indictment was properly framed embodying the offence of distribution within subsection (*f*) of section 4 of The Opium and Narcotic Drug Act.

[Affirmed by Supreme Court of Canada.]

APPEAL by accused from their convictions by MORRISON, C.J.S.C. and a jury at Vancouver on the 7th of November, 1930, on a charge of unlawfully distributing drugs, to wit, morphine and cocaine between the 4th and 8th days of October, 1930. On the morning of October 5th, 1930, one Shluker, a drug addict was seized by the police in Vancouver and a packet of morphine was found in his pocket, and he was taken to police quarters. Shortly after, through instructions from the police, he called up the accused Marino and arranged to meet him. He and a detective, one Bordeau, met the accused and proposed buying drugs from him. Later in the evening Shluker and Bordeau went to Marino's house and Shluker went to the door that was opened by the accused's housekeeper, to whom Shluker paid certain bills (the numbers on the bills being taken) and then he and Bordeau went to the Fulton rooms (on Hastings

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Street) and going upstairs to a bathroom Shluker found a parcel of morphine under the bath. On the 7th of October following the same men again met Marino, when Bordeau paid him $90 in bills (the numbers on the bills being taken) and Marino told them they would find the drugs in the same place. They then went to the Fulton rooms and Bordeau found a parcel of cocaine under the same bath. Shortly after Marino was arrested and some of the money given for both purchases was found upon him. Another detective who was concealed in the Fulton rooms saw the accused Yipp put the drugs under the bath on both occasions shortly before they were found by Shluker and Bordeau. There was evidence of Marino communicating with Yipp by telephone shortly after the money was paid on both occasions. There was but one count in the indictment, for distribution, and the contention on behalf of the accused was that the count was bad because it relates to more than one transaction. Both accused were sentenced to five years' imprisonment with ten lashes and a fine of $500, and in default three months.

The appeal was argued at Victoria on the 19th, 20th and 21st of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Nicholson, for appellants: There was no evidence to justify the conviction. The charge was distributing morphine and cocaine and no transaction was shewn on the trial involving distribution of morphine and cocaine. Four transactions were introduced on the trial. Of these three involved distribution of morphine to Shluker and one involved distribution of cocaine to Bordeau. There was no transaction involving both drugs. Section 853 (3) of the Code states that every count shall apply only to one transaction.

Maitland, K.C., for the Crown: The word "drugs" in the count includes morphine and cocaine.

O'Brian, K.C., on the same side: Shluker and Bordeau were together on both transactions and they are cumulative acts forming one offence only: see *Rex* v. *Michaud* (1909), 17 Can. C.C. 86; *Rex* v. *Weinfield* (1919), 31 Can. C.C. 163 at p. 171; *Rex* v. *Shea* (1909), 14 Can. C.C. 319. The case of *Rex* v.

Quinn (1905), 10 Can. C.C. 412 at p. 423 appears to be against us. See also *Rex* v. *Shea's Winnipeg Brewery* (1927), 48 Can. C.C. 322; *Rex* v. *Chow Ben* (1925), 45 Can. C.C. 152; *Rex* v. *Bond* (1906), 2 K.B. 389 at p. 395; *Rex* v. *Kelly* (1916), 27 Can. C.C. 94 and 140; 54 S.C.R. 220; *Rex* v. *Burnby* (1901), 20 Cox, C.C. 25; *Rex* v. *Thompson* (1913), 9 Cr. App. R. 252.

Argument

Nicholson, in reply: The word "distribute" means "dispense." There are two distinct offences in the one count: see *Rex* v. *Louie Hong* (1920), 33 Can. C.C. 153; *Rex* v. *McManus* (1918), 30 Can. C.C. 122. You should not use the cumulative effect: see *Rex* v. *Montemurro* (1924), 2 W.W.R. 250; *Rex* v. *Iman Din* (1910), 15 B.C. 476.

MACDONALD, C.J.B.C.: I would allow the appeal. I think there were clearly two separate transactions here in drugs, one a sale to Shluker on the 5th of October, and one between that and the 7th when there was a second offence, of a sale to Bordeau. There were two separate and distinct transactions. I am not dwelling upon the fact that the charge says that the accused had distributed morphine and cocaine; I am not drawing any distinction; if there had been morphine in both cases it would be the same, as far as I am concerned. But there were two separate transactions, a sale on one day to one man and a sale on another day to another man. There was distribution on these two occasions. I have always understood that the law is that where there are separate and distinct transactions, unless they can be said to be continuing transactions, which I think cannot be said in this case, then there must be distinct counts, if both are to be charged; they cannot be included in one count. It would be just as reasonable to say that a man who is accused of stealing from Smith today and from Jones tomorrow, should be charged with stealing from Smith and Jones. The word distribution does not seem to me to make any difference. What is the difference between stealing from a man and distributing opium to him? If you may steal from Shluker today, and steal from Bordeau two days later, they are two separate offences; I think that is clear enough. It does not seem to be disputed. What is the difference between that and distributing? You

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distribute to one today, and you distribute to the other two days later; I think it would be a misuse of language to call that anything else than separate offences.

I think therefore the indictment should have been an indictment with two counts, one for each offence. The ordinary practice in criminal cases of this kind has been departed from, and it is sought to combine the two offences in one, which cannot be done. Therefore I would allow the appeal, and order a new trial.

MARTIN, J.A.: With all due respect to contrary opinion, I have no doubt about the propriety of the conviction in this case and that the indictment is properly, having regard to the circumstances, framed, and embodies the offence of distribution under subsection (*f*) of the statute, and that the charge is not a distinct and separate one, but is in respect to its reference to morphine and cocaine properly conjunctive and includes "any drug." The offence of distribution may best be established by evidence of distinct and separate acts, as it has been herein, by the proof of distribution in the separate instances on the specified dates. No miscarriage of justice has occurred, and no prejudice has resulted to the accused. The question to my mind presents no difficulty—it is an old question reframed in a different way, which has never been decided contrary to this view. The appeal should be dismissed upon the ground, also, that "no miscarriage of justice has actually" occurred.

MARTIN, J.A.

I hope to find time to amplify these reasons by a written judgment at the first opportunity, if some relief from the present congestion of business comes.

GALLIHER, J.A.: I agree with my brother MARTIN. I have expressed my views pretty directly during the argument, and I still adhere to them. I might add just this, as it is borne out in the evidence, I am convinced that these sales or distributions are to a ring of drug distributors, all mixed in together in this sort of transaction. But, apart from that I still would say that the accused have been properly tried, under one count, and no prejudice has been occasioned.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I also agree that the appeal should be dismissed. I think that the gravamen of the crime here is dis-

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tribution. Of course it involves others in this sense, one person or more receives a narcotic drug. All the Crown is called upon to prove is that there was distribution. That there was distribution to A, B and C, or distribution to A alone, is immaterial in the matter, quite immaterial. I do not see the analogy between theft, say, and this crime. In the case of theft there is the appropriation of someone else's property and the taking of it by the thief. Here it does not involve any question of that kind at all. The ownership has to be established. And here no question of that kind arises at all. And, further, I take the view, as submitted by counsel for the Crown, that this was all one distribution, and really to the same person; it finally was to reach one person; and the evidence I think shews clearly that connection. It was a distribution to the same people, so to speak: no doubt an organization was getting these drugs. I think that is clear as a fact. And I think it would only be frittering away the statute to construe it as has been argued, with all deference to Mr. *Nicholson,* who has ably delivered his argument. In carrying out the public policy of the country we have to adopt the ostensible meaning of the statute as necessity requires, so long as no prejudice ensues to the accused and no violence is done to the language of the statute. In all cases we have to decide as to whether or no anything took place at the trial which has in its effect prejudiced the prisoner. I cannot see that anything was done at the trial which prejudiced the prisoner. The trial was complete; the case was proved, as I consider, within the language of the statute. I think the cases cited by Mr. *O'Brian,* and especially the judgment of Chief Justice Harvey in the Alberta Court of Appeal, is conclusive in the matter. I would therefore dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I do not think these were separate and distinct transactions; the evidence as a whole and particularly at page 36 points to that conclusion. With that view of the facts legal difficulties, if any, disappear.

MACDONALD, J.A.

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

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June 2.

JURE v. VANCOUVER HARBOUR COMMISSIONERS.

Negligence—Damages—Road allowance—Right of way across railway tracks—Trespasser—No breach of duty or cause of action—R.S.C. 1927, Cap. 170, Secs. 308 and 311—B.C. Stats. 1925, Cap. 8.

JURE v. VANCOUVER HARBOUR COMMISSIONERS

At the north end of Heatley Avenue in the City of Vancouver, a plank roadway about 36 feet wide continues north across the C.P.R. tracks to the waterfront, there being a beaten footpath about three feet wide immediately to the east of the planks used by pedestrians when the planks are occupied by vehicles. At about eight o'clock in the evening of May 26th, 1930, the plaintiff crossed on the planks to the waterfront. On his return and shortly after reaching the plank roadway he turned on to the beaten footpath on the east side, and after continuing along this path about half way across the right of way he strayed slightly easterly until he came to a switch which was about 13 feet east of the planks. As a C.P.R. train going easterly was then passing on the track beyond him, he stopped by the switch and started lighting a cigarette, when he was struck by a box-car backing up from the east, an engine of the defendants at the time being engaged in coupling this and other cars together as it backed westerly. A special jury found it had not been proved that the plaintiff was a trespasser, that the defendants were negligent, also that the plaintiff was guilty of contributory negligence and that each should be responsible for half the damages, for which judgment was entered.

Held, on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the defendants occupied the place in question with the approval of the Railway Board and were rightfully in occupation. The plaintiff was off the beaten track and had no right to be off the roadway. He was in the position of a trespasser to whom the defendants owed no duty except to refrain from wilfully injuring him and the action should therefore be dismissed.

APPEAL by defendants from the decision of MURPHY, J. and the verdict of a jury on the 17th of December, 1930, in an action for damages for injuries to the plaintiff, owing to the alleged negligence of the servants of the defendants. Where the north end of Heatley Avenue in the city of Vancouver reaches the C.P.R. tracks a plank roadway 36 feet wide continues northerly across the tracks of the C.P.R. and of the defendants to the Ballantyne Pier. There was a foot pathway that was hardened down by constant usage immediately to the east of the plank roadway about three feet wide, to which pedestrians going across

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the tracks would resort when the plank roadway was occupied by vehicles. At about eight o'clock in the evening of the 26th of May, 1930, the plaintiff went northerly on Heatley Avenue and crossed the tracks on the plank roadway to a pier on the north side, looking for a boat on which he hoped to get a job. Finding the boat had left he came back on to the plank roadway but veered off to his left on to the footpath aforementioned, and after continuing along the path a short distance he again veered to his left and came to a switch which was about thirteen feet east of the plank roadway. He stopped there waiting for a C.P.R. train to go past easterly on one of the tracks in front of him, and while lighting a cigarette he was struck by a box-car which was being shunted back with thirteen other cars from the east by an engine of the defendants. He was knocked down and the car ran over one of his legs. The jury found it was not proved to its satisfaction that the plaintiff was a trespasser, that the defendants were negligent and that the plaintiff should have taken more precaution considering the dangerous environment. They assessed the damages at $17,247.96, half of which should be paid by the defendants.

Statement

The appeal was argued at Vancouver on the 24th of March, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Burns, K.C., for appellants: The whole question on this appeal is whether the plaintiff was a trespasser. The jury said they were not satisfied that he was a trespasser but even the plaintiff's evidence shews he was not on the roadway as he was found at least ten feet from the plank roadway and the beaten foot-walk to the east of the planks is only about three feet wide. Any person getting east of the foot-walk is off the roadway and therefore a trespasser. A trespasser cannot recover in this case.

Argument

C. L. McAlpine, for respondent: We submit we were on the highway as the highway there is not confined to the plank roadway and the beaten path at the side of it: see *Canadian Pacific Railway* v. *Toronto Corporation and Grand Trunk Railway of Canada* (1911), A.C. 461 at p. 477. As to what is a highway is for the jury: see *Grand Trunk Railway of Canada* v. *Barnett*, *ib.* 361 at p. 370. It is a question of fact: see *Township of*

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Gloucester v. *Canada Atlantic R.W. Co.* (1902), 1 Can. Ry. Cas. 327 at p. 331. A trespasser is entitled to recover in this case: *Grand Trunk Railway Co.* v. *McSween* (1912), 2 D.L.R. 874. As to burden of proof see Salmond on Torts, 7th Ed., 469; Odgers on Pleading, 10th Ed., 308; Bullen & Leake's Precedents of Pleadings, 7th Ed., 314. On the question of a view see *Clarke* v. *Edmonton* (1928), 1 W.W.R. 553 at p. 564.

Burns, replied.

Cur. adv. vult.

2nd June, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The evidence does not disclose the ownership of the land at the place of accident. Did the injury occur on public property or on property owned by or in the occupation of the defendants? The defendants' railway was occupying the place in question with the approval of the Railway Board. They were, therefore, rightfully in occupation. The evidence fails to disclose that the plaintiff was rightfully at the place where he was injured. He was off the beaten track, the plank roadway, and it was not shewn that he had any rights off that roadway. He was, therefore, in the position of a trespasser to whom the defendants owed no duty, except to refrain from wilfully injuring him or what would amount thereto.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: After a careful consideration of this case, in which the unfortunate plaintiff has sustained severe injuries, I am unable to see any other reasonable conclusion, taking the evidence given on his behalf as substantially accurate, than that, on his own showing, he must be regarded as a trespasser, and therefore the defendants have not, in the circumstances before us, been guilty of any breach of duty towards him, and so the appeal should be allowed and the action dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: The appeal should, in my opinion, be allowed and on the short ground that the only reasonable conclusion is that under the circumstances disclosed in the evidence the unfortunate plaintiff was a trespasser.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the judgment

entered in conformity with the verdict of a special jury by Mr. Justice MURPHY. The cause of action was that of negligence in the operation of railway cars reversely at a level crossing in the City of Vancouver at Heatley Avenue near to the waterfront without compliance with section 310 of the Railway Act (Cap. 170, R.S.C. 1927). The crossing was not protected by gates and shunting was taking place without having a person on that part of the train which was then foremost to warn persons of the moving train. The plaintiff was struck down and suffered severe personal injuries resulting in the loss of his left leg. The contention of the appellants was that the plaintiff (respondent) was a trespasser and that there was no liability. The evidence in my opinion was sufficiently complete and well entitled the jury to find that the plaintiff was not a trespasser but was upon a well-defined way in common use by the public and a view was had by the learned trial judge and jury, of the point of the accident—it being an interswitching point at surface level—that is, the accident occurred at a level crossing. The jury found that the plaintiff was guilty of contributory negligence—finding as well negligence against the defendants (appellants)— finding that the plaintiff suffered damages to the amount of $17,247.96 and that the defendants were liable in damages for $8,623.98 being 50 per cent. of such sum and judgment was duly entered for the plaintiff for $8,623.98. The learned trial judge charged the jury both as to the law and facts in conformity with section 60 of the Supreme Court Act, R.S.B.C. 1924, Cap. 51, which reads as follows:

MCPHILLIPS, J.A.

60. Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to the issues; and the said right may be enforced by appeal, as provided by the Court of Appeal Act, this Act, or Rules of Court, without any exception having been taken at the trial; but in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the Court.

The jury found that the defendants had not proved to its satisfaction that the plaintiff had trespassed and that the boy was struck opposite the switch at the extreme west end of the

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switching tongue and that the plaintiff should have taken more precaution considering the dangerous environment. When it is remembered that there was a view in this case and that the accident took place at the extreme west end of the switching tongue—it is clearly found by the jury that the accident was upon the level crossing at Heatley Avenue—a portion of the crossing apparently was planked but as motor-cars took up the full width of the planked way pedestrians it seems would not always walk upon the planked way there being a well defined beaten pathway to the east side thereof and it was to the east side of the planked way that the plaintiff was struck. The learned trial judge in his charge to the jury said (and no exception was taken to this):

> First, you will ask yourselves: "Is this man a trespasser or not?" or rather "Has it been proven that the plaintiff is a trespasser?" If you answer that "Yes," then the balance of what I have to say to you does not apply. If you answer it: "No," then you are not troubled with the question of the defendants' negligence because I tell you on the case as presented here that negligence is admitted, or proven, at any rate; it is not formally admitted.

MCPHILLIPS, J.A.

I do not find it necessary to canvass the evidence upon the question of negligence as it cannot be disputed that there was negligence if the plaintiff was entitled to be where he was, that is, upon a level crossing. I would refer to another portion of the charge which reads as follows (and again no objection was taken):

> I particularly requested you to look at that cinder path in relation to its running from the wharf to Heatley Avenue. My reason for doing that is that there being no clear line of demarcation as to the easterly limit of the pathway, you gentlemen have to decide the question whether the plaintiff was on the pathway or not, and therefore, whether he was a trespasser or not, by asking yourselves this question: Would a reasonably careful man, having regard to all the surrounding circumstances at the time of the accident, regard the spot at which plaintiff was injured as being a part of the path-way leading from the wharf to Heatley Avenue, over which he would be entitled to walk in going from the wharf to Heatley Avenue? The onus is on the defendant to have you answer that question: "No." If you do answer it "No" then the plaintiff is a trespasser. And possibly I had better read to you again what the duty of the railway company would be in such circumstances. The railway company is not entitled unnecessarily and knowingly to increase the risk of the plaintiff, being a trespasser, by deliberately placing unexpected dangers in his way. But they are not, and it is my duty to instruct you here, that they are not liable if the plaintiff is shewn to be a trespasser, for the negligence of their

servants, for the negligence of the brakeman, for instance, if you think there was any such negligence. Always remember that I am now dealing with the situation where you find the plaintiff to have been a trespasser. Conceivably, if the brakeman had seen him I might have had something else to say to you even if he were a trespasser. But there is no evidence whatever as to his having seen him.

If you can answer that question I have read to you: "Yes," then the plaintiff is entitled to recover, because there is no controversy here that this is a level crossing. I need not trouble you with telling you of the provisions of the Railway Act, one of them, for instance, is that a company backing a train over a level crossing must have a man posted on the end of the train, and it must have a tail light and must do several other things which admittedly were not done here. So that if this man was on the highway, then the defendant was guilty of negligence and the plaintiff would be entitled to recover damages, subject to what I will have to say to you in a moment with regard to contributory negligence.

But remember that before that situation arises, you have to determine the question of whether he was a trespasser or not. If he was not a trespasser then he was, you must find, properly at the spot where he was injured in walking from the wharf to Heatley Avenue.

But even if you find that he is not a trespasser, and if you find that the defendant company was guilty of negligence, whilst that entitles the plaintiff to recover, there is another branch of the law which you must consider in determining the amount of damages that you would award to the plaintiff. If the plaintiff has been guilty of what lawyers call contributory negligence, then the damages have to be reduced.

MCPHILLIPS, J.A.

In this connection I would refer to *The Canadian Pacific Railway Company* v. *Boisseau* (1902), 2 Can. Ry. Cas. 335, at p. 337, a judgment of the Supreme Court of Canada:

This appeal fails. The question of negligence was very properly left to the jury. There was *prima facie* negligence on the part of the company in omitting to have a light on the rear end of the train, and in this it failed in its duty. It is true that there has been a finding which might lead to the inference that there was a contributory negligence on the part of the deceased, but the jury have also found that there was neglect of duty on the part of the company, and according to the law of the Province of Quebec, the plaintiff is entitled to recover, the question of contributory negligence in that Province merely affecting the assessment of damages, which are mitigated in such cases.

I adopt in its entirety the opinion expressed in the Court below by Chief Justice Lacoste, and am of opinion that this appeal should be dismissed with costs.

In principle the law in British Columbia is now the same as that of Quebec by reason of the Contributory Negligence Act, B.C. Stats. 1925, Cap. 8. The pertinent sections are 2 and 3 and they read as follows:

2. Where by the fault of two or more persons damage or loss is caused

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to one or more of them, the liability to make good the damage or loss shall be in proportion to the degree in which each person was at fault.

Provided that:—

(*a.*) If, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and

(*b.*) Nothing in this section shall operate so as to render any person liable for any loss or damage to which his fault has not contributed.

3. In actions tried with a jury the amount of damage, the fault (if any), and the degrees of fault shall be questions of fact for the jury.

It is somewhat interesting, in view of the facts of this case, to note what their Lordships of the Privy Council said in *Canadian Pacific Railway* v. *Toronto Corporation and Grand Trunk Railway of Canada* (1911), A.C. 461 at pp. 476-7:

> In the face of these documents, Mr. Armour contended that the Governor-General in Council had by expressly sanctioning, on January 25, 1887, the construction of the branch line, and approving of its location, impliedly sanctioned the acquisition by the Ontario and Quebec Company of the fee simple of the portions of the subaqueous soil of the slips on which their embankment was built; and that the public right of access to the remaining portion of the slip was, on the authority of *Corporation of Vancouver* v. *Canadian Pacific Railway* [(1894)], 23 S.C.R. 1, thereby destroyed; and further, that as the company are prohibited from alienating the land so acquired in fee, they could not dedicate anew to the public a right of way over those lands, and that, therefore, any public right of way which might theretofore have existed could not be recreated.
>
> In their Lordships' view the facts do not sustain this contention, and the decision in the *Vancouver Case* which was based on the terms of a particular statute differing entirely from those contained in the statutes referred to in this case, does not apply.
>
> Moreover, in their Lordships' opinion, the words "public communication" as distinguished from "public road, street, lane, or public way," must have been introduced into the definition of a highway to meet a case where the members of the public use or traverse a particular route as a means of arriving at, or returning from, a particular place, whether they do so as of right or by leave and licence, expressed or implied. These words, they think, do not authorize a trespass; but short of that they apply to an actual user by the public whether as of right or not. Indeed it is but natural that this should be so, inasmuch as the action both of the Committee and the Board is directed to promote and secure the convenience and protection of the public, and the danger to the public is the same whether its members traverse the lines of a railway upon which trains run, as of right, or by express or implied permission.
>
> As far then as the highway point is concerned, their Lordships are of opinion that the Railway Committee and the Railway Board had jurisdiction to make the orders they respectively made.

The *locus in quo* of this accident is exactly within the area dealt with by the Privy Council in *Attorney-General for British*

Columbia v. *Canadian Pacific Railway* (1906), A.C. 204; 75 L.J., P.C. 38. In view of the findings of the jury in the present case it is impossible to say that the plaintiff was a trespasser. In the reasons of Lord Atkinson in the Privy Council (1911), A.C. 461 at p. 477, it is clear that the Canadian Pacific Railway Company could dedicate anew to the public a right of way over those lands and that any public right of way which might theretofore have existed could be recreated and that was what was done here and the plaintiff was lawfully at the point where he suffered his injury and the defendants were guilty of a breach of statutory duty which was the proximate cause of the injuries suffered by the plaintiff. Further there was ample evidence before the jury in the present case sufficient to warrant the findings made. Section 3 of the Contributory Negligence Act is statutory authority supporting the judgment here under appeal as the amount of damage and the fault and the degrees of fault are questions of fact for the jury and those facts have been duly found. I would therefore dismiss the appeal and affirm the judgment of the Court below.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitor for appellants: *Knox Walkem.*
Solicitor for respondent: *W. H. Campbell.*

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1931

June 2.

THE KING v. MILKHA SINGH

THE KING v. MILKHA SINGH.

Domicil—East Indian—India domicil of origin—Resident in Canada for seven years—Claim of acquiring Canadian domicil—Goes back to India remaining 15 years—Return to Canada—Deportation ordered—Habeas corpus—Appeal—R.S.C. 1927, Cap. 93.

Milkha Singh an East Indian, came to Canada in October, 1907, when twenty years old, and worked as a labourer until August, 1914, when he returned to his native village in India, where he farmed with his brother for five years and later ran a store. He was married there and had three children. He claims he always intended to return to Canada and from 1916 on wrote two letters each year to the authorities asking for leave to return. The first letter from the applicant on the files of the immigration department is dated in 1926. He returned to Canada in a Japanese steamer in November, 1929, and was examined by the Board of Inquiry in Victoria and rejected. On *habeas corpus* proceedings it was held that Milkha Singh had Canadian domicil.

Held, on appeal, reversing the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that even if he had original domicil in Canada before he left for India, which is very doubtful, he returned to his domicil of origin, married and had children, and remained there for a sufficient time for the Court to conclude that he had resumed his domicil of origin, and was therefore not entitled to admission to Canada as a person domiciled here.

Statement.

APPEAL by the Crown from the order of FISHER, J. of the 9th of September, 1930, discharging Milkha Singh out of custody of the divisional commissioner of immigration and colonization at Vancouver. Milkha Singh came to Canada in October, 1907, and worked as a labourer until August, 1914, when he returned to his native town in India, but with the intention of returning to Canada as he considered he had acquired Canadian domicil before going back to India. He claimed that in 1915 and subsequently he wrote the authorities here asking for permission to return, but received no answers to his letters. The authorities here have no letters on file from him until 1926 when he wrote asking leave to return. The Board of Inquiry in Victoria sat on the 3rd of December, 1929, and after hearing evidence his application to return to Canada was rejected and his appeal to the Minister of Immigration was dismissed.

The appeal was argued at Victoria on the 12th of March,

1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER and McPHILLIPS, JJ.A.

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Elmore Meredith, for appellant: His application to return was twelve years after he went to India. The question is whether he had acquired domicil in Canada. We submit he never did as the circumstances shew he went back intending to stay; he was married and afterwards had three children. There is no record of any letters having been received from him by the authorities here until 1926. Every presumption must be given in favour of the domicil of origin: see *In re Immigration Act and Santa Singh* (1920), 28 B.C. 357 in which case it was held that domicil had been acquired. See also English & Empire Digest, Vol. 11, p. 316. The presumption is that Milkha Singh was married after his return to India in 1914: see *The Lauderdale Peerage* (1885), 10 App. Cas. 692; *Whitehouse* v. *Whitehouse* (1900), 21 N.S.W.L.R. 16; *Attorney-General* v. *Yule* (1931), 171 L.T. Jo. 249.

Argument

A. B. Macdonald, K.C., for respondent: The facts in this case are substantially the same as in *In re Immigration Act and Rattan Singh* decided by this Court on November 20th, 1928, but not reported. In that case the subject was released. The *Santa Singh* case (1920), 28 B.C. 357 is also in our favour. The test is the intention of the parties and in this case he intended to return sooner but the war intervened: see *Ross* v. *Ellison* (1929), 98 L.J., P.C. 163; *Huntly (Marchioness)* v. *Gaskell* (1906), A.C. 56 at p. 66.

Meredith, replied.

Cur. adv. vult.

2nd June, 1931.

MACDONALD, C.J.B.C.: The respondent was ordered to be deported. On *habeas corpus* the learned judge thought he ought to be admitted to Canada. This is an appeal from that judgment by the Crown. The point at issue is whether he was domiciled in Canada. He came here in 1907 and worked as a labourer until 1914 when he returned to India to his home village. He returned and sought to land in December, 1929, when his application to be allowed to land was rejected. He claims to be domiciled in Canada by reason of his seven years'

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residence here but apart from his statement of intention to make this his domicil there is no satisfactory evidence. On his return to India in 1914 he went back to his native village where he remained until he came to Canada in 1929. He married there and had three children born to him in India. He worked on a farm apparently in partnership with his brother. He contended when examined that he had written to the immigration authorities here in 1915 and subsequently, saying that he wanted permission to return. The immigration authorities, however, produced their file of letters and no letter was found on it until 1926, when he wrote asking for leave to return. Now even if it be held that he had acquired domicil in Canada before he left for India, which I think is very doubtful, he returned to his domicil of origin, and remained there, married and had children, for a sufficient time to enable me to draw the conclusion that he had resumed his domicil of origin and therefore was not entitled under our laws to admission to Canada as a person domiciled here.

I would allow the appeal and restore the order for deportation.

MARTIN, J.A.

MARTIN, J.A.: Were it not for the submission of the respondent's counsel that the facts of this case brought it within the scope of our decision (not reported) in *Rattan Singh's* case (delivered on 20th November, 1928), I should not have experienced any doubt at the conclusion of the argument, about the disposition of this appeal, but judgment was reserved for the main purpose of affording us an opportunity to consider that case, and after reading the appeal book therein and my notebook thereon, it is apparent that the circumstances are substantially different in several respects and so, in my opinion, the appeal should be allowed in the light of the authorities quoted, to which I shall add the remarkable case I cited during the argument, then pending before the Court of Appeal in England, of *Attorney-General* v. *Yule,* since reported, in 171 L.T. Jo. for 21st March, 1931, at p. 249, which confirms the view that the respondent had not changed his original domicil, and therefore the appeal should be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree that the appeal should be allowed.

McPHILLIPS, J.A.: In my opinion the order made by Mr. Justice FISHER under appeal was rightly made discharging the respondent Milkha Singh out of the custody of the divisional commissioner of immigration. I am not of the opinion upon the evidence that Milkha Singh had lost his Canadian domicil by reason of his absence in India. The evidence adduced shews conclusively that there always was an intention to return. The war ensued and it was impossible for him to return. Then there was a further question whether or not East Indians would be allowed to bring their wives and families to Canada. Milkha Singh is a married man. This boon was finally granted by the Government of Canada. This is a most important factor in the consideration of this appeal, in truth, all the evidence shews a decided intention to return to Canada throughout his whole absence from Canada. In my opinion the learned counsel for Milkha Singh, Mr. *A. B. Macdonald,* in his able argument was rightly entitled to submit that the present case is well within the principle of the decision in this Court in *In re Immigration Act and Santa Singh* (1920), 28 B.C. 357 and our later decision in *Rattan Singh* in 1928 (not reported). I cannot upon the facts of the present case conclude that there was any abandonment of the acquired Canadian domicil, the domicil of choice of the applicant, and without that the domicil of origin cannot be assumed to have been resumed. I would refer to my reasons for judgment in the *Santa Singh* case, *supra,* at pp. 360-63, as they are equally applicable to the present case, and I there dealt with the disability the East Indians suffered under in not being able to bring their wives and families to Canada now permitted. The deportation order as made by the Board in my opinion was without jurisdiction and Milka Singh in my opinion is entitled to be forthwith released and discharged from custody; that is, in my opinion he is entitled to re-enter Canada without restraint. I would therefore dismiss the appeal and affirm the order of the learned judge in the Court below.

MCPHILLIPS, J.A.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Congdon, Campbell & Meredith.*
Solicitors for respondent: *Macdonald & Prenter.*

MACDONALD, J. (In Chambers)

1931

June 18.

STUMP v. BATZOLD.

STUMP v. BATZOLD. ZION UNITED CHURCH, GARNISHEE.

Practice—Garnishee—Monthly salary—Payable to end of month—Garnishee summons served prior to end of month—Not attachable.

The defendant received a monthly salary from the garnishee payable at the end of each month. A garnishee summons was served on the garnishee on the 28th of April, 1931.

Held, that the salary payable to the defendant at the end of the month of April was not thereby attached.

Statement

SUMMARY trial to determine whether there were any moneys attachable under garnishee proceedings. Heard by MACDONALD, J. in Chambers at Vancouver on the 17th of June, 1931.

Argument

A. Alexander, for plaintiff.

Mayall, for garnishee, referred to *Hall* v. *Pritchett* (1877), 3 Q.B.D. 215; *Jones* v. *Thompson* (1858), El. Bl. & El. 63; *Fallis* v. *Wilson* (1907), 13 O.L.R. 595; *Chatterton* v. *Watney* (1881), 16 Ch. D. 378 at p. 383; *Shanly* v. *Corporation of London* (1863), 3 Pr. 223; *Wilson* v. *Fleming* (1901), 1 O.L.R. 599; *Thoreson* v. *Blairmore School District* (1927), 2 W.W.R. 439; and *Main Bros.* v. *McInnis* (1901), 4 Terr. L.R. 517.

18th June, 1931.

Judgment

MACDONALD, J.: Upon the summary trial of an issue, to determine whether there were any moneys attachable under garnishee process, having arrived at a conclusion as to the facts, the only point reserved for decision was, whether there was any debt attachable, at the time of the service of the garnishee summons. It appeared that the defendant was in receipt of a salary from the garnishee payable monthly and the garnishee summons was served on the 28th of April, 1931. Then the question to be determined is whether any portion of the salary, payable at the end of the month of April, became attachable.

Counsel for the garnishee has filed a carefully prepared memorandum of authorities supporting his contention that no moneys were attached by the garnishee process. No argument has been presented to the contrary, though a verbal contention was submitted to that effect at the close of the trial.

The cases cited by counsel for the garnishee appear applicable. In my opinion there was no money attached and the garnishee is thus entitled to judgment upon the issue, with costs.

Judgment for garnishee.

[In Bankruptcy.]

MACDONALD, J.

1931

July 13.

IN RE VANCOUVER DRESS CO.

IN RE VANCOUVER DRESS COMPANY LTD.

Bankruptcy—Preferred claims—Services by an insurance adjuster—Preference allowed—R.S.C. 1927, Cap. 11, Sec. 121—Bankruptcy rule 139.

In December, 1930, a fire occurred on the premises occupied by the Vancouver Dress Company Limited. The loss was covered by insurance. Not being able to adjust the loss with the adjusters acting for the Insurance Company the insured called in one Adkin, a recognized expert, to act as its adjuster, and after completion of the work it was agreed he should receive $750 for his services. The insured went into bankruptcy before paying Adkin who then filed his claim for his services as a preferred creditor, under section 121 of the Bankruptcy Act. The trustee in bankruptcy disallowed the claim. On appeal by Adkin under Bankruptcy rule 139:—

Held, that on the evidence Adkin established his right to the sum claimed and is entitled to preference within said section 121.

APPEAL by Robert Adkin under Bankruptcy rule 139 from the decision of the Canadian Credit Men's Trust Association, Limited as trustee in bankruptcy of the Vancouver Dress Company Limited (in bankruptcy) disallowing his claim for $750 in preference over the general creditors of the company. The appellant's contention is that his claim comes within section 121 of the Bankruptcy Act. Argued before MACDONALD, J. at Vancouver on the 15th of June, 1931. Statement

Swencisky, for appellant.
Arnold, for respondent.

13th July, 1931.

MACDONALD, J.: Robert Adkin filed a claim for $750 with the trustee in bankruptcy of the Vancouver Dress Company Limited. He claimed a preference over the general creditors of the bankrupt, on the ground that his claim came within a portion of section 121 of the Bankruptcy Act reading in part as follows: Judgment

In the distribution of the property of the bankrupt or authorized assignor, [the creditors] shall be paid, in the following order of priority:—

Thirdly, all wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services

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rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment.

The Canadian Credit Men's Trust Association Limited through its proper officer, as the trustee in bankruptcy of the said Vancouver Dress Company Limited, disallowed the claim of the said Adkin, who then appealed under Bankruptcy rule 139, to obtain a reversal of such disallowance, or modification thereof. The judge is required to hear and dispose of such an appeal summarily, and in accordance with the rule I considered evidence both *viva voce* and by affidavit. The contention is made on the part of the trustee that the claim is not genuine, but after consideration I have come to the conclusion that the proof afforded by Adkin, in the absence of any contradiction by Doane, who acted as manager for the bankrupt, establishes his right to recover the said sum of $750. If Adkin did not enter into the alleged contract for his services, Doane was available and might have been called as a witness. The result is that the claim for said amount should be allowed against the estate of the bankrupt.

The question then arises whether this claim is a preference or should Adkin only rank as an ordinary creditor. It involves consideration of said section 121 and the decisions thereunder. It is contended that the definition of "wage-earner" affects the matter. I think on the contrary that such definition is not applicable in determining the construction and effect of the portion of said section 121, now being considered. It only comes into play when deciding whether the Bankruptcy Act is to be applied. It restricts the operation of the Act as to certain wage-earners. The definition reads as follows:

Judgment

1. *(ll)* "wage-earner" means one who works for wages, salary, commission or hire at a rate of compensation not exceeding fifteen hundred dollars per year, and who does not on his own account carry on business.

Then section 7 of the Bankruptcy Act provides that "The provisions of this Part shall not apply to wage-earners or to persons engaged solely in farming or the tillage of the soil." *Vide* on this point *In re Lounsbury* (1927), 8 C.B.R. 505; *In re Nathanson* (1926), 7 C.B.R. 423; and *In re Julien* (1927), 8 C.B.R. 200.

As to the said section 121 receiving a liberal construction, FISHER, J. in *In re Hercules Rubber Co.* (1922), 3 C.B.R. 121 at pp. 122-3 said:

In my opinion a liberal construction of above section is that a commission earned by a travelling salesman [during] three months preceding an authorized assignment "in respect of services rendered by him to the bankrupt" entitles him to rank as a preferred creditor. The Act does not say that a "travelling salesman" is to give his services exclusively to the employer. . . . To my mind it makes no difference whether a travelling salesman was a jobber at the time he rendered services to the bankrupt or that he was engaged in some other work.

Duncan on Bankruptcy at p. 462, refers to the words in section 51 (now 121), to this effect:

Including as they do commission or compensation, in addition to wages and salary, are very wide.

Our Courts are under a statutory mandate to deem every enactment remedial and to give it such liberal construction as will best ensure the attainment of its object according to its "true meaning and spirt."

Judgment

Tweedie, J., in *In re Gordean Furniture Co.* (1923), 4 C.B.R. 237, decided that an accountant, who was professionally engaged by various firms, during the same period of time and who only supervised the bookkeeping of the bankrupt, came within the preference provisions of said section 121. I think that while the facts in that case are not exactly similar to those here presented, still that the principles declared, assist me in coming to the conclusion that Adkin is entitled to a preference within the said section 121 and his appeal should be allowed with costs. He, as well as the authorized trustee, may recover their costs of the appeal, out of the estate.

Appeal allowed.

MORRISON, C.J.S.C.

1931

July 14.

JARVIS v. SOUTHARD MOTORS LIMITED *ET AL.*

Negligence—Motor-car—Driven by employee of defendant company—Collision — Scope of employment — Plaintiff injured — Responsibility for damage.

JARVIS v. SOUTHARD MOTORS LTD.

G. was employed by the defendant Company for selling its motor-cars and he took a car out each day for demonstrating to prospective buyers. On taking a car out one day he saw two young ladies he knew who were on their way to dine with a relative. He volunteered to take them there and they entered the car. As there was time to spare he proceeded in a direction away from their objective and while so engaged collided with another car and the plaintiff was injured. It was found on the evidence that the collision was caused solely by G.'s negligence.

Held, that G. was the agent or servant of the defendant Company, that the question of deviation does not arise here and he was acting in the course of his employment. The Company is therefore liable for the damages suffered by the plaintiff.

Statement

ACTION for damages for negligence in a collision between the defendant Company's car when driven by an employee and the car of another, the plaintiff being injured. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 10th of June, 1931.

Cosgrove, for plaintiff.

C. L. McAlpine, for defendant.

14th July, 1931.

Judgment

MORRISON, C.J.S.C.: The defendant Gordon was an employee of the defendant Southard Motors Limited. At the time material to the issue herein he was engaged in selling its cars and for that purpose was given charge of one of its cars, leaving it to him to adopt whatsoever artful persuasive or demonstrative methods known in this comparatively new method of salesmanship, which the exigencies of the occasion required or seemed advisable to him. Its mandate to him was to sell its cars and to report every morning at nine o'clock as to the result of his efforts. There were no defined limits either of time or place to the devices necessary to inveigle people to pick on the particular car offered for sale by the defendant Southard Motors

Limited. They would be, of course, infinite. Whilst using its car thus obtained, he espied two young ladies with whom he was acquainted, waiting for a tram-car, who were on their way to dinner at a relative's. They entered his car, he volunteering to take them there. There being ample time to spare he proceeded in a direction away from their objective and the time was spent casually, the girls no doubt enjoying the ride and Gordon no doubt intending they should do so. He doubtless did not begrudge the time thus spent, for what better means of impressing upon these young ladies the advantages of such facility for purposes of enjoyment and time saving—get a car. In the course of this drive Gordon's car and another driven by the defendant Matthews, collided, causing the injuries to the plaintiff complained of. I find that the collision was caused solely by the negligence of Gordon, who reported orally to the defendant Southard Motors Limited, owners of the car. Gordon from that time ceased, at least for the time being, to be in its employ, so the officer of the company examined before trial has stated, and who said he was unable to answer certain interrogatories on that account. This officer did not testify at the trial, neither did Gordon vouchsafe evidence at the trial. The defendant submits that owing to the accident having occurred during the period of the alleged deviation, that Gordon was not about its business and that therefore it is not liable. It also takes the position that in any event it had parted with the control of the car after its delivery of it to him. However that may be I cannot accept the submission that it had relinquished its hold on and control of Gordon, its employee, or by whatever name it may choose to apply to the term of his engagement. Although the interrogatories might have been more pointed and extensive, yet I consider the answers on this aspect disingenuous. I do not think that in the particular circumstances of this case either ground is tenable. In the line of cases referred to as the Singer Sewing Machine cases, it is the sewing machine either attached or not to the wagon or car, which is the commodity sought to be sold. It would not help a prospective purchaser of a sewing machine to be shewn the ease with which a motor-car may be driven or the minimum number of gadgets necessary to be employed in so doing. So that if a seller of sewing

Judgment

MORRISON, C.J.S.C.

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machines chooses to entertain people in his car and an accident happens for which he is responsible, I can see that there might be safe ground upon which the owners of the car or machine could advance the plea of non-liability. His objective is to call at people's houses and to demonstrate to the housewife the utility of his sewing machine. And so with the chauffeur who has definite hours and assigned duties from which if he deviates for his own personal purpose and an accident happens, the liability should be solely his own. Where, however, as in this case, a party has in store such instruments of destruction as motor-cars and chooses for the accumulation of his profits to release them to an employee who may be more or less irresponsible, he cannot be heard to say that he had relinquished control and is therefore immune from the consequences arising from the negligent use of them. As Lord Justice Buckley said in the course of his judgment in *Reichardt* v. *Shard* (1914), 31 T.L.R. 24 at p. 25: "There was clearly a liability to the plaintiff by somebody." What inference is to be drawn from the defendant Company's part in this instance? I think it is a reasonable inference, the evidence being left as it is, that the Company did not give up control of the car in the sense urged upon me on its behalf. I find that Gordon was the agent or servant of the defendant Company on the occasion in question: that he was acting in the course of his employment. I do not think that the question of deviation can arise here. One of the most likely prospects for sale of an attractive motor-car is surely a girl who has arrived at the motor-car driving age, who has a pliant father in the background, and it may not be too fantastic to infer that all fathers may be taken to be pliant where daughters are concerned. There will be judgment for the plaintiff against the defendants Gordon and the Southard Motors Limited for $301.60 special damages and for $2,500 general damages. The defendant Matthews is dismissed from the case with costs.

Judgment

Judgment for plaintiff.

PARIS v. LEDINGHAM.

MACDONALD, J.

1931

July 25.

PARIS v. LEDINGHAM

Patent—Invention—Infringement—Travelling concrete-mixer.

The plaintiff obtained a patent for a travelling concrete-mixer with a facility for dumping concrete when mixed at the point of use. The plaintiff, in the course of using the mixer, would assemble the materials constituting concrete, namely, sand, gravel, cement and water, at a convenient central point, the necessary portion of each being put in the mixer, when the driver would proceed to the point of use. As the mixing required from two to three minutes to be ready for dumping at the point of use the driver would start the mixing when within a distance that he could cover in two or three minutes from the end of his roadway, thus delivering his material thoroughly and freshly mixed at the point of use. Concrete ordinarily transported from a central mixing plant is liable to become stratified *en route* to the job and would be unfit for use. The defendant mixed the materials at the central point, then dumped it into a cylinder on a truck, and as the truck neared the point of use the cylinder revolved, the defendant contending the rotary motion was only for the purpose of scouring the cylinder. In an action for an infringement of the plaintiff's patent:—

Held, that while the defendant's contention might be accepted to a certain extent, the avoidance of stratification through adopting a cylinder capable of being rotated by power supplied by the motor-truck and dumping the contents through the use of mechanical equivalents similar to those patented by the plaintiff, form an important part of the invention sought to be protected by the plaintiff's patent. The defendant has infringed the patent of the plaintiff and should be enjoined from continuing the use of the machines complained of.

ACTION for an alleged infringement of the plaintiff's Canadian patent No. 285843 of the 28th of December, 1928. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 25th and 26th of June, 1931. Statement

Lennox, for plaintiff.
G. Roy Long, for defendant.

25th July, 1931.

MACDONALD, J.: Plaintiff seeks redress against the defendant, for an alleged infringement of his Canadian patent No. 285843, dated 28th December, 1928. He invokes the protection afforded by section 23 of the Patent Act, reading in part as follows: Judgment

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> 23. Every patent . . . shall, grant to the patentee . . . the exclusive right, privilege and liberty of making, constructing and using, . . . the said invention, subject to adjudication in respect thereof before any Court of competent jurisdiction.

Counsel desired and I acquiesced in an agreement, at the trial, that the sole issue to be then determined should be, whether an infringement of such patent by the defendant had taken place. In other words that, for the time being, the validity of the plaintiff's patent should be admitted, and the trial proceeded along these lines.

The difficulty of determining whether an infringement of a patent has taken place has been often commented upon, and each case must, of course, depend upon its own facts. This difficulty, in most cases, is increased through the fact that the patented device, on the one hand, and the alleged infringing device on the other, may be very close to each other in nature and yet there would be no infringement. Then again on the other hand they may appear quite separate and distinct devices, and yet still be so close as to infringe. It is entirely a question of fact, depending upon the evidence, and it is thus almost impossible to find two similar cases. For this reason a citation of decisions is of little practical assistance. It has been very limited of late years in judgments.

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Fetherstonhaugh & Fox on the Law and Practice of Patents in Canada at p. 63, in referring to the construction of a patent, states that:

> As a necessary element in the due construction of any patent, and in order that a true conception may be had as to whether or not there has been infringement, it is primarily necessary to determine two questions, firstly, what is the exact invention protected, and secondly, what is the principle of the invention protected.

First as to the principle of the invention in question, this can best be determined by referring to the specifications and the views expressed by the plaintiff in seeking to obtain a patent. He there stated that his invention, relates to the handling of concrete and especially to a method and plant, whereby concrete could be delivered in large quantities upon a job, ready for pouring without the necessity of there employing a concrete-mixer, He then represented the benefit of such an invention in road building, and laid stress upon the fact that the materials constituting concrete, namely, sand, gravel, cement and water,

might be assembled at a convenient central point and then the concrete mixed and dumped at intervals along the road. In view of the extensive road-building now prevalent, this would doubtless prove very important as a ground for obtaining a patent, and emphasized the desirability of thereby affording the inventor and those who might manufacture the apparatus, due protection. The benefit was mentioned of being able, by the apparatus, to mix concrete in transit, as compared with mixing it at a central point or at the place where it was to be used. In other words, the plaintiff was seeking to obtain a patent, as he described it, for travelling concrete-mixers, coupled with facility for dumping concrete when mixed, at the point of use.

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Plaintiff also referred in his specifications, to the fact that concrete, which was ordinarily transported from a central mixing plant, became stratified *en route* to the job, and it was thus not homogeneous and thoroughly mixed throughout. It was not fit for use. This result, he submitted, would be obviated by the apparatus, so sought to be patented, mixing the materials constituting concrete thoroughly, as they approached the job. He emphasized this conclusion as follows:

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> This mixing need only continue for two or three minutes, hence the driver can arrange to start the mixing when within a distance that he can cover in two or three minutes from the end of the roadway, and the result will be he delivers his material thoroughly and freshly mixed, and ready for pouring at the end of the roadway, dump it rapidly, and return to the bunkers for another load.

This feature of the invention is important in determining the rights of the parties.

Bearing in mind that the novelty of this apparatus is not, at present, being considered, then, did the defendant by the manufacture and use of an apparatus, apparently similar in appearance, infringe the patent obtained by the plaintiff? In shortly discussing the principle involved in the patent, I have necessarily referred to the invention alleged to be protected. It will not serve any useful purpose to discuss many cases which might have a bearing upon this particular patent, or the infringement thereof. While the likeness of the two machines is apparent, still the defendant contends that the patent obtained by the plaintiff was not ignored when plans and detail drawings were made to construct the machines complained of, for the defend-

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ant. Frank Dodson said he was familiar with the plaintiff's patent, and drew the specifications in connection with the machines constructed for the defendant. He had such patent before him, and as I understood his evidence, he was careful, and sought to evade an infringement of the plaintiff's patent. His evidence, which was that of an expert, differed in many respects from that of Ernest E. Carver, who gave evidence on the part of the plaintiff. There is evidence, not only as to the construction of the machines, but also as to the results obtained by operation. This contradiction, however, does not pertain to the statements made by witnesses for the defendant, that his machine will not, as constructed, mix the materials forming concrete so as to produce a product ready for use as concrete. It was stated that while the rotary motion of the cylinder would turn over its contents, that this would not be sufficient of itself to create concrete ready for use. Further, that in practice, no attempt was made by the defendant to mix the necessary materials, and produce concrete, with such machines. That he mixed the concrete at a central plant and then transported it by motor-trucks, for use on a job, I have no reason to doubt the uncontradicted evidence of the defendant's witnesses on this point. It was disclosed during the evidence that the containers used by the defendant in transporting the concrete, had blades inside, but that they were not of any benefit in mixing the concrete so as to render it more satisfactory for use, and that such blades had been removed. It appeared that the manner in which they were placed in the cylinder or container, differed from that adopted by the plaintiff, in furtherance of his invention designed to mix concrete in transit. It appeared that the blades or vanes were placed by the plaintiff in his cylinders, so as to cascade or churn the contents, and produce concrete ready for use.

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The question then arises whether, accepting as I do the evidence as to the different results obtained by the two machines, there has been an infringement by the defendant of any substantial portion of the invention sought by the plaintiff to be protected through his patent. If the evidence discloses the fact that neither the spirit nor the principle of the invention has

been infringed, the defendant may escape liability, even though his machines might be within the wording of the specifications and claims covered by the patent. The point then to be determined, turns, as I have mentioned, upon whether a substantial principle of the patent has been invaded by the defendant. If the plaintiff's patent only protected a machine which was capable of mixing the necessary materials and creating concrete while the motor-truck was in motion, differing in that respect, as I have indicated, from the defendant's machine, then the plaintiff could not complain. But dealing only with infringement or no infringement, and laying aside for the moment the question of "novelty," I think that a substantial and important feature of the plaintiff's patent was that concrete mixed at a central plant might be transported in the container or cylinder; then, as mentioned, when the motor-truck was nearing the point where the concrete was to be used, the cylinder might be rotated in order to make the contents satisfactory, ready to be dumped at the point of destination. Stratification, which was referred to in the plaintiff's specifications, would thus be avoided, and the concrete would be acceptable and pass inspection, if such were necessary. This is exactly what occurred with respect to the motor trucks, with containers, constructed and used by the defendant. While his concrete may have been mixed at a central point, the cylinder was rotated as it approached or reached the point where the concrete was to be used. This rendered it capable of inspection upon municipal work, and removed the possibility of stratification having occurred, rendering the concrete inefficient. This conclusion is supported by the evidence of McCallum, a city engineer called by the defendant, who stated that while he was frequently at the place where concrete was being delivered upon city work, still that he had never noticed any occasion upon which the cylinder was not turned over, to render the mixture ready and proper for use. It is true that evidence was adduced on the part of the defendant, that this rotary motion was only for the purpose of scouring the cylinder, in order that the dumping of its contents would be more effectual. While this might be accepted to a certain extent, I think that the more important point was the one to which I

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have referred, namely, that the rotary motion would destroy the possibility of stratification. I think that this avoidance of stratification, through adopting a cylinder capable of being rotated by power supplied by the motor-truck, and then a dumping of the contents, through the use of mechanical equivalents similar to those patented by the plaintiff, formed an important part of the invention sought to be protected by plaintiff's patent. For a limited period he was entitled to be protected in this invention. I find that the defendant has infringed the patent of the plaintiff and should be enjoined from continuing the use of the machines complained of.

The issue as to "infringement" is thus found in favour of the plaintiff, and should it be desired that the trial upon other branches of the case, be proceeded with, an application could be made so that a date may be fixed for the trial as soon after vacation as possible. It is desirable that counsel should speedily declare their intention in the matter.

Judgment for plaintiff.

THE KING v. ADKIN.

MACDONALD, J. (In Chambers)

1931

Aug. 5.

THE KING v. ADKIN

Insurance—Insurance adjuster—Licence under Insurance Act—Quasi-criminal—Construction—Adjusting on behalf of insured—B.C. Stats. 1925, Cap. 20, Secs. 186 and 187.

Section 187 of the Insurance Act provides that: "(1.) No person shall act or offer or undertake to act as an insurance adjuster in this Province without first having applied for and obtained an insurance adjuster's licence under this Part. (2.) This section shall not apply to an insurance agent licensed under this Part, or to an officer or salaried employee of an insurer acting for that insurer, or to a member of the Law Society of British Columbia."

The defendant had acted in adjusting fire losses on behalf of the insured and on a charge under the above section was fined by a magistrate. On appeal by way of case stated it was submitted that the Act is only intended to cover cases where an adjuster acts on behalf of the insurer, and even if intended to apply to one acting for the insurer it is not so clearly and properly stated as to be applicable, and further the Act, in so far as regulating or controlling persons who may be engaged in adjusting losses under contracts of insurance, invaded the common law right of a person to carry on any legitimate trade or occupation, consequently it should receive a strict construction.

Held, that the intention of the Act was that persons adjusting insurance should be licensed. The facts shew that he came within the definition of "insurance adjuster" and was not licensed. He contravened the provisions of the above section and the magistrate properly imposed the penalty referred to.

Construction of *quasi*-criminal statutes considered.

APPEAL by way of case stated by Robert Adkin from his conviction for violation of section 187 of the Insurance Act. The facts are set out in the reasons for judgment. Argued before MACDONALD, J. in Chambers at Vancouver on the 5th of August, 1931. Statement

J. A. MacInnes, for appellant.
Hulme, for respondent.

MACDONALD, J.: Robert Adkin seeks, through a case stated, submitted pursuant to the provisions of the Summary Convictions Act, to set aside a conviction under the Insurance Act, B.C. Stats. 1925, Cap. 20. He was fined $150 for an alleged violation of section 187 of the said Act. It provides that: Judgment

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(1) No person shall act or offer or undertake to act as an insurance adjuster in this Province without first having applied for and obtained an insurance adjuster's licence under this Part.

Then subsection (2) is worthy of consideration. It reads as follows:

This section shall not apply to an insurance agent licensed under this Part, or to an officer or salaried employee of an insurer acting for that insurer, or to a member of the Law Society of British Columbia.

There are four questions submitted in the case stated, for consideration, but the first three of these, really cover the same ground. They involve construction of the portions of the Insurance Act, relating to adjusters. It is to be noted that section 187 is general in its application, except as to the persons referred to therein, namely, the insurance agents who are already licensed under the Act and to officers or salaried employees of an insurer, acting for the insurer, as well as lawyers, presumably engaged on behalf of either of the parties in connection with a loss covered by insurance. It is contended by the prosecution that all other persons who act as insurance adjusters should be licensed under the Act. It was submitted on the contrary by the applicant that, while he did not come within any of these exceptions and it had been proved to the satisfaction of the magistrate, that he had acted in adjusting fire losses, still that he was not amenable to the legislation nor subject to penalties thereunder. It was contended on his behalf that the Insurance Act does not apply to a person, who simply adjusts loss for an insured and that the Act is only intended to cover cases where an adjuster acts on behalf of the insurer. In other words, that, differing in this respect from other Provinces of Canada, the exceptions mentioned do not govern and that it was not intended to apply to persons who seek, on behalf of those who have suffered a loss under a contract of insurance, to adjust the same and recover the amount of indemnity covered by a policy of insurance. Further that even if so intended, that it is not so clearly and properly stated as to be applicable.

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It is submitted that this Act, in so far as regulating or controlling persons who may be engaged in adjusting losses under contracts of insurance, invaded the common law right of a person to carry on any legitimate trade or occupation. That consequently it should receive a strict construction, in order to

become effective, along the lines contended for by the prosecution.

It has been stated that criminals often escape, through the lack of clear statements contained in legislation. Although this is not a criminal statute, still it is *quasi*-criminal in its operation. The previous requirement of statutes in the wording of such legislation is not, however, the present mode of construction. Such acts are now constructed so as to determine, if possible, the true meaning and real intent of the Legislature. There was at one time a distinction between penal Acts and remedial Acts and the strict construction to which I have referred, applied to the penal Acts, whereas the others were construed liberally. Now, however, the deciding cases shew that penal provisions like all others are to be fairly construed according to such legislative intent expressed in the enactment. The Courts have refused to extend the punishment to cases which are not clearly embraced in this class of legislation. This reference is from Sedgwick's Statutory and Constitutional Law, 2nd Ed., p. 282, and then it is stated, Courts equally refuse by any mere verbal nicety forced construction or equitable interpretation to exonerate parties plainly within their scope. This passage was cited with approval by Bramwell, B., in *Attorney-General* v. *Sillem* (1863), 2 H. & C. 431 at p. 531. Then Lord Truro in the case of *Stephenson* v. *Higginson* (1852), 3 H.L. Cas. 638 at p. 686, states the rule of construction of statutes as follows:

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> In construing an Act of Parliament, I apprehend every word must be understood according to the legal meaning, unless it shall appear from the context that the Legislature has used it in a popular or more enlarged sense; that is the general rule; but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense, must plainly appear.

Then again it was decided that, where persons are contending that a penalty should be inflicted, they must shew that the words in the Act distinctly enact, that under the circumstances such penalty has been incurred. They must fail if the words are capable of a construction that would and one that would not inflict the penalty.

> The more correct version of the doctrine appears to be that the statutes of this class are to be fairly construed and faithfully applied according to the intent of the Legislature, without unwarrantable severity on the one hand, or equally unjustifiable lenity on the other:

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Vide Sedgwick's Statutory and Constitutional Law, p. 334 referred to in *Foley* v. *Fletcher* (1858), 28 L.J., Ex. 100 at p. 106.

Wright, J., in *London County Council* v. *Aylesbury Dairy Company* (1898), 1 Q.B. 106 at p. 109 said where an enactment imposes a penalty for a criminal offence, a person against whom it is sought to enforce the penalty is entitled to the benefit of any doubt which may arise on the construction of the enactment.

Huddleston, B., in *Rumball* v. *Schmidt* (1882), 8 Q.B.D. 603 at p. 608 said where there is an enactment, which may entail penal consequences, you ought not to do violence to the language in order to bring people within it, but ought rather to take care that no one is brought within it, who is not so brought by express language.

Then Smith, J., in *Llewellyn* v. *Vale of Glamorgan Railway* (1898), 1 Q.B. 473 at p. 478 said:

> When an Act [imposing a penalty] is open to two constructions, that construction ought to be adopted which is the more reasonable, and the better calculated to give effect to the expressed intention, which, in this case, is that the penalty shall be paid.

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I have referred somewhat at length to these authorities, for the purpose of emphasizing the difficulties which are presented and the course I should follow in dealing with this matter. If, according to these accepted authorities, I find myself in doubt as to the construction which should be placed upon this enactment, rendering the accused liable thereunder, then it appears that I should decide the questions in favour of the accused. So bearing in mind these decisions, then upon what ground can it be contended that the accused, who beyond question adjusted fire losses, does not come within the purview of the statute?

It is contended that he was not an "insurance adjuster" within the meaning and thus not liable. The interpretation of an insurance adjuster by section 183 of the Act is as follows:

> "Insurance adjuster" means any person who on behalf of any person other than himself for compensation or profit, directly or indirectly, makes any adjustment or settlement of loss or damage under a contract covering property situate in the Province.

I was concerned at first with the expression in this interpretation, as to it simply being a "contract" covering property, but,

upon turning to the interpretation clauses of the Insurance Act, I find that "contract" is given a broad meaning and is defined as follows:

> "Contract" means a contract of insurance and includes a policy, certificate, interim receipt, renewal receipt, or writing evidencing the contract, whether sealed or not, and a binding oral agreement.

The Part of the Insurance Act, dealing with insurance agents and insurance adjusters is headed: "Insurance Agents," and after by section 183 giving an interpretation of such expressions, it is followed by a provision prohibiting persons from acting as insurance agents without being licensed and provides a mode by which licences may be obtained. Then section 187 to which I have referred at length prohibits persons from acting as adjusters without being licensed. After giving the exceptions, it prescribes the manner in which a person seeking a licence, as an insurance adjuster, can obtain it from the superintendent of insurance. Section 190 makes provision for a temporary adjuster's licence to be granted to a person who resides outside the Province and who may be employed in the Province by an insurer or group of insurers, but the like benefit is not bestowed upon a party who has suffered a loss and is seeking to obtain outside assistance in order to protect his rights under a policy. This affords some support to an argument, that the purview of this particular portion of the Insurance Act is confined and is only intended to cover adjusters who may be acting for the insurers. It might be argued that if the Act was confined in its application, as contended by the accused, this section need not be so specific and limited in its provisions. Then in the application for an adjuster's licence, the party so applying is required to give the names of any "insurers" whom he has previously represented. This statement has some weight along the lines contended for by the applicant, but standing by itself it does not support the argument to any appreciable length.

Judgment

I return then to the consideration of the definition of "insurance adjuster." If I am in doubt as to this definition comprising the accused and bringing it within and covering the services rendered by him, then I should give him the benefit of such doubt. I think however that I would be destroying the plain wording of this interpretation were I to do so. It seems to me

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quite clear that the intention was, that persons adjusting insurance should be licensed.

The facts shew that he came within the definition and was not licensed. He thus contravened the provisions of section 187, requiring that he should have applied for and obtained a licence under Part X. of the Insurance Act. Under the circumstances, in my opinion, the magistrate properly imposed the penalty to which I have referred.

This answers the first three questions and an appropriate order will be drawn to that effect.

Judgment

Then there is a further question reading as follows:

Was it necessary for the prosecution to prove that the insurance companies which had written policies for the insured for whom the accused had acted, were without the provisions of section 177 of the Insurance Act?

I think the proof having been afforded that the accused adjusted losses under policies of fire insurance he came within the provisions of the Act and if there was any section available to him to shew that such adjustments were not covered by the Insurance Act he should have adduced evidence to that effect.

The order will be in pursuance of these reasons. The respondent is entitled to costs.

Appeal dismissed.

IN RE R. P. CLARK & COMPANY (VANCOUVER) LIMITED (IN LIQUIDATION).

MACDONALD, J.

1931

Sept. 10.

IN RE R. P. CLARK & Co. (VANCOUVER) LTD.

Stock-brokers—Bankruptcy—Right of customers to claim specific shares—Broker as agent of customer—Right to follow money paid for stocks—Uniformity of decisions—R.S.C. 1927, Cap. 11, Sec. 42.

It is important in cases arising out of "bankruptcy" or "winding-up" that there should, if possible, be uniformity of decisions throughout Canada. Business of stock-brokers in this country is conducted in a manner more closely resembling that which prevails in the United States than that which obtains in England, and for this reason the Courts here draw for authorities more freely than is usual upon American sources. The American decisions are in accord with the principle that where an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods, when bought, as it had in the funds purchasing it.

On the bankruptcy of a stock-broker, where there are sufficient shares of any particular description to satisfy orders given by customers to the debtor, they should be delivered to such customers who have purchased shares of that description. If these customers have paid in full for their shares no trouble arises except that a splitting of the share certificates might become necessary to deliver certificates representing the proper number of shares. If, however, any of these customers have not paid in full, pursuant to their several orders for purchase, then, aside from any liability to make payment before being entitled to the certificates representing the shares so purchased, they should be required to make payment of the balance payable by them in respect of their purchase with interest, as well as making payment of any other indebtedness by them to the debtor. If there are not sufficient certificates available of a particular description to satisfy the purchases by the different customers, there should be awarded to them "their *pro rata* parts" of the shares, so insufficient to satisfy the claims of the customers.

In re Stobie-Forlong-Matthews, Ltd. (1931), 1 W.W.R. 817 followed.

APPLICATION of the trustee in bankruptcy of the estate of R. P. Clark & Company (Vancouver) Limited, under section 42 of the Bankruptcy Act for directions, and asking for an order declaring that the stocks and shares received from F. O'Hearn & Company form part of the estate of the debtor, or such directions in regard to same as should seem meet. He further seeks an order declaring that all stocks and shares found by him as

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trustee which had been in the possession of the debtor and of which there had been in the opinion of the trustee no definite appropriation by the debtor to any of its customers, should form part of the assets of the estate of the debtor, and not the property of any particular customer who had given the debtor an order for purchase of stocks or shares of a similar description, but had never received the same. Further, for a declaratory order to that effect irrespective of whether a customer had or had not paid for such stocks and shares in full. Heard by MACDONALD, J. in Chambers at Vancouver on the 29th of June, 1931.

G. B. Duncan, for the trustee.

Hossie, for Dr. Weir, representing a certain class of creditors.

A. Alexander, for Dr. Hodgins, representing two other classes of creditors.

10th September, 1931.

MACDONALD, J.: R. L. Shimmin, on the 26th of November, 1930, was duly appointed trustee of the estate of R. P. Clark & Company (Vancouver) Limited (hereinafter called the debtor), in furtherance of an authorized assignment, under the Bankruptcy Act, made by the debtor, on the 6th of November, 1930.

Judgment

The trustee obtained an order on the 15th of December, 1930, whereby he was directed to instruct F. O'Hearn & Company, Toronto, stock-brokers, to register in the trustee's name and deliver to him certificates for all stocks and shares purchased through the said F. O'Hearn & Company by the said debtor and specified in the first schedule to such order. The trustee was required by the order to retain in his own custody all the certificates, which he might so receive from the said F. O'Hearn & Company and to hold them "subject to the right of any customer or creditor of the debtor to claim the same or to contest the claim thereto of any other customer or creditor." The trustee having thereby obtained certain certificates of stocks and shares, now invokes the provisions of section 42 of the Bankruptcy Act, for directions. He seeks, by his notice of motion, to obtain an order declaring that said stocks and shares received from F. O'Hearn & Company form part of the assets of the estate of the debtor or for such directions in regard to the same as should

seem meet. The trustee also applies for an order, declaring that all stocks and shares found by him as trustee, which had been in the possession of the debtor and of which there had been in the opinion of the trustee no definite appropriation by the debtor to any of its customers, should form part of the assets of the estate of the debtor and are not the property of any particular customer, who had given the debtor an order for purchase of stocks or shares of a similar description but had never received the same. Further, that a declaratory order might be made to that effect irrespective of whether a customer had or had not paid for such stocks and shares in full.

The trustee then, to supplement such motion, applied for directions, as to the service of the notice of motion and as to who should represent the different classes of persons interested in the application. For that purpose an order was made on the 30th of March, 1931. It outlines the questions to be determined and which should subsequently be covered by a formal order, so I think it advisable to refer to it somewhat at length. After reciting the notice of motion it stated, that it appeared there would be three rival claims to the stocks and shares mentioned in the first portion of the notice of motion,—

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namely (1) that of the trustee, who claimed them as part of the assets of the estate of the debtor, (2) that of those customers, approximately twenty in number, for whom it appeared that the stocks and shares in question had been ordered out by the debtor from O'Hearn & Company, and (3) that of all other customers, approximately 116 in number, who had given orders to the debtor for the purchase of Toronto stocks.

With respect to the second portion of the said notice of motion, such order recited, that there were two rival claims to the stocks and shares mentioned therein, *viz.*: (1) by the trustee on the one hand and (2) by a large number of customers of the debtor on the other hand. It was alleged that the two matters had been included in one notice of motion, because it appeared that similar questions of law would be involved in both matters and that to save expense, one customer in each of the classes of customers of the debtor might be appointed to represent and act for the benefit of all the customers interested in such classes respectively. To implement and give effect to such representations, the order provided: that Dr. G. M. Weir be appointed to represent those of the customers of the debtor for

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whom it appears from Exhibit C to the affidavit of Alex. Howden-Tough, sworn the 28th of March, 1931, that the debtor had ordered out from F. O'Hearn & Company the stocks and shares specified in the first schedule to the said order dated 15th December, 1930; that Dr. G. L. Hodgins be appointed to represent all other customers of the debtor who appear in the books of the debtor as creditors of the debtor, in respect of orders given by them to the debtor to purchase Toronto stocks; and that Capt. Henry Pybus be appointed to represent all customers of the debtor who appear in its books, as creditors, in respect of orders, given by them to the debtor, to purchase any stocks and shares listed on the Vancouver Stock Exchange and which were of the same description as those found by the trustee amongst the assets of the debtor, but which had not been definitely appropriated by the debtor to any particular customer.

Counsel for these representative customers of the debtor submitted arguments which portrayed a very complicated condition of affairs at the time of the bankruptcy and the existence of different conflicting interests is quite apparent. The situation was more complicated through the bankruptcy of Stobie-Forlong-Matthews, Ltd., agents of the debtor, in January, 1930, resulting in a great loss to the debtor and depriving it of funds, with which to maintain its credit with F. O'Hearn & Company, Toronto, or Laidlaw & Company of New York. Then the cross trades and extensive purchases upon the local stock market render the unravelling of the divers transactions still more difficult.

Judgment

In the first place the distinction between a stock-broker and an ordinary broker should not be overlooked, especially when the relationship of trustee and *cestui que trust* is being countered. This distinction is referred to in 9 C.J. p. 511, as follows:

> An ordinary broker is generally a mere negotiator, acting avowedly for another as principal and having neither the title to, nor possession of, the property bought or sold. The functions of a stock-broker, however, are in a great majority of his transactions much broader. He makes the purchase in his own name, frequently paying all or a part of the purchase price, and is intrusted with the possession of the securities dealt in, receiving or delivering them without the name of his principal appearing in the transaction.

A number of authorities were submitted, but, in considering

them, I deemed it most important to bear in mind, the difference between the manner in which stock-brokers conduct their business in Canada, as compared with England. This distinction was referred to by Anglin, J. (now Chief Justice) in *Clarke* v. *Baillie* (1911), 45 S.C.R. 50 at p. 76 as follows:

> It is common knowledge that the business of stock-brokers in this country is conducted in a manner more closely resembling that which prevails in the United States, and particularly in the State of New York, than that which obtains in England. Many customs and usages of English brokers are unknown in Canada; and many practices prevalent in our markets which have come to us from the United States, would not be recognized on the London Stock Exchange. For this reason, and also because of a dearth of English authority (see R. 70 of the London Stock Exchange, Stutfield, 3rd Ed., p. 45), I have drawn for authorities perhaps more freely than is usual in our Courts, upon American sources.

In adopting a similar course, I think it not out of place and appropriate, to refer to the remarks of Brett, L.J. in *Cory* v. *Burr* (1882), 9 Q.B.D. 463 at p. 469 as follows:

> If I thought that there were American authorities clear on this point, I do not say I would follow them, but I would try do so, for I agree with Chancellor Kent, that, with regard to marine insurance law it is most advisable that the law should, if possible, be in conformity with what it is in all countries. I must further add, that although American decisions are not binding on us in this country, I have always found those on insurance law to be based on sound reasoning and to be such as ought to be carefully considered by us and with an earnest desire to endeavour to agree with them.

Judgment

Then again in *In re Stobie-Forlong-Matthews, Ltd.* (1931), 1 W.W.R. 304 and 817, Dysart, J. in his judgment, involving the consideration of various claims against the liquidator for delivery of shares, made reference to such distinction between a stock-broker's business in Canada and England. His judgment affecting the different claims was appealed and in some instances reversed. The judgments in appeal were rendered subsequent to the launching of this application and were relied on, as giving support to the submissions of some of the claimants herein and destroying the contentions of the trustee. I have considered the authorities submitted by counsel for the trustee as tending to controvert such decisions in appeal, but feel satisfied that the conclusions of law there reached, with respect to a number of the claims, are applicable to the facts here presented and should be followed. In reaching a decision herein I find the same difficulty as mentioned by Fullerton, J.A. in his judg-

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ment, in the *Stobie-Forlong* case, that there does not appear to be any English authority, which would be binding, for the reasons already outlined, with respect to the custom and usages of stock-brokers in this country.

In deciding to agree with and follow the judgment of the Court of Appeal in Manitoba in the *Stobie-Forlong* case I should add, that I think it is important, in cases arising out of "bankruptcy" or "winding-up" that there should, if possible, be uniformity of decisions throughout Canada. Then how is the *Stobie-Forlong* case to be applied upon this application? The American decisions referred to require observation. Fullerton, J.A. at pp. 822-3 stated therein that:

> The Supreme Court of the United States has held that if, upon bankruptcy, the ear-marked certificates of a certain security are not traced and demanded, and there is enough of that kind of security to satisfy all customers entitled thereto, such customers, upon meeting any obligations of indebtedness or contribution, may be satisfied in full. If there is not enough of the particular security to satisfy all the "long" customers who claim ownership therein, such "long" customers, as owners as tenants in common, have rights proportionate to the amount of their claims: *Gorman* v. *Littlefield* (1913), 229 U.S. 19, 33 Sup. Ct. Rep. 690, 57 Law. Ed. 1047; *Duel* v. *Hollins* (1916), 241 U.S. 523, 36 Sup. Ct. Rep. 615, 60 Law. Ed. 1143. I can see no reason why the above principles should not be applicable here.

Judgment

The head-note in *Gorman* v. *Littlefield, supra,* supports a portion of the view taken by Fullerton, J.A. as to the American law in the matter, and is as follows (33 Sup. Ct. Rep. 690):

> Shares of stock in a certain corporation, indorsed in blank, and found in the possession of a bankrupt firm of stock-brokers in an amount greater than should have been on hand for a customer for whom shares in such corporation had been bought with the understanding that they were to be paid for in full, there being at the time of the purchase an ample credit balance with the firm in the customer's favour, applicable on its books to such payment, are not, up to the amount of such purchase, a part of the general bankrupt estate for the benefit of creditors, but should be turned over to such customer, where they are otherwise unclaimed, although they cannot be identified as the identical shares purchased for him.

Then *Duel* v. *Hollins, supra* (reversing *In re Brown* (1911), 184 Fed. 454), sustains the latter part of the statement of Fullerton, J.A. as to the American law. In that case Mr. Justice McReynolds, in delivering the opinion of a majority of the Court, after approving of the principles enunciated in *Gorman* v. *Littlefield, supra,* said (p. 527):

In view of our former opinions it must be taken as settled: That bankrupts and their customer stood in the relation of pledgee and pledgeor. That in their dealings stock certificates issued by same corporation lacked individuality and, like *fac-simile* storage receipts for gold coin, could properly be treated as indistinguishable tokens of identical values. That as between themselves, after paying amount due brokers, the customer had a right to demand delivery of stocks purchased for his account; and such delivery might have been made during insolvency without creating a preference.

Cases are cited in support of this proposition and then somewhat lengthy extracts from the judgment in *Gorman* v. *Littlefield, supra,* appear, one of which is as follows:

It is therefore unnecessary for a customer, where shares of stock of the same kind are in the hands of a broker, being held to satisfy his claims, to be able to put his finger upon the identical certificates of stock purchased for him. It is enough that the broker has shares of the same kind which are legally subject to the demand of the customer. And in this respect the trustee in bankruptcy is in the same position as the broker. *Richardson* v. *Shaw* (1908), 209 U.S. 365.

After referring to the duty of a broker, in dealing with his customer, especially as to having shares available subject to the order of the customer, so that he might deliver same without depleting his estate, the citation from such judgment ends as follows (p. 528):

No creditor could justly demand that the estate be augmented by a wrongful conversion of the property of another in this manner or the application to the general estate of property which never rightly belonged to the bankrupt. Judgment

A trustee is not in a better position than his assignor. *Frith* v. *Cartland* (1865), 34 L.J., Ch. 301. Nor can a debtor company set up its own wrong such as misappropriation in the attempt to benefit therefrom—*Gresham Life Assurance Society* v. *Bishop* (1902), A.C. 287.

The American decisions are in accord with the principle, that where an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands and the principal has the same interest in the goods, when bought, as it had in the funds producing it. Then again, if the goods so bought are mixed with those of the agent, the principal has an equitable title to a quantity to be taken from the mass, equivalent to the money advanced, which has been used in the purchase. This statement of the law also appears in *Carter* v. *Long & Bisby* (1896), 26 S.C.R. 430. There Smith Bros. had

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bought wool under instructions from Long & Bisby and after insolvency it was asserted by the assignee that Long & Bisby could not claim any of the wool in his possession through lack of identification. Chief Justice Strong, in delivering the judgment of the Court, stated that (p. 432):

> A great number of cases decided in Courts of equity ranging over more than a century have established that trust moneys may always be traced into property of any species into which it may have been converted, in such a way that the Court will give the *cestui que trust* as nearly as possible the same interest in the property as that which he had in the money of which it is the produce. See *In re Hallett's Estate* [(1880)], 13 Ch. D. 696.

Reference was then made to the principles propounded in the case of *Harris* v. *Truman* (1881), 7 Q.B.D. 340; (1882), 9 Q.B.D. 264 and a portion of the judgment of Lord Coleridge in that case cited as follows (p. 433):

> When large amounts of money are entrusted to a man to buy goods and carry on a business he becomes a trustee for the person to whom the money belongs and the proceeds of the money are affected with a trust. This is an old and well established doctrine in equity; it applies where the relation of principal and agent in the ordinary sense of the word does not exist. According to this doctrine where a confidence is created between two persons and where the one receives the money on the faith that he will do a certain thing and leads the other who has given the money to understand that the thing has been done, as between these two persons it is considered in equity to have been done. Therefore the person receiving the money is bound to hold what he gets for the person giving the money. I think that this ground is quite right.

Judgment

Then another portion of the judgment of Coleridge, J. was cited, supporting the proposition that where goods are found in the possession of an agent and mixed with his own but not capable of identification through not being ear-marked, the Court in that event will, upon what may be termed "a *cy pres* doctrine" give effect to the trust imposed upon the agent and afford relief to the principal. Adopting the words of such judgment and applying them to the trustee (p. 435):

> It shall not lie in the mouth of the trustee to say that any portion of these proceeds is not affected by the trust.

The extent and manner in which this view is to be applied may be difficult, under the varying conditions between the debtor and its customers.

Without attempting to deal specifically with the shares, represented by certificates which were in the hands of the debtor and thence came into the possession of the trustee, I have come

to the conclusion, that where there are sufficient shares of any particular description, to satisfy orders given by customers to the debtor, then that they should be delivered to such customers who have purchased shares of that description. If these customers have paid in full for their shares then no trouble should arise in this connection, except perchance that a splitting of the share certificates might become necessary, to deliver certificates representing the proper number of shares. If, however, any of these customers have not paid in full pursuant to their several orders for purchase, then, aside from any liability to make payment before being entitled to the certificates representing the shares so purchased, they should be required to make payment of the balance payable by them in respect of their purchases with interest, as well as making payment of any other indebtedness by them to the debtor. In this respect the standing of the customers with respect to their purchases should be apparent from the books. Then, if there were not sufficient certificates available of a particular description, to satisfy the purchases by the different customers, the course referred to in the *Duel* v. *Hollins* case, *supra,* and adopted by the District Court for the Southern District of New York should be followed. There should be awarded to the customers "their *pro rata* parts" of the shares, so insufficient to satisfy claims of the customers. This would involve consideration of their several accounts along the lines already indicated.

Judgment

These conclusions apply not only to shares bought in the local market but in the Toronto market and elsewhere.

The trustee, as to shares, is only entitled to deal with and consider as the property of the debtor, the certificates, representing shares, beyond the amount required to satisfy its customers; also such shares as may remain in his hands through default of the customers as to payment. In other words, the debtor only assigned, as the trustee only received, "the property of the debtor and not that of other persons." The property which passes to the trustee, and is divisible amongst the creditors of the debtor, is referred to, in section 23 of the Bankruptcy Act, as follows:

> The property of the debtor divisible amongst his creditors (in this Act referred to as the property of the debtor) shall not comprise the following particulars:—

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(i) Property held by the debtor in trust for any other person; . . . . But it shall comprise the following particulars:—

(a) All such property as may belong to or be vested in the debtor at the date of the presentation of any bankruptcy petition or at the date of the execution of an authorized assignment.

Then what disposition should be made of the shares obtained by the trustee from F. O'Hearn & Company pursuant to the said order which he obtained on the 15th of December, 1930? He was required thereby to retain the certificates representing these shares, subject to the rights of the customers of the debtor therein. He explains his actions in the matter, in a subsequent affidavit and it is apparent that shortly after assuming his duties as trustee, it was deemed important that any interest which had been possessed by the debtor, acting in the interest of his customers, should not be lost through F. O'Hearn & Company "selling out" the shares in the Toronto market. The debtor, as a broker, dealing with and responsible to another firm of brokers, was interested in these shares, but should be more concerned in furtherance of the trust imposed by its customers. He had received their money and instructed to purchase on their account. The shares were not the property nor in the possession of the debtor at the time of the execution of the authorized assignment nor did they pass thereunder. If they had been in the hands of the debtor at that time, then they would have been subject to the claims of the customers and should be dealt with in the matter previously mentioned. Is the trustee then in any better position than the debtor would have been had he been in possession of and thus been able to assign these shares? I do not think so, except that having acted with a view of salvaging some portion of the wreck, he expended money under authority of the order. This amount forms a lien with proper interest, upon the shares which thus came into his possession. Except for repayment of the moneys, so expended, I think these shares are in the same position as if they had, in the ordinary course, come into the hands of the trustee in taking possession of the assets of the debtor. The trustee only acquired any interest that the debtor might have in such shares and asserted this interest by applying to the Court for assistance. He could not to the detriment of the customers of his assignor destroy their rights, at any rate without due notice. The trustee placed himself and these shares,

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as it were, in the shoes of the debtor and undertook any burden which would have rested upon the debtor, if bankruptcy had not occurred. In *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (1925), A.C. 489 at p. 492; 94 L.J., Ch. 221, Viscount Cave, L.C., said:

> The effect of the bankruptcy was to close the account which had been running and to transfer the rights of the brokers to the trustee in their bankruptcy. But the rights of the trustee were no larger than had been the rights of the brokers and were subject to the like condition as to the return of the securities.

The trustee could not "justly demand that the estate be augmented by a wrongful conversion of the property" in such shares, possessed by the particular customers who had purchased them through the debtor. There would of course have to be the same adjustments as to these shares, as would arise under like circumstances, should the certificates therefor have been in the possession of the debtor at the time of bankruptcy.

As to the payment of the moneys expended by the trustee, in acquiring these shares from F. O'Hearn & Co. I think that upon principles of equity this amount should be paid *pro rata* with interest, by the customers who benefited through the course pursued by the trustee. If these customers have paid in full for their shares and others have only partly paid, then the manner of determining the *pro rata* basis may require further consideration. If, however, all have paid in full and still require to pay a further amount *pro rata* to satisfy the lien, then the customers would be entitled to rank as general unsecured creditors for what might be termed the over-payment. The manner in which a *pro rata* basis for payment is to be determined was not even discussed. Subject to argument, I think a fair mode to adopt would be to ascertain the value, forming the basis for ratable payment, from the several contracts or orders for purchases of the shares in question.

Judgment

In considering the claims, for delivery of shares in the hands of the trustee, I am assuming that in every instance the relationship of stock-broker and client existed and not that of vendor and purchaser. The result which follows upon bankruptcy, in the latter event was evidenced with respect to the Leaney claim in the *In re Stobie-Forlong-Matthews* case, *supra*. There Leaney bought from the Stobie-Forlong Co. and paid in full

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for 200 Lorne Gold Mine shares, but they were never delivered to him nor registered in his name. There were sufficient shares on hand at the time of the winding-up order to cover such purchase, but as they were not set apart nor appropriated to such purchase, no property passed therein to Leaney. It was like a bargain to buy goods and payment without segregation or delivery. It was consequently held that Leaney had no claim upon the liquidator in respect of these shares. I might mention on this point, that if it were shewn that any of the customers of the debtor bought shares from the debtor in a similar manner and certificates answering the description of their purchases came into the hands of the trustee but they were not set apart nor ear-marked, as the property of such customers, then the same result would follow and they would have no right to such shares. Their only redress would be to claim against the estate of the debtor as unsecured general creditors.

I have thus endeavoured to deal with the several matters submitted and consider the conflicting interests. It is apparent that the formal order will require close consideration, based on these reasons. It should give specific directions to the trustee as to the shares involved.

I think all parties should have costs out of the estate.

Order accordingly.

REX v. SHEWBROOKS.

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

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Aug. 31.

REX v. SHEWBROOKS

Architect—Formerly on register but struck off—Advertising of architect after being struck off register—R.S.B.C. 1924, Cap. 14, Secs. 31 (1) and 34; Cap. 245, Sec. 89.

Section 31 (1) of the Architects Act provides that "it shall be unlawful for any person not holding a certificate of registration under the provisions of this Act to put out any signs with a view to indicating to the public that he is an architect," and subsection (2) provides for the penalty in case of contravention of subsection (1).

In 1921 the defendant applied for registration under the Architects Act and was registered in the architects' register for that year, receiving a certificate that having complied with the requirements of the Architects Act he was registered as a member of the Architectural Institute of British Columbia. He did not pay any annual fee as required by section 34 of said Act for the year 1922 or following years, and on the 12th of October, 1923, his name was removed from the Register of Architects and has not since been restored. On the 16th of March, 1931, he put out certain signs at 4513 Kingsway in the Burnaby District, with a view to indicating to the public that he was an architect. A charge that he put out signs for the purpose of indicating to the public that he was an architect, contrary to section 31 (1) of the Architects Act was dismissed.

Held, on appeal, by way of case stated that the defendant in putting out the said signs with a view to indicating to the public that he was an architect was acting unlawfully, and contrary to the provisions of said section 31 (1) of the Architects Act, and that the case be remitted to the magistrate for the purpose of convicting the defendant, and imposing a fine pursuant to said Act.

APPEAL by way of case stated from the dismissal of an information by David Gillies, Esquire, police magistrate for the District of Burnaby, on a charge that the defendant Shewbrooks, not holding a certificate of registration under the Architects Act did put signs at 4513 Kingsway for the purpose of indicating to the public that he is an architect, contrary to section 31 (1) of said Act. Argued before MORRISON, C.J.S.C. in Chambers at Vancouver on the 14th of May, 1931. Statement

J. G. A. Hutcheson, for appellant.
McQuarrie, K.C., for respondent.

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31st August, 1931.

MORRISON, C.J.S.C.: The Architects Act, which is to be found in R.S.B.C. 1924, Cap. 14, Sec. 31, provides:

> Save as in this Act otherwise provided, it shall be unlawful for any person not holding a certificate of registration under the provisions of this Act . . . to put out any signs . . . with a view to indicating to the public that he is an architect.

The architects' register must be printed and published by the secretary of The Architectural Institute of British Columbia in each and every year and must contain the names of all persons appearing on the register on the first of January of that year—section 33.

In 1921 the respondent's name appears on the register. In 1923 it was removed therefrom and has not since been restored. Upon the removal of his name he had a right of appeal to a judge of the Supreme Court—section 36—of which he did not avail himself. The respondent continued to hold himself out as an architect in violation of the Architects Act as is alleged. The law was set in motion against him and he appeared before David Gillies, Esquire, one of His Majesty's justices of the peace in Burnaby, charged under section 89 of the Summary Convictions Act, Cap. 245, R.S.B.C. 1924, as set out in the case stated. The charge was dismissed, whereupon, on the informant's request, a case stated was formulated as follows:

Judgment

> CASE stated by David Gillies, Esquire, one of His Majesty's justices of the peace, in and for the Province of British Columbia, and police magistrate in and for the District of Burnaby, under the provisions of section 89 of the Summary Convictions Act, being chapter 245, R.S.B.C. 1924, and amending Acts.
>
> 1. On the 1st day of April, A.D. 1931, an Information was laid under oath before me by the above-named S. M. Eveleigh, for that the said Bernard Shewbrooks on the 16th day of March, A.D. 1931, at Burnaby, in the County of Westminster, being a person not holding a certificate of registration under the provisions of the Architects Act did put out signs at 4513 Kingsway for the purpose of indicating to the public that he is an architect, contrary to subsection (1) of section 31 of the Architects Act, chapter 14 of the Revised Statutes of British Columbia, 1924, contrary to the form of statute in such case made and provided.
>
> 2. On the 15th day of April, A.D. 1931, the said charge was duly heard before me in the presence of both parties, and after hearing the evidence adduced, and the statements of the said S. M. Eveleigh and Bernard Shewbrooks and their counsel, I did dismiss the said charge, but at the request of the counsel for the said S. M. Eveleigh, I state the following case for the opinion of this Honourable Court.

It was shewn before me that:

1. The said Bernard Shewbrooks did on the 16th day of March, A.D. 1931, at 4513 Kingsway, in the District of Burnaby, put out certain signs with a view to indicating to the public that he is an architect.

2. On the said 16th day of March, A.D. 1931, the said Bernard Shewbrooks was not registered under the provisions of the Architects Act, being chapter 14, R.S.B.C. 1924, and amending Acts.

3. The said Bernard Shewbrooks did in the year 1921, make application to be registered as an architect, pursuant to the said Architects Act, and was registered in the architects' register for that year.

4. The said Bernard Shewbrooks did not pay any annual fee as required by section 34 of the Architects Act, for the year 1922 or subsequent years.

5. The name of the said Bernard Shewbrooks was removed from the register of architects on the 17th day of October, A.D. 1923, and has not since the said date been restored to the register.

6. The said Bernard Shewbrooks on the 16th day of March, A.D. 1931, was the holder of, and upon the hearing of this case, produced a certificate in the words and figures following.

"This is to certify that Samuel Bernard Dean Shewbrooks having complied with the requirements of the British Columbia Architects Act, was registered as a member of the Architectural Institute of British Columbia founded Anno Domini MCMXIV. and afterwards constituted, under powers granted by the Legislative Assembly of British Columbia, Anno Domini MCMXX. a body politic and corporate to examine and authorize persons to practice the profession of architecture in the Province of British Columbia.

"IN WITNESS WHEREOF the Common Seal has been hereunto affixed, at a meeting of the council, held in Vancouver, B.C., this seventh day of January, 1921.

"Andrew L. Mercer.....President,
"Fred L. Townley.....Honorary Secretary.

"Register Number 80

"Architectural Institute of British Columbia. Founded 1914, Incorporated April 1920,"

being marked exhibit 3 upon the trial of this case.

7. The said Bernard Shewbrooks was not on the 16th day of March, A.D. 1931, the holder of any certificate other than that mentioned in the preceding paragraph hereof.

The solicitor for the said S. M. Eveleigh, desires to question the validity of my order dismissing the said charge on the grounds:

1. That it is erroneous in point of law.

2. That the facts as proven upon the hearing of this charge constitute an offence under subsection (1) of section 31 of the Architects Act.

3. That I erred in point of law in dismissing the said charge.

The questions submitted for the judgment of this Honourable Court being:

1. Was I correct in law in holding that the said Bernard Shewbrooks in putting out the said signs with a view to indicating to the public that he is an architect, was not acting unlawfully and contrary to the provisions an offence under subsection (1) of section 31 of the Architects Act.

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2. Was I correct in law in dismissing the said charge?

DATED at Edmonds, B.C., this 29th day of April, A.D. 1931.

Mr. *McQuarrie,* on behalf of the respondent submits that the respondent did not commit an offence under section 31 inasmuch as he had at one time had a certificate issued to him and having got that certificate, then it does not matter whether he defaults in the payment of his dues or that his name is subsequently struck from the register. That is a construction sought to be put upon the Act of which, in my opinion, it is not susceptible, having regard to its general nature and scope.

The paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object:

Maxwell on the Interpretation of Statutes, 7th Ed., 225. The object of section 31, to my mind, using the language of appellant's counsel, is to protect the public by giving the Architects Institute the power to control those desiring to practice as an architect within the Province and to specify the qualifications required, and to see that their members should not only possess those qualifications, but should comply with the rules, regulations and ethics of the Society, if they are to retain their membership, and it gives to the Society the power to expel and strike off the register, any persons who do not pay their dues or are guilty of unprofessional conduct, negligence or misconduct.

Judgment

The answer to the first and second questions is No.

The case is remitted to the magistrate for the purpose of convicting the respondent and to impose a fine pursuant to the provisions of the Architects Act, *supra.*

Appeal allowed.

IN RE IMMIGRATION ACT AND MUNETAKA SAMEJIMA.

FISHER, J. (In Chambers)

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July 8.

IN RE IMMIGRATION ACT AND MUNETAKA SAMEJIMA

Immigration Act—Order for deportation—Defective, not being in compliance with Act—Habeas corpus—Discharge of immigrant—R.S.C. 1927, Cap. 93, Secs. 23 and 33, Subsec. 7.

Munetaka Samejima was detained by the immigration authorities for deportation from Canada under an order, which reads in part as follows: "This is to certify that the rejected person above named [Munetaka Samejima] a person who entered Canada at Vancouver, B.C. from Yokohama, Japan, on September 29th, 1928, has this day been examined by the Board of Inquiry at this Port, and has been rejected for the following reasons: In that he is in Canada contrary to the provisions of the Immigration Act and effected entry contrary to the provisions of section 33, subsection 7 of said Act." On application for his discharge under *habeas corpus* proceedings:—

Held, that under the Act the reasons for rejecting an immigrant must be stated in full in the order. The reasons for rejection are not sufficiently given here and the order of deportation is therefore defective and not in accordance with the provisions of the Act. The applicant should be discharged.

APPLICATION by Munetaka Samejima, who was detained for deportation from Canada under an order for deportation, for his discharge under *habeas corpus* proceedings. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Victoria on the 29th of June, 1931. Statement

O'Halloran, for the application.
Clay, for the Crown.

8th July, 1931.

FISHER, J.: This is an application on behalf of one Munetaka Samejima for his discharge under *habeas corpus* proceedings. On the return to the writ the immigration officer in charge states that the said Munetaka Samejima is a person detained for the purpose of deportation from Canada under and by virtue of an order for deportation dated at Victoria, B.C., the 29th of April, 1931, and reading in part as follows: Judgment

"This is to certify that the rejected person above named [being the said Munetaka Samejima], a person who entered Canada at Vancouver, B.C.,

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from Yokohama, Japan . . . . on September 29th, 1928, has this day been examined by the Board of Inquiry at this Port, and has been rejected for the following reasons: In that he is in Canada contrary to the provisions of the Immigration Act and effected entry contrary to the provisions of section 33, subsection 7 of said Act."

The order purports to be made under section 33 of the Immigration Act and it is submitted on behalf of the applicant that it was not "had, made or given under the authority and in accordance with the provisions of this Act," that it does not therefore fall within the prohibition of section 23 of the Act, and the applicant is therefore entitled on these proceedings to be discharged from custody. Reliance is placed upon the case of *Rex* v. *Lantalum; ex parte Offman* (1921), 62 D.L.R. 223, and the case of *In re Narain Singh* (1913), 18 B.C. 506. In the *Offman* case it was held that an order of deportation made under section 33 of the Immigration Act, form B (similar to present form C) is defective, if, in the reasons for granting the order, reference is made to an order in council instead of the reasons for rejection being stated in full as required by the Act, and an intended immigrant in the custody of the immigration authorities is entitled on *habeas corpus* proceedings to be discharged from custody. Grimmer, J. at p. 238 says:

Judgment

> This matter, involving, as it does, the liberty of the person, requires to my mind that all the provisions of the statute which are invoked in its support and in support of the position which is taken in this case by the Board of Inquiry should be strictly performed. While the provisions of sec. 23 are very large, very conclusive, as far as the words themselves are concerned, yet, as reference has been made, they contain words which clearly point out to me at all events, that the decision which is arrived at by the officer or Board which made the inquiry into the matter must absolutely be made, had, or given under the authority and in accordance with the provisions of the Act relating to the detention or deportation of a subject whose deportation may be inquired into, and I am of the opinion that the form of the order which has been referred to, is as much a portion of the statute as any of the individual sections thereof. I am therefore of the opinion that when a person is ordered to be deported out of the country, the reasons for the deportation should be clearly stated in the order, and it is not a compliance therewith merely to refer under the instructions "Here state reasons in full" to the minutes of the order in council which provides the reason upon which the Board of Inquiry or immigration officer in charge may found or base its or his decision that the person or immigrant should be deported, and as, in this case, the order which made the deportation possible only used as the reason therefor the letters and figures "P.C. 23," it is in my opinion not in accordance with the provisions of the Act under which the order is made.

At p. 246 Crocket, J. says:

With regard to the merits I fully concur in the judgment of the Chief Justice that the order for deportation, under which Offman was and is held, was defective in not stating in full, as required by form B in the schedule to the Immigration Act the reasons for rejection. With all respect, however, I am unable to agree with his conclusion that he was precluded by the terms of sec. 23 of the Immigration Act from ordering the discharge of the applicant notwithstanding the defective order under which he was detained. The prohibition of that section, applies in my judgment only to proceedings, decisions or orders "had, made or given under the authority and in accordance with the provisions of this Act." The order in question, having omitted to state the reasons for rejection, which the Act clearly requires to be stated in full, is not an order, which was made or given in accordance with the provisions of the Act, and does not therefore fall within the prohibition of sec. 23.

In the *Narain Singh* case at pp. 510-11, HUNTER, C.J.B.C. says as follows:

The Court having concluded that the persons detained were entitled to their discharge on these grounds, it was then urged by Mr. *Taylor* that they were also held because of misrepresentations. But the order for deportation does not state that this was a reason for detention. The only reason, so-called, assigned, which could have any bearing on the matter, is given as "section 33." This section contains a number of subsections prohibiting different acts, and I do not think it is a proper compliance with the Act to refer generally to the section in this way as a reason for deportation. Common justice requires, and I think Parliament intended, that when a person is ordered to be deported out of the country, the reason for so doing should be clearly stated, in order that he might at least know what was the reason, and, in any event, a reason stated in such a fashion would not constitute a good return to a writ of *habeas corpus*.

Judgment

Reference was also made to section 23, which purports to limit the jurisdiction of the Court to interfere with deportation proceedings. It is, however, specifically enacted, that such restriction applies only to proceedings "had under the authority and in accordance with the provisions of this Act," and it would, indeed, be strange to find that the doors of the Court were shut against any person of any nationality, no matter what the act complained of might be.

In the present case it may be noted that in the order for deportation the only reason given is that "he [*i.e.*, Munetaka Samejima] is in Canada contrary to the provisions of the Immigration Act and effected entry contrary to the provisions of section 33, subsection 7 of said Act." As was said in the *Narain Singh* case of section 33, so I think it may be said of subsection 7, that it prohibits different acts, and in my opinion it may also be said that the subsection creates several quite distinct offences with respect to entry. In this connection

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reference might be made to *In re Wong Shee* (1922), 31 B.C. 145, where at pp. 149-50 MARTIN, J.A. says:

> At one time during the argument I was not satisfied that the "reason" required by form B (Order for Deportation) was sufficiently given in the order in question, wherein it is stated to be that the applicant "belongs to the labouring classes," without stating whether the class was of skilled or unskilled labour as set out in the order in council of June 9th, 1919, defining prohibited "classes or occupations." But upon further consideration I find myself unable to say that it is not, on the facts, a practical and sufficient, although not the most precise, definition of the applicant's disqualifications.

Counsel on behalf of the department of immigration has called my attention to what is called the decision of the Board, as though that would constitute sufficient compliance with the requirements, but it should be noted that it is only the recital that goes any further than the order of deportation and it only does so by purporting to recite a complaint received under section 40 of the Immigration Act which requires "full particulars" to be given. It should be noted, however, that this complaint is set out in the warrant issued by the deputy minister of immigration and colonization on the authority of which the Board of Inquiry was held and which was issued under section 42 upon the written complaint being received. A perusal of the warrant shews that the complaint is recited there as being in exactly the same terms as the order is, so that this would not seem to be any more definite. In any case, however, my view would be that it is the order itself, under which the applicant is held in custody, that must be considered, and after carefully considering such order I have come to the conclusion that the reason required by form C is not sufficiently given, and following the decision in *Rex* v. *Lantalum; ex parte Offman, supra,* I hold that the order of deportation is defective and not one given or made in accordance with the provisions of the Act, and the applicant is entitled to be discharged from custody. Order accordingly.

Judgment

Application granted.

IN RE MINISTER OF PUBLIC WORKS AND TIPPING.

Arbitration—Award—Jurisdiction — Excess of—Misconduct—Appointment and jurisdiction of umpire—R.S.B.C. 1924, Cap. 211, Secs. 15 and 20—B.C. Stats. 1930, Cap. 24.

The Court has jurisdiction to set aside any award which purports to exercise jurisdiction beyond that given by the authorizing Act and the submission made pursuant thereto. "Misconduct" should be construed in its widest sense and includes a mere mistake as to the scope of the authority conferred by the submission.

This arbitration is under the Highway Act with the arbitration sections of the Public Works Act made applicable thereto by the Highway Act and where the time for making an award by the arbitrators has not expired sections 15 and 20 of the Public Works Act circumscribe both the appointment and jurisdiction of the umpire and make certain conditions precedent to his right to determine the whole matter.

Where the powers of arbitrators are statutory anything they do beyond what is authorized by statute is not binding on the parties to the submission.

APPLICATION by the Minister of Public Works to set aside an award of arbitrators on the ground of misconduct. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 29th of May, 1931. Statement

McPhillips, K.C., and *A. deB. McPhillips*, for Minister of Public Works.

Hamilton Read, for Tipping.

3rd July, 1931.

FISHER, J.: This is an application on behalf of the Minister of Public Works to set aside on the ground of misconduct the awards made by Brian Harrison and Edwin Bush, the arbitrators, and *Henry L. Edmonds, K.C.*, the umpire, herein.

A preliminary objection was raised by counsel on behalf of Tipping based on the contention that there is an award good on its face and that such cannot be set aside on the ground that the arbitrators have made a mistake in law but my view would be that the Court would have jurisdiction to set aside any award that purports to exercise jurisdiction beyond that given by the Judgment

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authorizing Act and the submission made pursuant thereto, as the expression "misconduct" should be construed in its widest sense and would include a mere mistake as to the scope of the authority conferred by the submission. See Halsbury's Laws of England, Vol. 1, p. 478.

The first issue I have to consider therefore is whether the submission to arbitration was one under the Public Works Act or one under the Highway Act with the arbitration sections of the Public Works Act, being those from 12 to 31, made specially applicable by section 16 of the Highway Act (Cap. 24, B.C. Stats. 1930) or section 15 of the Act as it previously stood. It seems to me I can best determine this issue by first considering the preliminary documents and ascertaining from them what was really submitted to the arbitrators to determine.

I have before me two appointments each dated January 5th, 1931, one signed by the Minister of Public Works, appointing Harrison as his arbitrator, and the other signed by Tipping appointing Bush as his arbitrator. I have also before me an appointment signed by Harrison and Bush appointing *H. L. Edmonds* as umpire.

Judgment

The appointment signed by or on behalf of Tipping reads as follows:

Re Alexander Tipping.

Re Fractional North East ¼ Section 25, Township 20.

Re North West ¼ Section 30, Township 23.

Pursuant to the Highway Act being chapter 103 of the Revised Statutes of British Columbia, 1924, and to the Public Works Act being chapter 201 of the Revised Statutes of British Columbia, 1924, and in the matter of the claim of Alexander Tipping for compensation claimed by him in respect of the above mentioned land taken and for alleged direct or consequent damage to the same from the construction or in connection with the execution by the Minister of Public Works for highway purposes.

TAKE NOTICE that pursuant to the provisions of the said Acts, I DO HEREBY nominate and appoint E. Bush of Mission City in the Province of British Columbia in my behalf as arbitrator on the proposed arbitration to settle the amount of such compensation.

It is contended on behalf of Tipping that this is a submission pursuant to or after the filing of a claim pursuant to section 11 of the Public Works Act which reads in part as follows:

If any person has any claim for real or personal property taken, or for alleged direct or consequent damage to such property arising from the con-

struction or connected with the execution of any public work undertaken at the expense of the Province, or any other work as aforesaid, or any claim arising out of or connected with the execution or fulfilment, or on account of deductions made for the non-execution or non-fulfilment, of any contract for the execution of any such public or other work as aforesaid, made and entered into with the Minister, either in the name of His Majesty or in any other manner whatsoever, such person may give notice in writing of such claim to the Minister, stating the particulars thereof, and how the same has arisen; and thereupon the Minister may, at any time within thirty days after such notice, tender what he considers a just satisfaction for the same, with notice that unless the sum so tendered is accepted in thirty days after such tender the said claim shall be submitted to arbitration.

A comparison of the section with the phraseology of the appointment shews that the words "of any public work" appearing after the word "execution" in the section do not appear in the appointment but apparently instead thereof one finds the words "for highway purposes." It seems to me that this greatly weakens the contention of counsel that the appointment should be interpreted as indicating a submission made pursuant to the Public Works Act, and, in any event, justifies its being interpreted not by itself but in the light of the appointment signed by the other party. I therefore turn to the appointment signed by the Minister which reads as follows:

Judgment

Re Alexander Tipping and Nicomen Island.

Pursuant to the Highway Act, being chapter 24, of the Statutes of British Columbia, 1930, and to the Public Works Act, being chapter 211, of the Revised Statutes of British Columbia, 1924, and in the matter of the claim of Alexander Tipping for compensation claimed by him for land, namely, portions of the North East Quarter of Section 25, Township 20, and of the North West Quarter of Section 30, Township 23, Nicomen Island, in the Province of British Columbia entered upon and taken possession of by the Minister of Public Works for highway purposes.

TAKE NOTICE that pursuant to the provisions of the said Acts, I do hereby nominate and appoint Brian A. Harrison, Esquire, of Langley Prairie, in the Province of British Columbia, Farmer, in my behalf as arbitrator on the proposed arbitration to settle the amount of such compensation.

Referring to this appointment signed by the Minister of Public Works, counsel on behalf of Tipping has called my attention especially to the words "and in the matter of the claim of Alexander Tipping for compensation claimed by him" and submits that this read with the latter part of the appointment referring to the "proposed arbitration to settle the amount of such compensation" indicates that it was wide open to the arbitra-

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tors to settle the claim which Tipping had put in. There seems to be some dispute, and the material before me is not conclusive, as to just what claim Tipping put into the department of public works but in any event it seems to me that Tipping might have put in a claim in which he claimed to be allowed for some items allowable only under the compensation provisions of the Public Works Act and yet the Minister would not be at liberty, much less bound, to agree that some amount, to be determined by arbitration, should be allowed for such items if it was only for highway purposes that the land was being entered upon and taken possession of for in such cases the reference to arbitration is a statutory one and the Minister himself would be bound by the terms of the statute. Thus the conclusion is forced upon me that, if the appointment signed by the Minister, is unambiguous, it should determine what was really submitted to arbitration. Upon consideration of such appointment then it is to be noted that it specifically refers to the land (mentioned therein) as land "entered upon and taken possession of by the Minister of Public Works for highway purposes." It may be noted that the appointment of the umpire uses the same expression and it seems to me that this expression is unambiguous and that for land thus described as "entered upon and taken possession of for highway purposes" the Minister would and did act under the authority given by the Highway Act and, as authorized by such Act, submitted the matter of compensation for such land so "entered upon and taken possession of for highway purposes" to arbitration under the Highway Act with the arbitration sections of the Public Works Act made applicable thereby as aforesaid. It might be argued however that the acts of the parties or the course taken by the arbitrators has made the award binding even though it otherwise might not be so.

Judgment

I have some evidence before me as to the acts or conduct of the parties during the arbitration proceedings and on the hearing of the application before me counsel for the respective parties in the arbitration proceedings made contradictory statements as to the course of such proceedings. It must be remembered however that in this case public moneys are really being dealt with as payment of the amount of the compensation will

have to be made out of such and also that the land was taken for highway purposes as is apparent from the appointments as aforesaid and that under such circumstances as has been pointed out the Minister of the Crown was himself bound by the statute under which he was authorized to act. The reference is a statutory one and under the circumstances my view is that in any event the terms of the written submission could not be enlarged by the acts or conduct of the arbitrators or of counsel acting before them in the matter. See *Province of Quebec* v. *Province of Ontario* (1909), 42 S.C.R. 161 at pp. 179, 198-201. As pointed out in such case, once it is conceded that the powers of the arbitrators were statutory, it seems that anything the arbitrators did beyond what they were authorized to do could not be binding upon the parties to the statutory submission or have any possible effect.

I think it is admitted and, if not, I hold that the award of the umpire, *Henry L. Edmonds,* dated 10th March, 1931, is not made in accordance with the provisions of the Highway Act but purports to deal with matters beyond any jurisdiction given him under such Act and to grant an amount including therein allowances for items possibly allowable under certain compensation sections of the Public Works Act but certainly not allowable if, as I find, the submission was one made solely under the Highway Act with only the arbitration sections of the Public Works Act made specially applicable as aforesaid.

Judgment

I have before me however in addition to the award of the umpire awards by each of the arbitrators.

In this connection attention has been called by counsel on behalf of the Minister to section 15 of the Public Works Act, being one of the said arbitration sections reading as follows:

> Where more than one arbitrator has been appointed, such arbitrators shall, before they enter upon the matters referred to them, nominate and appoint, by writing under their hands, an umpire to decide on any matters on which they may differ; or if the umpire dies, or refuses or becomes incapable to act, they shall forthwith after such death, refusal, or incapacity appoint another umpire in his place; and the decision of every such umpire on the matters so referred to him shall be final.

In the first place it may be noted that Harrison, the arbitrator appointed by the Minister of Public Works, states in his affidavit that after the appointments of himself and

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Bush as arbitrators as aforesaid they entered upon the arbitration, discussed the claim of the said Alexander Tipping and inspected the said lands and after further conference came to the conclusion that they could not agree upon an amount of compensation and in view of their disagreement decided to appoint an umpire and accordingly did so. Thus it would seem that, though the said section states that before entering upon the matters referred to them the two arbitrators shall appoint an umpire to decide on any matters on which they shall differ, the arbitrators here apparently entered first upon the matters referred to them and having decided that they could not agree upon the amount of compensation, then, and not until then, appointed an umpire and proceeded as though the umpire was not simply to decide on any such matters on which they should differ but to join with them in considering all the matters referred to them relating to the compensation the amount of which was to be settled by the arbitration. Confusion as to the procedure to be followed and the authority of the umpire seems thus to have arisen with the result that each arbitrator made an award within the time appointed, one for $9,872, the other for $3,357.50 and the umpire for $8,850.95 although, as has been pointed out by counsel for the Minister the two arbitrators had agreed on one item of $500 to which the umpire does not specifically refer in his award which purports to be an award on the whole matter and the award of the umpire was made on March 10th though on such date sufficient time had not then expired so as to confer on the umpire, pursuant to section 20 of the arbitration provisions, the right to determine the whole matter in case the arbitrators had neglected to make their award within the appointed time. In this connection reference might be made to the case of *Winteringham* v. *Robertson* (1858), 27 L.J., Ex. 301, where it was held that there was power to appoint a third person as umpire before any difference had arisen and that the effect of his appointment was that he was to sit with the arbitrators and hear and consider the matters referred and if they did not agree in an award to make an award upon all the matters referred and not merely those on which they did not agree. In such case, however, it was clear from the original agreement of submission that power was

Judgment

thereby given to the two arbitrators, if they should not agree, to appoint a third person "to be umpire in or to concur with them in considering and determining all or any of the matters referred" and the appointment was accordingly in those terms. In the *Winteringham* case it was quite clear also that the arbitrators had differed on all essential points and did not agree in an award when the time for making it had arrived. In the present case the time for making the award by the arbitrators had not expired and, in my opinion, said sections 15 and 20 of the arbitration provisions circumscribe both the appointment and the jurisdiction of the umpire and make certain conditions (which did not exist here) precedent to his right to determine the whole matter.

Judgment

My conclusion, therefore, is that, as the two awards of the arbitrators did not agree, though it could never have been intended that there should be more than one award (see section 29 of the arbitration provisions), they must be set aside and the award of the umpire must also be set aside on the grounds that it deals with matters outside of the submission upon which it was founded and purports to exercise jurisdiction beyond that given by the authorizing Act (*i.e.*, the Highway Act) and in the absence of the fulfilment of the conditions precedent to the exercise of jurisdiction or contrary as I have pointed out to the provisions governing the submission. Judgment accordingly. Question of costs to be spoken to.

Awards set aside.

MORRISON, C.J.S.C.

1931

July 25.

COOPER v. WARBURTON

COOPER v. WARBURTON.

Slander—Damages—Repetition by contributors—Justification.

The plaintiff, who was treasurer of a social service association, published a financial statement of the society and submitted it to a meeting of the society. The statement did not contain the name of the defendant amongst those who contributed to the funds of the association. The defendant later stated to third parties that he had contributed to the association by payment of $5 to the plaintiff. The president of the association heard of the defendant's statement, and after getting in touch with the defendant they met in the president's office with others, when the defendant told them he had paid the plaintiff $5 by cheque. He then left them to bring back the cheque but he did not return and no cheque was produced. In an action claiming damages for slander:—

Held, that the statement made by the defendant might be most injurious to the plaintiff, and if true would justify his removal from office, and the repetition of the words was the natural consequence of the defendant uttering them. There was an obligation on those contributors who heard the defendant's assertions to repeat them to those in authority and the plaintiff is entitled to recover.

Statement

ACTION for damages for slander. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 11th of July, 1931.

O'Dell, for plaintiff.
Bayfield, for defendant.

25th July, 1931.

Judgment

MORRISON, C.J.S.C.: The plaintiff was treasurer of the Richmond Social Service Association during 1929-30. In October, 1930, a statement of the assets and liabilities of the society was published and submitted to a meeting of the society, which did not contain the name of the defendant amongst those of the contributors to the funds of the association. Thereafter, it is alleged, the defendant stated to third parties that he had contributed by payment of $5 to the plaintiff as such treasurer. The plaintiff has now brought action claiming damages for slander.

Slander is an oral statement published without lawful justification or excuse, calculated to convey to those to whom it is published, an imputa-

tion on the plaintiff injurious to him in his trade, or holding him up to hatred or contempt or ridicule.

It is immaterial whether or not the defendant meant the words to be defamatory. The question is whether the words he used were calculated to convey a disparaging imputation. *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741 at p. 772; *E. Hulton & Co.* v. *Jones* (1910), A.C. 23.

Spoken words are not actionable without proof of special damage and the damage complained of must in fact flow directly from the use by the defendant of the words complained of. The damage must not be too remote. *In re Polemis* v. *Furness, Withy & Co.* (1921), 3 K.B. 560. To this statement of the law there are a number of exceptions. The one applicable to this case is this: No proof of special damage need be given in the case of words imputing misconduct in an office of credit or honour such as would be ground for his removal from office: *Onslow* v. *Horne* (1771), 2 W. Bl. 750; Underhill on Torts, 11th Ed., 107. I find that the defendant made the imputation complained of against the plaintiff. These words are capable of bearing a defamatory meaning. I find that in fact they bear that meaning. They were words which might reasonably be understood by persons to whom they are published to refer to the plaintiff, and they were understood to refer to him. The defendant pleads privilege. No action lies for a statement which is made upon an occasion of qualified privilege and fairly warranted by it, unless it be proved to have been made maliciously, *i.e.*, with an improper motive. The defendant in the present action, upon learning that his name did not appear in the list of contributions, made use of the words complained of, to third parties, or a variation of them conveying the same imputations. Rumours based upon these statements reached the ears of Marshall, president of the association. He at once 'phoned the defendant and they met, together with others, in Marshall's office, when the defendant told them that he had paid the plaintiff the small sum in question. Upon being asked how the money was paid, he said it was by cheque, and he left in order to bring back the cheque. He did not return, and no cheque was forthcoming. He then adhered to his first statement that it was paid in person. Mr. *Bayfield,* for the defend-

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ant, submits that this occasion was privileged, and in support cites the case of *Speight* v. *Gosnay* (1891), 60 L.J., Q.B. 231. What that case decided on this point is that if the damage be immediately caused by the plaintiff himself, he cannot succeed. There the plaintiff (a young woman) told the slander to her betrothed who consequently refused to marry her. It was held that no action would lie against the slanderer.

> If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. . . . So if it is proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive:

Brett, L.J., in *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237 at pp. 246-7.

I draw the inference from the evidence, that the defendant finding that his name did not appear amongst those of his friends who contributed, he (it may be impulsively and not intending it should go further) stated he had in reality contributed. He well may have intended to contribute but forgot and was chagrined that he so forgot. It would doubtless be a matter of comment that his name was not on the list. However all that may be, a man is responsible for the natural consequences of his act. He released the statement which in its consequence upon the plaintiff might be of the most injurious character, and if true would certainly justify his removal from the position of trust held by him in this eleemosynary work. The repetition of these words was the natural consequence of the defendant uttering them. His interview on the occasion when privilege is claimed, was merely an attempt to justify what he had already uttered elsewhere. I think there was an obligation on those contributors who had heard the defendant's assertions, to repeat them to those in authority.

Judgment

There will be judgment for the plaintiff for nominal damages $10 and costs.

Judgment for plaintiff.

RE ESTATE OF THOMAS BOWHILL COLVILLE.

MACDONALD, J. (In Chambers)

1931

Aug. 8.

RE COLVILLE ESTATE

Will—Execution of by testator domiciled in British Columbia—Unattested holograph will subsequently made in California after change of domicil—Statement in holograph will cancelling all previous wills—Effect of holograph will as to realty and personalty in British Columbia.

The testator, while domiciled in British Columbia made a will while in British Columbia in accordance with the Wills Act of the Province. He subsequently went to California where he acquired domicil and made a holograph will revoking all previous wills and died domiciled in California. At the time of his death he was possessed of both real and personal estate in British Columbia. Upon application of the executor for advice as to the validity and effect of such wills:—

Held, that the holograph will made in California being valid there is also valid in British Columbia, and as to personalty it revokes the previous will made by the testator in British Columbia, the result being that all the personal property possessed by the testator in British Columbia is to be dealt with and distributed in accordance with the holograph will.

Held, further, that the earlier will operated as a valid will as to the British Columbia realty, notwithstanding that the testator by a subsequent will, valid according to the law of his domicil at the time of his death, but invalid to dispose of realty in British Columbia, purported to revoke the earlier will in its entirety.

APPLICATION by the executor under two wills of the late Thomas Bowhill Colville for the opinion of the Court as to the validity of such wills, of which he was granted probate in April, 1931. The facts are set out in the reasons for judgment. Heard by MACDONALD, J. in Chambers at Vancouver on the 22nd of July, 1931. Argument

George Duncan, for the executor.

8th August, 1931.

MACDONALD, J.: Robert Allison Hood, as sole executor under two wills of the late Thomas Bowhill Colville, seeks to obtain the opinion of the Court, as to the validity and effect of such wills, of which he was granted probate, on the 17th of April, 1931. Service of an originating summons for the purposes mentioned, was effected upon the parties interested, in accordance with an order on that behalf, made on the 14th of May, Judgment

MACDONALD, J. (In Chambers)

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RE COLVILLE ESTATE

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1931. Upon the matter coming before me for consideration, counsel for the executor and for Jean Gravette only, appeared and submitted argument.

The testator made the first of these wills on the 20th of April, 1927, while in British Columbia, and in accordance with the Wills Act of this Province. Then, subsequently he went to California, and while domiciled there, on the 1st of March, 1930, made a holograph will which was inconsistent in its terms with his prior will. Robert Allison Hood was appointed executor in both wills and the latter one authorized Hood to appoint a trust company in Los Angeles, California, "to handle and distribute property in California, if any; also to turn into cash to the best advantage possible and distribute it to persons named as receiving the interest thereon." In pursuance of this authority, Hood appointed the Title Guarantee Trust Company, a corporation of the State of California, to carry out the intent of the testator, and also consented to the appointment of such Trust Company as administrator, with the holograph will annexed. On the 3rd of December, 1930, probate of such will was granted to such corporation by the Superior Court of the said State.

The deceased, at the time of his death, was possessed of both real and personal estate in British Columbia. The question then arises as to the effect of such holograph will, as far as personal property in this Province is concerned, and then as to whether it became effective in any way as to real estate in British Columbia, or created an intestacy, as to such property.

Holograph wills are only recognized as being valid under the Wills Act, R.S.B.C. 1924, Cap. 274, to a limited extent, as provided by section 9 of the Act. Section 6 of the Act is specific in this respect. It is, however, submitted that the Wills Act Amendment Act, 1924, altered the situation as to holograph wills, under certain conditions, as affecting personal property in British Columbia. It provided as follows:

14A. Every will made outside of the Province by a British subject, whatever was the domicil of the testator at the time of making the same or at the time of his death, shall, as regards personal property, be held to be well executed for the purpose of being admitted to probate in the Province if the same is made according to the form required, either:—

(*a.*) By the law of the place where the testator was domiciled when the same was made; or

(*b.*) By the law of the place where the will was made; or

(*c.*) By the law then in force in that part of His Majesty's dominions where the testator had his domicil of origin.

This legislation being like all other enactments remedial in its purport, and so to be construed, was, according to the judgment in *In re Lyne's Settlement Trusts* (1919), 1 Ch. 80 at p. 100, enacted in England to alleviate the difficulty of British subjects who owned personal property in England, and might while abroad, desire to dispose of their personal property. There is similar legislation in Ontario, Wills Act, R.S.O. 1914, Cap. 120, Sec. 20, and in England it is usually known as Lord Kingdown's Act, 1861. Then do the facts here presented, and which I accept, as they are not in any particular contradicted, bring the holograph will in question within the terms of such amendment to our Wills Act? In the first place, was the testator a British subject at the time of making the will in question? While he afterwards became a citizen (as it is termed) of the United States and presumably destroyed his nationality of origin in Scotland, still it is contended that the will, being made at a time when he was a British subject, is valid. Our Wills Act, Sec. 21, provides that:

Judgment

> Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

At first blush this might appear as an unsurmountable obstacle in deciding that such holograph will is valid. It is, however, to be noted, that this amending Act fixes a time when the validity of the will is to be determined, namely: when it was made, not when it becomes effective through the death of the testator. Thus I think that said section 21 should be construed, as simply determining as to the property which is to come within the terms of the will and be affected thereby, at the time of the death of the testator. It does not determine the validity of the will itself. If a British subject, in other words, when travelling, makes a will which is in accordance with the law of the place where he is domiciled, at the time when the will is made, then its validity should not be destroyed by the fact, that he subsequently ceased to be a British subject. Then, if according to

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the law of Scotland, his domicil of origin, a holograph will is valid, it can be properly contended that its effect should not be destroyed through change of domicil or nationality. This result would also follow from a holograph will made in California, where the testator was domiciled at the time of execution. In this connection, in Dicey's Conflict of Laws, 4th Ed., pp. 759-60, a note to the similar English legislation is instructive, as follows:

> The Act does not make it clear if the testator must be a British subject at the time of his death; the absence of any saving of a change of nationality may be adduced in support of the view that this condition is requisite, but the strict wording of the Act requires British nationality only where the will is made, [and when made] and it does not seem legitimate to insist on any further condition.

While the point is thus arguable, still I think that the construction to be placed upon this remedial legislation should be, as I have indicated. I have, in coming to this conclusion, borne in mind the judgment in *Re Dartnell* (1916), 37 O.L.R. 483. It is true that in that case it did not necessarily require a decision upon the question now being discussed, but the fact that the testator made his will and died in New Jersey, after he had ceased to be a British subject, did not tend to invalidate the will, which he had made many years before, while domiciled in Ontario.

Judgment

Then, aside from the legislation thus shortly discussed, as the testator was domiciled in California at the time of his death, the law of that State should prevail as to personalty. This proposition was stated by Boyd, C., in *Re Dartnell, supra,* at p. 485, as follows:

> Neither the English legislation nor our own was intended to displace the general law recognized in all civilized nations, condensed in the words *mobilia sequuntur personam,* which mean that personal property is subject to the law which governs the person of the owner. If he dies, it is not the law of the country in which the property happens to be, but the law of the country of his then domicil, which governs. Lord Selbourne in *Freke* v. *Lord Carbery* (1873), L.R. 16 Eq. 461, 466, shews that "domicil is allowed in England to have the same influence as in other countries in determining the succession of movable estate." The Latin maxim embodies the law of the civilized world, and is founded on the nature of things. The Courts have regard to it, not by any special law of England, but by the deference which, for the sake of international comity, the law of England pays to the law of the civilized world generally.

As far then as the holograph will, made in California, is con-

cerned, I have no hesitation in determining, that as it was valid there, it is also valid in British Columbia. So as to personalty, it revokes the previous will made by the testator in British Columbia. Under similar circumstances, Orde, J., in *Re Howard* (1923), 54 O.L.R. 109, came to the same conclusion, *vide* p. 113, as follows:

> There can be no question that the holograph will effectually revokes or supersedes the earlier will, in so far as the Ontario personalty is concerned, upon that principle of English private international law which, under the maxim *mobilia sequuntur personam*, recognizes the validity in England over English personalty of a foreign will if valid according to the foreign domicil of the testator.

The result is that all the personal property possessed by the testator in British Columbia is to be dealt with and distributed, in accordance with such holograph will.

Having reached the conclusion mentioned as to the personalty, what effect, if any, has the holograph will as to the realty? While it purports to devise realty, still it has no effect and is invalid, as to disposing of real property in British Columbia, not being executed in accordance with our Wills Act. Then has the original will made in British Columbia been revoked through the opening statement in the holograph will, that it "cancels all previous wills that I may have made"? If this declaration of the testator has not the effect of revoking the previous will as to realty, then his wishes in this respect will not be carried out. But as the holograph will is ineffectual to dispose of realty in British Columbia, if it only operated to revoke the previous will, there would be an intestacy as to the realty. Has there been a revocation with such a result?

Judgment

Our Wills Act provides for revocation, by section 17, reading as follows:

> No will or codicil or any part thereof shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

If these provisions be recognized and accepted as the only means by which a properly executed will "affecting real estate" can be revoked, then, as none of them is here present, the will

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should stand and be valid as to the real estate possessed by the testator in British Columbia at his death. In this connection, in Theobald on Wills, 8th Ed., at p. 44, the similar section (20) in the English Wills Act, is quoted at length, and then after discussing the cases bearing upon revocation of a will, the author, at p. 52 says:

> But though a testator may have done everything which he considered necessary to revoke his will, the will is not revoked if he has not adopted one or other of the modes of revocation pointed out in section 20.

I do not deem it necessary, however, to discuss this section further, as I intend to adopt the reasons and follow the conclusion which Orde, J. reached in his interesting and well-considered judgment in *Re Howard, supra.* The facts in that case were almost precisely similar with those here presented. After the manner adopted by Dr. Dicey in his work on Conflict of Laws, the learned judge illustrated the results which might follow, from a party making his will when domiciled in one country, and then changing his domicil and making another will. Applying one of the illustrations with proper changes, it portrays the present case:

Judgment

Thomas Colville, while domiciled in British Columbia, and while owning realty in British Columbia, makes a will in British Columbia, valid as to realty in that Province. He then acquires a California domicil and makes a holograph will revoking all previous wills, and dies domiciled in California. He disposes by the latter will, of both realty and personalty. Does the British Columbia will still remain effective as to the British Columbia realty?

A distinction was drawn in the *Howard* case, between realty and personalty, when it is sought to dispose of them by will, and the judge felt constrained to hold that he should (p. 120) "give effect to any testamentary writing [properly] executed by a foreign owner of land, unless that writing has been revoked in accordance with the provisions of section 23 [our section 17] of the Wills Act." He then added:

> In other words, when our Courts are called upon to determine the title to the land in question they treat the matter without regard to the foreign domicil of the deceased owner, and for that purpose look for and give effect to such testamentary acts as according to the law of Ontario validly deal with Ontario realty. To our Courts the question is not really a testa-

mentary one, but one of title. . . . It is odd that the neat point that I have discussed at such length has not, so far as I am aware, been clearly decided or enunciated either by any Court or by any text-book writer.

This case was decided in 1923 and no authority or argument has been presented, which would have the effect of my withholding approval of the judgment. In my opinion the will made in British Columbia was not revoked, and is valid. I would have preferred that some one had appeared and argued to the contrary upon such a question, where there seems to be a scarcity of authority.

There is another feature, however, which led me to the conclusion that the will executed in British Columbia, disposing of real estate, is valid. Unquestionably, the deceased was in what might be called a testamentary mood, at the time he made both the wills. Then when he drew up the holograph will, is it not fair and reasonable to suppose that in dealing with the real estate, he was attempting to draw and execute a document which would be effectual for that purpose? Presumably his efforts would not be in the direction of creating an intestacy. So that as between a document which was ineffective to devise land, and the continuance in effect of his first will, he would prefer the latter course. After a will has been revoked for the purpose of making a fresh will, if no fresh will is made, then the original will is not revoked. See *In the Goods of Thomas Eeles* (1862), 2 Sw. & Tr. 600. Then, following the citation of this authority as to the intention of the testator governing, Theobald on Wills, along the same lines, at p. 46, states:

Judgment

> Nor, under similar circumstances, is the old will revoked if the fresh will, though made, is not effectual. *Hyde* v. *Mason*, Vin. Abr. Devise, R. 2, pl. 17; Com. 451; 1 Lee, 423, n. (*a*); *Dancer* v. *Grabb* [(1873)], L.R. 3 P. & D. 98; *West* v. *West* (1921), 2 I.R. 34.

Then, as to whether the holograph will, executed in California, disposes of moneys secured upon mortgage in this Province. In my opinion it serves that purpose, and such mortgages are personalty and come within the purview of such will. *Vide In re Gibbon* (1909), 1 Ch. 367.

The result which I have reached will enable counsel to draw an appropriate order, categorically answering the different questions submitted. The costs are payable out of the estate, as between solicitor and client.

Order accordingly.

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McGEE *ET AL.* v. R. H. POOLEY, ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA, AND COSGROVE.

Constitutional law—British North America Act—Secs. 91 and 92—Legislative authority—Security Frauds Prevention Act—Ultra vires—B.C. Stats. 1930, Cap. 64.

In an action to restrain the defendants from the examination and inspection of books and documents held by the Attorney-General of the Province under the Security Frauds Prevention Act, B.C. Stats. 1930, Cap. 64, from the examination of the plaintiff McGee thereunder, and for a declaration that said Act is *ultra vires* and beyond the competence of the Provincial Legislature it was held that the Act was not criminal in its nature and was within the legislative jurisdiction of the Province.

Held, on appeal, reversing the decision of MACDONALD, J., *per* MARTIN, GALLIHER and MACDONALD, JJ.A. (MCPHILLIPS, J.A. dissenting), that the investigation being a method of criminal procedure to obtain evidence in support of a criminal prosecution, which is exclusively within Dominion jurisdiction, was made without jurisdiction, and was a misapplication of the powers conferred by the Provincial Act. The defendants are restrained from further proceedings upon the investigation and the books should be returned to the owners.

Per MACDONALD, C.J.B.C.: That the Act was *ultra vires* of the Legislature.

Statement

APPEAL by plaintiffs from the decision of MACDONALD, J. of the 13th of January, 1931, in an action,—

(a) For return of the plaintiff's books and documents purported to be held by the defendants under and by virtue of the Security Frauds Prevention Act, being chapter 64 of the Statutes of British Columbia, 1930.

(b) For an injunction restraining the defendants or either of them, their servants or agents, from examining the said books and documents pursuant to any alleged authority conferred by the said Security Frauds Prevention Act.

(c) For an injunction restraining the defendant *Mark Cosgrove* or any one on his behalf, from examining the plaintiff W. K. McGee pursuant to any alleged authority conferred by the said Security Frauds Prevention Act.

(d) For an injunction restraining the defendants or either of them, their servants or agents, from examining any of the employees or past employees of the plaintiff Solloway, Mills & Company, Limited, pursuant to any alleged authority conferred by the said Security Frauds Prevention Act.

(e) For a declaration that the said Security Frauds Prevention Act is *ultra vires* and beyond the competence of the Provincial Legislature of the Province of British Columbia to enact.

The appeal was argued at Victoria on the 26th to the 29th of January, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellants: This is an attack on the validity of the Security Frauds Prevention Act, particularly Part II. First, the Act is *ultra vires* because it deals with fraud in its criminal aspect; this does not deal with property and civil rights or with the administration of justice. Secondly, the Act is bad because it interferes with the *status* of extra-Provincial companies, and thirdly, the Attorney-General is acting outside the scope of his own Act. That this Act deals with criminal law see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330; Clement's Canadian Constitution, 3rd Ed., 444. In distinguishing between fraud in its criminal aspect and its civil rights aspect see *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328 at p. 337; *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191. The Act is one that by its very nature is within the domain of criminal law. It deals with offences against society rather than private citizens: see reference *Re Validity of the Combines Investigation Act and of S. 498 of the Criminal Code* (1929), S.C.R. 409 at pp. 410, 412 and 428; (1929), 2 D.L.R. 802. As to the title of the Act and consideration that should be given to it see *Fenton* v. *Thorley & Co. Limited* (1903), A.C. 443 at p. 447; *Fielden* v. *Morley (Corporation)* (1898), 67 L.J., Ch. 611 at p. 612; *Attorney-General of Canada* v. *Attorney-General of Alberta* (1922), 91 L.J., P.C. 40 at p. 47; *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580. This is a deliberate attempt to supplement anything that the criminal law as provided by the Dominion has not covered: see *Bedard* v. *Dawson* (1923), S.C.R. 681 at p. 683; *Regina* v. *Bush* (1888), 15 Ont. 398 at p. 403; *Attorney-General for Ontario* v. *Canadian Wholesale Grocers Association* (1922), 52 O.L.R. 536 at p. 545; *Attorney-General of Manitoba* v. *Rosenbaum* (1930), 1 D.L.R. 152. One of the purposes of the Act was to obtain information for criminal prosecutions and this is invading the realm of criminal jurisdiction. As to the case of *In re Public Inquiries Act* (1919), 27 B.C. 361 it can be distinguished and it is overruled by *Reference Re Validity of the Combines Investigation Act and of S. 498 of the Criminal Code*

Argument

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(1929), S.C.R. 409 at p. 418; see also *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700. As to extra-judicial tribunals, a coroner's Court is a criminal Court: see *The Queen* v. *Hammond* (1898), 29 Ont. 211 at pp. 224-5; *Godson* v. *The Corporation of the City of Toronto* (1890), 18 S.C.R. 36; *Barratt* v. *Kearns* (1905), 74 L.J., K.B. 318. Solloway, Mills & Co. is a Dominion company. Section 12 of this Act purports to give a judge power to stop a Dominion company from doing business at all, and is therefore bad: see *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330; *Great West Saddlery Co.* v. *The King* (1921), 2 A.C. 91; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1929), A.C. 260 at p. 268. If section 12 of the Act is *ultra vires,* then the whole Act must go: see *In the Matter of Validity of Manitoba Act* (1924), S.C.R. 317 at p. 323 and on appeal (1925), A.C. 561; *Currie* v. *Harris Lithographing Co., Limited* (1917), 40 O.L.R. 290 at p. 294; *Carrick* v. *Corporation of Point Grey* (1927), 38 B.C. 481 at p. 483.

Argument

A. H. MacNeill, K.C., for respondents: In the case of *Reference Re Validity of the Combines Investigation Act and of S. 498 of the Criminal Code* (1929), S.C.R. 409, a sanction has been given to Provincial criminal law: see the judgment of Newcombe, J. at p. 418. The effect of the statute taken as a whole must be looked at. We are supreme where we deal with property and civil rights, and this is crime legitimately dealt with by the Provincial Government. All the impositions of the Act are within "Property and civil rights." The case of *Attorney-General of Manitoba* v. *Rosenbaum* (1930), 1 D.L.R. 152 was properly followed by the Court below: see also *Cunningham* v. *Tomey Homma* (1903), A.C. 151; *Quong Wing* v. *The King* (1914), 23 Can. C.C. 113; *Ex parte Ellis* (1878), 17 N.B.R. 593 at pp. 595-6; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1929), A.C. 260 at p. 268; *Regina* v. *Wason* (1890), 17 A.R. 221 at p. 227; *Kelly & Sons* v. *Mathers* (1915), 23 D.L.R. 225 at pp. 238, 241 and 244. Our position is that all the sections can be segregated: see *Attorney-General for Ontario* v. *Huteson* (1931), 1 D.L.R. 56.

On the question of examination of an accused see *Rex* v. *Harcourt* (1930), 3 D.L.R. 59.

Farris, in reply, referred to *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1902), 54 Can. C.C. 344.

Cur. adv. vult.

4th June, 1931.

MACDONALD, C.J.B.C.: In some respects to be presently mentioned I think that in the Security Frauds Prevention Act, B.C. Stats. 1930, Cap. 64, the Provincial Legislature went beyond its powers. Power to legislate upon the following matters is by section 91 of the British North America Act exclusively assigned to the Dominion Parliament:

"(21.) Bankruptcy and insolvency: (22.) Patents of invention and discovery: (27.) Criminal Law and procedure."

It is also declared at the end of the clauses in section 91 that any matters coming within any of these clauses shall not be deemed to be within those coming within section 92 which assigns certain powers to the Provincial Legislature. Fraud, as fraud, is not assigned to the Dominion Parliament but when fraud is a crime at common law or by the Criminal Code of Canada it comes within the clause criminal law, and the procedure applicable to its punishment is criminal procedure.

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I have, therefore, to enquire whether the Act in question impinges upon criminal law or the procedure in criminal cases. This preliminary enquiry is not necessary in relation to bankruptcy and insolvency, or patents of invention and discovery, which fall directly within said section 91.

I shall not attempt to specify every fraud mentioned in the Provincial Act which savours of criminal law, but shall mention some of those frauds which are penalized by the Act and which in my opinion trespass against criminal law as assigned to the Dominion Parliament by the said clause (27). What is meant in the local Act to be penalized are the frauds specified in section 2 thereof and without quoting them all I shall refer to subsections (*a*), (*d*), and (*h*) of that section, particularly to (*d*). The fraud mentioned in (*d*) is the gaining of a fee, commission, or gross profit by fraud which I think is the offence of

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obtaining money by false pretences referred to in the Criminal Code, section 404, and punishable under section 405, and therefore clearly within No. (27) of said section 91. It is not dealt with by the Act in question merely as a regulation or as a tort. It is penalized as a breach of public law. It meddles with that which does not concern it. It penalizes by the forfeiture of bonds as stated below. Again the applicant for registration under the Act as a broker who without registration is not allowed to carry on his business is required to furnish a bond under section 7 of the local Act, subsection (1), in the sum of $500 and which under section 8 may become forfeited to His Majesty the King in right of the Province when there has been filed with the registrar a certificate of the Attorney-General that the broker is "charged with a criminal offence" and by subsection (2) of section 7 a bond may be required from the broker in any amount specified by the Attorney-General and this in like manner may be forfeited to His Majesty the King when the broker has been "convicted of a criminal offence." These are not breaches of the said Act. They are substantive provisions for the punishment of alleged or actual wrong-doing connected with crime and are for the vindication of public law or morality, not to satisfy actual or assumed private losses which may be suffered by individuals. In other words the Province undertakes to penalize a broker whose conduct is under investigation in the Criminal Courts or who has been convicted of crime.

Now as to the first penalty where the broker has been charged merely with crime, the vice of the section is that the Province undertakes to interfere with the penalty, to which the offender may be subjected, by imposing a new and separate penalty of its own upon the accused whether he be convicted or not, a penalty which is not within section 33, or if so, is illegal.

It is not for a breach of the Provincial Act that these penalties are to be imposed but in the one case for the breach of a criminal Act enacted by the Parliament of Canada. It is true that section 33 of the Act in question imposes penalties for breaches of the Act when not punishable under the Criminal Code but as I have already pointed out it is not a breach of the Act to be subjected to a charge of crime nor is it a breach of the Act to be convicted of crime. I refer also to section 35

which enacts that where in consequence of an investigation under Part II. any person or company who has been (a) "convicted of a criminal offence," the Attorney-General may certify in writing as to the costs of the investigation and shall be entitled to take such proceedings for the recovery thereof as are available to a judgment creditor. One may ask how a person can be convicted under this section for a criminal offence except by trial and conviction in the ordinary course of procedure unless indeed "convicted of a criminal offence" means convicted by the Attorney-General in such investigation. In either case there would be in the section an infringement of the criminal law. If it means that the evidence taken in the investigation may be used by the Attorney-General in a trial in a Criminal Court then the investigation is an attempt to supplement the procedure in criminal cases by an investigation under a Provincial Act, and charge the accused with the costs thereof. Said section 33 does not cover this case either.

Section 9, particularly subsection (*a*) I think invades the powers of the Dominion Parliament under No. 22 of section 91. Parliament's powers over trade-marks and designs fall under Patents of Invention and Discovery. Parliament has legislated upon these in the Trade Mark and Design Act, Cap. 201, Part II., of the Revised Statutes of Canada, 1927. That Act provides the terms upon which registration may be had under it, and when the applicant procures registration he has the right to use his designs. That Act empowers the minister to refuse registration if he thinks the design is contrary to public morality or order. Such a design may be of vital interest to the business of a company incorporated by Dominion charter and the company's rights may be gravely interfered with by section 9 of the local Act which concerns the same subject. That section makes no exception in favour of registered designs under the Dominion Act.

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By Part II. of the Act in question wide powers of investigation and examination of any person or company are given to the Attorney-General, also powers for the production of evidence and documents and failure without reasonable excuse of any person or company to furnish information or to appear or to answer questions, and any default on the broker's part shall be

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prima facie evidence upon which the Attorney-General or his representative may base an affirmative finding concerning any Act to which it may be deemed to be relevant, or, a magistrate may base a conviction against him for his misdoings.

The distinction recognized by law between the powers exercisable by a civil authority and those exercisable by a penal one consist I think in this that offences against civil or individual rights may be dealt with by the first, the other punishes for public wrongs. That is to say the one may legislate concerning torts and may punish breaches of the Act by fine and imprisonment. The legislation of the Province has to do with the rights of individuals, that of the Dominion with public order and morality. It is well settled that when the Dominion Parliament is clothed with power to deal exclusively with a particular subject no power which a Province may enjoy under section 92 can be exercised in violation of the rights of Parliament. But while the Province may make regulations which must, it is needless to say, be *bona fide* regulations within its powers, it cannot attempt to enforce public law or to interfere with its enforcement. Some of the provisions of the Act in question may be regarded as *bona fide* regulations of the business of trading in securities and so far as they are such are *intra vires* of the Province no matter how harsh and unjust they may be. The fact that the Attorney-General is given power to distribute the penal sums which have become debts to His Majesty to those who are or who claim to be entitled to private redress cannot, I think, enable him to act vicariously for them under the guise of imposing penalties for the breach of a local Act.

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There is another branch of this appeal to which I shall merely refer. It is said that the affidavit of Mr. *Cosgrove* the representative of the Attorney-General indicates that the investigation which he seeks is for the purpose of assisting in a criminal prosecution. My view on this point is covered above, and having come to my conclusion that the Act is *ultra vires* of the Province it becomes unnecessary to consider this branch of the appeal further. I may say that I do not think the Act can be saved by segregating the faulty sections from those which are good since I do not think that the Legislature would have passed the Act in such a truncated form.

I would allow the appeal and order the injunction to issue.

MARTIN, J.A.: This is an appeal from the judgment of Mr. Justice W. A. MACDONALD, dismissing the plaintiffs' action, made upon an application, by summons in Chambers, for an injunction to restrain the defendants from taking any further proceedings under the Security Frauds Prevention Act of this Province, being Cap. 64 of the statutes of 1930; either in "examining or questioning" the plaintiff McGee or in inspecting the books of accounts and documents of the other plaintiffs which were seized by the defendant *Cosgrove* as the "representative" of the Attorney-General in alleged pursuance of "delegated authority" under section 10 of said Act. Affidavits setting out the circumstances were filed by both parties and when the motion came on for hearing it was then agreed that judgment should be given upon the matter as though it were "the trial of the action so that it will be considered a final judgment." In such circumstances, there were no pleadings but the claim endorsed on the writ asked also that the said books and documents should be returned to the plaintiffs, and for a declaration that the said Act is *ultra vires* of the Provincial Legislature.

Upon the argument at this Bar the appellants supported their appeal on two distinct grounds, the first being that the Act as a whole is *ultra vires* as an interference with the powers of Federal companies (the plaintiff Company being incorporated under the National Companies Act) and also with "Criminal Law, . . . [and] procedure in criminal matters" which by section 91 (27) of the British North America Act are assigned to "the exclusive legislative authority of the Parliament of Canada."

Ordinarily we would pronounce judgment upon this primary point of the case in the usual way but since the argument at this Bar the same point has been considered by the Appellate Division of the Supreme Court of Alberta in *Mayland and Mercury Oils Ltd.* v. *Lymburn and Frawley* and judgment delivered unanimously on the 2nd of April last (reported in 25 Alta. L.R. 310, and (1931), 1 W.W.R. 735) on a statute of Alberta which we are informed is, in present essentials, identical with our statute, and in that judgment that Court has declared that the Act in question is substantially *ultra vires* for the reasons therein set out and therefore the proposed investigation was held

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to be based on "no authority" and a "want of jurisdiction" in the "minister of the Crown or his representative" and the legislation declared to be invalid.

If there were nothing more we should give our judgment in the ordinary course as aforesaid, after considering with great respect the decision of the said Appellate Court of like jurisdiction with ourselves, but we are informed by both counsel that an appeal has been taken to and is pending before the Privy Council from the said judgment of that Alberta Court, and it has been suggested that it would be expedient to reserve our judgment till the result of that appeal is known so as to avoid, meanwhile, any possible conflict of decisions, with resulting uncertainty, in a matter of much public importance.

There is, doubtless, much to be said in general in favour of the adoption of such a course, but the second ground upon which the appellants herein rely is quite distinct from the first and did not arise in the said Alberta case and therefore whatever might be the result of the decision of the Privy Council it would have no effect upon said second ground, though if the appellants' submission upon it be correct it would decide this action in their favour. Consequently, under such circumstances, it becomes necessary for us to consider and pass upon that ground without delaying judgment to await the decision of the Privy Council which could not throw any light upon it.

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Proceeding then to consider it, the second submission is, that, assuming the said Security Frauds Prevention Act is *intra vires* of the Legislature of this Province, yet the proceedings taken thereunder by the persons to whom the Legislature has delegated its authority by Part II., Secs. 10 (1) and 28 (2) of the said Act, entitled "Investigation and Action by the Attorney-General," have exceeded the authority of the delegates, and instead of confining this proposed examination to the limits authorized by section 10, *i.e.*, "to ascertain whether any fraudulent act, or any offence against this Act . . . has been, is being, or is about to be committed," the Attorney-General, by and through his delegated representative, has unconstitutionally misapplied the powers delegated to him and solely contemplated by the Legislature and misused them in a manner that constitutes an invasion of the exclusive authority of the Parliament of Canada

in the domain of "Criminal Law, . . . [and] procedure in criminal matters" as aforesaid.

It is clear from the Act itself that it was contrary to the alleged intention of the Legislature to do anything of that kind because, *e.g.*, section 33 distinctly excludes from its operation those "fraudulent acts" (defined in section 2) which are "punishable under the provisions of the Criminal Code of Canada," but if the unauthorized proceedings of its delegates have had that effect then the result is that the Federal field has been just as much invaded, even if indirectly, as if the primary invasion had been accomplished directly by the passage of an Act which in terms was a violation of the overriding statute, the Imperial British North America Act.

It must be conceded that the Legislature cannot acquire jurisdiction by seeking to do indirectly that which it cannot do directly, for this has been settled by many leading cases including two from this Province, *viz.*, *Union Colliery Company of British Columbia* v. *Bryden* (1899), A.C. 580; 1 M.M.C. 337; and *Cunningham* v. *Tomey Homma* (1903), A.C. 151, wherein at p. 157 their Lordships say of the *Bryden* case:

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> This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province.

And in still another case from this Province, *Brooks-Bidlake and Whittall Ld.* v. *Attorney-General for British Columbia* (1923), A.C. 450 at 457, their Lordships said that the said statute in *Bryden's* case

> was not really applicable to coal mines only . . . but was in truth devised to prevent Chinamen from earning their living in the Province.

This is in accord with the unanimous and still leading decision of the Ontario Court of Appeal, constituted with a distinguished Bench, and having the benefit of an argument from that great lawyer, Mr. Edward Blake, in *Regina* v. *Wason* (1890), 17 A.R. 221; 4 Cart. 578, that "the true object, intention, and character" of the impeached legislation must be inquired into to ascertain its validity (pp. 230, 239 and 250), and citing the

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language of the Privy Council in *Russell* v. *The Queen* (1882), 7 App. Cas. 829 at 839-40, *viz.*:

> The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs.

And in *Regina* v. *Lawrence* (1878), 43 U.C.Q.B. 164; 1 Cart. 742, the Court of Queen's Bench said, *per* Harrison, C.J. at p. 744:

> It never could have been the design of the Imperial Legislature, as manifested by the language which it has used in the B.N.A. Act, to permit any legislative body, under pretence of exercising only its own exclusive legislative powers, to cover ground which in truth by the Constitution belongs to another.

See also the decision of the Privy Council in *In re the Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191 at 197 and 200 wherein their Lordships said that the impeached legislation would be the subject of "scrutiny sufficient to render it clear that the circumstances are abnormal" on which it was based.

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Though in England, because there is only one Parliament, and therefore no legislative conflict, the first ground taken herein could not arise yet on the second ground now under consideration there are a number of decisions shewing the action taken by the Courts, in particular circumstances, in reviewing the conduct of those public bodies or persons to whom Parliament has delegated its authority. For example, the House of Lords in *Institute of Patent Agents* v. *Lockwood* (1894), A.C. 347, considered the charge that a rule passed by the Board of Trade —"a great public Department of State" (Lord Herschell, L.C., 357)—was "*ultra vires* although duly made . . . with the formalities and in the manner prescribed by the Act" (354) and, under the circumstances, came to the conclusion that the rule was valid because it was made in the proper exercise of a delegated discretion, Lord Watson saying, p. 364:

> Now, it appears to me that the whole scheme was left to the discretion of the Board of Trade; and it is impossible for me to say that, looking to those regulations, the Board of Trade have in any measure exceeded that discretion.

In *The King* v. *Electricity Commissioners* (1924), 1 K.B. 171, the Court of Appeal prohibited the defendants (a statutory body with large powers) from proceeding with a scheme which

the Court declared to be *ultra vires,* and in declaring the power of the Court so to intervene Lord Justice Bankes said, p. 194, adopting the language of Brett, L.J., in *Reg.* v. *Local Government Board* (1882), 10 Q.B.D. 309, 321:

> My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.

And Lord Justice Atkin at p. 210 said, Lord Justice Younger concurring:

> In coming to the conclusion that prohibition should go we are not in my opinion in any degree affecting, as was suggested, any of the powers of Parliament. If the above construction of the Act is correct the Electricity Commissioners are themselves exceeding the limits imposed upon them by the Legislature, and so far from seeking to diminish the authority of Parliament we are performing the ordinary duty of the Courts in upholding the enactments which it has passed.

Then in *The King* v. *Minister of Health. Ex parte Davis* (1929), 1 K.B. 619, the Court of Appeal, upholding the King's Bench Division of three judges, prohibited the defendants from even considering a scheme (prepared by a local authority under the Housing Act, 1925) because such a scheme to be valid must comply with the Act, and gave effect to the ground advanced by the applicant, p. 621, "that the proposed scheme was not a scheme within the meaning of the Act, and that, consequently, the Minister had no jurisdiction to consider it"; all the six judges, above and below, were unanimous in their view of the matter.

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Finally there is the recent decision of the House of Lords in *Minister of Health* v. *The King* (*on the prosecution of Yaffe*) (1931), A.C. 494; 100 L.J., K.B. 306; 47 T.L.R. 337; wherein another scheme of the same Housing Act, advanced by the Corporation of Liverpool, was reviewed and their Lordships declined to sanction *certiorari* proceedings to interfere with an order of the Minister made therein on the alleged ground (p. 501) that it "was *ultra vires,* null, and ought to be quashed," because the scheme, when examined, was found to be in accordance with the provision of the Act in essentials, and so the Minister had jurisdiction to make a confirmatory order, with

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proper modifications, pursuant to the Act. But at the same time Viscount Dunedin pointed out, p. 502, that the above-recited case of *Institute of Patent Agents* v. *Lockwood* was "the high-water mark of inviolability of a confirmed order," and proceeded to distinguish it, and also *Ex parte Davis, supra,* on the facts (510), and pointed out that prohibition in the case before him would not lie "because, if successful, it would have prevented the Minister doing what . . . he could legitimately do" (513). And he concludes:

> I confess I am glad to be able to reach this result. No one could possibly look at these proceedings without being convinced that they are a genuine scheme for sweeping away an insanitary area and replacing the old by new and sanitary houses. There is no trace of any oblique motive.

Lord Warrington of Clyffe, Lord Tomlin and Lord Thankerton agreed in the result for varying reasons given, though Lord Russell dissented taking the same view as the Lords Justices appealed from. Lord Tomlin at pp. 519-20 said:

> My Lords, the first question for consideration is whether by reason of sub-s. 5 of s. 40 of the Housing Act, 1925, your Lordships are precluded from inquiring into the validity of the order made by the Minister of Health on November 23, 1928.

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> Upon this matter I entertain no doubt. The Minister's jurisdiction to make an order is under the Act strictly conditioned, and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the sub-section in question. . . .
>
> It is therefore in my opinion permissible and necessary to consider the following further questions—namely, (1.) whether or not the conditions founding the Minister's jurisdiction were fulfilled in the present case; and (2.) whether or not the order made by him is in relation to its contents *intra vires.*

Applying the foregoing principles to essential facts uncontradicted in the evidence before us, it appears that under the provisions of the Criminal Code of Canada a charge of conspiracy to commit theft had been preferred by the defendant Attorney-General (respondent) herein against two of the plaintiffs (appellants) herein and that while that charge was pending the plaintiff McGee was served (on 2nd January last) with a "Summons to a Witness" (dated 30th December, 1930) signed by the defendant *Cosgrove* as "A special representative of the Honourable the Attorney-General of British Columbia under the Security Frauds Prevention Act" requiring McGee to appear before him for examination on the 5th of January,—

in order to ascertain whether any fraudulent act or any offence against this Act or the regulations has been, is being, or is about to be committed by Solloway, Mills & Company Limited of the City of Vancouver, in the Province of British Columbia . . . and . . . to testify what you know concerning the said matter as aforesaid. Herein fail not.

The fifth paragraph of McGee's affidavit goes on to say:

5. That some few days ago *Mark Cosgrove*, who I verily believe is the *Mark Cosgrove* signing the said summons, advised me he was going to examine me in connection with the Solloway, Mills prosecutions and would want me to assist in connection with such prosecutions. The said *Cosgrove* also advised me that he intended to examine other employees and past employees of the said firm of Solloway, Mills & Company Limited, under the provisions of the Security Frauds Prevention Act.

This very important allegation is not denied in *Cosgrove's* affidavit in answer to McGee's, nor are paragraphs 10 and 11, as follows:

10. From my various conversations with the said *Cosgrove* I verily believe the purpose of the said examination of myself and the other employees of the said Solloway, Mills & Company Limited is to assist the Crown in the criminal prosecution against the said plaintiffs, Solloway and Mills.

11. I have been informed by *W. B. Farris*, Esq., K.C., of counsel for the accused Solloway and Mills, and verily believe, the said *Mark Cosgrove* appeared at the hearing at the Vancouver Police Court at which the defendant Harvey Mills was granted bail, and represented himself as acting for the Attorney-General's Department in connection with the said prosecution.

In paragraph 2 of his affidavit *Cosgrove* says:

2. That on the 19th day of September, 1930, *Robert Henry Pooley*, Attorney-General for the Province of British Columbia, delegated authority to me as his representative to conduct an investigation under the Security Frauds Prevention Act into Solloway, Mills & Company Limited in order to ascertain whether any fraudulent act had been committed by that Company and for that purpose to examine any person, company, property or thing whatsoever.

The effect of this statement is, at best, merely that the Attorney-General properly "delegated authority" to the deponent "to conduct an investigation under the . . . Act" (and he says in paragraph 4, that he was carrying on that investigation, and necessarily examining McGee therein), but that does not meet the specific and vital charge that on his own showing he was improperly misusing the procedure of that Provincial Act as a direct means to assist in a pending National prosecution, which, it happened, he was personally conducting.

Upon all the authorities above cited it is clear in principle that the delegate of a Provincial Legislature can no more usurp

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indirectly the functions of the National Parliament than can the Legislature itself, and that it is the duty of the Courts to intervene to protect the subject from such an "illegitimate" exercise of powers founded upon "oblique motives," to use the apt language of Viscount Dunedin. In the present case there is, unfortunately, no dispute about the essential facts and from them the only inference that can be drawn is that the investigation was being directly and primarily used as a method of criminal procedure to obtain evidence to support a prosecution in a criminal charge which was exclusively within the jurisdiction of the Parliament of Canada, under the said section of the British North America Act, and therefore the investigation was wholly without jurisdiction and entirely contrary to the "true nature and character" of the Provincial Act it is sought to be founded upon, and hence this Court should so declare, and also order that the defendants be restrained from taking further proceedings upon this invalid investigation and that the books and documents wrongfully taken from the plaintiffs be returned to them.

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GALLIHER, J.A.

GALLIHER, J.A. agreed with MARTIN, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: It is my opinion that in view of the fact that the Supreme Court of Alberta (Appellate Division) has passed upon a statute in all material respects the same as the one impugned here and said to be *ultra vires* that it would really not be fitting to consider the self same point when we are advised by counsel at this Bar that the decision of the Alberta Court is now standing for hearing before His Majesty's Privy Council in London—the case in the Alberta Court is *Mayland and Mercury Oils Ltd.* v. *Lymburn and Frawley*—especially as counsel for all parties at this Bar have intimated that they are not now asking for judgment from this Court and are of the view that this Court might very well withhold its decision. However, as the majority of the Court are of the opinion that judgment should be given I am constrained to state my view with respect to the challenged statute, namely, as to whether it is in its nature *intra vires* or *ultra vires*. As at present advised I am disposed to hold that the statute is *intra vires* and do so hold.

I do not consider it fitting in view of the special circumstances

to enter into my line of reasoning as it would entail the canvassing of the reasons for judgment of the Court of Appeal of Alberta—a Court in a sister Province of equal jurisdiction to our Court here—when that Court's judgment is at the present time in His Majesty's Privy Council and standing for hearing therein.

In my opinion where in Canada there is a divided constitution, *i.e.*, Dominion and Provincial, it is the statutory duty of Dominion and Province to co-operate in the carrying on of government, especially is this the case where it is a matter of "peace order and good government" (British North America Act (Imperial) 1867) and where there is exclusive legislative authority in the Province capable of being implemented to further this purpose it is, in my opinion, the bounden duty of the Province to give its aidance by statute law and in whatever way it can be most effectively given. That was what was done here and notably in other Provinces of Canada.

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In respect to the custody of the books and papers taken possession of by the deputed authority of the Attorney-General in claimed pursuance of the statute I would make no order being of the opinion that they were rightly taken and that all of the actions of the Attorney-General were had and taken in accordance with the statute law in the public interest and legally justifiable within Provincial statutory powers. Further it is my opinion that all the proceedings taken were in the interests of justice and within the powers conferred by the Legislature to enquire into and abate, if possible, a grave exploitation of the general public by a class of the community that apparently had with success in many instances defrauded those who had reposed trust in them.

I would dismiss the appeal.

MACDONALD, J.A.

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

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondents: *F. D. Pratt.*

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CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. JOHNSTON

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED v. JOHNSTON *ET AL.*

Trespass—Loss of profits—Cannery seized under Fisheries Act—Sections applicable declared ultra vires later—Application of section 9 of Magistrates Act—Officers, meaning of—R.S.C. 1927, Cap. 73—R.S.B.C. 1924, Cap. 150, Sec. 9—Marginal rules 282 and 283.

The defendants who were respectively the deputy minister of marine and fisheries for Canada, director of fisheries, inspector of fisheries for British Columbia and fisheries officer for the District of Prince Rupert, seized the plaintiff's floating cannery and confiscated the canned fish thereon in the summer of 1926 by reason of his having operated in breach of certain sections of the Fisheries Act that were later declared *ultra vires* of the Dominion Parliament. In an action for trespass and loss of profits by reason thereof, the defendants moved for dismissal of the action under marginal rules 282 and 283, on the ground that they were protected from such an action by section 9 of the Magistrates Act, which provides that "No action shall be brought against any judge, stipendiary or police magistrate, justice of the peace, or officer," etc. The motion was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J., that the acts protected by section 9 of the Magistrates Act are judicial acts and therefore even judicial officers are not entitled to immunity under the section with respect to ministerial acts.

APPEAL by defendants from the order of MCDONALD, J. of the 14th of April, 1931 (reported *ante*, p. 44). An action was brought against the defendants for trespass and loss of profits incurred by reason of the defendants having in the year 1926 prevented the plaintiff from carrying on the business of salmon-canner. The defendant Johnston is the deputy minister of marine and fisheries; the defendant Motherwell is the inspector of fisheries for British Columbia and the defendant Mackie is a fisheries officer for the District of Prince Rupert. In 1924 the plaintiff constructed the hulk of an old steamship named the "Laura Whalen" into a salmon cannery. In the summer of 1926 when the "Laura Whalen" was fastened to the wharf of a cannery on land at Massett Inlet, B.C., and operated for canning salmon, it was seized by the defendants and the fish that were canned were seized, and the plaintiff was prevented from

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operating. The acts of the defendants complained of were performed by them in the execution of their respective offices, and as a result of the plaintiff having operated in breach of certain sections of the Fisheries Act, which sections were later declared to be *ultra vires* the Dominion Parliament. The defendants moved under marginal rules 282 and 283 for a decision on a point of law raised in the pleadings, namely, that they were protected from an action such as this by reason of the provisions of section 9 of the Magistrates Act. The motion was dismissed.

Statement

The appeal was argued at Victoria on the 2nd and 3rd of July, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Burns, K.C., for appellants: This is an application to dismiss the action on a point of law. We are given immunity under section 9 of the Magistrates Act. The sections of the Fisheries Act providing for licences for canneries were declared *ultra vires*: see *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1930), A.C. 111. They are suing us for damages for seizure. The learned judge below held that in interpreting "officer" the *ejusdem generis* rule should be applied and that "officer" means a "judicial officer presiding as such" and that the defendants did not come under this class. The defendants Motherwell and Mackie are justices of the peace. There should be a liberal construction placed on section 9 of the Magistrates Act, and it applies to any person administering the law. The real object of the section is to protect anyone administering the law. If the judgment below is right some are protected and others are not. The word "officer" was put in the Act to complete the class and was meant to include those administering the law: see *Thorman* v. *Dowgate Steamship Company, Limited* (1910), 1 K.B. 410 at p. 420; *Larsen* v. *Sylvester & Co.* (1908), A.C. 295; *Magnhild (S.S.)* v. *McIntyre Bros. & Co.* (1920), 3 K.B. 321, and on appeal (1921), 2 K.B. 97 at p. 105; *Anderson* v. *Anderson* (1895), 1 Q.B. 749; *Crispin & Co.* v. *Evans, Coleman & Evans* (1923), 32 B.C. 132; *Lebeaupin* v. *Crispin* (1920), 2 K.B. 714 at p. 718.

Argument

Williams, K.C., for respondent: These men are not judicial officers: see *Venning* v. *Steadman* (1884), 9 S.C.R. 206;

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O'Brien v. *Miller* (1890), 29 N.B.R. 114. On the construction of the statutes see Craies's Statute Law, 3rd Ed., 109.

Burns, replied.

MACDONALD, C.J.B.C.: The appeal must be dismissed. The matter does not occasion much difficulty. Section 9 of the Magistrates Act, R.S.B.C. 1924, Cap. 150, provides that an application for dismissal of the action may be made a question of law, which question of law is divided into two parts: First, the defendants are entitled to the protection of that section if they are within the wording of the section. I think that they are not within the wording of the section; that the section applies to judicial officers and not to ministerial officers. And it is admitted here that the activities of the defendants were ministerial; therefore they are not entitled as ministerial officers to the protection of the first part of the section.

That really disposed of the whole matter so far as this application is concerned. Mr. *Williams* has, however, raised a second point, that it was not only necessary to shew that they were within the section as "officers" but that they acted within the Fisheries Act, R.S.C. 1927, Cap. 73, which was then in force, but was afterwards held to be *ultra vires,* that their acts were justified by the Fisheries Act. That is not a question of law as appeared from the pleadings. Mr. *Burns* frankly admits that he must take the pleadings as stating the facts, and this being in the nature of a demurrer, that he is bound by the statements of fact in the pleadings. That being so, these defendants acted outside the scope of the Fisheries Act, and therefore are responsible for their conduct; they cannot rely upon the Fisheries Act as protecting them. So that Mr. *Burns* must fail on the whole case. I think he fails on both branches of it, and the appeal should therefore be dismissed with costs. It is true that two of the defendants are judicial officers, but it is admitted by their counsel that in this case they did not act as such.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This is an appeal upon one question only. And as it raises an important question which may go farther, I wish to define my position clearly, so as to have no misunderstanding about it. I give my judgment upon one point, and one

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point only, *i.e.*, upon the question submitted to the Court by consent of the parties, at p. 161 of the appeal book, and dealt with by the order of the learned trial judge on p. 166; and that question is:

> Are the defendants entitled to rely upon the protection of the Act respecting justices of the peace and other magistrates, being chapter 150 of the Revised Statutes of British Columbia?

That sole question I answer in the negative, that is to say, that the defendants are not in my opinion—with all appreciation of the able way in which Mr. *Burns* put forward the argument—entitled to invoke that section or to have its protection. And therefore the only order I think this Court can make, and the only one I propose to make so far as I am concerned, is that the appeal from the order of the learned judge dated April 14th, 1931, be dismissed with costs.

I would add to that, in order to keep this matter perfectly clear as a point of law only, that the objection that Mr. *Burns* informs us he took below to the inclusion in the appeal book to a large amount of evidence, should be sustained, as a matter of proper practice, and for the protection of this Court in case this matter should go further and the question might arise as to what was or was not in the appeal book and considered by us. Therefore the evidence wrongfully included in the appeal book should be struck out, as it has no place in a question of law only, and struck out with costs, of course.

MARTIN, J.A.

In brief, even though these defendants were judicial officers they were not acting in this matter in a judicial capacity, and therefore are not within the provisions of section 9 of the Magistrates Act.

GALLIHER, J.A.: The consent here is to the defendants setting down an application to have this action dismissed by reason of the Magistrates Act, R.S.B.C. 1924, Cap. 150; a point of law raised by the defendants, paragraph 11 of the statement of defence. I have viewed this from the beginning of the argument as simply the one point to decide in this appeal, and that is whether these officers come within the meaning of section 9 of the Magistrates Act. On that I must say as at present advised I am not free from doubt. My learned brothers I think are all of the view that they are not included, as that

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refers to judicial and not to ministerial officers. As I say, I am not clear that that is so. My position will then be simply that on that question, which I think is the only question before us, while I do not dissent I do not find that they are outside the provisions of that Act.

MCPHILLIPS, J.A.: I am of the opinion also that the appeal should be dismissed. As I view our practice and as I view the particular point for the consideration of the learned judge in the Court below, it was in its nature a pure question of law. I disagree that it is possible to introduce further questions of fact in this particular matter. We must proceed only on the language of the consent:

> We, the respective solicitors for the above-named plaintiff and defendants setting down an application to have this action dismissed by reason of the Magistrates Act of British Columbia, a point of law raised by the defendants in paragraph 11 of the statement of defence delivered herein on the 13th of June, 1927.

As I read paragraph 11 we have nothing to do with other facts than the fact that establishes the question, that these parties did an act that was unlawful, that is all: I do not quite see why, nor do I agree that I am called upon to canvass paragraph 11 and state the facts there and apply my mind to that at all. The only question of law here is: Are the defendants protected under section 9 of the Magistrates Act, R.S.B.C. 1924, Cap. 150? I disagree that it is permissible now under our practice to do other than to come to this Court and have a bare question of law determined. The question of fact will be determined by the learned judge of first instance, and until it is determined by him no appeal upon it will be determined by this Court. I do not agree that it is possible under the guise of a point of law to determine questions of fact. The practice as I understand it is that the defendant makes admissions, we will say, and the plaintiff then may move for judgment on the admissions of fact. That is what is done. If the defendant wishes to admit all the facts, which I understand Mr. *Burns* was willing to admit here before us, the proper form is to admit them in the Court below, and then the plaintiff may move for judgment on those admissions, and the questions of fact will be determined first by the judge of first instance. Then if there

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is an appeal we pass upon them; otherwise not. But we here, in my opinion, only pass upon a point of law, and we are not concerned with the facts at all. We have the admission here that certain acts were done, and these acts it is claimed are supportable and there is immunity in respect of them by virtue of Cap. 150, Sec. 9, R.S.B.C. 1924. I am in agreement with what my learned brother the Chief Justice has said, that the acts that are protected are acts that flow from judicial action, that is the stipendiary magistrate, the police magistrate, the justice of the peace, or other officer of that character. Now the parties here do not come within that terminology, in my opinion, therefore there is no immunity. And that being so, the question of law, as I understand it, is decided, when we say there either is immunity or there is no immunity. I say there is no immunity on this point of law. More I am not called upon to say.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I am in agreement with the learned judge who heard the application below.

MACDONALD, J.A.

Appeal dismissed.

Solicitors for appellants: *Burns, Walkem & Thomson.*
Solicitors for respondent: *Williams, Manson & Gonzales.*

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June 23.

REX v. TAHKAR.

Immigration — Alien — Deportation — Entering Canada surreptitiously— Board of Inquiry—Order of—Sufficiency—R.S.C. 1927, Cap. 93, Sec. 33, Subsec. 7.

REX v. TAHKAR

A Board of Inquiry, under the Immigration Act, made an order for deportation under section 33, subsection 7 of said Act, which stated that it was made because the deportee had entered Canada surreptitiously and without examination. An application for a writ of *habeas corpus* was dismissed.

Held, on appeal, affirming the decision of FISHER, J. (MACDONALD, C.J.B.C. dissenting), that in the course of the examination the Board found the suspect's real *status* from which deportation would follow. His own examination disclosed that after being in Canada one year, in 1907 he went to the United States where he remained 23 years, and then sought to enter Canada by stealth. It is therefore unnecessary for the Board to set out formally a supplementary finding to establish that he was not a Canadian citizen or of Canadian domicil, as that was obvious from the context.

APPEAL by defendant from the order of FISHER, J. of the 26th of March, 1931, dismissing an application for a writ of *habeas corpus*. The defendant came to Canada from India in 1907, where he remained one year. He then went to California and remained there until 1930, when he crossed the border into Canada through a bush near Cloverdale in British Columbia. Shortly after his entry he was taken in charge by an immigration officer. On the 31st of March, 1930, he was examined by the Board of Inquiry under the Immigration Act and the Board ordered that he be deported from Canada, in that on the 24th of March, 1930, he entered Canada surreptitiously and without examination.

Statement

The appeal was argued at Victoria on the 23rd of June, 1931, before MACDONALD, C.J.B.C., MARTIN and GALLIHER, JJ.A.

A. B. Macdonald, K.C., for appellant: Accused was ordered to be deported by the Board of Inquiry solely on the ground that he entered Canada surreptitiously and without examination. The Board had no jurisdiction to make the order dealing with his domicil: see *Re Sing Kee* (1901), 8 B.C. 20 at p. 22.

Argument

A. DeB. McPhillips, for the Crown: Accused was in the

United States for 23 years. The Board proceeded under section 33, subsection 7 of the Act and found he had entered Canada surreptitiously and without examination. It must be assumed they concluded on the evidence that he did not have domicil here. They ascertained this in the course of the inquiry.

Macdonald, replied.

MACDONALD, C.J.B.C.: I think that under section 33, subsection 7 (Immigration Act, R.S.C. 1927, Cap. 93) before the Board can make an order for deportation they must make a finding in the terms of this Act itself, that is, they, the Board, must first find whether the person detained has entered Canada surreptitiously. For that offence he may be fined or imprisoned. Then the section goes on to say that:

and if found not to be a Canadian citizen, or not to have Canadian domicil, such entry shall in itself be sufficient cause for deportation whenever so ordered by a Board of Inquiry or officer in charge subject to any appeal which may have been entered under the provisions of this Act relating thereto.

Now it may be that the evidence shews that he was neither a Canadian citizen nor had Canadian domicil, but it has not been so found. It is for the Board to make a finding. They do make a finding that he came in surreptitiously. If they had not made that finding they could not deal with the matter under this section at all. They must find that a certain punishment would be imposed for coming in in that way. If they wanted to go further they could deport him; they can do that if he is found not to be a Canadian citizen or of Canadian domicil. That was not found at all. The word "found" has a long-established meaning. It means "found" by the tribunal. It does not mean that it can be found, but it has been found.

MACDONALD, C.J.B.C.

This is a penal statute, affecting the liberty of the subject, and should be construed strictly.

When it comes before this Court we are left without any finding that he is either a citizen, or not a citizen, and has or has not domicil. We would then be required to find this ourselves on the evidence. That would not be the finding of the tribunal appointed to make this finding, and therefore not having made a finding in this case it is not entitled to make the order for deportation. The appeal should be allowed.

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1931

June 23.

REX v. TAHKAR

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from an order of Mr. Justice FISHER whereby he refused to grant proceedings by way of *habeas corpus* for release of the applicant who is held by the immigration authorities for deportation pursuant to an order for deportation following the sitting of the Board of Inquiry, dated March 31st, 1930, because his right of entry into Canada was rejected for the following reason:

> In accordance with the provisions of section 33, subsection 7, of the Immigration Act, and regulations in that on the 24th March, 1930, he entered Canada surreptitiously and without examination.

This is the finding on the section mentioned, that he entered by stealth, "surreptitiously" having the same meaning, after "eluding examination," admittedly.

It is now suggested that the learned judge below should have ruled that the Board of Inquiry, in the course of the proper discharge of the duty cast upon it by said subsection 7, to investigate this entry by stealth, should even if they had been judicially satisfied that that fact was proved, have also gone farther and made a definite and substantive finding that the applicant was not a Canadian citizen or did not have Canadian domicil, before they were entitled to make the order for deportation; *i.e.*, that though they have satisfied the main requirement of the section yet they could not give effect to it, and make an order for deportation without making a supplementary and formal finding that they had "found" in the course of their examination of the "suspected person" that he was not a Canadian citizen or of Canadian domicil.

With all respect, I am unable to adopt the submission of the learned counsel for the appellant that such a formal finding is necessary. On the contrary, it is to me perfectly clear that what Parliament intended was this, and this only: That if during the course of that examination the Board became apprised, that is to say, "found" out the suspect's real *status* by its becoming manifest or clearly appearing as here, on the evidence, then deportation would follow. I interpret the word "found" in this sense in this context. On the face of it the order of the Board is within the ambit of the statute, but if it is permissible to go behind it and open the door of the proceedings, what do we find? That it is established perfectly clearly by the suspect himself

in the course of his examination, that he came to this country in 1907, remained for a year, then went to the United States for 22 years, applied to the United States Government for permission to bring his wife and family to the United States, and finding he could not do so, sought to enter Canada by stealth, and was discovered trying to get in through the bushes and "eluding examination" by the immigration officers.

All this is admitted before us, and not only that, but on the evidence before the learned judge below it is clear that the appellant is not in the excepted categories above mentioned.

MARTIN, J.A.

How then can it be said, having regard to the wishes of Parliament—assuming that we are entitled to open the door—that having thus opened the door, and finding, as it was "found" upon the evidence, that this man was not within one of those categories, that in the absence of any authority to that effect, it is necessary to set out formally a supplementary finding to establish what is and was obvious?

With all respect, I have no doubt that the learned judge below was right in making this order and so the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: My learned brother MARTIN has expressed my views which I arrived at during the argument.

This would be the conclusion I would arrive at.

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

Solicitors for appellant: *Macdonald & Prenter.*

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

COURT OF APPEAL

1931

June 16.

REX v. WIGGS.

Criminal law—Assault—Boys bullying accused's son—Provocation.

A father was convicted for assaulting a boy who was seen with other boys by the father in the act of punching and kicking his son after he was thrown to the ground.

Held, on appeal, that the father was justified in defending his son. It was not shewn that he had used more force than was necessary in the circumstances, and the conviction should be set aside.

Per MACDONALD, J.A.: The law makes allowances for human passions aroused in a father by a vicious attack of this character on a defenceless boy, and permits the father to use such a degree of force as may reasonably prevent its repetition.

REX v. WIGGS

Statement

APPEAL by accused from his conviction on the 30th of March, 1931, at Vancouver, by J. A. Findlay, Esquire, deputy police magistrate, for unlawfully assaulting a boy, occasioning him bodily harm. It appeared from the evidence that accused's young son, who had been at school, came home in a very nervous state, and related that he had been abused by certain boys at school, and on the following day he took his son to school and kept watch. The boys then attacked the son again, one sitting on his head and punching him in the face, and another kicking him in the ribs. The father then attacked the boys who were doing the bullying, and slightly injured the boy who was punching his son. The father was sentenced to two months with hard labour.

The appeal was argued at Victoria on the 16th of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Wood, K.C. (*Harper,* with him), for appellant: Accused's son was made a butt by some of the boys at school and they bullied him. He complained to his parents as to this. His father went to the school and caught these boys kicking his son and hitting him in the face. In the circumstances he was justified in his attack: see Blackstone's Commentaries, Lewis's Ed., Book 3, p. 3; *Rex* v. *Scott* (1910), 15 Can. C.C. 442; *Rex* v.

Drouin (1909), *ib.* 205; *Reg.* v. *Hopkins* (1866), 10 Cox, C.C. 229; *Rex* v. *Loo Manson* (1925), 43 Can. C.C. 30; *Rex* v. *Ogal* (1928), 2 W.W.R. 465 at p. 467. The violence in such a case must be away out of proportion before it can be an assault: see *Anonymous* (1836), 2 Lewin, C.C. 48; 1 East, P.C. 406; Russell on Crimes, 8th Ed., 848; *Rex* v. *Ritter* (1904), 8 Can. C.C. 31; *Rex* v. *Kinman* (1911), 18 Can. C.C. 139; *Rex* v. *Whalley* (1835), 7 Car. & P. 245.

Argument

Hulme, for the Crown: The evidence shews that accused used more force than was necessary, and the magistrate was justified in convicting him.

MACDONALD, C.J.B.C.: I think that the appeal must be allowed and the conviction set aside.

There is no doubt that the boys, including Lewis, had been shamefully abusing the Wiggs boy for some time before this occurrence, certainly the day before, and trying to frighten him by taking him up a steep place and forcing him down. The boy was 12 years of age. The father, very naturally, was angry and went the day in question to see what would happen. When the boy came out of school there was a preconcerted attack upon him by several boys, including Lewis, four or five of them; they threw him down, Lewis sat on his head and punched him, and another boy was kicking him, when the father rushed out to interfere. He was probably in a passion, had a right to be, and struck out right and left, hitting Lewis on the face and causing the injuries complained of. It has not been shewn that he used more force than was necessary in the circumstances, in defending his boy.

MACDONALD, C.J.B.C.

It is perhaps just as well that mischievous boys who act as these boys did should be punished on the spur of the moment, though perhaps it would have been better if the father had advised the school authorities for the purpose of stopping what was going on, but we cannot say, because he did not take that course, that he was not justified in defending his boy, when he found him thrown down and being kicked and punched by other boys, with malice aforethought.

Therefore I think the magistrate was wrong in imposing any imprisonment, not to say two months with hard labour. But

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here we have to consider the picture the father saw, and the natural indignation it excited in him, which I think justified his actions.

MARTIN, J.A.: I am of the same opinion and for the same reasons and also, in particular, that the observations of the magistrate in giving judgment at the conclusion of the case, and particularly his report which is before us, shewed that he viewed the case from (I say it with all respect) an entirely wrong aspect, as this one quotation from his report would shew, second paragraph:

MARTIN, J.A.

> There was practically no dispute as to the facts in this case. The appellant's son was at school and was fighting with some other boys.

That is an entire misstatement of the situation, and when you have an entire misstatement of a legal situation it is impossible that anything founded thereupon can be conclusive.

GALLIHER, J.A.: The circumstances of this case are somewhat different to the ordinary case. One naturally feels resentful when a big powerful man attacks a child or youth of 12 or 15 years. If there was just the attack, without anything else, one would naturally feel like giving a very severe punishment. There was, however, I think, in this case a very great provocation, as far as the father was concerned, and if he had continued his attack in a way that you might term vengeful for what was occurring, then I would not interfere with the magistrate at all. I do not think he probably realized the force he could put into what he did, and if we are to accept it, as I think we must under the evidence, as being simply an action of throwing off one here and another there, to free his boy, then probably we should not impute to him the using of unnecessary force.

GALLIHER, J.A.

Now in this connection, on the facts of this case, and viewing the circumstances in that light, I feel that I should allow this appeal, and agree with my learned brothers who have spoken on the matter.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree that the conviction be set aside.

MACDONALD, J.A.

MACDONALD, J.A.: With deference to the magistrate, I cannot understand how he could arrive at the conclusion he reached

in this case. The degree of force used, if viewed apart from the indignation the father felt, might be regarded as excessive. But the law respects and makes allowance for the human passions aroused by a vicious attack of this character on a defenceless boy, and permits his father to use such a degree of force as may reasonably prevent its repetition.

Appeal allowed.

Solicitor for appellant: *A. M. Harper.*
Solicitor for respondent: *H. D. Hulme.*

REX v. JOHNSTON.

Statute, construction of—By-law—Sub-classifying motor-vehicles for hire—Validity—By-law City of Vancouver, No. 2095—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 163, Subsecs. (131) and (135) (j).

The defendant was charged with having unlawfully permitted a vehicle used for hire to remain standing in a public place, not being one of those public places expressly allowed and designated as a stand for such vehicles. The car in question was an automobile used for hire and not provided with a meter for measuring the distance travelled. The by-law in question distinguishes between metered and non-metered cars for hire, and provides metered cars with more space for parking than non-metered cars. The licensing by-law previously passed divided motor-vehicles into seven classes of which one (Class "C") includes "every motor-vehicle used exclusively as a taxi-cab or touring-car . . . for hire." It was held that the City Council exceeded its powers in sub-classifying Class "C" and the charge was dismissed. On appeal by way of case stated the decision of the magistrate was affirmed.

Held, on appeal, reversing the decision of McDONALD, J., that under the provisions of the Vancouver Incorporation Act, 1921, the City Council have the power to sub-classify motor-vehicles for hire into metered and non-metered cars and to assign to each of them certain parking spaces within the City.

APPEAL by the Crown from the order of McDONALD, J. of the 17th of April, 1931 (reported *ante*, p. 35) dismissing an

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1931

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Statement

appeal by way of a case stated from Deputy Police Magistrate Kerr of the City of Vancouver, who dismissed a charge against the accused for having unlawfully permitted a vehicle used for hire to remain standing in a public place, namely, on Abbott Street, said place not being one of those public places expressly allowed and designated as a stand for such vehicles.

Sections 6, 7, 8 and 9 of by-law No. 2095 under which the charge was laid divide vehicles for hire without meters from those that have meters, and set out parts of certain streets upon which motors with meters only can stand and parts of other streets upon which cars without meters can stand. The charge was dismissed on the ground that the above sections of by-law 2095 were *ultra vires* the City Council.

The appeal was argued at Victoria on the 5th of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

McCrossan, K.C., for appellant: The licensing by-law divides motor-vehicles into seven classes, one of which ("C") includes motor-vehicles used for hire. The by-law in question divides motor-vehicles used for hire into two classes, namely, those with meters and those without. The learned judge below says we cannot make this subdivision. Subsections (131) and (135) of section 163 of the Act of Incorporation are the sections to be considered. There is delegated to the City full control over its streets, and this by-law comes within said subsections: see *Rex* v. *Calbic* (1920), 28 B.C. 113; *Re Crabbe and Swan River* (1913), 23 Man. L.R. 14 at pp. 20 and 22. The Court should not be too astute to find invalidity and this is essentially a local matter: see Dillon's Municipal Corporations, 5th Ed., Vol. 3, p. 1852; McQuillan's Municipal Corporations, 2nd Ed., Vol. 1, pp. 921-4, Vol. 2, p. 758. In exercising a discretionary power the Court will not interfere: see McQuillan, Vol. 1, p. 986; Dillon's Municipal Corporations, 5th Ed., Vol. 1, pp. 457 and 458. This is essentially a police regulation and the Courts will not interfere: see McQuillan, Vol. 3, p. 240; 11 C.J. 829; *Re Foxcroft and City of London* (1928), 61 O.L.R. 553 at p. 556; 7 C.E.D. pp. 719-20. The by-law is within the ambit of our powers.

J. E. Bird, for respondent: The city divided vehicles into classes, one of them being motor-vehicles for hire and there is no power to make a further subdivision. As to the word "classification," see Oxford Dictionary, Vol. 2, p. 468. The Act of 1921 took the sub-classification power away from the City, and this by-law is a sub-classification of Class "C" as fixed by the licensing by-law. There are many more non-metered cars than metered cars, and the by-law is very unfair. This is differentiation and not a classification: see *Rex* v. *Sutherland* (1930), 42 B.C. 321 and 367. Arugment

McCrossan, replied.

MACDONALD, C.J.B.C.: I think the appeal should be allowed. It is perfectly clear on the evidence that there was no fraud or unreasonableness in what the Council did in this case—a pure question of their power. And Mr. *McCrossan,* I think, has gone very fairly and fully into the question of their powers in accordance with the statute, and I think, and have no hesitation about it, that they had the power to classify these two classes and to assign to them certain parking spaces, which they have done. They have that power, I think, unquestionably, and therefore the judgment below was wrong in saying they had not the power. The costs follow the event. MACDONALD, C.J.B.C.

MARTIN, J.A.: I agree. MARTIN, J.A.

GALLIHER, J.A.: I agree. It seems to work out, to my mind, if I am right in the impression I have, that this cannot be termed a classification; then if there is nothing to shew there was any discrimination, or any evidence of bad faith in anything in administering it, then even if there was not a classification, they have the power to allot or give the privilege to these people to take certain stands and operate on certain stands. There being nothing discriminatory in the carrying out of the allotment, that ends it as far as it appears to me. GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion the statutory power of classification cannot be questioned. There is nothing to indicate that its exercise should be curtailed. It is not reasonable to so MCPHILLIPS, J.A.

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interpret the legislation, when you have a fast growing city, and changing conditions such as exist in the case of the City of Vancouver. The City of Vancouver has a municipal charter by way of a special Act and distinct from the general Municipal Act of the Province, and when the special powers conferred are borne in mind it would appear to me to be a very unreasonable construction for the Court to say that the power here challenged is in any way curtailed by one exercise of it to a certain degree and that it cannot be exercised to a certain other degree, all within the general power conferred. In this particular case it seems to me there was a proper exercise of a statutory right; and with great respect of course to the learned judge's view in the Court below, with which I cannot agree, I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I agree.

Appeal allowed.

Solicitor for appellant: *J. B. Williams.*
Solicitors for respondent: *Bird & Bird.*

SPLAN v. BARRETT-LENNARD AND SUTTON.

COURT OF APPEAL

1931

June 12.

SPLAN v. BARRETT-LENNARD

Practice—Appeal—Interlocutory—Extension of time for giving notice of appeal—When granted.

On application for an order extending the time for giving notice of appeal, the general rule is that leave should be given when "the interests of justice require that course to be adopted" having regard to the special circumstances of each case.

An order was made on this application extending the time, MACDONALD, C.J.B.C. and MACDONALD, J.A. dissenting.

APPEAL by defendant Barrett-Lennard from the decision of FISHER, J. of the 9th of March, 1931, in an action for a declaration that as between the plaintiff and the defendant Barrett-Lennard that a certain judgment recovered by the defendant Sutton against the plaintiff of the 29th of April, 1930, is payable and should be wholly paid and satisfied by the defendant Barrett-Lennard. The formal judgment of the 9th of March, 1931, recited

that the plaintiff [was] entitled to be exonerated from and indemnified by the defendant [Barrett-Lennard] against payment of any part of that certain judgment for $6,796.40 recovered in an action in this Court at the suit of the defendant, Matthew Sutton, as plaintiff, and the plaintiff [Splan] as defendant . . . and . . . the defendant Barrett-Lennard do within fifteen days from the service of this judgment upon him, exonerate the plaintiff from all liability in respect of the said judgment by payment into Court by the defendant Barrett-Lennard to the credit of this cause of the moneys due upon said judgment,

Statement

the Court reserving for further consideration the application and disposal of any and all moneys paid into Court. Notice of appeal was served on the 15th of April, 1931. On the respondent taking the preliminary objection that the appeal was out of time, as this was an interlocutory judgment, the appellant applied for an order extending the time for giving notice of appeal.

The appeal was argued at Victoria on the 12th of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. M. Whiteside, for appellant: This is an application to

Argument

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extend the time for giving notice of appeal. Giving the extension will not prejudice the respondent in any way. It is in the interests of justice that the appeal should be heard.

J. A. MacInnes, for respondent, referred to *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70.

MACDONALD, C.J.B.C.: The majority of the Court are of the opinion that you should be given an extension of time.

I dissent from that, because this is a matter that has been agitated in Court for many, many years in all the Courts of the Empire, and it has been finally adjusted, so far as this Province is concerned, in *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70; (1925), 2 W.W.R. 614, that to give leave to extend the time, in effect, is to give leave to appeal. The rule has been laid down that that will be done only where special cause is made out shewing a failure of justice if it should be refused. Now nothing of that kind occurs here. When I read the case referred to in *Roddy* v. *Fraser, supra,* in the Court of Appeal in England (*In re Manchester Economic Building Society* (1883), 24 Ch. D. 488; 53 L.J., Ch. 115) I find that what amounts to a failure of justice was there fully discussed. It is not a question whether refusal might be prejudicial to the other side or not; it is the question of what would be the final result. Would refusal bring about an almost certain failure? A wrong judgment sought to be appealed would inevitably prevail.

MACDONALD, C.J.B.C.

There is no case of that kind here, and if we are to upset these rules, then we will extend the time here on the ground that it is all right to give this poor fellow a chance to get before us in some way or other no matter how poor a case he may have. I think we ought to stick to the orderly procedure of the Court and not endanger *ad misericordia* the vested right of him who has secured it.

I understand the argument on the main appeal goes on.

MARTIN, J.A.: In my opinion this motion for leave to extend the time should be granted in accordance with the leading decision of this Court in *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70; (1925), 2 W.W.R. 614, wherein is to be found the general rule for our guidance in such a case as this,

MARTIN, J.A.

i.e., that we should give leave to appeal when "the interests of justice require that course to be adopted," having regard to the special circumstances of each case.

There is nothing new in that. It is just exactly what Lord Justice Bowen said in the case referred to by our Chief Justice in the beginning of his judgment, in *Fraser's* case, *supra, i.e., In re Manchester Economic Building Society* (1883), 24 Ch. D. 488; 53 L.J., Ch. 115, and I refer particularly to the language of Lord Justice Bowen, which has always appealed to me in that case, as follows (p. 503):

> It seems to me that to attempt in any one case to lay down a set of iron rails on which the discretion of the Court of Appeal was always to be obliged to run, and to say that the leave of the Court would never be granted except in certain special circumstances, and in a defined way, would be very perilous.

MARTIN, J.A.

And then, having regard to the question of consideration of the prejudice to the other side, he concludes his judgment in this manner:

> If the appellant is asking for what is evidently unjust it is clear that he ought not to have it; if he is asking for what may lead to injustice he ought not to have it except on the terms which would prevent any injustice possibly being done, and for that reason, if any of the respondents here had shewn that injustice was likely to arise in their particular case, I think terms ought to have been imposed, but if the person who is asking for leave to appeal after twenty-one days is only asking for what is just, why should not he have it?

Applying these principles to the circumstances of the case before us, leave should, in my opinion, be given.

GALLIHER, J.A.: I would grant the application.

GALLIHER, J.A.

MCPHILLIPS, J.A.: I think on every occasion when leave to appeal has come up for consideration I have expressed the view that it is always the interests of justice that must receive attention. The Legislature has granted us the power of giving leave to appeal notwithstanding that it is out of time, and our decision in *Fraser* v. *Neas. Roddy* v. *Fraser* (1924), 35 B.C. 70; (1925), 2 W.W.R. 614, is in no way a curtailment of our powers. When Parliament confers the powers (the Rules of Court are of statutory effect) there ought to be no arbitrary rule placing any clog in the exercise of conferring leave where the interests of justice require its exercise.

MCPHILLIPS, J.A.

COURT OF APPEAL

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MCPHILLIPS, J.A.

Here the plaintiff says the defendant should indemnify him, and the Court has pronounced that the defendant shall indemnify the plaintiff. That is the judgment taken out, but there was error in drawing up the judgment in putting it in interlocutory form. All this appellant is interested in is: Is he compelled to indemnify the plaintiff, or is he not?

The judgment was final in its nature and should have been so drawn up. And when the Court so finds, the interests of justice require that the appellant should have the right to appeal from the judgment, and he ought to be put in the position that he can appeal.

The appellant served notice of appeal, but within the time allowed in the case of a final judgment but too late in the case of an interlocutory judgment, and once the notice is served, the jurisdiction is in the Court of Appeal, and we, in the interests of justice, should dispose of it, and the proper order to make in this case in my opinion is to grant leave to appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I was anxious that Mr. *Whiteside* should be given an opportunity by a short postponement to bring this case if possible within the principles laid down in *Fraser* v. *Neas*. *Roddy* v. *Fraser* (1924), 35 B.C. 70; (1925), 2 W.W.R. 614. However, we have now simply to act on the statement of counsel, and I am afraid he does not bring himself within the case referred to.

Application granted, Macdonald, C.J.B.C. and Macdonald, J.A. dissenting.

McLEOD v. BOULTBEE AND ATKINS.

FISHER, J.

1931

June 13.

McLEOD v. BOULTBEE

Negligence—Automobile collision—Injury to gratuitous passenger—Left-hand turn at intersection—No warning—Collision with car following behind—Liability of drivers—General and special damages—Loss of wages—Contributory negligence—B.C. Stats. 1925, Cap. 8.

A. was driving his car easterly and approaching an intersection. B., with the plaintiff as a passenger, was driving his car in the same direction a few feet behind A. On reaching the intersection A., without giving any warning, turned to the left to go north. B., who was proceeding at about 35 miles an hour, on seeing A. turn to the left, immediately turned to the left himself but too late to avoid a collision, and the sides of the cars coming together the plaintiff was thrown out of B.'s car and severely injured.

Held, that A. was negligent in not signalling when turning at the intersection, also that B., in travelling behind another car at an intersection, should have taken reasonable care to minimize the risk which might arise from the driver of the car ahead making a sudden turn without giving any signal; that the Contributory Negligence Act applied and the damages should be assessed 60 per cent. to A. and 40 per cent. to B.

Held, further, that in an action for damages for personal injuries a claim for loss of wages to the date of the commencement of the action or of the trial is not recoverable as special damages but falls within the purview of general damages.

Trache v. *Canadian Northern Railway Co.* (1929), 1 W.W.R. 100 followed.

ACTION for damages resulting from a collision between two motor-cars, the plaintiff being a passenger in one of the cars. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 4th and 5th of June, 1931. Statement

A. B. Macdonald, K.C., and *R. V. Prenter*, for plaintiff.
Alfred Bull, and *Ray*, for defendant Boultbee.
Hossie, and *Ghent Davis*, for defendant Atkins.

13th June, 1931.

FISHER, J.: In this matter counsel on behalf of the defendant Atkins, who was driving his own car, argues that the evidence of the plaintiff herself and the witness, Miss Hespeler, called on behalf of the defendant Boultbee, who was also driving his own car, establishes that the Atkins car had turned out to the centre of the street about 60 feet back from the Willow Judgment

FISHER, J.

1931

June 13.

McLEOD v. BOULTBEE

Judgment

Street intersection as he points out that the plaintiff in one place says that one car was "right behind the other" and he contends that it is also a fair inference from the evidence of Miss Hespeler that they were so, as she says that the two cars overlapped and were so close that there was not room for another car to come by and pass between as they approached the intersection. It must be remembered, however, that it is practically common ground that the Boultbee car was straddling the most southerly rail and this is apparent from the argument that the Atkins car would be right in front of the Boultbee car after it is said to have turned to the centre of the street at a point 60 feet from the Willow Street intersection. It is clear also that it is common ground that at least up to such point the Atkins car was travelling within four or five feet of the curb on the south side of the street. Thus the relative position of the two cars is established up to such point. A perusal of the evidence of the said witnesses then shews that each of them is positive that the Atkins car did not appear to turn out towards the centre of the street or change its course until it reached or was well over on to Willow Street. The defendant Boultbee says that as his car was overtaking the other car Atkins, without any apparent signal, turned to the left (*i.e.*, north) at the intersection of Willow Street whereupon he (Boultbee) also swung left to avoid the collision but the rear ends of the cars collided. With respect to the evidence of those in the car with the defendant Atkins, I may say that it does not seem reasonable to me that they should know exactly where their own car was on the street and what their driver did shortly before such collision when they say they knew nothing of another car being in their vicinity until the impact. With respect to the defendant Atkins, I cannot say that he impresses me as a very alert driver when he also says that he did not know there was a car behind him till practically at the moment of impact although the car of the defendant Boultbee had been following him for blocks and at least a whole block with no other traffic in sight. I think it is fair to both drivers to say that at the moment of impact Boultbee is found to be doing something which broke the force of the impact by swinging his car to the north with the other while Atkins,

according to his own evidence, had observed nothing and was unable to do anything.

My conclusion from the whole evidence is that Atkins was not intending to turn at the Willow intersection until his attention was called to it by the witness Babcock when the car was at the intersection. Atkins then made a sudden left-hand turn without giving any signal or warning of his intention to turn. This means that Atkins did not comply with the regulations requiring him to give a plainly visible signal before turning and though Boultbee says he saw the Atkins car start to turn it was then too late for Boultbee to prevent an accident at the speed he was going, though, as he says, he almost made it but "the rear ends of the cars side swiped and bounced apart." The plaintiff was thrown against the door which was thrown open by the impact of the two cars and the plaintiff fell out on the devil strip about the centre of the intersection.

Under such circumstances I find that the defendant Atkins did not exercise reasonable care and was negligent in that he did not approach the turning point at the right side of and immediately next to the centre of the roadway but turned suddenly to the left at the intersection and did not before turning give a signal to the operator of the other car of his intention to so turn. I also find that such negligence caused or contributed to the damages sustained by the plaintiff.

Judgment

As to the defendant Boultbee, counsel on his behalf submits that he was entitled to proceed upon the assumption that the driver ahead would do what it was his duty to do. My view is that for the protection of the plaintiff whom he had undertaken to carry (even though gratuitously) the defendant Boultbee was bound to take that care which would have been reasonable under all the circumstances. See *Armand* v. *Carr* (1926), S.C.R. 575 at p. 581. Some of the circumstances have been already referred to. It may also be pointed out that the weather was fine and the pavement comparatively dry. Boultbee had a clear view of the Atkins car for several blocks and was obviously gaining on it and intending to pass. I find that Boultbee was going about 35 miles an hour and he frankly admits he did not slow down at all for the intersection. He was apparently going right through and was going so fast that he was unable to

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prevent a collision though he must have been, as I find, at least 40 feet behind the Atkins car when he saw it start to make the left-hand turn. In my view Boultbee was going too fast as he approached and entered upon the crossing of the intersection and was negligent in doing so with the other car where it was. I do not see that he can leave the safety of his passengers entirely in the hands of the driver ahead of him. It was his duty to minimize the risk there always is of a collision at an intersection through someone doing what he should not do.

My conclusion is that it was the joint negligence of both of the defendants which caused the accident to the plaintiff and having regard to all the circumstances I apportion the liability for degrees of the fault as 60 per cent. on the part of the defendant Atkins and 40 per cent. on the part of the defendant Boultbee.

As to special damages, I note that the statement of claim includes claims for loss of wages and loss of profits by way of earnings to the date of the commencement of the action or of the trial but these are not recoverable as special damages but fall within the purview of general damages. See *Trache* v. *Canadian Northern Railway Co.* (1929), 1 W.W.R. 100 at pp. 105-7 and 111-16. I would allow all the other items as set out in the statement of claim, making a total of $593.20 for special damages.

Judgment

As to the general damages, I have of course to consider the pain and suffering and the various injuries sustained by the plaintiff from the accident. More particularly, however, I have to consider the effects of the injuries to the eyes and the brain. As to the eyes, counsel on behalf of the defendants have emphasized the portions of the evidence of Dr. McDougall, called on behalf of the plaintiff, wherein he says that she (the plaintiff) was a moderately high long-sighted individual, that this was a congenital condition, and not one which would be due to an accident and that he certainly would have prescribed glasses for her if she had come to him before or apart entirely from the accident. It must also be noted, however, that Dr. McDougall elsewhere in his evidence says that the plaintiff "has got a muscular weakness in her eyes on account of the

accident" and that he really thinks that "she had some damage to the nerves controlling the muscles of the eye, at the time of the accident" and it is apparent from his other answers that he means by this that she received such damage at the time of the accident. My finding from all the evidence given at the trial relevant to this matter is that she could have got along for some time quite comfortably without wearing glasses and that the immediate necessity of wearing the glasses was caused by the accident, that such necessity does not make it impossible for the plaintiff to carry on her work as a public entertainer, but is a severe handicap which however she may be able to overcome. As to the effect upon the brain, it is or must be common ground, in view of the medical evidence, that the plaintiff had received an injury to her brain in the accident, which still persists somewhat, which however does not mean that the plaintiff's mental condition is affected as it is quite apparent that she is quite alert mentally. The issue is really as to the duration of the injury and, in view of Dr. Brodie's evidence, I am prepared to find that plaintiff should make a complete recovery in a short time so far as the brain injury is concerned. If I found otherwise I would think the injury was much greater than it appears to be and likely to cause complications in the future.

Judgment

With my findings as above I would point out that I cannot consider that the plaintiff had definitely devoted herself exclusively to a career as a public entertainer for at the time of the accident she was engaged in bookbinding as well as professional entertaining work. I must find, however, that the plaintiff, undoubtedly a talented young lady, having exceptional earning powers covering two different lines of work, has had such seriously interfered with, and a severe handicap imposed upon her by the accident, at an early and important period in her life.

Under all the circumstances I consider I am doing justice to all concerned when I allow the plaintiff, as I do, general damages in the sum of $6,000.

There will be judgment therefore in favour of the plaintiff against both defendants for the sum of $6,593.20 and costs.

As between the defendants themselves they will be liable for such costs of the plaintiff as they are liable for in the same

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proportion as for the damages and neither will have costs against the other.

Judgment for plaintiff.

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MERRYFIELD & DACK v. THE MALE MINIMUM WAGE BOARD

MERRYFIELD & DACK *ET AL.* v. THE MALE MINIMUM WAGE BOARD AND DAVENPORT.

Male Minimum Wage Act—Licentiates of pharmacy—Wages—Order of Board—Petition to review—Order made dismissing application to rescind order, that the Board be entitled to appear by counsel and fixing day to rehear petition—Right of appeal from order—B.C. Stats. 1929, Cap. 43, Sec. 9 (3).

On the application of certain licentiates of pharmacy, the Male Minimum Wage Board, pursuant to the provisions of the Male Minimum Wage Act, made an order on the 31st of July, 1930, that the minimum wage to be paid to licentiates of pharmacy be 80 cents per hour. Certain druggists being dissatisfied with the order made application by way of petition to a judge of the Supreme Court, under section 9 of said Act, praying that the order be reviewed, rescinded or varied. An order was made by MACDONALD, J. dismissing the application to rescind the order as invalid, but that the appeal from said order should be heard on a further date as a rehearing *de novo* of the matters considered by the Board and that the Board be entitled to appear by counsel.

Held, on appeal, that the whole appeal brought by the petition to the Court below must be disposed of before an appeal can be taken to this Court, and as the order appealed from did not dispose of the whole appeal, it should be quashed.

Statement

APPEAL by plaintiffs from the order of MACDONALD, J. of the 3rd of October, 1930, dismissing the application of the plaintiffs to rescind or set aside the order of the Male Minimum Wage Board of the 31st of July, 1930, and ordering that the said Board are entitled to appear by counsel in support of their order.

The appeal was argued at Victoria on the 9th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Crease, K.C. (*J. P. Hogg,* with him), for appellants.

H. W. Davey, for respondent Davenport, took the preliminary objection (1) That under the Minimum Wage Act no appeal lies from an interlocutory order; (2) that the ruling from which the appeal was taken was made in the course of the hearing and no appeal lies. The Board made a ruling that there should be a minimum wage of 80 cents per hour for licentiates of pharmacy. The appeal is from this ruling upon which argument has not yet been heard. Section 9 (3) of the Act provides for appeal and there is no provision for an appeal from an interlocutory order: see *Douglas Lake Cattle Co.* v. *Reinseth* (1922), 30 B.C. 552; *In re Moynihan* (1930), 2 Ch. 356.

Argument

Haldane, for respondent Board.

Crease: We have a right of appeal by virtue of section 9 of the Minimum Wage Act and the Court of Appeal Act. That the order of the Board is invalid is a point of law: see *Moss* v. *Great Eastern Railway Co.* (1909), 2 K.B. 274.

9th February, 1931.

MACDONALD, C.J.B.C.: The appeal is dismissed with costs.

Crease: Would there be any costs under this Act? It says that no costs should be awarded.

MACDONALD, C.J.B.C.: Before going into that, I wish to say a few words about the case:

Under section 9 of the Act an appeal may be taken, by way of objection to the findings of the Board, to a judge of the Supreme Court. The judge of the Supreme Court is then seized of the whole matter, the merits, and questions of law, and he may dispose of them. An appeal will lie, on questions of law, from his decision.

MACDONALD, C.J.B.C.

In this case the petition was lodged, the matter came before the learned judge, who made a ruling that, with respect, I cannot understand. It does not matter very much, because there should not have been any order taken out at all, but he ruled, at all events, that "the application to rescind or set aside the order is invalid. . . ." That has been explained to us to have been a finding on the question of law. And then he goes on to say that the appeal from the said order shall be heard on the 21st of October, and so on. That shews that he did not dispose of the

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whole matter. The matter was one matter, an appeal from the order, and the question of the merits and question of law should have been disposed of before any appeal had been taken at all. In fact, I do not think a formal order ought to have been taken out, on this, any more than in a trial where there is a ruling on admission of evidence; but it was taken out. At all events, this is perfectly clear, that it did not dispose of the whole appeal which was brought by that petition. Part of it was deferred, and the decision of this Court in *Douglas Lake Cattle Co.* v. *Reinseth* (1922), 30 B.C. 552, and other cases, shews that for a long time it has been laid down that an appeal shall not be taken in the middle of a trial or legal proceeding. The whole matter must be disposed of and then the appeal may be taken after the final order. That was not done in this case. The failure to do that would lead to very great inconvenience in the matter of appeals. Half a dozen appeals might be taken on interlocutory findings of the learned judge and final hearing of the case delayed for months, pending these expensive appeals.

MACDONALD, C.J.B.C.

That is the reason why the Court holds that there must be finality in the proceedings before the appeal is taken. That applies to this case, and therefore the appeal does not lie. It should be quashed.

MARTIN, J.A.: I am of the same opinion; so much so that I find it unnecessary to add anything, except to point out that very wisely the respondents formally took the ground that the so-called order which was appealed from never should have been taken out at all, that it was simply an adjudication made in the course of the trial, or hearing of the petition—which is the same thing—and from the moment that hearing is taken until it is finally concluded, there can be no interlocutory appeal on interlocutory adjudications, but there shall be one appeal, and one only, from the final disposition of the whole matter.

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That, as the learned Chief Justice has said, is in entire consistence with the unbroken decisions of this Court for many years, and of the old Full Court before that.

GALLIHER, J.A.: I agree. This has been the regular practice, and I do not see anything in the statute in question in this action that would cause me to deviate from it.

GALLIHER, J.A.

McPHILLIPS, J.A.: I agree with my learned brothers.

My observations during the argument have expressed my views.

MACDONALD, J.A.: I agree.

Appeal quashed.

Solicitors for appellants: *Crease & Crease.*
Solicitor for respondent Board: *W. H. M. Haldane.*
Solicitor for respondent Davenport: *H. W. Davey.*

SHANNON v. KING.

Practice—Pleading—Libel — Discovery—Examination of defendant—Statement of claim—Application to strike out section as embarrassing—Discretion—Jurisdiction—Appeal.

The plaintiff was appointed to the staff of the Kitsilano Junior High School as a teacher in September, 1928, for the school year ending June 30th, 1929. Shortly before the 25th of June, 1929, the defendant, who was principal of the Kitsilano school made a written report to the superintendent of schools and the Board of School Trustees for the City of Vancouver, and on the 26th of June, 1929, the superintendent of schools wrote the plaintiff advising her that she would not be re-engaged for the following school year. The plaintiff brought action against the defendant for damages for defamation contained in the report to the superintendent of schools, and before pleading applied for leave to interrogate the defendant as to the precise words which he uttered, but the learned judge postponed the application and suggested that the plaintiff should plead. The plaintiff pleaded paragraph 14 of the statement of claim reciting that the defendant falsely and maliciously wrote and published to the superintendent of schools words reflecting on the plaintiff's professional ability as a school-teacher, particulars of which words are not within the knowledge of the plaintiff and solely within the knowledge of the defendant and the superintendent of schools. On the application of the defendant said paragraph was struck out.

Held, on appeal, affirming the order of MACDONALD, J. (McPHILLIPS, J.A. dissenting), that the practice requires the libellous words to be set out. The paragraph in question does not allege the libellous words

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written by the defendant but simply suggests that he has done something that the plaintiff is unable to set out. The paragraph was therefore properly struck out.

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APPEAL by plaintiff from the order of MACDONALD, J. of the 6th of January, 1931, striking out paragraph 14 of the statement of claim. The action was for damages for defamation contained in a report made by the defendant to J. S. Gordon, superintendent of schools in Vancouver and the Board of School Trustees and others, concerning the plaintiff in the way of her profession of school-teacher. Section 14 of the statement of claim is as follows:

Statement

Shortly before the 25th of June, 1929, and on divers occasions since the 25th of June, 1929, which said occasions are known only to the defendant and to Mr. J. S. Gordon, Mr. W. J. Baird and the Board of School Trustees of the City of Vancouver, and are not known to the plaintiff, the defendant falsely and maliciously wrote and published to J. S. Gordon, superintendent of schools, Vancouver, B.C., Mr. W. J. Baird and the Board of School Trustees of Vancouver, B.C., words reflecting on the plaintiff's professional ability as a school-teacher, particulars of which words are not within the knowledge of the plaintiff and are solely within the knowledge of the defendant, Mr. J. S. Gordon, Mr. W. J. Baird and the Board of School Trustees who refuse to disclose to the plaintiff the words so written and published and spoken and published by the defendant.

The appeal was argued at Victoria on the 10th and 11th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Arugment

Sloan, for appellant: Plaintiff taught in Kitsilano School from September, 1928, to June 30th, 1929. On June 25th she went to King's office, when he told her in a loud voice that he did not like her, that she could not teach and he would not recommend her for reappointment. On the following day she received a note from the superintendent of schools that she would not be re-engaged for the coming school year. An investigation was had but neither the plaintiff nor her brother was allowed to be present. This application is under marginal rule 223. The pleading is not embarrassing: see *Robertson* v. *Boddington and Robinson* (1925), 56 O.L.R. 409 at p. 411; Annual Practice, 1931, p. 366; *B.C. Liquor Co. Ltd.* v. *Consolidated Exporters Corporation Ltd.* (1930), 42 B.C. 481. The judge below could have made the order for interrogatories: see *Russell*

v. *Stubbs* (1908), 52 Sol. Jo. 580; *Barham* v. *Huntingfield (Lord)* (1913), 82 L.J., K.B. 752. As to the discretion of the Court below see *Knowles* v. *Roberts* (1888), 38 Ch. D. 263 at p. 271.

Garfield A. King, for respondent: They claim libel and they do not know what the libel is. Where they claim libel they must have the precise words and the words must be pleaded: see *Harris* v. *Warre* (1879), 40 L.T. 429. There is no cause of action unless you say what the words are: see *Darbyshire* v. *Leigh* (1896), 1 Q.B. 554. Nobody knows the nature of King's report. Where there is no libel to start with they are merely on a fishing expedition. It is essential that the words be set forth in the statement of claim: see Halsbury's Laws of England, vol. 18, p. 643, par. 1199; *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741 at pp. 771-2; Gatley on Libel and Slander, 2nd Ed., p. 516. As to obtaining the information by discovery see *Berry* v. *Retail Merchants Association* (1924), 18 Sask. L.R. 283. As to fishing expeditions see *Hennessy* v. *Wright* (1888), 21 Q.B.D. 509. Arugment

Sloan, in reply, referred to *Atkinson* v. *Fosbroke* (1866), 35 L.J., Q.B. 182.

MACDONALD, C.J.B.C.: The appeal must be dismissed.

The law of libel and slander is definitely settled, that the libellous and slanderous words must be set out, and that practice has existed for a long time. This paragraph does not allege any libellous words written by the defendant. It simply suggests that he has done something that the plaintiff is unable to set out. The libel or slander is not set out in this case, and to my mind that settles the whole question before us under the present rule of pleading. There is a practice that in cases of this kind the plaintiff may apply to the Court for interrogatories before pleading, for the purpose of obtaining from the opposite party, in whose knowledge the words are, the facts which will enable him to plead, that is to say, which will enable him to set out the exact words complained of. That application was made in this case. The learned judge, instead of disposing of it, postponed it, and suggested that the plaintiff should plead (with respect) forgetting that the very object of the application before him was MACDONALD, C.J.B.C.

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to obtain facts that would enable the applicant to plead. Had the learned judge granted leave to serve interrogatories, there would be no trouble, but the postponement would do him no good, he would have to plead without the facts from the other side; the learned judge should have disposed of the matter at that time.

The authorities cited do not go the length, I think, that Mr. *Sloan* contends for, but they do go the length of shewing that the person complaining must be able to say what the words were. He has not been able to do this, therefore the paragraph struck out shews no cause of action.

MARTIN, J.A.: On this case as it comes before us there is no other course open, in my opinion, but to dismiss the appeal.

I cannot refrain from saying that it seems unfortunate that the well-known practice as laid down in Gatley on Libel and Slander, 2nd Ed., 518, was not persisted in, and the case has got into an unusual position, because of the delivery of the statement of claim before the information sought by means of interrogatories had been obtained. The claim as it now stands does not properly disclose a cause of action, and the different cases which have been cited to support it, when they are examined, do not do so, because the main one, *Atkinson* v. *Fosbroke* (1866), L.R. 1 Q.B. 628; 35 L.J., Q.B. 182, was a case where the Court pointed out (pp. 631-2):

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> Slanderous imputation against the plaintiff, of a definite character, is shewn to have been made by the defendant in the presence of Pym, and repeated by Pym to the committee, but the plaintiff has no means of ascertaining the exact terms of the slander, except by extracting it through means of interrogatories from the defendant himself.

Such allegation was, of course, *per se,* libellous in a high degree and the whole report of the case and expressions of the learned judge therein, must be taken in connection with that vital circumstance.

Then turning to the case which is unquestionably an interesting and leading one, the decision of the House of Lords in *Russell* v. *Stubbs, Lim.* (1908), in the note to *Barham* v. *Huntingfield (Lord)* (1913), [2 K.B. 193 at p. 200 *et seq.*], 82 L.J., K.B. 752 at p. 756 *et seq.,* it is pointed out at p. 759 by the Lord Chancellor that in that case, where a libel was clearly

alleged, there had been established a *prima facie* case of the publication by the defendants of the libel complained of, and therefore it was in order. It must, however, be remembered that that case was an exceptional one, as noted in Gatley, p. 539, wherein it is said that the case was "an exceptional one," depending on "very special facts," for an affidavit had been filed by the plaintiff's solicitor which afforded "*prima facie* evidence, and which was uncontradicted, that the libel had been published to more persons than the persons specified in the statement of claim," and it goes on to say:

Neither the Court of Appeal nor the House of Lords laid it down as a general proposition that it is permissible for the plaintiff in an action of defamation to allege publication to persons unknown and then interrogate the defendant as to the names of such persons. Such interrogatories would be clearly fishing and inadmissible.

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I conclude my remarks by adopting the language of Chief Justice Erle, in *Stern* v. *Sevastopulo* (1863), 14 C.B. (N.S.), 737 at p. 742; 32 L.J., P.C. 268, wherein the Court held in language appropriate to this case, that the rule that should be made there was so made because:

The unprecedented nature of the interrogatories, the nature of the action, and the absence of any special circumstances to warrant them, seem to me to afford abundantly sufficient grounds for holding that they overstep the boundary line.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would allow the appeal. On turning to the rules, and they are in the main the same in England, it is provided (marginal rules 281-284) that "No demurrer shall be allowed." Then:

Any party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the judge who tries the cause at or after the trial; provided that by consent of the parties, or by order of the Court or a judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

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If, in the opinion of the Court or a judge, the decision of such point of law substantially disposes of the whole action, or of any distinct cause of action, ground of defence, set-off, counterclaim, or reply therein, the Court or judge may thereupon dismiss the action or make such other order therein as may be just.

In the present case the statement of defence is filed and issue is joined; thereafter having pleaded over the defendant moves

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to strike out a paragraph of the statement of claim alleging slander but not setting out the exact words, owing to their not being known.

The motion is by way of a summons in Chambers, to strike out paragraph 14, alleging the slander on the ground that it "prejudices, embarrasses, or delays," and in the alternative, to strike it out on the ground that it "discloses no reasonable cause of action."

Now dealing with procedure and practice, on pp. 422-3 of the Annual Practice, 1931, we have this foot-note:

> A point of law which requires serious argument should be raised in this way under r. 2 of this Order, and not by a summons under r. 4 (*Dadswell* v. *Jacobs* [(1887)], 34 Ch. D. 284; *Hubbick* v. *Wilkinson* (1899), 1 Q.B. 91; *Worthington* v. *Belton* [(1902)], 18 T.L.R. 438).

The procedure adopted was to my mind not in the interests of justice, a summary hearing and disposition in Chambers. Further, as I view it, it is indeed questionable if there was jurisdiction in the learned judge upon the facts of this case to consider and dispose of the matter in Chambers. The facts disclosed are that the young lady is a school-teacher, with professional *status,* and as a teacher has been so treated that her profession is lost to her owing to being refused employment by one school authority after another, consequent upon, as alleged, some slanderous statements made about her as affecting her capacity as a teacher, which statements have been made to various school authorities, but these statements are withheld from the plaintiff. Is the law so impotent that nothing can be done to effectuate justice? I am not disposed to now say that the pleading is sufficient. I am not called upon to say so. It is an important point of law, and should not have been disposed of summarily in Chambers.

MCPHILLIPS, J.A.

In this particular case, I think, of all cases, the Court should not be too vigilant to dispose of the cause of action in this summary way. I certainly am not disposed to at all approve what has been done. The defendant should if it is desired take the point of law in the statement of defence and set the point of law down for hearing; that would be a hearing in Court. It is a reflection on our jurisprudence, that a grievous slander can be perpetrated, and no machinery in our law to ferret out the

actual facts and words used. I do not look upon the matter in that way; there is the right to submit interrogatories even before the statement of claim is filed, and an order may go for the submission of interrogatories at any later time.

I agree that parties are not compellable to give the names of the witnesses.

Therefore I think the matter was of such importance, that it should not have been disposed of in Chambers, but should be disposed of in Court. I would allow the appeal and set aside the order of the learned judge below.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree with what has been said by the Chief Justice and my brother MARTIN. I may add that if certain words of a defamatory nature—the best the plaintiff could allege—were set up in the statement of claim and upon discovery more explicit statements were received an amendment might then be made alleging the exact words complained of. That does not arise here, because no words of any kind have been alleged.

MACDONALD, J.A.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Montague G. Caple.*
Solicitor for respondent: *Garfield A. King.*

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IN RE REDMOND ESTATE.

THE ATTORNEY-GENERAL OF THE PROVINCE OF BRITISH COLUMBIA v. THE ROYAL TRUST COMPANY.

IN RE REDMOND ESTATE

Succession duty—Will—Bequest of half residue to child—In loco parentis—Proof of—R.S.B.C. 1924, Cap. 244, Sec. 2.

Section 2 of the Succession Duty Act provides that the "child" of a deceased includes "any infant to whom the deceased for not less than ten years immediately prior to his death stood in the acknowledged relationship of a parent."

Janey Redmond, born in the General Hospital at Vancouver, in January, 1917, was, with the consent of her mother adopted by deceased and his wife shortly after her birth. Deceased and his wife had lived apart for some years prior to the adoption of the child, but he provided for her maintenance by payment of $40 a month and they visited one another from time to time. Upon the adoption of the child, who took the name of her foster parents, she lived with the wife in Vancouver, but deceased who lived in Victoria visited her four or five times a year, and the child visited him three or four times a year in Victoria. He shewed his affection for the child by giving her presents and providing her with clothes and money for her education. By his will deceased bequeathed to the child one-half of the residue of his estate. On the application of the executors of William Redmond for the determination of the amount of succession duty as governed by the relationship of Janey Redmond to deceased, it was held that the succession duty be determined on the basis of deceased occupying the position of *loco parentis* to Janey Redmond.

Held, on appeal, affirming the decision of GREGORY, J., that the evidence brings the case under the statute, the deceased having stood in the acknowledged relationship of a parent to the adopted child, and the amount of succession duty should be governed accordingly.

Statement

APPEAL by the Attorney-General of British Columbia from the order of GREGORY, J. of the 20th of October, 1930, declaring that at the time of the death of William Redmond and for many years previously the said William Redmond occupied the position of *in loco parentis* towards Janey Redmond and that the succession duty upon that portion of the estate of the said William Redmond going to the said Janey Redmond under the will of the deceased be determined on that basis. Janey Redmond was born in January, 1917, in the General Hospital at Vancou-

ver, and three weeks later William Redmond and his wife adopted her with the consent of the child's mother. For some years prior to this William Redmond and his wife had lived apart, William Redmond living in Victoria and the wife in Vancouver, where she had established the St. Luke's Home, a semi-charitable institution which she carried on, and where she was known as Sister Frances. She visited her husband from time to time in Victoria, and he paid her $40 a month for her maintenance. The child lived with Sister Frances in Vancouver, but four or five times a year she visited William Redmond in Victoria and he provided partially for her clothing and education.

Statement

The appeal was argued at Victoria on the 18th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Pepler, for appellant: Deceased's estate was valued at $57,000, and by his will he left half of the residue of the estate to the child. The child lived with Sister Frances and was really adopted by her. The deceased lived in Victoria and was only visited from time to time by the child. The deceased did not stand in the position of a parent and was not a parent of the child: see *Ex parte Pye* (1811), 18 Ves. 141; *Powys* v. *Mansfield* (1837), 7 L.J., Ch. 9; *Pym* v. *Lockyer* (1841), 10 L.J., Ch. 153; *Fowkes* v. *Pascoe* (1875), 10 Chy. App. 343; *Bennet* v. *Bennet* (1879), 10 Ch. D. 474; *In re Ashton* (1897), 66 L.J., Ch. 731; *In re Eyre* (1917), 86 L.J., Ch. 257. The onus is on the executors to shew that deceased was in the position of *loco parentis.* There was no documentary evidence to support the claim, all the evidence being verbal.

Argument

Alan Maclean, for respondent, was not called upon.

MACDONALD, C.J.B.C.: The appeal must be dismissed. The case is somewhat difficult, as such cases must be, as shewn by the authorities cited. But after all there is the fact that the foster-mother swears that about a year after the birth of the child the deceased acknowledged her as their adopted daughter; and the deceased had provided for his wife, who has been able to keep the child, apparently, on money she received from her

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husband. The affection between the child and foster-father is conceded, and the fact that he gave the child presents from time to time and went to Vancouver to visit her three or four times a year, and she came over here three or four times a year, to stay at his house when he had a house, and was treated by him as if she were his own child.

Then there is the acknowledgment he made to several individuals that he did stand in the position of father to this child and would look after her during his lifetime and provide for her after his death.

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All this is evidence that brings the case under the statute, and I think the learned judge is right when he found he was *in loco parentis* to the child. The order has not been properly drawn up, and no doubt will be put in proper shape to correspond with the statute.

MARTIN, J.A.: In this appeal the simple question we have before us is, does the adopted child in question come within section 2 of the Succession Duty Act, Cap. 244, R.S.B.C. 1924, as being one "to whom the deceased . . . stood in the acknowledged relationship of a parent." Now that is a question of fact which must be determined by the specific words of these statutes which are not the same as the ordinary term of *in loco parentis,* and therefore the cases which have been cited, while valuable to a certain extent, are, nevertheless, to be regarded from the point of view that the language of our statute is different. The ascertainment of the question, of course, depends upon the facts of each particular case, and in no case can it be expected that they will be precisely the same.

All I have to say about this case, without taking time to recite all the facts of it which induce me to take the view that I do, is that after a consideration of them all, I have no doubt at all that the deceased did stand in the acknowledged relationship of a parent to the adopted child in question, and therefore the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the appeal should be dismissed. I agree in the result arrived at by the learned judge in

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the Court below. The turning point of the matter is whether or not this child comes within the terminology of the statute, Cap. 244, R.S.B.C. 1924, Succession Duty Act, section 2 of which in part reads:

> . . . Any infant to whom the deceased for not less than ten years immediately prior to his death stood in the acknowledged relationship of a parent, . . .

It would appear to me that there could be no other conclusion arrived at upon the evidence brought before the learned judge in the Court below; that there was the duly acknowledged relationship of *parent* within the purview of the enactment. The amount going to her under the will will be rightly entitled to exemption under section 4 of the Act.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree.

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *Eric Pepler.*

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

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Practice—Endorsement on writ—Statement of claim seeking relief not in endorsement—Application to strike out pleading—Marginal rule 228.

The plaintiff endorsed his writ with a claim for $3,998, being money had and received by the defendants to the use of the plaintiff, and upon trust for the plaintiff. By paragraph 7 of her statement of claim she sued for said money under and by virtue of subsection (3) of section 236 of the Criminal Code of Canada and claims as against the defendants a judgment and decree forfeiting the said sum of $3,998. An application to strike out paragraph 7 of the statement of claim was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN and GALLIHER, JJ.A. dissenting), that what is set out in the statement of claim is a justifiable enlargement or extension of what was set out in the writ and comes within the provisions of marginal rule 228. The Court should not interfere with the discretion of the learned judge below whose finding should be given effect to.

Statement

APPEAL by defendants from the order of MCDONALD, J. of the 3rd of December, 1930, dismissing an application to strike

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out paragraph 7 of the statement of claim. The endorsement on the writ was as follows:

1. The plaintiff's claim is against the defendant Edith O. Cann for the sum of Three Thousand, nine hundred and ninety-eight dollars ($3,998), being money had and received by the said defendant Edith O. Cann to the use of the plaintiff and upon trust for the plaintiff.

2. The plaintiff's claim is against the defendant Arthur R. Cann for Three Thousand, nine hundred and ninety-eight dollars ($3,998), being moneys of the plaintiff had and received by the said defendant Arthur R. Cann, to the use of the plaintiff and by him the said Arthur R. Cann paid over to the defendant Edith O. Cann without consideration other than a term of holding to the use of the plaintiff, or in the alternative upon trust for the plaintiff, which said sum the defendant Arthur R. Cann acknowledged to the plaintiff he had received for the use of the plaintiff and paid over to the defendant (Edith O. Cann) as aforesaid.

Paragraph 7 of the statement of claim is as follows:

Statement

The defendants and each of them refuse to pay over the said sum of $3,998 to the plaintiff on the ground that the defendants obtained the said sum by means of a lottery, ticket, card or other mode of chance, and the plaintiff therefore sues for the said money under and by virtue of subsection (3) of section 236 of the Criminal Code of Canada and claims as against each of the said defendants a judgment and decree forfeiting the said sum of $3,998 to the plaintiff as money had and received by the defendants to the use of the plaintiff.

The appeal was argued at Victoria on the 11th and 12th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

D. S. Tait, for appellants: Paragraph 7 of the statement of claim creates a new and distinct cause of action under section 236 (3) of the Criminal Code: see *Cave* v. *Crew* (1893), 62 L.J., Ch. 530; *The United Telephone Company Limited* v. *Tasker, Sons and Co.* (1889), 59 L.T. 852 at p. 853. The endorsement on the writ does not suggest any claim under the Criminal Code. A claim under a penalty must be strictly raised and pleaded: see *Oppenheimer* v. *Sperling* (1903), 10 B.C. 162.

C. G. White, for respondent: The parties are the same and the money claimed is the same. There is no undue extension. We have not gone beyond the provisions of marginal rule 228: see *Johnson* v. *Palmer* (1879), 4 C.P.D. 258; *Moore* v. *Alwill* (1881), 8 L.R. Ir. 245; *Ker* v. *Williams* (1886), 30 Sol. Jo. 238; *Jacobs* v. *Morris* (1901), 1 Ch. 261 at p. 268. As to the discretion of the trial judge see *Wellington Colliery Company* v.

Pacific Coast Coal Mines (1918), 25 B.C. 206; *Blygh* v. *Solloway, Mills & Co. Ltd.* (1930), 42 B.C. 531.

MACDONALD, C.J.B.C.: I would dismiss the appeal. I think I have explained my reasons fully during the argument. The Parliament of Canada declared that a lottery contract is illegal and void. The person who won the money had no interest in it at all. He got the money, but the statute says that it is not his, but that it belongs to anyone who shall bring suit to recover it. The plaintiff in this case brought the suit, alleging that it was money had and received for her. The proceedings are simply to recover the money, not to declare the ownership of it. The statute has declared the ownership of it, and the suit is to recover it. What is set out in the statement of claim is a justifiable enlargement or extension of what was set out in the writ; and therefore it is within the rule.

MACDONALD, C.J.B.C.

I think, without casting any reflection upon the decision in *Oppenheimer* v. *Sperling* (1903), 10 B.C. 162, that that case seems to have gone even further than this case. There there was one cause of action set up in the endorsement, and another cause of action added to it in the statement of claim. The Court held there that the two were so intimately connected that the statement of claim could be regarded as a justifiable extension of what was in the writ. In this, I think the matter is much clearer. And therefore I would not interfere with the discretion of the learned judge whose finding should be given effect to.

MARTIN, J.A.: In my opinion the appeal should succeed. There is an unbroken line of authority in England, and also in this Court, and in Ireland, under a similar rule, that it is not possible so to alter your writ, in effect, by your statement of claim as to set up an entirely distinct cause of action from that which you set up originally. If you essay to do that, your proper procedure is to apply to amend your writ. The cases in England make that very clear—several have been cited, but these three are sufficient—*Ker* v. *Williams*, a decision of Mr. Justice Kay, in 1886, 30 Sol. Jo. 238:

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> Kay, J. said that the case set up by the plaintiff in his statement of claim was totally different from that which he raised in his writ.

And after discussing the allegations there,—

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It was said that the Court ought to be lax in matters of this kind, but his Lordship was not of that opinion. The statement of claim must, therefore, be struck out. The plaintiff could, of course, issue a fresh writ.

The same learned judge gave a decision identical in principle, two years later, in *The United Telephone Company Limited* v. *Tasker, Sons and Co.* (1889), 59 L.T. 852, where he gave expression to language which followed his prior decision.

We then have the case of *Cave* v. *Crew* (1893), 68 L.T. 254, before Mr. Justice Kekewich, in which he gave a decision on principle identically the same; that such a thing, *i.e.*, setting up a distinct cause of action, is not within the rule 228, permiting alterations, modifications or extensions of a claim without amendment of the writ.

Those are decisions of single judges, which have been followed in England without question, and the law is settled thereby. And we have further a decision of a very distinguished Court, by one of the most eminent judges, a unanimous decision of the Irish Court of Exchequer, presided over by that illustrious jurist, Chief Baron Palles, in 1881, *Moore* v. *Alwill,* 8 L.R. Ir. 245, wherein the late Chief Baron uses language impossible to improve upon, setting out where such a thing as that arose, *i.e.*, that you have changed your cause of action, you must amend your writ; and Baron Dowse points out in his judgment the procedure that ought to be adopted in such case.

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Then we come to the decision of our own Court of Appeal, the Full Court, in which I took part, twenty-eight years ago; I have never heard it questioned since; I have always understood it to be the law; it is entirely in conformity with the decisions —and I might say that in the Irish Court of Exchequer all the decisions up to that time were considered by that Court. This is *Oppenheimer* v. *Sperling* (1903), 10 B.C. 162, wherein we had the benefit of the argument by my learned brother MCPHILLIPS, and his brother Mr. *L. G. McPhillips, K.C.,* and we gave a judgment there which I have never understood to this moment there was any doubt about; and we held there—p. 171—that where it appears if a fresh cause of action had been introduced in the statement of claim that that could not be allowed, because that would be an undue expansion of the writ. I at first had some doubts upon the matter, but upon further argument I was

unable to differ from the majority of the Court. My late brother DRAKE in his judgment was equally clear. And it was held in that particular case that there had been no undue expansion of the writ; but I can see no resemblance between the facts in that case and those in the present one.

Here the first endorsement of the writ is against one of the two defendants alone, Edith O. Cann, and it is substantially, in brief language, for breach of trust because, it says, she has $3,998 belonging to the plaintiff and refuses to pay it over—and therefore it is a breach of trust. The second paragraph in the writ is not against Edith O. Cann but against the other defendant Arthur R. Cann, and it is in essence the same; it says he has received money for her use but paid it over to the other defendant Edith O. Cann. The essence of these is money had and received, followed by a breach of trust. Nothing can be said against those causes of action; they are perfectly proper. But now we come to something new and entirely distinct in the statement of claim. The said claims in the writ were based on rights between parties *inter se,* but here we have a right declared, by the Parliament of Canada, not as between the parties *inter se,* but as a common and ordinary right, and that right is declared by section 236 of the Criminal Code, subsection (3); and it is that the property (in this case money) acquired, roughly speaking, by a lottery, is liable to be forfeited to any person who sues for the same by action commenced in any Court of competent jurisdiction—therefore entirely distinct from the capacity of these parties to sue one another *inter se;* there is the general and entirely distinct cause of action conferred upon any and all persons by the Parliament of Canada—for certain reasons, of course, in the public interest. With all due respect I am unable to see the least connection between that and the usual cause of action. How is it possible to say that a statutory right to sue, conferred upon all persons in the world at large, is something that grows out of a transaction between persons in particular?

MARTIN, J.A.

For these reasons it is clear to me, with all respect, that the appeal should be allowed, and that the statement of claim here is an undue expansion of the writ within the meaning of our rule.

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GALLIHER, J.A.: I am in entire accord with what my brother MARTIN has said. If it can be said that this paragraph in the statement of claim is an expansion of the endorsement on the writ, I would hold that it was an undue expansion. But I do not think that is really the proper term to apply to it. I agree that the cause of action set up in the statement of claim is a separate and distinct cause of action from that in the endorsement on the writ. And I need not add anything further; as I stated in the beginning, I am in entire accord with what my brother MARTIN has said. I would allow the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. I agree to what has fallen from the lips of my learned brother the Chief Justice. I would shortly put my view of the matter. I think the matter perfectly plain upon the point of practice alone; the profession are well aware of the fact that they can issue a writ and put a general endorsement on it, or a special endorsement. Very often they put a special endorsement on because they want to proceed under Order XIV., to judgment. Now counsel is sitting in his chambers, and has this case presented to him, and he has to advise. He looks at the Dominion statute, and he says, "Do you think anyone else has sued for this money? No, I do not think so, I am the first." And he turns to this section 236, subsection (3), of the Criminal Code:

> Every sale, loan, gift . . . by any lottery . . . and all property . . . is liable to be forfeited to any person who sues for the same by action or information in any Court of competent jurisdiction.

His advice to his client would be, "Now you sue, and provided you are the first one to sue, it is your money, money held to your use, and you are entitled to it under the law of the land." What else could he say? What other opinion could he give? This money is forfeited *ipso facto* to the person who first sues; and therefore the person in question must hold that money for the use of that person.

Now let us see what the endorsement is. "The plaintiff claims against the defendant for the sum of $3,998 being money had and received by the said defendant Edith O. Cann to the use of the plaintiff and upon trust for the plaintiff." It may well be called a statutory trust created by statute. I do not think it

would be doing any violence to the statute to say that a statutory trust has been created in favour of the first person who sues. Therefore I see no difficulty there.

And the next claim is, "The plaintiff's claim is against the defendant Arthur R. Cann for $3,998 being moneys of the plaintiff had and received by the said defendant Arthur R. Cann to the use of the plaintiff." Now as I said at the outset, the litigant may elect to make a general endorsement or a special endorsement. When it comes to the question of filing a statement of claim, the claim is often more elaborately stated and particulars are furnished.

I then come to this judgment in *Jacobs* v. *Morris* (1901), 1 Ch. 261 at p. 268. I suppose perhaps there can never be a higher authority on commercial law of England than Lord Mansfield, who was really the founder of the commercial law. In this case, Mr. Justice Farwell, as he then was—afterwards Lord Farwell—at p. 268 says this (when I come to the actual language of Lord Mansfield I will indicate it):

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> That is a well-known form of common law action, and it is explained by Lord Mansfield in *Moses* v. *Macferlan* (1760), 2 Burr. 1005. He points out that one of the distinctions between it and an action for debt is that debt implies contract whereas this does not. Then he proceeds [this is Lord Mansfield speaking]: "This brings the whole to the question saved at *nisi prius, viz.* whether the plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement. One great benefit, which arises to suitors from the nature of this action"—that for money had and received—"is, that the plaintiff needs not state the special circumstances from which he concludes 'that, *ex æquo & bono,* the money received by the defendant, ought to be deemed as belonging to him': he may declare generally 'that the money was received to his use'; and make out his case, at the trial."

Exactly this case. Therefore in my opinion the appeal should be dismissed.

MACDONALD, J.A.: There is no difficulty about the law applicable. The cases referred to by my brother MARTIN shew that a new cause of action may not be set up in the statement of claim not included in the endorsement on the writ. The point, however, is, have we an unwarranted extension of the claim made in the endorsement of the writ in the statement of claim. I do not think so. My brother MCPHILLIPS referred to clause 1 in the endorsement; I rely more particularly upon clause 2, the

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first part of it. It contains a claim for moneys "had and received by the defendant for the use of the plaintiff," omitting immaterial parts. In the paragraph complained of in the statement of claim that demand is in effect repeated. The claim there made, is for the same sum of money again designated as money "had and received by the defendant for the use of the plaintiff." The only addition is a statement that the claim is made because of section 236 (3) of the Code. It is not an undue extension, unwarranted by the rules, to shew in the statement of claim by what authority this money "had and received by the defendant to the use of the plaintiff" is claimed. I do not think it is material that, in the first instance under the Code all persons have the benefit of its provisions, because when "any person sues," as in this case, it is for the use and benefit of the plaintiff alone. Whether I have any sympathy or not with the invocation of this section in the Criminal Code, unless there are special circumstances I feel that I cannot interfere with the order under review.

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

Solicitors for appellants: *Tait & Marchant.*
Solicitors for respondent: *White & Martin.*

MACKEE v. SOLLOWAY, MILLS & CO., LTD.

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MACKEE v. SOLLOWAY, MILLS & CO., LTD.

Practice—Civil action—Stay pending criminal prosecutions—Action against company—Criminal proceedings against individual members—Criminal Code, Secs. 13, 14 and 855.

An application for an order staying proceedings in a civil action against an incorporated company was granted until criminal proceedings against certain members of said company be disposed of.

Held, on appeal, reversing the decision of McDONALD, J. (MACDONALD, J.A. dissenting), that the appeal should be allowed.

Per MACDONALD, C.J.B.C.: That the learned judge below invoked a wrong principle when he decided that whenever there is a criminal case pending involving the same question as a civil case, the civil action should be stayed.

Per MARTIN, J.A.: Whatever the rule may be it has no application to the circumstances of this case, taking into consideration the different way in which the action is brought against an incorporated company, and the persons who are proceeded against criminally are private individuals, even though they are members of that company.

Per McPHILLIPS, J.A.: There was no material before the judge below which justified the making of an order so far-reaching as this one, even if he had jurisdiction to make it.

APPEAL by plaintiff from the order of McDONALD, J. of the 21st of January, 1931, granting a stay of proceedings in the action pending the determination of the criminal prosecutions now pending in the Province of British Columbia against I. W. C. Solloway and Harvey Mills. The action was for the recovery of $44,400, being money and securities paid and delivered to the defendant for the purchase of shares, the plaintiff claiming that the defendant instead of buying or selling the said shares on the plaintiff's behalf, pretended to do so and wrongfully sold its own shares to the plaintiff. At the time criminal proceedings were pending both in British Columbia and in Ontario against I. W. C. Solloway and Harvey Mills, and all books of the defendant company were seized under the Security Frauds Prevention Act, both in British Columbia and Alberta.

Statement

The appeal was argued at Victoria on the 19th of February, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

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G. L. Fraser, for appellant: The learned judge below said the criminal proceedings against a partner must be first disposed of, following *Smith* v. *Selwyn* (1914), 3 K.B. 98 at p. 103. Section 14 of the Criminal Code sweeps away any distinction between a felony and a misdemeanour, so that the above case has no application in Canada: see *MacKenzie* v. *Palmer* (1921), 62 S.C.R. 517 at p. 520. The reason underlying the above is that it is the duty of the plaintiff to prosecute, but there is no such duty here as there is no felony: see *Porter* v. *Solloway, Mills & Co. Ltd.* (1930), 1 W.W.R. 680; *Attorney-General* v. *Kelly* (1916), 10 W.W.R. 131.

Arugment

W. B. Farris, K.C., for respondent: This is entirely a matter of discretion and when exercised by the Court below should not be interfered with. The documents are taken by the Crown and we are deprived of their use until the criminal proceedings are disposed of. As to the action being against the Company see *Moorehouse* v. *Connell* (1920), 17 O.W.N. 351; *Salomon & Co.* v. *Salomon & Co.* (1897), A.C. 22; *Wellock* v. *Constantine* (1863), 2 H. & C. 146; *Carlisle* v. *Orr* (1918), 2 I.R. 442.

Fraser, replied.

MACDONALD, C.J.B.C.: I would allow the appeal. I think where it is a question of the difficulty in producing documents because of the fact that they are under the charge of the Provincial offices, that that is a matter that should have been taken on an application to adjourn the trial, when it would be shewn how long an adjournment was necessary to get production, or inspection.

MACDONALD, C.J.B.C.

But here, there is a stay granted generally of everything. I am not very clear as to the authority of the Court to grant a stay on the particular facts of this case, but assuming that it had authority, I do not think that this is a case for the exercise of that authority. I think that the learned trial judge clearly invoked a wrong principle when he decided, as I think he did decide, that whenever there is a criminal case pending involving the same question as a civil case the civil action should be stayed. I do not think there is any general rule of that kind, and that is what he decided here, since he made the stay until the criminal

cases should be disposed of. On a proper motion he should have postponed the trial to avoid the difficulties.

MARTIN, J.A.: I agree that this appeal should be allowed, without expressing any final opinion on sections 13 and 14 of the Criminal Code, or further considering the *obiter* observations of Mr. Justice Duff, in *MacKenzie* v. *Palmer* (1921), 62 S.C.R. 517 at p. 520, which are considered in a decision of the appellate division of the Supreme Court of Alberta, *Porter* v. *Solloway, Mills & Co. Ltd.* (1930), 1 W.W.R. 680, because I think the question is a difficult one which requires further consideration. But I base my judgment on the ground that whatever the rule may be, it has no application to the circumstances of this case, taking into consideration the different way in which the action is brought against an incorporated company, and the persons who are proceeded against criminally are private individuals, even though they are members of that company. No case has been cited to shew that the rule, whatever it may be, would go that far, and therefore, on the failure, with all respect, to recognize that principle, I think the learned judge's order can not be supported.

MARTIN, J.A.

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

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MCPHILLIPS, J.A.: I would allow the appeal. I do not think, with great respect to the learned judge in the Court below, that there was material before him which would admit of making an order so far-reaching as the one that has been made, even if he had jurisdiction to make it, when it is considered that this is an action brought against a corporation, and other matters are brought in dealing with individuals separate and distinct from the corporation.

MCPHILLIPS, J.A.

The stay of preliminary proceedings is a very extreme step, because of necessary preparations for trial. Mr. *Farris* admits that there might come a time when application could reasonably be made for the postponing of this or that requirement. An omnibus stay is extreme.

It is only necessary to refer to the very celebrated case of *Salomon & Co.* v. *Salomon & Co.* (1897), A.C. 22, where the

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question is gone into as to how far you can connect a company or corporation with individuals. Lord Halsbury, L.C., at p. 31, remarks:

> The act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence.

Now the action here is against a company and he said at p. 32:

> But when one seeks to put as an affirmative proposition what the thing is which the Legislature has prohibited, there is, as it appears to me, an insuperable difficulty in the way of those who seek to insert by construction such a prohibition into the statute.

Although that has no real application here except to shew that it has nothing to do with the individual. Then again at p. 34 he says:

> They have been struck by what they have considered the inexpediency of permitting one man to be in influence and authority the whole company; and, assuming that such a thing could not have been intended by the Legislature, they have sought various grounds upon which they might insert into the Act some prohibition of such a result. Whether such a result be right or wrong, politic or impolitic, I say, with the utmost deference to the learned judges, that we have nothing to do with that question if this company has been duly constituted by law; and, whatever may be the motives of those who constitute it, I must decline to insert into that Act of Parliament limitations which are not to be found there.

MCPHILLIPS, J.A.

One other observation. Lord Herschell said on p. 43 of the same case:

> But when once it is conceded that they were individual members of the company . . . and sufficiently so to bring into existence . . . a validly constituted corporation, I am unable to say how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess.

A very serious matter here to be considered is this, that actions may be taken in the various Provinces of Canada, and judgments obtained and creditors here stayed in their proceedings, and assets of the company levied upon here and creditors here prejudiced. I cannot in the interests of justice persuade myself how this order under appeal should be sustained, and therefore I would allow the appeal, my opinion being that the order staying proceedings should be set aside.

MACDONALD, J.A.

MACDONALD, J.A.: With deference, I am of a contrary opinion.

I understand that the learned judge in the Court below

regarded this as a proper case for a stay on the material before him. He was not confined to the point as to whether, speaking generally, there should be a stay of a civil action while a criminal prosecution is pending. Even on that point the decisions are not uniform.

We have a new element introduced arising out of the enactment of the Security Frauds Prevention Act, *viz.*, that under it, books, records and documents belonging to the defendant were removed from its custody, thus preventing it from having that free and uninterrupted access to them to enable it to properly defend this civil action. The records I understand are in different parts of the country, but whether they are or not, a mere permission to inspect is quite different from custody and control by the defendant.

Under the Laws Declaratory Act, R.S.B.C. 1924, Cap. 135, subsection (5) of section 2, a judge may grant a stay of proceedings in all cases where he thinks fit to do so, and where he deems it necessary "for the purposes of justice." This is a general power not limited to any special cases.

In my view it is clear that he did not make an *ultra vires* order; he was within his rights in directing a stay, and whether or not had I been sitting below I would have done so, is not the point.

He has exercised his discretion on sufficient material, and upon reasonable grounds, and I cannot say that he was clearly wrong in doing so, or that we should interfere.

Appeal allowed, Macdonald, J.A. dissenting.

Solicitors for appellant: *Fraser & Murphy.*
Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

MORRISON, C.J.S.C.

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OVERN v. STRAND

OVERN v. STRAND *ET AL.*

Damages—Supreme Court action—Tried by consent before County judge—Validity of judgment—Award—Execution—Levy and sale—Liability of sheriff and purchaser—Barrister and solicitor—Authority to act—Proceedings void.

The plaintiff and one Weisner traded with the trappers and natives in the Ingenicka district north of Prince George, Weisner having a store at Whitewater. Weisner had borrowed money from time to time from the defendant Strand, and in the Spring of 1928 owed him $2,286. Weisner, then being in poor health, sold his store and outfit to Mrs. Overn, who then went out to Prince George with Weisner. On the way out they met a bailiff who served Weisner with a writ issued by Strand for the moneys Weisner owed him. On arrival at Prince George the defendant *J. O. Wilson* drew up a bill of sale from Weisner to Mrs. Overn for Weisner's property and outfit at Whitewater. Mrs. Overn then went to Edmonton, where she purchased a stock of goods which she brought to Prince George, and adding to her outfit there she then proceeded back to Whitewater, taking Weisner back with her as a river pilot. In the meantime Strand obtained judgment against Weisner. On the way in Mrs. Overn and Weisner were overtaken by a process server, who served them with a writ in an action by Strand to set aside the bill of sale from Weisner to Mrs. Overn as fraudulent and void. On arrival at Whitewater Weisner immediately returned to Prince George and instructed *Wilson & Wilson* to enter an appearance and defend the action, both for himself and Mrs. Overn. As no Supreme Court judge was available the solicitors agreed that the action be tried by ROBERTSON, Co. J., who gave judgment for the plaintiff. Writs of *fi. fa.* were issued in both actions for $2,705, judgment debt and costs in the first action on the goods of Weisner, and for $497, debt and costs in the second action. The sheriff's officer appeared at Whitewater, executed the writs and sold the entire stock of goods and merchandise at Mrs. Overn's post, including the buildings, to the Hudson's Bay Company, which had a post near there. Mrs. Overn alleged that being in Whitewater she was unaware of what had happened until the sheriff's officer appeared and that she had not given any instructions to *Wilson & Wilson*. She then went outside and instructed Messrs. *Cowan & Cowan* in Vancouver to appeal from the decision of ROBERTSON, Co. J. The appeal was dismissed on the ground that the proceedings before ROBERTSON, Co. J. merely amounted to an arbitration, and there was no appeal. The plaintiff then brought this action for damages for wrongful seizure and conversion of her goods and chattels at Whitewater, and for damages against *Wilson & Wilson* for wrongfully and without authority purporting to act for her in the former action. At the close of the plaintiff's case the defendants' motion to have the case

withdrawn from the jury was reserved, and after the defence was put in the jury returned a verdict for the plaintiff, assessing damages at $11,000. On the motion to dismiss:—

Held, that the plaintiff had made out a *prima facie* case against all the defendants. The jury found that Messrs. *Wilson & Wilson* proceeded without instructions from the plaintiff, who was unaware of the case coming on in her absence. The action was tried by ROBERTSON, Co. J. without her consent, and he therefore had no jurisdiction. The verdict justifies the Court in holding that the process was void *ab initio*. It follows that the Hudson's Bay Company in purchasing the goods identified themselves with the sheriff when he made an illegal disposition of the stock based on a process which was void, and Strand is liable for commencing and standing behind the proceedings. The application was therefore refused.

Reversed on appeal: see *ante*, p. 47; restored by Supreme Court of Canada: see (1931), S.C.R. 720.

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ACTION for damages for wrongful and illegal seizure and conversion by the defendants of the plaintiff's goods and chattels at a trading post at Whitewater, B.C., in September and October, 1928, and against the defendants *Wilson & Wilson* for damages for wrongfully and without lawful authority purporting to act for the plaintiff in an action brought by John Strand against herself and J. H. Weisner. The facts are sufficiently set out in the head-note and reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver, on the 29th of September, 1929.

Statement

J. A. MacInnes, and *Arnold*, for plaintiff.

Hossie, for defendant Hudson's Bay Company.

Locke, for defendant Strand.

Pattullo, K.C., and *A. N. Robertson*, for defendants *Wilson & Wilson*.

E. A. Lucas, for defendant Peters.

9th December, 1929.

MORRISON, C.J.S.C.: The plaintiff, a native of the Colony of Newfoundland, has been for over 20 years a resident of British Columbia and had been engaged in trading in the northern parts of the Province since 1925 principally in and around Deserters Canyon which lies north of Prince George. In 1926-1927 she moved to that part of that district known as Ingenicka carrying on her trading with trappers and Indians. During the

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time material to the issues in this case she had more or less to do with two other traders and trappers, John H. Weisner and Charles Overn by name. Overn she married in due course; he was a trapper. Weisner's headquarters were at Whitewater. The defendant Strand also traded there and used to make advances in money to Weisner. The outcome of their business relations led to Strand subsequently issuing a writ against Weisner claiming the sum of $2,286, the amount settled between them in the spring of 1928 as owing to Strand. It is alleged that Weisner being in poor health determined to settle up his affairs and thereupon sold out to the plaintiff (who by that time had become Mrs. Overn) his possessions consisting of his trading post at Whitewater and his freighting outfit, the plaintiff's intention being to continue the post on her own account. The plaintiff, Weisner and her husband Overn then proceeded to come out to Prince George and on their way were met by a bailiff or process server who served Weisner with the writ in the suit of *Strand* v. *Weisner* issued out of the Supreme Court registry at Prince George at the instance of Strand claiming the $2,286. Upon arriving at Prince George, the plaintiff was taken to the office of the defendant *Wilson & Wilson* by Weisner who introduced Mrs. Overn to *Wilson,* Jr. who drew up a bill of sale of her purchase from Weisner. This was on the 22nd of May, 1928. Weisner then instructed *Wilson* to enter an appearance for him which was done and to defend in the suit of *Strand* v. *Weisner* the writ in which had been served upon him *en route.* The plaintiff after securing the bill of sale proceeded to Edmonton and bought a stock of goods. These were sent to her to Prince George where she supplemented her stock. She then left Prince George on the 11th of June for her post at Whitewater, taking Weisner along as her river pilot and freighting superintendent. On the 20th of June, after their departure, Strand, who was in Prince George, obtained judgment on his claim of $2,286. When they had penetrated as far as Deserters Canyon on the Finlay River about 100 miles from Whitewater another process server overtaking them served them both with a writ issued on the 22nd of June from the Prince George registry, Strand being again the plainiff, Weisner and Mrs. Overn being defendants, praying for a declaration that the bill of sale in

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question was fraudulent and void and that the stock-in-trade then in the plaintiff's possession was liable to seizure on the judgment obtained on June 20th to satisfy Weisner's creditors. Weisner wrote his solicitors the defendants *Wilson & Wilson* to defend the action and also asked Mrs. Overn to write them. That she did on the 29th of June saying:

> Mr. Weisner has instructed me to write you, I am not taking this case up with any lawyer in Prince George. . . .

On July 26th *Wilson & Wilson* wrote to Weisner:

> We have your letter also Mrs. Overn's letter and from what she says we take it that she does not wish us to defend this action on her behalf. . . .

The party arrived at Whitewater about the end of July. Weisner shortly afterwards returned to Prince George and called upon *Wilson & Wilson* relative to the suit of *Strand* v. *Weisner and Overn* leaving Mrs. Overn at Whitewater. In Prince George at the same time was Charles Overn, the plaintiff's husband, who had been taken there under arrest charged with illegal trapping. Weisner instructed *Wilson & Wilson* to put in an appearance and to take all necessary steps to defend on behalf of Mrs. Overn as well as on behalf of Weisner. This *Wilson & Wilson* did. There being no Supreme Court judge available, *Wilson & Wilson* purporting to act as solicitors for both defendants, agreed in writing with Strand's solicitor to have the action tried before His Honour Judge ROBERTSON, judge of the County Court at Prince George. A trial was accordingly so held on August 22nd and judgment given Strand in terms of the writ. Mrs. Overn alleged that she was quite unaware of what had happened, she being at the time at her Whitewater post. On September 15th writs of *fi. fa.* were issued in the first action of *Strand* v. *Weisner,* directing the defendant, Sheriff Peters to levy for $2,705.63 judgment, debt, costs and poundage on the goods of Weisner and also to levy $497.25 for debt, costs, and poundage in the second action of *Strand* v. *Weisner and Overn.* Of all this Mrs. Overn testified she was unaware until the sheriff's officer appeared at Whitewater and executed these writs. The jury accepted this testimony. On October 3rd he sold the entire stock of goods and merchandise at Mrs. Overn's post, together with the buildings in which they were stored, to the defendant, the Hudson's Bay Company which had a post

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nearby. Mrs. Overn protested but in vain. She then in due course, the winter approaching and her stock gone, came out and proceeded to Vancouver and instructed her solicitors, Messrs. *Cowan & Cowan*, to enter an appeal. This was done but upon the appeal coming on counsel on behalf of Strand took the objection that inasmuch as the proceedings before His Honour Judge ROBERTSON amounted to an arbitration no appeal would lie. To this objection the Court of Appeal gave effect. From the meagre report of what took place before that learned tribunal it would appear that the merits were neither referred to nor dealt with. The plaintiff then issued the writ in the present suit and it is submitted on behalf of the defendants that the above incident constitutes a species of estoppel and that by the course of conduct of the plaintiff she ratified what was done and of which she now complains. The trial came on before me with a jury on the 24th of September, 1929. Weisner was not called as a witness. At the close of the plaintiff's case counsel for all of the defendants moved to have the case withdrawn from the jury. I reserved leave by consent of counsel. The defence was then fully gone into. The jury returned a verdict for the plaintiff assessing the damages at $11,000.

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Argument on the motion to dismiss now coming on I find that the plaintiff had made out a *prima facie* case against all the defendants. The application therefore is refused. Mr. *MacInnes* for the plaintiff bases his case substantially upon the point that the proceedings herein are void from the beginning. That being so, the numerous cases cited by the defendants and relied upon by them are not apposite as in each of them the proceedings were held to have been irregular and not void. The distinction is fundamental. The earliest case which I find bearing on the distinction drawn between a process which is void and that which is merely erroneous or irregular is *Parsons* v. *Lloyd* (1772), 2 W.Bl. 845; 3 Wils. 341 decided in the reign of Geo. III. The next case is *Jeanes* v. *Wilkins* (1749), 1 Ves. Sen. 195 where the Lord Chancellor says:

> To avoid the sale and title of the defendant it must be proved, that the *fi. fa.* was void, and conveyed no authority to the sheriff; for it might be irregular, and yet if sufficient to indemnify the sheriff, so that he might justify in an action of trespass, he might convey a good title, notwithstanding the writ might be afterward set aside.

In *Regina* v. *Monkman* (1892), 8 Man. L.R. 509 at p. 511, Taylor, C.J. in the course of his judgment where the *fi. fa.* was on somewhat the same ground as here said:

> The answer to the question reserved by the learned judge must, it seems to me, depend upon whether the writs are in consequence of the error, void or not. In my opinion they are not void, but at most only irregular.

From which I am led to conclude that had the writs been void, the application would have been granted.

There are also American cases cited in 35 Cyc. at pp. 1627, 1671, 1722, 1743 and 1744 which throw some light on the point.

The jury found that the defendants *Wilson & Wilson* proceeded without instructions from the plaintiff who was unaware of the case coming on in her absence. The matter came before His Honour Judge ROBERTSON without her consent first being obtained. Without the consent of both parties to the suit the learned judge had no jurisdiction whatever. The old maxim *audi alteram partem* seems to have been overlooked at the hearing. If I am right in holding as I do that the verdict of the jury justifies me in saying that the process is void *ab initio* then it follows that the defendant the Hudson's Bay Company in purchasing the goods identified themselves with the sheriff when he made an unauthorized illegal disposition of the plaintiff's stock-in-trade based upon a process which was void. The defendant Strand is liable as he it was who commenced and stood behind the proceedings. The perturbing aspect of the case, as urged by counsel for the purchaser at the sheriff's sale, is the risk which such purchaser takes. If I am right as to a purchaser's liability it is for the Legislature to amend the apposite legislation so as to protect both the buyer and the sheriff. Upon these grounds briefly set out I shall let the verdict stand. There will be judgment accordingly in the terms of clauses (a) and (c) of the statement of claim.

Judgment

Judgment for plaintiff.

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IN RE CAMPBELL RIVER MILLS LTD.

DINNING v. INGHAM

IN RE CAMPBELL RIVER MILLS LIMITED. DINNING v. INGHAM.

Bankruptcy—Company—Moneys received on fire-insurance policies—Claim under assignment of insurance moneys—Trustee for bondholders—Assessment of Workmen's Compensation Board—R.S.C. 1927, Cap. 11, Sec. 121; R.S.B.C. 1924, Cap. 278, Sec. 46.

The property of the Campbell River Mills Limited was destroyed by fire on July 23rd, 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 July 30th, 1930, one Ingham advanced $15,000 to the company, taking as security therefor an assignment of the first $15,000 which should become payable to the company on the insurance policies. On an issue to ascertain the priorities of the various claimants, including the claim for assessments of the Workmen's Compensation Board and that of the plaintiff as trustee for the holders of the bonds of said company, it was held that Ingham's claim was first, then the Workmen's Compensation Board for the amount of its claim, and the plaintiff the remainder of the fund. On appeal by the plaintiff as to the priority given the Workmen's Compensation Board:—

Held, reversing the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that the plaintiff as holder of a debenture mortgage on the property of the bankrupt which became a specific charge upon the property when the bankruptcy order was made took priority over the assessment for fees due to the Workmen's Compensation Board.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 2nd of April, 1931 (reported, 43 B.C. 477), in an issue brought by the trustee for the debenture holders of the Campbell River Mills Limited with the various claimants of the 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 properties were destroyed by fire in July, 1930, and on the 27th of August following the company became bankrupt. Prior to the fire one Ingham had sold timber to the company from time to time, in which he still retained an interest. Shortly after the fire Ingham advanced $15,000 to the company, and by agreement with the company took as security therefor an assignment of the first $15,000 that was payable to the company on the fire-

Statement

insurance policies. The assignment was not registered under the Assignment of Book Accounts Act. It was held that registration of the assignment was not necessary, and Ingham was entitled to priority in respect of $15,000. The claim of the Workmen's Compensation Board was next in priority and the plaintiff was entitled to the remainder of the fund.

The appeal was argued at Victoria on the 15th of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Alfred Bull, for appellant: The Compensation Board has a claim of $11,974. We say there was error in the interpretation of section 46 of the Workmen's Compensation Act: see *Denn* v. *Diamond* (1825), 4 B. & C. 243 at p. 245; *Workmen's Compensation Board* v. *Edgar* (1924), 2 W.W.R. 566 at p. 572. Section 46 of said Act does not create a charge. Statutory charges upon a subject's property must be created in express terms: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 493; *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842 at p. 856. This money is the proceeds of a contract of indemnity and assuming a lien is given by section 46, this fund is not a class of property over which a lien is given. As the Bankruptcy Act has dealt with the rights of the Workmen's Compensation Board this would exclude the Provincial legislation on the same subject: see *Workmen's Compensation Board* v. *Edgar* (1924), 2 W.W.R. 566 at p. 575; *In re Inverness Railway* (1924), 5 C.B.R. 58; *In re West & Co.* (1921), 2 C.B.R. 3 at p. 5; *Hoffar Ltd.* v. *Canadian Credit Men's Trust Association* (1929), 40 B.C. 454. This case is decided by the *Hoffar* case. See also *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1894), A.C. 189 at p. 200; *Tennant* v. *Union Bank of Canada, ib.* 31; *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Company* (1909), A.C. 194 at p. 198. The Bankruptcy Act only refers to unsecured creditors: see *In re Canadian Logging Co.* (1927), 1 W.W.R. 406.

Argument

Hossie, for respondent: The assessments for the Workmen's Compensation Board are in fact Crown debts: see *In re Sid B. Smith Lumber Co. Ltd.* (1917), 25 B.C. 126; *Rosebery Sur-*

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prise Mining Co. v. *Workmen's Compensation Board* (1920), 28 B.C. 284; *In re Inverness Railway* (1924), 5 C.B.R. 58; *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184. He must come within the Bankruptcy Act, as the $15,000 he claims is in the hands of the trustees. He says we have no lien but we come in equally well under section 125 of the Bankruptcy Act: see *Workmen's Compensation Board* v. *Edgar* (1924), 2 W.W.R. 566 at p. 575; *The Queen* v. *Bank of Nova Scotia* (1885), 11 S.C.R. 1 at p. 10; *Re Cardston U.F.A. Co-op. Ass'n Ltd., Ex parte The King* (1925), 4 D.L.R. 897 at p. 900.

Argument

Bull, in reply: He cannot take from us the fruits of our security. His only hope is section 46 of the Act. As to the effect of liquidation on a floating charge see *Governments Stock and Other Securities Investment Company* v. *Manila Railway Co.* (1897), A.C. 81 at p. 86; *Illingworth* v. *Houldsworth* (1904), A.C. 355 at p. 358; *Evans* v. *Rival Granite Quarries, Limited* (1910), 2 K.B. 979 at pp. 990 and 993. The strict rule of construction of the statute must be applied. The case comes down to section 46 of the Act. Has he a lien that displaces my claim?

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.: We quashed the wage-earners' appeal at the hearing on the ground that they had no *status*.

The only other question in the appeal is that raised by the appellant Dinning and involves the right of the Workmen's Compensation Board to priority of distribution by the trustee in bankruptcy as set forth in section 121 of the Bankruptcy Act, Cap. 11, R.S.C. 1927, which reads as follows:

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> In the distribution of the property of the bankrupt or authorized assignor, there shall be paid, in the following order of priority:—
>
> (The 1st and 2nd subsections may be ignored.)
>
> Thirdly, all wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three months before the date of the receiving order or assignment and all indebtedness of the bankrupt or authorized assignor under any Workmen's Compensation Act.
>
> (The 4th subsection is also inapplicable.)

The appellant Dinning was the holder of a debenture blanket mortgage on the property of the bankrupt which crystallized when the bankruptcy order was made and thereupon became a specific charge upon the property. The bankrupt owed the respondent for an assessment for fees due to the Workmen's Compensation Board and the appellant claims priority for the mortgage in the distribution of assets by the trustee in bankruptcy.

I will assume in the absence of evidence that the appellant valued his security and claimed only for the balance; that he had not surrendered it for the general benefit of the creditors else he would not be here. The trustee therefore took the bankrupt estate subject to appellant's specific charge upon it. Bankruptcy Act, Sec. 6. He took only the equity of redemption. The charge of the mortgage was appellant's and was not money or property which the general creditors had any interest in.

Section 121 of the Bankruptcy Act is set out above. Section 125 of said Act was also relied upon by the respondent. That section means that nothing in the said sections shall interfere with the collection of certain Crown debts levied or imposed upon the debtor or his property under any law of the Dominion or of the Province, nor prejudice any lien or charge upon the same. It confers no rights except the right to be left alone. Priorities are one thing, liens and charges are another. There might be questions of priority between mortgagees and chargees or lienholders imposed by agreement or by law upon the debtor's property, but I do not think that the rights of general creditors could come in conflict with these. The Bankruptcy Act does not make a debt to the respondent Board a lien or charge on the debtor's property. If it did then doubtless there might be a question of priority to be decided as between appellant and respondent. The proceeds of the appellant's security is, I think, to be paid to the appellant and forms no part in the property to be distributed amongst the unsecured creditors unless it can be said that the indebtedness of the bankrupt to the Workmen's Compensation Board is by the words of sections 121 and 125 a charge on the debtor's property or on the property in the hands of the trustee. No question of priority arises here. The submission of respondent is and must be that the proceeds

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of the sale of appellant's security are just as much the property of the unsecured creditors as is that of the equity of redemption. This would mean that Parliament has taken away from a mortgagee the special estate which he enjoyed before the bankruptcy and gave it to the unsecured creditors. I think there is nothing in the Act which would justify that conclusion and that the Board is in the like position here to a wage-earner who had failed to secure a lien on the debtor's property.

I, therefore, think that the appeal of the appellant Dinning should be allowed.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal, in my opinion, should fail. The judgment of the learned trial judge, in a very complete manner, sets forth the legal situation with regard to the claim of the Workmen's Compensation Board, and it was held that it had priority. The combined effect of the material statute law bearing upon the question is plainly evident when the two sections in the respective Acts are read, and I here set them forth. Firstly, we have section 46 of the Workmen's Compensation Act, Cap. 278, R.S.B.C. 1924:

> 46. Notwithstanding anything contained in any other Act, the amount due to the Board by an employer upon any assessment made under this Act, or in respect of any amount which the employer is required to pay to the Board under any of its provisions, or upon any judgment therefor, shall have priority over all liens, charges, or mortgages of every person, whenever created or to be created, with respect to the property, real, personal, or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workmen by their employer.

Secondly, we have section 125 of the Bankruptcy Act, Cap. 11, R.S.C. 1927:

> Nothing in the four last preceding sections shall interfere with the collection of any taxes, rates, or assessments payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

What is to be dealt with here in arriving at a decision as to priority or not of the claim of the Workmen's Compensation

Board is whether there was a valid assessment under the Workmen's Compensation Act. That would seem to be undoubted and is nowhere challenged. Then we have the assessment which is within the purview of section 46 of the Workmen's Compensation Act, and that assessment "shall have priority over all liens, charges, or mortgages." The appellant is at best in the position of a mortgagee before the bankruptcy—the holder of a floating charge only. The respondent has a claim authorized and supported by statute law, *i.e.,* a statutory lien, the highest form of specialty security and the statute law says in terms,—

> any assessment made under this Act, or in respect of any amount which the employer is required to pay to the Board under any of its provisions or upon any judgment therefor, shall have priority over all liens, charges or mortgages:

Section 46, Cap. 278, R.S.B.C. 1924. Now the Legislature of the Province of British Columbia has exclusive authority to legislate in respect to many matters, as it is well known, and section 92 of the British North America Act, *inter alia,* covers "(13) Property and civil rights in the Province." What have we here? A claim as to priority in respect of certain charges against a certain fund and we have the statutory declaration that "any assessment [under the Workmen's Compensation Act] . . . shall have priority over all . . . mortgages" and the claim of the appellant is that notwithstanding this statute law he has priority of right. It is nothing more than idle contention in my opinion. If there could have been a constitutional question at all as to priorities that is set at rest by the terms of the Dominion legislation, section 125, and that legislation is mandatory in its terms and gives priority to the respondent as against any claims of the appellant in respect of the debenture trust deed under which the appellant is trustee. The learned counsel for the appellant, Mr. *Bull,* dealt in an elaborate way with the niceties arising in respect of priorities as instanced in many decided cases and very persuasively dealt with them with the submission that the respondent was not entitled to contend that the assessment was in its nature a statutory lien. The learned counsel for the respondent, Mr. *Hossie,* very ably met the contention of his learned opponent by relying as he did upon the statute law which I have here set forth and in a most concise argument submitted that that was the whole question. After the most careful

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consideration I cannot come to other than the conclusion which I think I have already well indicated and, in my opinion, the judgment of the learned trial judge should be affirmed and the appeal dismissed.

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MACDONALD, J.A.: Appellant Dinning is a trustee for debenture holders under a trust deed executed on the 24th of April, 1928, by the Campbell River Mills Limited (now in bankruptcy) whereby by way of a specific charge, it granted, mortgaged and assigned to appellant (to secure payment of principal moneys and interest on bonds issued) a certain timber lease, machinery, logging equipment, etc., therein set out. The company also by this instrument mortgaged and charged "as and by way of a floating charge" in favour of appellant

its undertaking and other property and assets present and future not hereinbefore assured, together with all its present and future tolls, back debts, incomes and sources of money rights, powers, privileges and franchises.

In August, 1930, a quantity of logs belonging to the bankrupt company were destroyed by fire and the proceeds of insurance ($29,404.24) was paid to the Canadian Credit Men's Trust Association Limited, trustee in bankruptcy of the property of the company. Appellant as trustee for the bondholders claims payment of this sum (less $15,000 admittedly due to one Ingham) under its debenture mortgage.

MACDONALD, J.A.

The respondent Workmen's Compensation Board contests appellant's claim to the extent of $11,974.17, the amount due it by the company for unpaid assessments and medical aid dues imposed under the provisions of the Workmen's Compensation Act (R.S.B.C. 1924, Cap. 278). The learned trial judge who tried an issue directed held that by reason of section 46 of the Workmen's Compensation Act and section 125 of the Bankruptcy Act (R.S.C. 1927, Cap. 11) respondent was entitled to priority over appellant's charges.

It is provided by section 46 referred to that the amount due respondent for assessments

shall have priority over all liens, charges, or mortgages of every person, whenever created or to be created, with respect to the property, real, personal, or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workmen by their employer.

The outcome turns solely on the interpretation of this section. It does not provide that the amount due for assessments shall be a first charge or lien on the property, as *e.g.,* in the Nova Scotia Act (R.S.N.S. 1923, Cap. 129, Sec. 9, Subsec. 2). A statutory charge against property must be created in precise terms. It gives merely a right of priority (it is not a secured creditor) over liens, charges or mortgages, etc., held by others. As to the nature of the charge created by the debenture mortgage the view of the learned trial judge that

> 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

was not, I think, questioned. When that event occurred the equitable charge created by a floating security became a fixed charge. As of that date therefore we have a contest between the holders of a registered charge or mortgage and a creditor. The amount due respondent for assessments is treated as a debt under other sections of the Act and summary proceedings may be taken to enforce it (sections 37-40), not for the realization of a charge or for an order for the sale of the property but for the collection of a debt. It is "an amount due the Board" or an "amount which the employer is required to pay to the Board" (section 46).

Sections 121 and 125 of the Bankruptcy Act (R.S.C. 1927) do not assist respondent. These sections do not deal with priorities where registered charges are encountered. Section 121 deals with order of payment in respect to four classes of claims. Mortgage securities are not referred to, but it does not follow that such charges are postponed in the distribution of the estate. It deals with the distribution of the property of the bankrupt but where a charge exists the bankrupt's property liable to distribution is diminished to the extent of the encumbrance. It can only be affected by express statutory enactment. Section 125 provides that:

> Nothing in the four last preceding sections shall interfere with the collection of any taxes, rates, or assessments payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion, or of the Province wherein such property is situate, or in which the debtor resides, nor prejudice or affect any lien or charge in respect of such property created by any such laws.

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Taxes, rates and assessments payable by the debtor under Provincial Acts are not interfered with by reason of the provisions in section 121 relating to four subjects or by the matters mentioned in sections 122, 123, and 124. But no reference is made therein to mortgage securities. It is not dealing with priorities among secured creditors. As to the last part of section 125

> nor prejudice or affect any lien or charge in respect of such property created by any such laws

it need only be stated that no lien or charge is created by section 46 of the Workmen's Compensation Act in respect to assessments. A right of priority is distinct from the creation of a lien. Appellant in realizing under the mortgage is not interfering with the collection of assessments, but in pursuing remedies a registered charge cannot be ignored.

Respondent therefore must succeed, if at all, under section 46 of the Provincial Act. No doubt if the Legislature so enacted in clear language it might provide for priority of debts over registered charges and encumbrances of any and every kind. Whether or not this section does so or relates only to priority between debts, I do not find it necessary to decide. Assuming priority over the charge in question and even assuming a lien priority by section 46 is only given over all charges or mortgages created

MACDONALD, J.A.

> with respect to the property, real, personal, or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable.

The fund in question is an indemnity paid by an insurance company in respect to a fire loss. Is this fund "the property real, personal or mixed" of the bankrupt company "used in, or in connection with or produced by the industry"? I think not: it arose from another source. It was moneys received in what might be called a wagering contract. In *B.C. Fir & Cedar Lumber Co.* v. *The King* (1931), S.C.R. 435, where it was sought to tax as income moneys received in lieu of profits under a policy providing for indemnity for loss of earnings through fire, the Supreme Court of Canada held that the proceeds of the insurance policy could not be regarded as profits earned by the business for the purposes of taxation. Leave to appeal has I think been granted by the Judicial Committee, but whatever the

final decision may be it will, I think, turn on the construction of a section of the Act, without disturbing the view that moneys paid by way of indemnity for loss of earnings is not profits of the business. That hardly requires to be stated. This insurance fund did not arise from nor is it incidental to the operation of the business. The bankrupt's property or the industry carried on did not produce it. It was produced by a contract providing that if a certain contingency arose a sum of money would be paid. A lien or charge is created with respect to the property to which it attaches and extends no further unless moneys received from a defined source is mentioned. Priority under section 46 is only given in respect to charges on the property or industry, not on other sources of income, *e.g.*, an insurance contract. It is property "used in" or "produced by" the industry (*e.g.*, manufactured products). It would be possible to enlarge the section to include such a fund but even a liberal construction of the words used would not permit such an extension. It should not be so construed as to defeat a registered charge conveying an estate to another unless clear words were employed indicating such an intention. On the other hand, while respondent is not given any priority in respect to payments from the fund in question the appellant's charge to secure debenture holders does embrace it. A floating charge in favour of the trustee was created by the instrument in respect not only to the "undertaking"; it extends to assets "present and future" together with all the company's "incomes and sources of money." This fund therefore is impressed with a charge and respondent is not by statute or otherwise given priority in respect thereto.

MACDONALD, J.A.

I would allow the appeal.

Appeal allowed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitors for respondent: *E. P. Davis & Co.*

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REX v. SMITH.

Criminal law—Disposing of trading stamps—Given to purchaser of goods—Holder of 50 entitled to prize—"Premium"—Criminal Code, Secs. 335 (x), 505.

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The giving of a trading stamp by a merchant to a purchaser of goods in his store, the trading stamp having a printed memorandum on its back that upon presentation of 50 of the stamps at the Coast Advertising Agency a camera would be delivered to the bearer on certain conditions being complied with, is the giving of a "premium" within the meaning of section (*x*) of the Criminal Code, defining "trading stamps" and it was held that the accused was properly convicted under section 505 for giving or disposing of tickets of the kind described to a merchant or dealer in goods for use in his business.

The conviction recited that the appellant "did unlawfully issue trading-stamps to one Hart and others, being merchants, for use in their business," etc. On objection that this is a conviction for a dual offence and therefore void for uncertainty:—

Held, that the evidence adduced at the trial was restricted to the sale to Hart alone, and no uncertainty arose in the Court below or on appeal as to the offence he was tried for and convicted. It is impossible to say that "any substantial wrong or miscarriage of justice had occurred," and the case falls within the scope of section 1014 (2) of the Criminal Code.

APPEAL by accused from his conviction by J. A. Findlay, Esquire, deputy police magistrate for the City of Vancouver, on a charge of unlawfully issuing trading stamps to one Hart and others, being merchants, for use in their business, contrary to section 505 of the Criminal Code. One Bert Hart, who owns a grocery and confectionery store, purchased from the Coast Advertising Agency, W. A. Smith being the manager of the Agency, 5,000 advertising cards for $20. The card advertised Hart's store on the front, and on the back was a printed memorandum stating that upon presentation of 50 of the cards at the Coast Advertising Agency a camera would be delivered to the bearer, conditioned upon the simultaneous purchase by the person presenting the tickets of six rolls of Kodak films at the regular price of 25 cents per roll, together with a payment of 35 cents as packing and handling charges for the camera.

Statement

Hart gave one of the cards to customers for each 25 cents purchase of goods, and the purchasers, upon accumulating 50 of the cards could obtain a camera upon complying with the conditions set out on the back of the card as aforesaid.

The appeal was argued at Victoria on the 15th of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Nicholson, for appellant: The conviction is void for uncertainty. There is more than one offence dealt with in the information, and an information on a summary trial is the same as a count: see *Rex* v. *Mah Sam* (1910), 19 Can. C.C. 1. There is a multiplicity of charges dealt with and it should be quashed: see Archibald's Criminal Pleading, 28th Ed., 50; *Rex* v. *Molloy* (1921), 2 K.B. 364; *Rex* v. *Quinn* (1918), 43 O.L.R. 385; *The Queen* v. *Blackie* (1868), 7 N.S.R. 383; *Rex* v. *Roach* (1914), 23 Can. C.C. 28 at p. 31. A fine of $500 is far too severe.

Argument

W. M. McKay, for the Crown: This case is substantially the same as *Rex* v. *Pollock* (1916), 36 O.L.R. 7. We confined our evidence to the Hart case and no substantial miscarriage or wrong has occurred.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.: I would dismiss the appeal from conviction but I would reduce the fine to $250.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This is an appeal from a conviction by the deputy police magistrate of Vancouver for that the appellant at the City of Vancouver between January 1st and the 4th day of March, A.D. 1931, did unlawfully issue trading stamps to one Hart and others, being merchants, for use in their business, contrary to section 505 of the Criminal Code of Canada.

It is submitted that this is a conviction for a dual offence and therefore void for uncertainty, but whatever might be advanced in support of that submission the case is clearly one within the scope of subsection (2) of section 1014 of the Criminal Code, because the only evidence that was adduced at the trial was restricted to the sale to Hart alone and therefore no uncertainty whatever arose below or arises here as to the particular offence

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he was tried for and convicted, and so it is impossible to say that "any substantial wrong or miscarriage of justice has actually occurred" herein and therefore the appeal should be dismissed.

There remains the appeal against the sentence, and having regard to all the circumstances of the case justice would be met, in my opinion, by reducing the fine to $250.

GALLIHER, J.A.: Counsel for the appellant (Mr. *Nicholson*) really argued only one point, that the words "and others" following the word "Hart" in the information and indictment is dealing with more than one offence, and is bad for duplicity.

This was a summary trial by consent before J. A. Findlay, Esquire, deputy police magistrate at Vancouver, for unlawfully issuing trading stamps contrary to section 505 of the Criminal Code. No objection was taken at the trial to the form of the information and if the appellants had deemed themselves prejudiced thereby they could have applied for particulars, which they did not do.

In cases of conspiracy an accused may be charged with conspiring with a person or persons unknown—see remarks of Hare, J., in *Rex* v. *Johnston* (1902), 6 Can. C.C. 232 at p. 236. The point taken here was not taken in the case of *Rex* v. *Pollock* (1916), 26 Can. C.C. 24; nor was it passed upon by the Court although the words complained of here were in the charge laid. This case was relied on by Crown counsel (Mr. *McKay*) but as I say does not decide the point before us although it does decide that the transaction here was within the statute.

GALLIHER, J.A.

Mr. *Nicholson* relies upon section 853 (3) which is to be found under the heading of General Provisions as to Courts in Part XIX. of the Code.

> Every count shall in general apply only to a single transaction.

Then follows section 854:

> A count shall not be deemed objectionable . . . on the ground that it is double or multifarious.

It was held in the Supreme Court of Saskatchewan in the case of *Rex* v. *Mah Sam* (1910), 19 Can. C.C. 1, Lamont, J. dissenting, that section 854 was applicable to proceedings under Part XVI. of the Code. But apart altogether from that case

(which I do not question) the charge here was for a certain stated offence between certain specified dates concerning one Hart and others. There was no dispute as to the transaction with Hart and the contract is an exhibit in the appeal book. They did not avail themselves of their right to ask for particulars and, in my view, were in no way prejudiced in their trial.

The sentence also was appealed against. The penalty under the Code is a maximum of one year's imprisonment and a $500 fine. The imprisonment awarded was negligible being during the period of detention, but the fine was the maximum. The offence may not seem grave, still Parliament has legislated against it, doubtless for good reasons and it might become widespread in its ramifications, but considering it is a first offence I agree to a reduction of the fine to $250.

GALLIHER, J.A.

The appeal should be dismissed.

McPHILLIPS, J.A. agreed in dismissing the appeal and reducing the fine.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Appeal from a conviction for unlawfully issuing trading stamps "to one Hart and others being merchants for use in their business contrary to section 505 of the Criminal Code of Canada." The conviction was properly made—that I think was conceded—but it was urged that it was void, for uncertainty and duplicity inasmuch as more than one offence was charged in the information. It was an offence to issue trading stamps to Hart and an offence to issue them to "others." The accused was convicted of issuing stamps to Hart and others (formal conviction) although the conclusive evidence was directed to dealings with Hart alone. Only casual references were made to dealings with "others." While an information should not charge one with two or more separate offences yet criminal acts may be alleged with respect to several persons if it forms one transaction. That principle is not applicable because the issue of trading-stamps was the outcome of a written contract with Hart and presumably a distinct contract in writing was entered into with the "others." They were separate transactions. The information therefore is defective. The formalities of the law should be complied with and it should

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not be assumed that the curative sections of the Code will be applied at all times where formalities intended to insure the due administration of justice are not observed. While saying so as an intimation that care should be taken in properly defining charges involving the liberty of the subject, no substantial wrong occurred in this case.

An appeal was taken from the sentence imposed. The maximum penalty provided is imprisonment for one year and a fine not exceeding $500. The maximum fine was imposed and imprisonment for eleven days ordered. It was the first offence.

MACDONALD, J.A.

In addition the accused sought and obtained advice as to the legality of the practice. Even if erroneous it afforded a measure of justification. A fine of $500 might seriously cripple one doing business in a small way and on all the facts should not have been imposed. Counsel for the Crown agreed that the fine should be reduced. I would reduce it to $250.

Appeal dismissed; fine reduced.

Solicitors for appellant: *J. A. Russell, Nicholson & Company.*
Solicitor for respondent: *O. C. Bass.*

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REX v. BAMPTON

Criminal law—Incorporated club—Card-room "kept for gain"—Steward in charge—Paid salary only—Poker played in card-room—Players charged ten cents every half-hour—Money paid to club revenue—Criminal Code, Secs. 69 and 226 (a).

The accused was steward and in charge of the Brunswick Sports Club, and paid a salary only. Only members were allowed on the club premises, which contained a billiard-room, reading-room and card-room. The club also owned and operated a football field. Members played poker and paid the steward ten cents every half-hour for the privilege, the money so received being paid into the club's revenue. When the place was raided by the police four tables of poker were in play in the card-room. The steward was convicted of keeping a common gaming-house.

Held, on appeal, affirming the decision of police magistrate Findlay, that on the entry of the police on the premises members were playing poker, which is a mixed game of chance and skill, each paying an assessment to the finances of the club, and the accused being in charge at the time, was properly convicted.

Rex v. *Sullivan* (1930), 42 B.C. 435 followed.

APPEAL by accused from his conviction by J. A. Findlay, Esquire, deputy police magistrate at Vancouver, on a charge of unlawfully keeping a disorderly house, to wit: a common gaming-house. The accused, Bampton, was steward of the Brunswick Sports Club, and was paid a salary. The club was duly incorporated, and in addition to the club premises owned and operated a football field on Hastings Street East. It was not contended that the club was a fictitious one, and no person was allowed to enter except members. When the police entered the club members were playing poker at four tables; each player paid ten cents every half-hour to the accused who turned the money over to the club and it was used in the general financing of the club. Statement

The appeal was argued at Victoria on the 2nd of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, J.J.A.

J. W. deB. Farris, K.C., for appellant: There are 1700 members of this club. That it is a *bona fide* club is not ques- Argument

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tioned, and a charge of a similar nature two years previously was dismissed. There was no rake-off in the game they were playing. The club charged each player ten cents every half hour. The club dues are $1 per year. There is no ground for a conviction: see *Rex* v. *Riley* (1916), 23 B.C. 192; *Downes* v. *Johnson* (1895), 2 Q.B. 203 at pp. 207-8. It is not a place kept for gain in that sense: see *Jackson* v. *Roth* (1919), 1 K.B. 102 at p. 119; *Rex* v. *The Trainmen's Club* (1926), 20 Sask. L.R. 461; *Rex* v. *Sullivan* (1930), 42 B.C. 435. The chips were provided by the servants of the club but there is nothing wrong in that.

Argument

W. M. McKay, for the Crown: The football field is half a mile away from the club. That this is a common gaming-house see *Rex* v. *Donovan* (1921), 15 Sask. L.R. 22; *Rex* v. *Johnson* (1919), 32 Can. C.C. 7; *Rex* v. *Ham* (1918), 25 B.C. 237; *Regina* v. *Brady* (1896), 10 Que. S.C. 539; *Rex* v. *Long Kee* (1918), 26 B.C. 78; *Rex* v. *Forder* (1930), 54 Can. C.C. 388; *Rex* v. *Coy* (1925), 36 B.C. 34.

Farris, replied.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The decisive facts are not in dispute. The appellant is steward of the Brunswick Sports Club and had a full knowledge of the club's business. It is a large club with several departments. In addition to billiards and a reading-room it supports football and has a room set apart for card-playing. The players are charged for every half-hour of play a certain sum which goes into the general revenue of the Club, and forms a very substantial part of its revenue. I think this room is "a house, room or place kept by [the Club] for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill" within section 226 (*a*) of the Criminal Code.

Members were playing a game of poker which is a mixed game of skill and chance, when the place was raided by the police. Appellant who was in charge of the Club at the time is, I think, guilty of the offence charged under section 69 of the Criminal Code and was properly convicted. This case is, I

think, undistinguishable from the case of *Rex* v. *Sullivan* (1930), 42 B.C. 435. The only difference suggested is that the Club in question at Bar was a larger one than that in the *Sullivan* case and included in its activities athletic sports but that in my opinion does not make the card-room in this club any less a "house, room, or place kept," etc. I need not refer to any of the cases cited to us other than *Rex* v. *Sullivan, supra,* and *Rex* v. *Radinsky* (1929), 41 B.C. 317, since these decisions are by our own Court upon facts which are unquestionably analogous except as above stated.

MACDONALD, C.J.B.C.

I would dismiss the appeal.

MARTIN, J.A.: After a careful consideration of all the facts this case cannot, in my opinion, be distinguished in principle from our decision in *Rex* v. *Sullivan* (1930), 42 B.C. 435. Indeed, in some respects it is a stronger case for conviction than that, and therefore the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: After a consideration of the cases in our own Court and in other Provinces of Canada along similar lines I think the learned magistrate below was right and would dismiss the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *T. B. Jones.*
Solicitor for respondent: *W. M. McKay.*

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REX v. RICHARDS

REX v. RICHARDS.

Criminal law—Keeping common gaming-house—Automatic vending-machine—Indicator shewing result of each operation—Effect of—Criminal Code, Secs. 228 and 986 (4)—Can. Stats. 1930, Cap. 11, Sec. 27.

Accused had in her store a machine known as an automatic vending slot machine, in which customers placed a five-cent coin, pulled a lever and received from the machine a package of candy with or without "slugs" or "tokens" (varying in number up to twenty). The slugs could not afterwards be used in the machine but were exchanged in the store for merchandise to the value of five cents for each slug. There was a legend or indicator on the machine plainly to be read by the operator telling him the nature of the candy and the number of slugs he was to get upon his pulling the lever. When the lever was pulled the indicator would change, shewing what would be the result of the next operation. Accused was convicted of keeping a common gaming-house.

Held, on appeal, affirming the conviction, that although a customer knew what he was to get on each operation, they yield different results, and when he started with the intention of playing the machine a number of times he did not know at the beginning what the second, third or following operations would bring forth, the inducement being to keep on playing until he won something substantial. The evidence brings the accused within the words of section 986 (4) "or which as a consequence of any number of successive operations yields a different result to the operator" and the conviction should be sustained.

APPEAL by accused from her conviction by George Jay, Esquire, police magistrate for the City of Victoria, on the 30th of March, 1931, on a charge that she was unlawfully the keeper of a disorderly house, to wit, a common gaming-house. The accused, who runs a candy store, has on her counter a slot machine. Customers who play the machine put five cents in the slot and turn a lever, after turning it a piece of candy will come out with a number of slugs or tokens from two to twenty in number. Before turning the lever an indicator in a space at the top of the machine shows the customer what he is going to get when he turns the lever, and after the lever is turned the indicator changes to show what the next customer who turns the lever is going to get. Customers generally played from five to ten times in succession, anticipating that on the plays following

Statement

they would receive more slugs. It was held that the machine was operated in an unlawful manner.

The appeal was argued at Victoria on the 2nd of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Higgins, K.C., for appellant: This machine is not owned by the accused. It is owned by others, the accused being in charge of it when played by customers in her candy shop. It had been inspected by the police before it was licensed. The question is whether this is a gambling device. We submit that it is not a game of chance at all, as the operator of the machine always knows what he is going to get: see *Rex* v. *Stubbs* (1915), 24 Can. C.C. 303 at p. 308; *Rex* v. *Smith* (1916), 23 B.C. 197 at p. 200; *Rex* v. *Wilkes* (1930), 66 O.L.R. 319; *Rex* v. *O'Meara* (1915), 34 O.L.R. 467; *Rex* v. *Freedman* (1931), 1 W.W.R. 775.

Argument

C. L. Harrison, for the Crown: Section 236 of the Code is the section creating the offence. This machine is directly within the 1930 amendment of section 986 (4) of the Criminal Code. The cases as to illegal machines are: *Rex* v. *Gerasse* (1916), 34 W.L.R. 965; *Rex* v. *Arnold* (1927), 48 Can. C.C. 101; *Rex* v. *Wolfe* (1928), 50 Can. C.C. 189; *Rex* v. *Canada Mint Co., ib.* 384; *Rex* v. *Poulin* (1924), 43 Can. C.C. 242.

Higgins, replied.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.: Owing to the conflicting opinions of several of the Courts of Canada which have dealt with this question it is necessary to consider it with those cases in mind. I think if we set the evidence in this case over against the terms of the statute governing it an offence against the Act is disclosed. The machine in question was used by the appellant as a candy vending machine from which she admittedly made a profit. Constable Banister for the purpose of obtaining evidence for the prosecution called at her store and played the machine by placing a nickel in the slot and pulling a lever. There was a legend on the machine plainly to be read by the operator telling the

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exact result of that operation. That legend was changed with each successive operation of the machine and for a second operation the new legend would shew the result of the following operation and so on in succession. The result of the playing of the first nickel was as indicated, a package of candy, which cost the appellant about half a cent. The constable then played another nickel with the new legend before him and got exactly what it promised, namely, another package of candy, with a new legend shewing what the next operation would bring. Upon playing a third nickel he got what that legend promised, namely, two brass trade tokens which could be exchanged for merchandise in the store. He used one of these to purchase goods and kept the other for the purpose of evidence in the case.

Section 986 (4) of the Criminal Code of Canada provides that

> In any prosecution under section 229 any automatic machine intended to be used for vending merchandise or for any other purpose, the result of one of any number of operations of which is, as regards the operator, a matter of chance or uncertainty, or which as a consequence of any given number of successive operations yields different results to the operator, shall be deemed to be a means or contrivance for playing a game of chance, within the meaning of subsection two of this section, notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance.

MACDONALD, C.J.B.C.

This section was amended in 1930, Cap. 11, Sec. 27, Subsec. (4), by striking out the word "or" in the fourth line thereof, and inserting the word "of" in its place. I cannot see that this amendment is of any real importance in the consideration of this case. It was argued that each operation of the machine was a distinct game and that as the operator knew before risking his money what the result would be it is a game that does not fall within the purview of this section. In this respect it is no different from several of the cases cited to us including *Rex* v. *O'Meara* (1915), 25 D.L.R. 503, and *Rex* v. *Arnold* (1927), 60 O.L.R. 582; 48 Can. C.C. 101. I think the game that was played by the constable consisted of the playing of the three nickels which might be considered as successive operations but whether as successive or independent it appears to me to make little difference because that was the game he played and the inducement was to him to keep on playing until he won something substantial. Therefore, taking that as the whole game and applying the words of the said subsection (4) to it the result of

one or any number of operations was as regards the operator a matter of chance or uncertainty since he did not know at the beginning what the second or third operation would bring forth. I think it also must be considered that that evidence brought the appellant within the words of the said section "or which as a consequence of any given number of successive operations yields a different result to the operator." Here we have three successive operations, one of which resulted differently from the others, and the game is one of chance, "notwithstanding that the result of some one or more or all of such operations may be known to the operator in advance."

The intention of Parliament was to take away the lure of gambling whether the gambler knew or did not know the result of each operation beforehand. The case of *Rex* v. *Wilkes* (1930), 66 O.L.R. 319, was cited as a judgment of the Ontario Court of Appeal differing from their judgment in *Rex* v. *O'Meara, supra,* but I do not think that it can be regarded as such. The majority of the judges there founded their judgment I think on the common law definition of "gaming" and it was said and I think well sustained that where there is a prohibition against "gaming" without a statutory definition of that term, the common law definition must be applied, namely, that the gambler must be liable to lose as well as to win. The judges in *Rex* v. *Wilkes, supra,* were, I think, with very great respect, misled by applying the common law definition to the word "gaming." Here the definition is clearly defined by the section itself and if the offence falls within that statutory definition there is no necessity for looking further for a definition. That definition is imperative and as I have endeavoured to shew by what I have already said if there was in this case a breach of the provisions of that section it matters not whether the offence was a game of chance falling within the common law definition of gaming or not.

MACDONALD, C.J.B.C.

Shortly before the decision of *Rex* v. *O'Meara, supra,* the Court of Appeal of Alberta in *Rex* v. *Stubbs* (1915), 25 D.L.R. 424, dealt with said subsection (4) and came to the opposite conclusion. This case was not followed by the Ontario Court of Appeal in *Rex* v. *O'Meara, supra,* and some criticism has been levelled against the Ontario Court because it did not follow the

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recognized general rule that where the construction of a Dominion statute is in question and has been decided in one Court of the Dominion other Courts should adopt that decision. I agree fully with the principle involved in that, but that rule is not a rule of law and is not binding in that sense—it is like the rule of *stare decisis,* and where one Court finds itself in disagreement with another and is satisfied that its opinion is right it would not be justified in perpetuating error by adopting the other opinion. In *Rex* v. *Arnold, supra,* it is worth while noting that that was a prosecution under section 236 of the Criminal Code and that the two learned judges who dissented from the judgment of the majority founded their dissent on the wording of that section which used the words "contestant" or "competitor," and held that the appellant in that case was neither a contestant nor a competitor and therefore was not guilty. They seemed to think that it could not be said that the operator was contesting or competing with another. It is worth while noting what Mr. Justice Masten, who delivered the judgment of the majority of the Court in *Rex* v. *Wilkes, supra,* said near the end of his opinion in *Rex* v. *Arnold* (1927), 60 O.L.R. 582 where the operation of a machine similar to the one here was considered:

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> I am therefore of opinion that, while the machine is a gaming device and its operation is gambling, the defendant was not guilty of disposing of goods, wares or merchandise, by a game or mode of chance

because there was no competitor. The question there was whether the offence fell within section 236, not under 986.

In this state of the cases I have no hesitation whatever in adopting the conclusion of the Court of Appeal of Ontario in *Rex* v. *O'Meara, supra,* and in *Rex* v. *Arnold, supra.* This subject has been very well dealt with by Mathers, late Chief Justice of Manitoba, in *Rex* v. *Gerasse* (1916), 34 W.L.R. 965, and also by the Court of Appeal, in the recent case of *Rex* v. *Freedman* (1931), 1 W.W.R. 775, where the Court unanimously sustained the conviction and pointed out that *Rex* v. *O'Meara* had not been called to the attention of the Court in *Rex* v. *Wilkes.*

On the whole, I think, the weight of opinion is in favour of sustaining the conviction and I would therefore dismiss the appeal.

MARTIN, J.A.: Since the argument we have the advantage of the decision of the Supreme Court of Canada in *Roberts* v. *Regem* (1931), S.C.R. 417 which sets at rest the main point of this case and supports the submission of Mr. *Higgins,* for the appellant, that the particular type of automatic vending machine before us, called the "Jennings To-day Selected Vendor," is, if operated pursuant to its accompanying directions, not an infringement of the Criminal Code, and so the conviction cannot, with respect, be supported for all the reasons given by the convicting police magistrate wherein the facts are not wholly accurately stated in essentials. But it can be supported on the ground that the additional act of the appellant in exchanging the tokens or slugs for merchandise upon the occasion in question (whereon this particular charge is solely founded and with which alone we are dealing) does make the operation of the machine in conjunction with that act a gaming transaction prohibited by the Code.

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Seeing that the machine is only leased and not owned by the accused, it is important to keep this distinction in mind—*i.e.,* its legitimate and illegitimate use—because it would doubtless be an element in considering its confiscation and destruction, an order for which was made by the magistrate, as is stated in the appeal book but it is not before us, nor was the point argued, but as the complexion of the matter has been changed by the said intervening judgment in *Roberts* v. *Regem* it would, *abundanti cautela,* be well to hear counsel thereupon if they wish and if we have any jurisdiction in the premises.

GALLIHER, J.A.: The latest decision on the operation of these vending machines is to be found in (1931), S.C.R. 417. The case, *Roberts* v. *Regem,* was an appeal from the Court of Appeal for Manitoba and the Supreme Court of Canada held that the accused was not guilty under the Criminal Code of keeping a common gaming-house, adopting the reasons for decision in *Rex* v. *Wilkes* (1930), 66 O.L.R. 319.

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The machines in those two cases and the one in the case at Bar are identical and were it not for the difference in the operation of the machine it would be an end of the case. Whereas in the *Wilkes* case, *supra,* certain slugs or tokens at times dropped

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out of the machine in varying numbers they were of no commercial value and could not be exchanged for merchandise in the store, but could only be used in producing certain legends which would appear upon the face of the machine for the amusement of those operating same, nothing being received in value, but here the accused herself admits she cashed these tokens over the counter giving in value candy equal in value to what would be obtained by playing a five-cent piece into the machine. In doing so she has, I think, brought herself within the Code, and this case can be distinguished from *Roberts* v. *Regem* and *Rex* v. *Wilkes, supra,* in that respect.

I would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: I have no doubt, after a perusal of the cases, some of them conflicting, that the accused was properly convicted. It is important to have uniformity in applying the Criminal law throughout Canada. One should not be convicted of a crime in one Province and on the same facts and under the same law another acquitted elsewhere. *Rex* v. *Stubbs* (1915), 31 W.L.R. 567 was not followed by the Ontario Court of Appeal in *Rex* v. *O'Meara* (1915), 34 O.L.R. 467 nor in later cases (*e.g., Rex* v. *Gerasse* (1916), 34 W.L.R. 965; *Rex* v. *Smith* (1916), 23 B.C. 197). *Roberts* v. *Regem* (1931), S.C.R. 417 based upon the decision in *Rex* v. *Wilkes* (1930), 66 O.L.R. 319 is distinguishable inasmuch as the slugs had no commercial or exchangeable value, having in view the manner in which the machine in question was operated by the accused.

In the case at Bar the machine known as the "Jennings To-day Selected Vendor" is patented in Canada and its authors apparently regard it as proof against criminal assault. It could be operated lawfully. It is not wholly true to say that as operated the indicator disclosed the result to the player each time he operated the machine and before he operated it. The player on depositing a nickel and operating received, it is true, the article indicated by the machine but in addition might also receive from two to twenty slugs. These slugs were given a mercantile value. In exchange merchandise was given for them

by the accused to the operator to the value of five cents for each slug. The machine did not indicate before the play how many slugs would appear on successive operations. The candy received may be seen through a glass before operation. That is a definite play involving no element of chance. In respect to the slugs a notice appeared on the machine indicating that they were of no value except for amusement purposes. They were of no value as between the operator and the machine. They were of value however to the operator; he obtained merchandise for them and the amount obtainable was uncertain. They were of value also to the accused because although the player did not pay for the merchandise (he merely delivered the slugs) she obtained five cents for each one from the lessor of the machine with whom she had a profit-sharing arrangement. The machine was operated for "gain." Whether or not it could be operated legally is not the point so far as the accused is concerned. We are concerned with the manner in which it was operated in this case. The accused was paid for the merchandise given to the operator in exchange for the slugs. It was, as operated, a contrivance for unlawful gaining. It was kept by the accused for gain or profit. The play was not limited to one operation. The indicator did not shew that after each play the same result would follow. If it did, the element of chance would be wanting. While the operator knew that he would secure candy he had the "chance" of obtaining slugs. If only two slugs appeared he was induced to repeat by the prospect that another play might bring twenty for which he could obtain merchandise. Nor can it be said that each play must be regarded as a completed transaction. The contrivance, as operated, by reason of the uncertain results was intended to, and in fact induced repeated trials.

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Reference was made to the amendment of section 986 of the Code by which subsection (4) thereof was repealed and a section slightly differently worded substituted by Can. Stats. 1930, Cap. 11, Sec. 27. "One of any number of operations" was changed to "one or any number of operations." The difference is not material. Whether it is one operation or "any given number of successive operations" if they yield different results to the operator "the machine must be deemed to be a means or con-

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trivance for playing a game of chance." With therefore the professed object of stimulating trade (quite proper if the means are legitimate) and the gain derived by the sale of merchandise, dependent upon the uncertain number of slugs obtained, all doubt is removed and the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellant: *Frank Higgins.*
Solicitor for respondent: *C. L. Harrison.*

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MERRITT REALTY COMPANY LIMITED v. BROWN.

Taxation—Income—Company with power to buy and sell real estate—Profit on sale over purchase price—Subject to income tax.

The appellant Company was incorporated by one Dr. Gilbert, who held all its shares with the exception of two. He conveyed to the Company certain properties in return for the shares, the Company having the power, *inter alia*, to carry on the business of buying, holding, managing and selling real estate. Upon the Company taking over the properties it made improvements, rented the buildings and sold when opportunities arose to make a profit, and purchased other properties. The profits so made were assessed as income and the assessments were upheld by the Court of Revision.

Held, on appeal, affirming the decision of the Court of Revision (MACDONALD, J.A. dissenting), that these profits cannot be classed as accretions to capital as the Company's business included the buying and selling of lands in which it was mainly engaged. The profits thus made are therefore income and subject to assessment as such.

[Affirmed by Supreme Court of Canada.]

Statement

APPEAL by plaintiff from the decision of *W. H. S. Dixon*, Esquire, judge of the Court of Revision, Vancouver Assessment District, of the 24th of March, 1931. The appellant Company was incorporated under the Companies Act in 1919. It is a personal corporation, the chief shareholder being Dr. O. C. Gilbert, a dentist in Vancouver, who held 125,252 shares, the two other members of the company having one share each. The objects of the Company as set out in the memorandum of asso-

ciation, were to purchase, lease, or otherwise acquire lands and buildings, to lease lands improved or unimproved, to sell or otherwise dispose of property and to carry on the business of real estate agents. Doctor Gilbert formed the company for the purpose of investing his money in property generally, and to sell at a profit when opportunities arose. Doctor Gilbert had acquired the Rawlings Apartments in Vancouver and the company took the apartments over, the consideration being 40,000 shares in the company of $1 each in value given to Dr. Gilbert. The company also bought and sold a number of properties at considerable profit and claimed that the profits thus obtained was an accretion of capital and not a profit from dealing in real estate.

Statement

The appeal was argued at Victoria on the 10th and 11th of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C. (*J. S. McKay,* with him), for appellant: This is in every sense of the word a private company. They bought a number of properties and when the flurry came in 1929 they sold at a profit. This is not a question of fact, it is an inference of law founded upon the specific facts: see *South Behar Ry. Co.* v. *Inland Revenue Commissioners* (1925), A.C. 476 at p. 483. What must be considered is the business of the company and the actual intention of the company as to its business: see Plaxton & Varcoe's Dominion Income Tax Law, 2nd Ed., pp. 104 and 106; *Inland Revenue Commissioners* v. *Korean Syndicate Ld.* (1921), 3 K.B. 258 at p. 272. Profits on betting are not taxable: see *Graham* v. *Green* (1925), 9 T.C. 309. The question is what is the ordinary business of the company: see *Tebrau (Johore) Rubber Syndicate Ltd.* v. *Farmer* (1910), 5 T.C. 658 at p. 664; *Californian Copper Syndicate* v. *Harris* (1904), *ib.* 159 at p. 167; *In re Taxation Act and Anderson Logging Co.* (1924), 34 B.C. 163 at p. 165, and on appeal (1925), S.C.R. 45 at pp. 48-9; *In re Taxation Act and The All Red Line Ltd.* (1920), 28 B.C. 86; *In re Hastings Street Properties Limited* (1930), 43 B.C. 209.

Argument

Harper, for respondent: The facts shew the lands were purchased for investment as long as they were paying, but they

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were sold when a sale could be made at a profit. This was part of their business under the memorandum of association. They were trading in their investments and the facts so shew. That is the inference to be drawn from the facts. They made four sales in a short time, all at a profit.

Farris, replied.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: In 1919 Dr. Gilbert incorporated a private company with power, *inter alia,* to carry on the business of buying, holding, managing, and selling real estate. He claims that he intended the company to control real estate for investment of his own money and the management of his own property, not for speculation. He conveyed certain real estate to the company in return for shares all of which except two belong to him. He conveyed certain of his lands to the company which thereafter increased substantially in value and were sold at a handsome profit. The company bought other lands with the money and in this way dealt with the lands and property which it acquired, selling each time at a profit. The company claims that these profits were accretions to capital and objects to pay income tax thereon. They were, however, assessed by the Government for income tax and on appeal to the Court of Revision the judge upheld the assessment. It is from this judgment that this appeal is taken. If it can be said that the company's business was buying and selling lands then the profits made in that business are income subject to assessment as such. On the facts of the case I agree with the Court of Revision and in the reasons therefor and would dismiss this appeal and cross-appeal.

MARTIN, J.A.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed and the cross-appeal allowed.

GALLIHER, J.A.

GALLIHER, J.A.: After a perusal of the authorities, the memorandum of association, and the evidence given in the appeal before the learned judge of the Court of Revision I am impressed by the soundness of his reasoning which I think is amply borne out by the authorities cited and to which we have been referred.

McPHILLIPS, J.A.: This is a taxation appeal and it has been very elaborately argued by counsel with a large citation of authorities. In my opinion it is a simple case and easy of determination. We have a company formed for, *inter alia,* the following purposes: [sufficiently set out in statement].

Now, the facts here are that real estate was bought and sold by the company in pursuance of its corporate powers and very substantial profits were made, in so doing. It appears to me to be a plain case, I cannot take any other view. The appellant carried on business in conformity with its statutory powers and having made profits the taxes claimed by the Crown were properly leviable and in consequence thereof due and payable by the appellant. The learned judge of the Court of Revision and Appeal, Vancouver Assessment District, has most elaborately canvassed both the law and the facts, and upon a perusal of the finding made and giving every consideration to the very forceful and able argument of Mr. *Farris,* the learned counsel for the appellant, I cannot persuade myself that the case is other than a simple one and that the assessment made, confirmed by the learned judge, was rightly made and in conformity with the law and the appellant is liable. I would affirm the judgment of the learned judge of the Court of Revision and Appeal, dismiss the appeal, and allow the cross-appeal.

MACDONALD, J.A.: The point in controversy is whether profits arising from the sale of three parcels of real estate is income subject to taxation or capital accretions. It may be put another way. Did appellant, having acquired properties as an investment, sell, not for profit but to add to his estate by substituting one investment for another, or on the other hand dispose of them in a commercial way so that the profits may be said to arise from carrying on a trade or business in real estate?

A true appreciation of all the facts is of course necessary. The governing principles are well settled but it is often difficult to apply them. Appellant is a limited company and Dr. Gilbert a practising dentist holds all but two qualifying shares. Having considerable wealth he incorporated appellant Company to hold his investments. It is a personal corporation. The memoran-

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dum of association contains, among its objects, in addition to the right to purchase, hold and dispose of real estate, the power to carry on the business of real-estate agents. It had therefore authority to buy and sell for profit. The judge of the Court of Revision laid stress on this power but all the powers of a company need not be exercised. The fact that the company is acting within its powers does not mean that it is carrying on a trade or business although the objects of the company is a factor in deciding on the facts the nature of the business carried on.

The company first purchased from Dr. Gilbert four lots on Granville Street, Vancouver, for $85,250, and in payment issued to him 85,250 one dollar shares. It erected new buildings thereon to the value of approximately $20,000 bringing the total investment to $100,000. The evidence and surrounding facts shew that the purpose in purchasing it was not to speculate on a possible advance in value, but to hold it as an income-yielding investment. The erection of buildings, including a number of stores from which rentals would be obtained and the demolition of an old building would indicate the purpose of the investment apart from Dr. Gilbert's direct evidence. The anticipated revenue was the controlling factor in inducing the purchase. It is not without significance (to shew that revenue from an investment was the primary purpose) that on a small area of vacant ground at the rear of the lots appellant erected an inexpensive building upon finding that it would bring in a rental of $50 a month. All stores were leased as soon as completed. A few years after this purchase it sold one of the four lots to one Rainford (November, 1925) for $35,000. This meant an advance or profit of $12,178.19 over the estimated cost. The sale was made because rentals received in the meantime diminished; in other words it did not prove to be an attractive investment. Two years later, however, appellant repurchased it for $48,000, because in the meantime rentals increased. The lot returned to the position of a good revenue-yielding investment. In addition by repurchasing it was possible that the whole area (the four lots were contiguous) might be leased for 99 years yielding satisfactory returns. Lower rentals when sold and higher rentals available when repurchased bears out the view that the sale to Rainford meant that an investment was realized

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upon to be converted into other investments (bonds or mortgages) and that it was repurchased when it was profitable to do so from a revenue standpoint.

The next event was the final sale of these four lots to one Gardiner (December, 1928) for $300,000. This disclosed a net profit to appellant of $168,724.61, and income tax is claimed thereon, together with the profit on all other sales. The material facts in arriving at a conclusion as to whether or not this amount is a commercial profit from dealing in real estate are as follows: In the winter of 1928 there was an active market in real estate on Granville Street, Vancouver, and upon the solicitation of a real-estate agent, not associated with appellant, it consented to sell. The value advanced to a point where the rentals would represent a comparatively small return. It was wise to convert and reinvest. The profits obtained were in fact reinvested in stocks and mortgages and in the purchase of more real estate for income-bearing purposes. Dr. Gilbert wanted to leave $100,000 or more of the purchase price on a first mortgage, but it could not be arranged.

The second parcel involved is a twenty-five foot corner lot on Granville and Smythe Streets. Appellant purchased it in 1921 through real-estate agents for $55,809.77. It had several stores on it and the rentals brought in 8 per cent. on the investment. After three years the rentals dropped and an offer to purchase for $74,000 was accepted in October, 1926. Before the sale the returns depreciated to less than 5 per cent. on the basis of a valuation of $74,000. The sale was made through agents and a profit of $17,684.23 realized.

The third parcel, situate at 11th Avenue and Granville Street, was purchased by appellant in 1929, for $55,000. An old building thereon was demolished and a new one erected resulting in an advance in revenue from $225 to $500 a month, giving a return of 7 per cent. on the investment. It was purchased for the purpose of developing it for revenue and appellant still owns it. On the foregoing sales a total profit of $198,587.03 was realized and on that amount income tax is sought.

As to whether appellant was engaged in the business of buying

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and selling real estate it may be mentioned that the company had no part in the management of these properties. It was a holding company. All rents were collected, leases arranged and sales made through agents. Appellant never listed them, nor advertised them for sale. A real-estate agent who made all the sales stated that he solicited the listings from Dr. Gilbert and persuaded him to sell. Usually if one wants to sell the order is reversed. Sales only were effected when offers to purchase were made by other than appellant's agents. All sums realized from rentals and sales were reinvested. No dividends were paid although for two years Dr. Gilbert drew a salary of $2,400 a year. The offers received for the sale of the properties were accepted because by reinvesting more revenue could be obtained. There is no evidence that any purchases and sales were made to make a profit by speculating in real estate. The lands were purchased for investment purposes and were so held until it appeared that a greater income might be obtained by investing the proceeds in other securities. It is also of some significance that appellant could have sold at a profit before the date of the actual sales but not at such an advance as would justify a change of investment. Usually a trader sells when a reasonable profit is available.

The judge of the Court of Revision held that the profits realized on the sale of the properties were subject to income tax. He found as a fact, "that there was a business of buying and selling real estate being carried on and income being made from such business." If that is true it ends the case but with deference there is no evidence to support it. One would have to recast the evidence to arrive at that conclusion. Further, the evidence is not in dispute.

We have to decide if the profits arising from the sales and reinvested represent merely an enhancement in value by realizing on a security, or a substitution of one form of investment for another, or whether it was realized as part of the gains of the business of buying and selling real estate. It is difficult to say that appellant was "engaged" in this business when at no time did it offer, either by itself or through agents, to sell; or make any attempt to dispose of any of its holdings. One would expect that anyone engaged in a business would be actively

prosecuting it. The sales were made when offers were received and the question decided on each occasion was whether or not for revenue purposes appellant should hold the property or take the proceeds and reinvest in other revenue producing investments. Accretion to capital consisting of real estate is meaningless if in all cases the difference between its first cost and sale at an enhanced price must be treated as income. We must have regard to the "governing purpose" (as Duff, J. stated in *Anderson Logging Co.* v. *The King* (1925), S.C.R. 45), in acquiring the property, to quote from his Lordship's judgment at p. 55:

> The essential conditions of assessability (where a profit proposed to be assessed is the profit derived from a sale of part of the company's property) appear to be that the company is dealing with its property in a manner contemplated by the memorandum of association as a class of operation in which the company was to engage, and, moreover, that the governing purpose in acquiring the property had been to turn it to account for the profit of the shareholders, by sale if necessary.

We cannot say that appellant acquired the three parcels to turn them to account for the benefit of shareholders by sale if necessary unless we ignore the evidence. One cannot reject the evidence and say that sale for profit was the governing purpose. It was not a profit-making venture.

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The true principle is again stated by Lord Dunedin in *Commissioner of Taxes* v. *Melbourne Trust, Limited* (referred to by Mr. Justice Duff) (1914), A.C. 1001 at p. 1010:

> Their Lordships think that the principle is correctly stated in the Scottish case quoted, *Californian Copper Syndicate* v. *Harris* (1904), 6 F. 894; 5 T.C. 159. "It is quite a well settled principle in dealing with questions of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to income tax 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."

The line separating the two classes my at times be a fine one and each case must depend on its own facts. The case falls on one or the other side of the line by the answer to the question—Did appellant traffic and trade in real estate for profit?—was that its governing purpose? Or, was it the fact that more revenue could be obtained by selling and reinvesting? As

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already intimated the evidence furnishes the answer to that question. True it is from the evidence of the individual chiefly affected but apart from the fact that his evidence was favourably regarded it is the only evidence. No objection can be taken to the admissibility of the evidence given by Dr. Gilbert who controlled the company. The actions of a private or personal company are the actions of the man controlling it. If a public company its intentions or policy would be derived from a prospectus. Because too a public company exists to carry on a business within its powers it might be assumed that it was for profit.

If appellant's business or trade was to buy and sell real estate it was singularly inactive although lack of activity is not a decisive test. A trader may be quiescent for a long period, but it is some value. As stated appellant never offered the parcels for sale. That too is not conclusive as a trader might wait for possible purchasers and save commissions but it is some evidence. The "governing purpose" is derived from all the facts of assistance in answering the question—What was appellant doing and why? The fact that alterations were made: old buildings demolished and new ones erected points to the "governing purpose." Usually one acquiring property to turn over at a profit does not erect buildings upon it. The ultimate purchaser may require the lots for altogether different purposes and the buildings thereon prove valueless. One could, of course, trade in investments, but it must be found that appellant formed the company to secure profits from appreciation in the value of real estate because as Rowlatt, J. said in *The Rees Returbo Development Syndicate Ltd.* v. *Ducker* (1928), 13 T.C. 366 at p. 378:

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> Now income tax is not attracted by the mere circumstance that there is a profit; because the profit may be a mere accretion of the value of the article, and the profit may not accrue in the course of any trade at all."

Holders of investments would be greatly restricted if not permitted to change the form of the investment without payment of an income tax for usually no change would be made unless a profit by way of capital accretion is realized. The Act does not tax capital. It is income from a business. It must be found that the object of the company was to sell the property in question at a higher price. If one has property and due to enhanced

values it is more expensive than his requirements demand, or, if he can make better use of the proceeds of a sale, he may sell but the enhanced value does not represent profit from a trade. That is what occurred here, except that the act was repeated. It was in appellant's interest to reinvest the proceeds as new capital. One of the properties owned by appellant is still held. No effort was made to sell it. No doubt it could be sold at a profit (as in the other cases), but substitution would secure no better returns. Where sales were made it was by a landowner, not by a trader. It is profit arising from a trade that is taxed: not profits from the sale of land. It cannot be said that appellant used these three parcels of land as the basis of or "capital" for a trade or business. "Land-owning is not a trade," as Farwell, L.J. stated in *Hudson's Bay Co.* v. *Stevens* (1909), 5 T.C. 424 at p. 437:

> . . . and it would be an enormous deterrent to that free dealing with land which the Common Law has for centuries regarded as of the greatest importance for the public weal, if the vendor were to be charged with income tax on all or any part of the purchase-money of the land sold by him.

Some further tests may be applied derived from the observations of Rowlatt, J. in *Graham* v. *Green* (1925), 9 T.C. 309, where he said (p. 313):

> A person who buys an object which subsequently turns out to be more valuable, and then sells it, does not thereby make a profit or gain. But he can organize himself to do that in a commercial and mercantile way, and the profits which emerge are taxable profits, not of the transaction, but of the trade.

I already indicated as some *indicia* that no organized effort of any kind was made to effect sales. That taken in conjunction with the fact that there was on the other hand an organized effort to procure revenue assists in ascertaining the governing purpose in view. Agents were engaged to secure tenants, draw leases, collect rents and do all acts necessary to secure the highest possible returns: no one was engaged to effect a sale. Certainly there was no organized effort by ordinary commercial methods to try and sell real estate for gain. It is not trading to sell an object that later enhances in value. That is procuring capital increment; the profit is retained as additional capital. It would be a failure to properly conserve capital were it not

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sold when increased prices are available if thereby more revenue could be obtained by reinvestment.

On all the facts I cannot assume as Duff, J. put it in the *Anderson* case, *supra,* at p. 49,

> that the correct inference from the true facts is that the limits [here lots] were purchased with the intention of turning them to account for profit in any way which might present itself as the most convenient; including the sale of them,

and would allow the appeal. I agree that the cross-appeal should be allowed.

Appeal dismissed, Macdonald, J.A. dissenting.

Solicitors for appellant: *McKay & Fraser.*
Solicitor for respondent: *A. M. Harper.*

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PATRICK v. THE ROYAL BANK OF CANADA

PATRICK v. THE ROYAL BANK OF CANADA.

Banks and banking—Stock certificates endorsed in blank—Deposited with broker subject to certain conditions—Certificates pledged to bank by broker—Suspicious circumstances—Duty of bank to make enquiry.

The plaintiff entered into an agreement with the manager of the B.C. Bond Corporation to buy under certain conditions preference shares in said Corporation, and deposited with the said manager certain share certificates transferred in blank as evidence that he would, when the conditions were performed, complete the purchase. The manager of the Corporation pledged the share certificates to the defendant Bank as collateral security for his own account. In an action to recover the share certificates from the Bank:—

Held, that where the Bank receives certificates under circumstances that should arouse suspicions that the pledgor has no authority or a limited authority to deal with them, but the Bank takes them without enquiry, although in the belief that it has a legal right to do so, it obtains no title to them as against the owner.

Statement

ACTION for delivery by the defendant to plaintiff of two share certificates for 100 shares each of "Cities Service Common" or in the alternative damages for the conversion by the defendant of the two share certificates without title or colour of

right, and with the knowledge or means of knowledge at the time of such conversion that the said share certificates were the property of the plaintiff. The facts are set out fully in the reasons for judgment. Tried by GREGORY, J. at Victoria on the 17th of June, 1931.

Maclean, K.C., for plaintiff.
A. D. Crease, for defendant.

GREGORY, J.: In this case I have come to the conclusion, but not with entire confidence in its correctness, that the plaintiff must have judgment. And before I proceed to state the facts and make some reference to the law, I wish to state that the evidence of Mr. Stevens and Mr. Robertson, who testified on behalf of the Bank, was given in the most unexceptional way, and there is absolutely no criticism to be made of the manner in which they gave their testimony; I think they were frank, and made not the slightest effort to conceal anything; so that I wish the judgment to be understood as making no reflection upon either of these gentlemen. I think the mistake that was made, if any, was in their understanding of the right of the Bank to take the securities as a matter of law.

The facts are—or most of them—the plaintiff who is a customer of the defendant Bank verbally agreed under certain conditions to buy preference shares in the B.C. Bond Corporation, and one Boorman, the manager of the B.C. Bond Corporation, induced plaintiff to deposit with such manager certain share certificates as evidence that he would, when the conditions were performed, complete such purchase. Boorman further at the same time induced plaintiff to execute a transfer of such share certificates, leaving the name of the transferee in blank. There was no arrangement between Boorman and the plaintiff as to how, in the event of plaintiff not completing such purchase of preference shares, the share certificates deposited were to be used. Plaintiff had funds to pay for the shares in full and intended to pay cash for the same, which I think Boorman knew. Plaintiff was not a stock speculator; any shares which he had ever bought he had bought through the B.C. Bond Corporation and he had paid for them in full at the time of purchase. The

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conditions under which plaintiff was to buy were never fulfilled and he never became liable to make such purchase.

I may say that the Bank knew of the scheme for the increasing of the capital stock of the B.C. Bond Corporation by the sale of preference shares; but Mr. Stevens says he cannot say that he knew the plaintiff was purchasing any of those shares, but he knew of the scheme generally.

Immediately upon receipt of the share certificates by Boorman, on September 24th, 1930, he took them to the defendant Bank and deposited them with the Bank and was thereupon entitled to credit thereon to a certain amount. The Bank at the time had other securities on deposit and against which Boorman or rather the B.C. Bond Corporation was entitled to a total credit of $250,000 or such portion of that amount as represented the marginal value of the securities on deposit at any particular time.

The effect of the deposit in question was to increase the Bank's security for moneys already advanced. The Bank received between that date and October 9th, when the Bond Company made an assignment for the benefit of creditors, more cash by some thousands of dollars than it had paid out. Some of the moneys received, however, represented the proceeds of securities which the Bank permitted Boorman to withdraw, presumably at its marginal value.

Judgment

Boorman was unable to make any use of the securities without committing a crime; and he clearly committed a crime—and of course it is well known now that in connection with his operations in connection with this company he is now undergoing confinement in one of the institutions.

The Bank knew that a considerable portion at least of the securities deposited by the B.C. Bond Corporation were property of the B.C. Bond Corporation's clients. The B.C. Bond Corporation's account and security were a matter of considerable concern to the Bank after the financial crash of October 24th, 1929, and the Bond Company was being urged to increase the value of its securities on deposit or replace the weak ones with others of better character and pressing for reduction of the account if better collateral was not provided.

At the time of the deposit of the securities in question the Bank knew that the B.C. Bond Corporation was practically insolvent, and shortly before had advised it to make an assignment for the benefit of creditors. It knew that Boorman was in such a state of mind as to be reckless, and as Mr. Stevens, the manager, says he "felt that Boorman was very apt to do something that was not just right."

On October 9th the B.C. Bond Corporation made an assignment and the defendant then sent the plaintiff's shares to its New York agent who filled in the blank transfer to himself and had new shares issued in his own name, and the Bank now claims to own them outright.

At the time of the deposit with the Bank it made no enquiries at all about the Bond Corporation's right to deal with them. Mr. Stevens, the manager, very frankly testified that he felt it was none of his business so long as the execution of the transfer in blank was properly authenticated, as it was.

It seems to me, and I place my judgment upon this ground, that the circumstances were such that it was the Bank's duty to make enquiry; and having failed to make enquiry they cannot hold these securities now for the full amount of their value.

Judgment

If Boorman had had the right to pledge them for a limited amount I do not think I would have any difficulty in finding that the Bank would be entitled to hold them to that extent. But Boorman's right to deal with the shares never arose, he had no authority at all.

In *France* v. *Clark* (1884), 26 Ch. D. 257; 53 L.J., Ch. 585, the Court of Appeal in England had a case somewhat similar to this. In *Smith* v. *Prosser* (1907), 2 K.B. 735 at p. 744; 77 L.J., K.B. 71, Vaughan Williams, L.J. makes these remarks:

> In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such.

It seems to me clearly that the plaintiff here never had any such intention.

At p. 745 the same judge says—and this was a case of blank promissory notes:

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The defendant came to England, and, being desirous that sums of money should be raised on his behalf if the necessity should arise while he was away, he delivered these notes to his attorney, not as notes to be issued, and which the attorney was from the first to have authority to fill up and issue, but as custodian only, and intending that the notes should not be issued until he sent instructions to that effect from England. Under these circumstances the authorities seem to shew that, in the absence of a delivery of notes to an agent with the intention that they shall be negotiated, or at any rate that the agent shall have power to negotiate them, the signer is not responsible even to a *bona fide* holder for value.

The case of *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333; 57 L.J., Ch. 986, is strongly relied upon by the plaintiff. And in that case the bank was not allowed to hold the shares (shares were the subject-matter of that litigation, as in this case) against the plaintiff except for the amount which the plaintiff had authorized to be borrowed. That was a case of a money-lender going to a bank and getting advances. It has created a good deal of discussion, and perhaps caused some litigation, by reason of the fact that apparently it has been understood by many people to have made some change in the law. That probably is not accurate, though. The Lord Chancellor in that case, Lord Halsbury, and Lord Watson, and Lord Bramwell, all stressed the point that the intention of the owner of the shares, when he parted with them, was most material, that is, that he intended that the person to whom he gave them should deal with them. And Lord Halsbury further said (p. 341):

Judgment

> I think they had actual knowledge, but if they had reason to think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to enquire.

We have direct evidence here that the Bank knew that many of the documents delivered to it were the property of the broker's customers. Mr. Stevens did not say that he knew that this particular document in question was the property of the plaintiff, but I think that is the inference; the document on its face shewed it belonged to Mr. Patrick, subject to certain rights possibly because of the endorsement.

Mr. *Crease* in his argument for the Bank stated, I think very frankly and properly, that he would not pretend to argue that the Bank did not know that Boorman was giving it documents belonging to Boorman's customers. He said the Bank exchanged

securities any time, and I presume exchanged the securities whenever Boorman required them for the purpose of satisfying his clients; the Bank would surrender them, upon receipt of course of other securities to take their place.

Lord Watson in the *Sheffield* case, *supra,* at p. 344, says there was no evidence that it was customary for money lenders to deal with customers on the footing of their being entitled to mortgage *en bloc.* And Lord Bramwell uses language to the same effect upon the following page. And he says he cannot doubt that the defendants had notice of the infirmity of the pledgor's title—that would be Boorman in this case.

In *Colonial Bank* v. *Cady and Williams* (1890), 15 App. Cas. 267; 60 L.J., Ch. 131, the Court of Appeal in England very fully considered the judgment in the *Sheffield* case; and the judges there drew careful and particular attention to the fact that in the *Sheffield* case the Court stressed, what I have already said, the intention of the owner of the shares when he dealt with them.

There are some remarks of Lord Watson and Lord Herschell in this case which it is a little difficult for me to reconcile with my finding here except on the ground of necessity of the Bank making an enquiry; for Lord Watson said that if the shares had been left with the broker or in his custody he would have had no hesitation in finding that the bank got a good title. And that was the situation here. But that remark is not necessary to the decision, it is a *dictum;* but I would not have any hesitation in following it if I felt sure that the learned judge intended it in its full significance.

Judgment

Lord Bramwell in the same case said that if the document had been stolen it would have given no title, and everybody admitted that. Now it seems to me in this case that practically the document was unquestionably stolen by Boorman.

Lord Bramwell at p. 281 in this case stresses the question of the intention of the party owning them; and Lord Herschell again to the same effect on p. 283.

In the case of *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201; 61 L.J., Ch. 723, which was decided practically by the same judges who decided the *Sheffield* case—and they comment upon that case—Lord Halsbury says, at p. 208, that the

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bank took the bonds with a full knowledge that the person from whom they received them was either owner or had full authority to deal with them, as, in fact, he did deal with them. But he says in the *Sheffield* case the bank had actual knowledge that the person pledging them had only a limited authority to raise money upon them; though it sincerely believed that, as a matter of law, that gave them a right to hold the securities for advances made beyond that limited amount.

Now that, I think, was the Bank's position here; it sincerely believed that it had the right; but the question is, did it have the right?

And he said, at p. 210, speaking of the *Simmons* case, *supra*:

> I can find no trace of any such course of business brought home to the knowledge of the bankers as would give them the least suspicion that their clients had not full authority to deal as they were dealing with the securities in their hands.

Now it does not seem to me that was the condition in the case before me; the Bank did have something which should arouse its suspicion. I have already set it out in the statement of facts. It knew Boorman was desperate, it knew his company was insolvent, it had actually advised an assignment, and it received the securities not for new advances being made but for augmenting the security which it held for advances then already made.

Judgment

Lord Watson in that case says:

> They were dealing with a broker, at that time of unblemished repute;—

and that of course had influence, that the broker who negotiated the bonds was a man of unblemished repute; but here Boorman was not a man of unblemished repute—and he says the bank was

> entitled to assume, in the absence of aught to indicate the contrary, that whether the bonds belonged to [the broker] or to a customer, he had full authority to deal with them.

Going back to the remarks of Lord Halsbury, he says in the *Simmons* case at p. 211:

> It does not follow, and I do not know, that the banker could reasonably be expected to presume that they belonged to different customers, and that the limit of the broker's authority was applied to each individual security by his own client,

which he added was totally different from the facts proved or inferred in the *Sheffield* case. But the position here is the Bank

had actual knowledge of the client's limited authority. Lord Halsbury in that case, the *Simmons* case, decided it partly upon the ground that he could not assume that the bank knew it, but in our present case the Bank, we have the testimony, did know it.

Lord Herschell, at p. 221, says:

> If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further enquiry.

It seems to me that is what Mr. Stevens did. He should have suspected it under the circumstances, but he put it aside because he felt that legally he was justified in accepting them.

In *Fry* v. *Smellie* (1912), 3 K.B. 282 at p. 294; 81 L.J., K.B. 1003 (that is the case where the Court fully discussed the *Sheffield* case) Farwell, L.J., says, p. 294:

> I can only say that certificates and a blank transfer are in everyday use as securities for raising money, and that every man who lends money to A. on documents which shew a title in B. is of course put on inquiry. This does not mean that he must refuse to deal with the agent at all but must refer to the principal, but that he must make such inquiry as is reasonable under the circumstances. If he is foolish enough to lend to A. without inquiry, and A. has not right or authority to deal with the documents, he loses his money, and it is perfectly immaterial whether the security is a deposit of title deeds to real estate or certificates of shares with a blank transfer. Such a question as arises in the present case can only arise when the owner of the property has authorized such a dealing with the property as is corroborated by the possession of the *indicia* of title. If no authority at all has in fact been given it is quite immaterial whether the lender inquires and is given an untrue answer or does not inquire at all; in either case he loses his money.

Judgment

Vaughan Williams, L.J. at p. 289 says:

> When one deals with transfers of this sort, not of property, but of documents giving a right to registration in the books of the company as the holder of specific shares, the relation of the transferor to the transferee is of essential importance.

In the case of *Smith* v. *Prosser* (1907), 2 K.B. 735, the Court of Appeal had a somewhat similar case. In that case it was a case of promissory notes left in blank. At p. 744 Vaughan Williams, L.J. says:

> In my judgment it is of the very essence of the liability of a person signing a blank instrument that the instrument should have been handed to the person to whom it was in fact handed, as an agent for the purpose of being used as a negotiable instrument, and with the intention that it should be issued as such.

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This is a case where the signer of the instrument, the notes, had gone to England. He says, at p. 745:

> Under those circumstances the defendant came to England, and, being desirous that sums of money should be raised on his behalf if the necessity should arise while he was away, he delivered these notes to his attorney, not as notes to be issued, and which the attorney was from the first to have authority to fill up and issue, but as custodian only, and intending that the notes should not be issued until he sent instructions to that effect from England.

So in the present case it seems to me that when the plaintiff left these shares with Boorman he left them with him, if anything can be assumed, to use them only when and if he failed to purchase the preference shares which he said he would purchase. As a matter of fact the time to purchase the preference shares never arose, and so the condition never arose.

The case of *Ray* v. *Willson* (1911), 45 S.C.R. 401, is also a case of promissory notes having been filled up in blank, and it was held there that no title passed. Mr. Justice Duff said it was mere forgery. Well, here it was a theft—that is all it was. The papers were left, all the holder of them had to do was to fill in the amounts, the signature was there, and he could use them. That case considered *Smith* v. *Prosser*, which I have just referred to, and followed it.

Judgment

So it seems to me in this case that when the certificates were delivered by the plaintiff to Boorman he had no intention that he should use them, or, if he did have any intention that he should use them only if he failed to pay; the occasion to pay never arose; so he never had any right to use them. And one might say that that was sufficient, that gave the Bank no title. But apart from that, I place my judgment on the ground that the circumstances existing when the Bank received these certificates from Boorman were such as should have caused the Bank to make an enquiry. And I cannot believe that if Boorman had been questioned he would not have disclosed the facts. Because Stevens knew thoroughly about his condition, he was his banker, he knew he was insolvent, and he knew of the scheme, that the plaintiff was to take part in, for raising capital; and I feel satisfied that his judgment would have told him, and that he would have learned that Boorman had very limited authority to deal with them; and if he did that he could not take them and

apply them towards augmenting the security which he then had for the advances which he had made.

There was some evidence of a custom but it was not the custom pleaded, and at best only amounted to this that in transactions between brokers or bankers and brokers, certificates transferred in blank with the signature authenticated were treated as "in order." There is no evidence that plaintiff knew of this custom, and his dealings with Boorman could not by any stretch of imagination be called a stock-exchange transaction.

There will therefore be judgment for the plaintiff, with costs.

Crease: I suppose the judgment will be for the return of the shares in question?

Maclean: No, my Lord, I submit the judgment should be for the sum of $5,500. They have converted these to their own use. Now the shares have gone down. Suppose they had gone up, then would they have gone into the market to buy; but because they have gone down, they cannot take advantage of that and go and buy these shares now at a smaller sum than they took them in at when they converted them. I submit, my Lord, that judgment should be for the amount of the value of these shares at the time of conversion. They took them in at $5,500. In addition to that they have got the independent evidence of Pullen that that was the market value of the shares at that time. I would say, my Lord, that the law is absolutely clear, that it is the value at the date of conversion.

Judgment

The Court reserved this question for argument later on.

Judgment for plaintiff.

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B.C. RED CEDAR SHINGLE CO. LTD. v. STOLTZE MANUFACTURING CO. LTD.

B.C. RED CEDAR SHINGLE COMPANY LIMITED v. STOLTZE MANUFACTURING COMPANY LIMITED.

Company—Purchase of timber limits and equipment—Transfer of shares of the company in consideration therefor—Failure in operations—Subsequent transfer back of limits and equipment and surrender of the shares therefor—Cancellation of shares—No substantial reduction in capital—Validity—R.S.B.C. 1924, Cap. 38, Secs. 43 (1) (c), 46 to 50.

On December 24th, 1918, the defendant Company entered into an agreement with the Canada Lumber & Timber Company, Limited, for the purchase of merchantable cedar timber on certain limits near Gibson's Landing, British Columbia, the defendant covenanting to pay $1.50 per cord for shingle bolts cut and removed, and one-half the taxes and fees payable to the Government. On March 10th, 1923, by two agreements the defendant transferred to the plaintiff a logging camp and equipment near Gibson's Landing aforesaid, and by way of assignment all interest in the agreement of December 24th, 1918, above referred to, and in consideration therefor the plaintiff issued to the defendant 4,000 fully paid up preference shares of the capital stock of the plaintiff Company. The plaintiff then commenced operations removing 2,000 cords of shingle bolts which were already cut but they lost money, and with the exception of paying some licence fees, paid nothing under the agreements aforesaid. Under agreement of the 31st of January, 1927, for the consideration of $1 the plaintiff reconveyed to the defendant the timber licences and equipment aforesaid, and on the 2nd of February, 1927, the plaintiff Company at an extraordinary general meeting, passed a resolution that the Company "accept the surrender by way of gift from the Stoltze Manufacturing Company 4,000 fully paid preferred shares $10 each in its own company, and that these shares be cancelled."

The plaintiff succeeded in an action for a declaration that the agreement of the 2nd of February, 1927, was *ultra vires* of the Company and for rescission.

Held, on appeal, reversing the decision of FISHER, J., that the evidence disclosed the plaintiff was unable to operate profitably and the defendant desired repossession of the licences to return them to the original vendor. They both desired to escape from a difficult situation when entering into the agreement in question. The consideration expressed in the agreement was one dollar, but assuming the real consideration was the surrender of the preferred shares, it only means the substitution of the surrendered shares for the one dollar, and one was as valuable as the other. The limits were of no marketable value and the shares recovered were of no value. The extinguishment of the shares did not therefore bring about an illegal reduction of capital.

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APPEAL by defendant from the decision of FISHER, J. of the 20th of April, 1931, in an action for a declaration that an agreement between the plaintiff and defendant of the 2nd of February, 1927, the purchase by the plaintiff from the defendant of 4,000 preferred shares of the plaintiff company, and the transfer by the plaintiff to the defendant of certain logging and camp equipment and certain timber licences were *ultra vires* and void. On January 31st, 1923, the two companies entered into an agreement whereby the Stoltze Company sold to the B.C. Red Cedar Shingle Company all its logging and camp equipment situate at Gibson's Landing in British Columbia, and all interest in the timber referred to in a certain timber agreement of the 24th of December, 1918, for the sum of $144,400, payable by delivery of 4,000 preferred shares ($10 each) of said Company, and 1,044 ordinary shares ($100 each) of said Company, the said shares being duly allotted to the Stoltze Company. On the 31st of January, 1927, by agreement between the B.C. Red Cedar Shingle Company and the Stoltze Company the B.C. Red Cedar Shingle Company in consideration of $1 transferred to the Stoltze Company all its interest in the timber licences above referred to and the equipment on the timber limits, and on the 2nd of February following the B.C. Red Cedar Shingle Company at an extraordinary meeting of the shareholders passed a resolution that the Company accept as a gift 4,000 of its own preference shares from the Stoltze Company. On the 2nd of February, 1927, the B.C. Red Cedar Shingle Company entered into an agreement with the Stoltze Company, whereby the B.C. Red Cedar Shingle Company agreed to purchase the said 4,000 preferred shares from the Stoltze Company for the consideration of the transfer by the B.C. Red Cedar Shingle Company to the Stoltze Company of the timber licences and the logging and camp equipment above referred to. It was held on the trial that the agreement of the 2nd of February, 1927, was *ultra vires* of the plaintiff Company.

Statement

The appeal was argued at Victoria on the 18th and 19th of June, 1931, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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C. W. Craig, K.C. (*Tysoe*, with him), for appellant: The judgment was for $40,000 with certain deductions, reducing it to $22,000. This is a motion to quash the cross-appeal in which they seek to increase the judgment. After delivery of notice of appeal the respondent taxed its costs of the action and demanded payment, and as a condition of withdrawing execution on the judgment required the amount of the judgment and costs to be deposited in a special account, pending disposition of the appeal: see *Reid* v. *Galbraith* (1927), 38 B.C. 287.

Wood, K.C., for respondent, referred to *Coleman* v. *Interior Tree Fruit & Vegetable Committee of Direction* (1930), 42 B.C. 499; *Atlas Record Co. Ltd.* v. *Cope & Son, Ltd.* (1922), 31 B.C. 432; *Videan* v. *Westover* (1897), 29 Ont. 1 at p. 6 (note).

Craig, in reply: In demanding payment he has forced a situation advantageous to himself by means of the judgment.

Judgment on preliminary objection reserved.

Argument

Craig, on the merits: The agreement was held to be trafficking in the Company's own shares and therefore *ultra vires*. We say, first, the learned judge erred in finding the transfer of shares was a consideration for giving back the timber limits and the equipment as they were distinct transactions; second, in the circumstances of the case the transfer of the shares back to the plaintiff does not amount to trafficking in shares, and third, assuming their contention correct the plaintiff Company has suffered no damage by the transaction. As to first point, when the plaintiff acquired the timber limits it was found they could not operate profitably and they wanted to get rid of it: see *Patterson* v. *Vulcan Iron Works* (1930), 42 B.C. 300. The Stoltze Company released the plaintiff of over $11,000 by the agreement of 1927: see *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409. The case of *In re Denver Hotel Company* (1893), 1 Ch. 495 at pp. 504-5 applies to this case, and the case of *British and American Trustee and Finance Corporation* v. *Couper* (1894), A.C. 399 differs from the *Denver* case but goes further: see also *Rowell* v. *John Rowell & Sons, Limited* (1912), 2 Ch. 609; *In re Irish Provident Assce. Co.* (1913), 1 I.R. 352.

Assuming it was an illegal transaction, we cannot be made to pay the face value of shares that may be worth nothing.

Wood: The facts shew this was one transaction and it has been so found. There were two meetings, one, half an hour before the other. The transfer of the stock was the consideration for the transfer of the timber and equipment. Stoltze is president of the plaintiff Company and the defendant Company owns a majority of the shares in the plaintiff Company. As to the judgment below see *Chisholm* v. *Aird* (1930), 43 B.C. 354; *Bellerby* v. *Rowland & Marwood's Steamship Company, Limited* (1902), 2 Ch. 14; *In re Railway Time Tables Publishing Company; Ex parte Sandys* (1889), 42 Ch. D. 98; *Welton* v. *Saffery* (1897), A.C. 299; *In re Dronfield Silkstone Coal Company* (1880), 17 Ch. D. 76; *The North-West Electric Co.* v. *Walsh* (1898), 29 S.C.R. 33 at pp. 50-1; *Alberta Rolling Mills Co.* v. *Christie* (1919), 58 S.C.R. 208 at pp. 217-220; *In re Wragg, Limited* (1897), 1 Ch. 796 at p. 812. This transaction was *ultra vires* of the Company: see Street on Ultra Vires, p. 199. There were creditors to whom $50,000 was owing and they had no notice of the transaction: see *In re Manes Tailoring Company, Limited* (1908), 18 O.L.R. 572 at p. 576; *Re Cornwall Furniture Co.* (1909), 20 O.L.R. 520 at p. 526; *Re Clinton Thresher Co.* (1910), *ib.* 555.

Argument

Craig, replied.

Cur. adv. vult.

6th October, 1931.

MARTIN, J.A.: I am so much in accord with the judgment of my brother M. A. MACDONALD, in favour of allowing this appeal, that it would not be profitable to add anything thereto, but simply say that as we are all of the same opinion on the merits it becomes unnecessary to express an opinion on the preliminary and very nice question raised by Mr. *Craig*, that the appellant has "under the circumstances" lost by his conduct any right to appeal from the judgment complained of.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: In my opinion this appeal must succeed with great deference to the learned judge who carefully and

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elaborately but erroneously, in my opinion, arrived at the conclusion that the cancellation of the shares was an *ultra vires* proceeding bringing about an illegal reduction of capital. That in my opinion was not the legal effect of what was done. It is clear to demonstration that the timber limits in question were without commercial value—that upon the facts was admitted and common ground. Commencing from that premise, there was statutory authority to cancel the shares (section 43 (1) (*c*) of the Companies Act, R.S.B.C. 1924, Cap. 38) aud all proper proceedings were taken to that end, and a cancellation of shares in pursuance of the statutory authority is by the statute not to be deemed a reduction of capital within the meaning of sections 46 to 50 of the Act and it is apparent that all requisite and effective steps were had and taken to effectually accomplish that which was done. Section 43 of the Act with the subsection thereto admits of the cancellation of share capital by resolution and filing with the registrar without the sanction of the Court. It is beyond doubt upon the facts that there was implicit adherence to all statutory requirements, therefore it would seem to me that there is but the one answer. There was a valid cancellation of the shares and by virtue of the statute the cancellation is incapable in the present case—in view of all the admitted facts —of being deemed an *ultra vires* act nor can it be successfully contended that the extinguishment of the shares resulted in any illegal reduction of capital. Any such contention is fallacious and an untenable argument in the present case. I do not consider that there is any necessity to embark upon any extended elaboration of that which, to me, was the carrying out by agreement with all the parties to the action of a step supported upon the facts of the present case by positive statute law. Therefore, that which was done and here impugned, was an *intra vires* act, not as determined by the learned trial judge an *ultra vires* act. That being my view, and again with great respect to the learned trial judge, the result, in my opinion, must be that the judgment of the learned trial judge should stand reversed and the appeal be allowed.

MCPHILLIPS, J.A.

MACDONALD, J.A.

MACDONALD, J.A.: This action is based on the allegation that an agreement whereby respondent transferred part of its

so-called assets to appellant, and received in exchange certain shares of its own capital stock held by appellant, is *ultra vires*. Incidental relief is claimed in respect thereto.

Appellant, Stoltze Manufacturing Company Limited, by two agreements dated March 10th, 1923, transferred to respondent a logging camp with equipment, situated at Gibson's Landing; also, by way of assignment, all its right, title and interest in a certain agreement for the purchase of merchantable cedar timber, entered into by appellant as purchaser, with the Canada Lumber & Timber Company, Limited, and one T. W. Paterson as vendors, on December 24th, 1918. Under this last-mentioned agreement appellant covenanted to pay $1.50 per cord for shingle bolts cut and removed, and one-half of all assessments, taxes and fees, payable to the Government. It further provided that if any cedar remained on the limits at the end of five years a joint cruise should be made, the purchaser (appellant) agreeing to pay for all the cedar so found, fifteen days after completion of the cruise, at the price before mentioned. The respondent, by the agreement of March 10th, 1923, covenanted to pay $144,400 on the following terms: as to $40,000 by issuing to appellant 4,000 fully paid and non-assessable preference shares of the capital stock of respondent Company, and the balance, *viz.*: $104,400 in ordinary shares. It was agreed that the sum of $40,000 in preference shares was the consideration for the transfer of appellant's interest under said timber agreement of December 24th, 1918, as well as for all logging and camp equipment and machinery covered by a bill of sale of even date. We are not therefore concerned with the balance. The $104,400 ordinary shares acquired for other considerations, are still held by appellant. The $40,000 preference shares carried a fixed cumulative preferential dividend of 7 per cent. per annum. Appellant also agreed to purchase 100 shares of the common stock of respondent Company, paying therefor $10,000 in cash. This was to provide working capital. Other parties and interests referred to in the agreements outlined are not concerned in the decision of the case. Appellant represented that the timber limits so transferred carried fifty million feet of merchantable cedar timber, whereas it was estimated that they contained only nine million feet.

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Respondent commenced operations but found it a losing venture. It removed 2,000 cords of shingle bolts already cut and lying on the ground, and lost money in doing so. That was its sole operation. In 1925 all work on the limits ceased. Apart from the payment of $600 for licence fees, respondent paid nothing to appellant under the agreements outlined; even the shingle bolts taken off were not paid for. It found itself "unable to operate the licences advantageously," and lost six or seven thousand dollars in the attempt. It is common ground that in 1927, when the agreement later referred to, and attacked in this action, was entered into, the limits had no commercial value. Counsel for respondent asserted that they never were worth anything, and no evidence was led to establish that because of changed marketing conditions or otherwise, values changed in the intervening four-year period. Respondent's managing director testified that these limits were "of no value to the company and never were." The reason they were valueless, was not because the limits did not carry fifty million feet of cedar as represented, but because "nobody could operate Gibson's Landing claims . . . there was no water and nothing else to do anything with." This fact, *viz.*, valueless timber limits, is the decisive feature of the case in considering the law applicable.

Under these circumstances, having reached an *impasse,* respondent and appellant in, on the whole, a friendly spirit, considered how best to escape from a difficult situation, and after discussion, entered into the agreement now alleged to be *ultra vires* of respondent Company. This was on the 31st of January, 1927. It recites the original agreement with the Canada Lumber & Timber Company Limited; the fact that respondent could not operate advantageously, and the desire of appellant to obtain repossession of its former interest in said licences (in order to return it to the original vendor), and covenanted in consideration of one dollar for the reconveyance to appellant of said interest subject to such depreciation as might have occurred in the meantime, appellant agreeing to indemnify respondent in respect to all licence fees, taxes, or charges. This agreement restored the *status quo ante* as it existed prior to 1923. That was its main purpose. No mention

is made in it of the surrender of preference shares by appellant. That was the original consideration when respondent acquired the limits. The parties voluntarily agreed to follow a course best adapted to relieve them from an impossible situation. Respondent did not ask for rescission by reason of alleged misrepresentation as to quantity. That point was not considered. Apparently the more timber there was on the limits the greater would be their loss in operating and the amount respondent would have to pay after a cruise correspondingly greater. When this agreement was made the interest in the timber licences was, as counsel for respondent stated "not then regarded as one of the assets of the Company": yet the attack on the agreement under review is based upon an illegal reduction of capital or assets. Respondent's managing director testified "we not only lost the whole assets that he [appellant] secured his stock for, but lost several thousand dollars trying to do something with it."

In the following month, *viz.*, February 2nd, 1927, after what may be called the restoration agreement was executed an extraordinary general meeting of the members of respondent Company was convened and the following resolution passed:

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> Resolved that the company [respondent] accept the surrender by way of gift the following shares from the following shareholder—From Stoltze Manufacturing Company Limited [appellant] 4,000 fully paid preferred shares of $10 each, and that these shares be cancelled.

The shares were marked "cancelled." No reference is made in that resolution to the allegation that this surrender of shares was the consideration moving from appellant to respondent for the execution by the latter of the agreement restoring the *status quo ante* executed the previous month. An issue of fact arose as to whether or no the execution of the agreement and the surrender of the shares were intended to be and in fact were contemporaneous acts. Appellant's managing director, Mr. Stoltze, testified that when the proposition proved unworkable he and respondent's manager agreed that they should try to get out of their difficulties by persuading the original vendors from whom appellant acquired the limits in 1918, to take it back, thereby relieving respondent of onerous liabilities. If not relieved, as already intimated, it would have to cruise the timber and pay a comparatively large sum for the quantity found thereon. Mr.

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Stoltze declared that when the agreement for restoration was made (it was arranged some time before being reduced to writing), nothing was said or discussed about the surrender of appellant's preferred shares. That was discussed, according to him, after the agreement was executed and after the timber was turned back to the original vendor. Later, appellant agreed to surrender the shares. Respondent's managing director, on the other hand testified that "the object in getting back the shares was to carry out a deal proposed by Mr. Stoltze, that he would give me my shares for the timber." He also stated that

> he [appellant] made me a proposal that if I would give him back the Gibson's Landing timber, he would give me my $40,000 preferred shares back and cancel some other indebtedness. We agreed to that. It was all one transaction: one was the counterpart of the other.

The learned trial judge found "that the surrender of the shares and the transfer of the timber and equipment constituted one agreement." The agreement does not say so. The consideration therein expressed is one dollar. The resolution already mentioned refers to the surrender, not as consideration, but as a gift, and the resolution ratifying the agreement refers to the consideration not as the surrender of shares but "the consideration named in such agreement." However, in view of that finding, I base my conclusions of law on the state of facts so found, *viz.*, that the consideration for the restoration agreement was the surrender of the preferred shares. I do not think it makes any difference in the result. It only means the substitution of the surrendered shares for the one dollar mentioned as the consideration in the agreement, and one was as valuable as the other. All parties regarded the shares as of no value, and the timber as of no value. Their real concern was to secure relief from an agreement containing onerous covenants. The agreement reduced to writing dated January 31st, 1927, with its suggestive recitals correctly gives the clue to the real intention of the parties. Nothing is said about shares but the important feature paramount in the minds of the parties, *viz.*, relief and indemnity, is set out. Respondent was "unable to operate such licences advantageously" and the appellant was "desirous of obtaining repossession" for the purpose of carrying out his bargain to return it to the original vendor. The surrender of shares was regarded as of little account; merely inci-

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dental to the real transaction. What occurred constituted an arrangement or compromise of difficulties that arose between respondent Company and its largest shareholder. This is true whether the consideration is regarded as one dollar or as surrendered shares. We must regard substance rather than form, and base our consideration of the law applicable on the real character of the transaction.

On the facts as outlined, respondent obtained a declaration that the agreement with appellant providing, *inter alia,* for the surrender by appellant to respondent of four thousand fully paid preference shares of the par value of $10 each of the capital stock of respondent Company was an *ultra vires* agreement, illegal and void, and that the register should be rectified to replace appellant as holder of said preference shares, and also that respondent should receive from appellant the sum of $40,000 less certain allowances by way of counterclaim. It is anomalous that respondent, a voluntary party to all that occurred (and for its benefit) should not only be relieved from a bad bargain but also have its treasury replenished to the extent of $40,000. It was not damnified. It never had an asset of value at any time. The limits were commercially worthless. It was not and could not be despoiled of any real assets, yet it now secures a windfall of $40,000 and invokes its own alleged illegal acts as the basis of its action. The one possible grievance, if pressed, was misrepresentation as to the extent of timber on the limits, but no judgment for rescission was obtained or damages for deceit awarded.

From all the facts I draw the following conclusions: (a) That the "pith and substance" of the agreement impugned was a mutual arrangement by way of compromise, to escape liabilities, (b) that the incidental surrender of shares, treated as valueless even though part of the agreement, does not alter its true character; (c) that when the respondent parted with what it now alleges was an asset, *viz.,* rights acquired under the agreement of March 10th, 1923, it was in fact a liability; (d) that creditors were not affected prejudicially; (e) that there was no real reduction of capital; (f) that substantially the shares were surrendered by way of gift.

Section 43 (1) (*c*) of the Companies Act (R.S.B.C. 1924,

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Cap. 38) provides that "the company may by extraordinary resolution cancel paid up shares which are surrendered to the company by way of gift: and if the resolution so provides, diminish the amount of its share capital by the amount of the shares so cancelled"; also "a cancellation of shares in pursuance of this section shall not be deemed to be a reduction of capital within the meaning of sections 46 to 50." By subsection (4) such a resolution is not effective until filed with the registrar. The resolution referred to was filed with the registrar on the 10th of February, 1927. Sections 46 to 50 deal with the reduction of share capital with the sanction of the Court. Section 43 and its subsections deals with either the increase or cancellation of share capital by resolution and filing with the registrar without the sanction of the Court. Respondent followed the latter course, and substantially observed the provisions of the Act.

The learned trial judge referred to *Patterson* v. *Vulcan Iron Works* (1930), 42 B.C. 300. It has no application to the facts as found by the trial judge, but is of assistance when applied to the true facts. He held that the 4,000 preference shares obtained by appellant in consideration of the transfer to respondent of the timber agreement, were "really paid-up shares for which a sum of money or the equivalent of money had been paid." That is what was thought to have occurred when 55 shares were allotted to the plaintiff Patterson. It was thought that the true value of the assets turned into the Vulcan Iron Works was represented by 55 shares, *i.e.*, that they were fully paid, just as it is alleged in the case at Bar that the value of the timber rights transferred was truly represented by 4,000 fully paid preference shares. But in both cases subsequent events disclosed the true state of affairs, and the realization of the facts called for an adjustment or compromise. The alleged assets thought to be worth 55 shares, were in fact valueless, as the alleged asset represented by the timber agreement was valueless. There is no dispute in the evidence on this point. It was repeatedly asserted by all parties, and emphasized by counsel for respondent, that the agreement was of no value and never had any value. The true value (or lack of it) cannot be affected by the parties' original misconception. It was upon the discovery

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of this fact (as in the *Patterson* case) that the parties entered into the agreement held to be illegal: an agreement to compose a situation created by all parties, honestly, but mistakenly, regarding an asset as being of value. It is not therefore, with deference, correct to say as the trial judge found, that "the equivalent of money (*i.e.,* $40,000) had been paid" for those shares. As stated at p. 311 of the *Patterson* case, *supra*:

> If there is a surrender of shares issued as fully paid on the false basis that there was consideration and the shareholder and company mutually agree that the shares were in fact not paid for the consideration never having existed, the *status quo ante* may be restored by the parties.

True, something tangible was given in exchange for the shares. If the parties define and fix a certain property as the true value of a block of shares, that will, as Vaughan Williams, J. stated in *In re Wragg, Limited* (1897), 1 Ch. 796 at p. 812, fix their value unless the contract is set aside as fraudulent, but as intimated at the same page (*obiter*) if the parties admit that the property was worth only half the value assigned to it, would not the shareholder be held liable only for the balance? That in principle, is what occurred in this case: a mutual admission that the property for which 4,000 preference shares were issued, was of no value. If the timber lands were acquired to be enjoyed, *e.g.,* as a park, there would not be failure of consideration. These limits were acquired to be operated commercially, and they could not be so operated except at a loss. In such a case the law permits a company to compromise with a shareholder; otherwise it would be difficult to rectify a mistake of this sort.

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The paid-up capital must of course be kept intact available for creditors as the source of payment of their claims. That source in this case consisted, not of cash paid for the shares, but its alleged equivalent in property. Convertible assets in this form did not in fact exist. Capital may not be diminished except in certain legitimate ways. But real capital is not diminished by relinquishing something of no value, or by securing relief from liabilities. If respondent Company had used its funds, or its assets to purchase its own shares, the transaction could not stand. But it is an error to assume that the "pith and substance" of the real transaction was such a purchase. The

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real transaction was the composition of disputes with, not the purchase of shares, but their surrender involved and that merely as an incident to the larger design of escaping from onerous liabilities. True, if the rights of creditors were jeopardized it would be immaterial what the object in view was for this so-called purchase of 4,000 preferred shares paid for by so-called assets. The prohibition against purchase prevails in law because if a company could buy its own shares from its shareholders, the latter would receive repayment of the moneys subscribed, and cash or its equivalent formerly in the company's treasury would pass into the pockets of the shareholders. But surrender of shares stands on a different basis. A surrender is objectionable when it is equivalent to a sale. This surrender did not bring about a parting with assets of the company unless what was regarded and treated as a liability must be considered an asset. As in *In re Denver Hotel Company* (1893), 1 Ch. 495, the company did not part with a saleable asset in procuring the shares. At p. 505, Lindley, L.J. says:

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> Under these circumstances the transaction is not really a purchase by the company of its own shares; the transaction is really a sale by the company of some of its assets for less than their cash value, in consideration of a release from heavy burdens and of a surrender of shares, for which, however, it is parting with no saleable asset whatever.

Even if the shares in the case at Bar had not been surrendered, the bargain would be a good one for respondent. If, on the other hand, it is insisted that some value must be given to this asset, and if to the extent of that value the capital was incidentally diminished, it still does not follow that the transaction is void (*Trevor* v. *Whitworth* (1887), 12 App. Cas. 409 at p. 418). Each case must be decided on its own facts and I apprehend that the diminution in capital must not be fanciful or theoretical, but actual and substantial, before the transaction can be successfully attacked.

When a company purchases its own shares, the company itself becomes a shareholder and as Lord Watson pointed out in *Trevor* v. *Whitworth, supra,* at p. 424, that "is inconsistent with the essential nature of a company." Not so with a surrender of shares. It may cancel them and to the extent, not of their professed, but actual value, diminish the capital. If the shares were not cancelled but reissued and sold, the charge of trafficking in

shares might be encountered (*Alberta Rolling Mills Co.* v. *Christie* ((1919), 58 S.C.R. 208 at p. 219). That statement, however, is not intended, I think, to be of general application. When surrendered shares are ready to be reissued, still forming part of the capital and no resolution to increase the capital is required to enable them to be reissued, there would be no reduction of capital or trafficking involved in accepting the surrender with the right to reissue. If the shares may be reissued there can be no reduction of capital. But we need not consider that aspect: the shares were cancelled and the only point involved is —did their extinguishment bring about an illegal reduction of capital? The surrender of fully paid shares with return of the moneys paid is an illegal use of capital, but surrender involving no reduction is not (*Rowell* v. *John Rowell & Sons, Limited* (1912), 2 Ch. 609). The capital fund is cash received for shares or property. There was in reality a lack of both in this case. No money was paid and the property was valueless for commercial purposes.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *J. F. Downs.*

Solicitors for respondent: *Wood, Hogg & Bird.*

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ENFANTE v. ENFANTE.

Practice—Solicitor and client—Costs—Money paid into Court on garnishee order—Change of solicitors—Settlement of action by parties—Charging order—R.S.B.C. 1924, Cap. 136, Sec. 104.

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The plaintiff who had separated from his wife, claimed that while they were living together he had placed moneys in her hands aggregating $30,000 which she held in trust for him. He brought action to recover this sum and pursuant to a garnishing order moneys aggregating $12,876 was paid into Court. He then gave a written authority to his solicitor to settle the action as he saw fit and agreed to pay him $1,000 and his taxed costs. Subsequently the plaintiff, without the knowledge of his solicitor and without making any provision for his costs, compromised the action with his wife and changed his solicitors. The solicitor then applied for a charging order for his costs upon the moneys paid into Court under section 104 of the Legal Professions Act, and after his costs were taxed an order was made for the amount of his taxed costs and costs of the motion, but excluding the $1,000 that the plaintiff agreed to pay him. On appeal by the solicitor and cross-appeal by the defendant:—

Held, affirming the decision of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting as to cross-appeal), that the evidence justified the finding that there was collusion between the plaintiff and defendant to deprive the solicitor of his costs, but the agreement by the plaintiff to pay his solicitor $1,000 as a retainer over and above the taxed costs, while good as between the parties, is not part of the taxed costs and not capable of taxation in the bill of costs. Both the appeal and cross-appeal should therefore be dismissed.

APPEAL by *A. G. Duncan Crux*, former solicitor for the plaintiff, from the order of MCDONALD, J. of the 7th of April, 1931. The plaintiff had brought action to recover $30,000 from defendant and for an accounting. The plaintiff and defendant were married in December, 1920, but separated in August, 1929, and the plaintiff claims that during the time they were together he placed sums of money in his wife's hands from time to time, amounting in all to over $30,000 in trust for himself. The action was commenced on the 29th of January, 1931, and issue was joined on the 25th of February, 1931. Further proceedings were stayed pending an appeal from an order of FISHER, J. of the 2nd of March, 1931. A garnishing order was taken out by the plaintiff on the 29th of January, and moneys

Statement

aggregating $12,676 (held by the defendant in the Bank of Montreal and The Royal Bank of Canada) were paid into Court by the garnishees. On the 21st of March, *Crux* received notice that the plaintiff had engaged *G. S. Wismer* to act for him in place of the said *Crux*, and *Wismer* advised *Crux* that he had been instructed to settle the action. *Crux* then applied for a charging order on the fund in Court for his costs. On the hearing the application was adjourned and *Crux* was advised to have his costs taxed. Before action the plaintiff gave *Crux* a written order to settle the action for him on whatever terms he saw fit, and agreed to pay him $1,000 and his taxed costs. The registrar taxed the costs at $1,656.45. On the rehearing of the application for the charging order, an order was made giving *Crux* a charging order against the fund in Court for $656.75, to which was added $75 for the costs of the application. The applicant appealed and the defendant gave notice of contention that *Crux* was not entitled to any charging order.

Statement

The appeal was argued at Victoria on the 22nd of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

C. W. Craig, K.C., for appellant: It was found that the change of solicitors and the settlement was made to defeat *Crux* of his costs. In carrying out the settlement the defendant's money being in Court, they borrowed $3,000, and this was found to be a collusive transaction. The bill was taxed at $1,656.75, but the learned judge below would not allow the $1,000 that the plaintiff promised to pay *Crux*. This was not champertous as there was no arrangement to divide proceeds: see *Arbuthnot* v. *Hill* (1927), 39 B.C. 81 at p. 82. There was no appeal from the taxation, it is therefore final and conclusive. Solicitor and client can make a bargain for a lump sum for costs. The arrangement was a legal document and should be given effect to: *Moxon* v. *Sheppard* (1890), 24 Q.B.D. 627.

Argument

Sloan, for respondent: We dispute the statement that there was collusion, and he cannot recover from defendant: see *Bigford* v. *Squirrell* (1921), 2 W.W.R. 739; *Price* v. *Crouch* (1891), 60 L.J., Q.B. 767 at p. 769; *Beatty* v. *Neelon* (1886), 13 S.C.R. 1 at p. 5. He must shew the defendant was a party

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to attempting to deprive him of his costs. The fund in Court is not subject to the plaintiff's costs. He must first succeed in the action before he has a charge against it: see *Miller* v. *Wollaston* (1929), 41 B.C. 145 at p. 147. He must shew he failed to recover from the primary debtor: see *Phillips and Scarth* v. *London Guarantee & Accident Co., Ltd.* (1927), 2 W.W.R. 570; *Greer* v. *Young* (1883), 52 L.J., Ch. 915. Collusion must be in the minds of both: see *Royal Bank of Canada* v. *Mars* (1930), 1 W.W.R. 262.

Argument

Craig, in reply, referred to *Campbell River Lumber Co.* v. *McKinnon* (1922), 64 S.C.R. 396.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.: I think there was collusion between the plaintiff and the defendant to deprive the solicitor of his lien for costs. Moreover, I think there was sufficient evidence of notice to the defendant that the solicitor's costs were not paid and that what was agreed upon would result in defeating his lien. Why else should the defendant take an indemnity against the claim for costs?

MACDONALD, C.J.B.C.

The agreement by the plaintiff to pay his solicitor $1,000 as a retainer in the action over and above taxed costs, while perfectly good between the parties, is not, I think, part of the taxed costs and therefore not binding upon the defendant nor capable of taxation in the bill of costs.

I would, therefore, dismiss the appeal and the cross-appeal.

MARTIN, J.A.: In this case the former solicitor of the plaintiff got an order from Mr. Justice D. A. MCDONALD under section 104 of the Legal Professions Act, Cap. 136, R.S.B.C. 1924, declaring him entitled to a charge for $656.45, being his taxed costs, upon the sum of $12,876 then in Court having been paid in, pending the determination of the action, by the garnishees, two banks, being creditors of the defendant to that extent, under orders obtained by the said plaintiff's solicitor on the 29th of January, 1931, the writ having been issued the same day; and statement of claim delivered on 21st of February; defence on the 24th; and joinder of issue on the following day.

MARTIN, J.A.

On the 20th of March the plaintiff gave notice of change of his solicitor and of discontinuance of the action, which was the result of an agreement for settlement made by the parties (who are husband and wife though living separate and apart since August, 1929) on the 19th of March, as appears by a cheque for $3,000 given by the defendant Paolo Girone on that day pursuant to the terms of agreement between husband and wife "to settle all matters in dispute," and a concurrent one between the wife and Girone reciting that Girone

has been acting on behalf of the said William Enfante in the said settlement and has been largely instrumental in bringing about such settlement; AND WHEREAS in the course of the said action the said William Enfante has incurred certain legal costs, payable to his solicitor on record in the said action . . .

And going on to provide

1. Should the party of the first part [the defendant wife] be required to pay any sum of money whatsoever over and above the amount agreed upon in settlement between herself and her said husband, the party of the second part [Girone] covenants and agrees to assume the said obligation, whether the same be payment of the aforesaid legal fees of the aforesaid William Enfante, or otherwise, and to indemnify and save harmless the party of the first part from any liability to pay the same.

The only sum that Mrs. Enfante had agreed to pay under the written agreement for settlement with her husband, the plaintiff, was one dollar, and for that she obtained a general release of all demands and a particular release of the said pending suit and a covenant that the plaintiff would "at once" discontinue it and release to her "all the aforesaid moneys on deposit in the Supreme Court of British Columbia under the aforesaid attachment proceedings." There is no covenant in that agreement that the wife should pay the husband's costs, but she says in her affidavit that on three different occasions her husband accompanied by one *Branca,* a solicitor, came to her house to endeavour to settle the case and that she referred them to her solicitor, but finally:

4. On the 19th day of March, 1931, the said Mr. *Branca* and my said husband, Paolo Girone and Eugene DePaola came to my residence and talked about settlement of this action to me. During the course of the conversation *Branca* said to me "You had better make a settlement for $3,000. If you pay this you are free of everything. Enfante (*i.e.*, my husband) will pay all his own expenses." My husband then said, "I will pay all my expenses." Girone then said to me "If he (meaning Enfante) doesn't pay the lawyer (meaning Mr. *Crux*) I will."

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She proceeds to say that she finally agreed to this settlement but insisted that her solicitors should prepare the papers, and that:

> 8. In order to allow Girone to carry out his agreement with me and to make sure that Mr. *Crux* was paid, I made a cheque payable to the said Girone for $3,000.
>
> 10. I have at no time made any collusive arrangements with my husband or with anyone else for the purpose of defeating the claim of Mr. *Crux* for his costs.

It is impossible, to my mind, to find that on these undisputed facts there was any collusive agreement on the part of the defendant; on the contrary, from what is before us it would appear that she, alone and without assistance, was finally badgered by the four men into making an agreement and handing over an extravagantly large sum of money to a person not entitled to it, contrary, on the evidence, to her best interests.

She had, moreover, every reason to believe *Branca* to be acting at large as or for the plaintiff's solicitor, because the present claimant, while denying that *Branca* was empowered to make any settlement (which was quite unknown to him, he avers) yet admits, paragraph 6, that he had on his client's (plaintiff's) instructions employed *Branca* "for the purpose of securing certain evidence to be introduced at the trial thereof"; but how was Mrs. Enfante to know the limit of *Branca's* authority when he came to her repeatedly with the plaintiff himself and in the absence of her own solicitor? If as the result of his activities the position of the parties became equivocal it is assuredly not Mrs. Enfante who can be held responsible for being misled thereby, but the person who employed him, the solicitor upon the record. These exceptional circumstances make the case a peculiar one and quite apart from those which have been cited to us, or which I have examined in addition. In the true sense of the words of the statute the claimant has not "recovered or preserved" any "property" in the "prosecution" of the action because it was discontinued, and the defendant thereupon became entitled to the repayment of her money out of Court which had been paid into Court on an unfounded claim.

MARTIN, J.A.

Looking at the substance of the matter, it would be a strange thing if the result of the defendant's *bona fide* and even disadvantageous settlement (as appears from the record) would be

that in addition to the payment of the preposterous sum of $3,000 to Girone, to over secure by about five times the payment of her husband's costs (which is striking evidence of her *bona fide* intentions as well as of her being over-reached) her property in Court should also be charged to secure them; that certainly does not "appear just and proper" in the language of the section.

It was submitted, and very plausibly, by Mr. *Sloan*, that the proper fund to charge, under these circumstances, was that in Girone's hands, who is upon all the facts a trustee also for the plaintiff as well as guarantor for the defendant (which submission receives support from *Greer* v. *Young* (1883), 24 Ch. D. 545), but it is not for us to find the proper remedy for the claimant if the one invoked is without the statute, as is my opinion after a careful consideration of the whole peculiar situation.

I have not overlooked the two other substantial objections to the validity of the solicitor's charge, but in the view I take of the matter they need not be further considered, though as regards one of them, it may be remarked that, apart from any legal obligation (which is urged as essential) the most ordinary precaution would have suggested to the ex-solicitor the desirability, at least, of making an immediate demand upon the plaintiff for his costs, and particularly so because of the special contract under which he not only claims, by his appeal, the further sum of $1,000 in addition to his said taxed costs, but also the right to negotiate a settlement of the plaintiff's cause of action as appears, by the contract, made after the issue of the writ and a week before the settlement complained of, *viz.*:

MARTIN, J.A.

Vancouver, B.C.,
March 12, 1931.

Mr. A. G. Duncan Crux,
Barrister and Solicitor,
535 Georgia St. West,
Vancouver, B.C.

Re Enfante v. *Enfante*

Dear Sir:

I hereby authorize you to settle this action for me on whatever terms you see fit, and I agree to pay you the sum of One Thousand Dollars ($1,000) and your taxed costs.

I further authorize you to receive any moneys payable under the said

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MARTIN, J.A.

settlement, in your name and to retain out of the said fund your fees as agreed, and pay me the balance.

Yours truly,
W. Enfante.

This would in any event introduce elements of great difficulty into the question of the amount of the charge as against the defendant, who is an entire stranger to that special bargain, if it had to come to a consideration of that aspect of the matter, but in accordance with my said view it does not arise.

The appeal, therefore, should, in my opinion, be dismissed and the cross-appeal allowed upon the grounds above set forth.

GALLIHER, J.A.: In this case I think the contract to pay $1,000 over and above taxed costs is a matter for action to recover that sum, and does not come within the provisions of the Legal Professions Act so as to create a lien in favour of the solicitor.

The learned judge was, I think, right and the appeal against that ruling should be dismissed.

The respondents filed a notice of contention which was argued before this Court upon the hearing of the appeal asking that the several sums of $656.45 and $75 be repaid by the appellant to the respondent.

GALLIHER, J.A.

Notwithstanding that the defendant (respondent) swears she did not collude with the plaintiff to deprive the solicitor of his costs, I would find on the evidence that she did so, and the learned trial judge was justified in so finding. Take the circumstances—the plaintiff, the defendant, and some of their friends meet behind the back of the plaintiff's solicitor and without his knowledge and a settlement is effected. A change of solicitors is made at or about the same time for what reason it seems hard to understand as a settlement was effected and all that was necessary was for defendant to issue her cheque payable to the solicitor in which case the $3,000 would have reached the proper party to deduct therefrom whatever he was entitled to, but instead of doing this they resorted to the round about way of issuing a cheque for that amount to one Paolo Girone and taking a bond of indemnity back. Girone cashed the cheque and doubtless the proceeds have found their way to where it was intended they should. These circumstances convince me

that the plaintiff, the defendant and their friends put their heads together to devise a scheme to relieve the plaintiff from what he considered was an onerous agreement he had made with this solicitor—and that there was collusion on the part of the defendant.

The defendant's solicitor as I take it in drawing up the release and indemnity document merely acted upon instructions as to the settlement and how they wished it carried out and do not in my view in any way assist the defendant.

GALLIHER, J.A.

I would dismiss the cross-appeal.

I notice that the order of the learned judge below preserved in Court the sum of $2,000. If the taxed costs and the item of $75 have already been paid as I assume they have this sum of $2,000 should now be paid out to the defendant.

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I am in entire agreement with my brother MARTIN and would dismiss the appeal and allow the cross-appeal.

MACDONALD, J.A.

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

Appeal and cross-appeal dismissed, Martin and McPhillips, JJ.A. dissenting as to cross-appeal.

Solicitor for appellant: *A. G. D. Crux.*

Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

FISHER, J. (In Chambers)

1931

Sept. 14.

MORGAN v. MORGAN

MORGAN v. MORGAN.

Courts—Small Debts Court—Appeal—Rehearing—Evidence.

An appeal from the Small Debts Court is by way of a rehearing and the Court has power to receive evidence on questions of fact even of witnesses not called at the trial.

Malkin v. *Tobin* (1900), 7 B.C. 386 followed.

Statement

APPLICATION by way of appeal for an order to set aside a judgment of the Small Debts Court, dismissing the action, and for an order that judgment be entered for the plaintiff, the main ground of appeal being that the stipendiary magistrate erred in finding that the agreement sued on was against public policy. Heard by FISHER, J. in Chambers at Vancouver on the 22nd of July, 1931.

Crux, for plaintiff.

Coulter, for defendant.

14th September, 1931.

Judgment

FISHER, J.: With regard to the preliminary objections I find it unnecessary to decide whether or not section 73 of the County Courts Act applies as in any event I think the grounds of the appeal are such that the matter might well remain in the Supreme Court. An appeal from the Small Debts Court however is by way of a rehearing and the Court has power to receive evidence on questions of fact even of witnesses not called at the trial. *Malkin* v. *Tobin* (1900), 7 B.C. 386. By section 50 of the Small Debts Court Act it is provided that "on every such appeal the Court to which the same is taken shall try and determine the question in dispute." I do not think that the Act means that such a trial shall take place in Chambers and my view is that the case should be placed on the trial list for hearing on such suitable day as the registrar shall in writing appoint and a copy of said appointment served upon all parties concerned in the usual way. I direct accordingly and would like to add that I do not consider myself further seized of the matter.

Order accordingly.

SANFORD v. CROSSLEY.

MURPHY, J.

1931

Sept. 14.

Damages—Negligence—Action under Lord Campbell's Act—Motor accident —Death of son five years old—Pecuniary loss necessary—Evidence.

In order to succeed in an action under Lord Campbell's Act it is necessary for the plaintiff to shew that he has lost a reasonable probability of pecuniary advantage.

SANDFORD v. CROSSLEY

ACTION for damages owing to the alleged negligence of the defendant. The action was brought under Lord Campbell's Act by the parents of a five-year-old boy who was struck by the defendant's motor-car and killed. The plaintiffs could recover only pecuniary loss, and the only evidence of any pecuniary loss was that the boy was very bright and obedient, was used to opening garage doors for the parents, start his father's motor-car for him and was of assistance in other minor ways. Tried by MURPHY, J. at Vancouver on the 12th of September, 1931.

Statement

L. H. Jackson, for plaintiffs.

Alfred Bull, for defendant, referred to *Barnett* v. *Cohen* (1921), 2 K.B. 461.

14th September, 1931.

MURPHY, J. (oral): On the first point in this action, I find that there is no evidence that the plaintiffs suffered any loss as a result of the death of the child because of services that the child had been rendering previous to his death. Now, with regard to the future, unless it is to be laid down that every time a child of four or five years of age meets with death as the result of an accident there is to be recovery of damages, I cannot conscientiously say that there is evidence here of any reasonable probability that either of the plaintiffs would receive pecuniary benefit from this boy. As was stated in the case that Mr. *Bull* cited, it is a matter of contingency upon contingency. Conscientiously I cannot say that there is any such proof as is required of pecuniary loss.

Judgment

With regard to the second point, I find the facts as follows: The defendant Crossley was driving at a rate of speed not more

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than 20 to 25 miles an hour. I cannot reconcile Drysdale's evidence, which I fully credit, with any higher degree of speed. I find that the little child, unfortunately, ran across in front to his father, a natural thing under the circumstances for him to do, if he did not see the car. Now, where is there any evidence of Crossley's negligence? I find that Crossley was well over to the west side of the cement strip. His duty under those circumstances, I suppose, would be to look ahead. He was looking ahead. The matter of the skidmark has given me some pause, but I think common sense will lead any person to the conclusion that it is pretty hard to declare what a motor-car will do under such circumstances. It depends on so many things as to what skidmarks a car may leave. At any rate, as far as I can see, in the face of my findings of fact, there is no proof of negligence on the part of the defendant Crossley here, and the action is dismissed with costs.

Judgment

Action dismissed.

FISHER, J.

1931

Oct. 5.

MORGAN v. MORGAN. (No. 2).

Husband and wife—Separation agreement—"Separation with a view to later living together again"—Validity.

MORGAN v. MORGAN

A separation agreement between husband and wife "prospectively looked" to the parties living together again.

Held, that as there was no provision for a future separation thereafter the agreement was not void as against public policy.

Westmeath v. *Salisbury* (1831), 5 Bligh (N.S.) 339 applied where it was held that an instrument which provides for a future separation and which prospectively looks to the parties living together again and then to a future separation, will not be given effect to by the Courts.

APPEAL by plaintiff (wife) from the judgment of C. L. Fillmore, Esquire, stipendiary magistrate of the Small Debts Court of the County of Vancouver dismissing the plaintiff's action on a separation agreement on the ground that the agreement was void as being against public policy and uncertain.

Statement

Heard by FISHER, J. at Vancouver on the 30th of September, 1931.

Donnenworth, for plaintiff.
Coulter, for defendant.

5th October, 1931.

FISHER, J.: This is an appeal by the plaintiff from the judgment of C. L. Fillmore, Esquire, stipendiary magistrate of the Small Debts Court of the County of Vancouver, dismissing the plaintiff's action against the defendant on the ground that the agreement was void as being against public policy and uncertain.

Upon the trial before me it was first contended on behalf of the defendant that the agreement was, or should be declared, void on the ground that the defendant had been induced to enter into the agreement by fraud, duress or undue influence but I find there was no foundation for this contention.

It was also contended on behalf of the defendant that in any event there had been a breach by the plaintiff of the covenant contained in paragraph 5 of the agreement as hereinafter set out and that the defendant was thereby exonerated from any further performance of his covenant.

Judgment

I find that under all the circumstances the plaintiff substantially complied with the covenant but if I should be wrong in this, my view would be that the covenants are independent of each other and that in any event the plaintiff did not act in a manner wholly inconsistent with the objects of the agreement and in such a case the defendant would not be exonerated from liability under the agreement. See *Fearon* v. *Earl of Aylesford* (1884), 14 Q.B.D. 792.

In my opinion the real issue between the parties herein is whether or not the agreement is void as being against public policy or uncertain.

The material parts of the agreement dated March 13th, 1931, read as follows:

(1) That the parties hereto agree to live separate and apart from each other, and not to interfere or molest or in any way annoy each other henceforth from the date hereof, and is not to take any action against each other in any way, either for restitution of conjugal rights or otherwise save and

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except any matrimonial offences, this agreement shall not be deemed to be a bar to divorce proceedings.

(3) The party of the first part agrees to pay to the party of the second part the sum of $30 and 'phone and light bills and instalment on radio during the first month of the separation hereunder. Should the separation continue after that date, the party of the first part agrees to pay the party of the second part the sum of $50 per month in each and every month during the continuance of these presents.

(5) The parties hereto agree and covenant with each other that they will attend at . . . on the 13th day of April, A.D. 1931, at the hour of twelve (12) o'clock noon, and will then and there rediscuss their differences with a view to resuming cohabitation as man and wife on an amiable basis. And the parties hereby agree and covenant with each other, that during the first month of this separation that they will in a *bona fide* manner endeavour to modify any bitter feelings that may at present exist between them and to meet in a friendly manner, to have a free discussion with a view to resuming cohabitation as aforesaid.

Both counsel relied on the case of *Westmeath* v. *Salisbury* (1831), 5 Bligh (N.S.) 339 and it seems to be common ground that an agreement between husband and wife to live apart, whether with or without cause, is not considered contrary to public policy but is valid and enforceable, provided it is made in contemplation of and is followed by, an immediate separation. Halsbury's Laws of England, Vol. 16, sec. 899.

Judgment

Counsel on behalf of the defendant submits that the insertion of paragraph 5 shews that the agreement was not "made in contemplation of or followed by an immediate separation" but that the effect of the whole agreement is such that it might be termed a "trial separation" agreement and is therefore contrary to public policy. On the other hand it is submitted by counsel on behalf of the plaintiff that, in any event even without such a covenant as is contained in said paragraph 5, the parties might have become reconciled and that the agreement, though containing paragraph 5, does not provide for a future separation if the parties have been reconciled and lived together again and therefore is not invalid or unenforceable as contrary to the principle laid down in the *Westmeath* case, *supra*, where, at p. 367, the Earl of Eldon said:

I apprehend also, . . . any instrument which provides for a present separation, and which prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect; the coming together after the first separation being looked upon as what the civilians call a condonation, and that being held, in such case, to put an

end to all separate provision, though that separate provision was to be enjoyed in a future separation according to the terms of the instrument itself that provided for the first separation.

Elsewhere Earl Eldon says at p. 375:

. . . but the Courts have said over and over again, If there is not to be a present immediate separation, the deed will not do; if there is to be a present immediate separation, and the deed provides for future separations, the deed will not do as to future separations, because as soon as the parties come together again, at that moment there is an end both with respect to the future, and with respect to the past, separation.

And at p. 366:

. . . it is an agreed fact, that when that instrument was executed there was no separation, indeed there could be no separation consistently with that deed, because it looks forward to the idea of a future separation, and excludes the idea of a present separation. . . .

And at p. 411:

After that deed had been executed, the parties lived together again; the consequence of which is, that although there had been a valid separation, their living together again annulled it.

Judgment

Having carefully considered the *Westmeath* case I have come to the conclusion that the separation agreement in the present case is a valid one and should be sustained. I hold that the agreement is not void for uncertainty and I find that when the agreement was executed there was a separation consistently with the agreement and not excluded thereby. It is admitted that the parties never lived together again and, although it might be said that the agreement "prospectively looks" to the parties living together again, it does not provide for a future separation thereafter and therefore is not within the principle laid down as to future separation or condonation.

The appeal is therefore allowed and with all respect I would remit the case back with instructions to enter judgment in favour of the plaintiff.

Appeal allowed.

FISHER, J.

1931

Sept. 15.

WYLLIE v. MARTIN.

WYLLIE
v.
MARTIN

Divorce—Foreign divorce of persons domiciled abroad—Validity in Canada—Foreign law—Evidence of—Foreign decree—Validity of divorce in British Columbia.

The petitioner (husband) was married to the respondent in Chicago, State of Illinois, U.S.A., in March, 1930. The respondent had been married to one Thomas at Portland in the State of Oregon, U.S.A., in November, 1918, but after divorce proceedings commenced by her in November, 1919, in the State of California, U.S.A., on the ground of wilful desertion by her then husband, which is a ground for divorce under the California Code, the said marriage to Thomas was dissolved by a final decree obtained in July, 1922. The petitioner seeks a declaration that the marriage celebrated between himself and the respondent is null and void *ab initio* as she was then the wife of Thomas as at the date of the commencement of said divorce proceedings the matrimonial domicil of the parties was in the State of Oregon. At the time the action for divorce was commenced Thomas was domiciled in the State of Oregon, and the respondent had lived for a year and a half prior thereto in the State of California.

Held, that the Courts in Canada will recognize the binding effect of a decree of divorce obtained in a foreign country against a husband domiciled outside Canada, although he was not domiciled in the country of the Court which granted the decree, if the Courts of the country of his domicil would recognize the validity of the decree, but in this case the husband was domiciled in the State of Oregon when the wife obtained a decree of divorce in the State of California, and as the evidence was that the Court of the husband's domicil (*i.e.*, Oregon Court) would not recognize the divorce which had been obtained without further inquiry, the California divorce will not be recognized here, and the marriage celebrated between the petitioner and the respondent is void *ab initio*.

Statement

PETITION for a declaration that the marriage celebrated between the petitioner and the respondent at Chicago, Illinois, U.S.A., on the 13th of March, 1930, is null and void *ab initio* by reason of the respondent then being the lawful wife of one J. Oren Thomas who was alive on and after the 13th of March, 1930. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 23rd of June, 1931.

Maitland, K.C., and *St. John*, for petitioner.
Van Roggen, and *McLorg*, for respondent.

15th September, 1931. FISHER, J.

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FISHER, J.: The petitioner (husband), domiciled in this Province, seeks a declaration that the marriage celebrated between himself and the respondent at Chicago in the State of Illinois, U.S.A., on the 13th of March, 1930, is null and void *ab initio* by reason of the fact (alleged) that she was then the (lawful) wife of one J. Oren Thomas who was alive on and after the said 13th of March, 1930. The respondent admits that she was lawfully married to the said Thomas at Portland in the State of Oregon, U.S.A., on the 29th of March, 1918, but claims that her said marriage to Thomas was dissolved by a final decree obtained on the 19th of July, 1922, following an interlocutory decree on November 21st, 1919, after divorce proceedings commenced by her on November 10th, 1919, in the State of California, U.S.A., on the ground of wilful desertion of the plaintiff by her said husband which is a ground for divorce under the California Code (section 92). The petitioner pleads that she was nevertheless still the wife of the said Thomas on the said 13th of March, 1930, forasmuch as the alleged divorce of the respondent from the said Thomas was procured by fraud and collusion between the parties thereto and the Court of California was without jurisdiction to grant the said divorce by reason of the fact that at the date of commencement of the said divorce proceedings the matrimonial domicil of the parties thereto was in the State of Oregon, U.S.A.

Judgment

Thus the issue as to the validity of the marriage between the petitioner and respondent herein depends upon the validity of the said divorce between the respondent and the said J. O. Thomas, both of whom were natural-born Americans and were American subjects in 1919.

Counsel on behalf of the respondent criticizes the conduct of the petitioner but I cannot see that this assists me to decide the issue arising under the circumstances of the present case and in this connection might quote the remarks of Riddell, J. in *Cromarty* v. *Cromarty* (1917), 39 O.L.R. 571 at p. 573 where he says:

> Nor is he estopped, by the fact . . . from saying that the divorce was and is invalid—the relationship of husband and wife is of such great public importance that the doctrine of estoppel cannot here apply.

I find as a fact that at the time the action for divorce was commenced by Mrs. Thomas in the California Court, Thomas was domiciled in the English legal sense in Oregon, U.S.A., and

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also that Mrs. Thomas had lived for a year and a half prior thereto in California. From the evidence of the two California attorneys called I also find as a fact that the decree is final and conclusive according to the law of California and that it cannot be attacked collaterally by a third person or by either of the parties in California.

In one portion of his argument on behalf of petitioner (if I understand it correctly) Mr. *Maitland* cites two decisions in our own Courts tending to shew that the California decree would be recognized in our Courts only if the husband had a domicil in California in the English legal sense when the proceedings were instituted but I think he elsewhere concedes and I would hold that our law is that our Courts will recognize the binding effect of a decree of divorce obtained in a foreign country even though the husband was not domiciled therein if the Court of the country of his domicil would recognize the validity of the decree, so that the law of Oregon must be considered. See Brown & Watts on Divorce, 10th Ed., 199 citing *Armitage* v. *Attorney-General* (1906), P. 135.

Judgment

At the trial oral evidence as to the American law was given by an Oregon attorney, Mr. Veazie, called on behalf of the petitioner, and it was further agreed on the request of counsel for respondent, in order to expedite the matter, as he had no Oregon attorney then available here as a witness, that he should be allowed to submit a written argument on American law and authorities quoted should be accepted as having been proven by oral testimony. A memorandum of Messrs. R. W. Wilbur and Francis E. Marsh, Oregon attorneys, and a supplemental argument on certain cases by Mr. Veazie in reply thereto have now been submitted and I accept same accordingly as though proven by oral testimony and direct that they be filed as part of the record and marked as exhibits in the same manner as Exhibit 12.

The evidence of the experts as to what the Oregon law is or what an Oregon Court would hold under certain circumstances is contradictory on some, though I do not think, on all phases of the matter.

Different views have been put forward as to the meaning of the terms "domicil" or "residence," as to the right of the wife to acquire a separate domicil or residence and the right of the

petitioner herein to collaterally attack the California decree. If I may be permitted to do so, I would like to say that my position is somewhat similar to that of the Court in *Bater* v. *Bater* (1906), P. 209 where, at pp. 215-17, Sir Gorell Barnes says:

Those, I understand, are the two opposing views of the law of New York that are presented for consideration in this case. Now I feel it is practically impossible for me to reconcile those two views: and I feel that one is presented with a serious difficulty, because one has, so to speak, to place oneself in the same position as a judge in the State of New York would be in if this point was raised before him—in other words, to ascertain, through him, what is the rule he would apply in deciding this case; because it is said by both counsel that there is no authority on the subject in the State of New York—no definite decision one way or the other—and that it is, therefore, except so far as the experts express their views about it, an open question, and it is of very little use to go through the evidence which has been given about the matter in detail. I think I have sufficiently stated it in the course of what I have said. From the petitioner's point of view it is very clear. Mr. Barratt gave evidence, a short summary of which I have taken down, and it is this: General residence is tantamount to domicil; a wife may prove a separate domicil in cases of necessity—which, I understand him, is the principal object of introducing the 3rd and 4th subsections of s. 1756. This does not prevent her claiming his domicil as hers, and for that proposition he claims the authority of *Hunt* v. *Hunt* (1878), 72 N.Y. 217; 28 Am. Rep. 129. On the other side it is not necessary to read the evidence. It is very clearly stated by Mr. Crane as involving two separate permanent domicils. That being the state of things, it seems to me that I have to ascertain, so far as lies in my power, upon what principle of law the Courts of New York would endeavour to solve this problem. I cannot help thinking there would be this consideration in the outset to guide them. In a case such as this it is said that the wife could maintain a suit in this country (assuming, of course, that she had not been barred by previous matters) against a husband who has separated and gone to America and become domiciled there; and there are many cases in which that has been allowed in undefended cases. I am not at the present moment aware—and I would desire to reserve any careful consideration of that point—how that matter would be treated if the case were really put on the domicil of the husband abroad. But in many of the undefended cases what happens is, that the wife is deserted in England. The husband goes to America, nothing is heard about him, and the Court, in order to do justice, either acts upon the view that the husband has not come forward to prove another domicil, and possibly could not be heard to say that he had another domicil when he deserted his wife in this country; or, as some have thought, that a woman may be treated as having been left in a separate domicil of her own, and, to do justice, she is not bound to follow the husband all over the world from place to place, and so may get relief in this country. However, that may be, that is a difficult point, and one which does not in the least, to my mind, oust the foreign Court, assuming that it has jurisdiction, from saying, If you have come to our Court and

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your husband is domiciled here, we will, apart from our statutory difficulties, give you relief. Then, supposing that case is presented to the Court in New York, the Court would very naturally say, Apart from being tied by the section, your husband is domiciled here; his home is here, and *prima facie* yours is here. You have come here to pursue him and obtain your remedy. Why should that remedy be withheld because, if you succeed, you propose to return to your own country? I should have thought myself, as a matter of justice, expediency and convenience, it was very proper to allow a suit to be entertained in a foreign country in these circumstances, and I cannot help feeling that considerations of that character would weigh very considerably with a judge in the State of New York in deciding whether under such a term as the term "Resident" he was to exclude the petitioner from her right to maintain a suit. After giving this matter my best consideration, and endeavouring to decide partly as a matter of principle in the difficulties in which I am placed and partly guided by the evidence that has been given . . . I have come to the conclusion that this suit could have been maintained in the State of New York, and therefore, if that is the only question to be determined, that the decree was a good decree.

Mr. *Van Roggen* of counsel for the respondent contends that there is a great difference between British and American law in regard to the legal conception of domicil and submits that in order to understand certain statements in the evidence of Mr. Veazie and in some of the cases cited the word "residence" must be substituted for the word "domicil." It is pointed out that Mr. Veazie in the course of his evidence makes the following statement:

Judgment

> Generally speaking, so far as I am acquainted with the holdings of the Courts in the American States, the term domicil and residence seems to be of the same meaning—that is, synonymous. The State of Oregon so treats the words.

It is submitted that Mr. Veazie here and elsewhere in his evidence, wherein he refers consistently to domicil, had in mind the American conception of domicil meaning only *bona fide* residence or principal establishment or "technically pre-eminent headquarters" which latter expression is found in what may be called a definition of the word "domicil" by Mr. Justice Holmes in *Williamson* v. *Osenton* (1914), 232 U.S. 619 where at p. 265 he stated:

> The very meaning of domicil is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined.

Mr. Dorn, California attorney, also states in his evidence that the terms "domicil" and "residence," as used in the State of California (in divorce matters) are synonymous. Mr. *Van*

Roggen also very forcibly, and quite properly so, stresses the fact that the word "resident" or "residence" is used in both the Oregon and California codes in the sections providing for the granting of divorce.

In the Oregon Code, 1930, we have section 6-910 (apparently formerly section 509, L.O.L., as cited in the *Miller* v. *Miller* case, *infra*) reading thus:

> In a suit for the dissolution of the marriage contract, the plaintiff therein must be an inhabitant of the State at the commencement of the suit, and for one year prior thereto; which residence shall be sufficient to give the Court jurisdiction, without regard to the place where the marriage was solemnized, or the cause of suit arose.

In the California Code we have section 128 reading in part as follows:

> A divorce must not be granted unless the plaintiff has been a resident of the State one year and of the County in which the action is brought three months, next preceding the commencement of the action.

Mr. *Van Roggen* points out that in both the Oregon and California sections the word "plaintiff" is used denoting either a husband or wife—plaintiff—and contends that all a wife has to do in either State to confer jurisdiction on the State Court is to prove residence for one year. In this connection Mr. *Van Roggen* refers to the Oregon case of *Shepro* v. *Shepro* (1931) and the judgment Roll is produced shewing that the Court granted a final decree of divorce to a wife testifying to a year's residence in the State though the husband had never been even a resident of the State of Oregon and the plaintiff (wife) admitted she intended to return to the State of Washington where the husband's domicil apparently was. It should be noted however, as pointed out by Mr. Veazie, that in the *Shepro* case the wife testified to wilful desertion on the part of the husband without any justifying cause for more than seven years and that the contention on behalf of the petitioner here is not that by the law of Oregon a wife cannot under any circumstances acquire a domicil or residence (necessary to give the Court jurisdiction) different from that of her husband but that the common law prevails in Oregon and that by that common law as interpreted by the Supreme Court in *Miller* v. *Miller* (1913), 67 Or. 359; 136 Pac. 15 a wife cannot acquire a separate domicil or residence without a justifying cause. It must also be noted that the

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California Code would appear to have a provision not in the Oregon Code, *viz.*, 129 reading as follows:

In actions for divorce neither the domicil nor residence of the husband shall be deemed to be the domicil or residence of the wife. For the purpose of such an action each may have a separate domicil or residence depending upon proof of the fact and not upon legal presumptions.

In a portion of his evidence Mr. Veazie says in answer to questions as follows:

Assuming it is correct—where would you say, at the time these proceedings were commenced—the Thomas divorce proceedings—the witness Thomas was domiciled? I would say on the evidence that I have heard that both parties were domiciled in the State of Oregon.

That both parties were? Yes.

And that is according to the law of Oregon, is it? That is according to the law of the State of Oregon, yes.

Now, did the law of the State of Oregon which was in force at the time this action commenced, permit a wife to have a separate domicil than that of her husband—I am speaking of the Thomas and Thomas action—at that time? I think I should perhaps answer that question rather fully. In the year 1845 the Territorial Legislature of the State of Oregon adopted an Act providing that the common law of England should be—I had better give the exact wording of it—that Act was passed on the 12th of August, 1845. Section 2 of the Act reads as follows: "That the common law of England shall in all cases govern where no statute law has been made or adopted." The Constitution of the State of Oregon was adopted on September 18th, 1857, and Oregon was admitted to the union on February 14th, 1859, under that Constitution. That Constitution provides that in article 18, sec. 7—it reads as follows: "Section 7. Former Laws in Force. All laws in force in the territory of Oregon when this Constitution takes effect and consistent therewith, shall continue in force until altered or repealed." By virtue of that section of the Constitution and the fact that the common law had been adopted by the territory and was in effect at the time the Constitution was adopted, the common law of England applies in the State of Oregon in all cases except where it has been modified.

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Where there has been no statute made? Yes, in respect of the domicil of the wife.

Yes? And therefore at least until a good cause for separation is shewn, the domicil of the wife remains the domicil as of the husband, the same as it would in England.

Let me put this to you before you go any further and let me get this clear. As I understand you then your law is this: That the common law of England shall in all cases govern except where there is no statute law made or adopted? That is the law of Oregon.

And no statute law has been made or adopted in respect of the domicil of the husband or wife in Portland, Oregon? That is true also.

In the State of Oregon? Yes.

Questioned as to the effect or bearing upon the present case of

the California law, Mr. Veazie says in answer to questions in part as follows:

Would you still be of the opinion, assuming the law of California to be as now clarified by section 129 of its Code and assuming the wife to have established a *bona fide* residence qualifying her under this section in California to be domiciled in California—is it your opinion, that the fact that she was married to a man domiciled in Oregon would cause your Courts in Oregon to not recognize that California decree of divorce? I think so, for this reason: There can be as I understand it, but one actual domicil and she was at the time of her marriage—or at least she became at the time of her marriage domiciled in the State of Oregon with her husband; and she remained bound to that domicil as far as the law of Oregon is concerned, and the attitude of the State of Oregon towards the case, until she had a justifying ground for separating from her husband and finding a different domicil; and I do not understand there can be two different domicils. A vessel cannot be emptied until it is—

Even assuming the California Court had decreed that she had established her domicil in California and had given its final decree, you say it would be open to attack? Yes, because she remained still domiciled in Oregon and Oregon is controlling the *status* of its own citizens and inhabitants and would not allow any other State unless on something different from domicil to do that. . . .

And your view is that the Oregon Court would assume to inquire into the question of domicil itself? Yes, the question of domicil itself. They would say these two people belong in Oregon and the handling of their marital *status* is exclusively an Oregon prerogative, so long as they both remain domiciled here. . . .

Judgment

The principle of a wife's right to establish a separate domicil apart from her husband, you say is not recognized in Oregon? That is your view? Not unless she has a justifying cause for separation as cited in the *Miller* case.

And on that you cannot give me any decision? Yes. I have cited *Miller* v. *Miller*.

In the *Miller* case, *supra*, at p. 17, the Court said:

In determining the residence or permanent habitation of the plaintiff necessary to give the Court jurisdiction, the principal canon to be applied is, To what place did the plaintiff intend to return after the object of her going to Idaho for the education of her children had been accomplished? It is contended by the plaintiff that this must be worked out by the domicil of the husband. This, however, is not an invariable rule of construction. It is possible for a wife, whose husband by his misconduct has rendered life with him unbearable, to acquire a separate domicil, based upon which she may institute a suit to dissolve the marriage contract. . . .

As said by Mr. Justice Beard in *Duxstad* v. *Duxstad* [(1909)], 17 Wyo. 411, 100 Pac. 112, 129 Am. St. Rep. 1138: "We think the rule is that the wife's residence is that of her husband, save in exceptional cases, when she can, on account of necessity, establish and claim a separate residence. One of such exceptions is when he has given her cause for divorce. In that case it has been generally held that she may acquire a separate residence in another jurisdiction which will entitle her to maintain an action for

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divorce in that jurisdiction. This she may do; but her husband cannot by his wrongful acts and by mistreating her compel her to do so; . . . she may still claim his residence as hers, at least until she has established a residence elsewhere."

In his supplementary argument Mr. Veazie referring to the above passage says:

In the language above quoted the Court expressly recognizes that a wife may establish and claim a separate residence whenever her husband has given her cause for divorce, or when the husband by his conduct has made life with him unbearable. Otherwise the common law rule prevails that the wife's residence is that of the husband.

I note also that Messrs. Wilbur and Marsh in their memorandum state the law in answer to a question as follows:

Can a wife secure a separate domicil from that of her husband? We may answer that—a wife can acquire a separate domicil from that of her husband whenever it is necessary and proper that she should do so. The right springs from the necessity for its exercise.

The only Oregon case touching on the question of domicil relative to a divorce case is that of *Miller* v. *Miller* (1913), 67 Or. 359; 136 Pac. 15. The Court held in this case that:

The rule is that the wife's residence is that of her husband, save in exceptional cases, when she can, on account of necessity, establish and claim a separate residence. One of such exceptions is when he has given her cause for divorce.

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After fully considering the evidence on this phase of the matter I have to say that I find as a fact that the law of Oregon is that as a general rule the wife's residence is that of her husband save in exceptional cases as stated and that as applied to the present case the respondent wife could not establish and claim a separate residence from that of her husband so as to transfer the jurisdiction over a divorce case between them to another State than that of the matrimonial domicil unless the husband had given her cause by wilful desertion. Counsel on behalf of respondent submits that the question as to whether or not Thomas deserted his wife is *res judicata*. Messrs. Wilbur and Marsh also say that

it has been definitely established by the testimony in the California case of *Thomas* v. *Thomas* [referring to the transcript filed as Exhibit 14] which fact is *res adjudicata* that Mrs. Thomas had justifiable reasons for leaving her husband, to wit: wilful desertion.

On the other hand Mr. Veazie cites *Bell* v. *Bell* (1901), 181 U.S. 175 as holding that the recital in proceedings for divorce of the facts necessary to give jurisdiction, may be contradicted in a suit between the same parties in another State.

It is submitted on behalf of the respondent that the California decree, being final and conclusive there would be recognized by the Courts of Oregon under the full faith and credit clause of the American (Federal) Constitution, being Article IV., section 1, which reads in part as follows:

Full faith and credit shall be given in every state to the public Acts, records and judicial proceedings of every other state.

Referring to this clause Mr. Veazie in his evidence says in part as follows:

And in the case of *De Vall* v. *De Vall* (1910), 57 Or. 128 [109 Pac. 755 at p. 756] the Supreme Court has declared, and it is a rule that is universally recognized that, "[As] the construction of the full faith and credit clause of the Federal Constitution involves a Federal question, its interpretation by the Federal Supreme Court is controlling." And in that same case our Supreme Court held as follows: I am quoting now: the language of the Court [109 Pac. at pp. 758-9]. "Neither the full faith and credit clause spoken of nor the Act of Congress mentioned prevented an inquiry into the jurisdiction of the Court of a sister State by which a judgment rendered therein was offered in evidence, and that a copy of such record, though duly authenticated, might be contradicted as to the facts necessary to give the Court rendering the judgment power to hear and determine the cause, or if it appeared in a collateral proceeding in another State, that such facts did not exist, the record would be a nullity, notwithstanding it might contain recitals that they did exist." In the case of *De Bouchel* v. *Candler* [(1924)], 296 Fed. 482, which was decided by the United States District Court for the Northern District of Georgia on February 1st, 1924, the Court laid down the following proposition (p. 486): "The actual domicil of one party or the other in the State in which a decree of divorce is granted being thus essential to the jurisdiction to make it, whether such domicil in fact exists may be collaterally inquired into when the decree is sought to be used in another State. If it clearly appears that such domicil was lacking, the decree will be treated as a nullity, and the *status* of the parties unaffected thereby." And (p. 484) "In an action for breach of marriage contract, where defendant set up the invalidity of a divorce of plaintiff from a former husband in another State, whether plaintiff was properly domiciled in such other State so that the Court acquired jurisdiction to grant its decree *held* for the jury."

Judgment

Mr. Veazie also cited an Oregon case *Ferry* v. *Troy Laundry Co.* (1917), 238 Fed. 867 as in point on the ground that the Supreme Court of Washington had held that there was jurisdiction in the Washington Court to grant a decree of divorce in the case of *Ferry* v. *Ferry* (1894), 9 Wash. 239, 37 Pac. 431, both parties having appeared and submitted themselves to the jurisdiction of such Court and yet Judge Wolverton in the District Court of the United States for the District of Oregon held

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otherwise. In his judgment at pp. 868-9 is found the following statement:

> By the statute of the territory as it existed at that time, any person who had been a resident of the territory for one year was entitled to sue for annulment, by decree of divorce, of his or her marriage relation, in any county where he or she might reside. Section 2002, Washington Code for 1881 and 1883 (citation is from plaintiff's brief). Under such a statute, neither the plaintiff nor the defendant in that suit was entitled to sue in the territory for divorce. Not being so entitled to sue, it is settled by the adjudications of the United States Supreme Court that the decree was a nullity, and not entitled to full faith and credit in another state or territory under the full faith and credit clause of the Constitution, and hence the decree is not a bar to the complainant's present action here.

I think it must be admitted, as Mr. *Van Roggen* suggests, that it might be a fair inference from what Judge Wolverton states that, if the Washington statutory requirement of one year's residence (in the ordinary sense of the word) of the plaintiff had been complied with by one of the parties, he would have recognized the Washington decree without further inquiry even if the wife had been the plaintiff. He did not so decide however and I cannot look upon the case as authority for more than it decides and in the absence of any express authority I refuse to hold that in any event the Washington decree in such case would have been recognized in Oregon by virtue of the full faith and credit clause as it seems inconsistent with both the spirit and the letter of what is said in *Haddock* v. *Haddock* (1906), 201 U.S. 562 at p. 574 where the Court says:

Judgment

> Under the rule contended for it would follow that the States whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and the public policy of the other States. Thus the argument comes necessarily to this, that to preserve the lawful authority of all of the States over marriage it is essential to decide that all the States have such auhority only at the sufferance of the other States.

In the *Haddock* case at p. 573 the Court also says:

> . . . however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the Court by which the decree was rendered

is open to inquiry. And if there was no jurisdiction, either of the subject-matter or of the person of the defendant, the Courts of another State are not required by virtue of the full faith and credit clause of the Constitution, to enforce such decree.

It must be noted also that section 9-626 Oregon Code Ann. 1930 reads as follows:

Any judicial record may be impeached and the presumption arising therefrom overcome by evidence of a want of jurisdiction in the Court or judicial officer, or collusion between the parties or of fraud in the party offering the record, in respect to the proceedings.

By the light of the testimony I have on the foreign law, I have reached this point that I accept the statement of Mr. Veazie that the law of Oregon as laid down in *Miller* v. *Miller, supra,* appears to accord exactly with that of New Jersey, as declared in *Thompson* v. *Thompson* (1918), 103 Atl. 856. In that case the Court said in part as follows (p. 858):

The decree is invalid, because the Court did not have jurisdiction over the subject-matter upon which it pronounced judgment. In passing, it may be said that the judgment was not obtained by any actual fraud practised upon the Court, because all the facts attending her domicil in this State and her departure therefrom and her then abode were fully and truthfully set forth by the defendant in her complaint, so that the single question is whether the Court rightfully assumed jurisdiction. It is a fundamental principle of general jurisprudence that a divorce can be granted only in the State wherein the *status* on which it operates has a *situs.* And it is also entirely settled that the jurisdiction of the adjudging Court, whether over the parties or the subject-matter, may be inquired into and determined by the Court in which the judgment is sought to be enforced. *Fairchild* v. *Fairchild* [(1896)], 53 N.J. Eq. 678, 34 Atl. 10, 51 Am. St. Rep. 650; *Thompson* v. *Whitman* [(1873)], 18 Wall. 457, 21 L. Ed. 897; *Wisconsin* v. *Pelican Ins. Co.* [(1888)], 127 U.S. 265, 8 Sup. Ct. 1370, 32 L. Ed. 239; *Andrews* v. *Andrews* [(1903), 188 U.S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366]; *German Savings Society* v. *Dormitzer* [(1904)], 92 U.S. 125, 24 Sup. Ct. 221, 48 L. Ed. 373; *National Exchange Bank* v. *Wiley* [(1904)], 195 U.S. 257, 25 Sup. Ct. 70, 49 L. Ed. 184; *Wallace* v. *Wallace* [(1901), 62 N.J. Eq. 509, 50 Atl. 788]; *Watkinson* v. *Watkinson* [(1904), 67 N.J. Eq. 142, 58 Atl. 384]. Under the New York Code, a separation may be granted from bed and board forever for cruel and inhuman treatment (section 1762) where the parties were married within the State and the plaintiff is a resident thereof when the action is commenced (section 1763) and a married woman is deemed a resident if she dwells within the State although her husband resides elsewhere (section 1768). And it is there held that the "residence" required of the plaintiff is synonymous with "domicil," and that "dwells" as used in section 1768 neither adds to nor subtracts from that meaning. . . . The inquiry then resolves itself into whether the defendant acquired a new domicil in New York, by which she carried the *res,* or a part of it, with her. The husband's domicil undeniably was in this State, which in

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legal contemplation was also that of the wife and was unchangeable by her except with his acquiescence or consent, or for such misconduct on his part, inimical to the union as justified her in selecting another. . . . Whether there was such justification is purely a question of fact to be passed upon by the trial Court in which the judgment is offered in determining whether a separate domicil had been acquired, and in this determination the foreign adjudication that the petitioner had been guilty of cruel and inhuman treatment and that the defendant was justified in the separation and that she acquired a domicil within the State and that the Court had jurisdiction over the subject-matter, has no evidential force whatever. Such, in effect, is the ruling of the Supreme Court of the United States in the cases hereinbefore cited, and it was so declared by this Court in the *Watkinson* case. . . .

I have only to consider further the contention of Mr. *Van Roggen* that "the California decree in *Thomas* v. *Thomas* contains all the elements of a valid foreign judgment *in rem* recognized without review by British Courts." Piggott on Foreign Judgments, 3rd Ed., Part II., is cited and on p. 6 he states:

> The best known form of the judgment *in rem* is a judgment declaring the *status* of an individual: as that such and such persons are married. . . .

Pemberton v. *Hughes* (1899), 1 Ch. 781 and *Bater* v. *Bater* (1906), P. 209 have also been referred to. I have considered these cases and would say that they do not go any further than to hold that the judgment of a foreign Court is entitled to recognition (only) if such Court has jurisdiction over the parties and the subject-matter. In the *Pemberton* case, Lindley, M.R., at p. 790, says in part as follows:

Judgment

> If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice.

In the *Bater* case at p. 218 the Court said:

> But I think when those cases are examined that the collusion or fraud which was being referred to was in every case, so far as I have had time to examine the matter, collusion or fraud relating to that which went to the root of the matter, namely, the jurisdiction of the Court. In other words, as an illustration, cases where the parties have gone to the foreign country and were not truly domiciled there, and represented that they were domiciled there, and so had induced the Court to grant a decree. The collusion or fraud in those cases goes to the root of the jurisdiction. There is no jurisdiction if there is no domicil, . . .

I think it is clear from this and other passages in the *Bater* judgment that anything going to the root of the jurisdiction of the Court may be investigated. Counsel for the respondent,

however, contends that in any event this would not mean that in the present case the Court is at liberty to inquire and determine whether or not the wife was entitled to establish a separate domicil or residence on the ground of wilful desertion as this is *res adjudicata*. He refers to *Armitage* v. *Attorney-General* (1906), P. 135, and contends that in that case it was held that the wife was entitled to a separate domicil because she had a cause for divorce against her husband and that this was proven by production of the decree obtained by her in South Dakota without further inquiry. It should be noted, however, that in the *Armitage* case there was evidence that satisfied the Court that the Court of the husband's domicil would recognize the decree which had been obtained. In the present case the evidence satisfies me that the Court of the husband's domicil would not recognize the decree without inquiring whether there was such misconduct on the part of the husband as justified the wife in selecting another domicil or residence. I have perused the *Armitage* case and I am not convinced that the precise point here raised was argued. It may be that the question as to how British Courts test the jurisdiction of foreign Courts granting divorces where both parties are foreigners has never been definitely decided. I have failed to find anything decisive against my view which is that if "the foreign Court" had not jurisdiction over the *res* which in this case is the marital *status* of the parties (and not simply divorce) then it was not competent to deal with the matter and an inquiry into anything going to the point of its jurisdiction is not an inquiry into "whether the foreign Court has properly or improperly exercised a jurisdiction which it had but whether it has usurped a jurisdiction which it had not."

Judgment

I am also firmly of the opinion that in the present case it is a jurisdictional question whether there was such wilful desertion on the part of Thomas as justified or entitled his wife to establish a separate residence from that of her husband in another jurisdiction and to maintain an action for divorce there as in the absence of such wilful desertion there was no justification and therefore no right on the part of the wife that would be recognized extra-territorially to establish such a separate residence in California as would entitle her to maintain an action for divorce

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or vest jurisdiction in the Court there. The question therefore is one going to the root of the jurisdiction of the foreign Court granting the decree and this is a question of fact to be passed upon by the trial Court in which the decree is offered and in the determination of the question "the foreign adjudication has no evidential force whatever."

Coming then to the consideration of what are the real facts in the present case as affecting the jurisdictional question I have to say that, although Thomas was in the State of California at the time the divorce proceedings were commenced and was served there, I am satisfied it could not be seriously contended that if he had been plaintiff he could have been deemed to have satisfied the statutory requirements as to "residence." On the evidence before me I find that he was domiciled at the time in Oregon and that the matrimonial domicil was in such State. I also accept the evidence of Thomas as to what the actual circumstances were at the time of his enlistment and during his necessary absence on Overseas service and if I am to consider the evidence in the California Court as is apparently suggested on behalf of the respondent, I would find that there was a fraudulent statement or fraud on the part of the respondent going to the root of the jurisdiction as there was no truth at all in her evidence to the effect that Thomas wilfully deserted her on March 30th, 1918, the day after they were married. I prefer, however, to rest my judgment upon the finding that there was no desertion by him of his wife (or any other misconduct on his part) giving her cause for divorce and entitling her under the law of Oregon to establish and claim a separate residence and transfer the jurisdiction over a divorce case to another State than that of the matrimonial domicil. In the divorce case of *Le Mesurier* v. *Le Mesurier* (1895), A.C. 517, referred to in *Haddock* v. *Haddock, supra,* Lord Watson said at pp. 527-8:

Judgment

> When the jurisdiction of the Court is exercised according to the rules of international law, as in the case where the parties have their domicil within its *forum* its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce *a vinculo*, pronounced by a Court whose jurisdiction is solely derived from some rule of municipal law peculiar to its *forum*, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.

In my view the respondent and her husband (Thomas) were "spouses amenable to the tribunals" of Oregon and, as was suggested in the passage quoted from the *Bater* v. *Bater* case, *supra,* it seems to me that I have to ascertain so far as lies in my power, upon what principle of law the Courts of Oregon would endeavour to settle the problem. After giving this matter my best consideration I have come to the conclusion upon my findings as above that the Courts of Oregon would not recognize the validity of the California decree. I would also say that, if I were deciding the matter apart from such conclusion and on the basis of the principle to be applied upon my findings, I would not recognize the validity of the California decree. I appreciate the serious difficulties or scandal that may arise "when a man and woman are held to be husband and wife in one country and strangers in another" (*Wilson* v. *Wilson* (1872), L.R. 2 P. & M. 435 at p. 442) but this is surely a case, the respondent having apparently been married and divorced three times, to invoke the principle that was perhaps adopted to put a check upon "migratory divorces," and referred to in the *Wilson* case where at p. 442 we find the following statement:

Judgment

> Different communities have different views and laws respecting matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws.

My conclusion on the whole matter is that there was no jurisdiction in the California Court to grant a decree of divorce to the respondent herein as there was no jurisdiction in that Court over the subject-matter. Such decree was and is therefore invalid and a nullity and the respondent therefore on the 13th of March, 1930, was the wife of the said J. Oren Thomas still alive. There will therefore be a decree declaring that the said marriage celebrated between the petitioner and the respondent is null and void *ab initio* by reason of the fact that the marriage between the respondent and the said J. Oren Thomas was a valid and subsisting marriage at the time of the marriage of the petitioner and respondent.

As to costs, the respondent should have her costs against the petitioner (see *Bourgoin* v. *Bourgoin* (1930), 42 B.C. 349) to

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be taxed on scale provided for under Column 4 of Appendix N if there is no question as to my right to change the usual scale, otherwise the matter may be spoken to.

Petition granted.

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DEVINE AND BONNESS v. SOMERVILLE AND SOMERVILLE.

Mines and minerals—Verbal agreement to form syndicate—Defence of Statute of Frauds and section 75 of Mineral Act—Fraud—Contract to transfer units in syndicate—Security Frauds Prevention Act—Applicability—R.S.B.C. 1924, Cap. 167, Sec. 75—B.C. Stats. 1930, Cap. 64, Secs. 3 (h) and 33.

In an action for a declaration that the defendants are trustees for the plaintiffs and other members of a syndicate formed by the plaintiffs and defendants, of certain mineral claims under a verbal agreement entered into by the said parties, the defence of the Statute of Frauds and section 75 of the Mineral Act will not be given effect to where to do so would be to permit the defendant to perpetrate a fraud both on the plaintiffs and on all other parties who became members of the syndicate agreement.

The property was divided into 500 units or shares, and one of the terms of the agreement was that the plaintiffs were to receive 25 units from the trustee as soon as the syndicate was formed.

Held, that the agreement was one under which the defendants must be regarded as actual "prospectors" within the meaning of subsection (*h*) of section 3 of the Security Frauds Prevention Act, and therefore the plaintiffs were entitled to sue thereon although they were not licensed under the said Act.

Statement

ACTION by plaintiffs, a firm of brokers, for a declaration that the defendants are trustees for the plaintiffs and other members of a syndicate formed by the plaintiffs and the defendants of the Oro Fino and Independence mineral claims situate in the Similkameen District and for a declaration that the plaintiffs as agents for the syndicate are entitled to certain units in the syndicate for their services in forming the syndicate and for procuring subscriptions for units, the proceeds to be used in

the development of the property transferred to the trustee of the syndicate by the defendants. The latter, husband and wife, entered into a verbal agreement with the plaintiffs, whereby the defendants agreed that a syndicate should be formed to acquire the Oro Fino mineral claim belonging to the defendant E. S. and the Independence mineral claim belonging to the defendant W. S. and that both mineral claims should stand in the name of the defendant W. S. as trustee for the syndicate.

The property was divided into 500 units or shares of which the defendants were to have 280 in consideration of transferring their mineral claim to the syndicate.

Statement

The plaintiffs by the same agreement were engaged to act as agents for the sale of the units of the syndicate and actually sold a number of these units to various purchasers. After the moneys subscribed by the members of the syndicate had been expended in development work on both mineral claims under the supervision of the defendant W. S. the defendant E. S. refused to transfer the Oro Fino mineral claim to her co-defendant as trustee stating that she had not actually agreed to do so although she was present at the meeting at which the matter was arranged and did not raise any objection thereto. Tried by MURPHY, J. at Vancouver on the 10th of September, 1931.

Argument

A. M. Whiteside, for plaintiffs: The defendant E. Somerville is a trustee and the Statute of Frauds does not apply: see *Dale* v. *Hamilton* (1847), 16 L.J., Ch. 397; *Reynolds* v. *Jackson* (1917), 3 W.W.R. 507; *Morris* v. *Whiting* (1913), 5 W.W.R. 936; *Wells* v. *Petty* (1897), 5 B.C. 353; *Smith* v. *Ross* (1868), 15 Gr. 374. The claims are Crown granted and the defendants cannot rely on section 75 of the Mineral Act by reason of the provisions of section 74 (3). All the parties to the agreement are before the Court. As to the plaintiff's *status* see *Wolff* v. *Van Boolen* (1906), 94 L.T. 502. A licence under the Security Frauds Prevention Act is not required, as the units of the syndicate come within the definition of securities which are exempt under section 2 (*b*) of the Act.

Warner, for defendants: The defendants' interest in the Oro Fino mineral claim is an interest in land and there is no agreement in writing to satisfy the Statute of Frauds and section 75

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of the Mineral Act: see *McMeekin* v. *Furry* (1907), 13 B.C. 20; *Alexander* v. *Heath* (1899), 8 B.C. 95; *Stussi* v. *Brown* (1897), 5 B.C. 380. Individual members of the syndicate cannot maintain this action: see *Franklin* v. *Franklin* (1915), W.N. 342; *Sharpe* v. *San Paulo Ry. Co.* (1873), 8 Chy. App. 597 at p. 609; *McLaren* v. *McMillan* (1907), 16 Man. L.R. 604. There is no misjoinder as to the two branches of the action: see *Stroud* v. *Lawson* (1898), 2 Q.B. 44. The plaintiffs are not licensed under the Security Frauds Prevention Act and they are not entitled to remuneration: see *Baldwin* v. *Snook* (1918), 2 W.W.R. 314; *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297.

21st September, 1931.

MURPHY, J.: I find that the defendants, husband and wife, jointly agreed with the plaintiffs, *inter alia,* that they would transfer to the trustee of a syndicate, which it was one of the terms of the agreement should be formed, the Oro Fino mineral claim, the Independence mineral claim and the August mineral claim. The deal was a joint one, the claims being treated as owned by the plaintiffs in common or as pooled although in fact the Independence claim stood in the name of the husband and the other two in the name of the wife. I find specifically that the wife was a party to this agreement. They were to be given 280 units in the proposed syndicate for the three claims. This

Judgment

agreement was not reduced to writing. As contemplated by this contract a syndicate agreement was drawn up and signed by the husband but not by the wife. It is objected first that the action is not properly constituted as plaintiffs are not suing on behalf of themselves and all other members of the syndicate. As stated my view is there were in reality two contracts made. The plaintiffs, on this phase of the case, are suing on the first one and all parties to it are before the Court. Next it is objected that, as the contract sued upon is not in writing, plaintiffs cannot enforce its terms because of section 75 of the Mineral Act, R.S.B.C. 1924, Cap. 167 and because of the provisions of the Statute of Frauds. The August claim has now lapsed and as no claim for damages for such lapse is made it need not be further considered. With regard to the Statute of Frauds I think what is hereinafter set out amounts to part performance.

But whether that view is correct or not and whether section 75 of the Mineral Act applies to a Crown-granted mineral claim or not I hold that to give effect to this defence would be to allow the defendant Emily Somerville to perpetrate a fraud both on plaintiffs and on all other parties who have become parties to the syndicate agreement. She knew that the syndicate agreement had been drawn up and acted upon. She knew that money had thereby been obtained by the plaintiffs and paid to the syndicate trustee who expended it mainly on the Independence claim in which she was interested by virtue of her joint holding of units with her husband but to some extent also on the Oro Fino mineral claim. She knew that this money came from plaintiffs and consequently knew that they must either have purchased units under the syndicate agreement or sold such units to others or possibly—as in fact was the case—done both. She knew or ought to have known that if they made such purchases personally they did so relying on her said joint agreement to transfer the Oro Fino and August claims to the trustee of the syndicate agreement and that if they had sold such units to others such sales were made on the representation that the trustee held this claim as well as the other two for the syndicate. These being the facts as I find them, as already stated, my view is that to give effect to the contention that no writing exists signed by her or on her behalf would be to allow her to commit a fraud. I therefore hold that this defence fails. I accordingly declare that the defendant Emily Augusta Somerville is a trustee of the Oro Fino claim for the members of the syndicate.

Judgment

One of the terms of the first contract was that the plaintiffs were to receive 25 units from the trustee as soon as the syndicate was formed and the defendant William Somerville is sued as trustee to compel him to issue certificates for same. This provision of the first contract was incorporated in the written syndicate agreement and the suit on this phase must I think be considered as based not only on the first contract but also on said syndicate agreement. As this is a term of this agreement which affects only plaintiffs and the trustee I think the action on this phase also is properly constituted. It was the intention that these units be issued at once before any other members were

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obtained and the agreement provides that all of its terms become binding on each member as soon as he becomes a member.

It is further objected that the agreement as to these 25 units is in reality a trade in securities and since plaintiffs are not licensed they cannot succeed because of the provisions of the Security Frauds Prevention Act, B.C. Stats. 1930, Cap. 64. Assuming for the moment that this Act prevents the bringing of an action based on a trade in securities and assuming that this transaction is such a trade my opinion is that it falls within subsection (*h*) of section 2 of said Act and therefore the objection is invalid. The contract for the 25 units was a term of the first contract. The only reason why the plaintiffs must found not only upon it but upon the syndicate agreement is that it is by virtue of defendant William Somerville being trustee thereof that he, as such trustee, is the party who must deliver the certificates to which plaintiffs are entitled under the first contract. This first contract, as stated, was made between plaintiffs and defendants. In making it I think both defendants were actual prospectors making a trade for the purpose of disposing of part of their interests in said mining claims. The 25 units are stated to be given in consideration "for plaintiffs services rendered and in obtaining the properties for the syndicate." It was through the syndicate that defendants proposed to dispose of some of their interests in the mining claims owned by them. I think in this transaction defendants must be regarded as actual prospectors. The term "prospector" is not defined in the Act but in the glossary to 1 M.M.C. p. 869, prospecting is defined as,—

Judgment

> A searching for deposits; applied both to the seeking for undiscovered veins and to the investigation of the value of known veins by exploration.
>
> Prospector. One engaged in the above.

From the evidence it is clear that the object for which defendants entered into said contracts was to obtain funds to investigate the value of known veins in their said claims by investigation and that they proceeded to do so as soon as funds were so obtained. I hold therefore that plaintiffs are entitled to delivery of said 25 units.

As to their claim based on the Gilbert transaction I hold plaintiffs made a special contract with the trustee not to make

any claim for remuneration in connection therewith. It is therefore unnecessary to discuss what bearing if any the Security Frauds Prevention Act might have had I not found a specific contract. It does, however, become necessary to consider that Act in so far as it may constitute a bar to plaintiffs' claim for units by way of commission for the sale by them of units to others. This Act absolutely prohibits trading in any security by any person unless such person is licensed and imposes a penalty for breach of such prohibition—sections 4 and 33. When a statute contains such provisions the thing prohibited is held a thing illegal out of which no action can arise. *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297 at p. 306 where a number of authorities in support are cited. In so far as plaintiffs were selling these units they were clearly I think trading in securities as these terms are defined in the Act. They are not actual prospectors nor were they making these sales on behalf of defendants even assuming that subsection (*h*) of section 2 would permit of this which I think doubtful. They were selling them for the syndicate which from the moment it came into existence included themselves as members because of the 25 units to which they were entitled and as each sale was made the syndicate received a new member. I therefore disallow that part of their claim which comes under this head.

Judgment

The plaintiffs themselves purchased 8 units and it is urged that they thereby became entitled to 8 bonus shares. But the true meaning of the agreement is, I think, that these so-called bonus shares are really part of the commission given to plaintiffs for selling syndicate shares, and that therefore plaintiffs' claims for them arises from trades in a security within the meaning of said Act and for reasons already given these cannot form the basis of an action. On the other hand I think the plaintiffs are entitled to the eight shares which they purchased and paid for since as I read the Frauds Security Prevention Act it does not apply to such a transaction.

Plaintiffs are entitled to costs.

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LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE v. CRYSTAL DAIRY LIMITED.

LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE v. CRYSTAL DAIRY LTD.

Constitutional law—Taxation—Direct or indirect—Dairy Products Sales Adjustment Act, 1929—Validity of—B.C. Stats. 1929, Cap. 20, Sec. 2—B.C. Stats. 1931, Cap. 14, Secs. 4 and 9.

The imposts authorized by section 9 (*g*) of the Dairy Products Sales Adjustment Act, B.C. Stats. 1929, Cap. 20, including the levies made to defray the expenses of said Act, are indirect taxes; the Act is therefore *ultra vires* of the Provincial Legislature.

Statement

ACTION for a *mandamus* commanding the defendant as a distributor as defined by section 2 of the Dairy Products Sales Adjustment Act, as amended by section 4 of the amending Act of 1931, within the district in which the plaintiff operates, to make to the plaintiff forthwith returns of all milk or manufactured products purchased or received by the defendant from dairy farmers as defined by said section 2, as amended as aforesaid, during the month of March, 1931, as required by subsection (*c*) of section 9 of said Act, and for damages. Tried by MURPHY, J. at New Westminster on the 19th of September, 1931.

Maitland, K.C., and *McQuarrie, K.C.*, for plaintiff.
J. W. deB. Farris, K.C., for defendant.

26th September, 1931.

Judgment

MURPHY, J.: In my opinion the imposts levied by plaintiff under the authority of subsection (*g*) of section 9 of the Dairy Products Sales Adjustment Act fall within the exposition of what constitutes a tax contained in the judgment of Duff, J. in *Lawson* v. *Interior Tree Fruit and Vegetable Committee* (1931), S.C.R. 357 at p. 362 *et seq.* These imposts are enforceable by law—see sections 11, 13, 18A and 19 of the Act. They are imposed under the authority of the Legislature. They are imposed by a public body. As in the *Lawson* case the chairman of the plaintiff Committee is appointed by the Lieutenant-

Governor-in-Council. The Committee is invested with wide powers of regulation and control over the milk industry within the area over which it has jurisdiction. No one unless excused by the Committee can do any act within the meaning of selling or disposing of milk or manufactured products, as these terms are defined by the Act, without first obtaining a licence to do so from the Committee. Section 14: The Committee exercises jurisdiction over a great extent of territory. It exercises compulsory powers as well as inquisitorial powers of a most exceptional character. Section 9 and the subsections thereof. Sections 14, 17, 18, 18A, 19. The levy is made for a public purpose for, if I may be permitted, with deference, to quote the language of Duff, J. in the *Lawson* case, *supra*:

> When such compulsory, not to say dictatorial, powers are vested in such a body by the Legislature, the purposes for which they are given are conclusively presumed to be public purposes.

I conclude therefore on the authority of the *Lawson* case that these imposts are a tax.

Are they an indirect tax? Unless they are to be regarded as being a kind of sales tax on commodity or on trade in a commodity, in which case they would be of the nature of those taxes which have I think always been regarded as indirect taxes, these imposts are not an old and well defined species of taxation such as was the tax under consideration in *Halifax (City)* v. *James P. Fairbanks' Estate* (1927), 97 L.J., P.C. 11. They are, I consider, a new and unfamiliar tax which cannot be said to fall obviously under the classifications well established at Confederation of direct and indirect taxation.

Judgment

In my opinion these imposts, imposed as they are imposed under the Act, have a tendency to enter into and to affect the price of milk and cream in the fluid-milk market. If so they are indirect taxes—the *Lawson* case, *supra*. That they are imposed after the milk and cream have been disposed of by the persons who pay them does not *per se* prevent them from being indirect taxes. *Rex* v. *Caledonian Collieries* (1928), A.C. 358. The preamble of the Act and the evidence shew that there are but two markets for milk, *viz.*, the fluid-milk market wherein milk and cream are disposed of in fluid form and what may be termed the manufactured products market in which butter,

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cheese, condensed milk, etc., are sold. As the preamble states this latter is a world market. Being such a market the dairy farmers coming under the plaintiff's jurisdiction—or for that matter all the dairy farmers in British Columbia—are powerless to affect the prices ruling therein. But, as the evidence shews, they have what may be termed a monopoly in the fluid-milk market. The reason is obvious. Since milk in its natural state rapidly deteriorates in quality it follows that if it is to be sold in the fluid-milk market it must be sold soon after production. True, such deterioration may be delayed within well defined limits by the use of ice or in other ways but such methods are costly. Hence dairy farmers who carry on operations sufficiently close to any given fluid-milk market, such as Greater Vancouver and New Westminster, to enable them to ship their milk in the raw state without deterioration to such market, enjoy a pronounced economic advantage therein. They can by united action raise the price to consumers to the extent of such economic advantage. The evidence shews that the area over which plaintiff exercises authority embraces practically all the dairy farmers who have this economic advantage in the Greater Vancouver and New Westminster fluid-milk market.

Judgment

The imposts under consideration have to be paid in the first instance by some of these dairy farmers. They are a new and constantly recurring item in the cost account of every dairy farmer who sells in the fluid-milk market. The Act authorizing them has, I think, created conditions which automatically result in a tendency on the part of those who pay them to pass on these imposts to the consumer. The more successfully its administration accomplishes the object of the Act, as set out in the preamble thereof, of distributing the results of the sale of milk equally over the whole body of dairy farmers in any given district, the more completely will competition between such farmers in the fluid-milk market, which they supply, be eliminated because if the Act works successfully it makes no difference financially to the individual farmer whether he sells in the manufactured products market or in the fluid-milk market. The scheme of the Act is that his gains will be the same in either case. This scheme however gives an incentive to the dairy farmers as a body to raise the price in the fluid-milk market for

the more money obtained the greater the fund to be divided amongst them. Prices in the manufactured products market being, as the Act itself sets out, world market prices and therefore beyond the control of the dairy farmers under the jurisdiction of the Committee whilst the fluid-milk market is within limits highly susceptible to such control because of the economic advantage which said farmers possess therein arising from the nature of milk and such control being made much more complete by the working of the Act, since all incentive to compete in the fluid-milk market is thereby removed from those who are economically so placed as to do so successfully and since the more money there is obtained the more funds there will be to be shared by the whole body of dairy farmers, it seems clear there will be a tendency to pass on these imposts to the consumer in the monopoly market.

It will I think not be disputed that where a royalty is paid for the use of a patent giving a monopoly of the sale of some article in any particular market there will be a tendency that such royalty will enter into and affect the price. The imposts under this Act, in my opinion, are in essence the price which vendors in the fluid-milk market pay to secure a monopoly in that market. Consequently there will be a tendency on the part of those who pay them to pass them on—to make them enter and affect the price. It may be that in fact this tendency has not become an actuality in the case at Bar but to constitute indirect taxation in the case of such taxes as these under consideration it suffices that there is a tendency to pass the impost on to the consumer. The *Lawson* case, *supra; Attorney-General of British Columbia* v. *Canadian Pacific Ry.* (1927), 96 L.J., P.C. 149.

Judgment

For the same reasons I hold the levies made to defray the expenses of the Act to be indirect taxation. With regard to them however it might be argued that granted that they constitute indirect taxation the whole Act is not invalidated since conceivably it might be operated without them. But as it would be entirely unworkable without the imposts first discussed I would hold the Act to be *ultra vires* in its entirety for I do not think the Legislature would have passed it in such truncated form.

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LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE v. CRYSTAL DAIRY LTD.

Judgment

If the matter be viewed from the standpoint of what was in the contemplation of the Legislature in passing this Act—the test applied in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561 at p. 568 and other cases —I think the same conclusion will be arrived at.

It is a fact of such common knowledge that I think judicial notice may be taken of it that every person with an article to sell will in the ordinary course of business endeavour to sell it in the market which gives him the highest net returns. The dairy farmers under the jurisdiction of plaintiff therefore previous to the passing of this Act all endeavoured to sell milk in the Greater Vancouver and New Westminster fluid-milk market. This would be true of all dairy farmers in the Province in reference to their particular fluid-milk market. Hence arose the conditions set out in the first paragraph of the preamble to the Act. The dairy farmers did not fall into two mutually exclusive classes, the one selling in the fluid-milk market and the other in the manufactured products market. They all sought the fluid-milk market because the price there was higher. The result was competition and an over supply of milk in the fluid-milk market from the standpoint of the dairy farmers with a consequent probability of a lowering of price through the operation of the economic law that price is regulated by supply and demand. This was the situation which the Act proposed to remedy. The true pith and substance of this legislation is, in my opinion, to prevent the operation of this economic law by eliminating competition thus lessening supply and thereby creating a monopoly market to keep up price for the benefit not of a particular body of dairy farmers who supply the manufactured products market for apart from the Act no such body existed but for the benefit of all dairy farmers in any given area where the Act was brought into force. Strength is given to this view I think by the provision in the Act that it only comes into operation in any area on a favourable vote of 66 per cent. of the dairy farmers therein present at a meeting convened as provided for by section 4. To secure this elimination of competition an incentive is given through the provisions of the Act in the form of so-called adjustment payments as already explained. Funds to make these payments must be

secured from somewhere. Under the scheme of the Act the taxes under consideration supply these funds. They must come either from the dairy farmers or from the consumers. No individual with an article to sell will by his own act bring into force a law compelling him to pay a tax for selling that product in the most favourable market. If he does so it must be because he expects to pass such tax on to the consumer. The Legislature then I think by making the operation of the Act dependent on compliance with the provisions of section 4 sheds some light on its real intention in passing the legislation. Further the original Act, B.C. Stats. 1929, Cap. 20, which, as amended, is the Act under consideration, is intituled "An Act for the Relief of Dairy Farmers." The title of a statute is an important part of the Act and may be referred to for the purpose of ascertaining its general scope and of throwing light on its construction. This rule seems to apply alike to the "long" and the "short" title. Maxwell on Interpretation of Statutes, 7th Ed., 36 and authorities there cited.

Judgment

If my view of what is the true pith and substance of the Act is correct then it is clear that farmers as a body cannot be benefited by enacting special taxes payable only by them, or some of them, for the privilege of selling their produce in the most favourable market. The Act, read as a whole, in my opinion, is not an Act to impose additional burdens on particular dairy farmers for the benefit of other dairy farmers but is one to improve the economic condition of all dairy farmers who come under its provisions. Its title sets out its true purpose. If the dairy farmers as a body are to be benefited these taxes must be passed on to the consumer and, as already shewn, in my opinion the Act supplies the means of doing so. On the authorities cited it would appear that whether or not they have actually been passed on in any particular instance is irrelevant.

The action is dismissed with costs.

Action dismissed.

COURT OF APPEAL

1931

Oct. 6.

REX v. DONALD.

REX v. DONALD

Criminal law—Keeping common gaming-house—Evidence—Warrant—Game of cards—Chips—Prima facie case—Criminal Code, Secs. 229 and 985.

The police, with a search warrant, entered the accused's premises which consisted of a store in front and a recreation room at the back. In the recreation room they found the accused and four men sitting around a table playing a game called "pan giny," a mixed game of chance and skill, which is played with cards and poker chips. Other packs of cards, poker chips and dice boxes with poker dice were found on the premises. On the hearing before the magistrate the accused gave evidence on his own behalf and swore there was no rake-off, and that he recovered no profit from the game. He was convicted of keeping a common gaming-house.

Held, on appeal, affirming the conviction by the police magistrate at Prince Rupert, that the magistrate, by his conviction, disbelieved the accused's evidence that he made no profit and this evidence being disbelieved there only remained the *prima facie* evidence which convicted him.

APPEAL by the accused from his conviction by the police magistrate at Prince Rupert on the 25th of June, 1931, for keeping a common gaming-house under section 229 of the Criminal Code. On the 21st of June, 1931, the police, with a search warrant, entered the accused's premises on Third Avenue in Prince Rupert. There was a store in front of the premises at the back of which was an entrance into a room called a "Recreation Room," in which were card-tables and chairs. On the police entering this room they found the accused sitting at the larger table with four other men who were engaged in playing a game called "pan giny." There was a pack of playing cards on the table and a number of poker chips were in front of each player. A search was made and in a locker in the store part of the building was found nine decks of cards and some chips, also a punch board, a prize board and two dice boxes with poker dice. Accused was fined $50.

Statement

The appeal was argued at Vancouver on the 6th of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Adam S. Johnston, for appellant: The defence shews there

Argument

was no rake-off and no refreshments were sold; this is uncontradicted. We successfully rebutted any presumption under section 985 of the Code: see *Rex* v. *Radinsky* (1929), 41 B.C. 317; *Rex* v. *Cherry and Long* (1924), 2 W.W.R. 667; *Rex* v. *Charlie Sam* (1928), 50 Can. C.C. 364; *Rex* v. *Lemaire* (1929), 51 Can. C.C. 137.

W. M. McKay, for the Crown: In respect to the presumption under section 985 of the Criminal Code see *Rex* v. *Coy* (1925), 36 B.C. 34; *Rex* v. *Pidgeon* (1926), 37 B.C. 309; *Rex* v. *Cessarsky* (1920), 15 Alta. L.R. 201. That there was a proper conviction under section 229 of the Code see *Rex* v. *James* (1903), 6 O.L.R. 35; *Rex* v. *Forder* (1930), 54 Can. C.C. 388.

Argument

Johnston, in reply, referred to Phipson on Evidence, 17th Ed., 135.

MACDONALD, C.J.B.C.: The Crown has proven that there was gambling paraphernalia there. The presumption has arisen that he was keeping a common gaming-house. He has attempted to rebutt it by leading evidence himself. The magistrate has said in effect, when he gave evidence, "I do not believe you."

MACDONALD, C.J.B.C.

That is practically saying everything that can or ought to be said in this case. The magistrate, by his conviction, disbelieved the convicted man's own evidence that he was making no profit, and that being disbelieved, the only thing that remains is the *prima facie* evidence which convicted him.

MARTIN, J.A.: This case is based upon the same section of the Criminal Code as was our decision in *Rex* v. *Pidgeon* (1926), 37 B.C. 309, and, as in my opinion, it is in all essentials the same as that case, although there may be minor non-essential variations, it is our duty to uphold our decision, and therefore, in my opinion the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

Appeal dismissed.

COURT OF APPEAL

1931

Oct. 6.

LEFEVRE v. ANDREWS

LEFEVRE AND LEFEVRE v. ANDREWS.

Agency—Money given agent to invest on mortgage—Money used to complete construction of house—Negligence—Failure to see money was properly applied.

The defendant, a broker and agent of the plaintiff, was held liable for negligence in failing to protect the plaintiff's interest in respect of money that the defendant invested for him in a mortgage on a building under construction without seeing that existing liens thereon were discharged (MARTIN, J.A. dissenting).

Statement

APPEAL by defendant from the decision of LAMPMAN, Co. J. of the 11th of April, 1931, in an action for breach of trust and negligent acts and omissions as the plaintiff's agent. The defendant, whose business included negotiating and arranging mortgage loans, approached the plaintiff with a view to his lending money on mortgages through him, and the defendant brought to his attention a loan required by one Holker, who had partially built a house on a premises he owned and required additional money to complete it. The plaintiff visited the house and after examining it decided to lend Holker $1,750. The mortgage was executed and duly registered against the property. The money was paid to Holker, but before the house was finished he ran into difficulties, and the plaintiff found there was then liens amounting in all to $510.75 against the house, and it was not finished. In order to save himself he decided to advance $800 more, but even then the house was not finished and he had to take the house over himself on his mortgage and finish it at further expense. He claims the defendant was his agent and should have taken more care in the expenditure of the moneys advanced and see that it was properly applied. Judgment was given in favour of the plaintiff for $400.

The appeal was argued at Victoria on the 30th of June, 1931, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

W. J. Taylor, K.C., for appellant: From the first advance of $1,750 a first mortgage of $1,000 was paid off, so only $750 was left to complete the house. This was not enough, so $800

more was advanced. When the liens were put on the property the plaintiff blames the defendant for this, but afterwards, with full knowledge, he buys out the equity of redemption, so he has no claim: see *Wilson* v. *Tumman* (1843), 6 Man. & G. 236 at p. 242; *Ancona* v. *Marks* (1862), 31 L.J., Ex. 163 at pp. 167-8; *Koenigsblatt* v. *Sweet* (1923), 2 Ch. 314 at p. 325; Bowstead on Agency, 7th Ed., 63. The plaintiff passed the place every day and knew of the liens when the second payment was made. As to upsetting the trial judge on the evidence see *Khoo Sit Hoh* v. *Lim Thean Tong* (1912), A.C. 323 at p. 325.

Fowkes, for respondent: It was found that Andrews was an agent and there is ample evidence to support this finding. On the question of the agent's negligence see *Donaldson* v. *Haldane* (1837), 7 Cl. & F. 762; *Holmes* v. *Thompson* (1876), 38 U.C.Q.B. 292; *Lowenburg, Harris & Company* v. *Wolley* (1895), 25 S.C.R. 51; *Whitehead* v. *Weathern* (1825), 2 Bing. 464; *Marriott* v. *Martin* (1915), 21 B.C. 161; *Nemetz* v. *Telford* (1930), 43 B.C. 281. As to ratification, we notified him we would take a quit claim.

Argument

Taylor, in reply, referred to Bowstead on Agency, 7th Ed., 63, and *Smith* v. *Cologan* (1788), 2 Term Rep. 188 (note).

Cur. adv. vult.

6th October, 1931.

MARTIN, J.A.: After a careful perusal, since the argument, of all the evidence in this case I can only reach the conclusion that the plaintiff has not satisfied the onus upon him to support the allegation that the relationship of principal and agent existed between the parties in the transaction respecting the second mortgage out of which this action arises. Though the learned judge below truly said that the parties "in paying over money to Holker seemed to have blundered along with no real idea of how to secure the application of the money" yet I am unable to extract from this mutual blundering a definite liability of the defendant under such unusual circumstances as we have before us, and the more so because in important particulars the story told by the defendant is supported by both Page and

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Holker the latter of whom was not in the mere position of an ordinary contractor as the learned judge puts him in his reasons, but of a mortgagor and also building owner in personal execution of his contract for the construction of his own house in question, which has a material effect upon the view to be taken of the actions of the parties concerned.

The appeal, therefore, should in my opinion be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss this appeal. Upon full consideration I am satisfied that the learned trial judge arrived at the correct conclusion.

MACDONALD, J.A.

MACDONALD, J.A.: Appeal by defendant, a real-estate broker, from a judgment awarded against him of $400 for negligence in failing to take proper steps to protect the interests of the plaintiff (respondent) under the following circumstances. Respondent had some money to loan and asked appellant to advise him of any suitable investments that might arise. Shortly afterwards appellant advised him that a builder (Holker) erecting a house required a loan of $2,000 (subsequently reduced to $1,750) to complete it. Respondent, to satisfy himself, looked over the property, inspected the partly completed building and interviewed the builder. He made no inquiries as to the probable cost of completion, unpaid bills, etc., but "concluded in his own mind that the building was sufficiently advanced that $1,750 would finish it up—complete the house." Respondent reported to appellant that he "thought it alright." As the trial judge found respondent "visited the house which was then being built by Holker and on his own inspection without any recommendation as to the value or as to Holker's worth decided to lend $1,750." The trial judge also added "I do not think plaintiff [respondent] told the defendant [appellant] in express words to see to the proper application of the money." He is referring to this first advance of $1,750. Respondent gave appellant a cheque for $1,750 and the latter told him that "the builder had some little sum to pay off the lot." Respondent thought it would be a small amount as the lot was worth only $250. It transpired that it was a prior encumbrance for $1,000. This was paid out of the $1,750, the balance going to the

builder. There is no finding of negligence because of failure to disclose the prior encumbrance (appellant said he advised respondent of this mortgage), the only negligence is in respect to matters later referred to. The general instructions given at the outset may however be material in considering later events, the outcome of the initial transaction. Respondent said he instructed appellant "to search the title—see there is nothing, etc.," meaning no doubt by the incomplete sentence that appellant should see that the title was clear of liens, etc. At this time when the $1,750 was advanced (June 24th, 1930) the only encumbrance was the $1,000 mortgage referred to.

In the succeeding two months respondent expressed dissatisfaction with the progress made in completing the building. He consulted appellant, who advised him that the builder (Holker) required a second mortgage of $800 to complete it and he advised respondent to advance this further sum to protect his original advance. He added "there were already some liens against the building and if they went to Court they would swallow up your first mortgage." Appellant was thus aware of the necessity of providing for the payment of liens. They were filed subsequent to the first advance. Respondent agreed to make this further advance, and a second mortgage for $800 was executed. When this sum was advanced respondent testified that he asked appellant "to look after things—see that everything was paid." Appellant told him "it would take $800 more to pay off the liens and finish the house." He knew therefore that liens were registered. That was one reason why additional funds were required. This second advance was made in September, 1930, and the proceeds were paid by appellant to Holker. No amount was retained to discharge the liens. Notwithstanding this advance the building was not completed and respondent's position was precarious. Only with a completed building free of liens could he hope to realize on his advances.

At this stage he consulted solicitors and what occurred afterwards on their advice is relied upon by appellant as ratification of his alleged negligent acts. They secured on payment of $50 a quit claim from Holker, the builder, who released his equity of redemption to respondent; and as owner of the property respondent settled the lien claims and completed the building.

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By giving evidence as to the amount of his advances by way of loan; payment of liens; the amounts expended in the completion of the building and the value of the completed property he estimated a loss of $750. The trial judge awarded $400 and no objection can be taken to the *quantum* nor substantially to the method adopted in computing it. (*Lowenburg, Harris & Company* v. *Wolley* (1895), 25 S.C.R. 51).

The only negligence is failure to retain the $800 or a sufficient part to discharge the liens. Appellant justifies his action in paying the $800 to the borrower, suggesting that it was the latter's duty to use it properly in discharge of obligations and in the completion of the building. Whatever appellant's relation to the builder he acted in the matter of these two loans for respondent although making no charge for his services. He was paid by the borrower; but that is not material: it does not preclude agency. I think the evidence warrants the finding that appellant professed to act and did act for the respondent who invested money through him. He shewed respondent unpaid bills and stated (undertook) that he would "see to them." It was his duty to see that respondent had all the security the property would afford. In connection with the original advance he was not obliged to satisfy himself that the building if completed would protect the lender; the latter exercised his own judgment after inspection but when difficulties arose and a further advance was recommended by appellant he was bound to exercise care and while not responsible for the failure to complete, it was his duty to apply the $800 in the discharge of liens known by him to exist amounting to over $500. It was stated in evidence that respondent knew at the time that the second advance was made, that the $800 (or the greater part of it) was handed over to the builder by appellant but the trial judge rejected that testimony. The builder dishonestly appropriated the amount, and neither completed the building nor discharged the liens. Appellant through whose hands the money passed should have protected respondent against this swindle. He acted I am sure *bona fide* but failed to exercise care. He inferentially made a representation of capacity to handle funds entrusted to him in such a manner that unnecessary losses would not occur. Respondent suffered damages because of appellant's

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mistake in paying this amount to the builder. It was urged however that in some way the principle of ratification relieves appellant. Respondent was protected in so far as the first advance of $1,750 was concerned. It antedated the liens. After appellant's failure to retain part of the subsequent advance respondent as stated secured title, paid the liens and completed the building. These acts, particularly procuring title, it is said, amounts to a ratification, but of what? The course pursued with the consent of the builder to diminish the loss can not extinguish the negligent acts of the appellant occasioning that loss. There was no ratification of appellant's conduct. The only way respondent could ratify would be by approving respondent's negligent act in parting with the $800 upon being told of it. There would then be antecedent authority.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitor for appellant: *A. J. Patton.*

Solicitors for respondents: *Crease & Crease.*

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JAMES v. FERRIS.

Contract—Sale of a business—Agreement between brokers for share of commission—"Split a nice piece of change"—Meaning of—Findings of trial judge.

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The defendant, an investment broker, who was employed to bring about the sale of a lithographing business in Vancouver, interviewed the plaintiff, a salesman who had previously been in the lithographing business, with a view to obtaining his assistance in bringing about a sale, stating to him, "I have got a nice one and if we can put it over we can split a nice piece of change." Later at the defendant's request the plaintiff shewed one Bulman, a prospective buyer, over the premises, and Bulman eventually purchased the property. In an action for half the commission it was held by the trial judge on the evidence that the defendant agreed that for any assistance the plaintiff might render in the sale, the defendant would pay to the plaintiff half the commission received.

Held, on appeal, affirming the decision of FISHER, J., that the word "split" meant, without language to qualify it, one-half. This was a joint venture in which the plaintiff performed the services required of him under the agreement, and he was entitled to one-half of the commission.

APPEAL by defendant from the decision of FISHER, J. of the 17th of February, 1931, in an action to recover one-half the commission obtained by the defendant for the sale of a business known as the B.C. Printing & Lithographing Company, Limited to one Bulman, of the City of Winnipeg. The plaintiff claims that he was solicited by the defendant, an investment broker in Vancouver, to assist him in the sale of said business, and agreed to pay him one-half of all commissions received by him on the sale. Pursuant to the agreement the plaintiff claims he assisted the defendant in introducing the said business to one Bulman of Winnipeg as a prospective buyer, and the property was sold to Bulman in November or December, 1930, the defendant obtaining $4,000 as commission on the sale.

Statement

The appeal was argued at Victoria on the 17th and 18th of June, 1931, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Hossie, for appellant: We say there never was any agreement

to divide the commission. They say the word "split" was used but this does not mean an equal division. On the question of usage in a particular place see Halsbury's Laws of England, Vol. 10, p. 265, sec. 486; *Kirchner* v. *Venus* (1859), 12 Moore, P.C. 361 at p. 399. There is no evidence that James was familiar with any usage: see 1 Sm. L.C., 13th Ed., 619; Odgers on Pleading, 8th Ed., 95. Custom must be specially pleaded: see *Palgrave, Brown & Son, Ld.* v. *S.S. Turid* (1922), 1 A.C. 397 at p. 403; *In re Aykroyd* (1847), 1 Ex. 479 at p. 488. It must be shewn the parties know a local custom or usage: see *Burke* v. *Blake* (1875), 6 Pr. 260 at p. 261; Halsbury's Laws of England, Vol. 10, p. 271, sec. 496; *Mills* v. *Continental Bag and Paper Co.* (1918), 44 O.L.R. 71 at p. 73; *Bowes* v. *Shand* (1877), 2 App. Cas. 455 at pp. 462 and 471. He has not proven his case.

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Argument

J. A. MacInnes, for respondent: This is entirely a question of fact and if there is any evidence upon which the learned judge could find as he did, his decision should not be interfered with. As to the term "split" see *Wells* v. *Petty* (1897), 5 B.C. 353; 1 M.M.C. 147 at p. 149.

Hossie, replied.

Cur. adv. vult.

6th October, 1931.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A.: What strikes one at first blush is that the sum awarded by the learned judge below seems very considerable for the services rendered. The question, however, is—Was there a contract between the parties, and what is the effect of that contract? The learned judge has found as a fact that there was an agreement between the parties in effect as stated by the plaintiff. Upon this point the evidence is in direct conflict and I am unable to say that he was clearly wrong. The nature of that contract was as I understand it put in other words "We will join forces in trying to bring about this sale and if successful we will split the commission."

It cannot be said upon the evidence that the plaintiff did not render any assistance or devote any time or attention to the

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matter. It was a joint venture in which no question of who did the most or the least work in connection with the sale came into the matter.

Now what do the words "If this deal comes off we will split a nice piece of change" mean? It means as I view it that any remuneration received if the deal was consummated should be "split" between the parties. It is true that a sum of money may be split into several proportions but it seems to me that when one speaks of dividing commission or splitting a piece of change and no mention is made at the time as to the proportion in which it is to be split or divided by the party using the expression the proper interpretation to be put upon it is "divided half and half" apart from custom or usage to that effect, and, I think, that would be the understanding of the parties.

I would, therefore, dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is in relation to a claim for commission in respect to the sale of the business and plant of the B.C. Printing and Lithographing Company Limited to one Bulman. The evidence is somewhat voluminous but it may be crystallized into the following short summary. The parties to the action were friends and lived near each other in the City of Vancouver. The plaintiff was one with experience and practical knowledge of the business the defendant as a broker had for sale, *viz.*: the B.C. Printing & Lithographing Company Limited. The defendant it is clear wished to profit by the knowledge of the plaintiff and thereby make it possible for him to convince possible purchasers of the desirability of purchasing the business and plant he had for sale. This resulted in the plaintiff actively assisting the defendant and W. G. Ferris & Company, the name under which the defendant W. G. Ferris carried on business. Amongst other things done by the plaintiff at the request of the defendant was to bring to the notice of the defendant the names of parties who might be interested and become purchasers, notably people carrying on similar business to that desired to be sold in the eastern Provinces of Canada and amongst others the name of one Bulman of the City of Winnipeg was drawn to the attention of the defendant by the plaintiff and it was to Bulman

that eventually the business was sold. It is true apparently that the defendant was aware of the name of Bulman before the plaintiff gave the name to them yet Bulman was aware of the practical knowledge the plaintiff had and when he came to Vancouver the plaintiff was brought into touch with Bulman at the instance of the defendant and asked to go over the plant with Bulman and naturally to point out its capabilities and potential features. This the plaintiff did and as I read the evidence it is a fair conclusion to arrive at that the plaintiff was the effective cause of bringing about the sale. At the least he was a major cause in inducing Bulman to purchase—all the evidence supports this view. I do not intend to canvass the evidence in detail; that the learned judge has done and where the evidence was in its nature conflicting the learned judge has found in favour of the plaintiff. The case is one of credibility and upon that phase of it the learned trial judge has believed the plaintiff. There is no question of the fact that the plaintiff rendered services to the defendant and further in my opinion was the effective cause of the sale. With the careful judgment of the learned trial judge that we have here it does not seem necessary to particularize any portion of the evidence. I will, however, only call attention to one significant portion of the evidence that the learned trial judge sets forth in his reasons for judgment, *viz.*:

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> Do you remember that you [referring to the defendant Ferris] told him [referring to the plaintiff] to come in on Saturday and you would straighten up with him? Yes.

This is very significant and points the moral of the whole matter. There undoubtedly was employment and the law imports payment for services rendered. The defendant now attempts to disclaim all liability—it becomes a question of fact and the fact has been found in no uncertain terms in favour of the claim of the plaintiff. Now the learned trial judge in believing the plaintiff accepted his statement that the defendant Ferris in speaking to the plaintiff in respect to remuneration for services rendered the defendant said that if the plaintiff would help him they would "split a nice piece of change." The learned trial judge in respect of this in his reasons for judgment uses this language:

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I find that those words, either exactly or in effect, were used, and that the word "split" means half, and meant that to the parties; and I also find that the plaintiff, as I think is quite apparent from the passages which were read from the examination for discovery of the defendant and of the evidence, did assist in selling that business and that he is entitled to half of the sum of $3,750,

which was the commission the defendant received in respect of the sale of the business. A somewhat elaborate argument was directed at this Bar to the meaning of "split" and that it does not necessarily mean one-half but no authoritative precedent was cited to uphold any such submission and I have no hesitation in arriving at the conclusion that "split" meant, without language to qualify it, one-half, and I may say that I am in every way in complete agreement with the learned trial judge's conclusions of fact and his application of the law thereto in finding as he did in favour of the plaintiff. It is, of course, to be remembered that the Court of Appeal has a very responsible duty to perform in hearing appeals and that duty I am well aware of and the extent to which there must be enquiry in appeal with all that in mind it is plainly apparent to me that the learned trial judge has decided rightly and that within the line of duty that devolves upon the Court of Appeal this is not a case for the disturbance of the judgment of the learned trial judge. In that connection I would refer to the leading and authoritative decisions upon the point which well demonstrate that the present case upon its particular facts would not be one that would admit of disturbance of the judgment of the Court below. In *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 402 Lindley, M.R. (afterwards Lord Lindley), said:

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> The case was not tried with a jury, and the appeal from the decision of the judge is not governed by the rules applicable to new trials after a trial and verdict by a jury. Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must re-consider the materials before the judge, with such other materials, if any, as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions, and

when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witness. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen.

Then we have the recent pronouncement of the House of Lords upon the principle that should obtain and be borne in mind when it is asked as here that the judgment of the learned trial judge should in a case where it is one of fact be disturbed. I would refer to what Lord Sumner said in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37 at pp. 47-8.

MCPHILLIPS, J.A.

I am, therefore, of the view, in the present case, that the judgment of the learned trial judge should be affirmed and the appeal dismissed.

MACDONALD, J.A.: One point only arises in this appeal. The learned trial judge said:

> I accept the plaintiff's [respondent's] evidence and find that there was an arrangement made between him and the defendant [appellant] by which the plaintiff was to assist him in the sale of the business known as the B.C. Printing & Lithographing Company Limited, and that the defendant agreed with the plaintiff that for any assistance the plaintiff might render in the sale of the business, the defendant would pay to the plaintiff half of the commission received by the defendant on the sale of the said business.

His Lordship in this language is giving his interpretation of the words used by the appellant in framing an agreement. The words were "if we could put it over [*i.e.*, consummate the sale] we [appellant and respondent] would split a nice piece of change." The trial judge held that the word "split" used by appellant meant payment to resepondent of "one-half" of the commission earned. The only source from which "a nice piece of change" could be obtained was the commission on the contemplated sale. That is what the parties had in mind. The only question therefore is the true interpretation of the words used. Other points raised are not material in view of this finding of fact fully supported by the evidence.

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The words "split a nice piece of change" are not peculiar in a trade sense: it is jargon employed by the careless to express

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thought. No evidence could properly be given to control or alter the meaning of the words. Interpretation is for the Court. The natural meaning could only be elucidated by extrinsic evidence if it was shewn that universally, in the locality where uttered, and in the trade affected, a special meaning was assigned to them. No satisfactory evidence of this character was given. A witness attempted to assign a trade meaning to the word "split" but admitted that it might mean "one-half" or any other division into parts. No assistance is required to arrive at that simple conclusion. The word has no technical signification requiring explanatory evidence. The contract is interpreted by ascertaining the intention of the parties as indicated by the words used. Did appellant by using the word "split" promise to pay one-half and did respondent so understand it? A sum of money, article or commodity may be "split" in many ways—in equal or unequal parts—but it is obvious that if it was not appellant's intention to divide equally it was incumbent upon him to specify the smaller or larger fraction (as the case might be) payable to the respondent in the event of a sale. The only escape from that burden is to assert that the contract was wholly illusory and that it was so intended. I would not so find—I think the parties fully understood the intended meaning of the words. They were not idle words, but the basis of a contract for the payment of services to be rendered *in futuro*. The appellant denied using the words but his evidence was not accepted. The finding means therefore that appellant told respondent that he would "split" a nice piece of change (meaning the commission) with him. As intimated, he cannot now say that he meant less than one-half unless the smaller proportion was designated, nor can he say that the words were meaningless without convicting himself of deceit.

MACDONALD, J.A.

In the absence therefore of explanatory words, it must be taken that an equal division was intended. In *Wells* v. *Petty* (1897), 5 B.C. 353; 1 M.M.C. 147 the defendant said to the plaintiff "if you will shew me where you found the float I will prospect for the ledge and if I find it you will be in on it." It was held that the words "in on it" in connection with a mineral claim imported a co-ownership or partnership and the presumption was that the interest should be equally divided. That would

be true apart from the element of partnership. As there was no evidence in that case, or in the case at Bar of a contract for a different division the presumption must be, as pointed out by Turner, L.J., in *Robinson* v. *Anderson* (1855), 7 De G. M. & G. 239 at 242, in favour of equality; also "the burden of shewing an agreement to the contrary is on the defendant."

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *E. P. Davis & Co.*
Solicitors for respondent: *MacInnes & Arnold.*

TAYLOR v. FORAN AND THE ONTARIO LOAN & DEBENTURE COMPANY.

Contract—Plumbing—Partially completed in house under construction—Work on house stopped—Further plumbing impossible until house completed—Delay—Lien.

The plaintiff partially completed a plumbing contract in defendant's house while it was under construction, when the defendant stopped work and was unable to complete the house. The plaintiff was unable to continue his plumbing until construction work was resumed on the house and after waiting one year he filed a lien for the balance due on the plumbing work already done.

Held, that as long as the contract remains in a state of incompletion owing to the owner's default, the plaintiff is entitled to file a lien and he is entitled to judgment for the balance due and to a lien on the property charged.

ACTION to recover balance due for work performed on a plumbing contract that was only partially performed owing to the building on which the work was done not being sufficiently advanced in construction in order to allow the plumbing to be completed, and for a lien on the property. Tried by CAYLEY, Co. J. at Vancouver on the 24th of September, 1931. Statement

J. A. Grimmett, for plaintiff.
Ray, for defendant.

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13th October, 1931.

CAYLEY, Co. J.: The plaintiff was a plumber and entered into a contract with the defendant Foran to do certain plumbing on Foran's own premises. The contract was for $285. The plaintiff did $175 worth of work on which he was paid $50 leaving $125 due him. This was in May, 1930. He then waited for the defendant to bring the other structure of the house up to a certain point where the plumbing could be completed. It is evident that without certain other portions of the house being completed it was impossible to go on with the plumbing. The defendant Foran, however, had got into difficulties and the house has been idle for the past year and the house has not been sufficiently advanced at this time for the contracted plumbing to be completed. The plaintiff has therefore, an incompleted contract on his hand. He is ready, willing and able to complete the contract of the house at any time and is kept out of his money simply because he has been waiting on the defendant hoping and expecting that from time to time he could go on with his contract. In May, 1931, a year later, he decided that he had better file a lien for the plumbing he had already done and the only question is whether, since the last plumbing he did was in May, 1930, he has any right to file a lien a year later because, through the defendant's fault he has not been able to complete his contract. I hold that as long as the contract remains in a state of incompletion, owing to the owner's default, the plaintiff is entitled to file a lien. Judgment has been given for the plaintiff against the defendant Foran for $125 and it is declared that he is entitled to a lien on the property charged, *viz.*: lot 12, subdivision 3, block 43, subdivision in district lot 139, group 1, New Westminster District.

Judgment

Judgment for plaintiff.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA v. BRITISH COLUMBIA SUGAR REFINING COMPANY LIMITED.

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THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA *v.* BRITISH COLUMBIA SUGAR REFINING CO. LTD.

Income tax—Interest on Dominion bonds—Sent by cheque to Vancouver—Endorsed and sent for deposit in bank in Montreal—Money never used or invested in British Columbia—Subject to income tax.

Interest on Dominion Government bonds held by the defendant Company was sent by cheques to the Company's offices in Vancouver. On receipt of the cheques the amount received would be entered on the books of the Company, the cheques then endorsed and sent to the Bank of Montreal in Montreal for deposit in a special account kept by the Company there. These moneys were not used in the business of the Company or in payment of dividends but were reinvested in Dominion bonds or other securities outside this Province. It was held by the judge of the Court of Revision that the moneys so received were not subject to Provincial income tax.

Held, on appeal, reversing the decision of the judge of the Court of Revision, that the cheques having been brought into the Province and endorsed here, they must be treated as money, and are therefore subject to the income tax.

APPEAL by plaintiff from the decision of W. H. S. Dixon, Esquire, judge of the Court of Revision in Vancouver, of the 6th day of April, 1931. The British Columbia Sugar Refining Company, Limited, has its head office in Vancouver, British Columbia. It invests its profits from time to time in Dominion Government bonds. The bonds themselves are held by the Company in its offices in Vancouver. From time to time cheques are sent from Ottawa to the Company in Vancouver for the interest on the bonds. Upon receiving these cheques the Company endorsed them and sent them to Montreal for deposit in a special savings account in the Bank of Montreal there. The income thus earned is carried into a profit and loss account, but not used to pay dividends or for any other purpose than to buy more bonds or shares for investment. There was one exception to the above, namely, a cheque for $17,500 which was deposited in the Bank of Montreal in Vancouver for transfer to the account above mentioned in Montreal. This item was dealt with by the Court below in the same way as the cheques sent

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direct to Montreal. It was held that the income thus derived by the Company was not subject to taxation within the Province.

The appeal was argued at Victoria on the 25th and 26th of June, 1931, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Pepler, for appellant: The exemption is derived under subsection (*d*) of section 42 of the Taxation Act. The cheques were sent to Vancouver, endorsed and sent to Montreal for deposit there, but the amount was entered on the books of the Company in Vancouver. The Company had no branch office in Montreal. If you receive dividend cheques here they are taxable under the Act: see *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (1886), 2 T.C. 165 at p. 173; *Gresham Life Assurance Society* v. *Bishop* (1902), A.C. 287; 4 T.C. 464 at p. 475; *Standard Life Co.* v. *Allan* (1901), *ib.* 446 at p. 457; *Scottish Widows' Fund Life Assurance Society* v. *Farmer* (1909), 5 T.C. 502. The exemption clause must be strictly construed: see *Roenisch* v. *The Minister of National Revenue* (1931), Ex. C.R. 1 at p. 4; *Dame Mary Wylie* v. *City of Montreal* (1886), 12 S.C.R. 384.

Arugment

Hossie, for respondent: A statute which imposes a tax is construed strictly: see Maxwell on Statutes, 7th Ed., 107; *Tennant* v. *Smith* (1892), A.C. 150 at p. 154; *Partington* v. *The Attorney-General* (1869), L.R. 4 H.L. 100 at p. 122; *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1920), 90 L.J., K.B. 113 at p. 117; *In re J. Thorley* (1891), 2 Ch. 613; *Warrington* v. *Furbor* (1807), 8 East 242 at p. 245. Exemptions should be liberally construed in favour of the subject: see *Armytage* v. *Wilkinson* (1878), 3 App. Cas. 355 at pp. 369-70; *Inland Revenue Commissioners* v. *Dalgety & Co.* (1930), A.C. 527 at p. 531. The money was never brought into the Province. The cheques were orders on an account in Ottawa and are evidence of a debt only: see Falconbridge on Banks and Banking, 4th Ed., 166; *Scottish Widows' Fund Life Assurance Society* v. *Farmer* (1909), 5 T.C. 502 at p. 509; Dicey's Conflict of Laws, 4th Ed., 345; *Ramchurn Mullick* v. *Luchmeechund Radakissen* (1854), 9 Moore, P.C. 46 at pp. 69-70; *Hopkinson* v. *Forster* (1874), L.R. 19 Eq. 74;

Woodland v. *Fear* (1857), 7 El. & Bl. 519; *Rex* v. *Lovitt* (1912), A.C. 212; *Clare & Co.* v. *Dresdner Bank* (1915), 2 K.B. 576; *Royal Bank of Canada* v. *Rex* (1913), A.C. 283; *Attorney-General* v. *Bouwens* (1838), 4 M. & W. 171 at p. 191. Keeping an account on the books of the Company in Vancouver of moneys on deposit in Montreal does not make the money subject to taxation: see *Bartholomay Brewing Co.* v. *Wyatt* (1893), 3 T.C. 213 at p. 221; *Forbes* v. *Scottish Provident Institution* (1895), *ib.* 443 at p. 456; *Standard Life Co.* v. *Allan* (1901), 4 T.C. 446 at pp. 456 and 460; Dowell's Income Tax Laws, 9th Ed., 446; *The Scotch Provident Institution* v. *Farmer* (1912), 6 T.C. 34; *Gresham Life Assurance Society* v. *Bishop* (1902), A.C. 287.

Pepler, replied.

Cur. adv. vult.

6th October, 1931.

MARTIN, J.A.: This appeal arises out of section 42 (*d*) of the Taxation Act, Cap. 254, R.S.B.C. 1924, which provides that:

> The following income shall be exempt from taxation:—
> (*d*) All income derived from any source without the Province which is not brought into or used within the Province.

"Income," by section 2 of said Act, is thus relevantly defined:

> "Income" includes the gross amount earned, derived, accrued, or received from any source whatsoever, the product of capital, labour, industry, or skill; and includes all wages, salaries, emoluments, and annuities accrued due from any source whatsoever . . . ; and includes all income, revenue, rent, interest, or profits arising, received, gained, acquired, or accrued due from bonds, notes, stocks, debentures, or shares (including the stocks, bonds, or debentures of the Dominion or of any Province of the Dominion, or of any municipality), or from real and personal property, or from money lent, deposited, or invested, or from any indebtedness secured by deed, mortgage, contract, agreement, or account, or from any venture, business, or profession of any kind whatsoever.

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It will be noted that it is not "money" but "income" which has been "brought into or used within the Province," that is dealt with by the exemption in question and there is no indication of the meaning of the word "money" under various circumstances, as there is in the National Currency Act, R.S.C. 1927, Cap. 40, in *e.g.,* sections 8-19.

The question is one of first impression upon the special

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language of the section and by the industry of counsel many cases have been brought to our attention, yet because of differences in wording none of them is of exact application, but their general trend supports the view that it is sufficiently clear that, under the circumstances of this case, the income in dispute has been "brought into" this Province within the true intent and meaning of the statute.

There is nothing in the language of the section that warrants our taking the narrow and restricted view that "income" cannot be brought into this Province unless in the form of money, in coin or paper currency, which will completely satisfy the stringent requirements of "legal tender" as meticulously defined by the Parliament of Canada (the sole authority over that subject-matter) in the said Currency Act.

It would indeed, I think, shock the common business sense of this country if it were to be held that the said "gross amount earned, . . . or received from any source whatever" as "income" does not include such everyday equivalents of it in the form of money, in the broad sense of commerce, as have been in fact accepted and substituted for it in the carrying on of the business of the people, and particularly where those equivalents have been actually so treated, as here, in the books of account of the parties engaged in any transaction under consideration in the working out of the said Taxation Act. It would, for example, be pushing the matter to preposterous lengths to hold that a merchant of Vancouver had not "brought money" into this Province in the business and ordinary sense when he entered it from New York with his pocketbook filled with U.S. Government "green-backs," redeemable in gold, or from Quebec or Paris with his wallet filled with French *louis d'or,* though such currency might be at a premium here. And the same reasoning applies to the money orders of our chartered Federal banks, and cheques accepted by them, and to the money orders of Federally chartered express companies, and, above all, to cheques from the National Departments of State and the Post Office money orders of our National Government itself, all of which are treated in business transactions throughout Canada as the equivalents of money, if not indeed, in the two last and highest instances, as almost legal tender itself.

This view is in accord with the broad acceptance of it on this continent, as defined by Webster's New International Dictionary *sub. tit.*:

> Money. . . . 4. In a comprehensive sense, anything customarily used as a medium of exchange and measure of value . . . hence, *Econ.*, anything having a conventional use (1) either as a medium of exchange or a measure of value or (2) as a measure of value alone.

I cite this authority because it was relied on by the Privy Council in the leading case from this Province of *Victoria City* v. *Bishop of Vancouver Island* (1921), 2 A.C. 384 at p. 392, wherein it was also said by their Lordships that the words of statutes (p. 387)

> must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to shew that they were used in a special sense different from their ordinary grammatical sense.

There can be no reasonable doubt, I apprehend, that the usual wide sense of the words "brought into" is not restricted to such things as a man may carry in his pockets, or hands, or luggage, across the boundary of a Province, but extends to those things that he may direct or cause his servants or agents or consignors to follow, or be sent to him therein, as is recognized by a primary meaning of "bring" thus defined in the same Dictionary, *viz.*:

> Bring. . . . 2. to make to come; procure, produce, draw to.

It would, *e.g.*, be entirely correct to say that "Black walnut trees were first 'brought into this Province' by Sir Henri de Lotbiniere" (late Lieut.-Governor), though the way he did it was by giving orders to his agents in Quebec to send them from his estate there to him here at Government House in Victoria.

In determining the question as to whether anything has been "brought into" this Province, the duration of its stay there, after its entry, cannot affect the matter, because there can be no difference in principle between one thing being within its borders for a short time for one purpose, or several things for a long time and for many purposes.

Being, therefore, of opinion that the appeal should be sustained on this first ground, it is unnecessary to express any view upon the second one respecting income "used" within this Province.

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GALLIHER, J.A.: I think the learned judge of the Court of Revision was right in two of his findings: (1) That it was income from a source without the Province; (2) that it was not used within the Province. On the third finding I think he was in error in saying that the income had not been brought into the Province. Here cheques representing the amount of the income payable to the respondent were forwarded from Ontario to Vancouver, the Company's head office. It is true these cheques were endorsed and immediately sent back to be deposited to the Company's credit in the Bank of Montreal in Montreal. Had the income been remitted to Vancouver in the first place (say in gold) it would appear to me it could not be said not to have been received even if shipped back immediately and never used or deposited here. The point then is—Is the receipt of cheques in the same category? We know that in the ordinary course of business transactions cheques and drafts are remitted as payment. In *Gresham Life Assurance Society* v. *Bishop* (1902), A.C. 287 it was held, overruling the Court of Appeal in England, that the money had not been brought within the United Kingdom. Lord Brampton at p. 294 says:

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> It is conceded that no part of the money in question was ever received in the United Kingdom *in specie* or in any form known to the commercial world for the transmission of money from one country or place to another.

Lord Lindley at p. 296:

> My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e.g.*, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men.

and goes on to say at the bottom of the same page:

> The special case clearly shews that it has not in fact been remitted to this country in any way whatever.

Here there was a sender and a receiver of cheques. The receiver in Vancouver dealt with these cheques to this extent that he endorsed them thus making them available to be cashed. The medium of transmission was by mail. Had these cheques been handed to an official of the Company (say in Ottawa) not authorized to endorse them and he had either brought them personally to Vancouver or sent them by mail that would, I think, have been a bringing into British Columbia within the meaning of the Act and cheques being a recognized method of remitting sums due in commercial transactions and so treated

by business men I am of opinion that those *indicia* of income should be treated as if the amount had been remitted *in specie*.

On this ground I think the appeal succeeds.

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McPHILLIPS, J.A.: This is a taxation appeal brought by the Attorney-General from the judgment of the learned judge of the Court of Revision and Appeal, Vancouver Assessment District (*W. H. S. Dixon,* Esquire) wherein it was held that the assessment was invalid and was set aside as being income exempt from taxation under section 42 (*d*) of Cap. 254, R.S.B.C. 1924, the section and subsection pertinent to the matter in question reading as follows:

42. The following income shall be exempt from taxation:— . . .

(*d*) All income derived from any source without the Province which is not brought into or used within the Province.

At the outset it may be stated that the taxation in question on this appeal is only questioned because it is contended that the exemption applies. If not, the taxation is valid. The decision of the learned judge of the Court of Revision and Appeal is now under appeal to this Court. It may be said in passing that the income earned by the respondent in this appeal was in amount $506,262.50 during the years 1928, 1929 and 1930 and derivable from Dominion of Canada Government bonds and Steel Company of Canada preference shares, the bonds and shares being held by the respondent in its City of Vancouver head office. The revenue derivable from the bonds and shares was received by cheque payable to the respondent's order issuing from the Government of Canada Treasury at Ottawa and in the case of the Steel Company of Canada from its head office at Hamilton, Ontario; the Government cheques being payable at par at any chartered bank of Canada in any Province of Canada. The respondent did not cash the cheques in the City of Vancouver but indorsed same and remitted them to the Bank of Montreal's head office at the City of Montreal, Quebec, and they were placed to the credit of the respondent in its bank account at that office. The moneys represented by the cheques received can all be found credited in the books of the respondent and are all shewn in the profit and loss account of the respondent at its place of business in the City of Vancouver.

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The pass book of the Bank of Montreal shewing the deposits so made, and, as I understand, confined to these moneys, is held in the City of Vancouver and cheques drawn thereon by the respondent are always drawn in the City of Vancouver and there are admissions that some of these moneys may have been paid out in connection with dividends going to the shareholders although no definite amounts were ear-marked. I would refer to what the Lord President said in *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (1886), 2 T.C. 165 at pp. 173-4:

> They say that the state of the fact . . . of the case shews that this interest was not received in Great Britain [here it would be British Columbia]. Now in one sense of the word that may be true. That is to say, the interest received by the Company's agents in America has not been *in forma specifica* sent to this country. . . . If the dividend to the shareholders had been paid out of capital that would have been altogether illegal; . . . So that according to the way in which this Company keeps its books, it has really converted a sum which was received in this country as capital into an equivalent for the interest upon the foreign securities, and it represents in their books interest upon these foreign securities. Now in these circumstances it appears to me quite impossible for the Company to maintain that they have not received that interest. They have received it in this most proper sense of the term, that it enters their books in this country as such interest and is paid away as such. . . .

In *Gresham Life Assurance Society* v. *Bishop* (1902), A.C. 287; 4 T.C. 464 some significant remarks were made by Lord Lindley that would strongly support it being found on the special facts of the present case that the moneys in question here can be said to have been brought into British Columbia and used within the Province. Here we have the Government of Canada's cheques received at the City of Vancouver payable to the order of the respondent and payable at any chartered Bank of Canada at par. The respondent indorses the cheques and thereafter remits these cheques to the Bank of Montreal at the City of Montreal for deposit there. And it may be pointed out that by far the greatest proportion of the moneys in question came from the Government of the Dominion of Canada. Lord Lindley, at p. 296 in the *Gresham Life Assurance Society* case said:

> My Lords, this appeal turns upon the answer to be given to a simple question of fact. Has a certain sum of money entered by the Gresham Society in its accounts as an asset been received in this country by the society, or has it not? If it has, the appeal ought to be dismissed; on the other hand, if it has not, the appeal ought to be allowed. First, let us

consider what is meant by the receipt of a sum of money. My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e.g.*, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth.

In *Standard Life Co.* v. *Allan* (1901), 4 T.C. 446 at p. 457 Lord Trayner said:

> . . . I concede that in order to make the foreign interest liable in duty, it is not necessary that it should be remitted *in forma specifica* if that means was remitted in coin. Anything equivalent to money or which can be turned into money will do.

In the present case we have the most cogent evidence that the great bulk of the moneys in question in this appeal, *i.e.*, the Government of Canada cheques were "equivalent to money" and the money could have been got *instanter* upon the presentation of the cheques at any chartered bank of Canada in the City of Vancouver; further the cheques would have been paid at par, no exchange charges whatever. Further the cheques of the Steel Company of Canada "could be turned into money" at once upon deposit in the bank of the respondent at the City of Vancouver. In *The Scottish Widows' Fund Life Assurance Society* v. *Farmer* (1909), 5 T.C. 502 the Lord President, at p. 508, is considering the statute law there, *viz.*: "receipt." Here we have "brought into the Province." It would seem to me that the words we have to construe are in their nature more expansive and comprehensive but even were it "receipt" sufficient has taken place to satisfy the language of The Lord President. He said:

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> Now, I think your Lordships will recognize that the point of that case, [*Forbes* v. *Scottish Provident Institution* (1895), 3 T.C. 443] as put by the noble and learned Lords, was that they held themselves bound by the strict word of the statute, and that word is "receipt," and nothing less than actual receipt will do. Now, actual receipt of money, it seems to me, can only be effected in one of two ways. Either the money itself must be brought over *in specie*, or the money must be sent in the form which,

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according to the ordinary usages of commerce, is one of the known forms of remittance.

Can it be for a moment contended that in the present case the money was not "brought into the Province" "in the form which according to the ordinary usages of commerce is one of the known forms of remittance"?

It would seem to me that this question is only susceptible of one answer and that must be that the moneys were well and sufficiently brought in when the cheques were received, particularly is this so in the case of the Government of Canada cheques —they were immediately, at the City of Vancouver, convertible into cash.

There has been the utmost frankness upon the part of the respondent as to the *modus operandi* relative to receiving the income from the Government of Canada and the Steel Company of Canada and that the intention was to legally evade (*Simms* v. *Registrar of Probates* (1900), A.C. 323) if possible the incidence of taxation under the Taxation Act (Cap. 254, R.S.B.C. 1924) claiming that section 42 (*d*) gave complete immunity. In my opinion, upon the special facts of the present case, and upon a careful consideration of the relevant authorities it would seem to me that the language of the statute "brought into" was fully executed when the cheques were received at the City of Vancouver, and I would further think that at least some of the moneys were "used within the Province." I would adopt the language of Lord Shaw of Dunfermline in his speech in *Attorney-General* v. *Richmond and Gordon* (*Duke*) (1909), A.C. 466 at p. 487:

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> I do not think that the scheme was in this case accomplished without a contravention of the letter as well as a very plain violation of the spirit of the statute.

Therefore, in my opinion, the assessment made, as against the respondent, was a valid assessment and should be confirmed and the judgment of the Court of Revision and Appeal, Vancouver Assessment District, should be set aside; that is, the appeal should be allowed.

MACDONALD, J.A.

MACDONALD, J.A.: This is an appeal by the Attorney-General from a decision of the judge of the Court of Revision holding that a scheme resorted to by respondent to obtain the benefit

of an exemption clause in the Act later referred to, accomplished the object contemplated. Respondent a Dominion Company with registered office in Vancouver is engaged in refining sugar. It paid its shareholders in the year ending March 31st, 1930 (and I presume approximately the same amount during the three-year period in question) $1,340,000 in dividends. Because of large profits it was able to extract from the business for investment purposes a principal sum sufficient to yield interest amounting to $506,262.50 in three years. This principal sum was invested in bonds of the Dominion of Canada and preferred shares of the Steel Company of Canada located at Hamilton, Ontario. It is on the interest, arising from these two investments that the Attorney-General seeks to collect taxes amounting approximately to $36,000. The bonds and stock certificates were held at the registered office of the Company and from time to time as it accrued cheques for interest were sent from Ottawa and Hamilton to Vancouver. These cheques were endorsed by respondent, and immediately forwarded by mail to the Bank of Montreal in the Province of Quebec to be deposited to its credit at that point. The first amount received, *viz.*, $17,750 was first deposited in the Bank of Montreal in Vancouver "to be transferred" however, as respondent's vice-president and secretary stated "to this account in Montreal." Evidently this was not regarded as effective in evading the Act and later cheques were mailed to Montreal as and when received. In this way over half a million dollars was sent out of the Province in three years. Respondent did not have a branch office in that Province, nor had it any need of funds at that point for commercial or other purposes. The income was sent to Montreal with one object only, *viz.*, "for the purpose of escaping Provincial income tax." If this scheme succeeds other concerns and individuals, with surplus funds, may do likewise, thus depriving the Province of large sources of revenue and passing the onerous burden of taxation, to that extent, to the shoulders of others unable to accumulate a surplus (and far less able to bear it), or if able, unwilling to resort to this device.

The section of the Taxation Act (Cap. 254, R.S.B.C. 1924) invoked as a cloak is 42 (*d*) and reads as follows:

> The following income shall be exempt from taxation:— . . .

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(*d*) All income derived from any source without the Province which is not brought into or used within the Province.

In construing it

the intention to exempt must be expressed in clear unambiguous language; that taxation is the rule and exemption the exception, and therefore to be strictly construed:

Ritchie, C.J., in *Dame Mary Wylie* v. *City of Montreal* (1886), 12 S.C.R. 384 at p. 386.

A statute imposing a tax is construed strictly according to well known rules; the Crown must bring the subject within the clear words of the Act. This section is framed to relieve certain sums from taxation: not to impose a tax. It cannot be any broader than the plain natural meaning of the words suggest. If too, there is any doubt the words should be construed in a sense that will harmonize with the object in view in granting exemptions. It was not intended to exempt income arising from reinvested surplus funds earned in this Province. The Court when satisfied that the claim for exemption is unwarranted should not allow respondent "to escape from the operation of the law by means of the disguise under which its real character is masked." (Maxwell on the Interpretation of Statutes, 7th Ed., 100.) Again at the same page "Whatever might be the form or colour of the transaction, the law looks to the substance." The respondent resorted to a trick. Its contention lacks substance. The same author says at p. 174:

> A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the Legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words.

I do not think, however, there is any special need to resort to canons of construction in interpreting this section. As Sir James Colville said in *Armytage* v. *Wilkinson* (1878), 3 App. Cas. 355 at p. 370:

> It is only, however, in the event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or of liberality of construction need arise.

Certainly nothing more is excepted by this section than the words fairly indicate.

The question arises—Was the income (1) brought into or

(2) used in the Province? In either case it is taxable. Dealing first with the second phase although it was used in the Province only indirectly yet the requirements of this section were satisfied. The presence of a large sum representing income deposited in Montreal would naturally be considered (if not in declaring dividends) in the direction of the Company's business. In that sense it was used in British Columbia. Projects could be undertaken, expenditures made or reserves diminished because of the existence of this reservoir of wealth. It was an available source of credit which was taken into account in the conduct of the business. Indeed it is not clear from the evidence that it was not regarded when dividends were declared. The evidence on this point is not satisfactory. The witness first stated that none of it was used to "pay dividends or debts or anything of that sort." When asked if it was taken into account in estimating dividends he replied "not necessarily so." Then these questions and answers follow:

Part of that is taken into consideration in estimating dividends to shareholders? Not necessarily.

It is as an actual fact, in this case? I would not admit it is.

Can you say it is not? I would not say it is not.

It might be we will leave it at that. Alright it might be.

If the witness who suggests that it was not "used" in paying dividends or otherwise will not definitely say so I do not think the Court should be astute in a case of this sort to find reasons for arriving at a different conclusion. The fair deduction, coupled with what one would assume and from other evidence adduced, is that this potential source of wealth played a part in the fixing of dividends. It is entered in respondent's annual accounts, and taken into consideration in ascertaining the total profits and their division, none the less so although the decision may not be to disburse it as dividends. If not so disbursed it forms a valuable reserve fund. That is using it. Why should it not be taken into account? It was income readily available. Only the desire to evade income tax kept it, not out of respondent's reach, but out of the Province. A statement on which a declaration of dividends should be based would not be complete without reference to this income earned by the surplus funds of the Company. It belonged to the shareholders. Again although the evidence is sketchy and the inquiry not fully pursued other

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facts emerge. These interest cheques were passed through respondent's books and were included in the Company's annual profit and loss account. The secretary said "I think I am safe in saying all this money was kept in reserve account." The sum, part of it at all events, appears in profit and loss account for the year ending March 31st, 1930, as "Interest on Investments $367,565.99." In the same account there is a debit for dividends amounting to $1,340,000, although it shews that the profit on refining operations yielding dividends was a smaller sum, *viz.*, $1,199,074.19. True the account shews a balance from the previous year of over four million and this with profits would amount to a sum more than sufficient to meet the dividends paid. As to other years no evidence was offered and we do not know whether or not it was necessary to resort to the sum received as interest on the investments in question in declaring dividends or otherwise. We only know that in the year referred to this sum, *viz.*, $367,565.99 appeared in profit and loss account. The witness stated "if the balance at credit of profit and loss is sufficient to take care of the dividends these amounts (interest or income in question) need not enter into it at all." It is presented, I take it, to the shareholders in annual meeting as one of the resources of the Company and whether or not they decide to disburse it to shareholders or as a matter of policy allow it to accumulate as a reserve fund the respondent is "using" it in connection with the business of the Company. Probably the reason why it is represented as not being considered in estimating dividends or in paying larger dividends is to further the scheme in view, *viz.*, to get, if possible, the benefit of a so-called exemption and be able to shew that it was not "used" in the sense contemplated by the Act. Falling profits in less prosperous years might induce respondent to use them for this purpose. It forms part of a reserve fund adding to the financial wealth of the Company: enabling it, if credit should be required to afford additional security. The onus is on the respondent, claiming the exemption, to shew that it was not "used." The evidence points the other way: at all events that burden was not discharged.

On the remaining point: the income if not used in the Province is taxable if "brought into" the Province. All but a com-

paratively small amount is represented by cheques from the Dominion Government. Cheques of the National Government payable at par anywhere in the Dominion were "brought into" the Province. I think in passing that the suggestion that the money was "sent in" not "brought in" does not require comment. Respondent endorsed them here. It is not material that in order to avoid payment of income tax they were hurriedly despatched to Montreal. If the Dominion Government chose to forward currency by post or express it would not be suggested that such currency would not represent "income brought into the Province." It need not be "used" here. The fact that the words "brought into" and "used" are found in contradistinction shew that the physical act of entry is enough. In what respect would the receipt of a hundred-dollar bill by respondent differ from the receipt by it of a cheque from the National Government for the same amount? Both are written promises to pay having value because of reserves behind them. If a hundred-dollar bill would be regarded as "brought into the Province" so should a cheque of the National Government. Both are equally negotiable: the cheque only requiring endorsement. The section does not contemplate the receipt of interest in currency or legal tender. It contemplates the usual mode of payment. I think it is equally true that cheques received from the Steel Company of Canada must be treated in the same way and for the same reason. Only three comparatively small cheques were received from that source. They might have been worthless, but the evidence shews that they were not. They were of equal value with currency. Payment by cheque is a recognized method of transferring funds. It is regarded in commercial life as the common form for the transmission of money from one point to another. Respondent Company might demand currency but all parties agree to transfer in another form. In *Gresham Life Assurance Society* v. *Bishop* (1902), A.C. 287 at p. 296; 4 T.C. 464 at p. 476 Lord Lindley said:

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> I agree with the Court of Appeal that a sum of money may be received in more ways than one, *e.g.*, by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men.

Nor is it necessary to establish that the cheques of the Steel Company were payable in British Columbia. The evidence is

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silent on that point. The cheques were the equivalent of currency. This view disposes of the objection that the income or money never left the bank; that the cheques representing it simply travelled to British Columbia and back to Montreal the bank or Government only parting with the money when it was deposited in Montreal and presented for payment. This is not an obstacle if Lord Lindley's view is correct.

In *Standard Life Co.* v. *Allan* (1901), 4 T.C. 446, where it was held that interest received abroad and invested abroad is not "received" in the United Kingdom although in the yearly statement of accounts it is brought into account in the division of the profits of the Company (the Court was not dealing with the point of user). Lord Trayner says at p. 457:

> I concede that in order to make the foreign interest liable in duty, it is not necessary that it should be remitted *in forma specifica* if that means was remitted in coin. Anything equivalent to money or which can be turned into money will do.

A cheque can be turned into money and I think his Lordship would treat it as received even if for payment it had to be presented abroad. At p. 474 he refers to "something equivalent in the market to money." To remit by cheque is an ordinary procedure. It is an actual remittance.

Many cases were cited but I do not find in any of them statements contrary to the views outlined herein. In *Scottish Mortgage Co. of New Mexico* v. *McKelvie* (1886), 2 T.C. 165, interest was treated as received in Great Britain from abroad, although not actually forwarded because an equivalent amount was retained and a course followed that saved the expense of cross remittances. On the point as to whether the income was "brought into" the Province appellant is not relying, as in the *Gresham* case, on book entries disclosing the amount; that is only of importance on the question of user.

This appeal, therefore, should be allowed.

Appeal allowed.

Solicitor for appellant: *Eric Pepler.*
Solicitor for respondent: *Ghent Davis.*

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Criminal law—Murder—Circumstantial evidence—Written statement made by accused in German while in custody—Put in evidence by defence—Admissibility—Translation put in found later to be incorrect—Right to new trial.

An accused has no right to make an unsworn statement at the trial. *Rex* v. *Aho* (1904), 11 B.C. 114 distinguished.

On a trial for murder Crown counsel asked for a ruling as to the admissibility of a written statement made by the accused in the German language while in custody and handed to the constable in charge. Counsel for the defence took the position that it was for the judge to decide whether it should be allowed in. The learned judge ruled without objection that the statement was not admissible as evidence for the prosecution. On the case for the defence, accused's counsel tendered the same statement as evidence and Crown counsel objected to its admission. The judge then ruled that the constable could be called to shew the circumstances under which it was written, and after he was examined the statement was received as evidence and referred to by the judge in his charge. On appeal from the conviction it was shewn that the translation of the statement given on the trial was erroneous in certain respects so as to be prejudicial to the accused.

Held, that the trial judge should have refused to admit the statement in evidence, but having done so and it appearing that the translation of the statement given to the jury was incorrect, this gave rise to an inference prejudicial to the accused, which resulted in a miscarriage of justice, and a new trial should be directed, GALLIHER, J.A. dissenting.

APPEAL by the accused from his conviction on a trial before FISHER, J. and a jury at Prince George on the 25th of September, 1931, on a charge of the murder of one Max Westphal at Trembleur Lake in the County of Cariboo on or about the 12th of June, 1930.

Statement

The appeal was argued at Vancouver on the 16th and 17th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C., for appellant: We submit there was non-direction amounting to misdirection, as the learned judge did not put the whole case to the jury which he is bound to do: see *Rex* v. *Brooks* (1927), 4 D.L.R. 458 at pp. 470-1. The

Argument

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accused's statement which was in German was improperly translated to the jury. This was substantial miscarriage: see *Rex* v. *Wallace* (1931), 23 Cr. App. R. 32. On the question of prisoner making false statements as to the whereabouts of his companions see *Rex* v. *Nahirniak* (1931), 2 W.W.R. 604. The accused's defence was not properly put before the jury: see *Rex* v. *Burton* (1922), 17 Cr. App. R. 5; *Rex* v. *Hewston & Goddard* (1930), 55 Can. C.C. 13 at p. 16; *Rex* v. *Marriott* (1924), 18 Cr. App. R. 74.

Argument

Johnson, K.C., for the Crown: We say the murder was on the 12th of June, 1930, the bodies were found on the 11th of November, 1930, the accused was arrested on the 20th of November following, and was charged on the 26th of November. On the night of the 13th of June he spent considerable money. When arrested he had three opportunities of making a statement but did not do so. As to the statement put in by the defence see *Rex* v. *George* (1908), 73 J.P. 11; *Rex* v. *Jackson* (1910), 74 J.P. 352. That the facts here justify the jury's findings see Wills on Evidence, 6th Ed., 6; *Hodge's Case* (1838), 2 Lewin, C.C. 227; Taylor on Evidence, 11th Ed., 64, sec. 169; *Rex* v. Sankey (1927), 38 B.C. 361 at pp. 364 and 366-7. As to charging the jury on manslaughter see *Rex* v. *Burgess and McKenzie* (1928), 39 B.C. 492; *Rex* v. *Hopper* (1915), 2 K.B. 431; *Rex* v. *Thorpe* (1925), 133 L.T. 95; *Rex* v. *Bagley* (1926), 37 B.C. 353; *Rex* v. *Stoddart* (1909), 2 Cr. App. R. 217; Archibold's Criminal Pleading, 28th Ed., 211-3.

MacNeill, in reply: If the statement put in by the defence is evidence then the jury was not properly instructed. The law requires that the judge must explain.

Cur. adv. vult.

24th November, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): We have come to the conclusion there should be a new trial, my brother GALLIHER dissenting. We think the translation was introduced wrongly at the trial, and it may have affected the minds of the jury. Therefore, the verdict of the jury and the proceedings thereon should be set aside and a new trial ordered.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal from the conviction of the

appellant at the last Fall Assizes, holden by Mr. Justice FISHER, at Prince George, in the County of Cariboo, for the murder of Max Westphal at Trembleur Lake in the said County on June 12th, 1930.

Several grounds of appeal were raised, but in the view which should, in my opinion, be taken of the principal one, it will only be necessary to decide it, and, as the result of that decision will be a new trial, it is desirable that observations upon the case should be restricted to what necessity requires.

The case is peculiar in that the counsel for the accused at the end of the case for the prosecution announced his intention to "put in evidence that . . . consists of a written statement" made by the accused which would "consist solely of my evidence" on his behalf on which "evidence" consisted of a written statement, or declaration, in the German language, made wholly by the accused and signed by him at Prince George on December 8th last while he was in custody in the lock-up on the charge of murder on which he had been arrested, and handed by him on that day to one of the two Provincial police constables in whose custody he was.

MARTIN, J.A.

During the presentation of the case for the prosecution the Crown counsel had properly brought the same document to the attention of the presiding judge and called the said police constables at witnesses to shew the circumstances under which it was written, and left it to the learned judge to rule upon its admissibility as evidence for the Crown, but he did not press for its admission because of said circumstances and of the uncertain character of the document itself, as being in reality an exculpation *in toto,* denying that the accused had anything to do with the murder, and not a confession or admission in the ordinary sense, the counsel for the defence did not object to its admission but took the similar position "that the matter should be brought to the attention of the presiding judge and it is for him to decide whether or not it is admissible." The situation was somewhat unusual and difficult, and the learned judge finally ruled that:

> In the absence of any warning, I would hold that the statement is not admissible in the course of the evidence being led by the prosecution.

No objection has been taken to this ruling.

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Later, when, on opening the case for the defence, the prisoner's counsel tendered the same statement as evidence, as above set out, the Crown counsel objected to its admission for reasons given at considerable length, but the learned judge's decision was: "I rule on the application of Mr. *Young* [accused's counsel] that the constable may be called and the statement introduced"; and thereupon Mr. *Young* proceeded to call the constable and, after his evidence, "tendered" the document to the Court and it was received and marked as Exhibit 34, and was, beyond doubt, given to the jury with the other exhibits which were sent to their room by the judge's direction and was also treated by the learned judge in his charge to the jury as evidence without any distinction from the rest of it; *i.e.*, it was given its full evidentiary value as though it were sworn testimony; thus, *e.g.*, he calls it "a statement which has been read in evidence before you," and instructs them "to put it side by side" with the other evidence.

No case was cited to support such a disposition of the matter, and there is no practice in this Court that would justify such a departure from established procedure which would lead to many dangerous results, the most obvious of which are, the escape from cross-examination; the safe introduction of a concocted defence; the securing of all the benefits of sworn evidence in accused's favour without incurring the consequences of perjury by refraining from going into the witness box; and also depriving the jury of the benefit of appraising his credibility in general from his demeanour therein. It follows, therefore, that the learned judge should have refused to admit the statement in evidence.

MARTIN, J.A.

Its misreception, however, would not, in an ordinary case, be a ground of complaint by the accused because not only was it admitted as evidence in the fullest sense at his express request, but the result of it was greatly in his favour since he obtained the said substantial advantages which he was not legally entitled to, and therefore it is impossible for this Court to say that "any substantial wrong or miscarriage of justice has actually occurred" in that respect under section 1013 (2) of the Criminal Code, and so there cannot be a new trial on that ground—*Cf. Rex* v. *Henry Chow* (1930), 42 B.C. 365; 2 W.W.R. 389.

But a peculiar situation has arisen since the trial in that, by uncontradicted evidence now admitted without objection on this appeal, it now appears that the translation of the said statement, which was jointly treated as correct and "satisfactory" by both counsel at the trial, is erroneous in certain respects, one of which relates to the payment by one Cameron of the sum of about $150, which according to the original translation the accused said in effect he alone "had earned about $150 clear," and inferentially received it, whereas Cameron, called by the Crown, said that the money had been paid to Peters by cheque on behalf of the three companions, *i.e.*, the accused, the deceased, and Peters himself (who made their business arrangements) for wages earned by them all on Cameron's farm up to June 2nd. This discrepancy was all referred to by the learned judge in his charge and undoubtedly an inference prejudicial to the accused arose therefrom as tending to supply a motive for the murder and also respecting the possession and expenditure of money by the accused after the killing on July 12th. But by the admittedly correct translation now before us it appears that what the accused said in his statement was: "I worked with those two men for about four weeks and we cleared approximately $150," and so instead of its being a false statement of the fact and in opposition to Cameron's evidence, it is true and in accord with it.

MARTIN, J.A.

Such being the case, it is, in my opinion, legally impossible to resist the submissions of appellant's counsel that there has been on that ground alone a miscarriage of justice within the meaning of section 1014, subsection 1 (*c*) of the Code, and therefore a new trial must be directed.

In this view of the proper disposition of the matter it becomes unnecessary to deal with the other ground of appeal based on misdirection, and non-direction amounting to misdirection, though there is undoubtedly much to be said in support of the critical submissions of appellant's counsel.

Seeing that there is to be a new trial it becomes necessary to take notice of the decision of the Court of Appeal of Manitoba in *Rex* v. *Kelly* (1916), 27 Man. L.R. 105; 27 Can. C.C. 140; (1917), 1 W.W.R. 46, that (as Chief Justice Howell put it), p. 117 [Man. L.R.] and p. 54 [W.W.R.]:

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The Canada Evidence Act permits the accused to give evidence on his own behalf, but he no longer has a right to make an unsworn statement: *Rex* v. *Krafchenko* [(1914)], 24 Man. L.R. 652, and in this respect our Act differs from the English law.

And he goes on to say:

Counsel for the Crown tried to stop the accused [who defended in person] but he persisted in making in his speech unsworn statements of fact to the jury, notwithstanding strenuous objections.

Mr. Justice Perdue, p. 168 [Man. L.R.] and p. 91 [W.W.R.] and Mr. Justice Cameron, p. 185 [Man. L.R.] and p. 104 [W.W.R.] agreed with the Chief Justice in this statement of the law, and the two other judges did not dissent from it, as pointed out by Mr. Justice Idington, in the Supreme Court of Canada (1916), 54 S.C.R. 220 at p. 224, (1917), 1 W.W.R. 463, at p. 471, and at pp. 262-3 [S.C.R.] and pp. 483-4 [W.W.R.] it is to be inferred from the judgment of Mr. Justice Anglin (the Chief Justice and Mr. Justice Davies concurring, p. 261 [S.C.R.] and p. 482 [W.W.R.]) that therefore there no appeal lay from the decision of the Court below on that ground and so it was not raised by appellant's counsel in his argument, p. 225 *et seq.*, though the Crown counsel supported the decision on p. 233.

MARTIN, J.A.

There is, in my opinion, every reason why, to secure uniformity and otherwise, we should follow this decision by a Court of equal rank and moreover constituted by distinguished judges, on our National criminal law, and, speaking as the judge who tried the case (and also sat in the appeal therefrom) of *Rex* v. *Aho* (1904), 11 B.C. 114; 8 Can. C.C. 453 (Court for Crown Cases Reserved—then the Full Court) it is not an impediment to this view because the present question was not before that Court and so the interlocutory remarks of some of the learned judges, which I refrained from taking part in, formed no part of the final judgment that we delivered, and therefore Chief Justice Mathers in *Rex* v. *Krafchenko* (1914), 24 Man. L.R. 652 at p. 659; 6 W.W.R. 836 at p. 840, was justified in not regarding that decision as a precedent and his view was cited with approval in *Kelly's* case, *supra,* at p. 117 [Man. L.R.] and p. 54 [W.W.R.].

It follows, therefore, that the appeal should be allowed and a new trial had in due course of law.

GALLIHER, J.A. (oral): I would dismiss the appeal, with all respect to the contrary view. I have carefully read the evidence and what took place at the trial, and the proceedings throughout and, as the majority of the Court is in favour of a new trial, I do not propose to deal with the case at all at any length or deal with the evidence except to state in my opinion there has been no wrong, no substantial wrong or no miscarriage of justice at the trial, and in my view, entirely outside of what may be in the statement, which I think was improperly admitted, yet it is covered, as I view it, by the section in the Act. The prisoner has had, in my opinion, a fair trial, and the jury were justified, on the evidence that was before them, in bringing in the verdict which they did.

GALLIHER, J.A.

MCPHILLIPS, J.A. (oral): I may say that I am of the view that a new trial should be had. It was a view I formed on the argument, and I have had no reason to change it. I may say I have had the opportunity of reading the judgment of my brother MARTIN and, if I may say so, it, in an admirable way, succinctly deals with the matter, and I am in complete accord with him.

MCPHILLIPS, J.A.

MACDONALD, J.A. (oral): I am in agreement with the judgment of my brother MARTIN.

MACDONALD, J.A.

New trial ordered, Galliher, J.A. dissenting.

MORRISON, C.J.S.C.

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HUNTER v. CLARKE.

Negligence—Accident resulting in death—Families' Compensation Act—Action under—Contributory Negligence Act—Applicability of—R.S.B.C. 1924, Cap. 85, Sec. 3—B.C. Stats. 1925, Cap. 8.

HUNTER v. CLARKE

In an action for damages for negligence brought under the Families' Compensation Act where it is found that the negligence of the deceased contributed to the accident, the Contributory Negligence Act applies.

Statement

ACTION for damages for negligence under the Families' Compensation Act. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 10th of December, 1931.

Craig, K.C., for plaintiff.
Mayers, K.C., and *E. R. Thomson*, for defendant.

1st February, 1932.

MORRISON, C.J.S.C.: The point which arises for consideration in this action is as to the applicability of the Contributory Negligence Act, being Cap. 8 of the 1925 Statutes of British Columbia, to an action brought under the Families' Compensation Act, R.S.B.C. 1924, Cap. 85. So far as I have been able to ascertain, this point has not before come up for determination in British Columbia. I am not therefore aided by any previous adjudication.

Judgment

At common law the cause of action which a person had against another for injuries received through the negligence of that other, being an action of tort, was extinguished by his or her death—*Wheatley* v. *Lane* (1668), 1 Wms. Saund. 216*a*, note (1). So unjust was this condition of affairs considered that the Legislature enacted the Families' Compensation Act. By this Act certain persons, as set forth therein, are given a cause of action against the person through whose negligence the injuries resulting in death were caused to the deceased. This cause of action is not a revival of that cause of action enuring to the deceased had he lived but a wholly new and statutory one. The statute sets forth, in section 3 thereof, the cause of action which

these statutory representatives of the deceased shall have, and it is in the following words:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, etc.

It will be seen from this enactment that the cause of action which the statute gives, while not the same, is yet entirely dependent upon the cause of action which the deseased had.

Originally at common law a party, who was suing another for damages for injuries suffered and occasioned by the negligence of that other, could be met by two defences which are the usual ones pleaded in this type of action. Firstly, to deny and negative any negligence on the part of the defendant; and secondly, to allege and prove that if the defendant was guilty of negligence materially contributing to the accident so also was the plaintiff, no matter to what degree the plaintiff's negligence extended—this is the doctrine of contributory negligence. Later the doctrine of ultimate negligence appeared which however does not arise for consideration in this case.

It is thus seen that a defence of contributory negligence was a good defence and disentitled the plaintiff to recover anything. And, under the Families' Compensation Act, the said representatives of the deceased could be met with the same defence and with the same results, as such cases as *Pym* v. *Great Northern Railway Co.* (1862), 2 B. & S. 759 at p. 767, shew.

Judgment

This, then, was the state of the law when the Contributory Negligence Act was passed in this Province. That statute abrogates the old common law doctrine of contributory negligence except in so far as the doctrine of ultimate negligence can be said to arise therefrom. At the present time it is as if this old doctrine of contributory negligence had never been evolved. Now where both plaintiff and defendant have been guilty of negligence materially contributing to the accident, each is assessed in damages according to the degree in which he or she was in fault, the question of the degree of fault being a question of fact and for the determination of a judge or a jury, as the case may be.

Thus it is perfectly clear that a plaintiff can now recover damages, where formerly he or she was unable so to do. As was

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stated by Orde, J.A. in *Stark* v. *Batchelor* (1928), 63 O.L.R. 135 at p. 141, in dealing with the Contributory Negligence Act of Ontario:

> The Act is not designed for the protection of defendants. It is intended to give a plaintiff, guilty of contributory negligence, some relief where formerly his action would have been dismissed. It entitles him to recover his damages, but to the extent to which he was to blame he must suffer the loss himself.
>
> Instead of giving any rights to a defendant, the Act has cut down the complete defence formerly available to him and has made him liable for a proportionate part of the plaintiff's damages.

Turning again to section 3 of the Families' Compensation Act quoted above, it follows that the said representatives of the deceased also are able to maintain an action where formerly they could not do so. And this because the Legislature has thought fit to replace the old doctrine of contributory negligence, except as stated above, by the Contributory Negligence Act. Following the strict wording of the Families' Compensation Act, I do not think that it is possible to hold that the Contributory Negligence Act does not apply and that the old common law doctrine of contributory negligence is in some way resuscitated.

Judgment

With regard to the question of damages, for the reasons given above the plaintiff cannot be deprived of all compensation due to the death of the deceased. It is also clear that, had the deceased been solely responsible for the accident, the plaintiff would have been able to recover nothing. The deceased, had he lived, would, by virtue of the Contributory Negligence Act, have been able to maintain an action to a limited extent only. I think that it is erroneous to say that the Contributory Negligence Act merely affects the *quantum* of damages. It goes further and affects the cause of action itself. As Orde, J.A. held in the *Stark* case, *supra,* the Contributory Negligence Act entitles a plaintiff "to recover his damages, but to the extent to which he was to blame he must suffer the loss himself," and, as far as the defendant is concerned, it has "cut down the complete defence formerly available to him and has made him liable for a proportionate part of the plaintiff's damages." The plaintiff cannot have any higher right against the defendant than the deceased would have had had he lived, although of course damages are assessed upon a different principle under the

Families' Compensation Act than would have been recovered by the deceased, had he lived. The neglect or default in this action which "would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof" is a partial neglect or default as it were. And the plainiff's right to recover damages against the defendant is based and founded upon this partial neglect or default. Consequently the plaintiff is subject to the same proportioning of the damages recovered as the deceased would have been had he lived. I have not overlooked *Nunan* v. *Southern Ry. Co.* (1924), 1 K.B. 223. Judgment

Therefore I am of the opinion that the plaintiff is entitled to recover that proportion of the verdict of the jury which represents the degree of fault in which the defendant has been found to be. There will be judgment for the plaintiff accordingly.

Judgment for plaintiff.

REX v. HOARE.

Criminal law—Charge of having a still "in his possession"—"Mens rea"—R.S.C. 1927, Cap. 60, Sec. 176.

A copper boiler and other paraphernalia suitable for the manufacture of spirits were seized by excise officers while on a motor-truck belonging to the accused that was parked on a street not entirely uninhabited but somewhat isolated. On a charge of having in his possession a still suitable for the manufacture of spirits the accused's explanation was that he was hired to go to Haney with his truck and pick up some articles there, and bring them to Vancouver, that he did not know what the articles were, that he had no interest in them and merely acted as a truck-driver in the ordinary way. On appeal from his conviction under section 176 of the Excise Act:—

Held, that as *mens rea* had not been proved which is necessary to entitle the Crown to succeed, the appeal should be allowed.

APPEAL by accused from his conviction by J. A. Findlay, Esquire, deputy police magistrate at Vancouver on a charge of unlawfully having in his possession a still suitable for the manufacture of spirits. The facts are set out in the reasons for Statement

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judgment. Argued before ELLIS, Co. J. at Vancouver on the 28th of January, 1932.

Cassady, for appellant.

Orr, for the Crown.

1st February, 1932.

ELLIS, Co. J.: The appellant Virgil Hoare appeals from a conviction and sentence made and passed by J. A. Findlay, Esquire, deputy police magistrate in and for the City of Vancouver.

The said Hoare is charged that he unlawfully without having a licence under the Excise Act had in his possession a still, to wit, copper boiler and copper worm, suitable for the manufacture of spirits, without having given notice thereof as required by the Excise Act, the said still not being a duly registered chemical still of capacity not exceeding three gallons.

The learned magistrate found the appellant guilty and imposed the minimum penalty under the Act, *i.e.,* one month in Oakalla, a fine of $200 and in default of payment an additional six months in gaol.

Judgment

The charge is laid under section 176 of the Excise Act, R.S.C. 1927, Cap. 60. The operative part of the section dealing specifically with the charge is subsection (*e*). The section enacts that:

> Every person who without having a licence under this Act, then in force, (*e*) has in his possession, in any place, any such still, worm, rectifying or other apparatus, or any part or parts thereof, or any beer or wash suitable for the manufacture of spirits, without having given notice thereof as required by this Act, except in cases of duly registered chemical stills of capacity not exceeding three gallons each as hereinbefore provided for, or in whose place or upon whose premises such things are found; . . . is guilty of an indictable offence.

Counsel for the appellant raised a number of objections, some of which were, I think, successfully met by the Crown.

The issue narrows down to the interpretation that should be put on the words in the statute "has in his possession." Mr. *Orr* for the Crown relies on section 5 of the Criminal Code being the interpretation part of the Code, particularly subsection (ii) of subsection (*b*) and contends that the appellant comes squarely within the clause.

The section as applicable to this case reads as follows:

(*b*) having in one's possession includes not only having in one's own personal possession, but also knowingly,

(*i*) having in the actual possession or custody of any other person, and

(*ii*) having in any place, whether belonging to or occupied by one's self or not, for the use or benefit of one's self or of any other person.

No cases were cited by the Crown relating to the construction of the section, and I have been unable to find any judicial interpretation squarely on the point.

The words "but also knowingly" in subsection (*b*) of the section have reference to and apply to the following subsections (*i*) and (*ii*), so that there must be the presence or existence of knowledge on the part of the persons referred to in the subsections before their provisions can be invoked against them.

It is a well recognized principle of criminal law that while it is not always necessary to shew a guilty knowledge in order to convict a person of an offence, where the words of the statute creating it impose an absolute prohibition, on the other hand, when by the language of the statute a guilty knowledge is made an essential element of the offence, then in order to insure a conviction the guilty knowledge must be clearly shewn. And again our Courts have consistently held in many decisions that lack of knowledge on the part of the accused is a sufficient excuse.

Judgment

In *Rex* v. *Young* (1917), 24 B.C. 482 the Court of Appeal dealt with the word "possession" as used in section 356 of the Inland Revenue Act. The charge was that the accused had in his possession manufactured tobacco not put up in packages and stamped in accordance with the Act he not being a licensed tobacco manufacturer. The accused, two other Chinamen, were found together in a room with a quantity of tobacco which was not in packages and stamped in accordance with the Act. They were engaged in handling the tobacco, cutting, weighing, and putting it in packages. It appeared that the tobacco belonged to another Chinaman who was tenant of the premises and who employed one of the men found on the premises to cut the tobacco and put it in packages and permitted the men to occupy the premises. The police magistrate dismissed the charge on the ground that the accused was not "in possession" of tobacco contrary to section 356 of the Act.

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On a stated case the Court of Appeal unanimously upheld the decision.

In *Rex* v. *Cappan* (1920), 32 Can. C.C. 267, Perdue, C.J.M. gives an exhaustive judgment on the legal meaning of the word "possession." He quotes from Stephen's Digest of Criminal Law. The author says:

> A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons and when the circumstances are such that he may be presumed to intend to do so in case of need.

The case is a direct decision that there cannot be possession without knowledge.

The evidence in the case at Bar shews that the copper boiler and other paraphernalia were seized by the excise officers while on the motor-truck belonging to the accused. This truck was parked on a street, not entirely uninhabited, but somewhat isolated. Its lights were out and the evidence of the officers of the Crown as to how it was located and the general condition leading up to the seizure and arrest were sufficiently suspicious to throw a heavy onus on the accused to explain the possession of the still.

Judgment

His explanation is that he was hired by others to go to Haney with his truck, pick up some articles there, which would be found at the place designated, and to bring them back to Vancouver. For this he was to get $10 which was duly paid to him. He swore he did not know what the articles were he picked up, that he had no interest in them and merely acted as a truck-driver in the ordinary way. There was some suggestion that the articles were to be shipped to Campbell River, there to be used in a legitimate way. There was nothing outside of the fact that the excise officers captured the articles in the actual possession of the accused to convict him with ownership.

The evidence of the accused was not an unreasonable recital. It was not a story that is inconsistent with innocence. He was able to shew from creditable witnesses that he has for a long period held responsible positions of trust and enjoyed a good reputation. As *mens rea* has not been proven, which is necessary to entitle the Crown to succeed, the appeal will be allowed.

Appeal allowed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada:

BATTISTONI (G.) AND L. BATTISTONI v. C. M. THOMAS AND C. THOMAS (p. 188).—Affirmed by Supreme Court of Canada, 2nd February, 1932. See (1932), S.C.R. 144.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED v. JOHNSTON *et al.* (p. 354).—Reversed by Supreme Court of Canada, 1st March, 1932. See (1932), S.C.R. 219; (1932), 2 D.L.R. 462.

CLAY AND CLAY v. S. P. POWELL & COMPANY, LIMITED, AND POWELL (p. 124).—Affirmed in part and reversed in part by Supreme Court of Canada, 22nd December, 1931. See (1932), S.C.R. 210.

MACK v. THE ROYAL BANK OF CANADA (p. 81).—Reversed by Supreme Court of Canada, 1st March, 1932. See (1932), 1 D.L.R. 753.

MERRITT REALTY COMPANY LIMITED v. BROWN (p. 438).—Affirmed by Supreme Court of Canada, 9th February, 1932. See (1932), S.C.R. 187; (1932) 2 D.L.R. 465.

OVERN v. STRAND *et al.* (p. 47).—Reversed by Supreme Court of Canada, 6th October, 1931. See (1931), S.C.R. 720. Leave to appeal to the Judicial Committee of the Privy Council refused.

PRICE *et al.* v. B.C. MOTOR TRANSPORTATION LIMITED AND LEDBURY (p. 24).—Affirmed by Supreme Court of Canada, 2nd February, 1932. See (1932), S.C.R. 310; (1932), 2 D.L.R. 161.

REX v. MARINO AND YIPP (p. 265).—Affirmed by Supreme Court of Canada, 28th April, 1931. See (1931), S.C.R. 482; (1931), 4 D.L.R. 530.

SALE v. THE EAST KOOTENAY POWER COMPANY, LIMITED (p. 141).—Affirmed by Supreme Court of Canada, 7th October, 1931. See (1931), S.C.R. 712; (1931), 4 D.L.R. 593.

SUNDERLAND v. SOLLOWAY, MILLS & CO., LTD. (p. 241).—Affirmed by Supreme Court of Canada, 8th October, 1931. See (1931), S.C.R. 714.

Cases reported in 43 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:

CORPORATION OF THE CITY OF CUMBERLAND v. CUMBERLAND ELECTRIC LIGHT COMPANY, LIMITED (p. 525).—Affirmed by Supreme Court of Canada, 18th May, 1931. See (1931), S.C.R. 717; (1931), 4 D.L.R. 459.

KEY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY LIMITED (p. 288).—Affirmed by Supreme Court of Canada, 18th May, 1931. See (1932), S.C.R. 106.

KING, THE v. B.C. FIR & CEDAR LUMBER COMPANY LIMITED (p. 227).—Reversed by Supreme Court of Canada, 13th May, 1931. See (1931), S.C.R. 435; (1931), 3 D.L.R. 354. Decision of the Supreme Court of Canada reversed by the Judicial Committee of the Privy Council, 8th March, 1932. See (1932), 2 D.L.R. 241.

MACINNES v. CARTWRIGHT & CRICKMORE, LIMITED (p. 265).—Affirmed by Supreme Court of Canada, 28th April, 1931. See (1931), S.C.R. 425; (1931), 3 D.L.R. 693.

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK AND BERRY (p. 161).—Reversed by Supreme Court of Canada, 6th October, 1931. See (1932), S.C.R. 22; (1932), 1 D.L.R. 107.

Case reported in 41 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

MCTAVISH BROTHERS LIMITED v. LANGER AND ALAMO GOLD MINES LIMITED (p. 363).—Affirmed by the Judicial Committee of the Privy Council, 20th July, 1931. See (1931), 4 D.L.R. 209.

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CRIMINAL LAW—*Continued.*

where S. found a parcel of morphine under a bath in a bathroom, the parcel having been placed there by the accused Yipp under instructions over the telephone from Marino. Two days later S. and B. again interviewed Marnio, when B. paid Marino a sum of money for cocaine, being instructed by Marino as on the previous occasion where they were to find the drug. S. and B. went to the same place as on the former sale, where they found a parcel of cocaine under the bath that had been placed there by Yipp. Marino and Yipp were found guilty on a charge that they "unlawfully did distribute a drug, to wit, morphine and cocaine." *Held*, on appeal, affirming the conviction by MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that in the circumstances of this case the sales of drugs as disclosed by the evidence do not constitute separate and distinct transactions and the indictment was properly framed embodying the offence of distribution within subsection (*f*) of section 4 of The Opium and Narcotic Drug Act. [Affirmed by Supreme Court of Canada.] REX v. MARINO AND YIPP. - - - - - - - - **265**

6.——*Extradition — Obtaining goods by false pretences—Procedure—"Money, valuable security or other property"—Ejusdem generis rule—R.S.C. 1927, Cap. 37.*] A prisoner was committed for extradition on the charge that in the City of Baltimore, in the State of Maryland, by a certain false pretence he obtained from one Engle and others with intent to defraud 2,140 stockings. The schedule to the extradition containing extraditable offences includes: "7. Obtaining money, valuable security or other property by false pretences." On motion for release through *habeas corpus* proceedings:—*Held*, that the *ejusdem generis* rule applies and the words "other property" used in the crime of "obtaining money, valuable security or other property by false pretences" must be construed as covering other property of the same kind as "money" or "valuable security" and would not include "goods." The applicant is therefore discharged from custody. *In re* ROSEN. **203**

7. —— *Incorporated club — Card-room "kept for gain"—Steward in charge—Paid salary only—Poker played in card-room—Players charged ten cents every half-hour—Money paid to club revenue—Criminal Code, Secs. 69 and 226 (a).* The accused was steward and in charge of the Brunswick Sports Club, and paid a salary only. Only members were allowed on the club premises, which contained a billiard-room, reading-room and card-room. The club also owned and operated a football field. Members played poker and paid the steward ten cents every half-hour for the privilege, the money so received being paid into the club's revenue. When the place was raided by the police four tables of poker were in play in the card-room. The steward was convicted of keeping a common gaming-house. *Held*, on appeal, affirming the decision of police magistrate Findlay, that on the entry of the police on the premises members were playing poker, which is a mixed game of chance and skill, each paying an assessment to the finances of the club, and the accused being in charge at the time was properly convicted. *Rex* v. *Sullivan* (1930), 42 B.C. 435 followed. REX v. BAMPTON. - **427**

8. —— *Keeping common gaming-house—Automatic vending-machine — Indicator shewing result of each operation—Effect of—Criminal Code, Secs. 228 and 986 (4)—Can. Stats. 1930, Cap. 11, Sec. 27.*] Accused had in her store a machine known as an automatic vending slot machine, in which customers placed a five-cent coin, pulled a lever and received from the machine a package of candy with or without "slugs" or "tokens" (varying in number up to twenty). The slugs could not afterwards be used in the machine but were exchanged in the store for merchandise to the value of five cents for each slug. There was a legend or indicator on the machine plainly to be read by the operator telling him the nature of the candy and the number of slugs he was to get upon his pulling the lever. When the lever was pulled the indicator would change, shewing what would be the result of the next operation. Accused was convicted of keeping a common gaming-house. *Held*, on appeal, affirming the conviction, that although a customer knew what he was to get on each operation, they yield different results, and when he started with the intention of playing the machine a number of times he did not know at the beginning what the second, third or following operations would bring forth, the inducement being to keep on playing until he won something substantial. The evidence brings the accused within the words of section 986 (4) "or which as a consequence of any number of successive operations yields a different result to the operator" and the conviction should be sustained. REX v. RICHARDS. - - - - - - - - - **430**

9. —— *Keeping common gaming-house—Evidence—Warrant—Game of cards—Chips—Prima facie case—Criminal Code, Secs.*

about 35 miles an hour, on seeing A. turn to the left, immediately turned to the left himself but too late to avoid a collision, and the sides of the cars coming together the plaintiff was thrown out of B.'s car and severely injured. *Held*, that A. was negligent in not signalling when turning at the intersection, also that B., in travelling behind another car at an intersection, should have taken reasonable care to minimize the risk which might arise from the driver of the car ahead making a sudden turn without giving any signal; that the Contributory Negligence Act applied and the damages should be assessed 60 per cent. to A. and 40 per cent. to B. *Held*, further, that in an action for damages for personal injuries a claim for loss of wages to the date of the commencement of the action or of the trial is not recoverable as special damages but falls within the purview of general damages. *Trache* v. *Canadian Northern Railway Co.* (1929), 1 W.W.R. 100 followed. MCLEOD v. BOULTBEE AND ATKINS. - - - - - - - - **375**

6.——*Collision — Damages — Families' Compensation Act—Contributory negligence —Evidence.* - - - - - - - - **24**

See AUTOMOBILES. 2.

7.——*Contributory negligence—Road collision — Intersection — Restricted vision of drivers by street-car — Duty of drivers— Right of way—Damages—B.C. Stats. 1925, Cap. 8.*] As a motor-coach of the plaintiff Company was being driven westerly on Cormorant Street in the City of Victoria, and approaching the intersection at Douglas Street, a motor-truck of the defendant Company going southerly on Douglas Street was approaching the intersection parellel with and to the left of a street-car going in the same direction. The coach entered the intersection first, and the driver, thinking the street-car was slowing down for passengers before entering the intersection, proceeded to cross in front of it. The street-car did not stop but entered the intersection at the same time as the truck to its left, the motor-man slowing down to let the coach go across in front, the coach clearing the street-car by from five to six feet. The driver of the truck not seeing the coach owing to the street-car restricting his vision, until it was partly across the tracks, was then too close to stop and avoid running into the coach. It was held on the trial that the driver of the truck was negligent, and the plaintiff recovered judgment. *Held*, on appeal, varying the decision of LAMPMAN, Co. J. (MARTIN, and MCPHILLIPS, JJ.A. dissenting), that the drivers of both coach and truck were equally to blame in bringing about the accident and the damages should be equally divided between them. VANCOUVER ISLAND COACH LINES LIMITED -. E. LEBUS & COMPANY LIMITED. - - - - - - - - **102**

8.——*Damages—Irrelevant statement by witness—Charge to jury—Non-direction— Effect of appeal.*] The plaintiff, a passenger in a street-car, fell as she was about to get off and injured her hip, owing, as she alleged, to the car suddenly starting as she got up and then suddenly stopping again. A witness for the defence, after giving evidence that the plaintiff had hip trouble prior to the accident, suddenly volunteered the statement without being questioned that she came there voluntarily on account of the man who was driving the car; she didn't like the idea of his having to bear the blame for the accident which she knew was through Mrs. Keen's physical condition. Counsel for the plaintiff objected to the speech but nothing further was said by either counsel or the Court. The jury found that negligence was not proven and the action was dismissed. *Held*, on appeal, affirming the decision of MURPHY, J., that the statement made by the witness had no bearing on the question of whether the defendant was negligent or not. After counsel for the plaintiff objected the matter was dropped, as it was manifestly such an irresponsible and voluntary statement that no one attached any importance to it and the plaintiff did not suffer any prejudice thereby. KEEN AND KEEN v. B.C. ELECTRIC RAILWAY COMPANY LIMITED. - **183**

9.——*Damages — Road allowance—Right of way across raliway tracks—Trespasser— No breach of duty or cause of action— R.S.C. 1927, Cap. 170, Secs. 308 and 311— B.C. Stats. 1925, Cap. 8.*] At the north end of Heatley Avenue in the City of Vancouver, a plank roadway about 36 feet wide continues north across the C.P.R. tracks to the waterfront, there being a beaten footpath about three feet wide immediately to the east of the planks used by pedestrians when the planks are occupied by vehicles. At about eight o'clock in the evening of May 26th, 1930, the plaintiff crossed on the planks to the waterfront. On his return and shortly after reaching the plank roadway he turned on to the beaten footpath on the east side, and after continuing along this path about half way across the right of way he strayed slightly easterly until he came to a switch which was about 13 feet

east of the planks. As a C.P.R. train going easterly was then passing on the track beyond him, he stopped by the switch and started lighting a cigarette, when he was struck by a box-car backing up from the east, an engine of the defendants at the time being engaged in coupling this and other cars together as it backed westerly. A special jury found it had not been proved that the plaintiff was a trespasser, that the defendants were negligent, also that the plaintiff was guilty of contributory negligence and that each should be responsible for half the damages, for which judgment was entered. *Held,* on appeal, reversing the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the defendants occupied the place in question with the approval of the Railway Board and were rightfully in occupation. The plaintiff was off the beaten track and had no right to be off the roadway. He was in the position of a trespasser to whom the defendants owed no duty except to refrain from wilfully injuring him and the action should therefore be dismissed. JURE v. VANCOUVER HARBOUR COMMISSIONERS. - - - - - - **270**

10.—*High tension transmission line—Easement for strip of land on ranch—Power line running through—Licensee on lands—Comes in contact with wire—Severely injured—Damages—Liability—R.S.B.C. 1924, Cap. 77, Sec. 14.*] The defendant Company obtained an easement for a right of way over a strip of land 100 feet wide through D.'s ranch, for erecting and operating a high tension transmission line. It was agreed that the grantor should have the right to enter upon the right of way and that the Company would not fence it. Later P. obtained a lease of the whole ranch from D. The plaintiff, with two companions, started out in an automobile for the purpose of fishing in a lake on the other side of the ranch. On reaching the ranch they met P. who shewed them the easiest way across the ranch to reach the lake. The plaintiff then proceeded with the automobile as far as the power line, where they left the car and, carrying their rods and supplies, went along a path under the power line until they reached the lake. The poles upon which the transmission line was carried across the ranch were over 340 feet apart and the line between the poles sagged at the middle to within ten feet of the ground. The plaintiff knew of the danger of contact with the wire as he warned one of his companions of it on the way over, but there was no evidence that he knew the electricity would jump to a steel rod if it

came within five inches of the wire. The plaintiff and his companions came back from the lake on the following day along the path under the power line, and as they were nearing the place where they left the automobile (the plaintiff, owing to the load he was carrying being very tired), a steel fishing-rod which was in his right hand and was not taken apart, either touched or came so close to the high-power wire that the electricity jumped to it and he fell unconscious. Later his right arm was taken off below the elbow and his right side and right leg were badly burned. The jury found the defendant guilty of negligence and the plaintiff guilty of contributory negligence and apportioned the fault 30 per cent. to the plaintiff and 70 per cent. to the defendant, assessing the damages $12,500 net to the plaintiff. The learned trial judge then dismissed the action holding that the plaintiff was a trespasser and the defendant Company owed no duty to him to construct the power line in any particular way as to safety. *Held,* on appeal, affirming the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that whether the plaintiff be regarded either as a trespasser or a bare licensee, he was well aware from previous local knowledge of the danger he was incurring in carrying a steel rod under a low strung high-voltage wire, there was nothing in the nature of a concealed danger or "trap." The defendant owed no duty to the plaintiff to have the wire strung at a greater height and the action was properly dismissed. [Affirmed by Supreme Court of Canada.] SALE v. THE EAST KOOTENAY POWER COMPANY LIMITED. - - **141**

11.——*Master and servant—Evidence—Statement of servant—Scope of authority—Invitee and licensee—Measure of damages—Liability of landlord—Res ipsa loquitur—Remoteness of damage—R.S.B.C. 1924, Cap. 51, Sec. 60.*] The plaintiff, who had desk room in a tenant's office on the fourth floor of the defendant's building, left the office and rang the elevator bell. The elevator came down from above and stopped. After the door was opened and the plaintiff was about to enter the elevator started down, and on the emergency brake being applied by the elevator man, it stopped about six feet below the floor. The plaintiff, losing his balance, fell forward, landing on his hands and knees on the floor of the elevator. He was badly shaken up, but beyond a slightly injured ankle suffered no bodily injury, and on the elevator reaching the ground floor he walked out without assistance. Nine months later a foreign

substance getting into one of his eyes an abscess formed, which became so severe he lost his eye. In an action for damages there was medical testimony that his health was so run down owing to the elevator accident that he had not the power to resist disease and the loss of his eye was indirectly due to the accident and the plaintiff recovered judgment. *Held*, on appeal, varying the decision of MURPHY, J. (MACDONALD, C.J.B.C. holding that the appeal should be allowed), that the *quantum* of damages should be reassessed, and reduced by the sum allowed for the loss of plaintiff's eye, as the inflammation and abscess which appeared nine months after the accident and the resultant loss of the eye, was not the natural and probable consequence of the defendant's negligence. GORDON v. THE CANADIAN BANK OF COMMERCE. - **213**

12.——*Motor-car — Driven by employee of defendant company—Collision—Scope of employment— Plaintiff injured — Responsibility for damage.*] G. was employed by the defendant Company for selling its motor-cars and he took a car out each day for demonstrating to prospective buyers. On taking a car out one day he saw two young ladies he knew who were on their way to dine with a relative. He volunteered to take them there and they entered the car. As there was time to spare he proceeded in a direction away from their objective and while so engaged collided with another car and the plaintiff was injured. It was found on the evidence that the collision was caused solely by G.'s negligence. *Held*, that G. was the agent or servant of the defendant Company, that the question of deviation does not arise here and he was acting in the course of his employment. The Company is therefore liable for the damages suffered by the plaintiff, JARVIS v. SOUTHARD MOTORS LIMITED *et al.* - - - - - **286**

13.——*Motor-vehicles—Collision at intersection—Right of way — Both at fault—Apportionment of damages—Passengers co-plaintiffs — Right to contribution—Costs—B.C. Stats. 1925, Cap. 8 — Marginal rule 977.*] Where two cars on different streets approach an intersection and the one to the left of the other is substantially on the intersection first and its rear wheel is hit by the latter, the right of way which the latter would otherwise have had is displaced in the circumstances. In an action for damages resulting from a collision between motor-vehicles it was held that the joint negligence of both drivers was the cause of the accident, and the apportionment of fault should be two-thirds on the defendant and one-third on the plaintiff who was driving the car. The co-plaintiffs being passengers in Chambers's car, it was held that the defendant was entitled to contribution from Chambers against the amount allowed the co-plaintiffs to the extent of one-third. *Held*, further, exercising the power given under marginal rule 977, that the whole costs of the plaintiffs be taxed and two-thirds thereof be paid by the defendant to the plaintiffs, the defendant not to be entitled to any costs from the plaintiffs in respect to either claim or contribution. CHAMBERS, CLARK AND CRIGHTON v. SAMPSON. - - - - **134**

14.——*Municipal corporation—Construction of sidewalk—No by-law authorizing—Obligation to repair—R.S.B.C. 1911, Cap. 170, Sec. 53, Subsecs. (176) and (179).*] A three-plank sidewalk was constructed on a street within the defendant Municipality in 1912, repairs being made from time to time by a foreman who filled in holes in the sidewalk with sand or gravel. The Municipal Act empowered the corporation to construct the sidewalk but no by-law was produced authorizing its construction and the Act imposed no obligation on the corporation to repair. In October, 1929, the plaintiff, a young girl, coming home from school caught her foot in a hole between the planks, caused by the rotting of a supporting cross-piece below, and falling she broke her thigh. In an action for damages for negligence it was held that the case was one of non-feasance and the plaintiff could not recover. *Held*, on appeal, affirming the decision of MURPHY, J., that as no obligation to repair is imposed by the statute and there is no evidence of original faulty construction the corporation is not liable for the consequence of inevitable decay of the material properly used in construction and the appeal should be dismissed. GILROY v. THE CORPORATION OF THE DISTRICT OF BURNABY. - **171**

15.——*Servant — Liability of master—Scope of employment—Evidence.* - **188**
See MASTER AND SERVANT. 2.

NEW TRIAL — Procuring — Evidence—Corroboration — Hearsay statement tending to influence the jury—Criminal Code, Secs. 216 (*i*) and 1002. - - - - - **260**
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2.——*Right to.* - - - - **547**
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tarily delivered to Attorney - General's agent.] It appearing from the affidavits filed on an application by the plaintiffs for an order that the defendants file a further and better affidavit of documents, that the books and documents in question had been voluntarily turned over to the duly authorized representative of the Attorney-General of British Columbia and that the documents are now in the sole possession and power of said representative. The application was refused. MACKEE v. SOLLOWAY, MILLS & CO. LIMITED. - - - - - - **42**

5.——*Discovery— Interrogatories—Questions tending to criminate—Right to refuse to answer—R.S.B.C. 1924, Cap. 82, Sec. 5.*] Under the English practice relating to interrogatories the defendant is excused from answering questions that may tend to criminate him. Section 5 of the British Columbia Evidence Act provides that no witness shall be excused from answering any question upon the ground that the asnwer to the question may tend to criminate him. On an application to compel the defendant to answer interrogatories:—*Held*, that a party being examined on interrogatories is not treated as a witness and is in the same position as a party being examined on interrogatories in England and is protected. BLUMBERGER v. SOLLOWAY, MILLS & CO. LIMITED. - - - - - - - **41**

6.——*Endorsement on writ—Statement of claim seeking relief not in endorsement—Application to strike out pleading—Marginal rule 228.*] The plaintiff endorsed his writ with a claim for $3,998, being money had and received by the defendants to the use of the plaintiff, and upon trust for the plaintiff. By paragraph 7 of her statement of claim she sued for said money under and by virtue of subsection (3) of section 236 of the Criminal Code of Canada and claims as against the defendants a judgment and decree forfeiting the said sum of $3,998. An application to strike out paragraph 7 of the statement of claim was dismissed. *Held*, on appeal, affirming the decision of MCDONALD, J. (MARTIN and GALLIHER, JJ.A. dissenting), that what is set out in the statement of claim is a justifiable enlargement or extension of what was set out in the writ and comes within the provisions of marginal rule 228. The Court should not interfere with the discretion of the learned judge below whose finding should be given effect to. GIBBS v. CANN. - - **393**

7.——*Garnishee — Monthly salary—Payable to end of month—Garnishee summons served prior to end of month—Not attachable.*] The defendant received a monthly salary from the garnishee payable at the end of each month. A garnishee summons was served on the garnishee on the 28th of April, 1931. *Held*, that the salary payable to the defendant at the end of the month of April was not thereby attached. STUMP v. BATZOLD. ZION UNITED CHURCH, GARNISHEE. - - - - - - - - - - **282**

8.——*Injunction to restrain disposition of subject-matter of action pending appeal —Judge of Appeal Court may grant when Court not sitting.*] Appellant is entitled to an injunction restraining the respondent from dealing with the subject-matter of an action pending appeal, if the appellant might otherwise be deprived of the fruits of a successful appeal. A judge of the Court of Appeal can grant such an injunction unless the Court is in session. It is vacation in the Court of Appeal whenever the Court is not in session. ANDLER, EXECUTOR OF PROMIS *et al.* v. DUKE *et al.* - - **201**

9.——*Pleading— Libel — Discovery—Examination of defendant—Statement of claim —Application to strike out section as embarrassing—Discretion—Jurisdiction—Appeal.*] The plaintiff was appointed to the staff of the Kitsilano Junior High School as a teacher in September, 1928, for the school year ending June 30th, 1929. Shortly before the 25th of June, 1929, the defendant, who was principal of the Kitsilano school made a written report to the superintendent of schools and the Board of School Trustees for the City of Vancouver, and on the 26th of June, 1929, the superintendent of schools wrote the plaintiff advising her that she would not be re-engaged for the following school year. The plaintiff brought action against the defendant for damages for defamation contained in the report to the superintendent of schools, and before pleading applied for leave to interrogate the defendant as to the precise words which he uttered, but the learned judge postponed the application and suggested that the plaintiff should plead. The plaintiff pleaded paragraph 14 of the statement of claim reciting that the defendant falsely and maliciously wrote and published to the superintendent of schools words reflecting on the plaintiff's professional ability as a school-teacher, particulars of which words are not within the knowledge of the plaintiff and solely within the knowledge of the defendant and the superintendent of schools. On the application of the defendant said paragraph was struck out. *Held*, on appeal, affirming

STOCK-BROKER — *Bankruptcy—Right of customers to claim specific shares—Broker as agent of customer—Right to follow money paid for stocks—Uniformity of decisions—R.S.C. 1927, Cap. 11, Sec. 42.*] It is important in cases arising out of "bankruptcy" or "winding-up" that there should, if possible, be uniformity of decisions throughout Canada. Business of stock-brokers in this country is conducted in a manner more closely resembling that which prevails in the United States than that which obtains in England, and for this reason the Courts here draw for authorities more freely than is usual upon American sources. The American decisions are in accord with the principle that where an agent is entrusted by his principal with money to buy goods, the money will be considered trust funds in his hands, and the principal has the same interest in the goods, when bought, as it had in the funds purchasing it. On the bankruptcy of a stock-broker, where there are sufficient shares of any particular description to satisfy orders given by customers to the debtor, they should be delivered to such customers who have purchased shares of that description. If these customers have paid in full for their shares no trouble arises except that a splitting of the share certificaates might become necessary to deliver certificates representing the proper number of shares. If, however, any of these customers have not paid in full, pursuant to their several orders for purchase, then, aside from any liability to make payment before being entitled to the certificates representing the shares so purchased, they should be required to make payment of the balance payable by them in respect of their purchase with interest, as well as making payment of any other indebtedness by them to the debtor. If there are not sufficient certificates available of a particular description to satisfy the purchases by the different customers, there should be awarded to them "their *pro rata* parts" of the shares, so insufficient to satisfy the claims of the customers. *In re Stobie-Forlong-Matthews, Ltd.* (1931), 1 W.W.R. 817 followed. *In re* R. P. CLARK & COMPANY (VANCOUVER) LIMITED. (IN LIQUIDATION). - - **301**