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 XLV.

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.

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 section 3 of the "Court Rules of Practice Act" and of all other powers thereunto enabling, Appendix B, Schedule 2, of County Court Rules, 1932, be amended by striking out the words "Appendix M" where they appear in the paragraph under the heading "Mechanics' Lien Act," and substituting therefor the words "Appendix N."

R. H. POOLEY,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., November 25th, 1932.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

[IN BANKRUPTCY.]

IN RE CLAMAN'S LIMITED.

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

1932

Jan. 19.

IN RE CLAMAN'S LTD.

Bankruptcy—Preferred claim—Three months' rent—"Accrued due"—Meaning of—B.C. Stats. 1924, Cap. 27, Sec. 2, Subsecs. 5 and 6.

Subsection 5 of section 2 of the Landlord and Tenant Act Amendment Act, 1924, provides that "The landlord shall have a preferred claim against the estate of the lessee for arrears of rent not exceeding three months' rent accrued due prior to the date of the receiving order or assignment," etc.

Claman's Limited made an assignment in bankruptcy on September 14th, 1930. Rent payable in advance on the 1st of each month was in arrears from the previous March. The trustee was in occupation winding up the estate from September 14th until November 10th, 1930. He allowed as a preferential claim the three months' rent payable on the 1st of July, 1st of August and 1st of September respectively, also the rent for the month of October and the proportionate part of November as occupation rent during the period of administration. The landlord appealed, claiming that under the above section he was entitled to the full three months' rent as preference that was payable on the 1st of August, July and June, 1930.

Held, that the appeal should be dismissed following the reasoning of Mathers, C.J.K.B. in *In re Olympia Cafe Co.* (1926), 8 C.B.R. 82.

Statement

CLAMAN'S Limited, on 14th September, 1930, made an assignment in bankruptcy. Rent at the rate of $865 per month, pay-

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able in advance on the 1st day of each month, was in arrears from March, 1930. The trustee was in occupation winding up the estate from September 14th until November 10th, 1930, and allowed as a preferential claim to the landlord the three months' rent accrued due 1st July, 1st August and 1st September, respectively. He further allowed the rent for the month of October and the proportionate part of November as occupation rent during the period of administration. The landlord claimed under the Landlord and Tenant Act, R.S.B.C. 1924, Cap. 27, Sec. 2, Subsecs. (5) and (6) preferential right to three full months and under subsection (7) full rental during the period occupied by the trustee, *i.e.*, from the 14th of September until delivery up of possession on the 10th of November. The trustee refused to admit this claim on the ground that the three months' rent accrued due prior to the date of the receiving order or assignment "meant the months of September, August and July." Having allowed and paid as preferential the rent for September, accrued due prior to the bankruptcy, that allowance satisfied and paid the rent in full for September. Claiming under the Act the full three months' rent as preference, the landlord asserted the right to select the "three months' rent accrued due" as the months of August, July and June. The trustee ruled that "accrued due prior" should be read and construed as "accrued due next prior" and disallowed that part of the landlord's claim which included occupation rent from September 14th to the end of September. From this disallowance the landlord appealed. Argued before MORRISON, C.J.S.C. in Chambers at Vancouver on the 17th and 21st of December, 1931.

Statement

J. S. MacKay, for appellant.

J. A. MacInnes, for respondent.

19th January, 1932.

MORRISON, C.J.S.C.: I would dismiss the landlord's appeal, following the reasoning of Mathers, C.J.K.B., as set out in *In re Olympia Cafe Co.* (1926), 8 C.B.R. 82 where the analogous section of the Bankruptcy Act dealing with the three months' priority of wages was construed as meaning the wages earned in the three months "next" before the bankruptcy.

Judgment

Appeal dismissed.

IN RE CHINESE IMMIGRATION ACT AND CHIN SACK.

Mandamus—Written notice of Chinaman to leave Canada—Acceptance of by controller of Chinese immigration—Discretion—R.S.C. 1927, Cap. 95, Secs. 17 and 27.

Chin Sack, a Chinaman, upon first entering Canada, was given a certificate under section 17 of the Chinese Immigration Act. Subsequently the controller of Chinese immigration reopened the matter, held a fresh inquiry, and concluding a fraud had been committed, held Chin Sack in custody and ordered his deportation to China. An application for a writ of *habeas corpus* to prevent deportation was refused, but on appeal was allowed on the ground that having once landed him and issued his certificate the controller's jurisdiction was exhausted and he had no right to hold the second inquiry. The controller then instituted proceedings to contest the validity of his certificate, when it was held that the certificate was valid and authentic. Later an application by Chin Sack to be registered out for the purpose of visiting China was refused by the controller. Upon motion directing the controller to shew cause why a writ of *mandamus* should not issue directing him to register Chin Sack out to China:—

Held, that when, as in this case, the sole question in dispute is one of identity and that has been decided by this Court in the manner provided by the Act, it is binding upon the controller whose duty it is to register the applicant out, his act being no longer judicial but ministerial.

MOTION for a *mandamus* directing the controller of Chinese immigration at Victoria to accept written notice from one Chin Sack of his intention to leave Canada with his declared intention of returning thereto pursuant to section 23 of the Chinese Immigration Act and to register the said Chin Sack out to China according to law. The facts are set out in the reasons for judgment. Heard by GREGORY, J. at Victoria on the 18th of December, 1930. Statement

O'Halloran, for the motion.

Moresby, K.C., for Immigration Department.

23rd January, 1931.

GREGORY, J.: Motion directing R. Roff, Esquire, controller of Chinese immigration at the Port of Victoria, to shew cause Judgment

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why a writ of *mandamus* should not issue directing him to accept written notice from one Chin Sack of his intention to leave Canada with his declared intention of returning thereto, pursuant to section 23 of the Chinese Immigration Act, Cap. 95, R.S.C. 1927, and further ordering him to register the said Chin Sack out to China according to law.

Mr. *Moresby* for the controller very properly and frankly admits that the Chin Sack in these proceedings is the same Chin Sack as the Chin Sack referred to in *Rex* v. *Chin Sack* (1927), 39 B.C. 223; (1928), 40 B.C. 68. He also admits that a Chinese person properly in possession of a certificate under section 17 of the Act is entitled as of right to be registered out under section 23 of the Act when he desires to leave Canada with the intention of returning within two years.

The facts are that Chin Sack was some years ago landed in Canada and given the certificate referred to in section 17 of the Act. Subsequently the controller reopened the matter, held a fresh inquiry, came to the conclusion that a fraud had been committed that Chin Sack was not entitled to be landed, etc., and he was held in custody and ordered deported to China. His counsel applied to a judge of the Supreme Court for a writ of *habeas corpus* to prevent such deportation. The writ was refused but on appeal, 39 B.C. 223, the appeal was allowed shortly on the ground that the controller had no right to hold the second inquiry and that having once landed him and issued his certificate his jurisdiction was exhausted and the validity, etc., of the certificate could only be contested before a judge of a superior Court. The controller thereupon undertook to contest the validity of his certificate and instituted proceedings for that purpose before me as a judge of the Supreme Court and on the 6th of December, 1927, I gave my decision declaring the said certificate to be valid and authentic and that Chin Sack was fully entitled to it. The whole question in that inquiry as here was one of identity, and after full inquiry I came to the conclusion that Chin Sack was the person he claimed to be. No further attempt has, I believe, been made to deport him; but upon Chin Sack applying to be registered out for the purpose of visiting China the controller takes the stand that he has the

Judgment

right under section 23 of the Act to review and overrule the finding in the judicial inquiry already made at his request or rather at that of his immediate predecessor in office. The mere statement of such a claim discloses its absurdity. The controller, whoever he may be, is as much bound by the decision already given in the matter as Chin Sack would have been if the decision had been against him; and when he refuses to give full effect to that decision he is simply perverse and it does not make any difference whether he, as stated by his counsel on the argument, is satisfied or not with certain body marks of identification, that question having already been judicially determined and is binding upon him whether right or wrong in fact. Had there been no such determination the controller would under section 23 unquestionably have the right to inquire into the matter and the Court would not by *mandamus* attempt to interfere with his honest determination of the matter, but when, as here, the sole question in dispute is one of identity and that has been determined in the manner provided by the Act, it is his duty to register out and his act is no longer a judicial one but a ministerial one and the Court can compel him to do his duty. Even in the performance of a judicial duty the Court will compel an officer to act judicially and will not accept for the exercise of a discretion reasons given which are nugatory or illusory, for that would be no exercise of his decretion. See the language of Lord Esher, M.R., in *The Queen* v. *Vestry of St. Pancras* (1890), 24 Q.B.D. 371 at pp. 375-6:

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> If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

Also Lindley, L.J., in *The Queen* v. *Bishop of London* (1889), *ib.* 213 at the bottom of p. 240, and Loper, L.J., in the same case at p. 243, and Lord Ellenborough, C.J., in *The King* v. *The Archbishop of Canterbury and the Bishop of London* (1812), 15 East 117 at p. 140:

> It [Act of Parliament] virtually requires him to exercise his conscience duly informed upon the subject; to do which he must duly, impartially, and effectually inquire, examine, deliberate, and decide. If the Court have reason to think that anything is defectively done in this respect, it will interpose its authoritative admonition.

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See also Lord Halsbury, L.C., in the House of Lords in *Sharpe* v. *Wakefield* (1891), 60 L.J., M.C. 73 at p. 76:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something is to be done according to the rules of reason and justice, and not to private opinion.

I see nothing in *Allcroft* v. *Lord Bishop of London* (1891), A.C. 667 inconsistent with the opinion I have here expressed. In that case there was an honest exercise of a discretion in accordance with the rules of law and evidence. While I do not doubt the honesty of the controller's action, he has clearly not acted according "to the rules of reason and justice" as expressed by Lord Halsbury, L.C., for he sets up his own personal opinion upon the identical question which has already been judicially decided against him in proceedings instituted by him, and practically an appeal from him. In so doing he surely brings himself within the language of Lord Esher to which I have already referred.

Judgment

I wish to make it perfectly clear that my conclusion that a writ of *mandamus* must issue in this case is founded solely upon the fact that the only question inquired into by the controller was one of identity and that that question had been already settled judicially for him. It is unfortunate that I happened to be the judge who determined that question and I may even have been wrong in the conclusion, but it was the clear duty of the controller to give full effect to that decision; he had no authority to review and reverse it.

It was urged on the argument that the writ would not lie as the statute provided for an appeal to the minister. I do not think the applicant is compelled to appeal when he fears as here that his appeal will be ineffectual. In *The Queen* v. *Adamson* (1875), 45 L.J., M.C. 46, a simpler remedy than *mandamus* was provided by the statute—but notwithstanding counsel's argument—that it should be invoked the Court granted the writ. It was also urged that section 37 of the Act deprived the Court of the right to review, etc., the action of the controller relating to the *status* of Chin Sack. I do not think that section has any application to this case for I have held that the controller has

not really acted in the sense intended by the statute. He has in effect in the words of Lord Esher declined to act. Chin Sack's *status* had already been determined in the manner provided by the Act and it was his duty to respect that determination and give full effect to it. The Court of Appeal allowed a writ of *habeas corpus* to issue notwithstanding that section in the previous proceedings already referred to and reported at 39 B.C. 223.

Motion granted.

SHANNON v. KING. (No. 2).

Libel and slander—Discovery—Interrogatories—Unsatisfactory answers—Order for oral examination.

A school-teacher who was dismissed from office brought action for libel and slander because of statements concerning her alleged to have been made in reports forwarded by the school principal to the superintendent of schools and Board of School Trustees of Vancouver. The plaintiff was unable to state the words complained of and obtained an order for interrogatories to defendant for the purpose of pleading. The interrogatories not being fully and sufficiently answered, she obtained an order that the defendant file a further affidavit to certain questions, or alternatively that he be examined *viva voce*.

Held, on appeal, affirming the order of MCDONALD, J. (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting), that there is nothing to warrant interference with the order made in the Court below.

Per MACDONALD, C.J.B.C. and GALLIHER, J.A.: The plaintiff's right to discovery depends upon her shewing that defamatory statements, the exact words of which she seeks, were published of her by the defendant, but there is no evidence in this case to shew that any defamatory words were published by the defendant.

APPEAL by defendant from the order of MCDONALD, J. of the 22nd of April, 1931, that the defendant be orally examined before one of the judges of the Supreme Court upon interrogatories delivered for his examination. After the filing of the statement of claim in an action for libel and slander an order was made by MCDONALD, J. allowing interrogatories. The

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interrogatories were answered by the defendant on the 15th of April following. On the application of the plaintiff the order of the 22nd of April was made.

The appeal was argued at Victoria on the 9th and 10th of June, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

G. A. King, for appellant: The answers given are sufficient. The proper procedure is in Gatley on Libel and Slander, 2nd Ed., 518: see also *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445 (n). These interrogatories are for fishing purposes only: see Gatley on Libel and Slander, 596; *Atkinson* v. *Fosbroke* (1866), L.R. 1 Q.B. 628; *Russell* v. *Stubbs, Limited* (*1908*) (1913), 2 K.B. 200 (n); *Campbell* v. *Scott* (1890), 14 Pr. 203; *Dalrymple* v. *Leslie* (1881), 45 L.T. 478; Gatley on Libel and Slander, 607; Odgers on Libel and Slander, 6th Ed., 540; English and Empire Digest, Vol. 18, sec. 1807; Halsbury's Laws of England, Vol. 11, p. 102, sec. 169; *Norton* v. *Hoare* (1913), 17 C.L.R. 348 at p. 354; *Herschfeld* v. *Clarke* (1856), 11 Ex. 712; Odgers on Pleading, 10th Ed., 299; *Stein* v. *Tabor* (1874), 31 L.T. 444; *Stern* v. *Sevastopulo* (1863), 14 C.B. (N.S.) 737.

Argument

Sloan, for respondent: As a rule the Court will not interfere with the judge in Chambers in the exercise of his discretion unless he proceeds on a wrong principle: see Gatley on Libel and Slander, 597; *Peek* v. *Ray* (1894), 3 Ch. 282 at pp. 285-6; *Knapp* v. *Harvey* (1911), 2 K.B. 725 at p. 728. As to the form of the questions see *Hennessy* v. *Wright* (1888), 24 Q.B.D. 445 (n) at p. 448. As to precedent see *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506. As to recollections of the contents of a document see Bray on Discovery, 130.

King, in reply, referred to *Peek* v. *Ray* (1894), 42 W.R. 498 and Bray on Discovery, 13.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an action of libel and slander in which the plaintiff is unable to state the words she complains of.

She obtained an order for interrogatories to defendant for the

purpose of pleading. The words complained of are supposed to be contained in defendant's reports to his superiors and particularly to one J. S. Gordon, superintendent of schools of the City of Vancouver. An order was made for the delivery of interrogatories but enlisted no answer from defendant which would enable the plaintiff to plead in this action. An application was then made to the judge for an order directing the *viva voce* examination of the defendant to supplement the answers to the said interrogatories, and it is from this order that the appeal is taken to this Court by the defendant. The practice is laid down by Gatley on Libel and Slander, 2nd Ed., 605, as follows:

But the plaintiff cannot interrogate the defendant in order to ascertain what precise words were spoken, unless he can satisfy the Court, by an uncontradicted affidavit, that the defendant, at a certain place and in the presence of certain persons, has made a slanderous imputation of a definite character against him, and that those persons have refused to give him any particulars as to the precise words which the defendant uttered.

Atkinson v. *Fosbroke* (1866), L.R. 1 Q.B. 628, is cited for this proposition.

At p. 918 of the same text-book, we find the following:

As to publication where precise words are unknown. [An affidavit is necessary to support this interrogatory.]

Did you in the month of August, 1928, on the premises of Mr. A. B., 4 High Street, Bath, in the presence of Mr. C. D. utter words imputing forgery to the plaintiff?

If yea, as near as you can remember, what were the words which you so uttered?

MACDONALD, C.J.B.C.

The respondent has failed in this appeal to satisfy me that any libelous words were used or published by the appellant. In fact her solicitor in an affidavit sworn on the 6th of March, 1931, said that she had no knowledge of the words used in these reports and that it was necessary to have discovery of them so that they could be pleaded in her statement of claim; that is to say that she had no knowledge of slanderous or libelous words or implications. Her right to discovery which she now seeks depends upon her shewing that words were uttered or published by the defendant which were in effect libelous or slanderous; the exact words of which she seeks to have discovery. There is no evidence in this case to shew that any defamatory words were spoken or published by the defendant. The application for discovery is a mere "fishing" application.

I would allow the appeal.

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MARTIN, J.A.: Under the exceptional circumstances of this case no sound reason has, with respect, in my opinion, been advanced to warrant interference with the order made by the learned judge below. Our Appeal Rule 18, the same as English Rule 878, has a limited and rare application and cannot be invoked in this appeal, as the cases cited in the Annual Practice and Yearly Practice shew; and *cf.* also the decision of this Court in *Stephen* v. *Miller* (1918), 25 B.C. 388; 2 W.W.R. 1042.

MARTIN, J.A.

Much reliance was placed by the appellant's counsel on the decision of the King's Bench Division in *Dalrymple* v. *Leslie* (1881), 8 Q.B.D. 5; 51 L.J., Q.B. 61; 45 L.T. 478; and 30 W.R. 105; *coram* Grove and Bowen, JJ., but when carefully examined it does not assist the appellant but the reverse, because the real gist of the decision appears from the language used by Bowen, J. wherein, after referring to the practice before the Judicature Acts, he says in effect that if the witness has the means of knowledge he is not excused from answering, *e.g.*, when he has the means of informing himself by "inspection" though he would be excused where "he cannot produce or even inspect . . . a document of which he has an imperfect recollection" (see L.T. report p. 481). And it is to be noted that the report in the L.J. at p. 63 says that—"she swears she has no recollection" and also in the L.T.—"she swears she is unable to remember."

The appeal, therefore, should be dismissed.

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal has most important features relative to the jurisprudence of this Province. The Rules of Court are of statutory effect and in the practice of the Courts all things are directed to the accomplishment of justice and many of the difficulties and pitfalls that in by-gone days were productive of the miscarriage of justice have been provided against. The undoubted right of the subject is to bring proceedings in the Court upon any well-founded action. In the present day it is competent to bring that action and even before the delivery of pleadings interrogatories may be delivered to the

opposite party which must be answered saving all just exceptions —here that course has been adopted. The interrogatories the appellant submits have not been fully and sufficiently answered. Consequently the appellant moved for an order that the defendant file a further affidavit to certain questions put or alternatively that an order be made that he be examined *viva voce* before one of the Honourable Judges of the Supreme Court in the Court below and that order was made by Mr. Justice D. A. McDONALD. From this order an appeal is taken to this Court by the defendant. In passing I may say that the action as brought is one for damages for slander for false and malicious verbal statements and libel contained in written reports published concerning the plaintiff by the defendant—principal of the Kitsilano Junior High School—and made to J. S. Gordon, superintendent of schools, Vancouver, B.C., and as well to W. J. Baird, chairman of the management committee of the Board of School Trustees of the City of Vancouver and to other members of the Board of School Trustees between the 1st day of May, 1929, and the 28th day of June, 1929. Of course to allege causes of action is not tantamount to proof—proof must follow to the satisfaction of the Court at a trial duly had. The plaintiff is a young lady of admitted high character, the holder of an academic teaching certificate issued by the Province of British Columbia Education Department in 1922, a teacher of experience. The appeal was ably argued by the learned counsel appearing for the respective parties. I hope that I will not be carried away by my sympathies in this matter and have no doubt that I will not, but I cannot help expressing my sympathy for the young lady the plaintiff in the action. It is evident that she discharged her duties in schools of the Province with acceptation over a considerable time but in the end there comes a time when the school authorities take a stand against her and she is—without cause given—denied employment and that is the present day position. I cannot say that it reflects any honor or credit upon a system so materially supported by the Government of the Province. Everyone is entitled to be heard in his own cause. That is natural justice; here it apparently has been denied. Now the immediate matter is this—the relevancy of the questions—whether they are permissible questions? The learned trial

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judge was satisfied apparently as to that and made an order (as set forth in the order) "that the defendant be orally examined before one of the judges of this Court upon the interrogatories delivered for his examination herein and numbered 1, 2, and 3 and that the defendant shall attend before the said judge of this Court, Vancouver, B.C. . . . ."

The defendant resists compliance with this order hence this appeal. It is a matter for comment, at least I take the responsibility to make it, that with the extensive and as I believe very effective and up-to-date system of public schools of the Province that some scheme has not been worked out to carefully scan the personnel of all the school staff and as in the case here where we have a young lady having an academic teaching certificate and having entered upon the work of teaching—and apparently with acceptation to the authorities—that it would not be possible for any of the authorities to without cause given issue secret instructions that she should not have further employment. The young lady has acquired a profession—she should be protected in that. If the authorities wish to question her right to that qualification she should be heard; that is only natural justice and the law requires its observance. The school authorities nor none of its agents can be admitted to send abroad anything that will add or subtract one iota of the value of that academic teaching certificate—that could only follow where cause is shewn. Here the spectacle is a young lady of admitted talent and character, yet the suggestion is made and pressed that adverse statements have been made against her or such things have been done that throughout the whole Province she is met with denial of employment based upon what has emanated from a source that the defendant is claimed by the plaintiff to be responsible. To me the position seems inexplicable and reflects little honour upon the school authorities of the Province. Why this secretiveness? The public money is being used, the education of the teacher is at the public cost, the teacher is a public asset, why without sufficient cause deprive the public of the services and the ability of one trained to teach the youth of the Province? I may say that the learned counsel for the defendant gallantly admitted that nothing could be said against the plaintiff, then why this suggested message that has gone out to the school authorities of

MCPHILLIPS, J.A.

the Province that she shall be denied employment? I may have gone somewhat afield but I feel that it is indeed deplorable that litigation of this character should occur, and my trust is that it will not be necessary to have these matters debated in Court. I will only finally add that I am in complete agreement with the decision come to by Mr. Justice D. A. McDONALD and that the order made should be affirmed.

It follows that I would dismiss the appeal.

MACDONALD, J.A.: I would dismiss the appeal for the reasons given by my brother MARTIN.

MACDONALD, J.A.

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

Solicitor for appellant: *G. A. King.*
Solicitor for respondent: *G. McG. Sloan.*

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WONG FON HONG v. CHANSEE WONG FONG

WONG FON HONG *ET AL.* v. CHANSEE WONG FONG *ET AL.*

Landlord and tenant—Lease—Arrears of rent—Distress—Abandonment—Surrender by operation of law.

The defendants distrained on January 21st, 1929, for two months' rent in arrears on premises occupied by the plaintiffs as a restaurant. The bailiffs took possession in the afternoon, and at three o'clock on the morning of the 22nd the plaintiffs handed over the keys of the premises to the bailiffs who, on the plaintiffs leaving, locked the door. On the following morning the premises were locked and the plaintiffs were unable to enter. In an action for damages for ejectment the trial judge found that the plaintiffs, knowing they were unable to carry on, voluntarily surrendered the keys and abandoned the premises to the defendants.

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting), that the learned judge below reached the right conclusion and the appeal should be dismissed.

Per MACDONALD, C.J.B.C. and GALLIHER, J.A.: The word "abandonment" is not applicable in the circumstances. The question is, there having been no surrender by deed or note in writing, was there a surrender by operation of law? The circumstances do not warrant holding that there was.

APPEAL by plaintiffs from the decision of MCDONALD, J. of the 9th of March, 1931, in an action for damages for trespass and for improperly distraining on the premises of the plaintiffs at 143 Pender Street East, Vancouver. Under lease of the 15th of March, 1927, the defendant Chansee Wong Fong leased the second floor of the above mentioned premises to the plaintiffs for five years at a rental of $18,000, payable monthly in advance, the plaintiffs paying on the date of the lease $1,000 to cover the rent for the last three and one-third months of the said term. On the 21st of January, 1929, two monthly instalments of $300 each, one payable on the 15th of December, 1928, and the other on the 15th of January, 1929, and $20 water rates, making in all $620 were due and in arrear. The bailiffs, Messrs. Thompson & Binnington, under a distress warrant of the plaintiffs entered the said premises and distrained for the sum in arrears. The bailiffs remained in possession until three o'clock in the

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morning of January 22nd, and then locked the premises. On the following morning the door of the premises was locked and the plaintiffs were not allowed to enter. The defendants claimed that the plaintiffs gave the keys of the premises to the bailiffs and abandoned the premises.

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

Craig, K.C., for appellants: After the bailiffs seized and at night when they were ready to close up, the lessees handed the keys to the bailiffs, who locked the premises up at three o'clock in the morning, and on the following morning when the lessees tried to enter, the premises were locked and kept closed. At this time business was not good, but they were approaching the season when business was good. Distress does not give the right to keep the lessees out. The rent actually due at the time of distress was one month and six days, as the arrangement was that $150 was to be paid on the 1st and 15th of each month. A landlord, by distraining forfeits the right to determine the lease: see *Cotesworth* v. *Spokes* (1861), 10 C.B. (N.S.) 103; *Ward* v. *Day* (1863), 33 L.J., Q.B. 3 at p. 11; *doe dem. Flower* v. *Peck* (1830), 1 B. & Ad. 428; *Black* v. *Stebnicki* (1930), 2 W.W.R. 656. As to what amounts to an eviction see *Furnivall* v. *Grove* (1860), 30 L.J., C.P. 3; *Carey* v. *Bostwick* (1853), 10 U.C.Q.B. 156 at p. 169; *Brewer, dem. Lord Onslow,* v. *Eaton* (1783), 3 Dougl. 230. A surrender in law must be an equivocal act: see *Gold* v. *Ross* (1903), 10 B.C. 80; *Cannan* v. *Hartley* (1850), 14 Jur. 577; *Lyness* v. *Sifton* (1862), 13 U.C.C.P. 19 at p. 22. He must establish clearly such acts as amount to a waiver: see *Shultz* v. *Reddick* (1878), 43 U.C.Q.B. 155 at p. 163. Even if we fail as to the eviction we are entitled to a return of the $1,000 that was paid as the rent for the last part of the term, as the lease still had three years to run: see *Brown* v. *Walsh* (1919), 45 O.L.R. 646. The total damage is $2,450. Argument

Elmore Meredith, for respondents: That they intended to surrender the premises is amply supported by the evidence. When giving up the keys at three o'clock in the morning the lessees said "Here are the keys, we cannot carry on." There is

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no evidence of their protesting in being kept off the premises. The premises were vacant for six months after they left and a year and a half elapsed before the question of eviction arose. They did not try to carry on nor did they try to enter the premises on the morning following the bailiff's entry: see *Connolly* v. *Coon* (1896), 23 A.R. 37 at p. 41. Giving up the keys is a clear surrender. As to the return of the $1,000 see *Perrin* v. *Antlers Realty Co.* (1914), 20 B.C. 28; *Howe* v. *Smith* (1884), 27 Ch. D. 89. If they are entitled to damages they would only be entitled to the monthly payment for the five months that other tenants were in possession, and if their business was unprofitable they are entitled to no damages.

Craig, in reply: We are entitled to the $1,000 and the profit we would make in the busy season.

Cur. adv. vult.

6th October, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The first paragraph of the learned judge's reasons for judgment discloses the ground of it. He finds that "the plaintiffs knowing they were unable to carry on voluntarily surrendered the things and abandoned the premises to the defendants." The plaintiffs held a lease for five years on the premises in question—a restaurant. The rent was fixed at $18,000, payable in instalments of $300 monthly in advance. There was also a term that they should pay $1,000 in advance to apply on the last three instalments of the five year term. These payments were duly made—the $1,000 and the first instalment of rent. The plaintiffs became in default of their rent on the 15th of December, 1928, and on the 21st of January, 1929, the defendants distrained for two months' rent then in arrears. The bailiffs took possession of the plaintiffs' goods about 3 p.m., and left a sub-bailiff in charge who stayed in the restaurant until 3 a.m., on the 22nd of January when the restaurant was closed for the day. There is a dispute as to whether the man in charge asked for the keys or whether the plaintiffs voluntarily handed them to him. I shall conclude that they voluntarily handed them to him and that he locked the door. The plaintiffs had been, without success, endeavouring to obtain money to release the seizure but could get no more

than $150 which was refused. The next morning the sub-bailiff gave the key to his principals. The defendants becoming aware of what had happened then made the claim that the plaintiffs had surrendered the lease by handing over the keys. On this morning of the 22nd of January the plaintiffs were still endeavouring to arrange for the payment of the rent. Exactly what took place at the time of the delivery of the keys as contained in the evidence of the man Ford, the sub-bailiff, in possession is as follows:

Who was the last one to leave? I could not recognize him for a time: that was the first witness.

The first witness was the last one to leave? Yes.

Did you have any conversation with him about the keys? No; I just took the keys; I said I was going to lock up.

That is the only evidence in the case shewing the circumstances under which the keys were delivered up. The defendants refused to allow the plaintiffs' employees access to the restaurant the next morning and have held possession of the premises ever since.

MACDONALD, C.J.B.C.

The learned judge, I think, was not referred to the Statute of Frauds, Cap. 95, R.S.B.C. 1924, Sec. 3 (nor was this Court); which declares that a surrender of all leases of land made by deed or in writing must be evidenced by deed or note in writing except those surrendered by operation of law. The learned judge speaks of the abandonment of the premises, but I think that word is not applicable to the circumstances of this case. The question is was it a surrender by operation of law? If not then there was no valid surrender. What may be a surrender by operation of law was considered in *Lyon* v. *Reed* (1844), 13 M. & W. 285 at pp. 305-6, where it was said:

It remains to consider whether, although there may have been no surrender in fact, the circumstances of the case will warrant us in holding that there was a surrender by act and operation of law. . . . Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former.

And at pp. 307-8 we see this:

If we apply these principles to the case now before us, it will be seen that they do not at all warrant the conclusion, that there was a surrender of the lease of the 7th of April, 1812, by act and operation of law. Even

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adopting, as we do, the argument of the plaintiff, that the delivery up by Ord and Planta of the lease in question affords cogent evidence of their having consented to the making of the new lease, still there is no estoppel in such a case. It is an act which, like any other ordinary act *in pais*, is capable of being explained, and its effect must therefore depend, not on any legal consequence necessarily attaching on and arising out of the act itself, but on the intention of the parties.

The giving of the key to the man in possession was not a surrender by operation of law. The circumstances of the case shew, I think, that it was not intended to be a surrender. The plaintiffs were endeavouring during this period of time to procure the rent and get the bailiffs out of possession which is wholly inconsistent with the idea that by giving the key to the man in possession they intended to surrender this lease. I infer that they gave him the key to enable him to maintain possession of the goods seized for the night without staying in the premises. The learned judge says there was no ejectment, but I think it is immaterial whether you call it ejectment or refusal to let the plaintiffs in; as pleaded, it is the latter. There is no pretence that there was a surrender by deed or note in writing. The parting with the key to the man in possession cannot under the circumstances be held to have been a surrender of the lease by operation of law. Suppose the manager had said to him "I surrender my lease and I hand you this key as evidence of it." That would be a surrender by parol and would have to be evidenced by deed or note in writing. Whether Ford had authority to make such an arrangement on behalf of the defendants or not the act could not be an estoppel since it was not acted upon to the prejudice of the defendants. It was simply an act of grace to the man in possession to relieve him of the necessity of staying up all night and in no way damnified the defendants.

MACDONALD, C.J.B.C.

The evidence is not such as to enable me to fix all the damages with any degree of certainty. The plaintiffs have been wronged. Whether they would have made profit out of the lease or not is not shewn. The assumption might be that they would not since they were unable to pay their rent but they had expectation of business in view of an approaching Chinese New Year and had had several commitments for that period which they say would have been very profitable. They have asked in the alternative for $1,000 the amount paid in advance for the last three months

of the tenancy and I think they are entitled to that sum at least, and would therefore award it to them. They have received no consideration. They have been excluded from possession of the premises for the three months for which this sum was paid in advance.

The appeal should be allowed accordingly with costs.

MARTIN, J.A.: In my opinion the learned judge below has reached the right conclusion and therefore this appeal should be dismissed.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal, being of the opinion that the learned trial judge arrived at the proper conclusion in this case.

MCPHILLIPS, J.A.

MACDONALD, J.A.: I agree with the conclusion reached by the trial judge.

MACDONALD, J.A.

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

Solicitor for appellants: *L. H. Jackson.*
Solicitors for respondents: *Congdon, Campbell & Meredith.*

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CURLEY v. SINSER, *ET AL.*

Garnishment — Affidavit in support — Made by solicitor before action— Information and belief—Disclosure of source of information—Sufficiency—R.S.B.C. 1924, Cap. 17, Secs. 3 and 6.

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An affidavit made by the plaintiff's solicitor before action in support of a garnishing order is sufficient if it follows the form provided for by section 3 (2) of the Attachment of Debts Act without stating the source of his information, notwithstanding the fact that in such case the form requires the statement that he is aware of the facts.

Statement

APPLICATION to set aside a garnishing order. Heard by FISHER, J. at Vancouver on the 12th of October, 1931.

Donnenworth, for plaintiff.
Ghent Davis, for defendants.

19th October, 1931.

FISHER, J.: Application by defendants to set aside garnishing order.

Counsel on behalf of defendants submits that the affidavit in support of the garnishing order is insufficient and does not comply with the Attachment of Debts Act and that the deponent of the affidavit was not aware of the facts. The submission is based on the contention that a fair inference from sections 3 and 6 of the Act is that the affidavit, as to the indebtedness of the defendants, cannot be made on "information and belief" or in any event without giving the source of information and belief. In the present case the affidavit was made before action by Mr. *Crux* who swears that he is solicitor for the plaintiff and aware of the facts but it is argued that the affidavit itself along with the cross-examination (of the deponent) which took place shews that the affidavit is made on information and belief without disclosing the source.

Judgment

Said section 6 of the Attachment of Debts Act, as amended by section 2, Cap. 6, B.C. Stats. 1926-27, reads as follows:

> Any affidavit referred to in section 3 may, as to the indebtedness, obligation, or liability of the third person, be made on the information and belief of the deponent.
>
> (2) No affidavit referred to in section 3 need shew or disclose any knowledge of the facts, or the source or nature of any such knowledge, or the source or nature of any information or belief of the deponent in any other manner or to any further extent than is indicated by the words contained in the respective forms of affidavits in the Schedule.

I think it must be noted that according to the form of affidavit required under section 3 (1) of the Act when made either before or after judgment, but after action, neither the plaintiff nor the solicitor for the plaintiff if making the affidavit is required to swear that he is aware of the facts. I can readily imagine a case where the plaintiff himself has become informed of the indebtedness of the defendant through employees or books kept by them. In considering therefore the effect of said sections 3 and 6 when read together one might recall what was said in *Pomfret* v. *Morie and Imperial Bank of Canada* (1931), 2 W.W.R. 477 where, at p. 480, the Court states:

> One must consider the purpose of this rule, and . . . give a reasonable interpretation to it so as to carry out that purpose.

Applying this principle I would say that even where the plaintiff gets his information of the indebtedness of the defendant from his employees or books kept by them and is also making the affidavit before action the affidavit is sufficient if it follows the form provided for by section 3 (2) without stating the source of his information notwithstanding the fact that in such case, *i.e.*, before action, the form requires the statement even by the plaintiff that he is aware of the facts. I think also that it is the intent of the Act to put the plaintiff and his solicitor in the same category for the purpose of making the affidavit perhaps on the ground that for such purposes the knowledge of the client is treated as that of his solicitor for, as already pointed out, they are, in one respect at least, both distinguished from a third party who in every case is required to swear that he is aware of the facts. I would therefore hold that the affidavit here by a solicitor who swears that he is the solicitor for the plaintiff and aware of the facts is sufficient. As stated counsel on behalf of the defendant argued also that the deponent was not aware of the facts but, as pointed out in the case of *Pomfret* v. *Morie and Imperial Bank of Canada, supra,* at p. 480, it is the sufficiency and not the truthfulness of the affidavit which the registrar must consider before performing the ministerial act of issuing the order.

Judgment

The application is therefore dismissed.

Application dismissed.

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IN RE DIMOR.

Bankruptcy—Dissolution of partnership — Division of assets—Quit-claim deed — Hotel business — One partner given restaurant and chattels—Apparent ownership—Construction of deed—21 Jac. 1, Cap. 19.

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A firm of three members carrying on a hotel and restaurant business dissolved and executed a quit-claim deed under which two of them transferred to the third (D., the bankrupt in question here) all their interest in the goods and chattels pertaining to the restaurant business, subject to the payment by him of the outstanding liabilities incurred with respect to said part of the partnership business, and he covenanted to assume and pay said liabilities. The deed was not registered and D. carried on the restaurant business. At the time of his bankruptcy he was in possession of the chattels in question.

Held, that on a proper construction of the deed it was not the intention that the two transferring partners should have a lien on the chattels as security for the payment by D. of the outstanding liabilities.

Held, further, that assuming such lien did exist it should not be allowed to prevail against D.'s creditors, he having been given sole possession of the goods and was allowed to appear as the owner thereof.

Statement

MOTION by the trustee in bankruptcy of John Dimor, formerly carrying on business as the "Revelstoke Cafe" for an order declaring that certain goods, chattels and fixtures situate in the Revelstoke Hotel premises at Revelstoke, B.C., are his property as such trustee, and directing the delivery of possession thereof. Heard by MACDONALD, J. at Revelstoke on the 25th of September, 1931.

Craig, K.C., for the trustee.
H. B. Robertson, K.C., for Marcus and Dimor.

26th October, 1931.

Judgment

MACDONALD, J.: The trustee in bankruptcy of John Dimor, formerly carrying on business as the "Revelstoke Cafe," seeks, by his notice of motion to obtain an order, declaring that certain goods, chattels and fixtures, situate in the Revelstoke Hotel premises, at Revelstoke, B.C., are his property, as such trustee and directing that one Milton Marcus deliver up possession of the said goods, chattels and fixtures. Upon return of the motion, it was modified and the argument proceeded, upon the question

of possession of the goods, chattels and fixtures, as distinguished from ownership. I deemed it advisable, in view of the value of the property, to dispose of the matter summarily rather than to direct an issue for that purpose. Counsel were quite satisfied with this course being adopted.

It appears, that on the 26th of April, 1929, Milton Marcus, John Dimor, and Stephanie Dimor acquired all the interest, possessed by P. H. Murphy and Milton H. Laidlaw in certain lots, situate in the City of Revelstoke "together with all the contents of the hotel erected on said premises." Then they formed a partnership and carried on a hotel business with a restaurant or cafe in connection therewith, until the 6th of November, 1929, when the partnership was dissolved by mutual consent and a division of the partnership property was effected. The recital to a quit-claim deed of that date states that John Dimor retained the restaurant, with its goods, chattels and other equipment, while Milton Marcus and Stephanie Dimor retained the hotel property and furniture. Milton Marcus and Stephanie Dimor then leased to John Dimor that part of the hotel property, which had been used in carrying on the restaurant business, for the term of four and a half years at a monthly rental of $100 per month. The lease contained a provision, as to the removal of the chattels at the expiration of the lease and for an extension for a further term of 5 years, if the existing lease had been fully complied with. Then by quit-claim deed, of even date, Milton Marcus and Stephanie Dimor, after reciting the division of the partnership property, granted and assigned unto the said John Dimor "all their estate, right, title, interest, claim and demand" in the goods, chattels and fixtures, in connection with the said restaurant business, and its equipment of every kind, whether the same should be affixed to or form part of the real estate or not. The *habendum* to the deed reads as follows:

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> To have and to hold the aforesaid goods and chattels with all and singular the appurtenances thereto belonging or appertaining unto and to the use of the said party of the second part, subject nevertheless to the payment by the party of the second part of all the outstanding liabilities of the parties hereto incurred (and unpaid) in respect of the said restaurant portion of the business heretofore carried on by the parties hereto.

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It is followed by a covenant on the part of the said John Dimor reading as follows:

> And the party of the second part doth hereby covenant and agree with the parties hereto of the first part that he will assume and promptly pay all debts and liabilities of the said late co-partnership which were incurred in respect of the restaurant portion of the business heretofore carried on by them at said Revelstoke Hotel and which now remain unpaid—and indemnify them and each of them against payment of the same.

The partnership thus having been dissolved, the hotel was carried on by Milton Marcus and Stephanie Dimor under the name of the "Revelstoke Hotel," while John Dimor, according to the agreement carried on the restaurant business as the "Revelstoke Cafe" for a time, but shortly afterwards took into partnership one Chris Morris. This latter partnership was dissolved and the restaurant business having become financially involved, bankruptcy ensued. Thereupon the trustee in bankruptcy took possession of the restaurant premises and remained in possession thereof, together with the property now in question, until a judgment was rendered cancelling the lease, and Marcus Milton and Stephanie Dimor, as lessors, became entitled to the demised premises. They claimed also to be entitled to the goods, chattels and fixtures assigned to John Dimor, when the division of the partnership property occurred and the lease was executed. They asserted a right not only to the possession of such property, but that they were the owners thereof. There is a dispute, indicated by the affidavits as to the circumstances surrounding the taking possession of the property by Milton Marcus and Stephanie Dimor. It is quite clear however that the trustee did not concede that they had a right to such possession and adopted a proper course in making this application for a declaratory order.

Judgment

It is submitted by Milton Marcus and Stephanie Dimor that at the time of the dissolution of their partnership with John Dimor, they retained a specific lien, upon the property in question as being a portion of the partnership assets and that such lien gave them, as against the trustee in bankruptcy, a right to possession of the property in question which was enforceable, if the debts of the partnership were not paid or they were held liable therefor. Further, if such lien existed, as against John Dimor, then that the trustee in bankruptcy was not in any better

position, as to possession or ownership of the property than John Dimor would have been, had he been asserting a claim to that effect. I think this contention is well-founded if such a lien existed. A trustee is not in a better position than his assignor: *Frith* v. *Cartland* (1865), 34 L.J., Ch. 301. Compare *Canadian Credit Men's Trust Association* v. *Reaume* (1931), 12 C.B.R. 209.

Assuming for the moment the specific lien, then as to the right of the trustee in bankruptcy to claim the goods in question for the benefit of the creditors of John Dimor, a portion of the judgment in *Duel* v. *Hollins* (1916), 241 U.S. 523 at p. 528, quoting from *Gorman* v. *Littlefield* (1913), 229 U.S. 19 may be properly cited:

> 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.

The same result would follow here, if John Dimor held his portion of the partnership assets, subject to the trust created by a lien. Then section 23 of the Bankruptcy Act should be considered. It reads as follows:

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> 23. 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:—
>
> (*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 did Milton Marcus and Stephanie Dimor possess such a specific lien at the time of the said dissolution and, if so, has the lien been lost, so that they can only obtain redress by action or claim as ordinary creditors?

Since the oral argument upon this application, counsel for the trustee has by a written argument raised the point, that the provisions of the Bills of Sale Act were not complied with and thus that if the lien existed, it could not, in any event, prevail. I do not think I should give this point consideration, as it was not raised during the oral argument, when evidence might have been afforded and argument submitted, which would have shewn

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that there had been such a change of possession, that the Bills of Sale Act would not apply.

In support of the contention that such a lien exists upon a dissolution of partnership I am referred to the following citation from Lindley on Partnership, 9th Ed., p. 440:

> The lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them; and it is therefore available against their executors, execution creditors, and trustees in bankruptcy.

The cases cited in support of this proposition of law are *West* v. *Skip* (1749), 1 Ves. Sen. 239; *Skipp* v. *Harwood* (1747), 2 Swanst. 586; *Stocken* v. *Dawson* (1846), 9 Beav. 239; (1848), 17 L.J., Ch. 282. The partners now setting up a lien, at the time of the dissolution of their partnership, assigned and gave up possession of the goods. They upon the division of the partnership property gave John Dimor not only sole possession of the property now in question but allowed him to appear as the owner thereof. It was presumably intended that he should carry on the restaurant and afford convenient service to the guests of the hotel. It was to be a separate business but it can be assumed that Milton Marcus and Stephanie Dimor were, under the circumstances, well aware that John Dimor would obtain credit, upon the strength of such possession and apparent ownership of the property. This state of affairs continued up to the time of the bankruptcy. Legislation, so long ago as the reign of James I. (21 Jac. 1, Cap. 19) was passed to invalidate, as a fraud upon creditors, an agreement whereby a vendor of goods allowed possession to pass to his purchaser with an understanding, that he should be still entitled to assert a right to possession or ownership of the goods. This Act was referred to, in *West* v. *Skip, supra.* It is instructive and reads as follows:

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> XI. . . . That if at any time hereafter any person or persons shall become bankrupt, and at such time as they shall so become bankrupt shall by the consent and permission of the true owner and proprietary have in their possession, order and disposition, any goods or chattels, whereof they shall be reputed owners, and take upon them the sale, alteration or disposition as owners, that in every such case the said commissioners or the greater part of them shall have power to sell and dispose the same, to and for the benefit of the creditors which shall seek relief by the said Commission, as fully as any other part of the estate of the bankrupt.

The detrimental effect upon mercantile business of such a lien being allowed to prevail, as against creditors, is quite evident. A merchant, after a dissolution of partnership, would not be safe in giving credit to a continuing partner in possession and apparent ownership of property, if a retiring partner could without a registered agreement successfully assert a lien, in the event of bankruptcy, upon what might be a substantial portion of the partnership assets and thus create a preferential claim. The application of the Statute of James, even to the extent, under certain circumstances, of subjecting the property of one person for the debts of another, is referred to by Lord Chancellor Hardwicke in *West* v. *Skip, supra,* at p. 243 as follows:

> . . . There has been no case upon this Act, or ever will be, wherein a Court of law or equity will do so severe a thing as to subject the property of one to the debts of another . . . without proof of the consent of the real owner to leave them in the power of the bankrupt . . . or a laches in letting them remain there, so as to gain him a false credit.

It would be a badge of fraud and contrary to the principle enunciated in the oft-quoted *Twyne's Case* (1601), 1 Sm. L.C. 1; 76 E.R. 809, *vide* note (*c*) at p. 812:

> That permitting the former proprietor to continue in possession will in general make a sale of personal property fraudulent against creditors.

Judgment

It is true the situation here is reversed, but the principle should be applicable in favor of creditors.

However, if I find upon the facts and reasonable presumptions therefrom, that there was no lien of this nature, it is immaterial.

The contention of Milton Marcus and Stephanie Dimor is that upon a proper construction of the quit-claim deed, of the 6th of November, 1929, property there referred to, is subject to such a lien in their favour for payment of outstanding liabilities of the partnership which were not paid by John Dimor and for which they might be held liable. There is no doubt that they were held so liable for a substantial portion of such liabilities (*vide Burns & Co. Ltd.* v. *Marcus & Dimor* (1931), 43 B.C. 517), but I do not think that a lien, such as is asserted, exists. It was not the intention that Milton Marcus and Stephanie Dimor should have any right of possession or of ownership with respect to the property then transferred to John Dimor. It was an adjustment and division of the partnership

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assets and it was not intended that they should obtain any security, with respect to the liabilities then outstanding against the restaurant, as distinguished from the hotel proper. They relied upon the covenant for payment and indemnity in the deed and their remedy lies thereunder. They could not well under the circumstances contend, that it was intended that they should have a lien upon the property and thus defeat prospective creditors of John Dimor.

My conclusion is that the trustee is entitled, as against Milton Marcus and Stephanie Dimor, to possession of the goods in question, save such fixtures as form part of the freehold. There will be an order to that effect with costs.

Order accordingly.

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MORRISON v. MCTURK

MORRISON v. McTURK.

Contract—Sale of garage—Covenant by vendor not to enter into the garage business—Employee in garage—Whether covenant broken.

The defendant sold a one-half interest in a garage business to the plaintiff and covenanted "not to enter into the garage business" within a radius of one mile from the garage sold. He became an employee of a garage within said area but there was no evidence that he had any interest in the business, or that such employment was not genuine.

Held, that acting as a paid employee in another garage within the area specified did not constitute a breach of the covenant.

Statement

ACTION for damages for breach of an agreement not to enter into the garage business within a radius of one mile of a certain garage which the defendant had sold to the plaintiff. Tried by MACDONALD, J. at Vancouver on the 26th of October, 1931.

J. W. deB. Farris, K.C., for plaintiff.
G. Roy Long, for defendant.

29th October, 1931.

Judgment

MACDONALD, J.: Plaintiff, on 1st April, 1931, bought from the defendant for $800,

an undivided half interest in the goods and chattels described in the Schedule hereunto attached together with the grantor's share of the goodwill and the going concern known as the Moose Garage carrying on business at 145 East Cordova Street, Vancouver, B.C.

The bill of sale evidencing the sale, contained a provision as follows:

IT IS UNDERSTOOD and agreed between the parties hereto that William McTurk, the grantor of the first part, agrees not to enter into the garage business within the radius of one mile from the "Moose Garage" stiuated at 145 East Cordova Street in the City of Vancouver, Province of British Columbia.

It is alleged by the plaintiff in his statement of claim, that in breach of the said agreement the defendant "has been engaged in the garage business, in a competing garage which is within the radius of one mile of the said Moose Garage."

Each case must depend upon its own facts and the only assistance afforded by the many cases, to which I have been referred, is to establish principles which should be followed. I find that the defendant was employed by one William Carter in a garage, known as the "Elks Garage" which was within the mile limit and in competition with the Moose Garage. If I were to come to a conclusion, that such employment was not genuine and simply a camouflage, to conceal an interest possessed by the defendant in the Elks Garage, then I would have no hesitation in deciding that there had been a breach of the agreement by the defendant. There is, however, no evidence whatever to support such a conclusion. Defendant was simply an employee. He did not enter into nor have any interest in such garage business.

Judgment

It is to be noted that plaintiff seeks to place a construction upon the agreement, different to its actual wording. He states that the defendant "has been engaged" in the garage business and thus was guilty of a breach which should afford redress. The agreement, however, of the defendant was that he would "not enter into the garage business." The fact is that he has not done so and was only employed by said Carter, as a workman. This does not constitute a breach of the agreement.

The finding as lack of a breach, avoids the necessity of my considering the cases and rendering a decision upon the covenant in the agreement, according to the interpretation sought to be placed thereon by the plaintiff in his pleadings. If it had

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been the intention of the parties to prevent defendant from working within the limit mentioned, then plaintiff should have so instructed his solicitor and used apt words in the instrument for that purpose. I might however add in this connection that in *Lee Hing* v. *Green* (1927), 2 W.W.R. 729 the Court of Appeal in Saskatchewan, fully considered many cases relating to restrictive covenants of this nature. It was there decided that even where the wording of the covenant was, that the defendant would not for five years "engage" in Estevan, either directly or indirectly, in the business of restaurant keepers or confectioners that becoming a paid employee in another restaurant did not constitute a breach of the covenant. If it were requisite I would follow this judgment, supported as it is, by many authorities therein referred to.

The plaintiff's action is dismissed with costs.

Action dismissed.

SWANSON, CO. J.

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MCALLISTER v. BELL LUMBER AND POLE CO.

MCALLISTER v. BELL LUMBER AND POLE COMPANY, LIMITED.

Master and servant—Workmen's Compensation Act—Deduction of assessments from wages — Illegality of — "Workman" — Interpretation— R.S.B.C. 1924, Cap. 278, Secs. 2, 13 and 14.

The plaintiff was employed as a truck-driver by the defendant, trucking ties and poles for the company. He earned certain wages and from time to time the defendant company made deductions from moneys owing him for assessments payable through the company to the Workmen's Compensation Board. There was conflict of evidence as to whether the plaintiff expressly agreed to these deductions, but from time to time he received statements from the company's office that shewed the deductions from the moneys earned, and the plaintiff continued working for the company in the years 1929 and 1931 after receiving statements shewing the deductions and made no serious complaint until the final winding up of the accounts between them.

Held, that the plaintiff is a "workman" within the meaning of section 2 of the Workmen's Compensation Act, and even if there were an agreement

between the workman and employer that assessments payable by the employee under Part I. of said Act may be deducted from the workman's wages, it is illegal and the plaintiff is entitled to recover the sums so deducted.

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ACTION by an employee of the defendant company to recover certain sums that were withheld from his salary for Workmen's Compensation assessments. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Vernon on the 31st of October, 1931.

Earle, for plaintiff.
Lindsay, for defendant.

6th November, 1931.

SWANSON, Co. J.: The plaintiff is a truck-driver residing at Lumby in this County, and the defendant company has its registered office at Lumby, and carries on business in this County.

During the years 1929 and 1931 the plaintiff was employed by defendant as a driver of one or more of defendant's trucks trucking ties and poles for defendant company. He earned certain wages (as alleged) during said period of service. From time to time the defendant company made certain deductions from moneys owing to him for certain alleged assessments payable by him through the defendant company to the Workmen's Compensation Board of B.C. Defendant company alleges that plaintiff expressly agreed to this arrangement by which these deductions were to be made from moneys owing to plaintiff from time to time. This is denied by plaintiff. It was the practice followed by the company to make these deductions from moneys owing by all employees of the company. I do not think that the plaintiff ever expressly agreed to this arrangement. It is admitted however that in the several statements received from the company's office by plaintiff certain deductions were made by the company for workmen's compensation assessments. It would seem that plaintiff made enquiries about these deductions and probably made some objections to their being made, but not in the case of deductions for medical aid, about the latter of which there is no dispute. It is common ground, however, that these statements shewed deductions from moneys earned by plaintiff, and that plaintiff continued on working for the com-

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pany for some time in the years 1929 and 1931 after receiving statements shewing deductions and his cheques for balance owing, and made no serious complaint until the final winding up of accounts between them. It is contended here that the plaintiff is a "workman" within the purview of section 2 of the Workmen's Compensation Act, R.S.B.C. 1924, Cap. 278; that plaintiff did not agree to any such deductions being made, that he did not contract himself out of the protection of the Act, that any such alleged agreement is in direct contravention of sections 13 and 14 of the Act, and would be accordingly illegal, and that by virtue of section 14 the plaintiff now has the right to demand back from the company these several amounts which were illegally deducted.

It is quite clear I think that these assessments are to be levied and to be payable by the company and not by its employees. It is equally clear that a "workman" cannot contract himself out of the benefits reserved for him under the Act. Such an agreement alleged here by defendant company would in my view be clearly in defiance of the statute, and should be declared illegal.

Judgment

It is, however, alleged by defendant company that the plaintiff in fact is not a "workman," not a "servant" of the company, but an independent contractor. I am clearly of the opinion (for the reasons which I shall presently state) that the plaintiff is not a "contractor" but is a "workman" or "servant" of the company acting throughout under the orders and control of, and subject to dismissal at the hands of defendant company.

Section 2 defines a "workman" as including one who has "entered into or works under a contract of service," etc. Section 13 reads as follows:

> It shall not be competent for a workman to agree with his employer to waive or to forego any of the benefits to which he or his dependants are or may become entitled under this Part, and every agreement to that end shall be absolutely void.

Section 14 reads:

> (1.) Subject to the provisions of subsection (1) of section 33 in respect of medical aid, it shall not be lawful for an employer, either directly or indirectly, to deduct from the wages of any of his workmen any part of any sum which the employer is or may become liable to pay into the Accident Fund or otherwise under this Part, or to require or permit any of his workmen to contribute in any manner towards indemnifying the employer against any liability which he has incurred or may incur under this Part.

(2.) Every person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Part, and shall also be liable to repay to the workman any sum which has been so deducted from his wages or which has been required or permitted to pay in contravention of subsection (1).

In this case I hold that the plaintiff was a servant in the employ of defendant company, and was a "workman" within the meaning of the Act. I think it is clear from the evidence of plaintiff and the admissions of Liveland the company's superintendent that plaintiff was under the direction of the company's superintendent and yard foreman. He was obliged to take his instructions from the superintendent and the yard foreman. He was instructed as to the place from which he was to haul ties and poles, where to deliver and put them. Liveland admits that if plaintiff did not carry out his instructions he could "fire" him. Plaintiff used not his own truck, but the truck of the company, who supplied oil and gas. Plaintiff did not hire any men under him to do this work. Plaintiff was paid for some of his work in trucking from Grandview Bench to Grindrod at so much per day, later on hauling from Shuswap Falls to Lumby (11 miles) and from Sugar Lake to Lumby (26 miles) he was paid so much a load or trip for poles.

Judgment

Mr. Justice McCardie in *Performing Right Society* v. *Mitchell and Booker* (1924), 93 L.J., K.B. 306 at pp. 308-9 said:

It seems, however, reasonably clear that the final test, if there is a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is of course one only of several to be considered, but it is usually of vital importance. The point is put well in Sir Frederick Pollock's Law of Torts (12 Ed.), pp. 79 and 80: "The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or, as it has been put, retains the power of controlling the work."—see *per* Crompton, J., in *Sadler* v. *Henlock* (1855), 24 L.J., Q.B. 138; 4 El. & Bl. 570. "A servant is a person subject to the command of his master as to the manner in which he shall do his work."—*per* Bramwell, L.J., in *Yewens* v. *Noakes* (1880), 50 L.J., Q.B. 132 at p. 134; 6 Q.B.D. 530 at p. 532. Again in the same context Sir Frederick Pollock in his Law of Torts (12th Ed.), at p. 80, says: "An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it and may use his own discretion in things not

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specified beforehand." . . . . [See] Salmond's Law of Torts (5th Ed.), p. 97. . . . [also] Clerk and Lindsell on Torts (7th Ed.), pp. 65 and 66. . . . I need only refer further to the words of Bowen, L.J., in *Donovan* v. *Laing, Wharton & Down Construction Syndicate* ((1893), 1 Q.B.D. 629 at p. 634; 63 L.J., Q.B. 25 at p. 28). They are these: "By the employer is meant the person who has a right at the moment to control the doing of the act." This judgment of Bowen, L.J., was approved by the Privy Council in *Bain* v. *Central Vermont Railroad* (1921), 2 A.C. 412; 90 L.J., P.C. 221.

Lord Dunedin in the Privy Council in *La Societe Maritime Francaise* v. *Shanghai Dock and Engineering Co., Ltd.* (1921), 2 W.W.R. 800 at p. 802 said:

> Payment and the power to dismiss are cogent circumstances and often help to determine the question, but neither circumstance is conclusive. Their Lordships are of opinion that the law on the matter was accurately laid down by Bowen, L.J., in the case of *Donovan* v. *Laing* [*supra*].

Again Lord Shaw of Dunfermline states in the Privy Council in *A. H. Bull & Co.* v. *West African Shipping, Etc., Co.* (1927), A.C. 686 at p. 691:

> Their Lordships think it only necessary to refer to *Donovan* v. *Laing, Wharton & Down Construction Syndicate* (1893), 1 Q.B. 629 for a clear exposition of the question to whom attaches responsibility for the act of a servant transferred, so to speak, for the convenience of working a chattel lent or hired to another. In a sense, that is to say a general sense, he is the servant of the master who sends him, but upon the practical point of responsibility when he is doing the work of and under the orders or control of the other employer, to whom he is sent, he is, in the eye of the law, the servant of the latter and the latter is, in the eye of the law, his employer.

Judgment

An unreported decision of His Honour Judge RUGGLES in July, 1929, in *Fix & Hammerstrom* v. *Eburne Sawmills Ltd.* is along the lines on which I am now deciding under this Act. A large number of other cases were referred to in the argument, but I think the above authorities abundantly bear out the position I am taking here that the plaintiff was a "workman" within the meaning of section 2 of the Act. It is also to be noted that the defendant company has treated the plaintiff as a "workman" by entering his name on its payrolls.

I have gone into this matter at some length as I understand that this is a test action to determine liability of the company in a large number of cases of a similar nature.

There will be judgment accordingly in favour of the plaintiff for the amount claimed and costs.

Judgment for plaintiff.

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JOHNSON v. SOLLOWAY, MILLS & COMPANY, LIMITED.

JOHNSON v. SOLLOWAY, MILLS & CO. LTD.

Practice — Discovery — Examination of officer of corporation—Amended statement of claim—No defence filed in answer—Rules 370c (1) and 370e.

The defendant company as stock-brokers employed W. as "chief trader" for its Vancouver offices and at all times material to this action he had complete charge of the order department, his duties including the handling or filing of buy and sell orders for clients and for the company.

Held, on appeal, affirming the order of FISHER, J., that W. could properly be regarded as an "officer" within rule 370c (1), and subject to examination for discovery.

Rule 370e provides that "The examination on the part of a plaintiff may take place at any time after the statement of defence of the party to be examined has been delivered or after the time for delivering the same has expired."

The statement of defence was delivered in the action on the 22nd of October, 1930, and an amended statement of claim raising a number of new issues was delivered on the 2nd of September, 1931. On the 8th of September following, on the application of the plaintiffs and before the defendants had filed a statement of defence to the amended statement of claim, an order was made for the examination of a past officer of the defendant company.

Held, on appeal, varying the order of FISHER, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that the rules contemplate only one examination for discovery and the words "matters in question" in rule 370c (1) mean "the issues in question." The order recites that the examination is "touching the matters in question in this action," but by being made before an amended statement of defence is filed it prevents those very matters in question from being completely raised. An order was made that the carrying out of the order below be postponed till after the amended defence has been filed, or till after the time has expired for so doing.

APPEAL by defendants from the order of FISHER, J. of the 8th of September, 1931, that the plaintiff may orally examine one W. E. Willins, a past officer of the defendant company, touching the matters in question in this action.

Statement

The appeal was argued at Vancouver on the 23rd and 26th of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

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Sloan, for appellants: This order is made under rule 370c (1), and we submit a "past officer" does not come within the rule. The question is the scope of his duty and not the extent of his knowledge: see *Powell* v. *Edmonton, Yukon & Pacific Ry. Co.* (1909), 2 Alta. L.R. 339 at p. 340; *King Lumber Mills* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 26. As to who is an "officer" see 3 C.E.D. 237; *Leitch* v. *Grand Trunk R. W. Co.* (1890), 13 Pr. 369; *Morrison* v. *Grand Trunk R. W. Co.* (1902), 5 O.L.R. 38. The second ground is with reference to rule 370e. A defence was filed but no defence was filed after the amended statement of claim was filed. By filing an amended statement of claim the first statement of defence disappears: see *Nichols & Shephard Co.* v. *Skedanuk* (1912), 2 W.W.R. 1002; *Duncan* v. *City of Vancouver* (1917), 24 B.C. 267.

Argument

G. L. Fraser, for respondent: This Court has held that this is largely a question of fact. We say the moneys were converted and this was merely a bucket-shop transaction. It is an elementary principle of law that the broker is in a fiduciary position with regard to his customer. The questions to be considered are: 1. Is Willins best able to give discovery? 2. The scope and importance of the duties performed by him as an officer. 3. Consideration of the purpose and object of the rule. See *Brydone-Jack* v. *Vancouver Printing and Publishing Co.* (1911), 16 B.C. 55; *Fowler* v. *Boulton* (1866), 12 Gr. 437 at p. 438. Rule 370e only applies to an examination upon an order.

Sloan, in reply, referred to Holmested's Ontario Judicature Act, 4th Ed., 813, rule 336.

Cur. adv. vult.

30th October, 1931.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): In this case there are two questions involved. First, as to whether or not the alleged officer sought to be examined was an officer of the defendant Company. I think he is within the construction put upon rule 370e by the Courts particularly those of Ontario which is a very liberal construction. I think therefore he is liable to examination under that rule.

Then it is alleged that the statement of claim was amended after delivery. The defendant was given leave to amend his statement of defence but had not done so at the time his application for examination was made under said rule 370e of the Supreme Court Rules which reads:

> The examination on the part of a plaintiff may take place at any time after the statement of defence of the party to be examined has been delivered, or after the time for delivering the same has expired; and the examination on the part of a defendant may take place at any time after such defendant has delivered his statement of defence; and the examination of a party to an issue at any time after the issue has been filed.

That in my opinion fixes the time at which an examination for discovery may take place and where the plaintiff desires to examine the defendant he may do so at any time after the statement of defence has been delivered.

Now there is only one statement of defence in an action. That statement of defence may be amended from time to time under the Rules of Court but that does not make it any the less a statement of defence. There the statement of defence as originally delivered stands as the statement of defence mentioned in this rule. The rule does not say or imply that examination cannot be had until an amendment to the statement of defence has been made. It definitely fixes a time when the order for discovery may be made and that time is when the statement of defence has been delivered.

The only question we have to decide is, had the judge appealed from the right to make the order, or rather has the litigant the right, as soon as the statement of defence has been filed, to apply for an order for examination on discovery? I think there can be no doubt about that. It is stated in another rule that he is only entitled to be examined on the matters in issue and it is contended that the amendments are not in issue until the statement of defence is amended. If the plaintiff attempts to examine on matters which are not in issue then an objection may be made before the examiner and if the examiner rules, and one of the parties feels himself aggrieved by that ruling, he has the right to come to this Court for an interpretation of the rule, but we have nothing to do with that now and I express no opinion upon the construction of that rule. It is trite law that the Court does not make the rules. The rules

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have been made by the committee and it is the business of the Court to interpret those rules, not to make new rules and not to extend the rules by adding to them, and that is what I think we are asked to do in this case. We are asked to say that the plaintiff shall not be entitled to examine the defendant, as the rules say, when the statement of defence is delivered but only when the time is past for an amendment of the statement of defence to meet the amendment in the statement of claim. Now, if the rule was ever intended to do that it would have said so. Whether it was a *casus omissus* or whether it was never intended that the time should be extended beyond the time for the filing of the statement of defence I do not intend now to decide and I do not decide. I leave that matter to the decision of the Court when it comes before us. The time has not arrived yet. Therefore I think the order of the learned judge should not be interfered with.

MACDONALD, C.J.B.C.

Since I have the misfortune to disagree with my learned brothers, I must declare the appeal allowed. Costs of the appeal shall be payable by the appellant in any event in the cause.

MARTIN, J.A. (oral): Two questions are raised on this appeal. The first is as to whether or no the person sought to be examined under rule 370c (1) is one who has been an officer of this corporation, and that, as this Court has laid down in consonance with the decisions of other Courts of Canada, means with regard to all the circumstances of the case, and having given that regard to the present circumstances, I see no objection to the order that has been made by the learned judge below, that upon the facts of this case, which in some respects are peculiar, this person may properly be regarded as being one of the defendant company's officers within the rule.

MARTIN, J.A.

The second ground of appeal raises a question of considerable importance in regard to examinations of discovery, and the practice of this Court, upon which this application is made, is based upon the Ontario rules, and to those counsel have given considerable attention, and several cases have been cited. Unfortunately, the work chiefly cited, Holmested's Ontario Judicature Act, 4th Ed., only brings the cases down to 1915, and therefore at considerable labour it has been necessary to investigate subse-

quent decisions down to date, which I have done with great care, involving, I may say, the consideration of upwards of forty cases. The result is that the matter, to my mind, presents no difficulty whatever, and the order which I think should have been made is one which is entirely consistent with the Ontario practice and rules upon which our decision is founded. We have, fortunately, a good resume in 3 C.E.D. (Ont.) at p. 730 of the decisions upon these very rules in question before us, and we find this at p. 736, sec. 16:

> Right to Examination. The Rules contemplate only one examination for discovery of any party in the action.

That, I may say, after examining all the cases cited there, and others, is, in my opinion, entirely consistent with Ontario practice, and therefore we must proceed upon the assumption that the rules contemplate one examination only.

Turning then to the rules before us which govern this matter —they are two, 370c (1), which I have already cited, and 370e, and they both should be read together as they refer to the same thing, and to the method of carrying out the rule first referred to; *i.e.*, 370e is the rule which directs how the right to examine conferred by 370c (1) shall be carried out. Rule 370c restricts the application of the rule—*i.e.*, the right to examine that is thereby conferred—restricts it, as might be expected, to one thing, it may be examined "touching the matters in question." Now, the expression matters in question means, of course, the issues in the action, as is shewn in rule 305, where it says the pleadings are necessary "for the purpose of determining the real questions (using the very word), in controversy between the parties." The same language is used in 316; the "real question or issue raised by or depending on the proceedings."

We must, therefore, first find out what is the real question in controversy between these parties and then see that the method of carrying out the examination under rule 370e has been properly followed, and that rule 370e says the right shall be exercised in this manner:

> The examination [that is an examination under the rule already cited] on the part of a plaintiff [which is this case] may take place at any time after the statement of defence of the party to be examined has been delivered or after the time for delivering the same has expired. . . .

The statement of defence is not a partial statement of defence,

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but the statement of defence which raises the matters in question; *i.e.*, those matters which are in issue between the parties and are the real question in controversy.

What happened in this case is this, that one year after the plaintiff had delivered his statement of claim he delivered an amended statement of his original claim. A defence had been put in on the 22nd of October, and then, as I say, almost a year after he amended his statement of claim raising a number of new and very important issues, and although they were not indicated in the appeal book before us, as they should have been, yet I have examined them carefully with the original statements of claim, and it may be said that the amended statement of claim raises twice the number of questions, all fully equal in importance to those originally set out. In other words, they expand, amplify and fortify to a very considerable extent the original causes of action. Now, such being the case, immediately that statement of claim was delivered the pleadings were open and the defendant had the statutory right to answer all those new causes of action which had been displayed. In other words, he had the right to answer the matters in question. Now, before he exercised that right the learned judge below, for some reason which I am unable, with the greatest respect, to understand, because there is no authority to support it, made an order that this witness should be examined before the amended defence was filed. That is, that though the door of the Court was opened to the new and amended causes of action of the plaintiff, that same door was shut to the new and amended defence to the new causes of action. And therefore, as regards more than half of this statement of claim, the matters in question were at large.

MARTIN, J.A.

Now, under such circumstances, it is, to my mind, obvious that it was an improper exercise of power—using the term "improper" in its legal usage—improper exercise of power to say that there should be an examination of partial matters in question upon a partial defence, because the rule does not say it is a partial defence; it says it is the statement of defence, and the statement of defence means an entire defence to his entire cause of action. That, to my mind, abundantly appears in all these Ontario cases in question, and I shall just speak to a few

of them, beginning with this important statement by Mr. Justice Middleton, in *Playfair* v. *Cormack* (1913), 4 O.W.N. 817, wherein he says it is a cardinal rule that discovery is limited by pleadings; discovery must be relevant to the issues as they appear upon the record.

Now, the point is here that the defendant has not been allowed by this premature order to have his defence appear upon the record, and though the plaintiff has been permitted to amend as against him, he has not been permitted to reply in amendment as against the plaintiff, but nevertheless he is subjected to examination, which as the said resume of the cases in 3 C.E.D. (Ont.) shews, is outside of the rules, which contemplate only one examination for discovery. Now, in *Foster* v. *MacLean,* the Ontario Court of Appeal (1916), 11 O.W.N. 109, confirmed the judgment of Mr. Justice Britton setting aside an order for examination on this ground. There is no case in Ontario precisely the same as this, but the principle is the same, because nobody has ever attempted to do in Ontario what has been done here. It is, therefore, obviously, to my mind, a violation of the rule. This is what Mr. Justice Britton said (10 O.W.N. 457): MARTIN, J.A.

> It was not intended by Rule 336 that the defendant should be allowed to examine the plaintiff for discovery immediately after delivery of the statement of defence, when particulars thereof had been ordered, but not delivered. When particulars are ordered, they necessarily form part of the defence, and the statement of defence is not complete without them.

That is the gist of it. Until the statement of defence is complete you cannot get examination, and the Court of Appeal unanimously confirmed that decision.

In certain circumstances there might have been amended pleadings delivered on both sides, and then, properly, an examination upon the new issues raised after they have been so amended, an illustration of which is *Standard Trading Co.* v. *Seybold* (1904), 7 O.L.R. 39, where it is pointed out by Mr. Justice Teetzel that both sides had obtained leave to amend their pleadings, and in such circumstances he said (p. 40):

> I find that a practice has been established by the Master in Chambers under which orders for second examination are made where special circumstances are shewn, sufficient to satisfy the Master that it is in the interests of justice to make such an order.

There, of course, it was obviously in the interests of justice

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to make an order because new issues had been raised and they had been pleaded and upon them no examination had been had. But what are the special circumstances in this case? None at all appear upon the affidavit; therefore this is simply an attempt for the first time to lay down a new practice in contravention of the clear "contemplation," to use the Ontario word in the rule.

Then Mr. Justice Middleton, in *Clarke* v. *Robinet* (1915), 8 O.W.N. 263, in which he refers to the successful attempt to have re-examination, says:

> There does not seem to me to be any case made out for further examination. The deponents have given full discovery upon the case as now made, and the suggestion that by amendment the action may assume a wider scope does not help. Discovery is in aid of the case as pleaded, . . .

Now, how could a case be pleaded when one party has been heard by his amended statement of claim, and the other party has not been heard by his amended statement of defence? That is the principle upon which I have no hesitation in saying, with every respect, that the course pursued by the learned judge is an inadvertent abuse of the practice, and it has been laid down that in determining what the practice is, two elements are essential —*viz.*, what is convenient—that is how the Ontario Reports put it—what is convenient and what is least expensive. In other words, convenience and economy are the two principles which are applied to the consideration of the question as to whether or not a proper construction has been given in an attempt to work out a practice in accordance with the rules.

MARTIN, J.A.

In the present case, I will only add that the order that has been obtained by the plaintiff, and which is appealed from, says, using precisely the words of rule 370c, "That the examination is touching the matters in question in this action." Although it purports to confirm what the rule directs, in effect it prevents those very matters in question from being completely raised, so that there shall be one examination only.

For these reasons I would make this order, which I think will meet the justice of this case without requiring parties to go before the learned judge below again; *i.e.*, it is not necessary to set aside entirely his order and the operation of it, by varying it by directing that compliance with its requirements be postponed till after the amended defence has been filed, or till after

the time has expired for so doing; and the adoption of that course will save the expense of a further application and also establish the proper practice.

As to what order for costs should be made in those circumstances, I should be pleased to hear counsel speak to it.

GALLIHER, J.A. (oral): I agree with the views expressed by my brother MARTIN.

MCPHILLIPS, J.A. (oral): I am in complete agreement with what my learned brother the Chief Justice has said. The rules that we have are statutory, and the condition precedent to obtaining an order is after the defence is filed. The defence is filed here and is upon the record today, and was when the learned judge in the Court below made his order. The learned judge, therefore, had complete jurisdiction. In truth, the learned judge was compelled by the statutory rule to grant the order. This Court is not the Legislature. The rules are legislative and statutory. The plaintiff has amended his statement of claim; the defendant has obtained an order to file a defence to the amended statement of claim within a certain time. Now, the defendant is under no requirement whatever to file that defence. The time might elapse and no further defence be put in. The policy of the law is that when the defence is in an examination may be directed. Further, the policy of the law is that there shall be discovery, and what hand can prevent that discovery? Not even the Court.

MCPHILLIPS, J.A.

This is quite a momentous question in practice, and I consider that the learned judge made the proper order. He made an order within his jurisdiction, and I cannot see how this Court can say that the learned judge who has made a proper order, in pursuance of statutory rules and within his authority, even by this Court be set aside, or amended, or varied. The Court of Appeal as well as the learned judges in the Court below are to follow the rules, which are statutory.

I can well understand that when the order is obtained counsel obtaining the order will advise himself as to whether he will proceed then to examine, or later. That is a matter for the consideration of counsel. The plaintiff was entitled to this

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order, the learned judge made the order, and what authority is there in this Court to interfere? It is fundamental in practice. I do not understand how the learned judges in the Court below would be able to proceed if they have trammels put upon their right to make an order which is supported by statutory rules. There is no right in the Court of Appeal to interpose its mandate. There is a great deal of judge-made law in the books, there is no doubt about that; but I certainly will not be a party to any judge-made law in the teeth of statute law.

Therefore, my opinion is that the order was rightly made. As to the point of the alleged officer being an officer within the purview of the rules, I am quite of the opinion that this "chief trader" in the offices of the defendant was exercising a very responsible position, and he alone was the guiding hand and the executive agent of the defendant, and in him resides the information which may rightly and properly be inquired into—the proper officer to examine.

MCPHILLIPS, J.A.

I would, therefore, dismiss the appeal.

MACDONALD, J.A.

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

Order varied, Macdonald, C.J.B.C. and McPhillips, J.A. dissenting.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondents: *Fraser & Murphy.*

MOORE AND MOORE v. LARGE.

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1931

Dec. 31.

MOORE v. LARGE

Physicians and surgeons—Diagnosis of injured shoulder—Failure to use X-ray—Negligence—Damages.

The plaintiff Mrs. Moore, falling on the pavement and injuring her shoulder, consulted the defendant, a practising physician and surgeon who examined her shoulder and concluded that she had only a bad sprain with bruises. In the course of the next three months, her shoulder not improving, she consulted another doctor, who thinking her shoulder was dislocated had an X-ray taken and found that her shoulder was dislocated. This condition, owing to the lateness of its discovery, necessitated a major operation. In an action for damages:—

Held, that the failure to at least recommend an X-ray examination which in all probability would have disclosed a dislocation, constituted a lack of that reasonable care which rendered the defendant liable in damages.

ACTION for damages for negligence in giving treatment to the plaintiff as a duly-qualified surgeon. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 24th of November, 1931. Statement

Burns, K.C., and *Lundell*, for plaintiffs.
Wood, K.C., and *Hogg*, for defendant.

31st December, 1931.

MACDONALD, J.: Plaintiffs seek to recover damages from the defendant on the ground of his negligence as surgeon, in treating the plaintiff Mercy Marie Moore (for convenience hereafter called the plaintiff).

It appears that, on the 18th of December, 1930, the plaintiff slipped and fell on the pavement, at the corner of Robson and Seymour Streets, Vancouver, injuring her left shoulder. Upon the evening of the same day she engaged the defendant to treat her for such injury. He examined her then and on the following morning, and diagnosed the injuries, as simply being a bad sprain with bruises and so informed the plaintiff. He did not make any further attendance and plaintiff, reposing confidence in the defendant, expected an early recovery. Her condition however did not materially improve and about three months after the accident upon visiting her daughter at Powell Judgment

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River, B.C., Dr. Lyons was called in, to attend her. He believing, upon examination, that her shoulder was dislocated, had an X-ray taken, disclosing a dislocation of the left shoulder. This condition, consequent upon the time which had elapsed, in the opinion of Dr. Lyons, involved an operation and this conclusion was later verified. He, with proper professional etiquette, communicated with the defendant and asked him to make a choice of three named bone specialists. The result was that Dr. F. P. Patterson of Vancouver, B.C., was chosen and the X-ray film sent to him. It was not produced at the trial, as he had lost it in the meantime, but undoubtedly it shewed a dislocated shoulder. So Dr. Patterson performed a major operation, reducing the dislocation of the shoulder with attendant expense, pain and suffering. These facts, shortly stated, constitute the basis of the complaint by the plaintiffs, as to negligence.

It is quite clear that the defendant was called upon, in his professional capacity, for reward, to determine the nature and extent of the injuries, sustained by the plaintiff and, after a proper diagnosis, to apply proper treatment. I am quite satisfied, and in fact it was not otherwise contended, that plaintiff had a dislocated shoulder resulting from the accident. The defendant having thus undertaken to treat the plaintiff, the question then, for me to determine is, whether he did so either negligently or ignorantly, thus causing injury to the plaintiff. He impliedly undertook, that he was possessed of the reasonable amount of knowledge and skill necessary in the matter. If either through negligence or ignorance, he caused injury to his patient, he would be liable for the consequences resulting therefrom.

Judgment

> No general rule as to the degree of skill or knowledge so required can be laid down, and the question in each case must depend upon the particular circumstances which surround it. The practitioner need not, however, bring to the performance of his duties the highest possible degree of skill, and where it can be shewn that he exercised reasonable care and average skill his duties have been sufficiently discharged:
> Halsbury's Laws of England, Vol. 20, p. 332.

I feel no doubt that the defendant had quite sufficient skill and knowledge to properly diagnose the plaintiff's injuries and determine, whether her shoulder was disclocated or was simply suffering, as he stated, from sprain and bruises. Professional

men are liable to make mistakes, and unless they arise from a lack of reasonable care, they should not be held liable, merely because some other practitioner of greater skill and superior knowledge, might prescribe a different treatment or operate in a different manner. So in this case, as I find that the defendant had the necessary skill and knowledge, it is only the want of proper application of such skill, which could give any cause of complaint. In undertaking the unpleasant task of dealing with the actions of a professional man, I may well assume the position of the jury in the oft-quoted charge of Tindal, C.J. in the case of *Lanphier* v. *Phipos* (1838), 8 Car. & P. 475 at p. 479 as follows:

> What you will have to say is this whether you are satisfied that the injury sustained is attributable to the want of a reasonable and proper degree of care and skill in the defendant's treatment. Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill . . .

"Negligence" has been defined as omitting to do something that a reasonable man would do, or the doing of something which a reasonable man would not do, *vide,* Alderson, B., in *Blyth* v. *The Birmingham Waterworks Company* (1856), 25 L.J., Ex. 212.

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Even if the defendant had simply volunteered his services as a medical practitioner, he would be required to exercise reasonable care in his diagnosis of the condition and treatment of his patient. This statement of the law, as applied to a person giving free automobile transportation, was referred to by MARTIN, J.A. in *Motion* v. *Jure* (1928), 39 B.C. 354, quoting from the judgment in *Armand* v. *Carr* (1926), S.C.R. 575 at p. 581 as follows:

> To take that care which would have been "reasonable under all the circumstances." We regard this as the test of the responsibility of one who undertakes the carriage of another gratuitously—*Karavias* v. *Callinicos* (1917), W.N. 323; *Harris* v. *Perry & Co.* (1903), 2 K.B. 219—rather than some lower standard, which counsel for the appellant argued is implied in the decision of this Court in *Nightingale* v. *Union Colliery Co.* (1904), 35 S.C.R. 65.

An interesting article by C. H. Masters, K.C., in 2 Can. B.R. at p. 242, deals with "care" in relation to the law of negligence. It refers, at the opening, to the fact that:

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There is no branch of the law with which our Courts are so frequently called upon to deal, and none which presents such difficulty in presentation and determination, as that relating to injury to person or property incurred through negligence; and there is none which has been subjected to so much variety, in jurisprudence and terminology, in the course of judicial development.

Then, referring to Mr. Beven and his excellent work, he mentions that as acts of negligence calling for "care," vary in degree, so negligence must vary accordingly and then adds, that negligence is "want of care according to the circumstances." He refers to remarks of Rolfe, B. (Lord Cranbrook) in *Wilson* v. *Brett* (1843), 11 M. & W. 113 at p. 115, where he said he: "could see no difference between negligence and gross negligence"; that the latter was "the same thing, with the addition of a vituperative epithet." and reference was made to Pollock on Torts, 11th Ed., 445, citing an extract from the judgment in *Milwaukee, Etc. R.R. Co.* v. *Arms et al.* (1875), 91 U.S. 489 at p. 495, as follows:

> Gross negligence is a relative term. It is doubtless to be understood as meaning a greater want of care than is employed by the term "ordinary negligence"; but after all it means the absence of the care that was necessary under the circumstances.

Judgment

Bearing this in mind, did the defendant display such want of care, as was "necessary under the circumstances"?

It should be quite evident to a medical practitioner, of even average skill, that the plaintiff's injuries were such, that they might involve a dislocation of the shoulder, either with or without a fracture. Dr. Lyons said in his evidence "You can locate the nature of the injury by X-ray whereas you can't without it." Defendant apparently bore in mind the question of dislocation as well as fracture in examining his patient. For this purpose he applied certain of the tests in order to diagnose the nature and extent of the injuries. According to his evidence, plaintiff could not touch her nose with her left hand nor beyond the collar-bone with the tips of her fingers. Whether these tests were properly applied or not, it was common ground, and there was no denial even by the physicians called by the defendant, that an X-ray would, subject to an unlikely error, have disclosed the dislocation of the shoulder, which was suspected by Dr. Lyons after some tests and finally established through an X-ray. There is no doubt, as I have mentioned, that it existed at the time and thus the defendant was wrong in his diagnosis. It was

further admitted by physicians, in their evidence, that none of the tests discussed in the medical works for the purpose of determining dislocation or otherwise is infallible. An X-ray, subject to an improbable error in photography, would have solved the question. Mrs. Hammer, a neighbour, called in to comfort the plaintiff, suggested its use to determine the nature of the injury. There is no evidence to indicate that the defendant resented the suggestion and statements differ as to what was said on this point, but the defendant considered it a useless expense. Should he then have insisted upon an X-ray photograph of the shoulder or at any rate placed the responsibility upon the plaintiffs, if they were not willing to undertake the expense? It would have been out of all proportion to that subsequently incurred, when Dr. Patterson performed his serious operation to relieve the plaintiff.

The question of negligence or no negligence thus resolves itself into a very small compass. Defendant was wrong in his diagnosis and it is errors of this kind which very often bring about these actions. This circumstance is referred to in Taylor's Medical Jurisprudence, 8th Ed., Vol. I., p. 89, under heading of "Errors in Surgical Diagnosis" as follows:

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> These are pre-eminently the cases which result in litigation and are those in which the errors of diagnosis must almost inevitably result in, or be responsible for, errors in treatment. The most common type is that in which dislocations are described as fractures and fractures as dislocations: where it is alleged that the treatment has been incorrect and has resulted in the deformity of a limb or in the limitation of mobility of a joint. In many of the cases, even with the best, most skilful, and patient treatment, something in the way of detriment is almost inevitable; and, unless the practitioner is careful in regard to the management of the patient and his friends, more so perhaps even than in regard to the treatment of the injury, trouble may arise.

Then in that standard work, several cases are referred to, which are instructive, and the following pertinent remarks as to X-ray examination, appear on p. 90:

> In every case where there is difficulty in diagnosis, and in every case where the patient has sustained some violence which might possibly have caused fracture or dislocation, the practitioner who does not have an X-ray examination made is exposing himself to an unnecessary risk.

Then again on pp. 95-6 under the heading "X-rays in Medico-legal Work" reference is made as follows:

> This method of investigation and treatment of certain affections has

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become so important that it is a doubtful point whether a Court of law might not consider it a "want of due care" if a practitioner had not at least mentioned the matter and explained its value to a patient suffering from certain troubles and obscure symptoms. It obviously could not be considered malpraxis, if he did not actually provide an application of it, nor indeed if he did not provide the facilities for obtaining such an application.

This is not the place in which to discuss the clinical value of X-rays, but it may be observed that the rays will not fail to reveal all the following, *viz.*, all bone injuries, and indeed most of the diseases of the bone and periosteum, . . .

I adopt these remarks as applicable to the present case. While it is true that the defendant discussed the matter of an X-ray, still I think there was "want of due care" on his part, along the lines that I have indicated. He could and should have examined the injuries and treated his patient in the manner adopted by Dr. Lyons. He would thus have discovered the dislocation of the shoulder. When complaint was subsequently made to him by Oscar Smith, plaintiff's son-in-law, and asked why he did not have an X-ray taken, he said he did not X-ray every little case that came in to him. As I understood the defendant's evidence, he did not deny making this statement or one somewhat similar. It is thus apparent that I have reached the conclusion that the defendant was guilty of negligence.

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I deemed it unnecessary to refer to some technical evidence with respect to an abnormal condition of the plaintiff's shoulder. My reason for not discussing this matter is that I do not think it has any bearing upon the real point at issue in the case. In other words, this "congenital" condition, as it was termed, by a leading surgeon called by the defendant to give his views and opinions, did not afford any defence. Assuming that it existed, at the time of the accident when the dislocation took place, it would not have prevented an X-ray disclosing the fact, that there was a dislocation of the shoulder though it is true that Dr. Patterson does not seem to attach as much benefit to the use of X-ray as other practitioners. The condition probably predisposed the plaintiff to a dislocation of her shoulder, through her falling upon the pavement in the manner described. The defendant having been found negligent through lack of care in the matter, should make compensation by way of damages to

the plaintiffs and this is the only question remaining to be determined.

There is no doubt that the plaintiff Mercy Marie Moore has endured considerable pain and suffering through her dislocated shoulder not having been properly treated and replaced in position shortly after her accident. She not only was greatly inconvenienced, before the operation by Dr. Patterson, but has still some impairment of the shoulder, though it is greatly improved. In addition to the pain and suffering plaintiff has been unable to perform her usual household duties and they have been called upon to incur expense. It is difficult under such circumstances, to accurately estimate the amount of general damages which should be allowed. I think a reasonable amount would be $1,800. Then the defendant should also pay special damages including the account of St. Paul's Hospital (the amount of which is not disputed) at $152.50 and that of Dr. Patterson at $350, making together with two other items, a total of special damages awarded, at $547.50.

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There will be judgment accordingly for $2,347.50 against the defendant with costs.

Judgment for plaintiffs.

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TILLET v. CARLSON

TILLET v. CARLSON AND BRITTON.

Mortgage — Default in payment of taxes — Foreclosure — Instalments of arrears accepted by city under arrangement—Mortgagor's right of relief.

In a foreclosure action brought on the ground that the mortgagor had defaulted in performing his covenant to pay taxes, it appeared that under arrangement satisfactory to the city to which the taxes were payable the defendant was paying the arrears of taxes by instalments.

Held, dismissing the action, that the mortgagor was entitled to relief from his default subject to the plaintiff's right to apply for judgment should the defendant default in the performance of the order as to costs herein, and in the payment of the instalments for taxes.

Statement

MOTION for judgment and for a foreclosure order upon admissions contained in the statement of defence and affidavit of the defendant filed herein. Heard by FISHER, J. in Chambers at Vancouver on the 22nd of December, 1931.

C. F. MacLean, for plaintiff.
D. McKenzie, for defendant.

6th January, 1932.

FISHER, J.: Motion on behalf of the plaintiff (mortgagee) for judgment and a foreclosure order upon the admissions contained in the statement of defence and affidavit (and Exhibits) of the defendant filed herein.

The mortgage in question covering property in the City of Vancouver is therein stated to be in pursuance of the Short Form of Mortgages Act and contains the usual proviso that the mortgage should be void on payment of the principal and interest "and taxes and performance of statute labour," and the usual covenant that the "mortgagor will pay the mortgage money and interest and observe the above proviso." As pointed out by counsel the mortgage contains a clause reading as follows:

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Provided that in default of the payment of the interest hereby secured or taxes as hereinbefore provided the principal secured shall become payable.

It appears that apart from the effect of the acceleration clause the mortgagor is not in default in payment of principal or interest but it is contended by counsel on behalf of the plaintiff that

there has been default in the performance of the covenant to pay taxes.

The position with respect to the taxes is shewn by the material filed. A letter from the (Vancouver) city treasurer and collector, dated October 15th, 1931, and addressed to the defendants' solicitor reads in part as follows:

> The property in question is in arrears for the years 1929 and 1930 only, consequently will not be liable to Tax Sale until the year 1932 when payment of the 1929 taxes with interest will protect it for one year more.
>
> The 1929 taxes amount to $155.34 and against this the City holds a deposit of $35 (made by Mrs. Sarah Britton on 2nd September last) bearing interest at 4 per cent. This deposit with other similar payments will be applied towards payment of the 1929 taxes when sufficient has accumulated to cover one third of the taxes for that year. In other words, the taxes for the year may be divided into three payments for each of which a tax receipt may be issued, and smaller amounts may be placed on deposit earning interest at 4 per cent.

It appears from the affidavit of the defendant filed that the letter of October 15th, 1931, in part recited, was written pursuant to an arrangement which was made by the defendant with the tax collector to pay the taxes by monthly payments and it is also apparent that it is satisfactory to the city treasurer and tax collector for Vancouver that the taxes shall be paid by the instalments of $35 per month, which the defendant is now paying in order to avoid the appointment of a receiver pursuant to my order made herein on the 22nd of October, 1931, upon the application of the plaintiff for the appointment of a receiver. Notwithstanding the said arrangement and the payment of the said instalments by the defendant the contention on behalf of the plaintiff is that he is entitled to judgment on the ground that there has been a breach on the part of the mortgagor in the condition upon which she held the property. *Little* v. *Hill* (1916), 23 B.C. 321 is cited and reliance is also placed upon the acceleration clause and it is contended that there is no power to relieve from the consequences of non-payment of the taxes by the defendant in spite of the fact that the plaintiff has not been obliged to pay such taxes to protect his security and has not done so. Counsel further cites *McDougall and Secord* v. *York* (1908), 1 Alta. L.R. 59 as a case where the acceleration clause was invoked upon non-payment of taxes and it was held that the plaintiffs had a good cause of action. In the *McDougall*

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case, however, the plaintiffs had paid the taxes and counsel for the defendant in the present case has pointed out that no case has been cited by counsel for the plaintiff where the foreclosure order has been granted upon taxes being in arrears and not first paid by the plaintiff before bringing action.

On behalf of the mortgagee it is submitted that he is not obliged to pay the taxes as he may not be able to do so and that his right of foreclosure does not depend upon his doing so but arises upon default in payment of the taxes as and when the same fall due. I think the defendant was in default at the time the action was brought but that it must be admitted that the order of foreclosure would not be granted if the defendant had paid the arrears of taxes since action brought. It may be noted in connection with the mortgage clause above set out, being clause numbered 15 in Column 1 of the Second Schedule to the aforesaid Short Form of Mortgages Act that the form of words contained in Column II. of said Schedule provides that the mortgagor

> shall, on payment of all arrears under these presents, with lawful costs and charges in that behalf, at any time before any judgment in the premises recovered at law, or within such time as by the practice of equity relief therein could be obtained, be relieved from the consequences of non-payment of so much of the money secured by these presents or mentioned, or intended so to be, as may not then have become payable by reason of lapse of time.

Judgment

In the present case the mortgagor has not paid all arrears nor has the plaintiff but the defendant is paying the arrears by instalments under an arrangement satisfactory to the municipality to which the arrears of taxes are payable. In such case, in my opinion, the defendant is entitled to relief from the consequences of default in the payment of the said 1929 and 1930 taxes and as I understood it was desired that this action should be disposed of on the hearing of this motion I think I should dispose of the matter finally so far as possible but there will be liberty to the plaintiff to apply upon any default by the defendant in any other way with respect to the said mortgage.

Under all the circumstances I think the order I should make, as I do, subject to such right of the plaintiff to apply, is that upon payment by the defendant of the costs of the plaintiff up to the time of the filing and service of the statement of defence within three months from the taxation thereof without any

set-off and upon payment by the defendant of the said arrears of taxes for 1929 and 1930 and the taxes for 1931 by monthly instalments as aforesaid the action will be dismissed but if there should be any default by the defendant in the payment of the said costs or of said taxes as aforesaid the plaintiff will be entitled forthwith to judgment and the usual order of foreclosure as asked for with costs.

Order accordingly.

BENTLEY v. ALLEN AND YOUNG.

Negligence—Limitation of actions—Collision between automobile and street-car—Action against employees of company—Applicability of section 60, Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55.

The plaintiff brought action for damages against the employees of the B.C. Electric Railway Company by reason of their alleged negligence while operating a street-car of said company, the writ having been issued in the action more than six months after the accident.

Held, that the benefit of section 60 of the Consolidated Railway Company's Act, 1896 (which provides that actions for any damage or injury sustained by reason of the tramway or railway or the works or operations of the company shall be commenced within six months after the time when the damage was sustained), extends to employees of the company as well as the company itself.

ACTION for damages against two employees of the B.C. Electric Railway Company for negligence while operating a street-car of said company. The facts are fully set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 12th of January, 1932. Statement

J. E. Bird, for plaintiff.
J. W. deB. Farris, K.C., for defendants.

20th January, 1932.

MACDONALD, J.: Plaintiff seeks to recover damages from the defendants, by reason of their alleged negligence, while operat- Judgment

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ing a street-car, the property of the British Columbia Electric Railway Company, Limited. It appears that the plaintiff, on the 15th of August, 1930, at 11.45 p.m. was travelling along Main Street, Vancouver, B.C., in a southerly direction in his automobile and at the intersection of 16th Avenue, he collided with a street-car, which was backing across Main Street in an easterly direction and using that street as a "Y" or switch in order to reach the car barn of the B.C. Electric Railway Company.

As a result of the collision the plaintiff was seriously injured and his automobile damaged. The particulars of negligence in the statement of claim were not outlined in as specific a manner, as is usually adopted. No question, however, in this connection arose during the trial and the trend of the trial governs—*vide Scott* v. *Fernie* (1904), 11 B.C. 91. Defendants, as motorman and conductor respectively, in operating such street-car on behalf of their employer were subject to the restrictions placed upon the B.C. Electric Railway Company in utilizing the streets of the city. The company was controlled in the operation of its railway, not only by the Railway Act (R.S.B.C. 1924, Cap. 218) but by the rules and regulations authorized thereunder—*vide* sections 283 and 284. If there have been violations of the Railway Act, they would be *per se* evidence of negligence (*vide Baddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423 and other cases). The nature and extent of such violations were not specifically mentioned in the particulars of negligence, though discussed during the argument. The only allegation which might, upon a strained construction, have reference to such violations is, that the defendants were at the time backing the street-car at an unreasonable and excessive speed and in an unlawful manner. Amongst the provisions of the Railway Act, which it was submitted were applicable and had been ignored by the defendants were sections 191, 192 and 195. Sections 194 and 195 were referred to, but they only pertain to precautions to be taken at railway crossings and I think only apply to railway crossings, as distinguished from street-car crossings. Rule 18 which became effective on the 1st of March, 1928, provided for the equipment of city street-cars and as to the sounding of a gong or bell within a distance, not exceeding 60 feet from a

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crossing and also required that the motorman or person controlling the motor power of a street-car should sound or ring such gong or bell

whenever such person shall have reason to believe that there is danger of such car or train colliding with or running against any person, vehicle or any animal or obstruction.

Then rule 23 is similar to said section 193 of the Railway Act. While the side-note, to both the section in the statute and the rule, refers to "trains or cars" moving adversely in cities and thus might include street-cars, still the text only speaks of "trains" and thus it might well be contended that this provision, as well as others contained in the Railway Act, under the heading "Working of Trains" has no application to a street-car, which has the motive power in itself, upon a trolley being disconnected, of reversing and going backward instead of forward. The majority of these provisions do not apply and only lend aid in considering what the Legislature deemed were proper precautions to be observed under certain conditions. To this extent, they lend some assistance in determining the degree of care which should have been exercised by defendants, upon the occasion when they were utilizing 16th Avenue as a switching area.

Judgment

Aside then from any alleged breach of statutory obligation, denoting negligence, was there an absence of "care under the circumstances," on the part of the defendants? If so there was a breach of duty which constituted negligence and creates a liability. In this connection it was submitted by both counsel that the questions requiring consideration with reference to the actions of the defendants were:

The speed of the street-car when crossing the intersection.

The sounding of the gong at the time and the extent of the look-out by the defendant Young as conductor of the street-car.

There was flat contradiction as to the speed at which the street-car proceeded eastward along 16th Avenue with a view of crossing Main Street and with the assistance of a switch at the opposite side on 16th Avenue, then returning to Main Street. While one of the witnesses called for the plaintiff as to speed, had apparently forgotten a portion of the interview, shortly after the accident, with Henry Freshwater, investigating on behalf of the B.C. Electric Railway Company, still his recollection of some of the facts, as stated at the trial, differs from the defend-

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ants. I was impressed, however, with the evidence of James Neilson, a disinterested witness, who stated that the street-car was going across the intersection a little faster than the automobile. The street-car was backing up on the wrong side of the street and the defendants so utilizing the streets in an unusual manner should have exercised caution. While the defendant Allen, the motorman, is probably correct in stating that any degree of speed was unnecessary, if not impracticable, still I have come to the conclusion that the car was not, under the circumstances, proceeding at a reasonable rate across the intersection. Defendant Young doubtless gave the usual signal to his co-defendant to back up but he, depending upon the safety thus established in his mind proceeded at too great a speed in order to complete the switching process and to put his street-car in the barn for the night.

Then as to the gong being sounded, this was also the subject of contradiction and it was drawn to my attention that the defendants did not mention sounding the gong upon their examinations for discovery, though it would have been a responsive and proper answer to have been given to one of the questions asked. They now, however, both positively swear that the gong was sounded. This is positive evidence, as against the negative evidence afforded by witnesses for the plaintiff, so I accept it.

Judgment

The last and most important point to be considered is, whether the defendant Young kept a proper look-out in thus crossing the intersection. In the first place, his observation prior to giving the signal to Allen to back up and make the crossing was very unsatisfactory. He should be, and doubtless was, acquainted with the locality and aware that at the point on 16th Avenue where the street-car had stopped, after coming up from Main Street and passed over to switch, his visibility in observing any prospective traffic on Main Street, was limited. It was blocked to the north, to a certain extent, by a store on the corner. He pursued his usual habit, of not getting off the car and walking towards the intersection, so that he might see both ways on Main Street. He presumably came to the conclusion that the "coast was clear" and gave the requisite signal to his co-defendant, the motorman, to reverse and back across the intersection. In thus proceeding to make the crossing it was

necessary with one hand to hold the trolley pole down and disconnected from the trolley wire. According to his own account the other hand was engaged holding the bell-rope, in order to signal the motorman should occasion arise. Then he had a third operation still to perform, *i.e.*, to keep one of his feet on the gong and sound it as a warning. Main Street is an important thoroughfare and 16th Avenue was stated to be a "stop" street as it approached Main Street. From the time the signal was given, to back up, until the collision the street-car did not stop however. It was the duty of the defendant Young under the circumstances, especially in view of the speed adopted in crossing the intersection, to keep a proper look-out. He failed in this respect for some unaccountable reason. He did not exercise reasonable care. Even after the street-car had backed some distance and was actually upon the intersection, he did not observe the plaintiff's automobile coming from the north, until a collision was inevitable. He was given every opportunity of explaining his actions at the time but failed to do so. He frankly admitted that if he had observed the automobile, he could have given a signal which would have stopped the street-car almost instantly. This neglect of the defendant Young, coupled with the speed at which the defendant Allen was crossing the intersection, contributed to the accident.

Judgment

Defendants submit that if negligence be found against them, then that there was negligence, on the part of the plaintiff, contributing to the accident.

Plaintiff may not have been driving his automobile at an excessive rate of speed, but I feel satisfied that he was careless and negligent in the same manner as defendant Young. Statistics shew that the majority of accidents occur at intersections. The plaintiff was not, in approaching the intersection in question, keeping a proper "look-out," as it is termed, or exercising the care which the circumstances warranted and required. Plaintiff was thus guilty of contributory negligence and would, formerly, have had no redress, although he alone suffered by the joint negligence of the parties. Now by statute this unfairness has been remedied. The damages are awarded in accordance with the degree of fault. I think they were equally guilty in this respect. The damages both special and general I fix at

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$3,000. The defendants would be liable and unless relieved by the delay in bringing the action or the doctrine of ultimate negligence should pay plaintiff 50 per cent. of this amount. The costs would be borne upon the same proportion. Plaintiff then contends that if it be decided that he was guilty of contributory negligence, still that the doctrine of ultimate negligence or "last clear chance" should be applied as against the defendants and the defendants counter with a submission to the same effect against the plaintiff. I think that the doctrine is upon the facts inapplicable as to either of the parties.

They were jointly negligent and their negligence continued up to a time, so close to the collision, that it was impossible for either the plaintiff or the defendant Young by the exercise of reasonable care to have avoided the accident. There was joint concurrent negligence.

Defendants submit that, in any event, even if the action of the defendants, in crossing the intersection of Main Street and 16th Avenue should be found to be negligent and a liability thus created, still that they were at the time of the accident carrying out their duties as employees in the "operation" of the said B.C. Electric Railway and are entitled to the benefit of section 60 of the Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55. If this Act be applicable to the defendants, then the contention is well founded, and the action should be dismissed, as it was not commenced "within six months next after the time when such supposed damage is sustained." It is the same defence as was raised by the company in *Pribble* v. *B.C. Electric Ry. Co.* (1925), 35 B.C. 46; (1926), A.C. 466; 95 L.J., P.C. 51; 134 L.T. 711; 42 T.L.R. 332; (1926), 1 W.W.R. 786; (1926), 2 D.L.R. 865. In the Privy Council Lord Sumner in delivering the judgment of the Board, shews the similarity of such defence, with the one here submitted, as follows:

Judgment

> The appellants pleaded that the action was statute barred by virtue of s. 60 of their statute—namely, the Consolidated Railway Company's Act, 1896.

The section under consideration in the *Pribble* case and now invoked as a relief to the defendants reads as follows:

> 60. All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway, or the works or operations of the

Company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance of and by authority of this Act.

The neat point then to be decided is whether this provision, limiting the right of action, applies to this case or is the protection, so terming it, confined to the company alone.

In construing such legislation, the object of statutory limitations is referred to by Lord St. Leonards in *Trustees of the Dundee Harbour* v. *Dougall* (1852), 1 Macq. H.L. 317 at p. 321 as follows:

All Statutes of Limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; and in all well-regulated countries the quieting of possession is held an important point of policy.

The object of this legislation was also discussed in *Pribble* v. *B.C. Electric Ry. Co., supra,* and in referring to accident cases, the following citation is apposite ((1926), A.C. at p. 475):

In practice a limitation is more necessary in accident cases than in cases of injury to property rights inflicted by reason of the construction or maintenance of the railway, since fraud is much more possible in the former class of action than in the latter, and after a considerable lapse of time the company has little or no chance of defending itself against a charge of causing a personal accident by the negligence of its servants.

Judgment

The necessity however, thus outlined, for a limitation of action as against the company would not prevail where the accident is brought, as here, against its employees personally, on the ground of negligence and they are required to defend themselves. In support of the contention that this private Act does not apply, plaintiff refers to section 32 of the Interpretation Act, R.S.B.C. 1924, Cap. 1, which reads as follows:

32. No Act of the nature of a private Act shall affect the rights of any person, or of any body politic, corporate, or collegiate (such only excepted as are therein mentioned or referred to).

I cannot, however, appreciate the force of this submission because it may, for purpose of argument, be assumed that plaintiff had a right of action. The question is whether through delay, his remedy has been destroyed and the defendants entitled to invoke the legislation which, *prima facie* was enacted, as a protection to their employer. It was at one time considered, that a

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liberal construction should be placed upon legislation of this nature, but later authorities decided that

> A Statute of Limitation, like any other statute, must be interpreted in accordance with the fair meaning of the language used, and a litigant who relies upon it must bring his case within its terms as so interpreted. . . . The Court, before holding a claim to be barred by lapse of time, must see clearly that the statute applies:

Vide Lightwood on The Time Limit on Actions, pp. 2-3. Compare Lord Cranworth, C., in *Roddam* v. *Morley* (1857), 1 De G. & J. 23:

> It [Statute of Limitations] is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment.

There is no doubt that the provision does not in terms extend to the employees of the company referred to in the Act. Then can it be successfully contended that the defendants "are strictly within the enactment" and thus that the statute "clearly applies"? If the section had been worded in similar terms to the limitation provisions of the Public Authorities Protection Act, 1893 (56 & 57 Vict.), Cap. 61, Sec. 1, then there would be no difficulty in deciding that the defendants were relieved from liability. In that Act, shortly stated, it was provided that no action should lie or be instituted against any person for any act done in pursuance of any public duty

Judgment

> in respect of any alleged neglect or default in the execution of any such Act . . . unless it be commenced within six months. . . .

The title of the Act had a controlling effect upon its application. It was held that it did not extend to companies exercising statutory powers for purposes of profit or to contractors of public authorities.

> Thus it does not apply to railway and other companies which exercise statutory powers for their own private gain:

Vide Lightwood, p. 391 and cases there cited.

> Nor does it apply to a company which carries on a statutory undertaking as lessee of the municipal authority: *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1, C.A., see p. 20. Nor does it apply to contractors doing, for their own gain under contract with a local authority, work which the local authority is by statute authorized to do: *Kent County Council* v. *Folkestone Corporation* (1905), 1 K.B. 620, C.A.; *Tilling (Ltd.)* v. *Dick, Kerr & Co.* (1905), 1 K.B. 562 . . .

However, unless distinguishable, the point to my mind is concluded by a judgment of the Supreme Court of Canada, in *West* v. *Corbett* (1913), 47 S.C.R. 596. In that case the

defendants while carrying out a contract for the building of a portion of the eastern division of the Grand Trunk Pacific Railway set fire to the plaintiff's timber and the defendants pleaded that the action had not been brought within a year as provided by section 306 of the Railway Act. While the plaintiff obtained a verdict at the trial, the Full Court set it aside, giving effect to the plea of prescription. Said section 306, there considered, is very similar in its terms to said section 60 of the Consolidated Railway Company's Act, 1896. The first two subsections thereof read as follows:

306. All actions or suits for indemnity for any damages or injury sustained by reason of the construction or operation of the railway shall be commenced within one year next after the time when such supposed damage is sustained, or, if there is continuation of damage, within one year next after the doing or committing of such damage ceases, and not afterwards.

2. In any such action or suit the defendants may plead the general issue, and may give this Act and the special Act and the special matter in evidence at the trial, and may prove that the said damages or injury alleged were done in pursuance of and by the authority of this Act or of the special Act.

Duff, J. in his judgment summed up the situation shortly as follows (p. 607): Judgment

The only point requiring specific mention, in my judgment, is whether the first subsection of section 306 of the Railway Act applies.

I think that by force of section 15 of the National Transcontinental Railway Act that enactment is pleadable by the respondents in defence to this action.

Anglin, J. (now Chief Justice) in a more lengthy discussion of the section and its effect, agreed with the majority of the Court, that the defendants were entitled to the benefit of the limitation of action, conferred by said section. A portion of his judgment appears to fully cover the ground and support the contention of the defendants herein, that they should receive the protection of said section 60. It reads as follows (p. 609):

The remaining question has occasioned me rather more difficulty. Upon the examination of section 306 of the Railway Act a feature of it which immediately strikes one is, that subsections 1 and 2 are general in their terms, while subsections 3 and 4 are restricted in their application to railway companies themselves. This difference in language indicates an intention on the part of Parliament that the application of the two earlier subsections should not be confined to actions in which the railway company itself is defendant. We are asked by counsel for the appellant to read into subsection 1 after the word "suits," the words "against the company." I

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see no justification for doing so. On the contrary, I think that to insert these words would be to place upon the operation of subsection 1 a restriction which Parliament obviously did not intend. When the purpose was to confine the application of certain provisions of the Act to railway companies, Parliament has expressed its intention to do so by using the word "company." The reason for giving to railway companies the benefit of such protection as subsections 1 and 2 of section 306 afford applies with equal force to the case of contractors engaged in railway construction authorized by Parliament.

I cannot see any difference between the protection which was afforded to the "contractors" of the railway in that case, from one in which these defendants are seeking, under similarly worded legislation, a like result as "employees" engaged "in the operation" of the B.C. Electric Railway. So I think that the construction to be placed upon said section 60, even though a portion of a private Act, is that it applies to employees as well as the company itself and thus affords a protection to the defendants.

Judgment

The action, not having been commenced within the statutory limitation, is dismissed. Judgment accordingly with costs following the event.

Action dismissed.

SHANNON v. KING. (No. 3).

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SHANNON v. KING

Practice—Action—Application to discontinue without costs before statement of claim—Jurisdiction—Rule 286.

Where a plaintiff applies before delivery of her statement of claim under rule 286 for leave to discontinue her action without payment of costs:—

Held, that the Court may allow her to discontinue upon such terms as to costs as may seem just and in this case the application should be granted.

APPLICATION to discontinue action before delivery of statement of claim. Heard by MCDONALD, J. in Chambers at Vancouver on the 7th of January, 1932.

Statement

Sloan, for plaintiff.

Garfield A. King, for defendant.

11th January, 1932.

MCDONALD, J.: The plaintiff before delivery of her statement of claim, applies to the Court for leave to discontinue her action without the payment of costs. Upon the merits of the case, which I think it unnecessary to discuss, I am prepared to grant this application if I have jurisdiction to do so.

The application is made under Order XXVI., r. 1 which, after a careful argument and further consideration, as I understand it, may be paraphrased as follows:

The plaintiff may by simply giving a notice in writing discontinue at any time before receipt of defence or after receipt thereof and before taking any other proceeding. If he does follow this course the inevitable result is that he must pay the defendant's costs. The Court has nothing to say about it and there is no jurisdiction to deal with the matter.

Judgment

On the other hand, if the action has proceeded to a further stage than as aforementioned or if the plaintiff does not wish to face such inevitable result and be advised that it is a case where he may possibly escape the payment of costs then the plaintiff may apply to the Court and the Court may allow him to discontinue upon such terms as to costs or otherwise as may seem just. Having reached this conclusion, I think there is jurisdiction to make the order for which the plaintiff applies.

Application granted.

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BLUMBERGER v. SOLLOWAY, MILLS & CO. LTD.

BLUMBERGER v. SOLLOWAY, MILLS & COMPANY LIMITED.

Stock exchange—Broker and client—Stocks delivered broker as collateral security for indebtedness—Wrongful conversion—Evidence of—Access to defendants' books—Privilege.

The plaintiff employed the defendant company as stock-brokers and from time to time delivered to the defendants stocks, shares and bonds as collateral security to cover indebtedness owing by the plaintiff to the defendants in the course of their employment. Later the plaintiff changed his stock-brokers and on the defendants purporting to transfer the securities to the newly employed firm, the plaintiff took exception to the securities so transferred and brought action for damages for wrongful conversion of the securities so deposited with the defendants. In endeavouring to obtain evidence of the manner in which the defendants dealt with the securities, applications to obtain discovery were successfully met with a claim of privilege by the defendants on the ground that any discovery in the nature of production of documents would tend to incriminate them, and any endeavour to obtain admissions from the defendants by interrogatories shewing the disposition of the securities was met with the same defence. Prior to the trial the defendants obtained an amendment to their statement of defence on the undertaking of the solicitor to have certain stock registers available for use on the trial, should their production be ordered, but on the trial it was successfully contended by counsel for the defence that notwithstanding the undertaking, he should not be called upon to produce the books, they being privileged as they might incriminate or tend to incriminate his clients. Then *J. W. deB. Farris, K.C.*, senior counsel for the defendants was served with a *subpœna duce tecum* as a witness in the case. He admitted custody of the books in question but objected to producing them, claiming privilege by virtue of professional services. The books were, on the order of the Court, produced under protest.

Held, on the evidence, that the entries in the books shew that the disposition of the securities amounted to a denial of the plaintiff's ownership and an assertion on the defendants' part of a right to dispose of them as they saw fit which goes even beyond establishing a *prima facie* case of conversion against the defendants. The plaintiff should be paid by way of damages the market price of the different securities at the time that they were converted.

Statement

ACTION for damages for wrongful conversion of certain stocks, shares and bonds delivered by the plaintiff to the defendants as collateral security for any indebtedness owing by the plaintiff to the defendants in the course of the defendants'

employment as brokers in the purchase and sale of stocks. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 2nd of November, 1931.

J. A. MacInnes, and *C. F. MacLean,* for plaintiff.
J. W. deB. Farris, K.C., and *Sloan,* for defendants.

11th December, 1931.

MACDONALD, J.: Plaintiff seeks to recover damages from defendants for wrongful conversion of his property. In June, 1928, the plaintiff employed the defendants Solloway, Mills & Company, as his stock-brokers and agents at Vancouver, B.C. From time to time thereafter he delivered to the defendants, so employed, stocks, shares and bonds as collateral security for any indebtedness, which the plaintiff might owe to the defendants in the course of their employment. Securities mortgaged or pledged with a broker to secure the amount due or to become due to him from his client are spoken of as "cover" by Cozens-Hardy, M.R. in *Stubbs* v. *Slater* (1910), 1 Ch. 632 at p. 638.

I am satisfied that these securities were delivered and received by the defendants, not for the purpose of immediate sale or other disposition, but with the intent and agreement that they should be held by the defendants, for the purpose mentioned. It is alleged, that the defendants, without the plaintiff's knowledge and consent, wrongfully converted these stocks, shares and bonds to their own use by selling or otherwise disposing of them. The functions of a stock-broker are, in a great majority of transactions, different from those of an ordinary broker—they are much broader. With respect to stocks that may have been purchased on account of his client, a stock-broker is more like that of a factor, holding goods for sale under a *del credere* commission, and under advances to his principal. His office and duty is in the nature of a trust to be executed for the profit or loss of his principal, conditioned on the performance by the principal of his duty, to keep the marginal security good and is determinable at the option of either party. This relationship pertains not only to the purchase and sale of stocks, on account of a client, but would equally apply to the acts of the defendants as stock-brokers, with respect to the securities deposited by the

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plaintiff with them. A stock-broker "is a trustee, for the law charges him with the utmost honesty and good faith in his transactions." Any benefit enures to the *cestqui trust*—Dos Passos on Stock-brokers, 2nd Ed., 180. The cases of *Taylor* v. *Plumer* (1815), 3 M. & S. 563, and *Ex parte Cook* (1876), 4 Ch. D. 123, are cited in support of this statement of the law.

Plaintiff did not sue for an accounting, but undertook the difficult task of proving that the defendants had failed, not only to fulfil the trust reposed in them, but had wrongfully converted the securities referred to in his statement of claim. At the time of the slump in stocks in the fall of 1929, and after the arrest of Solloway and Mills, plaintiff changed his stock-brokers and employed the firm of Branson, Brown & Company at Vancouver. Defendants then purported to transfer to the latter firm or give an account of all securities held by them on account of the plaintiff. Some time afterwards, the plaintiff took exception to the conduct of the defendants, as his stock-brokers and then commenced this action. Defendants denied the allegations of conversion and the efforts of the plaintiff were then directed towards obtaining evidence which would shew the manner in which the defendants had dealt with the securities. No assistance whatever was afforded to the plaintiff towards that end. The plaintiff could not obtain access to the books of the defendants and applications to obtain discovery were met with a claim of privilege on the part of the defendants, on the ground that any discovery in the nature of production of documents would tend to incriminate the defendants. They were successful in this contention, which involved delay in bringing the action to trial. Plaintiff also sought by interrogatories to obtain admissions from the defendants to the same effect, shewing the disposition of the securities. This also failed on the same ground, the stereotyped answers of both Solloway and Mills to many questions of this nature being "I object to answer upon the ground that my answer may tend to incriminate me." Then, prior to the trial of the action, defendants applied for an amendment to their statement of defence, seeking to justify their disposition of the securities, as in accordance with the custom of the Stock Exchange. This

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amendment was granted upon the undertaking of the solicitor that he would have certain stock registers available for use at the impending trial, should their production be ordered by the trial judge. It was apparent that the plaintiff relied upon such production, as the means available to prove conversion. When fulfilment of the undertaking was required at the trial, Mr. *Sloan,* one of the counsel for the defendants, contended that, while he had given such undertaking, he should not be called upon to produce the books, asserting that they were privileged from production, as they might incriminate or tend to incriminate his clients. Argument was submitted at length upon this proposition and it was pointed out that the B.C. Evidence Act, directing that witnesses might, with due protection, give evidence, even though it might tend to incriminate, had no application to the production of documents. The force of this contention becomes evident upon consideration of the particular section, which invades the general principle, that no one should be called upon to incriminate himself, and shews that it was restricted to witnesses. It does not deal with production of documents. The counsel then, in referring to the difficulties which the Court had intimated, might be encountered by an employer desiring to obtain an accounting from his agent, said, that if seeking production from a company, a *subpœna duces tecum,* served on the proper officer "would compel him to produce documents in Court." The difficulties even then, that might be met were discussed and it developed that Mr. *Farris,* senior counsel, had been served with a *subpœna duces tecum* as a witness in the case. He admitted that he had the custody of the books in question but objected to produce them claiming that he was privileged, in so acting, by virtue of professional services. This point was then argued, many cases being cited by counsel, in support of his position, *inter alia, Greenough* v. *Gaskell* (1833), 1 Myl. & K. 98, but it did not appear to me in point. In fact, upon a close perusal, it seemed to be against the contention of the defendants, especially at p. 103, where Lord Brougham refers to a solicitor, called as a witness being privileged when he "learned the matter in question only as a solicitor or counsel and in no other way." If he had been a party to a

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fraud, and, for example, was giving evidence as an informer, after having engaged in a conspiracy, though he might be acting for another, he would not be protected from disclosure. Other instances were given where the protection of solicitors did not apply (p. 104)

where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstance of his being the attorney, but of which fact any other man, if there, would have been equally conusant.

Here, it was apparent, that the material entries in the books, which were sought to be produced, were made before this action was brought or even threatened. They existed long before in the course of business between plaintiff and the defendants. On account of the firm stand taken by such leading counsel, I then gave my reasons, somewhat at length, for ordering him to produce the books in his custody in accordance with the *subpœna*. I required, however, to firmly repeat my order before he complied therewith under protest and not receding from his contention. I pointed out that if I were wrong, he had his redress. In this connection I might refer to the remarks of Lord Brougham, in *Walburn* v. *Ingilby* (1833), 1 Myl. & K. 61 at p. 84, as follows:

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If the evidence is now obtained by the plaintiff under the order, and it is afterwards decided that the order ought not to have been made, the evidence will go for nothing.

This case is interesting, as outlining the principle to be followed, where a solicitor admits that he holds documents in his possession and production is refused. The facts are not similar to those here presented, but a failure to produce the books in question would have the same effect, as the Lord Chancellor mentioned at p. 83:

If such a defence, or such an arrangement among parties having a common interest in books and papers, were allowed to protect them against production, it is clear that means would never be wanting to evade or to defeat the jurisdiction of the Court.

He then added:

The whole affair has essentially the appearance of a contrivance for this purpose, and it can never be suffered to prevail.

I do not so find in this case, but, in the language of Lord Eldon, "the arm of the Court will indeed be palsied." Such a course would further assist the defendants, in their efforts to

avoid disclosure. It would be contrary to one of the duties, cast upon a stock-broker and referred to, in Halsbury's Laws of England, Vol. 27, p. 222, as follows:

> 443. . . . For this reason, in an action by a client against a broker, the client is entitled to see his account apart from the rules as to discovery, and, indeed, an action lies by the client to enforce production of the account to himself or to any proper person appointed by him, but he cannot insist upon its production to a person to whom reasonable objection may be made by the broker.

When the book shewing an account of the securities received by the defendants from the plaintiff was produced, it was quite evident that the defendants had good reasons for attempting to prevent the disclosure of the evidence, as presumption arises where there is suppression or refusal to disclose documents, that they are unfavourable to the party objecting to production. The plaintiff, however, undertakes to prove conversion and he cannot succeed upon a presumption of this nature. He must prove his right of action. I feel no doubt that the contents of the book, shewing such account between the parties is binding upon the defendants and affords evidence of conversion. The different securities are ear-marked through the number of the certificates being duly entered. This account destroys any benefit which might otherwise enure to the defendants, from their accounts being rendered to the plaintiff and to which no objection was taken at the time. The plaintiff had a right to assume the accounts rendered were correct and truly stated the transactions therein referred to, but as they do not agree with the account of the securities as entered in the book or register and their disposition, their efforts, as affording evidence against the plaintiff, is destroyed. In other words, plaintiff did not with knowledge of the true facts as to the disposition of his property, sanction the actions of the defendants as outlined in their accounts rendered. There is no longer an "account stated."

Judgment

Without discussing the disposition of each security deposited by the plaintiff with the defendants it will suffice to say, that the agreement and understanding between the parties and the basis, upon which these securities were deposited, was ignored by the defendants. Generally speaking, they dealt with these securities, as if they were their own property, without notice and

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regardless of the rights of the plaintiff. In many cases, contrary to the intention of the parties, they forwarded the securities to Toronto. They often sold them to a local broker or on the local Stock Exchange, immediately after having received them. The defendant in an action for conversion, is not bound to explain his actions, with respect to property and that want of an explanation "is not sufficient to enable the plaintiff to say, this amounts to evidence of the fact that is unexplained" (*vide* Lord Buckmaster in *H. C. Smith, Ld.* v. *Great Western Railway Co.* (1922), 1 A.C. 178 at p. 185). He has a right and may endeavour to succeed, on the lack of proof, on the part of the plaintiff to refuse to explain his conduct as here. The entries in the books I think, however, afford evidence, which goes even beyond establishing a *prima facie* case of conversion against the defendants. The disposition of the securities there shewn by the defendants, amounted to a denial of plaintiff's ownership and an assertion on their part of a right to dispose of them as they saw fit. This clearly was a conversion. While the defendants came into the possession of the securities properly, still there was "an unauthorized assumption of the powers of the true owners" which constitutes conversion.

Judgment

To constitute this tort there must be some act of the defendant repudiating the owner's right, or some exercise of dominion inconsistent with it: *Vide* Bullen & Leake's Precedents of Pleadings, 8th Ed., p. 354 and cases there cited.

I think that the usual demand, before the action, to prove conversion, would, under the circumstances, have been useless for that purpose, as there is no doubt there would have been a refusal, coupled with inability to comply with such a demand. The situation would have been similar to one, where it is apparent that formal tender of a payment becomes unnecessary, on the ground that it would be fruitless.

Defendants sought to excuse and defend their disposition of the securities by setting up customs of the Stock Exchange which would affect the situation. Evidence was adduced to prove such custom and rules. While plaintiff did not sign an agreement to be bound thereby in his business with the defendants, still it was unnecessary. The difficulty is that the defendants did not afford evidence, which would bring into

operation such custom or rules for their benefit. I have already referred to their accounts rendered being at variance with their books and thus not being binding upon the plaintiff, through not being immediately repudiated. I should add that the "confirmation" subsequently obtained from the plaintiff could not affect prior transactions as plaintiff had not then knowledge of the improper disposition of his securities and defendants could not, under the circumstances, allege that they were prejudicially affected.

Defendants then contend that, in any event, even if a conversion be so found against them, still that they are only liable to pay nominal damages. There is no doubt, that from the time they were dealing with the different securities, they, as a rule dropped in value after they were received by the defendants. Still they submit that they should not be called upon to pay damages based upon the value of the securities at the time when they converted the property to their own use. They are thus, as it were, setting up their own wrong and attempting to benefit therefrom. This is contrary to principle and the inability of a debtor company to obtain assistance, where misappropriation had taken place, is referred to in *Gresham Life Assurance Society* v. *Bishop* (1902), A.C. 287.

Judgment

I might add that the following citation from Dos Passos on Stock-brokers, 2nd Ed., p. 276, lends support to the conclusion I have reached that a demand was not necessary in this case, *viz.*:

> Where the broker sells the stock without authority a demand therefor is not necessary to maintain an action for conversion and such action may be maintained although they were purchased in the name of the plaintiff's agent: *Cunningham* v. *Stevenson*, 29 W.D. (N.Y.) 82.

Ordinarily upon the conversion of property, the damages are determined by ascertaining the value of the property, at the time of conversion. In *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199 at p. 203 this point is covered as follows:

> Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion, and in case the plaintiff could, by going into the market, have purchased other goods of the like quality and description, the price at which that would have been done would be the true measure of damages.

Mayne on Damages, 10th Ed., in dealing with actions, for not

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replacing stock, at p. 177, states that where a stock has risen in price, since the time appointed for the replacement, it will be taken at the price, on or before the day of trial, but if it had fallen "it was estimated at the price on the day that it ought to have been replaced." *Sanders* v. *Kentish* (1799), 8 Term Rep. 162. Then in another case, where no day was named for its replacement, and the stock had fallen in value, it was estimated on the day it was transferred to the borrower. *Forrest* v. *Elwes* (1799), 4 Ves. 492.

This action is not based on a failure by a broker to carry out instructions for sale of stocks or any proper conversion of property, thus some of the decisions cited, as to nominal damages only being allowed, are not applicable to the facts here presented. In this connection and as outlining the remedy afforded by a plaintiff, under like circumstances, the following extract from Meyer on the Law of Stock-brokers and Stock Exchanges, at p. 554, is pertinent, though perchance only applicable to the United States:

Judgment

> The measure of the customer's damages for the wrongful sale of his securities is the difference between the highest market value of the securities within a reasonable time after the customer has knowledge or notice of the sale and the amount which was credited to the customer as a result of the sale.

Vide cases cited.

Then again, at p. 555, the following extract would appear to fully cover the ground:

> This measurement of damages in security transactions is somewhat different from that which is employed in ordinary cases of conversion of personal property. The ordinary measure of damages for conversion is the value of the property converted at the time the conversion takes place. The Courts, however, early in the history of our jurisprudence, realized that the application of this measure to the conversion of property of a fluctuating value would leave the owner virtually without remedy. It would permit the party who committed the wrong to do so without penalty except the repayment of what he actually received, and disable the party wronged from reinstating his position without loss. Accordingly, the Courts engrafted this exception on the rule of damages applicable generally in conversion cases.

The defendants could not escape liability by offering to replace the securities alleged to be converted. This would not bar the right of action of the plaintiff "where an agent has violated his duty or instructions and made himself liable to an

action for damages, nothing but payment of the damages and accord and satisfaction or a release is a bar to the same." (*Clarke* v. *Meigs*, 10 Bosw. 338; s.c. 22 How. Prac. 340; *Gruman* v. *Smith*, 12 Jones & S. 389; reversed, on another ground, 81 N.Y. 25). However, while an inconsistency might thus appear in different countries, I think the plaintiff should be paid, by way of damages the market price of the different securities, at the time that they were converted. In my opinion they were so converted upon the dates shewn in the register of such securities, the requisite page of which, covering the ground, has been copied and filed as Exhibit 21.

The defendants contend that, in any event there should be a segregation of liability, whereas the plaintiff seeks, according to the form of the action, to hold the partnership of Solloway, Mills & Co. as well as the company, liable for the entire amount of damages which he may recover. According to his evidence he was not aware that the company had been incorporated and that it had taken over the business of the partnership at a certain period. The receipts which he received from time to time gave him notice to the contrary. He was well aware of the distinction between an incorporated company and a partnership. I think that he was bound by the information contained in the receipts, even although the books of the partnership were utilized by the company after incorporation and the business generally was continued in the same manner, as had previously prevailed. The result is that the plaintiff is only entitled to recover damages against the partnership of Solloway, Mills & Co. arising out of the deposit of securities up to and until the 14th of July, 1928, and subsequent thereto his remedy and right to recover exists only against the company. In order to determine the amount of damages thus to be allowed the plaintiff, there will be a reference to the registrar for that purpose and the dates to be accepted, as the time of conversion of each of the securities, are those afforded by said Exhibit No. 21. It shews when disposition was made of them and thus converted by the defendants. The highest market price for the different securities (saving those eliminated from consideration at the trial) is to be ascertained, on the respective dates and the amount of damages

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ascertained and allotted according to the times so indicated. If such market prices cannot be agreed upon with respect to any particular stock then the registrar may accept evidence by affidavit. This reference should be speedily concluded. Upon the registrar filing his report and its adoption obtained, a final order may be made. The plaintiff is entitled to his costs.

Judgment for plaintiff.

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Practice—Affiliation order by magistrate—Appeal—Notice—Time of service prior to hearing—Place of hearing—Service of notice of appeal on superintendent of neglected children—R.S.B.C. 1924, Cap. 34, Sec. 16—B.C. Stats. 1926-27, Cap. 9, Sec. 6.

Section 6, subsection (2) (*e*) of the Children of Unmarried Parents Act Amendment Act, 1927, provides that "Where the notice of appeal is filed more than fourteen days before a sitting of the Court to which an appeal is given, such appeal shall be made to that sitting; but if the notice of appeal is filed within fourteen days of a sitting the appeal shall be made to the second sitting next after such notice of appeal is filed."

Notice of appeal from an affiliation order of the police magistrate for the Municipality of Spallumcheen to "the County Court of Yale, holden at Vernon at the next sittings thereof" was filed on the 2nd of December, 1931, and the next sittings of the Court opened at Vernon on the 16th of December, 1931.

Held, on preliminary objection, that the notice of appeal does not designate the proper sittings at which the appeal should be heard, and that this irregularity is fatal to the appeal.

Held, further, that not serving the superintendent of neglected children in whose favour the order of affiliation was made, with the notice of appeal as required by section 16 of the Children of Unmarried Parents Act was fatal to the appeal.

Statement

APPEAL from an affiliation order by the police magistrate for the Municipality of Spallumcheen to the County Court of Yale, holden at Vernon on the 16th of December, 1931. The facts are set out in the reasons for judgment. Argued before SWANSON,

Co. J. at Vernon on the 17th of December, 1931, judgment being handed down later on the same day.

A. D. Macintyre, for appellant.
Galbraith, for respondent.

SWANSON, Co. J.: This is an appeal from an affiliation order made against the appellant by the police magistrate in and for the Municipality of Spallumcheen, on the 23rd of November, 1931.

The notice of appeal states that the appellant intends to appeal to "the County Court of Yale holden at Vernon at the next sittings thereof to be held at the Court House in the City of Vernon, B.C." The sittings of the County Court of Yale holden at Vernon were fixed by the Court for December 16th, 1931, at the previous sittings of the Court in November. The Court opened on December 16th when this case was called and in the absence of counsel for appellant the hearing was adjourned to December 17th. The Court is still in session on December 17th when this appeal was opened for hearing.

Judgment

A preliminary objection was raised by Mr. *Galbraith* that the appeal is lodged to the wrong sittings of the Court. He invokes the provisions of section 6, subsection (3) (*e*) of the Children of Unmarried Parents Act Amendment Act, 1927, which reads as follows:

> Where the notice of appeal is filed more than fourteen days before a sitting of the Court to which an appeal is given, such appeal shall be made to that sittings; but if the notice of appeal is filed within fourteen days of a sittings, the appeal shall be made to the second sittings next after such notice of appeal is filed.

The conviction or order is dated November 23rd, 1931, service of notice of appeal was effected on the magistrate December 2nd, and on the complainant (respondent) on December 3rd. On December 2nd, 1931, the notice of appeal was filed in the County Court registry at Vernon. On December 3rd the appellant deposited with the magistrate $119.25 made up as follows: Costs in magistrate's Court, $2.50; amount ordered to be paid to superintendent of neglected children, $57.75; three weeks' maintenance of child, $9; costs of appeal, $50; in all, $119.25.

The magistrate has returned into the registry of this Court

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$116.75, retaining $2.50, which Mr. *Galbraith* submits should also have been returned into this Court, and that it was the duty of appellant to see that it was returned.

It has been repeatedly laid down by trial judges and Courts of Appeal both here and in England that the right of appeal in such a case as this is purely a matter of statute, and that the statutory conditions precedent must all be strictly proved before the Court can acquire jurisdiction: see *Reg.* v. *Joseph* (1900), 6 Can. C.C. 144. There is no inherent right that it should appear on the face of the proceedings that the statutory conditions precedent have been complied with, otherwise the Court will dismiss the appeal for want of jurisdiction. The statutory provision set out in section 6, subsection (3) (*e*) above quoted is peculiar to appeals lodged from convictions or orders under the Children of Unmarried Parents Act and amendments. Such provision is therefore supplementary to sections 77 and 78 of the British Columbia Summary Convictions Act. Mr. *Galbraith* submits that the expression in this subsection "more than fourteen days" is equivalent to "at least" fourteen days, and must be read as excluding the day on which notice of appeal was "filed" in the County Court registry, to wit: December 2nd, and the opening day of the County Court sittings. If that interpretation is applied here, he contends that this Court has no jurisdiction to hear this appeal. This Court opened its sittings on the day publicly announced, December 16th. Excluding the day on which notice was filed, December 2nd, "more than fourteen days" thereafter would mean December 17th.

Judgment

This interpretation of the term "more than fourteen days" is clearly given by a majority judgment of the Supreme Court of Nova Scotia by Townshend, C.J., Meagher and Longley, JJ. (Russell, J. dissenting) in the case of *Rex* v. *Johnston* (1908), 13 Can. C.C. 179: see words of Meagher, J. at pp. 183 to 186. Mr. *Galbraith* also quotes the decision of Mr. Justice Lynch of the Court of King's Bench, Quebec, in *Rex* v. *Bombardier* (1905), 11 Can. C.C. 216 to establish the point that the "sittings of the Court" refers to the opening day of the term of the Court as fixed by law. Lynch, J. at p. 217 said:

> On the 23rd October the Court dismissed the motion, [to quash appeal] holding that the session of the Court held on 7th day of November, 1904,

was the same session which had commenced on the preceding 3rd day of October, and that the word "sittings" as used in paragraph *a* of section 880 of the Criminal Code refers to the opening of the term and not to any adjournment of the same.

I hold in this case that the notice of appeal does not designate the proper "sittings" at which this appeal should be heard, and that this irregularity is fatal to this appeal.

Mr. *Galbraith* also raised the objection that on the close of the appellant's case in proof of the regularity of the appeal proceedings no proof was adduced that "the sittings of this Court at Vernon are held nearest to the place where the cause of the information or complaint arose." It is essential that this statutory condition precedent should be proved and it was not proved up to that point. Mr. Justice Newlands in *Collison* v. *Kokatt* (1915), 8 W.W.R. 561 said:

> It has been decided in this Province [Saskatchewan] that the Court would take judicial notice that a town or other known place was within a judicial district, but it has never been decided that the Court should take judicial notice of the distance of one place from another. This must be a question of fact which should be proved. That being the case, a writ of *mandamus* will not lie.

See words of Lord Denman, C.J. in *Reg.* v. *Justices of Kesteven* (1844), 3 Q.B. 810; 13 L.J., M.C. 78 at p. 80. Judgment

With some reluctance I relaxed the strict rule of practice in this matter, and allowed counsel for the appellant to again put the appellant in the witness box to establish proof on this point. I wish to add that I will not in future regard this as a precedent in practice. His evidence, however, is not as satisfactory on this point as the strict rule of practice calls for. It is alleged by Mr. *Galbraith* that the evidence would shew that the cause of alleged complaint herein does not arise in the Town of Armstrong, as testified to by the appellant, but in the Municipality of Spallumcheen, and that there is no evidence whatever on the point as to the respective distances as the crow flies from that Municipality to Vernon and to the other Court centres in this county.

Mr. *Galbraith* also raises the objection that under section 16 of the Children of Unmarried Parents Act, cap. 34, R.S.B.C. 1924, no notice of appeal was served upon the superintendent of neglected children in whose favour the order of affiliation herein was made. Section 16 reads:

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Where any proceedings are instituted under this Act by any person other than the superintendent, the person instituting the proceedings shall give notice thereof to the superintendent, and the superintendent shall have the right to appear and intervene and be heard in person or by counsel on the proceedings.

In my opinion this essential requirement of the statute was not complied with by appellant. Under the affiliation order herein, the magistrate ordered that the money, $57.75, and weekly maintenance sum of $3 should be paid personally to the superintendent of neglected children. Surely it is of great importance that he should be duly advised by notice of appeal of the proceedings to set aside the order of the magistrate. I hold that the lodging of an "appeal" is a "proceeding instituted under the Act." That is also fatal to the appeal in my opinion. See annotation in 28 D.L.R. p. 158:

The appellant is to serve his notice of appeal upon the respondent, that is to say, the person in whose favour the adjudication was made by the justice.

I am of the opinion that this appeal has been improperly lodged and that it must be dismissed with costs, which are fixed at $50.

Appeal dismissed.

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Practice—Solicitor and client—Costs—Commission in lieu of—Validity—Supreme Court Rules, Order LXV., r. 29.

Order LXV., r. 29, of the Supreme Court Rules, provides that "In the absence of special agreement a solicitor shall be entitled to charge his client a commission in lieu of costs on the collection of accounts or claims according to the following scale," etc.

The plaintiffs had been instructed by the defendant to bring action against an insurance company to recover the amount of fire loss owing to the defendant on a fire-insurance policy. They recovered judgment and collected $6,800 from the insurance company. In an action to recover their costs the plaintiffs asked that in lieu of detailed costs on the basis of solicitor and client, they be allowed a payment of $405 as "commission in lieu of costs" upon the amount recovered under the authority of the above rule.

Held, that effect must be given to the rule and the plaintiffs should be allowed $405, charged as "commission" in lieu of costs.

ACTION to recover $510.85 as costs for legal services rendered by the plaintiffs for the defendant at the defendant's request. The facts are set out in the reasons for judgment. Tried by SWANSON, Co. J. at Kamloops on the 5th of November, 1931. Statement

Archibald, for plaintiffs.
G. W. Black, for defendant.

12th November, 1931.

SWANSON, Co. J.: This is an action for $519.85 amount of a bill of costs for legal services rendered by plaintiffs for defendant on its retainer and at its request. The chief item in the bill is one for commission on the sum of $6,800 realized in a suit in the Supreme Court. The plaintiffs were instructed by defendant to collect this amount from the Wawanesa Mutual Insurance Company, being amount of fire loss alleged to be owing to defendant by virtue of a fire-insurance policy effected on a quantity of poles, situate at Mile 81.5 up the North Thompson River, within this County, objection being raised to Judgment

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payment as to value of poles, defendant alleging that poles were mostly culls. Action was brought in the Supreme Court, and a trial ensued, and judgment was given in favour of the present defendant against the Wawanesa Company with costs taxed against the Wawanesa Company.

The plaintiffs in the present action were paid these costs of suit, which were taxed against the Wawanesa Company. They now claim for their services against defendant on the basis of solicitor and client fees. In lieu of detailed costs on the basis of solicitor and client the plaintiffs ask for a lump payment of $405 as "commission in lieu of costs" upon the amount recovered, $6,800, under the authority of Supreme Court Order LXV., r. 29 which reads as follows:

> 29. In the absence of special agreement a solicitor shall be entitled to charge his client a commission in lieu of costs on the collection of accounts or claims according to the following scale:—
>
> On the first $300 or less ..... 15 per cent.
> On excess over $300 up to and including $1,000 ..... 10 per cent.
> On excess over $1,000 ..... 5 per cent.
> A minimum charge of $5.00

Judgment

It is contended by counsel for the defendant that rule 29 above is an attempt to legalize a champertous matter. Admittedly there was no agreement between plaintiffs and defendant as to any specific charge or rate of remuneration. "Champerty" is dealt with in the following brief manner by Wharton in his Law Lexicon:

> CHAMPERTY [. . . a division of the land], properly a bargain between a plaintiff or defendant in a suit and a third person, *campum partire*, to divide between them the land or other matter sued for in the event of the litigant being successful in the suit, whereupon the champertor is to carry on the party's suit or action at his own expense; or it is the purchasing the right of action or suit of another person; illegal by Common Law, and by 3 Edw. 1, c. 25; 13 Edw. 1, st. 1, c. 49; and 32 Hen. 8, c. 9. . . .

There is no "bargain" or "agreement" in the present case between the parties. There is here no agreement that the plaintiffs should carry on the defendant's suit at their own expense. Indeed the contrary must have been clearly understood by defendant, that it would be responsible for the proper costs and disbursements incurred by the plaintiffs on its behalf. Two decisions of our Court of Appeal have been strongly stressed before me: *Taylor* v. *Mackintosh* (1924), 34 B.C. 57. In that

case there was an express agreement between the parties as follows:

To Messrs. Mackintosh & Crompton.

In consideration of your prosecuting our claims against the B.C. Electric Railway Co. without any expense to us, we authorize you to effect a settlement of which you may retain one half the amount recovered.

Ellen Taylor.
Alice M. Mayoh.

The Court of Appeal held this to be a "champertous" agreement, and that section 97 (now section 100) of the Legal Professions Act which purported to authorize barristers and solicitors within British Columbia to contract with clients for payment of professional services by way of a share of the proceeds of actions in lieu of the usual costs is *ultra vires* of the Legislature of British Columbia: that this in effect is an attempt to alter the law as to "champerty," and that such enactment is an invasion of the legislative domain of the Dominion Parliament relative to criminal law.

A later decision of the Court of Appeal is also relied upon by counsel for defendant—*In re Constitutional Questions Determination Act and In re Section 100 of The Legal Professions Act* (1927), 39 B.C. 83. That deals with the constitutional equation relative to said section 100 of the Legal Professions Act holding that the first six lines of section up to the word "solicitor" are *intra vires* and that the rest of the section is *ultra vires*. The portion declared *ultra vires* deals with a "contract" to "receive a portion of the proceeds of the subject-matter of the action or suit in which the barrister or solicitor is employed," etc. This is clearly not a case of an "agreement" at all.

Judgment

Rule 29, being a rule of the Supreme Court has practically the effect of a legislative enactment. It expressly provides that a "commission in lieu of costs" may be made chargeable against the client.

Rule 28 provides "that a solicitor may, however, contract with his client for a lump sum for costs; but the opposite party shall not be chargeable therewith." Our Tariff of Costs now provides for payment of costs by the "block system," as an alternative to detailed costs for each item of service rendered.

It is submitted by counsel for defendant that rule 29 may be

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invoked where no suit or action in Court has been taken by the solicitor; but that "collection" must be taken to exclude Court proceedings to enforce collection of the claim in question. I do not think the rule should be given such a narrow interpretation. Undoubtedly in this case the plaintiffs are entitled to certain costs usually called "solicitor and client" costs in addition to the "party and party" costs which they have already received from the other side (Wawanesa Company). Instead of submitting a detailed bill of costs for such services the plaintiffs now invoke rule 29 and ask for this lump sum as "commission." The plaintiffs claim that in any event a detailed bill of costs, on the solicitor and client basis would amount to about the same as the commission now claimed.

I do not think that the above decisions of the Court of Appeal are relative to the point to be now decided by me, as they are decisions rendered under very different circumstances from those in the case at Bar. I would respectfully beg to refer in this connection to the words of Lord Halsbury, L.C. in the House of Lords in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506; 70 L.J., P.C. 76 at p. 81:

Judgment

> There are two observations of a general character which I wish to make —and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.

I see no reason why I should not give effect to the plain meaning of rule 29. I accordingly rule that effect must be given to it and that plaintiffs should be allowed the amount of $405 charged as "commission" in lieu of such costs as above. As to the rest of the bill it will be referred for taxation to the registrar of the Court. Judgment will go in favour of the plaintiffs for the amount so taxed, which will include the above amount, $405, together with costs of this action.

Judgment for plaintiffs.

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Practice—Small Debts Court—Application for appointment of receiver—Dismissed—Right of appeal—R.S.B.C. 1924, Cap. 57.

The provisions in the Small Debts Act as to the right of appeal do not extend to matters of practice or procedure in that Court, they only apply to final "decisions," namely, in the case of judgment for the plaintiff on his claim or for the defendant dismissing the action.

An appeal does not lie from the dismissal by the magistrate of an application for the appointment of a receiver by way of equitable execution.

APPEAL by plaintiff from the decision of the stipendiary magistrate of the Small Debts Court of the County of Vancouver dismissing an application for the appointment of a receiver by way of equitable execution. The facts are set out in the reasons for judgment. Argued before MACDONALD, J. in Chambers at Vancouver on the 22nd of September, 1931. Statement

Donnenworth, for plaintiff.
Levin, for defendant.

23rd November, 1931.

MACDONALD, J.: Plaintiff appeals herein against the decision of the stipendiary magistrate, of the Small Debts Court of the County of Vancouver, dismissing an application for the appointment of a receiver, by way of equitable execution. The oral and extensive written arguments of counsel for the appellant and respondent indicate that they are desirous of obtaining a judgment of this Court, as to whether the said stipendiary magistrate had jurisdiction to appoint such a receiver, he having decided to the contrary. Judgment

The amount of the judgment, sought to be implemented by the receivership, with costs, amounts to $28.50. This amount is altogether disproportionate to the research and able arguments of counsel. There is no provision in the Small Debts Courts Act (R.S.B.C. 1924, Cap. 51) by which a "case" can be stated, for the consideration of this Court. It would appear, however, that this is, practically, the course which is sought to be adopted by

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the plaintiff and acceded to by the respondent. At any rate no contention was made by counsel for the respondent that I should not consider and render a judgment upon such decision, as to the practice to be followed in a Small Debts Court. If I were to do so, I would be conceding that the appeal had been properly launched for that purpose. To my mind, it is immaterial whether the magistrate refused to appoint a receiver, through a belief that he had no jurisdiction to do so, or in the exercise of his discretion, on the ground that there was some other and less expensive remedy open to the plaintiff for recovery of the judgment debt. The reason why I consider it immaterial is, because I do not think there is any appeal open to the plaintiff in the matter. In considering the right to appeal I am dealing with the jurisdiction of the Court and so should act, even if the question has not been raised by counsel. Fletcher Moulton, L.J. in *Kydd* v. *Liverpool Watch Committee* (1907), 2 K.B. 591 at p. 606, in this connection, and referring to the jurisdiction of the Court, said:

> It is clear that it is an objection which the Court itself would be entitled, and indeed bound, to take.

Judgment

Then in the same case upon appeal to the House of Lords (1908), A.C. 327 at p. 330 Lord Loreburn, L.C., in considering a matter of jurisdiction of far more importance than the one here presented, said as follows:

> My Lords, in this case the question is whether or not a Court of law has jurisdiction to entertain a special case, stated by quarter sessions, in regard to a point decided by quarter sessions under the Police Act, 1890, s. 11.
>
> The King's Bench Division held that they had no such jurisdiction. On appeal, two members of the Court of Appeal expressed their personal concurrence in that view, but held that they ought to follow the example of your Lordships' House in the cases of *Upperton* v. *Ridley* (1903), A.C. 281 in 1903 and *Garbutt* v. *Durham Joint Committee* (1906), A.C. 291 in 1906. Accordingly the Court of Appeal reversed the judgment of the King's Bench and held there was jurisdiction.
>
> Now it is beyond doubt that this House did set the example which was followed in the present case. The cases to which I have referred were special cases stated in regard to the very section in question, and this House, as well as the Courts below, entertained and decided them as though there were full jurisdiction. The explanation is that no question of the kind was raised at any stage by either party, and it does not seem to have occurred to any of the judges who heard these cases either in this House or in the Courts below that a proceeding so familiar as that of a case stated by quarter sessions was open to such an objection. Your Lordships, no

doubt, are bound by that which has been determined in this House. No such point as is now raised has ever been determined here. It was indeed argued by the appellant that, on the contrary, the decision in *Westminster Corporation* v. *Gordon Hotels* [(1908), A.C.] 142 was a precedent in their favour. I do not think so. That decision related to a different Court, a different Act, and a different subject-matter. I think the point before us is an open point.

The learning and the law laid down as to other Acts of Parliament do not conclude the present case. We must look at the Act itself, subject-matter and language together, in order to find whether or not the Court of quarter sessions can pass on to the Courts of law, by asking advice or by inviting decision, these particular duties. In my opinion it cannot pass on these duties. . . .

In *Von Stentz* v. *Comyn* (1849), 12 Ir. Eq. R. 622 at p. 629 the Lord Chancellor of Ireland said:

I am not aware of any general principle that by the constitution of England it is essentially the birthright of the subject to have the advantage of an appeal.

This is of moment, when it is considered, that the subject-matter which was being dealt with in that case, involved the validity of a will.

It seems to me apparent that the sections of the Small Debts Court Act, allowing an appeal, are not intended to apply to mere matters of practice or procedure in that Court, but to "decisions" which are final in their effect, such as a judgment recovered by a plaintiff or a claim dismissed, operating in favour of a defendant.

Judgment

Subsection (1) of section 47 of the Act says:

An appeal from the decision of a magistrate shall lie in all cases, both as to law and fact.

There is no specific definition of what constitutes a "decision" but read in conjunction with the context, as to appeals, I think it has the meaning I have mentioned. It is referred to in subsection (2) of section 10 of the Act and there, has the force of a judgment in open Court on the days fixed for trial of the cause. Subsection (2) of said section 47 provides that if the appellant be the plaintiff he shall give security, in a sum not exceeding $50 and, if defendant, in a sum equal to the amount claimed, together with a sum not exceeding $50 for costs. Then a portion of section 50 seems to clearly indicate that the appeal allowed by the Act, applies only, to claims sought to be recovered in the Small Debts Court. It states that the Appellate Court shall

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"remit the case back to the Small Debts Court, with instructions to enter the proper judgment."

The jurisdiction of this Court in such an appeal is thus limited. It can only adopt the course outlined by the legislation. There is no power to order or direct the magistrate to appoint a receiver. It would in that event be in effect a mandatory order which is not contemplated by the Act.

In coming to a conclusion that an appeal does not lie to this Court upon a matter of practice, in the Small Debts Court, I am bearing in mind the nature of and jurisdiction of such Court. If an appeal in matters of practice and procedure had been deemed advisable, then the legislation to that effect should have been clearly stated.

Judgment

In this respect I quote the language of Lord Halsbury, L.C. in *Ex parte County Council of Kent and Council of Dover* (1891), 1 Q.B. 725 at p. 728 as follows:

> . . . . if those who framed the Act of Parliament had intended that an appeal should lie, they would have either given it by express words, or taken care to use language, the importance of which had been pointed out ten years before by the decision of the House of Lords in the case to which we have referred. But the Legislature has not done so.

With respect to costs, if this had been a proper appeal, to be considered, I would have discretion as to awarding costs. As the question, whether the "decision" upon a matter of practice is appealable, was not raised by the respondent, I think the proper order should be that there will be no costs to either party. The appeal is therefore so dismissed.

Appeal dismissed.

DOMINION BANK v. PALITTI *ET AL.*

FISHER, J. (In Chambers)

1931

Oct. 17.

DOMINION BANK *v.* PALITTI

Practice—Partnership—Action—Style of cause—Naming individual partners and firm as defendants—Right to.

"Leo Palitti and Joe Gonzales carrying on business as the Wahkana Logging Company and the said Wahkana Logging Company" appeared as defendants in the style of cause in the writ of summons herein. The defendant Gonzales moved to have his name struck out of the style of cause or alternatively that the plaintiff be compelled to elect to proceed against the defendants Leo Palitti and Joe Gonzales or against the defendant Wahkana Logging Company, on the ground that it was improper to sue the defendants thus in their own names and also in their alleged partnership name.

Held, that the action was properly constituted and the motion should be dismissed.

APPLICATION by the defendant Gonzales that his name be struck out of the style of cause in the action on the ground of improper joinder of parties. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 2nd of October, 1931. Statement

McTaggart, and *A. N. Smith*, for the application.
A. Alexander, contra.

17th October, 1931.

FISHER, J.: Application on the part of the defendant, Joseph Gonzales, that his name be struck out of the style of cause in this action or in the alternative that the plaintiff be compelled to elect to proceed against the defendants Leo Palitti and Joe Gonzales or against the defendant Wahkana Logging Company on the ground "that the plaintiff has improperly sued the defendants in their own name and also in their alleged partnership name," the defendants, as named in the writ, being "Leo Palitti and Joe Gonzales carrying on business as the Wahkana Logging Company and the said Wahkana Logging Company." Judgment

It may be noted that Chitty in his book of King's Bench Forms, 16th Ed., at p. 669 says:

If the defendants be described as "A. B. and C. D., trading as A. C. & Co.," the action will be, not against the firm, but against the individual partners.

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In *Western National Bank of City of New York* v. *Perez, Triana & Co.* (1891), 1 Q.B. 304 at p. 314, Lindley, L.J. says:

> When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names.

Counsel for the applicant relied on the Ontario case *Wabi Iron Works Limited* v. *Patricia Syndicate* (1923), 54 O.L.R. 640 in which the plaintiffs in an action for the price of goods sold and delivered sued not only the syndicate but the two persons who composed it the defendants, O'Connell and Ross, and it was held on appeal (by Ross alone) that the action was improperly constituted and the name of Ross should be struck out. It may be noted, however, that in this case Mowat, J., the trial judge, at p. 641, says:

> In another series of actions in connection with debts of the syndicate, judgments were given against Sir Charles Ross upon the ground that he was a partner, and these cases were appealed to the Judicial Committee of the Privy Council, which tribunal, in a judgment by Viscount Cave, L.C., delivered on the 1st May, 1923, dismissed the appeals, upon the ground that Ross was a member of the combination, and as such a partner within the limits of the adventure, and bound by liabilities incurred: *Ross* v. *Canadian Bank of Commerce* (1923), 54 O.L.R. 59.

Judgment

A perusal of the latter case, as reported at p. 54 O.L.R. 59 and *Canadian Bank of Commerce* v. *Patricia Syndicate* (1921), 51 O.L.R. 42 shews that the action was brought by the bank as plaintiff, upon a number of promissory notes given to it by the Patricia Syndicate, not only against the Patricia Syndicate but also against Ross and the action would appear to have been continued throughout in the same manner, the contention of the bank being that "Patricia Syndicate" was the name of a partnership of which the partners were Ross and O'Connell.

Counsel on behalf of the plaintiff cites *Taylor* v. *Collier & Co.* (1882), 30 W.R. 701 in which an action was brought to which a firm and one of the partners in the firm were made defendants and separate defences were put in by that partner for himself and for the firm. No appearance was put in by the firm separately or by the other partner and it was held that the defence of the firm could not be struck out for default of appearance for the rules prevented Collier & Co. from putting in an appearance except by the partners individually. In the Annual

Practice, 1931, pp. 851-2 this case is cited as authority for the proposition that a firm cannot appear as a firm but if a partner is made co-defendant together with the firm he may put in separate defences, one for himself and one for the firm. In this connection it may be noted that in *Weir & Co.* v. *McVicar & Co.* (1925), 2 K.B. 127 it was held that in an action against a firm a person, who being served as a partner enters an appearance under protest denying that he is a partner in accordance with the provisions of (English) Order XLVIIIA. r. 7 was not entitled to both deny the partnership and at the same time claim to defend the action on behalf of the firm and dispute its liability. Order XLVIIIA. r. 7 then provided, as does our marginal rule 648g, that

> Any person served as a partner under Rule 3 may enter an appearance under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving the firm and obtaining judgment against the firm in default of appearance if no partner has entered an appearance in the ordinary form.

The English rule has been changed so that now the appearance provided for therein, as long as it stands, shall be treated as an appearance for the firm (see Annual Practice, 1931, p. 861). Under the Ontario Rule 104, as it stood in 1923, a person served as a partner could enter an appearance not only denying that he was a partner but also disputing the plaintiff's claim. On the other hand our rule is the same as the English rule was and, as was suggested by Wills, J. in *Davies & Co.* v. *Andre & Co.* (1890), 24 Q.B.D. 598, it seems a hardship that a person who is served with a writ in an action against a firm (only) and who desires to dispute the liability of the firm should only be allowed to do so on the terms of his admitting the partnership and that he should be put to his election which defence he would set up. It would seem to follow from the judgment in the *Taylor* v. *Collier & Co.* case, *supra,* that an action may be brought to which a firm and one of the partners are made defendants and that in such an action separate defences may be put in by the partner for himself and for the firm, if so desired. Therefore, whether an individual defendant sued as here desired to deny only the partnership or both the partnership and the indebtedness, I cannot see that he would be at all embarrassed by the manner in which the action had been framed whereas he might be if the action were brought only against the firm.

Judgment

FISHER, J. (In Chambers)

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On the other hand the plaintiff may wish to assert the right to obtain judgment against the firm and also against certain individual partners as he may not wish to rely simply upon rule 648h as to the issuance of execution where judgment is against a firm. I cannot see that under our rules the plaintiff is deprived of such right and certainly the judgment would have to follow or accord with the writ.

My conclusion is that the action herein is properly constituted and the application is dismissed.

Application dismissed.

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IN RE LONDON AND BROWN

IN RE LONDON AND BROWN.

Revenue—Taxation—Income—Realization—R.S.B.C. 1924, Cap. 254, Secs. 2, 8 and 51.

Section 51 of the Taxation Act provides that "The tax on income shall be assessed, levied and paid annually upon the net income of the taxpayer during the last preceding calendar year."

The appellant, who was manager of Guthrie, Balfour & Co. in the City of Vancouver, received from the company in addition to his salary, a bonus on the net show of profits in each year. Owing to the extensive business of the company the profits for the year 1927 were not ascertained until May of 1928, when the appellant received $17,143.60 as a bonus for his share of the company's profits for the year 1927. This sum was included in his assessment for income in the year 1928, and on appeal to the Court of Revision the assessment was affirmed.

Held, on appeal, reversing the decision of *W. H. S. Dixon*, Esquire, judge of the Court of Revision, that as the "gross amount earned" could not be ascertained, owing to the nature of the business, until after the time designated by section 8 of the Act for making the return had expired, and the money was not received until after the amount was ascertained, this sum should therefore not be included in the assessment for income for the year 1928.

Statement

APPEAL by T. W. B. London from the decision of *W. H. S. Dixon*, Esquire, judge of the Court of Revision and Appeal, Vancouver Assessment District, dismissing his appeal from

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assessment in 1928 on $17,143.60 that he received in 1928 for earnings in the previous year. Appellant was manager in Vancouver for Balfour, Guthrie & Company, his services as manager terminating at the end of 1927. He was paid a yearly salary as manager and also received certain commissions, bonuses and gratuities from the company. He earned certain commissions, bonuses and gratuities during 1927, but the amount that was due him was not known until the books for that year were closed in the beginning of May, 1928, when he was paid $17,145.60.

Statement

The appeal was argued at Vancouver on the 27th and 30th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., for appellant: The $17,143.60 is the only amount involved in this appeal. This money was earned as a bonus in 1927, but they were unable to ascertain the amount he was entitled to until May, 1928, and on the amount being ascertained he was paid. On the definition of "income" see *St. Lucia Usines Co.* v. *Colonial Treasurer of St. Lucia* (1924), 93 L.J., P.C. 212 at p. 214. "Income" is not income until received: see *Commissioner of Taxes* v. *Melbourne Trust, Lim.* (1914), 84 L.J., P.C. 21 at p. 25; *Rex* v. *Anderson Logging Co.* (1925), 95 L.J., P.C. 43 at p. 45; *Jones* v. *Ogle* (1872), 8 Chy. App. 192 at p. 196; *Inland Revenue Commissioners* v. *Blott* (1921), 90 L.J., K.B. 1028 at p. 1038; *In re Taxation Act. Seeley & Co.* v. *Brown* (1926), 37 B.C. 514 at p. 516.

Argument

Harper, for respondent: He retired from business at the end of 1927 and he earned this money during that year: see *Warburton* v. *Heyworth* (1880), 50 L.J., Q.B. 137. As to the word "due" see *Gleaner Co.* v. *Assessment Committee* (1922), 2 A.C. 169.

MACDONALD, C.J.B.C.: The appeal must be allowed and the assessment set aside.

MACDONALD, C.J.B.C.

MARTIN, J.A.: My view proceeds upon the point as applicable to the circumstances of this case, that in the definition of

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"income" upon which Mr. *Harper* places, quite properly, his reliance, the word "earned" in section 8 must be read in connection with the context, not severed from it. That is to say, the gross amount earned, and as the gross amount in this case could not be ascertained owing to the nature of the business until after the time designated by section 8 for making the return, and there was no extension of time given, it cannot be contemplated that the Legislature requires an impossibility to be performed. In this case, to give full effect to the submission on behalf of the Crown, gross amount earned would have to be read as the expectation of gross amount earned, whereas it is not expectation, but definite ascertainment which is contemplated by the said section of the statute.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The question of taxation is always a difficult one, and I do not see why, with great respect to Parliament, the highest Court in the land, why precise language should not be used to carry out the intention, if it is the intention, that a man shall be assessed in 1927 in respect of income not received until 1928. Income as defined in the Act, according to my view, and as decided in the cases, is income received or presently due and capable, and payable on demand, and capable of being collected or sued for. Take the particular facts of the present case, the assessed income here in question was a bonus not declared in 1927, but in 1928, and then only due and payable. Not until May, 1928, was it due and payable and later received.

The assessor could not put down in 1927, and assess for the year 1927, something which was not declared until May, 1928. The profits had to be ascertained and might have been swept away in some way or other, or they might find errors or mistakes, and although the appellant had anticipated profits to some extent, it might turn out there were no profits at all, and he would be called upon to return the money. If the Legislature had in apt words laid it down that notwithstanding that the income was not due and payable in the year assessed, nevertheless the assessment should be made that would be a different matter, but such is not the statute law. The Legislature in apt words has not so enacted. I am satisfied both on the facts and

the law that it was not income in the year 1927, and not being income in the year 1927, the assessment was invalid. The assessment should be made as of 1928, and not as of 1927, and the rate of assessment would be on what the appellant's income was in 1928 and received in 1928. It is unfair and inequitable that the appellant should be assessed as and for the year 1927 for income due only and payable in 1928. In the year 1928 he was not in receipt of any salary, having retired, and the rate of assessment would be less. Owing to the assessment being made in this illegal manner, *i.e.*, in 1927, the Crown are really getting an inequitable tax from the appellant. It is said that in the Crown resides infallible justice and I feel certain the Crown will do justice in this case.

MCPHILLIPS, J.A.

The appeal should be allowed and the impugned assessment made in 1927 should be set aside as illegal and invalid.

MACDONALD, J.A.: I take the same view as my brother MARTIN on the facts as we have them here.

MACDONALD, J.A.

Appeal allowed.

Solicitors for appellant: *Mackenzie, Kerr & Boyd.*
Solicitor for respondent: *E. Pepler.*

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1931

Nov. 10.

ANDLER v. DUKE

ANDLER *ET AL.* v. DUKE *ET AL.*

International law—Foreign judgment—Affecting real property in British Columbia—Breach of contract and fraud in obtaining title to property—Decrees in rem and in personam—Action on foreign judgment—Pleadings—Amendment—Appeal—R.S.B.C. 1924, Cap. 135, Sec. 2 (27).

In an action in the State of California all the parties being residents of that State, the plaintiffs obtained judgment for rescision of a contract for the sale of certain lands in British Columbia on the ground that the defendant Duke had obtained by fraudulent means a conveyance of the lands that had been left in escrow, and then in pursuance of that fraud had the conveyance registered, and later conveyed the lands to his wife, a co-defendant, who with knowledge of the fraud accepted the conveyance. The judgment ordered the defendants to execute and register a deed to the plaintiff, and in default of their so doing, the clerk of the Court was ordered and empowered to execute said deed and cause it to be registered. The defendants declining to execute a conveyance the clerk of the Court thereupon executed and delivered a deed to the plaintiffs who applied to have it registered. The registrar refused to register this deed and the plaintiffs brought this action for a declaration that by virtue of said conveyance and judgment they are the owners and entitled to be registered as owners of the property in question. They obtained judgment declaring that by virtue of the California judgment they were the owners of the lands in question and that said lands do vest in them.

Held, on appeal, varying the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting in part; he would allow the appeal *in toto*) that the conveyance by the clerk of the Court in California can have no effect that is binding upon or should be recognized by the Courts of this Province, the utmost recognition of the California judgment being to order the defendants to execute a conveyance to the plaintiffs and to put them in a position of contempt against the Court for refusing obedience to its decree. This action was wrongly framed and the judgment founded thereon could not be supported in the founding of it solely upon and by virtue of the California judgment, *i.e.*, by its own inherent authority. The plaintiffs should however be allowed to amend their claim by setting up an alternative cause of action by invoking the assistance of the British Columbia Court in implementing and giving effect to the California judgment, by vesting the lands in the plaintiffs, and judgment was given vesting said lands in the plaintiffs on the pleadings as so amended.

Statement

APPEAL by defendants from the decision of MACDONALD, J. of the 1st of April, 1931 (reported, 43 B.C. 549), in an action to enforce and obtain the benefit of a judgment recovered

in the State of California with respect to certain property in the City of Victoria. The property in question on Government Street in Victoria, and owned in equal shares by five members of the Promis family, was sold under contract of the 25th of September, 1925, to G. E. Duke for $55,000, the agreement being that upon the vendors depositing in escrow evidence of good title Duke would pay $10,000 cash and deliver a promissory note for the balance of $45,000, secured by a mortgage on certain lands in the City of Berkeley. In pursuance of the agreement the vendors deposited a deed of the Victoria property with the Alameda County Title Insurance Company, which on delivery would vest a good title to said property in G. E. Duke. Shortly after the deposit of said deed, Duke obtained possession of it without the knowledge of the vendors and without paying the $10,000 on delivery, the promissory note for $45,000, or the security therefor as above set out. In April, 1926, G. E. Duke conveyed the Victoria property to his wife, but in the meantime he borrowed $30,000 which was secured by a mortgage given on the property. The former owners then brought action in the Superior Court of California to recover said property. The Court found that the defendants obtained the property by fraud and it was ordered that the defendants deliver a conveyance of the Victoria property to the plaintiffs within 30 days, and in the event of their refusing to do so the Clerk of the Superior Court was appointed a commissioner of said Court and ordered and informed to execute and deliver such deed. The defendants appealed from said judgment to the Superior Court of California, but the appeal was dismissed. The defendants refused to execute a conveyance of the property in accordance with the judgment, whereupon the clerk of the Superior Court executed and delivered to the plaintiffs a conveyance of the property in accordance with the terms of said judgment of the Superior Court.

Statement

The appeal was argued at Victoria on the 24th and 25th of June, 1931, before MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

A. D. Crease, for appellants: The action in California was to set aside a contract for the sale of the Promis Block in Vic-

Argument

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toria, and by the judgment the Dukes were ordered to reconvey the block to the plaintiffs, or in the event of their refusing to convey, the clerk of the Court as commissioner of the Court, was ordered to execute and deliver a deed of the property to the plaintiffs. We say, first, no conveyance was tendered the defendants for execution: see *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83. A conveyance by a Court officer cannot have any effect here. The judgment is null and void outside the State of California: see Story's Conflict of Laws, 8th Ed., 757, sec. 543; *Fall* v. *Eastin* (1909), 215 U.S. 1. George Duke transferred the property to his wife before proceedings were taken in California. On the trial in California the learned judge found there was fraud on the part of the defendants. As to the effect of foreign judgments see Dicey's Conflict of Laws, 591, sec. 424; *British South Africa Company* v. *Companhia de Mocambique* (1893), A.C. 602 at p. 623. A judgment as to the *res* cannot be enforced outside the jurisdiction: see Dicey's Conflict of Laws, 4th Ed., 393; *Macdonald* v. *The Georgian Bay Lumber Co.* (1878), 2 S.C.R. 364 at p. 378; *Watts* v. *Waddle* (1832), 31 U.S. 389 at p. 399; *Barinds* v. *Green* (1911), 16 B.C. 433; *Lecouturier* v. *Rey* (1910), A.C. 262. It is an action on a judgment and the merits were not gone into: see Halsbury's Laws of England, Vol. 6, secs. 304 and 439; *Law* v. *Hansen* (1895), 25 S.C.R. 69; *Godard* v. *Gray* (1870), L.R. 6 Q.B. 139; *Schibsby* v. *Westenholz, ib.* 155 at p. 159. They rely on *Houlditch* v. *Donegal* (1834), 8 Bli. (N.S.) 301. No effort was made to enforce the judgment in California so no action can be brought to enforce it here: see Piggott on Foreign Judgments, 3rd Ed., 14; *Norris* v. *Chambres* (1861), 3 De G. F. & J. 583.

Argument

Alfred Bull, for respondents: This is a judgment *in personam,* it is not enforceable directly outside the jurisdiction but is the basis of an action where the land is situate: see *Fall* v. *Eastin* (1909), 215 U.S. 1 at pp. 12-13. All the parties reside in California, they submitted to the jurisdiction and it was decided the property should be returned to those entitled: see *Deschamps* v. *Miller* (1908), 1 Ch. 856 at p. 863. There are exceptions to the general rule that a judgment cannot affect

lands in another jurisdiction: see *Reimers* v. *Druce* (1857), 26 L.J., Ch. 196 at p. 200. The California Court said the transaction was a fraud and the case comes within the exceptions: see *Massie* v. *Watts* (1810), 10 U.S. 148 at p. 157; Westlake's Private International Law, 6th Ed., 216, sec. 172. The foreign judgment may be acted on by the local Courts. We do not claim the conveyance from California can *per se* be registered here, but the judgment here is effective to dispose of the lands in accordance with the Calfornia judgment: see Dicey's Conflict of Laws, 4th Ed., 452, rule 114; *Houlditch* v. *Donegal* (1834), 5 E.R. 955 at p. 967.

Argument

Crease, in reply: There is not a case where a judgment involving title to foreign lands has been enforced within the jurisdiction.

Cur. adv. vult.

On the 10th of November, 1931, the majority judgment of the Court was delivered by

MARTIN, J.A.

MARTIN, J.A.: All the parties herein reside and are domiciled in the State of California, U.S.A., and in the year 1929 an action was brought by the present plaintiffs against the present defendants in the Superior Court of that State for the County of Alameda to rescind a contract for the sale of certain lands in the City of Victoria in this Province made between the said parties, or their representatives, and to secure a reconveyance thereof to the plaintiffs with an account, upon the ground that the defendant G. E. Duke had obtained the conveyance (which had been placed in escrow) thereof from the plaintiffs in his favour by fraudulent means in violation of the agreement between the parties, and later in pursuance of that fraud had obtained registration of the said conveyance in the Land Titles Registry at Victoria followed by certificate of indefeasible title to himself as the owner thereof, and that still later, and in further fraud of the plaintiffs' rights, Duke had conveyed the lands to his own wife and co-defendant, who, with knowledge of the fraud and participating therein, accepted the conveyance and claims to be the owner of said

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lands thereunder and has retained the rents, issues and profits while refusing to account therefor to the plaintiffs.

Both the present defendants filed their answers to the complaint, and on the 30th of July, 1928, the said Superior Court in due course of law delivered judgment in favour of the plaintiffs and ordered and decreed that both the defendants should

execute, acknowledge and deliver, and cause to be recorded and registered according to the forms and laws of British Columbia, Dominion of Canada, within thirty (30) days of notice of entry hereof a deed of conveyance of said "Victoria Property" to [the plaintiffs subject to certain encumbrances] to the end that the plaintiffs may be restored to the ownership and possession of said "Victoria Property," to wit [description follows].

The judgment then proceeded:

IT IS FURTHER ORDERED AND DECREED that in the event of the failure or refusal of G. E. Duke and/or Margaret E. Duke, defendants herein, to so convey said "Victoria Property," within said time, George E. Gross, Clerk of this Court, be, and he is hereby, appointed as Commissioner of this Court; and said George E. Gross, as such Commissioner, is hereby ordered and empowered to make, execute and deliver such deed, and cause the same to be so recorded and registered, and to do and perform any and all other acts as may be necessary or proper, to effect and perfect a conveyance of said "Victoria Property" to the plaintiffs herein named, as and for said G. E. Duke and Margaret E. Duke, defendants herein, as their act and deed.

MARTIN, J.A.

The defendants appealed from that judgment to the Supreme Court of California and on the 24th of October, 1929, that Court of five judges unanimously affirmed the decision of the lower Court in all respects (reported *sub nom. Promis* v. *Duke* in (1929), 78 Cal. Decs. 511; 281 Pac. 613; 208 Cal. . .) saying also in the course of their judgment (514) that the plaintiffs had not estopped themselves from "asserting the invalidity of the instrument" but that when

[they] were, for the first time, confronted with definite and incontrovertible evidence of the falsity of Duke's promises and the utter unfaithfulness of his purpose . . they thereupon, and in due season, proceeded to invoke the usual and ordinary processes of the law to undo the wrong done them

No appeal was taken from this judgment, even if it were possible under the constitution of California to take one, and therefore it stands as the final adjudication in that State of the matter in controversy and upon the merits as it declares (512). The defendants failed to execute the conveyance as finally decreed thereby, and therefore the clerk of the said Superior Court, as commissioner *ad hoc*, executed and delivered one, in the name

of the defendants and as their act and deed, to the plaintiffs, as directed by the judgment, and they made application to the Registrar of Titles at Victoria to have the same registered so as to vest title in themselves thereunder but the registrar refused the application, whereupon the plaintiffs began this action by writ issued on the 21st of August, 1930, and on the 1st of April, 1931, obtained the judgment now appealed from, which orders and declares

> that by virtue of the [said] judgment of the Superior Court of the State of California in and for the County of Alameda . . . and by virtue of the conveyance dated 11th July, 1930, . . . duly executed by . . . . the clerk of the said Superior Court . . . as a Commissioner . . . the plaintiffs are the owners in fee simple [of the lands in question subject to encumbrances as aforesaid].

And then follows this paragraph:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said lands . . . . vest in the plaintiffs herein, subject only to the said [encumbrances].

It is to be observed that the statement of claim herein solely invokes, and is based wholly upon and "by virtue of" the said California judgment and conveyance directed thereby, and claims the right of ownership and registration thereunder, and does not ask for such a judgment from the Supreme Court of this Province in the exercise of its own jurisdiction, of which more anon.

MARTIN, J.A.

By the land registrar's certificate of the state of the title (Exhibit No. 1) it appears that the defendant Margaret Duke was at the time of the trial still the registered owner of an "indefeasible title" to the lands in question, under our Land Registry Act, R.S.B.C. 1924, Cap. 127.

The appellants' (defendants) counsel does not submit that the California Court could not proceed *in personam* against them under the circumstances of this case of fraud as aforesaid by directing them to execute a conveyance to the plaintiffs of the lands in this Province, but he does submit that the order that was made appointing a commissioner to execute such conveyance by and on behalf of the defendants, in default of their executing one as ordered, exceeds the jurisdiction of the California Court in that it directly deals with the title to lands in a foreign country by vesting them in the plaintiffs, and is also in reality

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a form of process of execution; and therefore it is further submitted that the Courts of this Province should wholly refuse to recognize or give effect to the said California judgment and (to quote from the notice of appeal, ground 6) "that all questions relating to the title to the said lands must be religitated *de novo* in the Courts of British Columbia."

The question of the exercise of the jurisdiction of Courts acting *in personam* in relation to foreign land (immovables), and therefore subject to the *lex situs*, has been often considered in its various aspects but it is, under the circumstances of this case, only necessary to consider one of them, and the leading cases sufficiently applicable to the present circumstances, are to be found, or referred to in *Angus* v. *Angus* (1736-7), West 23; *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 443; *Lord Cranstown* v. *Johnston* (1796), 3 Ves. 170, 178 *a*, 182; *Massie* v. *Watts* (1810), 6 Cranch 148; *Corbett* v. *Nutt* (1870), 10 Wall. 464, 475; *Hart* v. *Sansom* (1884), 110 U.S. 151, 155; *Carpenter* v. *Strange* (1891), 141 U.S. 87, 106; *Fall* v. *Eastin* (1909), 215 U.S. 1; *Title Ins. & Trust Co.* v. *California Development Co.* (1915), 152 Pac. 542, 553; *Promis* v. *Duke* (1929), 281 Pac. 613 *supra*; *Houlditch* v. *Donegal* (1834), 8 Bli. (N.S.) 301; 5 E.R. 955; *Lord Portarlington* v. *Soulby* (1834), 3 Myl. & K. 102; *Ewing* v. *Orr Ewing* (1883), 9 App. Cas. 34, 40, 46; (1885), 10 App. Cas. 453, 499, 546; *Duder* v. *Amsterdamsch Trustees Kantoor* (1902), 2 Ch. 132, 140; *Ex parte Pollard* (1840), Mont. & C. 239; 4 Deac. 27; *Deschamps* v. *Miller* (1908), 1 Ch. 856, 863; *Paget* v. *Ede* (1874), L.R. 18 Eq. 118; *Bank of Africa, Limited* v. *Cohen* (1909), 2 Ch. 129, 143, 146; *British Controlled Oilfields Limited* v. *Stagg* (1921), 127 L.T. 209; *Burns* v. *Davidson* (1892), 21 Ont. 547, 551-2 (a particularly valuable judgment by the Chancery Division of Ontario, *per Boyd*, C., and Ferguson, J.); *Henderson* v. *The Bank of Hamilton* (1894), 23 S.C.R. 716; *Law* v. *Hansen* (1895), 25 S.C.R. 69; and *Chassy and Wolbert* v. *May and Gibson Mining Co.* (1920), 29 B.C. 83, 94.

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Many other cases, *e.g.*, *In re Hawthorne* (1883), 23 Ch. D. 743, 748; *Norris* v. *Chambres* (1861), 29 Beav. 246; *British*

South Africa Company v. *Companhia de Mocambique* (1893), A.C. 602; *Gunn* v. *Harper* (1901), 2 O.L.R. 611; and *Purdom* v. *Pavey & Company* (1896), 26 S.C.R. 412, 417, have not escaped attention, but they are all clearly distinguishable from this one, either because of the absence of fraud, or otherwise; and even in the *British South Africa* case (in which, as Lord Halsbury pointed out at p. 630, the "only real question" was one of "trespass to land in a foreign country") Lord Chancellor Herschell, at p. 626, recognized the equitable principles that the plaintiff herein relies upon, as noted by Mr. Justice Byrne in the *Duder* case, *supra,* p. 142, wherein his able judgment is of special assistance to us here because it contains full and apt citations from the judgment of Lord Chancellor Cottenham in the leading case of *Ex parte Pollard, supra* (approved by the House of Lords in *Brown* v. *Gregson* (1920), A.C. 860, 875), the two reports of which are, regrettably, not in our library.

The said special aspect of the present case is the declaration in the California judgment that the commissioner appointed thereunder shall execute the conveyance, as aforesaid, as and for the defendants and in their name upon their default in that respect, which, it is submitted, is an excess of jurisdiction as regards lands in this foreign country though it appears to be a valid direction to make respecting lands in California.

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This question has not been raised in any British or Canadian case that we have been able to find, but it has been dealt with in the United States of America, and by the Supreme Court thereof in *Ager* v. *Murray* (1881), 105 U.S. 126, 132; and in four of the cases cited above, *viz., Corbett* v. *Nutt; Hart* v. *Sansom, Carpenter* v. *Strange,* and *Fall* v. *Eastin,* with the result that the view taken of it is thus expressed in the *Hart* case at pp. 154-5, *viz.*:

> Generally, if not universally, equity jurisdiction is exercised *in personam,* and not *in rem,* and depends upon the control of the Court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem,* establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his

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claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. . . .

It would doubtless be within the power of the State in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the Court for that purpose. *Felch* v. *Hooper* [(1875)], 119 Mass. 52; *Ager* v. *Murray* [(1881)], 105 U.S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction, a Court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title. In the judgment in question, no trustee to act in behalf of the defendant was appointed by the Court, nor have we been referred to any statute authorizing such an appointment to be made. The utmost effect which can be attributed to the judgment, as against Hart, is that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiff's title.

There is no such provision in the statutes or Rules of Court in this Province.

In *Fall* v. *Eastin*, the Court adopted, p. 10, the language above cited, and also, p. 9, approved *Corbett* v. *Nutt*, *supra*, as follows:

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In *Corbett* v. *Nutt* . . . the doctrine was repeated that a Court of equity acting upon the person of the defendant may decree a conveyance of land situated in another jurisdiction, and even in a foreign country, and enforce the execution of the decree by process against the defendant, but, it was said: "Neither its decree nor any conveyance under it, except by the party in whom the title is vested, is of any efficacy beyond the jurisdiction of the Court." This, the Court declared, was familiar law. . . .

And in *Carpenter* v. *Strange*, *supra*, pp. 105-6, the same Court said (also approved in *Fall* v. *Eastin* at p. 9) that:

While by means of its power over the person of a party a Court of equity may in a proper case compel him to act in relation to property not within its jurisdiction, its decree does not operate directly upon the property nor affect the title, but is made effectual through the coercion of the defendant, as, for instance, by directing a deed to be executed or cancelled by or on behalf of the party. The Court "has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title."

The Court in *Fall* v. *Eastin*, at pp. 10-11, noted that:

In *Hart* v. *Sansom*, *supra*, it was directly recognized that it was within the power of the State in which the land lies to provide, by statute, that if the defendant is not found within the jurisdiction, or refuses to perform, performance in his behalf may be had by a trustee appointed by the Court for that purpose.

And proceeded, p. 11:

. . . We think that the doctrine that the Court, not having jurisdiction of the *res*, cannot affect it by its decree, nor by a deed made by a

master in accordance with the decree, is firmly established. The embarrassment which sometimes results from it has been obviated by legislation in many States. In some States the decree is made to operate *per se* as a source of title. This operation is given a decree in Nebraska. In other States power is given to certain officers to carry the decree into effect. Such power is given in Washington to commissioners appointed by the Court. It was in pursuance of this power that the deed in the suit at Bar was executed. But this legislation does not affect the doctrine which we have expressed, which rests, as we have said, on the well-recognized principle that when the subject-matter of a suit in a Court of equity is within another State or country, but the parties within the jurisdiction of the Court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such case the decree is not of itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment or sequestration.

It follows from this clear and apt exposition of the exact question, which we are fortunate in having from so high a tribunal, that the said conveyance by the commissioner can have no effect that is binding upon, or should be recognized by the Courts of this Province, and therefore the matter must be viewed by us as though the "utmost effect" of the California judgment is to order the defendants to execute the conveyance in favour of the plaintiffs and to put them in a position of contempt against that Court for refusing and continuing to refuse obedience to its decree.

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Upon its becoming apparent to us that such was the true position of the matter it also became apparent that the present action was in substance wrongly framed in founding it solely upon and "by virtue of" the California judgment, *i.e.*, by its own inherent authority, and also that the judgment herein could not, largely at least, be supported for a similar reason, *viz.*, because it recited the same "virtue" and recognized an extension of jurisdiction which the California Court did not possess in addition to its conceded one; and therefore we deemed it wise (*cf. Grey* v. *Manitoba and North Western Railway* (1897), 66 L.J., P.C. 66, 71-2) in view of the important and novel questions involved, to hear (on the 7th of October last) counsel further upon the case before pronouncing a final judgment with the result that the plaintiffs are allowed to amend their claim by

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setting up an alternative cause of action invoking the assistance of our proper Courts to implement and give effect to the California judgment by vesting the land in question in the plaintiffs.

Two submissions of defendants' counsel, however, still remain to be considered, *viz.*, (1) that the California judgment cannot be recognized at all and there must, irrespective of it, be a trial of the whole matter on the merits here before we can pronounce any judgment; and (2) that any proceedings taken here to vest the property in furtherance of the California judgment will in reality be a form of execution of the same and therefore should not be countenanced or assisted by our Courts.

As to the first submission, the authorities already cited, and those to follow, establish the position that, under the circumstances, the California judgment is a valid one upon the merits finally determining the issues raised between the parties in that State and it is only objectionable in this Province because it contains the additional direction to its commissioner to execute the conveyance; in other words, the decree itself is valid but the method of working it out differs in the two jurisdictions. If, *e.g.*, that decree had contained the bare direction that the defendants should execute the conveyance, and they had contumaciously refused to do so and had been imprisoned as the result of coercive proceedings in the nature of contempt taken to enforce the decree but yet had proved obdurate and therefore remained in custody up to the bringing of this action, and till now, that obduracy would not be a valid reason for the refusal of our Courts to grant by international comity such remedies to the plaintiffs under the judgment itself as they were properly entitled to. Particularly in the case of a woman, as here, being the registered owner, any Court would be most reluctant to imprison her for such a cause in these enlightened days which are, happily, far removed from the time when an accused person was subjected to "the clumsy and barbarous expedient of the *peine fort et dure*" in the attempt, often unsuccessful, to induce him to plead—Holdsworth's History of English Law, Vol. 9, 179; Stephen's History of Criminal Law (1883), Vol. 1, pp. 298-9. Naturally the Courts of California would, like ours, shrink from creating such a situation if at all avoidable and so

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have adopted the method under consideration of effecting the necessary result in a humane way in their State, just as we do by means of a direct vesting order in our Province, now embodied in the Laws Declaratory Act, R.S.B.C. 1924, Cap. 135, Sec. 2, Subsec. (27).

I should mention that it became necessary for me to adopt this course in a case (which I shall call *Doe* v. *Roe*) that came before me in 1899 wherein the defendant had been ordered to execute a conveyance of land or stand committed for contempt, and it was not anticipated that he would refuse to execute it. No appeal was taken and I heard no more of the matter, till several months after, I was shocked to learn from my late highly esteemed brother Chief Justice McColl, then residing in New Westminster, that the defendant was in prison there for said contempt and doubts had arisen respecting his sanity, because of his obduracy against the advice of his counsel. A motion for his release was soon thereafter made to me, and it appearing that he had become obsessed on the point, I made, without objection, an appropriate vesting order and released him from custody.

In the case at Bar, if the female defendant registered owner had been committed to prison in default of obedience and become insane therein, or even had become insane before the expiration of the 30 days appointed for execution by her of the conveyance, would the Courts of either or both countries become powerless to apply the proper modern remedy in their respective jurisdictions at the right time? Surely not.

It is aptly said in Story's Equity Jurisprudence (3rd English Ed.) 312-13, on specific performance:

> . . . It is not possible to lay down any rules and principles, which are of absolute obligation and authority in all cases; and, therefore, it would be a waste of time to attempt to limit the principles, or the exceptions, which the complicated transactions of the parties, and the ever-changing habits of society, may, at different times, and under different circumstances, require the Court to recognize or consider.

And at pp. 541-2:

> The jurisdiction of Courts of equity, in regard to trusts, as well as to other things, is not confined to cases where the subject-matter is within the absolute reach of the process of the Court, called upon to act upon it; so that it can be directly and finally disposed of, or affected by the decree. If the proper parties are within the reach of the process of the Court, it will be sufficient to justify the assertion of full jurisdiction over the sub-

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ject-matter in controversy. The decrees of Courts of equity do, primarily and properly, act *in personam*, and, at most collaterally only *in rem*. Hence, the specific performance of a contract for the sale of lands, lying in a foreign country, will be decreed in equity, whenever the party is resident within the jurisdiction of the Court. So, an injunction will, under the like circumstances, be granted to stay proceedings in a suit in a foreign country.

In exercising its powers to act *in personam* in enforcing contracts respecting lands in foreign countries, the Court, as Lord Chancellor Cottenham put it (in the language cited by Lord Finlay in *Brown* v. *Gregson, supra,* p. 875) is "not thereby in any respect interfering with the *lex loci rei sitæ,*" and he adds:

> If indeed the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree it would be useless and unjust to direct him to do the act.

No such impediment exists here: on the contrary, the case is peculiarly one in which justice requires that all possible relief should be afforded the plaintiff.

The fact that the California Court has made a declaration in its judgment which exceeds its jurisdiction is no sound ground for our refusing to implement that part of its judgment which is entitled to our sanction and, as the Privy Council said *per* Lord Watson, in *Huntington* v. *Attrill* (1893), A.C. 150, 155:

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> The Court appealed to must determine for itself in the first place, the substance of the right sought to be enforced.

In, for example, *Ewing* v. *Orr Ewing* (1885), 10 App. Cas. 453 (wherein the same words "by virtue of" occur, 456, 545), the House of Lords rejected part of the judgment of the Scotch Court of Session but adopted the major part of it, as Lord Watson points out, at p. 544 (see also the formal judgment pp. 551-2) saying at pp. 531-2:

> I do not, of course, intend to suggest that domiciled Scotchmen, acting in the execution of a Scotch trust, when temporarily resident in a foreign country, may not, by reason of their personal presence, be subjected, *qua* trustees, to the jurisdiction of the tribunals of that country. And I think it may be safely asserted that in some cases it would be the plain duty of the Courts of Scotland to recognize and give effect to these foreign proceedings; and that in other cases, it might be their duty, as well as their right, to disregard them. If a foreign creditor, in such circumstances, obtained a regular judgment, by process in his own Courts, against Scotch trustees, for a debt incurred to him by the truster. I do not think the Court of Session could or would examine the merits of that judgment, or refuse to enforce it.

He says also, p. 532:

I am at present disposed to think that, whenever a real conflict of jurisdiction does arise between two independent tribunals, the better course for each to pursue is to exercise its own jurisdiction so far as it availably can, and not to issue judgments proclaiming the incompetency of its rival.

And see Lord Blackburn at pp. 520 and 528; and it is to be noted that he "completely agreed" with Lord Watson and Lord Deas (p. 533) that, in the absence of legislation, "the judicatures of Scotland and England are as independent of each other as if they were the judicatures of two foreign states."

See also Lord Selborne, at pp. 499, 500, 506, and 514-5; at p. 500 he says:

If it were necessary to enter into the question whether there may not have been, in this case, some excess of its own jurisdiction, on the part of the Court of Session, I should be disposed to say that, although the Courts of any country may affirm their own competence, and may decline to give effect to the proceedings or orders of a foreign Court, they have no authority to determine the extent or limits of the jurisdiction of that foreign Court within its proper territory.

In the present case there is no good ground for our "declining to give effect" to the judgment of the California Court; indeed it is "our plain duty" as Lord Watson said, to recognize and give effect to it *pro tanto,* because as Lord Fitzgerald said, in the same case, p. 551, "there is no real conflict of jurisdiction between the two judicatories"; and he goes on to say:

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Though there is no conflict of jurisdiction, there may arise what would more properly be called a collision between the practice of the independent Courts of separate divisions of the same United Kingdom, which would properly be settled by the judicatories of the two countries acting in ancillary courtesy to each other. . . .

This is an apt and graceful way of indicating the course to be adopted under the present circumstances.

The case of *Raulin* v. *Fischer* (1911), 2 K.B. 93 is another and striking illustration of a foreign judgment (French) being held to be severable and sustainable in England in its civil aspect, *i.e.,* by enforcing the judgment for damages, a civil tort, and rejecting it in its criminal aspect, despite the objection, p. 97, that to do so would be "to dissect the judgment and enforce here that part which was enforceable by action though the judgment as a whole was not enforceable."

This principle of carrying into effect a foreign judgment was adopted in *Maudsley* v. *Maudsley, Sons & Field* (1900), 1 Ch. 602, wherein a receiver was appointed over property out of the jurisdiction, Cozens-Hardy, J. saying pp. 611-12:

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It is well settled that the Court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the Court acts *in personam*. The Court does not, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country. . . . In *Houlditch* v. *Marquis of Donegal* (1834), 8 Bli. (N.S.) 301; 37 R.R. 181 the House of Lords held that the Court of Chancery in Ireland ought to appoint a receiver in a suit instituted to carry into effect a decree of the Court of Chancery in England by which a receiver had been appointed over estates in Ireland. In other words, the receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done, and until that has been done in accordance with the foreign law, any person, not a party to the suit, who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver's possession or otherwise.

In re Huinac Copper Mines, Limited (1910), W.N. 218, a receiver was authorized, in a debenture-holders' action on a trust deed, to take possession of a copper mine in Peru.

The form of decree in the *Houlditch* case is given at p. 349 and declares that the appellants (plaintiffs):

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ought to have the aid and assistance of the High Court of Chancery in Ireland for carrying into effect the order made by the High Court of Chancery in England whereby a receiver was ordered to be appointed [of defendant's estates in Ireland].

In *Massie* v. *Watts, supra,* the Supreme Court of the United States, *per* Chief Justice Marshall, said (p. 158) that the decree in cases of this character is not to be considered as "involving a naked question of title" but (p. 159) as "a strict primary decree of a Court of equity *in personam*," and (p. 158):

. . . The circumstances, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In *Henderson* v. *The Bank of Hamilton, supra,* the Supreme Court of Canada held that in the exercise of this jurisdiction the Court should not go so far as to direct a sale in the nature of equitable execution of lands in a foreign country (p. 719) which would bring about a collision between the Courts of the respective countries, and the decision of the same Court in *Purdom* v. *Pavey & Company, supra,* is based on the same principle—p. 417.

The decision of the same Court in *Law* v. *Hansen, supra,* supports the views we have above expressed, *e.g.,* at p. 72:

It is now established in English law that a judgment of a foreign Court of competent jurisdiction having the force of *res judicata* in the foreign country has the like force in England. . . .

And p. 73:

Judgments *in personam* bind parties and privies, and, generally speaking, are conclusive at least upon the material issues tendered by the plaintiff's complaint.

"The doctrine of estoppel by a former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other." *Per* Miller, J. in *Aurora City* v. *West* [(1868)], 7 Wall. 105.

"The very object of instituting Courts of justice is that litigation should be decided, and decided finally. That has been felt by all jurists." *Per* Willes, J. in *Great Northern Railway* v. *Mossop* [(1855)], 17 C.B. 140.

And again, p. 75:

Apart from technical rules of pleading there would not seem to be satisfactory reason, upon principle, for declining to give effect to a foreign judgment merely because it was obtained after the beginning of the action in which it is sought to be made available. The considerations of justice and public policy which dictate the rule of *res judicata* as applied to foreign judgments operate to prevent the defeat of the rule by technical considerations.

In a recent case in the House of Lords, *Salvesen* v. *Administrator of Austrian Property* (1927), A.C. 641, Lord Haldane said, p. 659, approving *Pemberton* v. *Hughes* (1899), 1 Ch. 781, 790:

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Our Courts, . . . never inquire whether a competent foreign Court has exercised its jurisdiction improperly, provided that no substantial injustice according to our notions has been committed.

If, however, fraud, or collusion appear it would be otherwise, as Lord Dunedin points out at p. 663; and see other illustrations in two cases in this Province of *Boyle* v. *Victoria Yukon Trading Co.* (1902), 9 B.C. 213; and *Wanderers Hockey Club* v. *Johnson* (1913), 18 B.C. 367, and also Dicey's Conflict of Laws, 4th Ed., 430 *et seq.*, on the subject generally, particularly at pp. 449-51 wherein at p. 450, this well-known passage from Lord Lindley's judgment in *Nouvion* v. *Freeman* (1887), 37 Ch. D. 244, 256, is cited:

The principle on which an action can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal, or that if such rights have not been in fact investigated and determined, it is because the parties, or one of them, have made default and not availed themselves of the opportunities afforded them by the foreign tribunal. In an action on a foreign judgment not impeached for fraud, the original cause of action is not reinvestigated here, if the judgment was pronounced by a competent tribunal having jurisdic-

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tion over the litigating parties: *Godard* v. *Gray* [(1870)], L.R. 6 Q.B. 139; *Schibsby* v. *Westenholz* [*ib.*], 155. The judgment is treated as *res judicata*, and as giving rise to a new and independent obligation which it is just and expedient to recognize and enforce.

See also Lord Watson, in the same case in the House of Lords (1889), 15 App. Cas. 1, 12. Dicey proceeds, p. 450:

> This general principle, though stated in reference to a judgment *in personam*, applies to every kind of judgment; it extends alike to a judgment *in personam*, to a judgment *in rem*, and to a judgment, or sentence of divorce, or any other judgment having reference to *status*.

The case of *Reimers* v. *Druce* (1857), 26 L.J., Ch. 196 also merits attention.

Finally, with respect to the submission that the taking of proceedings herein by way of a vesting order to give effect to the California judgment *in personam* would be in reality a form of execution, it is sufficient to say that no case has been cited to support that view, and the authorities hereinbefore set out are opposed to it: the exercise of such a jurisdiction is not in its nature one in execution of a judgment in the usual and proper sense of that term, even the appointment of a receiver is in its real nature not a form of execution but equitable relief. *In re Shephard* (1889), 43 Ch. D. 131, 135, 138.

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Upon the whole case, therefore, it may be said in the language of Lord Watson, in *Nouvion's* case, *supra*, that the California judgment "exhausts the merits of the controversy between the parties," and so we think the proper order to be made, under all the circumstances, is that the appeal should be allowed in part by varying the judgment below by striking out the first adjudicating paragraph thereof and reframing the second paragraph so as to vest the lands in question in the plaintiffs pursuant to this Court's sole adjudication based upon its jurisdiction to implement the California judgment.

The question of costs is unusually difficult to determine satisfactorily in view of the necessary amendment, but the best solution of it, under the unusual circumstances, is to apportion them and give the plaintiffs (respondents) two-thirds of the costs below and defendants one-third; and the appellants (defendants) two-thirds of the costs of appeal and respondents (plaintiffs) one-third, and judgment will be entered accordingly.

McPHILLIPS, J.A.: I may say that at the threshold of this appeal, with great respect to the learned trial judge, it is clearly apparent that the judgment under appeal in my opinion must be set aside. The judgment proceeds upon lines in actual defiance of the law of England which we have (Laws Declaratory Act, Cap. 135, R.S.B.C. 1924). The English Courts have not nor have our Courts jurisdiction to determine directly the title to a foreign immovable and likewise no foreign Court, and it is the judgment of a foreign Court which has been given effect to here by the learned trial judge. That is, the well understood and fundamental law is that no foreign judgment presuming to adjudicate on the title to English realty would receive recognition in an English Court (Halsbury's Laws of England, Vol. 6, sec. 439 and sec. 304 at pp. 296-9).

A leading case is *British South Africa Company* v. *Companhia De Mocambique* (1893), A.C. 602, although that case specifically only dealt with trespass to land situate abroad yet the Court considered and passed on the main question. It will be noticed in the report at p. 604 where the argument is reported, counsel for the appellants said:

> The question was in the first instance one of title, but the prayer for a declaration of title was abandoned and the case is now confined to trespass.

Unquestionably it was admitted that the Court would have no jurisdiction with the question of title to land situate abroad. This significant language of Lord Halsbury at p. 632 is worthy of notice:

> But wherever the place was material, as the unvarying current of authorities establishes that it was in all controversies relating to land, the defendant might traverse the place, and, even if he did not, if it appeared in proof that the place was out of England, the plaintiff was nonsuited.

The present case presents these features: that the learned trial judge in the Supreme Court of British Columbia—the Court below—gave effect by his judgment to a judgment of the Superior Court of the State of California (one of the United States of America) in and for the County of Alameda which judgment in terms reads as follows: [The learned judge after setting out the judgment continued].

It will be seen that a foreign Court has presumed to deal with the title to land in the Province of British Columbia, Dominion of Canada, but does not halt at that but in a mandatory manner

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decrees that certain persons execute a conveyance of the lands and failing that nominates an officer of a foreign Court to execute a conveyance of lands in a country foreign to the Court exercising the jurisdiction, has directed that the defendants execute, acknowledge, deliver and cause to be recorded and registered a deed of conveyance of property, *i.e.,* land in the City of Victoria, British Columbia, to certain nominated persons and a direction vesting in them the title to the land subject to an encumbrance of $30,000, now of record and subject to no other liens or encumbrances whatsoever and perform such other acts as may be necessary to the end that the plaintiffs may be restored to the ownership and possession of the property and the property is described. Then a provision in case of failure that the clerk of this foreign Court is ordered to execute and deliver the deed and cause it to be registered. It is really a most startling judgment indeed of a foreign Court relative to lands situate abroad, *i.e.,* in the Province of British Columbia, and without the territorial jurisdiction of the Court that made the order. This extra-territorial jurisdiction attempted here is unsupportable in law, is without jurisdiction and offends against the principles of international law and there is absolutely no authoritative precedent in the Courts admitting of any such judgment being pronounced, and is a void judgment, and was incapable of judicial notice upon the part of the learned trial judge, much less to be accorded as it was legal validity. The judgment—which is under appeal—reads as follows: [After setting out the judgment the learned judge continued.]

The vice of the present case is apparent when it is seen that a foreign Court by its decree undertook to deal with the title to land in a foreign country, *i.e.,* the Province of British Columbia. It was not the case of only making an order *in personam* but designating an officer of that foreign Court to execute the conveyance in case of default in execution of the conveyance directed to be made whereby the title to lands in a foreign land would be transferred. The case is one without precedent to my knowledge and one that is startling in view of the principles of private international law which apply equally to the United States of America, its respective States, the Dominion of Canada and its respective Provinces. Here we have the foreign Court under-

taking to make a declaration of title as to foreign lands and the right to their possession and the Court below adopting it. What was done here was not a decree *in personam* by a foreign Court in respect of foreign lands but a decree *in rem* and it has been implemented by the officer of the foreign Court executing the conveyance of the foreign lands and tendering it to the Land Registry office of the foreign country, and insisting upon its registration which if accepted as a valid conveyance by the Land Registry office would have the effect of transferring title to the lands in question, the foundation resting alone upon the decision of a foreign Court relative to the title to lands in a foreign country, that is, the Province of British Columbia. This question of the jurisdiction of foreign Courts over foreign lands and the title thereto has at various times received the consideration of the Courts in Canada and in the House of Lords and the Privy Council in England. One notable case which went to the Privy Council—and the decisions of the Privy Council, it is well known, are binding upon this Court—was *Grey* v. *Manitoba and North-Western Railway* (1897), 66 L.J., P.C. 66. That was an appeal from the Manitoba Full Court (*Gray* v. *Manitoba & N.W. Ry. Co.* (1896), 11 Man. L.R. 42), the then highest Court of that Province. Taylor, C.J. (later Sir Thomas Wardlaw Taylor), at pp. 57-8 considered *Companhia de Mocambique* v. *British South Africa Company* (1892), 2 Q.B. 358; (1893), A.C. 602, and had this to say:

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> The most recent case is *Companhia de Mocambique* v. *British South Africa Company* (1892), 2 Q.B. 358; (1893), A.C. 602. The learned Chief Justice of the Supreme Court said that the rules laid down in the later English authorities have now culminated in the decision of the House of Lords in that case, and it does seem to be conclusive on the subject. It was an action in which the plaintiffs, alleging that they were owners of mines in South Africa, claimed against defendants within the jurisdiction a declaration of title to the lands, an injunction and damages in respect of trespasses on the lands. The Divisional Court held that the Court would not entertain an action for directly determining the title to land in a foreign country. In the Court of Appeal it was held that the Court had jurisdiction, but Lord Esher dissented holding that, the cause of action being a wrongful entry upon lands abroad, the Court could not entertain the cause at all; it could not make a declaration as to the title; it could not issue an injunction; and it could not award damages. In the House of Lords this dissenting judgment of Lord Esher was sustained and the judgment of the majority of the Court of Appeal reversed. The judgments of Lord Herschell and Lord Halsbury are exceedingly instructive.

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In my opinion the Court cannot consistently with the authorities make a decree for the sale of land over which it has not territorial jurisdiction. While the 180 miles forming the first division of the railway may be a section capable of being sold under the Railway Act, there is nothing to warrant a sale as a section of that part which lies within the Province. As then the Court cannot sell the whole because part lies outside the jurisdiction, it follows that no decree for sale can be made at all.

It was argued that if this Court cannot order a sale there is no other Court that can do so, and that seems to have weighed with the learned judge at the original hearing in coming to the conclusion he did. That argument was most effectually disposed of by Lord Esher in the case last referred to, when he said, "As to the contention that the Courts of a country can assume jurisdiction in respect of extra territorial acts, over which they have otherwise no jurisdiction, on the mere ground that, if they do not, the plaintiff has no remedy anywhere, I am of opinion that it does not bear examination. It is claiming too ambitious a province. It was a noble ambition, but it is without recognition or authority."

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In the present case what territorial jurisdiction had the Superior Court of the State of California over the lands in question here? None whatever! Therefore this Court cannot admit of the foreign Court's exercise of jurisdiction approved and adopted in the Court below by the learned trial judge whose judgment is under appeal to this Court. It will be seen that the learned Chief Justice of the Manitoba Court dealt specifically with the question which comes up here and the excerpt I have made clearly shews this. What is being asked of this Court is to approve a judgment of the learned trial judge of the Court below which is in affirmance of a judgment of a foreign Court in respect to lands over which it had not territorial jurisdiction, in view of the controlling decisions. The Supreme Court of British Columbia could not do what the foreign Court has presumed to do if the lands in question were not within its territorial jurisdiction. The lands in question are within the territorial jurisdiction of the Supreme Court of British Columbia and the respondents in this action would be at liberty to bring an action in the Supreme Court of British Columbia —if they should be so advised—and in due course the Courts of this Province would adjudicate upon the matters in question. It is, though, quite unthinkable that this Court could approve of the judgment of the Court below which as I have already said is an affirmance of a judgment of a foreign Court, absolutely without territorial jurisdiction. The decision of any

Court which has not territorial jurisdiction is a thing of naught and therefore of no legal effect whatever. In the present case the lands in question were in the Province of British Columbia one of the Provinces of Canada and the Court that presumed to adjudicate in respect of the lands was a Court in the State of California one of the United States of America. Now in the *Grey* case (66 L.J., P.C. 66) reading in part from the head-note we find this language:

Held, that, though the whole division was, by the law of Canada, saleable by the mortgagees, the Manitoba Court could neither sell the whole, as part was outside of its jurisdiction, nor disintegrate the division by selling such portion only thereof as was within its jurisdiction; . . .

It will, of course, be remembered that a question of jurisdiction is always open and even if not raised in the foreign Court or in the Court below it can be raised at any time and in this Court as well as all other Courts *ex mero motu*. I will a little later return to a further reference to the *Grey* case (66 L.J., P.C. 66) but I now wish to point out what the judgment under appeal in its terms as drawn up and entered determines not a determination of the Supreme Court of British Columbia upon the merits at all but a mere echo of or recital of a judgment of a foreign Court wholly without jurisdiction. Note the terms of the judgment below:

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This Court [the Supreme Court of British Columbia] DOTH ORDER AND DECLARE that by virtue of the judgment of the Superior Court of the State of California . . . dated the 30th day of July, 1928, in an action No. 93395 . . . and by virtue of the conveyance dated 11th July, 1930, from the defendants George E. Duke and Margaret E. Duke to the plaintiffs herein [not executed by them at all, of course] by George E. Gross the clerk of the said Superior Court of the State of California . . . as a commissioner pursuant to the directions contained in the judgment herein referred to, [the California Court's judgment, not the judgment of the Supreme Court of British Columbia] the plaintiffs are the owners in fee simple of and entitled to be registered as the owners in fee simple of all and singular, etc.

(The described lands, declared to be the owners, not by the Supreme Court of British Columbia, but by virtue of the California judgment, a judgment of a Court without territorial jurisdiction).

It is to be remembered that the judgment under appeal to us is based solely and only upon the judgment of the California Court and based solely and only upon the conveyance executed

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by the named officer, *i.e.*, commissioner mentioned in the judgment.

The second to last paragraph of the judgment under appeal is wrong in terms as it would lead one to believe that the learned judge in the Court below adjudicated independently of the judgment of the California Court. That is not so nor was any issue in the action joined upon the merits which would entitle the learned trial judge to so decree. It can only be read with the insertion of the following as in the first paragraph of the judgment after the word "Adjudge":

> That by virtue of the judgment of the Superior Court of the State of California in and for the County of Alameda dated the 30th day of July, 1928, in an action No. 93395, that the said lands namely lots three (3) four (4) eleven (11) and twelve (12) in block seventy-five (75) Victoria City according to a map or plan deposited in the Land Registry office at the City of Victoria and numbered 219 vest in the plaintiffs herein subject only to the said mortgage and to the said lease.

The learned trial judge was without the power or the jurisdiction to make any such order vesting the lands in the plaintiffs. The judgment under appeal can only be looked at as a judgment in affirmance of and adoption of the judgment of the California Court and based upon that only, a judgment of a foreign Court and wholly without territorial jurisdiction.

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In the *Grey* case, *supra,* at p. 71 Lord Hobhouse who delivered the judgment of their Lordships of the Privy Council said:

> As regards the question of sale, the decisions, both English and Transatlantic, which bear on the jurisdiction of Courts of justice to deal with foreign land, have been very carefully discussed in the Courts below. It is hardly necessary to go into that discussion again here. The thing asked for by the bill is a judicial sale of land partly within and partly out of the jurisdiction, as an entire thing, and with specific directions by the Court. It is impossible to do that; the decree of the Court below does not do it directly, and it has been hardly more than suggested at the Bar that there is any principle or authority to justify it.

Here we have the case of a foreign Court without territorial jurisdiction undertaking to adjudicate as to the title to the lands and directing the transfer thereof and failing the execution of a conveyance that then an officer of the Court should execute the conveyance. The decree of the foreign Court was without jurisdiction and in its nature a *brutum fulmen* decree (Piggott on Foreign Judgments, 3rd Ed., Part I., p. 146) and such an action would not have been tried in England when relating to

land abroad. Likewise, there was no jurisdiction in this case in the California Court, the land being in British Columbia—Piggott, Part I., pp. 148 and 152; *British South Africa Company* v. *Companhia de Mocambique* (1893), A.C. 602, Lord Herschell, L.C., at p. 625.

In Byrne's Law Dictionary, at p. 477, we find this stated:

> Hence the Court had (and therefore the High Court now has) jurisdiction to deal with a question affecting land situate in a foreign country, if the question can be settled by enforcing the decree or order against a person within the jurisdiction. It is in this sense that Admiralty actions are divided into actions *in rem* and *in personam*, an action *in rem* being one in which the ship or other property out of which the cause of action arises (the *res*) is arrested as security for the performance of an obligation, while in an action *in personam* the performance of the obligation can only be enforced against the defendant personally.

Even if it be admitted that an action could be brought in California it would be an action *in personam* not an action *in rem* as the *res*—in the present case the land—is not in the territorial jurisdiction of the California Court although the defendants may be domiciled there. The Court has presumed to vest the title in the land in the plaintiffs and in fact has so decreed. This is a proceeding *in rem* and undoubtedly beyond the province of the foreign Court. The action *in personam* could at best proceed no further than a direction that a conveyance be executed and failure to execute it could be enforced against the defendants, *i.e.*, they might be attached or proceeded against for contempt of Court or visited with damages to the value of the land but no such proceedings would appear to have been taken and if following such steps the defendants had executed a conveyance the matter would have been simple, but there was no power to make an order and direction that a third party, an officer of the Court, should execute the conveyance; that was going beyond the particular persons over whom the Court had jurisdiction (Piggott on Foreign Judgments, 3rd Ed., Part I., pp. 107 to 164). Therefore here we have in the foreign Court not merely an action *in personam*, but an action *in rem* with the attempt to affect the *res*—in truth a declaration of title vesting the *res* in the plaintiff. This in no case is permissible, that can only be attained by the commencement of an action where the land, *i.e.*, the *res*, is situate and that is British Columbia (and counsel at this Bar stated that such an action has been brought

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and is now pending) and if in an action properly brought in the Supreme Court of British Columbia—the Court having territorial jurisdiction—the Court should, after hearing the witnesses and deciding the issues upon the merits, independent of the foreign judgment decree that the lands should be deemed to be the lands of the plaintiffs and the defendants failed to execute the necessary conveyance, the Supreme Court of British Columbia would be within its jurisdictional rights to direct that the registrar of the Court should execute the necessary conveyance but no such jurisdiction resided in the Superior Court of the State of California and the judgment made and pronounced was one made and pronounced without jurisdiction and should not have in my opinion been given effect to by the learned trial judge in the Court below. It follows that, in my opinion, the appeal should be allowed, and the action dismissed.

Since the writing of my judgment as above counsel were asked to come before the Court upon the point of some amendment that might admit of this Court giving aidance and implementing the foreign judgment. The Court by a majority directed certain amendments to be made and being made it was decreed that the lands in question be vested in the plaintiffs being in aidance and implementing the decree of the foreign Court. With great respect to my learned brothers I cannot agree with the decision so come to and I dissent therefrom. If proper amendments had been granted, whereby the issues would be tried wholly disassociated from the decree of the foreign Court and paying no heed thereto—a trial to be had upon the merits in the Supreme Court of British Columbia, the Court having territorial jurisdiction—I would have been in agreement with my learned brothers as my unswerving view of the law is that no foreign judgment adjudicating on the title to British Columbia lands can receive recognition in the Courts of British Columbia. I would draw attention to the language of Kay, J. in *In re Hawthorne. Graham* v. *Massey* (1883), 23 Ch. D. 743 at p. 747:

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> I am not aware of any case where a contested claim depending upon the title to immoveables in a foreign country . . . has been allowed to be litigated in this country. . . .

See *Ross* v. *Ross* (1892), 23 Ont. 43; *Purdom* v. *Pavey & Company* (1896), 26 S.C.R. 412, Sir Henry Strong, C.J. at pp.

417-8; *Brereton* v. *Canadian Pacific R.W. Co.* (1898), 29 Ont. 57; *Henderson* v. *The Bank of Hamilton* (1894), 23 S.C.R. 716; *Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444; *Toller* v. *Carteret* (1705), 2 Vern. 494; *Norris* v. *Chambres* (1860), 29 Beav. 246; *Strange* v. *Radford* (1887), 15 Ont. 145; *Mayor, &c., of London* v. *Cox* (1867), L.R. 2 H.L. 239 at p. 261.

Here we have aidance and recognition of a foreign Court's decree relating to and the declaration of the title to land in British Columbia in truth adopting the judgment as to title to land in British Columbia. In the result it comes to this that this Court abdicates its functions and adopts the judgment of a foreign Court without a hearing upon its part of the merits of the matter in issue between the parties and an adjudication as to who the parties are under the law of British Columbia rightfully entitled to be declared to be the owners of the land. It is impossible to cite a case in England where there has been a declaration of title to land abroad and I know of no case in the Courts of the Provinces of Canada or the Supreme Court of Canada so deciding, yet aidance is to be accorded to implement in this case a decree of a California Court vesting title to lands in British Columbia without trial upon the merits in the Supreme Court of British Columbia, the Court having territorial jurisdiction. I adhere to my view that the appeal should be allowed and the action dismissed.

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

Solicitors for appellants: *Crease & Crease.*

Solicitors for respondents: *Walsh, Bull, Housser, Tupper & Molson.*

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RAHAL v. BURNETT.

Negligence—Motor-vehicles—Collision—Intersection—Right of way—Findings of trial judge—Appeal.

On the afternoon of December 2nd, 1930, the plaintiff was driving his car easterly on 17th Avenue in the City of Vancouver, and approaching its intersection with Heather Street. At the same time the defendant was driving his car northerly on Heather Street and approaching said intersection. On reaching the intersection the plaintiff stopped his car and, looking south on Heather Street, stated that he saw the defendant's car about one block away, when he proceeded across the intersection without again looking in that direction. The defendant, on approaching the intersection saw the plaintiff's car but he continued on, thinking the plaintiff would stop as he (defendant) had the right of way. When he saw that the plaintiff was continuing on with the intention of crossing ahead of him he tried to stop his car, but it was too late, and he struck the rear right side of the plaintiff's car and knocked it over, the plaintiff being badly injured. It was held by the trial judge that the defendant had the right to assume that the plaintiff would observe the rule of the road and give him the right of way, and the plaintiff should have seen the defendant approaching, when he should have stopped. The action was dismissed.

Held, on appeal, affirming the decision of GREGORY, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that there was enough evidence to justify the finding that both cars approached the intersection at such respective distances from it, and under circumstances that gave the defendant the right of way, the defendant being entitled to cross first if when approaching the intersection he was *equi*-distant with the plaintiff from the probable point of impact.

Lloyd v. *Hanafin* (1931), 43 B.C. 401 followed.

Per MACDONALD, C.J.B.C.: That both parties were negligent and the damages should be equally divided between them.

Per MCPHILLIPS, J.A.: That the defendant was wholly to blame for the accident and the appeal should be allowed *in toto*.

The Court being equally divided the appeal was dismissed.

Statement

APPEAL by plaintiff from the decision of GREGORY, J. of the 4th of May, 1931, dismissing the plaintiff's action for damages for negligence and giving judgment for the defendant on his counterclaim. On the 2nd of December, 1930, at about three o'clock in the afternoon the plaintiff was driving his automobile easterly on 17th Avenue, and approaching the intersection of Heather Street in Vancouver. About the same time the defend-

ant was driving his car northerly on Heather Street and approaching said intersection. The further facts are sufficiently set out in the reasons for judgment of the trial judge.

Killam, for plaintiff.
Alfred Bull, and *Ray,* for defendant.

GREGORY, J.: There is bound to be a great deal of difference of opinion as to who is responsible for accidents such as we are having every day. I think a jury perhaps would decide the question much better than a single judge. In this case, it seems to me that the plaintiff is solely responsible for this accident. It is beyond question that the defendant had the right of way, approaching the intersection from the plaintiff's right. The plaintiff says he stopped. That has been contradicted by the defendant. I make no actual finding upon that point, but if he did stop he stopped west of the intersection. According to his own evidence he stopped before he got up to it. Now the mere stopping is not enough. There is no "stop" sign there. He did not have to stop but it is the proper and reasonable thing to do. Other things being equal traffic coming north along Heather Street would have the right of way over him, and that was the position of the defendant. It is possible that the plaintiff reached the boundary line of the street intersection before the defendant did, but even if he did he was reckless and foolhardy to attempt to cross without seeing that he had full opportunity to do so before any traffic approaching on his right might intercept him. He is not justified in taking a chance. The traffic which the defendant would particularly have to look out for would be that approaching on his right and it would be moving west on the north or far side of 17th Avenue.

There is always a great variety of opinion as to the speed of a car. The only evidence here with respect to the defendant's speed is that he was at the highest point in that block travelling at 25 miles an hour and he said when he went to move into high gear the speed would, for the time being, be reduced, and that unquestionably is so.

The plaintiff never saw the defendant at all. He was not keeping a proper look-out. He should have seen him. He could

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have seen him. If he was doing what he said, he must have seen him because the defendant came on to Heather Street from 18th Avenue; he had to slow up going around the corner and then there was the bake-wagon in front of him. I am satisfied the defendant was not travelling at 25 miles an hour when he reached the intersection. It was something less than that, and while when you mention it in miles per hour it might sound as though it was a great deal of speed at which to come to an intersection, we see it every day, people travelling that rate, and they can and do stop their cars, without difficulty. Defendant said he saw the plaintiff coming. He did not use the expression "I counted upon his giving me the right of way as I thought I had it," but he does it in one sense when he says "When I saw that he was not going to give me the right of way I put on my brakes and I stopped my car." And that evidence is supported, that he stopped it in eight or ten feet. The force of the blow with which he struck the plaintiff's car, if he did strike it, could not have been very much, could not have been tremendous. He could not have been travelling at any great speed. My own impression is that he was practically stopped, if not stopped as he says. It is quite possible he was stopped and the injury to his car and the defendant's car could easily be accounted for by what you might call the rear of the plaintiff's car sideswiping defendant's left front. It could easily account for all the injuries done, and that is the only way I can see, and I am forced to a certain extent to act upon my own judgment because I had no expert evidence; that is the only way I can see in which his frame could have been bent to the right. I am not a bit concerned with who took the plaintiff out of the car. I think everybody was excited and perhaps Mr. Ashthorpe thinks he took him out and the defendant thinks he took him out. The main thing is they got him out. I think it was the plaintiff's duty to see the defendant's car which must have been in plain view, had he looked for it. The defendant saw the plaintiff's car. He had the right to assume that the plaintiff would observe the rule of the road and give him the right of way. Neither one of them is justified in taking chances. If two cars are about to cross, one car has to hold back, and I think in this case it was the plaintiff's duty to hold back and he

Statement

did not hold back, because he did not see the defendant. He was not looking. He should have looked.

The plaintiff's action will therefore be dismissed. The defendant is entitled to judgment on his counterclaim and I give him $250.

From this decision the plaintiff appealed.

The appeal was argued at Vancouver on the 30th of November and 1st of December, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Killam, for appellant: The plaintiff stopped before entering on the intersection and then proceeded on. He was well on the intersection before the defendant, and was nearly across when the rear right side of his car was violently struck by the defendant. He had much farther to go on the intersection to reach the point of impact than the defendant, so that he must have been on it appreciably before the defendant. When the plaintiff stopped before reaching the intersection he saw the defendant nearly a block south of 17th Avenue.

Bull, for respondent: The defendant had the right of way and the plaintiff was found at fault in the Court below for this reason: see *Carter* v. *Van Camp* (1930), S.C.R. 156 at p. 161. The evidence shews they arrived at the intersection substantially at the same time and the defendant was entitled to the right of way: see *Lloyd* v. *Hanafin* (1931), 43 B.C. 401.

Argument

Killam, in reply: The evidence is sufficient to justify a reversal: see *Groff* v. *Herman* (1931), 3 W.W.R. 417; *The Village of Granby* v. *Menard* (1900), 31 S.C.R. 14. The defendant was guilty of excessive speed and even if the plaintiff were negligent the defendant by using reasonable care could have avoided the accident: see *Davies* v. *Mann* (1842), 10 M. & W. 546; *Swadling* v. *Cooper* (1931), A.C. 1.

MACDONALD, C.J.B.C.: I think the appeal should be allowed, and that both the plaintiff and defendant were guilty of negligence. I think the defendant was guilty of greater negligence than the plaintiff was. The finding of the learned judge, while the other way, seems to me to run contrary to the physical facts.

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Now, I have no doubt of the truth of the evidence of the plaintiff and his witnesses, the independent witnesses who swear that he did stop when he reached the intersection, that he was probably within the intersection when he stopped, that then he proceeded on at fifteen miles an hour. There is no doubt about that evidence at all, and it seems to be borne out by the physical facts.

The other man, on the other hand, was coming up from 18th Avenue. It is true the plaintiff says, "When I saw him he may have been on the other side of 18th Avenue," which, if true, was impossible. We must remember that all evidence of that sort about where a person is is subject to this: the party may have actually thought he was further away than he was, or he may have been enticed by cross-examination into an admission which was not correct. I am satisfied that the car which the plaintiff saw about a block away was the defendant's car. If there had been any other car there, the defendant would have proved it. There was no mysterious car there, so we start off with this, that the defendant's car was seen by the plaintiff a block away, and when plaintiff started across the intersection he did so in perfect confidence that nothing would interfere with him. I think he ought to have looked as he was crossing, and that is where his negligence comes in. Even so, I think when one starts to cross an intersection, and it is clear, if another who can see him doing so chooses to enter and injure him, the real negligence is not on the part of the person who enters first. The rule of the road does not preclude evidence of want of care on the defendant's part when he enters the intersection. He is bound to take reasonable care, notwithstanding the rule of the road.

MACDONALD, C.J.B.C.

The question is, did he exercise that reasonable care here? I think he did not. I think when he saw the plaintiff, as he says, coming along 17th Avenue, the plaintiff was really coming along the intersection, and no doubt the defendant did put on his brake when he discovered it, but he was then at the intersection, he was then at the peak of his speed, and we ought not to disregard that evidence. He was then at the peak of his speed, he reiterated this three times, and he put on his brake and skidded some ten feet, striking the plaintiff, who was ahead of him, causing the injury complained of. Now, I say he did not take

reasonable care in doing that. He ought to have slowed down when approaching the crossing, so as to cross at a sane rate of speed. Instead of that, he speeded up, and had to reduce his speed from 25 to nought in order to have any chance of saving the plaintiff. He had not even then a chance to save him, as the result shews.

While I am clearly of the opinion that the defendant was the person who was guilty of the greater negligence, I think the plaintiff also must be held to have been negligent in not keeping a look-out as he was crossing, and therefore I would find that both were negligent, and would divide the damages equally between them.

MARTIN, J.A.: Under the circumstances of this case, it is brought, in my opinion, within the principle of our recent decision in *Lloyd* v. *Hanafin* (1931), 43 B.C. 401, and therefore the appeal should be dismissed. It must be conceded that the plaintiff was guilty of negligence in failing to keep a look-out, and I agree with what our brother, the Chief Justice, has just said in that respect.

As regards the defendant, it is clear to my mind, upon our decision in *Lloyd* v. *Hanafin,* that he had approached the intersection in such a way as to give him the right of way, which is the important initial fact in this case regarding his position, and the learned judge's finding in that respect cannot be successfully impugned. As I regard it, that is the result of his finding, the only inference which can be drawn on that, notwithstanding that, I say so with respect, in several respects his judgment is not clear, and unless there is careful consideration of the facts it might lead to an erroneous conclusion and almost invite an appeal.

Having established that primary fact, we proceed then to the next one, which is this, and is the only ground of negligence raised against the defendant and which can be alleged against him on the facts; *i.e.,* he did not when he became apprised of the danger take proper steps to avoid it because it is alleged he was not in a position to do so owing to the fact that, as charged against him, he was going at the excessive speed of 25 miles an hour. Now, that is disposed of also in his favour by the finding

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of the learned judge, and it has to be remembered that the defendant, while very frank in his statements as to the rate of speed at which he was going, still did not say in express terms he was going at the rate of 25 miles an hour, but that is simply his estimate of the rate, not based upon the speedometer or anything of accuracy, and his statement was that his speed did not exceed that rate, if it amounted to it. The learned judge has found, as I say, something which amounts to a demonstration that in fact defendant was right, and that he was not going at that rate. The exact finding of the learned judge on that point, which I refer to again because it is very important, is, "I am satisfied that the defendant was not travelling at 25 miles an hour when he reached the intersection": he bases that very largely upon the fact that defendant stopped in eight or ten feet.

MARTIN, J.A.

Now, I agree with what my brother M. A. MACDONALD has said, that possibly that may be allowing him too much, but the evidence is uncontradicted that he did stop within twelve feet, and that would shew he was not going more than fifteen miles an hour. It comes to this, that if the situation is such that he was in his proper place at the intersection, and had acquired a right of way, that he was not going at an excessive speed, and that he was keeping a proper look-out, no negligence whatever can be charged against him, and upon each of these questions of fact, the right of way, the non-excessive speed, and the proper look-out, I am unable to say that the learned judge arrived at a conclusion which is not proper upon the evidence before him, and therefore, it follows therefrom that the appeal must be dismissed, because it is impossible to say, under the circumstances, that he took a clearly wrong view of the facts of the situation.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion that the appeal should be allowed. I am unhesitatingly of that opinion, and, with great respect to the learned trial judge, I think he went wholly wrong. The plaintiff's evidence—and his witnesses have corroborated it—is that as he came along 17th Avenue he proceeded out to the line of the curb of Heather Street, and his motor-car projected out there, and he looked to his right. He saw a car about a block away, only a short block, something like

240 feet. Then the plaintiff, seeing the coast clear, rightly proceeded, and he is shewn to have proceeded at a reasonable speed, that is, fifteen miles an hour. He got how far across Heather Street? Three-quarters of the way across—almost across, you might say. The defendant comes up whilst the plaintiff is in the act of crossing, and he sees the plaintiff crossing, he admits he saw him crossing, and he comes up at a rate of 25 miles an hour and hits this car on the rear, smashes the spokes of the wheels and throws it over, a heavy car, and plunges it in the ditch. Then he has the effrontery, as I view it, to say, "Oh, I was not going fast," although he swore repeatedly he was going 25 miles an hour, and under the law of the land he was *prima facie* guilty of negligence in doing that. As Lord Atkinson said in the Privy Council, a person is entitled to believe that people will obey the law. Why did not this defendant obey the law? The plaintiff was entitled to believe he would obey the law. The plaintiff, being first in entering upon and proceeding to cross, was entitled to the right of way. I hold upon the evidence that the defendant had not the right of way.

MCPHILLIPS, J.A.

I would refer to the case of *Rex* v. *Broad*, in the Privy Council ((1915), A.C. 1110; 84 L.J., P.C. 247), where Lord Sumner dealt with this question of crossing, and he said that when a person had entered upon the crossing and was crossing, that person should be allowed to cross. That is the law of England and the law as we have it, and for a Court (and I say this with great respect to any of my brothers who take a contrary view) to approve upon the facts of this case of the action of this defendant is simply courting like and worse disasters, and we see, according to the public press, that motor-car accidents are continually occurring here from day to day and a large toll of lives is taken consequent upon the reckless conduct of drivers of motor-cars, similar to the conduct of the defendant in this present case.

I have no hesitation in saying if the plaintiff had been killed this defendant would have been well entitled to be charged by the Crown with manslaughter. Are the citizens of this city, or any other part of British Columbia, to have it said that this class of thing can be done, and done with impunity, and done without at least suffering monetary damage?

GREGORY, J.

1931

May 4.

COURT OF APPEAL

Dec. 1.

RAHAL v. BURNETT

In *Coghlan* v. *Cumberland* (1898), 67 L.J., Ch. 42, referred to by Mr. *Killam*, Lord Lindley one of the most distinguished judges of our time in England, laid down the principle, adopted later by the House of Lords, which governs Courts of appeal. We are not allowed to shirk our responsibilities. The appeal is a rehearing and we have to apply our minds to all the evidence. It is idle to submit from the Bar that the Court of Appeal is to re-echo the judgment of the learned judge in the Court below. In charging myself with the law of the land, as it is, I have studied this evidence, and, considering it, I cannot see any evidence which is of the slightest advantage to the defendant, or capable of excusing the defendant. He was wholly wrong, he was reckless to a degree, and is his recklessness to be approved? Recklessness of that character means loss of life and damage to property. The Court's duty is to weigh all this evidence and weigh all the circumstances. It is plain that the plaintiff went across that intersection slowly. It is plain that the defendant came up there recklessly and at an excessive speed and hit this car of the plaintiff, and he (the defendant) ought to thank Providence to the end of his days that he was not answerable for the death of the plaintiff.

MCPHILLIPS, J.A.

The case is an impossible one for the defendant, without one redeeming feature; the facts overwhelmingly, in my opinion, establish gross negligence against the defendant. Further, this is a case of ultimate negligence, and the plaintiff is entitled to recover notwithstanding that he may have in some respects been negligent, such as not looking again to the right at about the time of the collision. The plaintiff was three-quarters of the way across. What reason had he to believe he would meet with an attack such as this? And if it is ultimate negligence, then the plaintiff is entitled to recover, even if he has been, upon his part, guilty of some negligence—not that I believe he was guilty of any. Therefore, I would allow the appeal *in toto* and would direct that there should be a new trial confined to the assessment of damages only.

MACDONALD, C.J.B.C.

MACDONALD, J.A.: The appellant has the burden of displacing findings of fact by the trial judge. In a case of this kind, it

is often difficult to ascertain the exact facts. We have to take them as found and see if there is any reasonable evidence to support the findings. Now, there is enough evidence, to my mind, to justify the finding that both parties approached the intersection at such respective distances from it, and under circumstances, that gave the respondent the right of way. The respondent was entitled to cross first, if upon approaching it he was *equi*-distant with the appellant from the probable point of impact. The trial judge, too, was justified in thinking, as he must have thought, that the appellant was mistaken when he placed the respondent's car a distance of one block away as the appellant approached the crossing. If that allegation had been accepted, it would, of course, place an entirely different aspect on the whole situation.

As to the respondent's alleged speed of 25 miles an hour at the crossing, if there was a finding to that effect, other considerations might arise. I know of no reason why the learned trial judge, notwithstanding respondent's evidence, could not make a finding upon that point, as he did upon all the facts. There were physical facts to be taken into consideration when an approximate estimate of speed was given by the respondent. The fact that he passed a milk-wagon in the middle of the block and practically stopped to do so; the further definite finding that he stopped his car in ten or twelve feet before the impact—or within some reasonable distance—shews that the trial judge was justified in saying that respondent was mistaken in thinking that his speed was 25 miles an hour. I cannot say that he was clearly wrong in viewing it in that way.

I would therefore dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellants: *Killam & Shakespeare.*
Solicitors for respondents: *Walsh, Bull, Housser & Tupper.*

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1932

Jan. 5.

REX v. BURGESS

REX *EX REL.* JONES v. BURGESS.

Quo warranto—Order for information for—Appeal—Member of board of police commissioners — Previously convicted of criminal offence—Ground for disqualification—Delay by relator after discovery of conviction—Amendment to notice of motion—Proof of conviction.

An applicant for an information in the nature of a *quo warranto*, sought the removal of a police commissioner from his office on the ground that he had been convicted of a criminal offence. An order *nisi* being granted, an appeal was taken on the grounds (1) That too great delay had occurred in applying for the order (about seven weeks) after the relator discovered the alleged disqualification; (2) that an amendment to the notice of motion by which the citation of the sections of the Act which applied to the case were changed, should not have been allowed; (3) that the alleged convictions, made by a police magistrate, were not properly proved.

Held, per MARTIN and MACDONALD, JJ.A. (affirming the decision of MACDONALD, J.), that all the objections should be overruled and the appeal dismissed.

Per MACDONALD, C.J.B.C.: That the first two objections should be overruled, but as to the third in a case of this kind there must be strict compliance in proof of the conviction, and the appeal should be allowed.

Per MCPHILLIPS, J.A.: That all three grounds of appeal are fatal to the order, and as to the third there is only one way to prove a conviction and that is in conformity with the provisions of the Criminal Code, and no such proof was made herein. The appeal should therefore be allowed.

The Court being equally divided the appeal was dismissed.

APPEAL by defendant from the order of MACDONALD, J. of the 15th of June, 1931, that an information in the nature of *quo warranto* proceedings be exhibited against the said defendant to shew by what authority he claims to exercise the office of a member of the Board of Police Commissioners for the City of Vancouver. The defendant was appointed a member of the Board of Police Commissioners for the City of Vancouver by the City Council on the 7th of January, 1931. This application was made by Charles Jones as a relator on the ground that on the 11th of May, 1927, Burgess was convicted by *George McQueen*, Esquire, police magistrate for the Municipality of Point Grey, then exercising jurisdiction under Part XVI. of the Criminal Code, relating to the summary trial of indictable offences, on two charges of having stolen a quantity of lumber

Statement

under the value of ten dollars. He pleaded guilty on both charges. Sentence was suspended in each case. Under the Vancouver Incorporation Act, 1921, and amendments thereto, anyone convicted of an indictable offence is disqualified from holding office as a police commissioner.

The appeal was argued at Vancouver on the 19th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Edith L. Paterson, for appellant: The order should not have been made. First, the application was made too late; second, he must make out a case on the material submitted and an amendment should not have been allowed; third, there is no proof of conviction. As to the first objection, eight weeks elapsed after relator first knew of the alleged conviction: see Short & Mellor's Crown Office Practice, 2nd Ed., pp. 183 and 188; *Rex* v. *Rowlands* (1906), 75 L.J., K.B. 501 at p. 503. That an amendment should not have been allowed see *The King* v. *Rolfe* (1833), 4 B. & Ad. 840; Short & Mellor, p. 186; *The King* v. *Barzey* (1815), 4 M. & S. 253. Discretion should be exercised in accordance with the established practice: see *The Queen* v. *Tidy* (1892), 2 Q.B. 179. The conviction, sentence being suspended, was in May, 1927: see *Sale* v. *East Kootenay Power Co.* (1931), 43 B.C. 336; *In re Wood* (1867), 26 U.C.Q.B. 513; *The King* v. *Sargent* (1793), 5 Term Rep. 466. Strict documentary proof of a conviction is necessary: see *Mash* v. *Darley* (1914), 3 K.B. 1226; *Rex* v. *Drummond* (1905), 10 Can. C.C. 340. The documents must be produced under section 794 of the Criminal Code: see *Rex* v. *Taylor* (1906), 12 Can. C.C. 244 at pp. 246-7; *Regina* v. *Bourdon* (1847), 2 Car. & K. 366; *Rex* v. *Legros* (1908), 14 Can. C.C. 161 at p. 164.

Argument

Orr, for respondent: This was a motion to make absolute an order *nisi.* As to proof of conviction see *Rex* v. *Tansley* (1917), 3 W.W.R. 70; *Hartley* v. *Hindmarsh* (1866), 35 L.J., M.C. 255 at p. 256; *Hutchinson* v. *Lowndes* (1832), 4 B. & Ad. 118; 110 E.R. 400. On the question of delay see *Regina* v. *Francis* (1852), 18 Q.B. 526 at p. 529. The question of amendment is entirely discretionary: see *Australian Steam Navigation Company* v. *Smith & Sons* (1889), 14 App. Cas. 318.

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Paterson, in reply, referred to *Commissioner of Police* v. *Donovan* (1903), 1 K.B. 895, and Phipson on Evidence, 3rd Ed., 557.

Cur. adv. vult.

REX v. BURGESS

5th January, 1932.

MACDONALD, C.J.B.C.: The first objection in the notice of appeal to the judgment below was that there was too long delay in making the application for an information of *quo warranto.* This objection I think must be overruled.

The second objection was that the Court had no power to amend the notice of motion for the information, to change the citation of the sections of the Act which applied to the case. This I think must also be overruled. I refer to the unnumbered rule at the bottom of page 316 of the Supreme Court Rules as shewing the power of the Court to make amendments in proceedings of this kind which are civil proceedings.

The third objection is more serious than the others. It is sought to remove the defendant from his office of police commissioner on the ground that he had been convicted of an indictable offence. No formal conviction has been proven. In fact it is apparent that no formal conviction was ever made out but there are memoranda of the clerk and the magistrate which indicate that the defendant was convicted on a plea of guilty and let out on suspended sentence. The authorities cited for the failure to prove the conviction otherwise than by a formal document is *Commissioner of Police* v. *Donovan* (1903), 1 K.B. 895 at p. 902. This was a case of proving a previous conviction and the Court held that memoranda such as we have here was admissible to make out the *prima facie* case, the previous conviction having occurred in the said magistrate's own Court as that proving the second offence. The same question was referred to in *London School Board* v. *Harvey* (1879), 4 Q.B.D. 451, where the Court first laid down the rule which was followed in *Commissioner of Police* v. *Donovan, supra,* in the Court of Appeal.

MACDONALD, C.J.B.C.

The fact that the previous conviction was in the same magistrate's Court appears to me to have been the fact relied upon in coming to the Court's conclusion. I am, therefore, convinced that in a case of this kind there must be strict compliance in

proof of the conviction and that the appeal on this ground of appeal should be allowed.

I can see no good reason for postponing a decision of the trial, which cannot in my opinion affect the question.

The appeal should therefore be allowed.

MARTIN, J.A.: Upon this appeal from the order for a *quo warranto* information three grounds were relied upon, *viz.*, first, that there has been too long a delay between the time the relator first discovered the alleged disqualification of the appellant, *i.e.*, on 11th April, 1931, and his motion for an order *nisi* which was launched on the 2nd of June thereafter, a period of about 7 weeks. Now while it is undoubtedly the duty of the applicant to move promptly yet what amounts to undue delay depends upon the circumstances of each case and it was said by the King's Bench Division, *per* Lord Alverstone, C.J., in *Rex* v. *Rowlands* (1906), 95 L.T. 502, 505:

Then, further, as to the delay in applying for this writ, the time that elapsed before the application was made—some ten weeks—is a serious matter. Ten weeks may, in some cases, be a short time; but here the notice was given of the election and the election was held, and this application was not made for more than two months after the respondent had acted as guardian. It is the applicant's duty to come as promptly as possible, and that might have been a serious obstacle to our making the rule absolute in this case. However that may be, taking the view I do of the statute, I do not think that the repayment of the money by the applicant made any difference, and this rule must therefore be discharged.

Having regard to the circumstances of this case there has not been, in my opinion, undue delay.

It may be noted that in *The King* v. *Rolfe* (1833), 4 B. & Ad. 840, Chief Justice Denman said (p. 843):

. . . I, for one, should be very slow to grant a rule of this kind after the lapse of five years, unless in a case which left the Court no discretion.

And in *Reg.* v. *Francis* (1852), 18 Q.B. 526 a rule was granted after the lapse of a year.

In the second place it is objected that the amendment of the notice of motion, as follows, should not have been made, *viz.*:

THIS COURT DOTH ORDER that paragraph 5 of the notice of motion herein be amended by striking out the words and figures "sections 7 and 253" where they appear in the fourth line thereof and by adding the words "and amendments thereto" after the figures "1921."

Reliance is mainly placed upon *The King* v. *Rolfe, supra;*

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The King v. *Barzey* (1815), 4 M. & S. 253; and the passage in Short & Mellor, 2nd Ed., 186, founded thereupon, *viz.*:

> If the order *nisi* be granted upon insufficient affidavits, leave will not be given, upon shewing cause, to amend them, and if the order *nisi* be discharged, the motion cannot be renewed upon fresh affidavits at the instance of the same relator.

This statement is not supported in an important particular by the report in *Barzey's* case because the Court in refusing leave to amend, as "a dangerous precedent" said: "The parties must make a new application," and under the circumstances thereof, it is easy to understand why that course, and not the allowance of an amendment, was adopted. But that case is, in any event, entirely distinct from the present because what was done here was not to allow additional proof of the charge to be given by further or amended affidavits but the amendment of the notice of motion only, in order to correct an error in the reference to the statute creating the disqualification, and I have no doubt that such an amendment would have been allowed even in *Barzey's* case, and the whole scope of amendment is now fully covered by the express and ample curative powers conferred upon us by rule (250) of our Crown Office Rules (Civil), p. 316; further, and in any event, as recently pointed out by Lord Justice Scrutton in *Oakly* v. *Lyster* (1931), 1 K.B. 148 at 151, and Lord Justice Greer at p. 154, there is happily a marked difference in principle between the way our Courts now regard such matters and that which formerly prevailed when mistakes were made in the selection of the appropriate remedy; and *cf.* *Coughlan* v. *Victoria* (1893), 3 B.C. 57, 61. Therefore however regarded this objection cannot prevail.

MARTIN, J.A.

It is lastly submitted that the two separate convictions of the appellant for theft of lumber under the value of $10 on the 10th and 11th days of May, 1927, respectively, by the police magistrate of Point Grey Municipality, under Part XVI. of the Federal Criminal Code, were not properly proved and therefore the appellant, who is a police commissioner of the City of Vancouver, was not shewn to be within the statutory disqualification from such office of persons "who shall have been convicted of . . . an indictable offence in any Court of law within His Majesty's dominions or elsewhere" (Vancouver

Incorporation Act, 1921 (Second Session), Cap. 55, Sec. 255, and 1928, Cap. 58, Sec. 31).

What is sufficient proof of a conviction depends upon the particular circumstances of the case and of the *status* of the adjudicating tribunal and of its method of keeping its own records, as appears by the authorities cited by counsel, and in Tremeear's Criminal Code, 4th Ed., 1121, all of which I have examined carefully, and many others with the result that the best consideration of the matter as applied to the circumstances at Bar is to be found in the unanimous decision of the Appellate Division of Alberta in *Rex* v. *Tansley* (1917), 3 W.W.R. 70.

The proof of conviction herein is the affidavit of the convicting police magistrate (Mr. *G. R. McQueen,* barrister-at-law) that two separate formal informations (set out in detail) against Henry Burgess were laid by P.C. Fish for the said offences of stealing lumber from two different persons, and it proceeds:

5. On the 11th day of May, 1927, in the exercise of my office as such police magistrate and pursuant to the jurisdiction conferred on me by Part XVI. of the Criminal Code, the said Henry Burgess appeared before me at the Police Court at Kerrisdale in the County of Vancouver, to answer to the said above charges. He was thereupon arraigned by me and I stated the substance of each charge to him by reading the charges to him separately, and after each charge was read to him he pleaded guilty thereto.

MARTIN, J.A.

6. I accordingly convicted the said Henry Burgess of both the said charges and suspended sentence in each case.

7. Hereunto annexed and marked Exhibits "A" and "B" to this my affidavit, are respectively the original complaints on both of the charges mentioned in paragraph 4 hereof, together with my memorandum in respect to each one endorsed thereon.

8. Now produced and shewn to me and marked Exhibit "C" to this my affidavit is the Police Court calendar or docket of the Municipality of Point Grey in which there is an entry relating to the convictions of the said Henry Burgess.

9. Hereunto annexed and marked Exhibit "D" to this my affidavit is a certified copy of an extract from return of convictions made by me to the Clerk of the Peace of the County of Vancouver on or about June 23rd, 1927.

There is also the affidavit of F. O. Fish verifying the said information that he laid and confirming the magistrate's statement of the trial and conviction and identifying the present appellant as the person so convicted.

The entry of the Police Court clerk in the calendar or docket is as follows:

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1927
May 11

No. of Case 302
" " 303

Defendant: Henry Burgess.
Address: 4423 Belmont Avenue.
Date of offence: May 10th, 1927.
Charge: Section 386 Code Theft.
Where committed: Third and Imperial Street.
Informant: F. O. Fish.
Date of trial: May 11th, 1927.
Disposition: Suspended sentence.
Prosecutor: John Murdoch.
Presiding Magistrate: Geo. R. McQueen.

And in the quarterly return (ending 31st May, 1927) made by the convicting magistrate to the clerk of the peace for the county and certified to by the clerk on being filed with him on the 23rd of June following the conviction, the same statements are in substance contained, and the return was made pursuant to section 1133 of the Criminal Code.

Upon cross-examination on his affidavit the magistrate said:

Read: In other words, what you endorsed on the two informations and complaints, is the only record so far as you know, of a conviction. You see you have these words on it "11th May, 1927. Pleaded guilty. Sentence suspended. George R. McQueen." The only record I know of is the minute of adjudication to which you have just referred the records of which were shewn to me and are Exhibits to that affidavit.

MARTIN, J.A.

Doubtless it was owing to the fact that sentence was suspended that the conviction was not drawn up after being, nevertheless, duly recorded.

It was submitted by the respondent's counsel that this body of evidence in support of a conviction by a magistrate or justice of the peace, is stronger than the Court held to be sufficient in the *Tansley* case, *supra,* and an examination of it bears out this submission, and in that case also "the conviction had never in fact been formally drawn up" (74), and the convicting magistrate was not called as here, to prove the conviction, nor was the information produced, nor had a statutory return thereof been made, as here, to the proper officer; the evidence simply of the clerk of the Court and the production of the record of the proceedings in the magistrate's docket, signed by the magistrate, which the clerk produced, were held to be sufficient proof of the conviction. The judgment is, if I may say so, an informing one and entitled upon its reasoning to our adoption, and in particu-

lar the following passage therein (at p. 76) is applicable to the case before us:

> But in view of the entire absence of any such rigid rule as to the record as prevails in the case of superior Courts or so called "Courts of Record," I think the proper rule for the Court to adopt is to take a practical view of the matter and where there does exist under the hand of the justice of the peace, a memorandum made at the time, which substantially proves that there had been a conviction for a previous offence, to treat that as sufficient.

And at p. 75, the following passage from Wigmore on Evidence, paragraphs 2426, 2450, is adopted:

> Moreover, in inferior Courts—typically, that of a justice of the peace—in which by tradition the doctrine of incontrovertible records never obtained, the final enrolment was never customary at common law. Hence the justice's docket or minutes, with the original papers, represent in the first instance the proceedings; and though the legal theory persevered that these Courts do not possess records at all, in the strict sense, yet the practical features of a record are usually attributed to these books, so as to exclude proof of oral transactions.

The whole judgment is also consistent with the unanimous decision of the Ontario Court of Appeal in *Rex* v. *Yaldon* (1908), 17 O.L.R. 179 (not cited to us) affirmed in *Rex* v. *Legros, ib.* 425, wherein it was said, p. 182:

> There being no information or other formal record, the charge and the proceedings thereon, so far as material to be shewn, were proved in the only way in which they were capable of being proved. The same mode of proof seems to have been adopted in *Regina* v. *Shaw* (1865), 10 Cox, C.C. 66, and *Regina* v. *Hughes* (1879), 4 Q.B.D. 614, if one may judge from the language of the opinions delivered. See the observations of Hawkins, J., in the latter case at p. 627, in commenting upon *Regina* v. *Shaw* (*supra*). But, whether that be the case or not with regard to these cases, here the best evidence which the nature of the case permitted was produced.

The evidence given was (p. 179) that of "the police magistrate and his clerk [who] went into the box and gave an account of what took place before the magistrate."

The difference between the recording of a conviction and the drawing up of a commitment is well pointed out in *Hutchinson* v. *Lowndes* (1832), 4 B. & Ad. 118; 110 E.R. 400, and in *The King* v. *Smith* (1828), 8 B. & C. 341, Lord Tenterden, C.J. (342-3) points out the distinction between the proof of proceedings in the Court of Quarter Sessions, which is one of *oyer* and *terminer* and of record, and those in inferior Courts. As to the decision of the King's Bench Division in *Commissioner of Police* v. *Donovan* (1903), 1 K.B. 895, that does not touch the

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MARTIN, J.A.

point before us as it was on the safe and distinct ground that a Court of summary jurisdiction may look at its own "minute" and "register" under the Acts of 1848 and 1879 to prove its own previous conviction: no such question arises herein.

It only remains to note that the provision of section 794 of the Federal Criminal Code that a "certified" or "proved" copy of the conviction or dismissal "shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceedings" is one of facility (*Tansley's* case, *supra,* p. 74) and an additional and enabling method of simple proof which, whatever application it may have to Federal matters over which the Parliament of Canada has jurisdiction, has at least no limitation upon the rules of evidence in Provincial Courts enforcing property and civil rights, and that these proceedings are of a civil nature is beyond question as our said Crown Office (Civil) Rules shew, and that *quo warranto* proceedings now exist in practice in their civil aspect only has long been settled, though the power to make rules is *e.g.,* nominally preserved (*ex abundanti,* doubtless) in section 576 of the Code; *cf., The King* v. *Francis* (1788), 2 Term Rep. 484, wherein a new trial was granted because it was a civil proceeding: *Everett* v. *Griffiths* (1924), 1 K.B. 941, 957; Halsbury's Laws of England, Vol. 10, p. 178; Short & Mellor, *supra,* 182 note (3); and our said Crown Office Rules 51-9, and 134-5.

It follows that the appeal should be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from an order of Mr. Justice W. A. MACDONALD that an information in the nature of a *quo warranto* be exhibited against the appellant to shew by what authority he claimed to exercise the office of a member of the Board of Police Commissioners for the City of Vancouver, and allowing an amendment to the notice of motion, without which amendment the application must necessarily have been dismissed in that no statutory inhibition was cited disentitling the appellant from exercising his office. The authorities are all one way that in a proceeding of the character we have here the proceedings must be regular and sufficient in every respect and that even irregularities will result in a dismissal of the application. Further, "after the order *nisi* is granted the Court will not

receive an additional affidavit." Here a palpably inefficient case was set up and later it was allowed to be bolstered up. See *Rex* v. *Newling* (1789), 3 Term Rep. 310; *The King* v. *Barzey* (1815), 4 M. & S. 253; *The King* v. *Sargent* (1793), 5 Term Rep. 466 at p. 467.

It is submitted that the learned judge had a discretion but it must be a judicial discretion and an examination of the authorities amply demonstrates it. To speak colloquially, there can be no amendment which will be the "putting up of fences," the proceedings must be regular in their inception. The office here was an annual office. In Short & Mellor, 2nd Ed., we find this:

> . . . the Court . . . usually imposes a further limit with respect to annual offices and in such cases will not give leave to file an information unless it be applied for as soon as circumstances will admit after the election.

Here there was a delay of five months less five days and dilatory proceedings thereafter so that in the end the judgment of this Court on the appeal was only possible of being given after the term of office had expired. The fatal objection, in my opinion, is that no conviction was proved. I expressed that opinion at the outset of the argument at this Bar.

MCPHILLIPS, J.A.

To be a valid conviction—the hearing necessarily being before two magistrates—necessitated the signature of the two magistrates. This was admittedly not proven. Further, on application to one of the magistrates, he refused to sign the conviction. There is only one way to prove a conviction and that is in conformity with the provisions of the Criminal Code of Canada and no such proof was made. This point alone disposes of these proceedings. In *Rex* v. *Rowlands* (1906), 75 L.J., K.B. 501, we find Lord Alverstone, C.J., upon the question of delay, saying the following, at p. 503:

> I think further that the delay in applying for this order *nisi* raises a serious difficulty. Notice of the intended election was published on January 11, a candidate for the office was proposed, and was elected on February 3. Yet this rule *nisi* was not moved until April 27, upwards of ten weeks later. It was the duty of the prosecutor to apply as promptly as possible. Therefore this rule ought to be discharged.

Upon the point of failure to prove the conviction I would refer to what Buckley, L.J. said at p. 1230 in *Mash* v. *Darley* (1914), 3 K.B. 1226:

> The first point upon which the justices proceeded was that the superin-

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tendent of police who was giving evidence spoke to the fact of the conviction, that he was present when the man was convicted, and the justices say, "We admitted the evidence of the superintendent of police and held that the conviction of the appellant was sufficiently proved." The conviction was not proved either by the production of the record or by the proper proceedings under s. 13 of Lord Brougham's Act of 1851, and on that point —I do not see that it is necessary to decide it, because I am going to decide this case upon other grounds—I do not myself see that it could be said that the conviction was proved, and in fact Mr. Barrington-Ward before us has not raised that contention. He does not say that the evidence of the police superintendent that the conviction was arrived at in his presence is a proof of the conviction.

We also have Phillimore, L.J., in the above case saying at p. 1236:

But I am bound to say that other matters in this case may require on some future occasion further consideration. Mr. Campion, in his very able and concise argument, to my mind inverted the points. I think that the first and really important point is whether, if the conviction had been properly proved, it would have been admissible. I can see the difficulty. As you can convict without corroboration, ought a conviction which may have been obtained without corroboration to go any further than the girl's evidence? I think that that is a matter which will require some very careful consideration. But if it is admissible to prove that on another occasion the person has been convicted and you once get into the history of the trial, it seems to me very difficult to say that you must not go to the end of the history of the trial; and although I entirely agree that for any purposes for which a conviction is to be relied on as a conviction of crime (if it is to be relied on under the Habitual Criminals Act or for the purposes of the Common Law Procedure Act, and so on) you must have strict documentary evidence, I am not certain that as part of the history of the case (if the conviction was admissible, as to which I desire to express no opinion), it was not for this purpose sufficiently proved for the particular case. All, however, that it is necessary for me to say is that I agree, on the ground put by Buckley, L.J.

MCPHILLIPS, J.A.

Section 794 of the Criminal Code of Canada is the section that deals with the evidence of conviction or dismissal, and at p. 1121 of Tremeear's Criminal Code, 4th Ed., we have the section and notes of cases:

794. A copy of such conviction, or of such certificate of dismissal, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction or dismissal for the offence mentioned therein in any legal proceedings. . . .

Where the conviction was by two justices, but only one had signed the formal conviction, it is defective as evidence. *Rex* v. *Taylor* [(1906)], 12 Can. C.C. 244 (Alta.); and the defect is not cured by producing the memorandum of adjudication which both had signed because the memorandum is not proof of the conviction itself. *Ibid.* No provision is made in Part XVI. for a memorandum of adjudication such as is contained in the sum-

mary convictions clauses, Part XV., by Code sec. 727. Nothing less than the formal conviction or a duly certified or proved copy thereof is sufficient: *Reg.* v. *Bourdon* [(1847)], 2 Car. & K. 366; *Rex* v. *Taylor* [(1906)], 12 Can. C.C. 244 (Alta.); even where the trial on which it is to be proved is before the same magistrate as made the conviction. *Rex* v. *Legros* (1908), 14 Can. C.C. 161; 17 O.L.R. 425.

In *Rex* v. *Taylor, supra,* we have Stuart, J. at pp. 246-7 saying:

> The only question upon which I had any doubt in this case was whether any admissible evidence had been produced to shew that the accused had been sentenced to imprisonment. Mr. Dickson, the clerk of this Court for the Macleod judicial district, was called, and produced two documents which he stated he had received by mail apparently from the justices of the peace who signed them. One was the information and complaint upon which the accused was originally tried by them, bearing on its face a minute of adjudication and sentence. This minute purported to be signed by both justices, and was in the words "pleads guilty, sentenced 2 months in common gaol at Macleod, with hard labour." The other document was a formal conviction, but was signed by only one of the justices. I am of opinion that neither of these constitute proper evidence of the conviction. I think nothing less than the formal conviction or a duly certified copy thereof is sufficient: *Rex* v. *Bourdon* [(1847)], 2 Car. & K. 366; Code, sec. 802. The former document is, therefore, insufficient, and the latter, not being signed by both justices, is also, I think, defective.

MCPHILLIPS, J.A.

After the most careful consideration of the matters to be considered in this appeal I cannot but express my strong disapproval that proceedings of a *quo warranto* nature should have been taken by the Corporation of the City of Vancouver or deemed necessary in the public interest as against an esteemed citizen who had proved himself by long residence to be a citizen of credit and good standing, and had been selected as police commissioner by the City Council by resolution dated the 7th day of January, 1931, and not until the 2nd of June, 1931, were proceedings commenced, the lapse of five months after his selection and occupancy of the office.

The proceedings were belated and as I consider fatally defective and it was not a case where any Court should hold out a helping hand. In my opinion, the amendment granted was against all precedent, against the well-understood practice in such a case as this. The discretionary power of amendment cannot be admitted to extend to completing a case of this character (although I am convinced it did not complete it) where before the amendment it was obviously incomplete and defec-

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tive. But if it could be said that the proceedings were regular up to the introduction of the essential proof then upon the cases it is clear to demonstration that no conviction was proved in accordance with law. That being so there is but one order, in my opinion, possible of being made by this Court and that is that the appeal should be allowed and the order and proceedings in the Court below be set aside and vacated.

MACDONALD, J.A.

MACDONALD, J.A.: I agree with the reasons for judgment of my brother MARTIN.

The Court being equally divided the appeal was dismissed.

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JARVIS v. SOUTHARD MOTORS LTD.

JARVIS v. SOUTHARD MOTORS LIMITED.

Negligence—Motor-car of defendant company driven by employee—Plaintiff gratuitous passenger—Collision—Plaintiff injured—Employee responsible for accident—Scope of employment—Responsibility of company—Costs.

G., an employee of the defendant company was engaged in selling its cars, and was given in charge of a car for demonstrating to prospective buyers. While using a car thus obtained he saw two young ladies he knew waiting for a tram-car to take them to a relative's for dinner. He volunteered to take them there and they entered the car. There being time to spare he proceeded in a direction away from their objective, and while so driving he collided with another car, and the plaintiff was injured. G. was found to be solely responsible for the accident, further that he was an agent or servant of the defendant company, that the question of deviation did not arise, that he was acting in the course of his employment and the defendant company was liable for the damages suffered by the plaintiff.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that at the time the accident occurred G., the servant of the defendant company, was about the master's business, he was solely responsible for the accident and the defendant company is liable.

Held, further, affirming the decision of the Court below, that the owner of the car with which G. collided, being a party defendant in the action, is entitled to recover his costs from the defendant company.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 14th of July, 1931 (reported 44 B.C. 286) in an action for damages resulting from a collision between two

automobiles. The defendant Gordon was an employee of the defendant company engaged in selling its cars, and for that purpose was given in charge of one of its automobiles for demonstrating to prospective buyers. While using the car he saw two young ladies (one of them the plaintiff herein) waiting for a tram-car to take them to a relative's house for dinner. He volunteered to take them there, and they entered his car. There being time to spare he took them in another direction. In the course of this drive Gordon collided with a car driven by the defendant Matthews, and it was held on the trial that Gordon was solely responsible for the collision. The plaintiff was severely injured, and recovered judgment against the defendant Southard Motors Limited for $2,801.60, the action being dismissed as against the defendant Matthews, his costs to be paid by the defendant Southard Motors Limited.

Statement

The appeal was argued at Vancouver on the 14th and 15th of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

C. L. McAlpine, for appellant: Gordon was not an agent for Southard Motors and in the next place he was not on the business of the company when the accident took place. That he was not an agent see *Howard* v. *Henderson* (1929), 41 B.C. 441; *Boyer* v. *Moillet* (1921), 30 B.C. 216; *Perrin* v. *Vancouver Drive Yourself Auto Livery* (1921), 30 B.C. 241; *Ruff* v. *Sutherland* (1930), 43 B.C. 218; *Bartonshill Coal Company* v. *Reid* (1858), 3 Macq. H.L. 266 at p. 282; Salmond on Torts, 7th Ed., 124-5 distinguishes between permission to a servant to do something for his own purposes from employment to do something for his master, in the former case the master not being responsible: see also *Barnard* v. *Sully* (1931), W.N. 180; *Katz* v. *Consolidated Motor Co.* (1930), 42 B.C. 214. As to admissibility of evidence of agency see Bowstead on Agency, 7th Ed., 361; *Fairlie* v. *Hastings* (1804), 10 Ves. 123; Taylor on Evidence, 11th Ed., 414; *Everest* v. *Wood* (1824), 1 Car. & P. 75; *Powell* v. *M'Glynn & Bradlaw* (1902), 2 Ir. 154. It is clear on the evidence that Gordon was on a frolic of his own: see *Mitchell* v. *Crassweller* (1853), 13 C.B. 237; *Battistoni* v. *Thomas* (1931), 44 B.C. 188; *Joel* v.

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Morison (1834), 6 Car. & P. 501 at p. 503; *Storey* v. *Ashton* (1869), L.R. 4 Q.B. 476 at p. 479; *Wills* v. *Belle Ewart Ice Co.* (1906), 12 O.L.R. 526; *Joseph Rank Lim.* v. *Craig* (1918), 88 L.J., Ch. 45; *Halparin* v. *Bulling* (1914), 50 S.C.R. 471 at p. 474. The case of *Harrington* v. *W. S. Shuttleworth and Co. Limited* (1930), 171 L.T. Jo. 71 is precisely the same as the case at Bar; see also *Beard* v. *London General Omnibus Company* (1900), 2 Q.B. 530; *Gates* v. *R. Bill & Son* (1902), 2 K.B. 38; *Hibbs* v. *Ross* (1866), L.R. 1 Q.B. 534; *Joyce* v. *Capel* (1838), 8 Car. & P. 370. As to paying the successful defendant's costs see *Rhys* v. *Wright and Lambert* (1931), 43 B.C. 558; *Young Hong* v. *Macdonald* (1910), 16 B.C. 133; *Huxley* v. *West London Extension Railway Co.* (1889), 14 App. Cas. 26 at pp. 32-3; *Green* v. *B.C. Electric Ry. Co.* (1915), 9 W.W.R. 75 at p. 79; *Holt* v. *Holmes & Wilson Ltd.* (1930), 42 B.C. 545.

Cosgrove, for respondent: Once it is established that Gordon was driving the defendant company's car the burden of proof shifts and the learned trial judge concluded on the evidence that he was on the company's business at the time of the accident: see *Hibbs* v. *Ross* (1866), 35 L.J., Q.B. 193; *Barnard* v. *Sully* (1931), W.N. 180; *Joel* v. *Morison* (1834), 6 Car. & P. 501; 172 E.R. 1738.

McAlpine, replied. *Cur. adv. vult.*

5th January, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. would dismiss the appeal.

MARTIN, J.A.

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

GALLIHER, J.A.

GALLIHER, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal is one in a negligence action. The injuries the respondent received, serious in their nature, arise from a collision between two motor-cars and liability has been found against the appellant founded upon the negligence of a servant of the appellant being at the time on the master's business; that is to say, Gordon, the salesman for the appellant was driving the motor-car of the appellant when engaged in his duty as a salesman and demonstrator of motor-cars. When upon that business and upon his way to Marpole, a place a few miles

south from the City of Vancouver, when proceeding on his way out from the City of Vancouver he saw two young ladies waiting for a street-car. He stopped his motor-car and finding that they were going in the general direction he was he volunteered to take them there but as the young ladies had ample time before the dinner hour they did not object to his first going to Marpole where he had some business of the appellant to transact. Their return was made in the direction of the City of Vancouver with the intention no doubt of later branching off from the main highway (there are two main highways, the trip to Marpole was upon one of these and the return towards the city was upon the other) and taking the young ladies to the home of their relatives and in doing this it would only be a little more circuitous for Gordon to drive into the City but before it was necessary to make the turning the accident for which the action was brought took place. The learned Chief Justice of the Supreme Court heard the case without a jury and said in his written reasons for judgment:

> I find that the collision was caused solely by the negligence of Gordon. . . . .

MCPHILLIPS, J.A.

In my opinion the learned Chief Justice arrived at the proper conclusion upon the facts, that at the time the accident occurred Gordon, the servant of the appellant, was about the master's business; that is, the business of the appellant, and it is clear to demonstration that the accident was owing to the negligence of Gordon alone, he being the servant of the appellant. I do not think it necessary to enter into any elaboration of the particular facts. In truth, it would not appear to me that it was at all possible to controvert negligence, nor would I think that counsel for the appellant really felt that there was any possibility of effectually refuting negligence. The appeal really turns upon the question of whether or no it was negligence for which the appellant is responsible in law. As to this point it would seem to me that there can be but one answer, that being, that at the time of the accident Gordon who was guilty of the negligence which resulted in the injuries to the respondent was the servant of the appellant and at that moment about the master's business and that being so the master, *i.e.*, the appellant, is liable. It was attempted on behalf of the appellant to make out that the situa-

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tion at the time of the accident was that referred to by Parke, B. in *Joel* v. *Morison* (1834), 6 Car. & P. 501, 503:

> 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.

Upon the facts of this case it is quite an untenable argument to contend that it was a case of "a frolic." It was not even the going out of his way as in truth up to the time of the accident Gordon was, in ordinary course, on his way to the City of Vancouver, the place where the master's business was centred. When upon this point it is well to consider the whole judgment of Parke, B. as reported in 40 R.R. 814:

> He is not liable if, as you suggest, these young men took the cart without leave; 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.

His Lordship afterwards, in summing up said: This is an action to recover damages for an injury sustained by the plaintiff, in consequence of the negligence of the defendant's servant. There is no doubt that the plaintiff has suffered the injury, and there is no doubt that the driver of the cart was guilty of negligence, and there is no doubt also that the master, if that person was driving the cart on his master's business, is responsible. If the servants, being on their master's business, took a detour to call upon a friend, the master will be responsible. If you think the servants lent the cart to a person who was driving without the defendant's knowledge, he will not be responsible. Or, if you think that the young man who was driving took the cart surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable. The master is only liable where the servant is acting in the course of his employment. 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. As to the damages, the master is not guilty of any offence, he is only responsible in law, therefore the amount should be reasonable.

MCPHILLIPS, J.A.

Even if Gordon had deviated in his course, which he did not, the point had not been reached to make the deviation to take the young ladies to their destination, yet under the language of Parke, B. there would still be liability as I read it. Sir Frederick Pollock in 40 R.R., preface vi. said:

> *Joel* v. *Morison*, p. 814, on the distinction between acts of a servant in the course of his employment for which the master is liable and extraneous misuse of the master's property, or other opportunities acquired in the course of service, for which the master is not liable. This last is a *nisi prius* ruling elevated to the first rank of authority by subsequent approval.

It may well be pointed out that the case was cited and fol-

lowed in *Whatman* v. *Pearson* (1868), L.R. 3 C.P. 422; 37 L.J., C.P. 156 and in *Burns* v. *Poulsom* (1873), L.R. 8 C.P. 563; 42 L.J., C.P. 302.

I had occasion to deal with this question of law in *Battistoni* v. *Thomas* (1931), 44 B.C. 188 at pp. 191-3, and at the present moment an appeal to the Supreme Court of Canada is under consideration, judgment being reserved.* As I interpret the submission of the learned counsel for the appellant in his very able argument there is really no contest as to the negligence or the damages awarded but what was pressed was that the servant (Gordon) was not when the accident took place acting within the scope of his employment or about his master's business and that therefore there is no liability upon the appellant. With the most careful attention to all the facts and consideration of all the relevant authorities I cannot persuade myself that the learned Chief Justice went wrong in any particular; on the contrary, I am fully satisfied that the learned Chief Justice arrived at the only and proper conclusion admissible both upon the facts and the law in an action of this character.

MCPHILLIPS, J.A.

Now with respect to the defendant Matthews who has been given costs against the appellant I cannot say that there is any error in that. The appellant undertook to set up in its statement of defence (paragraph 6) the following:

> In answer to the whole statement of claim herein the defendant says that if the plaintiff suffered injuries as alleged, which is not admitted but denied, such injuries were occasioned by the negligence of the defendant Matthews.

I cannot see that any facts were led at the trial upon the part of the appellant which would enable it to be at all said that the proximate cause of the accident could be reasonably said to be attributable to the defendant Matthews, and the learned Chief Justice upon the facts as adduced at the trial dismissed Matthews from the case with costs and in the formal judgment as taken out we have this:

> AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the said defendant H. C. Matthews do recover from the defendant Southard Motors Limited, his costs of and incidental to this action, and of the third-party proceedings.

I cannot see in what way the appellant, in view of the special facts of this case and the procedure adopted, can be relieved of

*Affirmed: See (1932), S.C.R. 144.

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this liability. An issue was apparently undertaken as between the appellant and the defendant Matthews but I cannot well follow upon what authority. I know of no practice to warrant it whereby the appellant would seek to transfer the liability upon Matthews in case liability was imposed upon it. We are very familiar with actions where the situation is one of the right to indemnity over against some person or persons who have undertaken to be answerable but I must confess I am wholly unable to understand the procedure here adopted but having adopted it I cannot well see how the appellant can now complain. I would dismiss the appeal, being of the opinion that the judgment of the learned Chief Justice of the Supreme Court is right and should be affirmed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The respondent (plaintiff) obtained damages against appellant company, motor-car dealers, for injuries received while riding in a car driven by its salesman. A collision occurred between appellant's car and another driven by the defendant Matthews. Appellant appeals on the ground that their salesman (Gordon) was not, as its servant, engaged in appellant's business at the time of the accident but rather was "on a frolic of his own." The action was dismissed as against Matthews because, although alleged in the statement of claim that the drivers of both cars were to blame, the only negligence found was on the part of appellant's salesman. He too was a defendant in the action.

In the formal judgment it was ordered that

> the said defendant H. C. Matthews do recover from the defendant Southard Motors Limited [appellant] his costs of and incidental to this action, and of the third-party proceedings.

Appellant also appeals from this award as to costs. Matthews is not a party to this appeal (although served with notice). He appeared at the trial to defend and also as a witness for the respondent.

The driver Gordon was, as stated, a salesman, engaged to sell appellant's cars on commission. This evidence was ascertained from answers to interrogatories delivered to the appellant. On the day in question he was driving a car owned by the appellant. He was permitted to operate appellant's car night or day, on the company's business, or for his own private purposes. While on

a business errand with appellant's car he gave respondent a ride, picking her up on the street. She was going to visit a friend in a remote part of the city and expected to ride as far as he could conveniently take her in the direction business called him. Instead of getting out at that point she drove on, at his request, to Marpole a few miles from the city, where he had some business to transact, the intention being to drive her to her friend's place later in the day. They returned from Marpole by a somewhat circuitous route, either for some business reason or for her pleasure or the pleasure of both and shortly afterwards the accident occurred. The salesman was not a witness and we can only surmise the purpose he had in view on the return journey. It may be that he anticipated a longer drive might demonstrate to respondent and to the friend with her, the value of the car, possibly leading to a sale.

It was submitted that the circuitous route taken suggested "a frolic." If he had in mind delivering respondent at her destination he could have returned by a shorter road and, as no one suggested a deviation for pleasure, the inference might be drawn that the longer road was taken for business purposes. Respondent's presence in the car did not interfere with the prosecution of the salesman's business. The fact is that respondent rode with him while he was on a business trip; at all events as far as Marpole and for ought we know to the point where the accident occurred. He did not go along with her. She went along with him. The necessary turn to respondent's point of destination was not made before the accident.

MACDONALD, J.A.

On the foregoing facts is appellant liable for the negligence of its salesman? The allegation in the statement of claim is that respondent was injured while

> riding as a passenger in the automobile of the defendant [appellant] being operated by the defendant Gordon duly authorized by the defendant Southard Motors Limited [appellant].

It was submitted that this was a plea of bailment—simply permission given, as it might be given to a stranger—to drive the car (entrusting him with it) without any allegation of agency or of the relationship of master and servant. It is an unsatisfactory plea. A bailment signifies a contract resulting from the delivery of a chattel:

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Delivery of a thing in trust for some special object or person, and upon a contract express or implied, to conform to the object or purpose of the trust:

Wharton's Law Lexicon, 13th Ed., 92.

It would probably be equally unsatisfactory as a plea of bailment. However, it is alleged and proven that appellant was the owner of the car and Gordon was driving it and the presumption arises that the driver was the servant of the owner unless rebutted.

Perrin v. *Vancouver Drive Yourself Auto Livery* (1921), 30 B.C. 241 was referred to. It has no application. The question of a breach of the provisions of a section of the Motor-vehicle Act does not arise. This is the ordinary case of negligence of a servant in the course of his employment while on his master's business. Nor does *Howard* v. *Henderson* (1929), 41 B.C. 441 assist. It is not a case of a mere licence being given by one owner of a car to another to drive it. "The driver" too in that case "was not the agent or the servant of the plaintiff" (p. 443).

The point is does the maxim "respondent superior" apply? If so appellant is liable. This must be ascertained from all the facts. If Gordon was restricted in the use of the car the result would be different. He had general authority to use it for his own purposes as well as to advance his employer's interest. The decisive feature is that this general and unrestricted commission at large was given for the master's benefit. It is never known at what time, or under what circumstances, a sale may be effected. That may be gathered from the evidence of Wilson, a witness for appellant.

MACDONALD, J.A.

A salesman may have prospects and he may go after them any time of the day or night.

He was permitted to operate it "at all time of night or day on the company's business or for his own private and personal use." In other words, he had a roving commission. While on a pleasure jaunt a sale might be made. Where pleasure was indulged in business naturally would be combined with it. He was definitely on his master's business when he invited the respondent to ride with him. There is no evidence either to shew that, after leaving Marpole, he did not take the slightly circuitous route to serve a business purpose. The record is silent on that point. But an inference might be drawn by a jury

from the evidence that he took this course for his own business purposes, and not to accommodate his passenger. We cannot say that the trial judge was clearly wrong in drawing that inference. He was not solicited by respondent to take her on a trip for pleasure. On the contrary she rode with him while he was about the company's business. It may be that, without expressing it, he hoped to induce respondent to become a purchaser by demonstrating it to her. That was what the car was for. With such wide powers given, wholly for business reasons (because it should not be assumed that he was permitted to retain it for personal use as a concession; it advanced appellant's interests to allow him to do so) I think the inference may be drawn that at the time of the accident he was acting in the course of his employment.

If he was only "permitted" to have the car after working hours for his own purposes the master would not be liable. The fair interpretation of the evidence however is (notwithstanding the use of the word "permitted" in appellant's evidence) that he was "employed" to take the car, drive at any time he chose to do so, day or night, knowing that at any moment a sale might be effected and this liberal arrangement best served the interests of the appellant. It is conceded that he was "permitted" to drive night or day on the company's business or "for his own private and personal use." While it may be possible to segregate these separate activities yet they were not severed nor was it intended that they should be. He was always interested in selling cars.

On the whole, with the burden admittedly on the respondent to shew that the injuries were caused by the negligence of the driver while on appellant's business, with presumptions arising from proof of the fact that appellant was the owner of the car and the driver in control of it, we should not interfere with a finding of a jury favourable to respondent. The evidence, and fair inferences, would support such a finding. Nor can we interfere on the same findings by a trial judge. I would dismiss the appeal. I would not interfere with the disposition made in respect to costs. *Appeal dismissed.*

Solicitor for appellant: *C. L. McAlpine.*
Solicitor for respondent: *Mark Cosgrove.*

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DEWEES v. MORROW

DEWEES v. MORROW.

Negligence—Collision between automobiles—Damages—Measure of—Finding of trial judge—Appeal.

In an action for damages resulting from a collision between two automobiles, the defendant admitted that the accident was due to his negligence and paid $1,100 into Court as sufficient to cover the damages done to the plaintiff's car. The plaintiff claimed his car, valued at $2,600, was completely wrecked, alternatively that repairs cost him $1,617.45, and he was deprived of the use of the car for five months. It was found by the trial judge that the car was, previous to the accident, in first-class shape and it would cost $1,458.05 to place it in a like condition, but on this being done it could not be sold as a second-hand car for more than $900. That the plaintiff would not have accepted $1,458.05 for it, and although in the ordinary course of trade it could not be sold for more than $900, persons like the plaintiff, indifferent to operating cost and the out of date feature, would give more than $1,458.05 for it, this being based on offers for purchase testified to by the owner whose testimony in relation thereto was accepted, and he gave judgment for the plaintiff for $1,458.05.

Held, on appeal, reversing the decision of MURPHY, J., that the rule to apply is that the plaintiff is entitled to the fair value of his car just before it was injured. It was found by the trial judge that the cost of replacing the car in the condition it was before the accident would be $1,458.05, but if this were done the car could not be sold, as second-hand cars are usually marketed, for more than $900. This is a finding of the fair value of the car before its injury. No sentimental consideration enters into the case, and the plaintiff can replace his car by another equally as good for $900. The injured car was worth $100 as scrap, which deducted from $900 leaves the plaintiff's damages at $800.

A subsequent application for leave to appeal from this judgment to the Supreme Court of Canada was refused by an equal division of the Court.

Statement

APPEAL by defendant from the decision of MURPHY, J. of the 30th of July, 1931. The action was for damages resulting from a collision on the 11th of October, 1930, when the plaintiff, while driving his automobile northerly across Granville Street bridge in Vancouver, was run into by the defendant, who was driving southerly on said bridge. The plaintiff claimed that his automobile was of the value of $2,600, and that it was completely wrecked, that he lost the use of the car for five and one-

half months and that the cost of storage of the wrecked car was $50. Alternatively he claimed that the cost of repairs amounted to $1,617.45, and that he was in the meantime deprived of the use of his car. The defendant admitted that the accident was the result of his negligence but denied that the plaintiff's car was worth more than $950 and that it could have been repaired so as to be in as good condition as it was prior to the accident for a sum not exceeding $1,100. He admitted liability for $1,100 and brought this sum into Court, which he claimed was sufficient to satisfy all the plaintiff's claims in respect to the matters set forth in the statement of claim. The plaintiff recovered judgment for $1,458.05.

Statement

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

Alfred Bull, for appellant: We say the car was not worth more than $800. In the case of *Barron* v. *Wallace,* decided by this Court in October, 1928, the market value of the car was accepted as a basis of the damages suffered: see also *Weart* v. *Municipal District of Stauffer* (1923), 2 W.W.R. 51; Huddy on Automobiles, 8th Ed., secs. 868 and 870. In the case of total destruction the same rule applies in Common Law as in Admiralty: see *The "Argentino"* (1889), 14 App. Cas. 519; *Beilby* v. *Shepherd* (1848), 3 Ex. 40; *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323. He cannot recover more than the actual loss he has suffered.

Argument

Craig, K.C., for respondent: The plaintiff is entitled to recover the cost of repairs, because such cost is less than the value of the car. It is submitted, firstly, that the judgment should be sustained for the reasons given by the trial judge. He found as a fact that the plaintiff could have sold his car for more than the cost of repairs, that is to say, that the car was worth more than the cost of repairs. This finding of fact should not be disturbed. Secondly, it is submitted that the price that might have been realized by a sale of the car to a second-hand dealer does not fix a market price. This was the only evidence

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given by the defendant as to the value of the car. A market is a place where there are both buyers and sellers. If there are no sellers, there is no market. There is no evidence that a similar car, or one as good, could have been purchased by the plaintiff from a second-hand dealer. The evidence shews that no such car was available. Therefore, there was no market. The reason why the market price is the test of value is because with that price a person can go into the market, and buy a chattel like the one he has lost. Where a person cannot buy another chattel like the one he has lost, there is no market, and hence no market price. The value then is the value of the chattel to the owner: *The Harmonides* (1903), P. 1; *Henderson* v. *Park Central Motor Service,* 244 N.Y. Supp. 409; *The Duke of Newcastle* v. *The Hundred of Broxtowe* (1832), 4 B. & A. 273 at p. 282;

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Wednesbury Corporation v. *The Lodge Holes Colliery Company, Limited* (1907), 1 K.B. 78 at pp. 83 and 88; *Livingstone* v. *Rawyards Coal Company* (1880), 5 App. Cas. 25; *Porteous* v. *Chotem* (1920), 2 W.W.R. 1; Halsbury's Laws of England, Vol. 21, p. 485, sec. 809; Mayne on Damages, 19th Ed., 399; *Canadian National Fire Insurance Co.* v. *Colonsay Hotel Co.* (1923), S.C.R. 688; *The King* v. *The Quebec Skating Club* (1931), Ex. C.R. 103.

Bull, in reply, referred to *Hoff* v. *Wabash Ry. Co.* (1923), 254 S.W. 874. On "market value" see Stroud's Judicial Dictionary, Vol. 2, p. 1164; *France* v. *Gaudet* (1871), L.R. 6 Q.B. 199. *Weart* v. *Municipal District of Stauffer* (1923), 2 W.W.R. 51 at p. 58 is right in point.

Cur. adv. vult.

5th January, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think that *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 is decisive of this appeal. The finding of the trial judge was held to be conclusive on the question of fact. There had been a subsidence of part of a road by reason of mining operations. The company proposed to repair it to less than its former state and at less cost of such repair. The colliery company submitted that it could be repaired to a condition just as convenient to the public though not to its original condition at a much

lower sum. The trial judge held that that cost was the measure of damages. On appeal by the corporation to the Court of Appeal the judgment was reversed and on appeal to the House of Lords, the House reversed the Court of Appeal and restored the judgment of the trial judge. The Lord Chancellor on pp. 325-6 said that:

> They [the plaintiffs] did not in fact consider how they could make an equally commodious road without unnecessary expense. Their position was that they were in law entitled to raise the road to its old level and to charge the defendants with the cost of so raising it. At the trial, as an afterthought, they also contended that the road would not in fact be so commodious to the public if it were made up on the lower level at the smaller cost. . . . My Lords, I regard the finding of Jelf, J. [the trial judge] as conclusive on the question of fact. . . . The point of law which was advanced by the plaintiffs, namely, that they were entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, will not, in my opinion, bear investigation. Such a rule might lead to a ruinous and wholly unnecessary outlay. There is no authority for it, though there is authority to shew that as between the owners of a public road and the adjacent lands the former may be entitled to restore the ancient level. Even those who have been wronged must act reasonably, . . . Accordingly with the utmost respect to the Court of Appeal, I think the judgment of Jelf, J. should be restored.

Lord Macnaghten and Lord Atkinson concurred.

The position of the corporation there was analogous to that of the plaintiff in this case. Here he insists upon putting the car back into the same condition it was in before injury. That, it is admitted, will cost more than the car was worth. Now had the car been utterly destroyed the measure of damages would be the fair market value of the car at the time. It was contended here that the fair market value was what a car of a similar kind in similar condition could have been bought for second hand. In fact it was sought to apply the rule applicable to a contract for the sale of goods of which there was a breach and in which the purchaser or vendor could go into the market and buy a similar article and claim the difference in the cost of it and the cost of the goods contracted for as the measure of his damages. That rule, I think, is not applicable to this case. It is impossible to find another article of the kind and in the condition of this car in the market. It can be said that there is no real market for such cars but it is admitted that cars equal in class and in second-hand condition can be bought on the market and are con-

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stantly sold on the market at a much lower price than this car would have cost to repair. I think the rule to apply is that the plaintiff is entitled to the fair value of his car just before it was injured which brings this case rather closely within the case of a broken contract but in a different way. Evidence was called here to prove that a similar car in a like condition could have been bought for $900. The learned judge made this finding:

> Plaintiff's car at the time of the accident was in first class shape mechanically, and in appearance. It will cost $1,458.05 to place it in like condition. If this were done the car could not be sold as second-hand cars are usually marketed for more than $900 at the outside.

That I think is a finding of the fair value of the car before its injury. No sentimental consideration enters into this case and the plaintiff can replace his car by another equally as good for $900. The case is analogous to the case above cited where

MACDONALD, C.J.B.C.

the cost of a road equally commodious substituted for the original one was allowed as the reasonable measure of damages.

There are many cases *pro* and *con* on this subject but I am of opinion that the decision in such cases should be consistent with reason and when an amount can be arrived at which in all the circumstances is reasonable that amount should be adopted as the fair market value. The injured car is worth $100 as scrap, which deducted from the $900 above mentioned leaves the plaintiff's damages at $800. The damages are reduced accordingly.

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of my brother the learned Chief Justice and being of the opinion as in his judgment expressed that the damages allowed should be reduced to the sum of $800.

MACDONALD, J.A.

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

Appeal allowed.

On the 5th of February, 1932, a motion for leave to appeal to the Supreme Court of Canada was heard at Victoria by

MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

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Craig, K.C., for the motion.
Alfred Bull, contra.

MACDONALD, C.J.B.C.: I do not think it is a case in which we ought to give leave to appeal to the Supreme Court of Canada. The amount is small. The reason for the insertion in the Act of $2,000 as the limit, without leave, was to prevent cases of this sort, not of very great importance, being appealed. Here there is only one question of fact: what could be bought on the market in the way of a car in the same condition and state of repair as this car in question was in, and at what price? The learned judge has said that this very car would be sold on the market at most for $900. And that ought to be conclusive, I should think. I would refuse leave to appeal.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This case raises an important question in regard to the assessment of damages of the value of motor-cars of a peculiar kind, which I think it would be well to have the benefit of the highest Court of the Nation upon. I do not wish to say that I think this Court has taken an improper view of the matter, but only if it is wrong in its reasons as expressed, I think an opportunity should be given for it to be put right, the matter being of such importance; one indeed of large public interest, because these questions of motor-cars, their value, and damages arising out of collisions, are so widespread. Therefore I think that leave should be given.

MARTIN, J.A.

MCPHILLIPS, J.A.: I dissented in the case of *Chan* v. *C.C. Motor Sales Ltd.* (1926), 37 B.C. 88; and the same reasons that I gave there actuate me now in thinking that this is not a proper case for leave to appeal. The policy of the law, as expressed by Parliament, is that appeals should not be allowed when the amount involved does not exceed $2,000. Now this is a car found at the time of the accident to be of the value of $900, and the learned trial judge's judgment was for $1,400, that is to say, $1,400 allowed to repair a $900 car. So the

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amount allowed by the trial Court is considerably under the $2,000. I think the policy of the law is that the Provincial Court of Appeal's judgment should be accepted up to that amount. And of course there is a right to apply for leave to the Supreme Court of Canada that is still open. I would not think it a proper case in which to give leave.

MACDONALD, J.A.: I would be disposed to give leave to appeal, on the special facts of the case, and on the questions of law that arise as applying to these special facts.

The Court being equally divided the motion was dismissed.

BUDD v. CANADIAN PACIFIC RAILWAY COMPANY.

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Negligence—Damages—Trial—Jury—Judge's charge—Direction as to evidence applicable to the issues—R.S.B.C. 1924, Cap. 51, Sec. 60—R.S.C. 1927, Cap. 170, Secs. 266 and 308.

In an action for damages the jury exonerated the defendant company and found the plaintiff, a truck-driver, entirely responsible for an accident resulting from a collision between the truck and the defendant's train at a highway crossing. On appeal it was urged that the learned trial judge did not give the jury a proper and complete direction upon the law and as to the evidence applicable to the issues pursuant to section 60 of the Supreme Court Act.

Held, per MACDONALD, C.J.B.C., that the section merely affirms the law as it previously was and does not cast a duty on the judge to go over the evidence in his charge with meticulous care. He should refer to the different issues and point out the evidence referable thereto and in this case he put questions which to a certain extent took the place of the charge to the jury on questions of evidence. Looking at the whole charge and the questions submitted no serious fault can be found with it and no substantial wrong has been done.

Per MARTIN and MCPHILLIPS, JJ.A.: The submission is that there was no direction at all upon the evidence and a careful perusal of the charge shews that to be the surprising case. We are asked to hold that it is not a sufficient compliance with the requirement of said section that the judge shall direct the jury upon the law "properly and completely" if he entirely omits to direct them upon the evidence, even though he may apply that law to proper questions submitted to them, and we should so hold. There should be a new trial.

Per MACDONALD, J.A.: The evidence was laid before the jury to some extent coupled with the submission of pertinent questions based upon law and facts that by their nature sharply draw the attention of the jury to the evidence fresh in their minds and form part of the charge. No inflexible rule can be laid down, it is a question of degree and must always depend upon the circumstances of the case, no substantial wrong occurred and there was reasonable compliance with the law.

The Court being equally divided the appeal was dismissed.

[Affirmed by Supreme Court of Canada.]

APPEAL by plaintiff from the decision of MURPHY, J. of the 23rd of May, 1931, and the verdict of a jury in an action for damages for negligence. On the 9th of June, 1930, the plaintiff's truck was proceeding on a road near Silverdale, about 38 miles east of Vancouver, and about to cross the defendant's right of way to a wharf on the Fraser River that was just

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beyond the tracks on the south side. On reaching the tracks it was struck by an eastbound train of the defendant company and totally destroyed. The plaintiff claimed that the road in question was a highway and the accident was solely due to the defendant company not complying with the statutory requirements; that the train was travelling at an excessive speed, no whistle or other warning was sounded, no precautions were taken to warn the plaintiff at the point in question of the approach of the train, the engineer in charge of the train did not keep a proper look-out, and the company permitted the approach by which the public highway in question is carried across the railway to be greater than one foot of rise for every twenty feet. The jury answered questions put to them and found that the defendant company was not guilty of negligence causing the accident, but that the driver of the truck was guilty of contributory negligence which was one of the causes of the accident, in not keeping a proper look-out. The plaintiff appealed on the grounds that the verdict was perverse and that the learned judge did not submit and leave to the jury the issues involved in the action with a proper and complete direction to the jury upon the law and as to the evidence applicable to the issues, in accordance with section 60 of the Supreme Court Act.

The appeal was argued at Victoria on the 21st and 22nd of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, for appellant: This was a highway and statutory warnings are required. Sections 266 and 308 of the Railway Act were not complied with: see *Respberry* v. *C.N.R.* (1928), 3 D.L.R. 831. If the statute had been complied with it would have prevented the accident. A view was taken and there was a demonstration that was prejudicial to the plaintiff's case: see *Griffith* v. *Thomas* (1827), 5 L.J., K.B. (o.s.) 126; *Walsh* v. *Walsh* (1925), 1 D.L.R. 1192; *Bennett* v. *Smith* (1877), 17 N.B.R. 27; *Smith* v. *Nield* (1889), 10 N.S.W.L.R. 171; English & Empire Digest, Vol. 30, p. 219. As to the effect of no objection being taken at the time see *Bennett* v. *Smith* (1877), 17 N.B.R. 27; *Anderson* v. *Rowatt* (1880), 20 N.B.R. 255;

Rex v. *Broad* (1915), A.C. 1110 at p. 1114; *Canadian National Railways* v. *Clark* (1923), S.C.R. 730. The judge did not charge the jury on the facts as required by section 60 of the Supreme Court Act: see *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473.

McMullen, for respondent: The jury found that the driver of the truck did not keep a proper look-out and discharged the railway of any liability. There is no question but that there was evidence upon which the jury could so find. From a gate on the road to the track is 50 feet and the ascent does not comply with the statute, but this ascent has nothing to do with the accident as the driver negotiated this grade at maximum speed. As to the view that the operation of the train was not a demonstration of what took place at the accident see *Straker* v. *Graham* (1839), 4 M. & W. 721. As to the charge, I submit the jury were sufficiently instructed on the facts. The jury was asked to answer fourteen questions and the facts were dwelt upon as to each question: see *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362 at p. 373; *Seaton* v. *Burnand* (1900), A.C. 135 at p. 145. Not having taken objection at the end of the charge he cannot now complain: see *Barthe* v. *Huard* (1909), 42 S.C.R. 406 at p. 410.

Argument

Bull, replied.

Cur. adv. vult.

1st March, 1932.

MACDONALD, C.J.B.C.: The jury found that the driver of the plaintiff's truck was guilty of contributory negligence in that he did not keep a proper look-out, and that he was entirely responsible for the occurrence complained of. The word "contributory" may be disregarded as pointed out in the judge's charge. That verdict means that the jury found that the truck-driver's negligence was the sole cause of the accident. I would interpret it to mean that if the defendant was guilty to any extent in the performance of its statutory duties that failure was not the approximate or real cause of the plaintiff's loss. The *Canadian Pacific Ry. Company* v. *Smith* (1921), 62 S.C.R. 134. The Contributory Negligence Act, in my opinion, has no application to the case.

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The alleged faults of the defendant when the *locus in quo* was visited, I think, were not proven. There was a complaint that the learned judge did not sufficiently present the plaintiff's case to the jury in accordance with section 60 of the Supreme Court Act. That section merely affirms the law as it previously was, and it has been pointed out repeatedly by high authority that it does not cast a duty on the judge to go over the evidence in his charge with meticulous care. No doubt he ought to refer to the different issues and point out the evidence referable thereto. Now in this case he puts questions to the jury which were duly answered. These questions referred to the different issues raised and called the jury's attention thereto. They take the place to a certain extent of the charge to the jury on questions of evidence and looking at the whole of the charge and the questions submitted I am of opinion that no serious fault can be found with the same. No substantial wrong has been done I think in this respect.

MACDONALD, C.J.B.C.

The appeal, therefore, should be dismissed.

MARTIN, J.A.: Several grounds are submitted in support of this appeal but having regard to the view I take of what is really the principal one it will not be desirable or expedient to consider the rest. That principal, indeed vital ground, is that the jury were not properly instructed by the learned judge pursuant to section 60 of the Supreme Court Act 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.

MARTIN, J.A.

This section has received consideration in several cases, *e.g.*, *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473; 35 S.C.R. 362; *Scott* v. *Fernie* (1904), 11 B.C. 91; and *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460 at 467; 39 S.C.R. 390; (1909), A.C. 361, and its assistance is invoked

here because no objection on this ground was taken to the charge at the trial, by either counsel, and so the present objection, apart from the section, could not be entertained by us. The submission now is that there was no direction at all upon the evidence, and a careful perusal of the charge shews that to be the surprising case (the nearest approach to it being at p. 203 of the appeal book), though adequate questions were properly submitted and answered.

This is a situation which has not hitherto arisen, because in all the prior cases before us or the old Full Court the question has been one of the degree of sufficiency in direction and not of its total absence, and so the point is now sharply raised for the first time.

After a consideration of the section in the light of the said decisions, I can only reach the conclusion that the statute applies to this situation and that it preserves to the plaintiff (appellant) a "right which may be enforced by appeal" under the present circumstances at least.

In the *Alaska* case, *supra,* I said, p. 485:

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> If the present case were to be considered as one of non-direction merely, some difficulty might be experienced in giving the appellant relief, for as was said, affirming *Ford* v. *Lacey* (1861), 30 L.J., Ex. 352, in *Great Western Railway Company of Canada* v. *Braid* (1863), 1 Moore, P.C.N.S. 101, "Non-direction is only a ground for granting a new trial where it produces a verdict against the evidence."
>
> The precise distinction, however, between non-direction and misdirection is sometimes difficult to determine, and that in some cases non-direction may amount to misdirection there is no doubt—it is only a question of degree how great the omission is. This is made clear by *Ford* v. *Lacey, supra,* where the exact point raised here is forestalled by Baron Channell thus:
>
> "I do not mean to say that it may not be a good ground for a new trial that a direction has been left so bare as to require an explanation to prevent the probability of its being misunderstood."

And on p. 487:

> On the other hand, however, it is equally plain from the authorities cited that the application of at least the leading groups of evidence to the various issues should be made as clear as practically possible to the jury, though the doing of that in the manner which will be the fairest to both parties having regard to all the evidence must be left to the discretion of the judge, and an appellate tribunal would only interfere with a discretion so exercised in a very exceptional case, if at all.

And on p. 491:

> The appellant's counsel's contention is that a fair construction of the

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section, which calls upon the judge to give a "proper and complete direction to the jury . . . as to the evidence applicable" to the issues, does not require him to review or charge upon each particular fact, but does require him to instruct upon all leading groups at least of the evidence, and apply to them the law as affecting the issue or issues arising out of such evidence. The section speaks for itself, and is clearly broad enough to include this very reasonable and practical contention, which conforms to the authorities already cited, and the only ground which the respondent's counsel has been able to suggest why it should not be given effect to is that if pushed to its extreme literal conclusion it would be unworkable. The answer to that objection is that so far as the case at Bar is concerned, this Court is not asked to put an unreasonable or impracticable construction upon the section; and if it ever should be so asked, which I think there is no reason to apprehend, in all probability no difficulty will be found in applying the section to the particular facts of any case which may arise, and in the manner directed in *Panton* v. *Williams* [(1841), 2 Q.B. 169].

These views of the matter were in substance confirmed by a majority, four, of the Supreme Court of Canada: Mr. Justice Nesbitt who delivered the leading judgment said at p. 367:

> A number of cases were commented on to shew what was the duty of a judge in directing a jury. I think that one cannot do better than adopt the language of Lord Watson in the case of *Bray* v. *Ford* (1896), A.C. 44, at page 49, "that every party to a trial by jury has a legal and constitutional right to have the case which he has made either in pursuit or in defence, *fairly submitted* to the consideration of that tribunal."

MARTIN, J.A.

And after pointing out that the extent of duty depends upon "the particular case," and after explaining the true result of *Ford* v. *Lacey* and other decisions, he goes on to say, p. 371:

> I do not think the judge is bound to comment upon evidence in the sense of reviewing what the several witnesses have sworn to, or to point out for the consideration of the jury anything which may strike him as throwing light upon the credibility of the story, but I think he is bound to direct the jury as to the law and to direct their attention how that law is to be applied to the facts before them according as they find them.

And he proceeds to emphasize the great desirability of putting questions to the jury so as to clarify the issues, pp. 372-3:

> If questions are answered by a jury many difficulties are avoided and the jury's attention would be directed to the points at issue. In case of a new trial I would suggest that, particularly in actions of negligence, it is well for a trial judge to get from a jury, by questions to be answered, the grounds specifically upon which they find negligence. Lord Coleridge in the case of *Pritchard* v. *Lang* [(1889)], 5 T.L.R. 639 at p. 640, uses some strong expressions in reference to this subject, in fact saying that in pursuing the course of not asking the jury to put the specific ground upon which they found negligence was calculated to mislead them and to defeat justice.

The effect of the present section (then 66) was not considered by the Supreme Court for the reason given by Mr. Justice

Killam at p. 374, and he took the view (which I also held—"conforms to the authorities," p. 491) that the section does not vary the practices at common law, but it does confer a new right of objection—*ib.* 490.

All that we are now asked to hold is that it is not a sufficient compliance with the requirement of said section that the judge shall direct the jury upon the law "properly and completely" if he entirely omits to direct them upon the evidence even though he may apply that law to proper questions submitted to them: in my opinion we should so hold.

It is not to be overlooked that under certain circumstances the application of the section may be excluded as in *Scott* v. *Fernie, supra,* by the course of the trial, as well as by express agreement.

MARTIN, J.A.

The present appeal must therefore, in my opinion, be allowed, but the successful appellant must suffer the penalty of his failure to take objection at the proper time by paying the costs as the section directs. The costs of the trial which thus become abortive are placed in our discretion by the same section and under the circumstances of this case they should abide the result of the new trial.

MCPHILLIPS, J.A.: I am in complete agreement with my learned brother MARTIN and am of the like opinion that it is a proper case for the direction of a new trial, the costs of the abortive trial to abide the result of the new trial, the appeal to be allowed setting aside the judgment, the appellant however to pay the costs as directed by section 60 of the Supreme Court Act.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The jury, in answer to questions, exonerated the respondent and found that the plaintiff (appellant) a truck-driver was "entirely responsible" for the accident, resulting from a collision between the truck and respondent's train at a highway crossing. Unless that finding was perverse or the jury were misled, it would be wrong to set it aside. It was submitted that what occurred at a view improperly influenced the jury. I find, on the true facts, no substantial merit in this contention. We can safely assume that the jury appreciated the true significance of all that occurred and were neither misled nor confused by the alleged demonstration.

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A further point was raised and it is at least debatable. It was urged that the learned trial judge did not give to the jury a "proper and complete" direction upon the law and "as to the evidence applicable to the issues" pursuant to section 60 of the Supreme Court Act, R.S.B.C. 1924, Cap. 51. I am convinced that the jurymen with the assistance of the careful and elaborate statement as to the law outlined to them by the trial judge were able to apply it to the facts and did so, arriving at a verdict fully justified by the evidence. In this respect it differs from *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473, where a more complete elucidation of the facts was necessary to enable the jury to decide the issues. This section, of course, cannot be ignored and as "nothing herein . . . shall prejudice or take away the right of any party" to have a reasonably full direction from the Court upon the law and evidence applicable to the issues, the right, if not enjoyed at the trial, should be secured at a new trial. In view, however, of the fact that the evidence was laid before the jury to some extent, coupled with the submission of pertinent questions to the jury, based upon the law and the facts I am not prepared to say that there was not a reasonable compliance with the law. Questions by their very nature sharply draw the attention of the jury to evidence fresh in their minds and also form part of the charge. No inflexible standard of care can be laid down applicable to all cases. It is a question of degree and must always depend upon the circumstances of the case (Killam, J., p. 373). If, as I am convinced, the jury were not misled by the scanty reference to the facts and as a result no substantial wrong occurred a new trial should not be directed.

MACDONALD, J.A.

I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Walsh, Bull, Housser & Tupper.*
Solicitor for respondent: *J. E. McMullen.*

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Negligence — Highways — Obstruction owing to repair work—Injury to unlicensed driver—Liability of municipality—Negligence and contributory negligence—Finding of jury—Whether perverse—B.C. Stats. 1930, Cap. 47, Sec. 2 (2).

Vancouver city workmen had made certain concrete repairs at about the middle of the Georgia Street viaduct close to the south curb and after completion covered the concrete and placed a barrier to the west of the repaired spot to protect the concrete. Four red lanterns were attached at intervals to the barrier. In the night following, at about 12.30 a.m., when there was a drizzling rain, the plaintiff's husband, a chauffeur, took five passengers in his car on to the viaduct from the west side. He apparently did not see the lights until close to the barrier, when he turned suddenly to the left. He cleared the barrier but his car skidded and crossed to the north side of the viaduct, mounted the curb on to the sidewalk, and breaking through the parapet or protecting wall, fell thirty feet below. The chauffeur and three passengers were killed. There was conflict of evidence as to the speed at which the car was travelling, and as to the visibility of the lights on the barrier and the number lit at the time of the accident. The jury found the City was negligent and judgment was entered for the plaintiff.

Held, on appeal, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A. (affirming the decision of MORRISON, C.J.S.C.), that the case was not one in which the finding of the jury in favour of the plaintiff was so clearly wrong that the Court of Appeal would be justified in interfering with it.

Per MARTIN and MCPHILLIPS, JJ.A.: That the evidence established beyond all reasonable doubt that the cause of the accident was the negligence of the taxi-driver.

Held, further (*per* MACDONALD, C.J.B.C. and MACDONALD, J.A.), that the fact of the taxi-driver not having a driver's licence as required by the city by-law, and not obtaining a permit as a chauffeur from the chief of police as required by the Motor-vehicles Act, does not affect the liability of the city for injuries caused him by its negligence.

The Court being equally divided the appeal was dismissed.

[Affirmed by Supreme Court of Canada.]

APPEAL by defendant from the decision of MORRISON, C.J.S.C. and the verdict of a jury in an action for damages for negligence. The City's workmen had made certain repairs on the Georgia Street viaduct at about the middle of the bridge on the south side near the curb, where concrete was used in making the repairs. After the repairs were completed, and at about noon on Saturday, the 14th of March, 1931, in order to protect

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the concrete, a barrier was put up to the west of the repaired spot from the curb out to about the south track, and on the barrier were placed four red-coloured lanterns at intervals from one another, a fifth lantern being placed upon a barrel about 30 feet east of the outside end of the barrier. The plaintiff is the wife of a taxi-driver who took five passengers in his seven-passenger Hudson car on to the viaduct from the west end at about 12.30 on the morning of the 15th of March, when there was a drizzling rain. He apparently did not see the barrier lights until quite close to them, when he turned out suddenly to his left. He avoided the barrier but went into a skid that took him across the viaduct to the north side, and after mounting the sidewalk over the curb the car broke through the parapet or protecting wall at the side and fell about thirty feet to the ground below. The chauffeur and three of the passengers were killed. At about 9 o'clock in the evening of the 14th of March, one Forrester with a Mrs. Physick and Miss Jessie Macdonald visited the house of a Mrs. Cole on Quebec Street in Vancouver, and shortly after their arrival one McIvor arrived there with two dozen of beer and a bottle of gin. The party continued there until about 10.30 p.m., when Mrs. Cole and a Mrs. Reynolds went to the liquor store before it closed at eleven o'clock. They bought a bottle of Scotch whisky and then went back to Mrs. Cole's in Burchill's taxi-cab. They all stayed at Mrs. Cole's, including Burchill, until about ten minutes past twelve, when they all, except Mrs. Cole, got into the taxi-cab and drove down town and stopped at a taxi-stand on Smithe Street, where Burchill consulted a man on the stand as to cafes or cabarets. They then decided to go to the Green Gables, an amusement place at the end of the car line on Hastings Street East, and proceeded along Georgia Street to the viaduct when the accident took place as previously stated. There was conflict of evidence as to the speed at which they were travelling, also as to the visibility of the lights on the barrier and the number that were lit when the accident took place.

The appeal was argued at Vancouver on the 20th to the 26th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

McCrossan, K.C., for appellant: There was a verdict for $20,000. The party was on their way to a road-house after twelve o'clock at night. They had been at Mrs. Cole's house from nine o'clock in the evening and they had indulged in considerable drinking. The chauffeur was in Mrs. Cole's house prior to eleven o'clock and remained there until they started their drive just after twelve o'clock. Repair work had just been completed at about the middle of the viaduct on the south side, and this was guarded by a barrier that was properly lighted with five lights. There is no ground for finding negligence on the part of the city: see *Stuart* v. *Moore* (1927), 39 B.C. 237; Beven on Negligence, 4th Ed., 559; Roberts & Gibb on Collisions on Land, 2nd Ed., 71; *Templeman* v. *Haydon* (1852), 12 C.B. 507. As to rules to be applied on hearing appeals on questions of fact see *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213 at p. 230; *Toll* v. *Canadian Pacific R.W. Co.* (1908), 1 Alta. L.R. 318; *Hart* v. *The Lancashire and Yorkshire Railway Company* (1869), 21 L.T. 261. The Court itself is in a better position to say whether the barrier was a sufficient warning: see Phipson on Evidence, 7th Ed., pp. 373 and 379-80; *Crafter* v. *Metropolitan Railway Co.* (1866), L.R. 1 C.P. 300; *Joseph Crosfield and Sons (Limited)* v. *Techno-Chemical Laboratories (Limited)* (1913), 29 T.L.R. 378; Halsbury's Laws of England, Vol. 13, p. 480. All their witnesses saw the lights on the barrier. It follows that if he had used proper care there would have been no accident: see Beven on Negligence, 4th Ed., p. 126; Roberts & Gibb on Collisions on Land, 2nd Ed., p. 9; Barron on Motor-vehicles, Supplement, pp. 514-5. As to the excuse that he thought these lights were tail-lights of other motors see *Goudy* v. *Mercer* (1924), 34 B.C. 103; *Webber* v. *Weary* (1924), 57 N.S.R. 502. As to jury arrogating to themselves functions they are not entitled to see *Baltimore & Ohio Railroad Company* v. *Goodman* (1927), 275 U.S. 66 at p. 70; Halsbury's Laws of England, Vol. 21, p. 362. The parapet at the side is solely for the protection of pedestrians, and was not contemplated to protect vehicular traffic; it would be impossible to have it of such

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strength that it would stop an automobile travelling at a high speed: see Beven on Negligence, 4th Ed., Vol. 2, p. 1180; *Fafard* v. *City of Quebec* (1917), 39 D.L.R. 717 at p. 718. He must use due care driving on a bridge: see *Cotton* v. *Wood* (1870), 8 C.B. (N.S.) 568 at p. 573; *Cooke* v. *Waring* (1863), 2 H. & C. 332 at p. 338. Affirmative evidence as to the lights should be accepted: see *Alyea* v. *Canadian National Railway Co.* (1925), 57 O.L.R. 665 at pp. 667-8; *Lefeunteum* v. *Beaudoin* (1897), 28 S.C.R. 89 at pp. 93-4. As to the city's duty to avoid setting traps see *Albion Motor Express* v. *City of New Westminster* (1918), 25 B.C. 379; *King* v. *Municipal District of Riley* (1925) 2 D.L.R. 218; *Macdonald* v. *Township of Yarmouth* (1898) 29 Ont. 259 at p. 263; *Wise* v. *Toronto Transportation Commission* (1928), 62 O.L.R. 120. Assuming negligence on the part of the city the verdict cannot be supported as the driver of the car was negligent in two respects: (1) Not keeping a proper look-out; (2) not keeping his car under control: see *Johnson* v. *Giffen* (1921), 18 Alta. L.R. 312; Barron on Motor-vehicles, p. 385; C.J., Vol. 42, pp. 910 and 1135; *Stanley* v. *National Fruit Co. Ltd.* (1931) S.C.R. 60; *Vancouver Ice and Cold Storage Co.* v. *B.C. Electric Ry. Co.* (1927), 38 B.C. 234; *McGinitie* v. *Goudreau* (1921) 59 D.L.R. 552 at p. 554; *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at p. 144; *McLaughlin* v. *Long* (1927), S.C.R. 303 at p. 310; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263; *Butterfield* v. *Forrester* (1809), 11 East 60; *Davies* v. *Mann* (1842), 10 M. & W. 546; *Swadling* v. *Cooper* (1931), A.C. 1; *Skidmore* v. *B.C. Electric Ry. Co.* (1922), 31 B.C. 282; *Jones* v. *Toronto and York Radial R.W. Co.* (1911), 25 O.L.R. 158 at p. 162; *McCarthy* v. *The King* (1921), 62 S.C.R. 40; *Barry* v. *Winnipeg Electric Co.* (1926), 36 Man. L.R. 27; *Turner* v. *Cantone* (1929), 41 B.C. 514. The verdict was unreasonable: see *Hood* v. *Eden* (1905), 36 S.C.R. 476 at pp. 483-4. The chauffeur was not licensed: see *Walker* v. *B.C. Electric Ry. Co.* (1926), 36 B.C. 338; *Hart* v. *Cooper* (1920), 46 O.L.R. 565 at p. 572; *Sercombe* v. *Township of Vaughan* (1919), 45 O.L.R. 142 at p. 143; *James* v. *City of Toronto* (1925), 57 O.L.R. 322 at pp. 324-5; *Martin* v. *Ralph* (1921),

54 N.S.R. 277 at p. 282; *Sampson* v. *Robertson* (1924), 57 N.S.R. 498 at p. 501; *Etter* v. *City of Saskatoon* (1917), 39 D.L.R. 1 at p. 3; *Waldron* v. *Rural Municipality of Elfros* (1923), 17 Sask. L.R. 152 at p. 155; Barron on Motor-vehicles, p. 174; *Roe* v. *Township of Wellesley* (1918), 43 O.L.R. 214; *Anderson* v. *County of Bruce* (1922), 22 O.W.N. 534; *Goodison Thresher Co.* v. *Township of McNab* (1910), 44 S.C.R. 187 at pp. 190-3; *Cobb* v. *Cumberland County Power & Light Co.* (1918), 104 Atl. 844; *City of La Junta* v. *Dudley* (1927), 260 Pac. 96. Lack of a licence is a statutory neglect and amounts to contributory negligence: see *Smith* v. *City of Welland* (1921), 50 O.L.R. 252 at p. 257; *Acorn* v. *MacDonald* (1929), 3 D.L.R. 173 at p. 181; Barron on Motor-vehicles, Supplement, p. 607. The damages given in this case are grossly excessive.

J. W. deB. Farris, K.C., for respondent: This is an appeal from the findings of fact by a jury: see *Stuart* v. *Moore* (1927), 39 B.C. 237; *Toronto Railway* v. *King* (1908), A.C. 260 at p. 269. There was a special jury in this case. On the evidence as to the speed of Burchill's car see *Boyer* v. *Moillet* (1921), 30 B.C. 216 at p. 219; *Perrin* v. *Vancouver Drive Yourself Auto Livery, ib.* 241; *Hall* v. *Toronto Guelph Express Co.* (1929), 1 D.L.R. 375 at p. 378. Where a driver is on the causeway where it is wide and clear without intersections he may reasonably go faster than on the ordinary road. As to the city's negligence, first, the system of lights on the barrier was inadequate, there being only one light there at the time of the accident; secondly, the lights were smoky and dim; and thirdly, the lights were so placed that instead of being a warning they looked like tail-lights on other cars.

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McCrossan, in reply: On the measure of damages see *Lodge Holes Colliery Co. Lim.* v. *Wednesbury Corporation* (1908), 77 L.J., K.B. 847 at p. 849. That the verdict was perverse see *Jones* v. *Spencer* (1898), 77 L.T. 536 at p. 538; *The Metropolitan Railway Company* v. *Wright* (1886), 11 App. Cas. 152; *Toronto Railway Company* v. *King* (1908), A.C. 260 at p. 269. The verdict was not reasonable: see *The Canadian Pacific Railway Company* v. *Smith* (1921), 62 S.C.R. 134 at p. 135; *Monrufet* v. *British Columbia Electric Railway Company,*

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Limited (1913), 18 B.C. 91. He must have his car under control: see *MacGill* v. *Holmes* (1927) 39 B.C. 65. As to lack of licence see *Bensley* v. *Bignold* (1822), 5 B. & Ad. 335 at pp. 339-41; *The Grand Trunk Railway Company of Canada* v. *Anderson* (1898), 28 S.C.R. 541 at p. 550; *Robert Addie & Sons* v. *Dumbreck* (1929), A.C. 358; *Halpin* v. *Grant Smith and Company* (1920), 2 W.W.R. 753. As to upsetting the jury in certain cases see *Zellinsky* v. *Rant* (1926), 37 B.C. 119 at p. 122.

Cur. adv. vult.

5th February, 1932.

MACDONALD, C.J.B.C.: Among other grounds of defence counsel for the appellant contended that because the deceased had not obtained a driver's licence as provided for by the Motor-vehicles Act he had no right to be on the viaduct or bridge in question which was a public highway and was a trespasser as to whom the appellant owed no duty to take care. I cannot agree. This Court decided in *Boyer* v. *Moillet* (1921), 30 B.C. 216 that that Act does not impose civil liability upon persons who commit breaches of its provisions so that as to this case it is as if that Act had never been passed. The failure of the deceased to obtain and have a driver's licence cannot affect his civil right to use the street. He was therefore not a trespasser and this ground of defence, I think, must fail.

MACDONALD, C.J.B.C.

The decision of the appeal in my opinion depends upon the evidence of negligence. The appellant was bound to give sufficient notice to those lawfully using the viaduct of the barriers which it placed there pending repairs. It says it did this. The jury in effect says it did not. There is evidence *pro* and *con* of a considerable body of witnesses on this point and the jury has decided it in respondent's favour. The respondent had the right of trial by jury and if this Court were to decide upon the facts in favour of the appellant according to our own view of them we should deprive respondent of his right. The rule is well established and this case is too clearly within it to enable me to say that the jury was wrong. Like reasons prevent us from saying that there was negligence on the part of the deceased.

In automobile accident cases, both civil and criminal, I cannot

but think that juries are a very unsatisfactory tribunal to decide the facts but that is for the Legislature, not for the Court.

I would dismiss the appeal.

MARTIN, J.A.: Several questions are raised in this important appeal from the judgment of Chief Justice MORRISON, with a jury, awarding $20,000 damages, under the Families' Compensation Act, Cap. 85, R.S.B.C. 1924, to the wife and two children of the deceased who was killed shortly after midnight on the 15th of March, 1931, while driving his motor-car for hire, carrying five passengers, on the Georgia Street viaduct in the City of Vancouver owing to the car having skidded and crashed through the parapet and fallen to the ground below. It is alleged that this sad disaster was caused by the negligence of the defendant in the course of making repairs to the viaduct, which is one of the main thoroughfares under its control, and virtual, at least, ownership in that, mainly, the barrier erected at the place where the repairs were being made was dangerous in its position and lack of lights.

The defendant denied all acts of negligence and charged that the accident was wholly occasioned by the deceased's own negligence in driving at an excessive speed and without proper control of his car and in failing to keep a proper look-out, and its counsel submitted that the adverse verdict of the jury was perverse in that it was not one which they could reasonably find on the evidence before them. If that be the proper view to take of the evidence the verdict must be set aside in accordance with the long established practice of this Court, founded on a long line of authorities, as Viscount Dunedin said very recently in the House of Lords in *Fardon* v. *Harcourt-Rivington* (1932), 48 T.L.R. 215, *viz.*:

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> Now on the case a great deal was said about the respective provinces of judge and jury, but it has been settled beyond the possibility of recall that, if in the opinion of the Court there is no evidence on which the jury should reasonably have come to the conclusion to which it did come, the verdict must be set aside.

Applying this test to the facts before us and after a careful consideration of them I find myself driven to the conclusion, though not without hesitation, that there was evidence on which the jury could reasonably find that there was negligence on the

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part of the defendant of insufficient lighting; but I have no doubt that they could not reasonably free the deceased from the said charges of contributory negligence because it is, to me at least, apparent from the evidence of the plaintiff's own witnesses that it is established beyond all reasonable doubt that his death was substantially brought about by such negligence on his part.

It is noteworthy that all of the many witnesses driving across the viaduct, called by the plaintiff to establish the defendant's negligent erection and lighting of the barrier, were yet able to avoid any damage therefrom by the exercise of those proper and necessary precautions of moderate speed, proper look-out, and due control which were obviously neglected by the deceased. It is very probable that one explanation of the disaster is to be found in the fact that Cawley, a taxi-driver, who knew the deceased and his car, testifies that it was "much harder than mine to handle or drive" with "two-wheel brakes and large wheels" and "high off the ground and . . . top-heavy, and usually if you touch the brakes on those cars they skid right away." With such a car it is manifest that, under the conditions of poor visibility and drizzly rain existing herein, it was inviting destruction to cross the viaduct without taking due precautions to meet such conditions.

MARTIN, J.A.

It is a strange thing, but many of the witnesses seem to have entirely excluded from their observation or consideration the fact that repairs might have to be made on the viaduct as on any other street, and to have assumed that all red lights must be tail lights of motor-cars. In my opinion the deceased could, beyond all reasonable doubt, have avoided this accident had he taken said reasonable precautions.

In conclusion I feel it my duty to express my regret that in such a difficult and complicated case the ordinary proper course of submitting questions to the jury was not followed by the learned trial judge, with the inevitable result that the hearing of the appeal was greatly prolonged before us with consequent increased expense, and the difficulty of reaching a correct conclusion greatly enhanced. On this important point, I refer to our recent observations in *Gordon* v. *The Canadian Bank of*

Commerce (1931), 44 B.C. 213, 238; 3 W.W.R. 185, 375, and also cite the very apt judgment of the Supreme Court of Canada in *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362, at pp. 372-3:

> If questions are answered by a jury many difficulties are avoided and the jury's attention would be directed to the points at issue. In case of a new trial I would suggest that, particularly in actions of negligence, it is well for a trial judge to get from a jury, by questions to be answered, the grounds specifically upon which they find negligence. Lord Coleridge in the case of *Pritchard* v. *Lang* [(1889)], 5 T.L.R. 639 at p. 640, uses some strong expressions in reference to this subject, in fact saying that in pursuing the course of not asking the jury to put the specific ground upon which they found negligence was calculated to mislead them and to defeat justice.

This appeal should, in my opinion, be allowed and the action dismissed.

McPHILLIPS, J.A.: This appeal is one from the decision of the learned Chief Justice of the Supreme Court sitting with a jury in a negligence action brought by the widow of one Burchill, a taxi-driver, for the benefit of herself and two infant children, the husband having been killed consequent upon the motor-car crashing through the cement railing upon the viaduct situate on Georgia Street in the City of Vancouver, the viaduct connecting the east and west sections of the City of Vancouver. The viaduct is in what may be termed the central part of the City of Vancouver and it is a modern structure built of cement with a wide roadway, sidewalks for pedestrians and a railing on each side well lighted by standard lights. The accident took place at 12.30 a.m. Burchill had been employed by a party of people to drive them about. It may be said that it was a party bent upon having an enjoyable evening and might in the end be said to be a party on a "frolic," spending some time at a residence on the west side, then at this late hour, deciding to cross the viaduct and proceed to some road-house or place of entertainment. There was evidence that alcoholic beverages had been partaken of and the lady sitting in the front seat of the motor-car with Burchill had been taken ill. Nevertheless the whole party were bent upon prolonging the evening's festivities. The Corporation of the City of Vancouver were repairing the viaduct some little

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distance towards the centre thereof and had placed a barrier up with lighted lanterns to warn anyone crossing the viaduct—it was on the southern side of the viaduct—but leaving some 35 feet of a clear roadway to the north. In my opinion, weighing all the evidence, the barrier was good and sufficient and ample warning to anyone driving a motor-car and should have been known and seen by Burchill. Yet, strange to say, notwithstanding all this proper and sufficient warning, Burchill drives on to the viaduct at an excessive speed, apparently at the last moment sees the barrier, then swerves his car to the left (north), passes the barrier, then attempts to straighten up but has been going at such an excessive speed that his car skids and tears backwards, mounts the sidewalk and crashes through the cement barrier and falls to the ground below and several fatalities take place, Burchill, the taxi-driver, being one of the number. Burchill in approaching the viaduct passed other cars and the drivers of these other cars had no difficulty in seeing the barrier and apprising themselves of the situation of things and hundreds of cars passed over the viaduct and met with no difficulty or mishap. The truth of the matter is that the accident was due and due solely, in my opinion, to the reckless conduct of Burchill. This is established to the clearest demonstration of anyone who acquaints himself with the facts. No doubt the case was one that aroused sympathy for the widow and the infant children, yet it cannot be allowed that where the facts are so overwhelming—evidencing reprehensible negligence and disregard of all proper barriers and warning—that a jury should be admitted to find negligence which is the present case. I do not propose to go through the evidence in detail, the appeal was long and ably argued by the learned counsel upon both sides and the evidence carefully scanned and giving the closest attention to all the evidence adduced I cannot persuade myself that the happening was other than due to reckless conduct of the most censurable kind. The excessive speed was the proximate cause of the accident—this is well borne out by the action of the motor-car. The speed generated was such that passing the barrier, in the attempt to bring it back to the straight way—with a width of over 35 feet to operate on—the car skids and is propelled backwards,

crashes through the cement barrier and falls some 40 to 50 feet below.

I am of the opinion that upon the whole case the very apposite language of the Chief Justice of Canada (Anglin, C.J.C.) used in *Sale* v. *East Kootenay Power Co.* (1931), 4 D.L.R. 593 at p. 595 is a fitting and proper description of what occurred in the present case:

> On the whole case, therefore, we are of opinion that primary negligence on the part of the defendants has not been proved; but that, on the contrary, the evidence does disclose negligence amounting to recklessness, on the part of the plaintiff [here the deceased taxi-driver Burchill] himself, as the sole cause of the accident which cost him so dearly.

This is a signal case of perverseness upon the part of the jury and, in my opinion, the verdict of the jury should not be allowed to stand. With respect to the law the latest authoritative case in the House of Lords is *Swadling* v. *Cooper* (1931), A.C. 1. At p. 9 Viscount Hailsham said:

> In *Butterfield* v. *Forrester* [(1809)], 11 East 60 the defendant had erected an obstruction in the highway and the plaintiff rode against it and was hurt, and Bayley, J. directed the jury that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without ordinary care, they should find a verdict for the defendant, and this direction was upheld.

MCPHILLIPS, J.A.

Even in this case, were it to be conceded that there was any negligence upon the part of the corporation, there would not and could not be on the facts of the present case judgment for the plaintiff (respondent) and I would call attention in this connection to what Viscount Hailsham further said at pp. 9-10:

> Parke, B. quotes and affirms his own previous statement of the law in *Bridge* v. *Grand Junction Railway Co.* [(1838)], 3 M. & W. 244, 248, in these terms: "The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* [(1809)], 11 East, 60: and that rule is, that, although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong."

Upon the whole case and in the light of the authorities I am impelled and forced to the conclusion that the jury were perverse in their finding of negligence against the defendant (appellant) which in effect is the result of the general verdict for the plaintiff. It follows that, in my opinion, the appeal must be allowed and the action dismissed.

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MACDONALD, J.A.: The respondent, administratrix of the estate of S. E. Burchill, deceased, recovered from a jury $20,000 damages against the City of Vancouver (appellant) for the death of her husband. He (a taxi-driver) was killed along with three passengers while driving his car easterly over the Georgia Street viaduct in Vancouver shortly after midnight on March 15th, 1931. Appellant some time before, repaired the south side of the roadway and to protect the repairs and to warn motorists and others, erected a barrier around it. One travelling easterly had to swerve to the left to pass the barrier. The width of the roadway at the barricade was 53 feet from curb to curb. The barricade was about 12 feet long; 4 feet 3 inches above the pavement and extended approximately from the curb on the south side of the road to the southerly rail of two street-car tracks in the centre of the roadway, leaving about 36 feet between it and the curb on the north side. Looking eastward a barrel was placed about 30 feet beyond the barrier extending a little further out to the north. Four red lights were placed on the barrier and one on the barrel, each of them a short distance only from the deck of the bridge. The lights on the barrier were 4 feet apart and 3 feet above the deck and, if burning, should plainly reveal the obstruction throughout its entire length. Whether or not they were all burning at the time of the accident is important. At nine o'clock, before the accident, the barricade was knocked down by a cyclist and two of the lights extinguished. They were replaced by appellant's bridge superintendent. No one was placed there after this incident (nor at any time) to see that a similar occurrence did not take place, or to relight lamps if extinguished because of any mishap. Appellant relied, I think without warrant, on the public and on night-workmen engaged generally on city streets to report to the proper official anything requiring attention.

The bridge superintendent gave this evidence:

> There are often complaints; that is in regard to lights being knocked down, we always hear complaints about that.

He revisited the scene the following morning after the accident and found the barrier as left the night before with the exception that one of the lights might have been out. A police official was at the scene of the tragedy shortly after the accident,

and, I think, remained there until morning. He was not called. He might have testified, as to whether or not all lights were burning immediately after the accident because the barrier was not disturbed. The viaduct was illuminated by standard cluster lights on each side, spaced from 80 feet to 100 feet apart. Half of them (in alternate numbers) were turned off at midnight. Near the barricade the standard light on the north side would be burning all night.

Deceased, crossing the viaduct from the west, with five passengers, evidently did not notice the barrier in time and, in attempting to avoid it, his car, after passing it, first skidded and then climbed the curb, and broke through the parapet and fell a great distance to the ravine below.

I will first consider a point in the appeal that affords some ground for controversy, *viz.*, that appellant is not liable because the deceased Burchill was using the streets unlawfully, inasmuch as he had not a driver's licence as required by a city by-law and did not obtain a permit as a chauffeur from the chief of police as required by the Motor-vehicles Act. He was, therefore, it was submitted, a trespasser on the streets, illegally driving a car for hire, and appellant owed to him no duty except to refrain from setting a trap or from doing him malicious or wilful injury.

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This Court held in *Walker* v. *B.C. Electric Ry. Co.* (1926), 36 B.C. 338 that the failure of the owner and driver of a car to possess a licence did not prevent him from recovering damages against a negligent defendant. In *Boyer* v. *Moillet* (1921), 30 B.C. 216 it was also held that statutory prohibitions in the Act were of a penal nature, passed for the protection of the public and to punish offenders, and did not affect civil rights. The case at Bar is different and other considerations arise. Respondent's claim is not against another negligent driver but against the owner of the highway.

Section 2 of the Motor-vehicles Act, B.C. Stats. 1930, Cap. 47 provides that:

> No chauffeur shall within any municipality drive, operate, or be in charge of a motor-vehicle carrying passengers for hire unless he is the holder of a permit therefor issued to him by the chief of police of the municipality.

I note, for future reference, that the prohibition is not

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against using the highway (unless inferentially) but against driving or operating a car without a permit. The permit must be obtained from the chief of police with a right of appeal to the council in case of refusal. The city by-law provides (without quoting it fully) that no person shall carry on, or operate a car in his trade as a taxi-driver, unless and until he has procured a licence so to do. Applicants for licences must apply to the inspector, who before issuing it, ascertains if the applicant is a fit and proper person to hold a licence. It is submitted therefore that the deceased, by plying his trade without a licence, could not impose a duty on appellant to take care, save in the exceptional cases referred to, whatever duty might rest upon an individual in respect to him or to others. Appellant's duty, as owner of the highway, is, it is submitted, limited to those lawfully using it and akin to that of an owner of property to those who come upon it.

The other view is that, although deceased was liable to prosecution and punishment that did not relieve the appellant from the duty to take care and the Courts cannot add to the penalty imposed by the Act by depriving him of civil rights. The breach of a by-law or of the statute had, it was urged, nothing to do with the accident, and in that event only is material.

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The cases are conflicting. In *Sercombe* v. *Township of Vaughan* (1919), 45 O.L.R. 142 the plaintiff failed in an action against the municipality for damages to his truck, caused by crashing through a bridge because he operated a truck 96 inches in width in contravention of a statute providing that "no vehicle shall have a greater width than 90 inches." It was held that "the plaintiff had no right to have such a vehicle on the highway at all and that he was a trespasser." If the accident occurred because of the extra width of the vehicle no difficulty would arise. This consideration however was regarded as without signification. I assume the decision would be the same if the prohibition was against the use of a truck without a licence.

In *Etter* v. *City of Saskatoon* (1917), 39 D.L.R. 1 (again an action against a municipal corporation) the driver of a motor-car, who in breach of the Act, operated his car without having displayed thereon his number plate was held not entitled to

damages arising from a collision with a hidden obstruction on the highway. Earth used in filling an excavation in the street extended above the surface to provide for the settling process that would follow. It was covered with snow and the plaintiff, mistaking it for snow, drove into it damaging his car.

The Saskatchewan Act provided that:

> No motor-vehicle shall be used or operated upon any highway, which shall not have been registered under this Act, or which shall not display thereon the number plate as prescribed by this Act.

It was held by Brown, J. (concurred in by Haultain, C.J. and Lamont, J.) that as the plaintiff was prohibited by statute from operating his car at the time of the accident "he was therefore operating it illegally, and the defendants owed him no other duty than not to wilfully or maliciously injure" (p. 3). In *James* v. *City of Toronto* (1925), 57 O.L.R. 322 Middleton, J.A. at pp. 324-5, after discussing *Godfrey* v. *Cooper* (1920), 46 O.L.R. 565, and pointing out the different considerations that apply in an action against a municipality arising out of non-repair, as compared with the rights and obligations of two persons using the highway, said:

> In such case the plaintiff can only succeed if he shews that the defendant owed a duty to him, and he fails when it appears that by reason of some fact he is not lawfully upon the highway, the obligation to repair the highway being an obligation to those lawfully upon it. I adhere to this view, but it carries the matter no further: the question yet remains whether the fact that the car was driven by an unlicensed chauffeur makes its presence upon the highway unlawful.

The action we are considering is not based upon non-repair of a highway. Is an act of misfeasance in negligently permitting an obstruction to remain on the highway; or, if allowed to remain, leaving it unguarded by warning signs, actionable at the suit of an unlicensed chauffeur? The only distinction that can be drawn between the *Etter* case, *supra*, and the case at Bar (and it is important) is that the section in the Saskatchewan Act is more stringent—"No vehicle shall be used upon any public highway," etc.

The Saskatchewan Court of Appeal in a later case where another section of the Motor-vehicle Act was in question reached a different conclusion on other grounds and the reasons advanced are of interest. I refer to *Waldron* v. *Rural Municipality of*

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Elfros (1923), 17 Sask. L.R. 152. The section of the Act considered provided that:

> 25. Every motor vehicle, . . . shall, while in operation on the public highway [at night] (*a*) carry on the front at least two lighted lamps, . . . and (*b*) . . . at the rear a lighted lamp exhibiting one red light . . .

The plaintiff did not comply with this requirement and it was held that he was entitled to recover because of the failure to keep the highway in repair. This section did not provide that a motor-vehicle without lights should not be used or operated upon a public highway and because of that difference it was held that the plaintiff was not unlawfully upon the highway. Section 2 (7) of our Act (B.C. Stats. 1930, Cap. 47) does not prohibit unlicensed chauffeurs from using the highway. The words are:

> No chauffeur shall . . . drive, operate, or be in charge of, etc.

The word "drive" of course must mean to "drive" somewhere but not necessarily upon a highway. The words "drive" and "operate" are used in relation to the car—"drive, operate, or be in charge of a motor-vehicle." Mr. Justice Lamont, at p. 155, said:

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> The point we have therefore to determine is: Did Waldron's failure to carry the lights required by sec. 25, although such failure did not in any way contribute to the accident, make him unlawfully upon the highway? The answer to this question depends upon the intention of the Legislature in enacting the section. That intention is to be ascertained from the language used considered in the light of the nature and scope of the enactment. Apart from the statute, Waldron had a right to travel upon the public highway at night with his automobile without any lights. That right can only be denied him if the statute, either expressly or by necessary implication, has taken it away. The statutory restrictions, being in derogation of Waldron's common-law right to use the highway, are to be construed strictly against the defendants. *In re Cuno; Mansfield* v. *Mansfield* (1889), 43 Ch. D. 12 at p. 17, 62 L.T. 15, Bowen, L.J. said: "In the construction of statutes, you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the Legislature."
>
> A perusal of the statute satisfies me that the main purpose of the Act was two-fold: (1) To prevent the operation upon the highway of a motor-vehicle unless the same had been registered (including payment of fees) and carries and displays the distinctive number plate provided by the Act; and (2) To protect travellers upon the highway by requiring the observance on the part of owners and drivers of such vehicles of certain provisions calculated to guard against or lessen the dangers incident to the use of motor-vehicles upon the highway.

He then refers to other sections of the statute and as to section 6 thereof, reading as follows:

(1) No motor-vehicle which has not been registered or which does not carry and display the distinctive number plate furnished by the Provincial Secretary, shall be operated upon a public highway.

says at p. 156:

The language used in sec. 6 indicates a clear intention on the part of the Legislature to make the complying with the requirements of that section conditions precedent to the right to operate a motor-vehicle on the highway at all. Operating such vehicle without first complying with the section would, therefore, be unlawful, as was held in *Etter* v. *City of Saskatoon*, *supra*.

Then contrasting it with section 25, *supra*, he says:

In sec. 25 the Legislature did not employ the same language. It directed the carrying of lighted lamps at night, but it did not say that the vehicle should not be operated in the absence of lights. The Legislature not having expressly made the carrying of lighted lamps a condition precedent to the operation of a motor-vehicle at night, is such an intention necessarily implied? The fact that we do not find in sec. 25 language which expressly makes a compliance with the requirements of the section a condition precedent to the right to operate a motor-vehicle on the highway, as we find in sec. 6, is, in my opinion, some evidence of a different legislative intention. Further, sec. 25 clearly contemplates that motor-vehicles will be operated on the highway at night. In Maxwell on Statutes, 6th Ed., 649, I find the following:

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience; but the question is in the main governed by considerations of convenience and justice."

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It is a matter of construing the language used and ascertaining the intention of the Legislature. Civil rights may be taken away if it was so intended. The viewpoint stated by Mr. Justice Lamont does not apply so readily to sec. 2 (1) of our Act. Our Act is worded differently and the question of public safety is involved. The balance of the section (not quoted) and other sections in our Act makes that clear. A driver likely to endanger the public safety by carelessness, addiction to drink, etc., might be denied a licence; in other words, as suggested, be refused permission to use the highway to ply his trade. But the pertinent inquiry is, did the Legislature intend to drive unlicensed chauffeurs off the streets and to treat them as tres-

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passers if they ventured upon it? The section, *e.g.*, relating to excessive speed, as it stood before amendment (R.S.B.C. 1924, Cap. 177, Sec. 12) reads:

> No person shall drive or operate a motor-vehicle upon any highway within any city, . . . at a greater rate of speed than 15 miles per hour, etc.

It was enacted for the public safety yet it would be difficult to say that, when in force a driver became a trespasser, or an outlaw on the highway the moment his speed limit changed from 15 to 20 miles an hour. These considerations are indicative of legislative intention. The public safety is not alone insured by treating the unlicensed driver as a trespasser. It is insured by supervision, cancellation of licences and by the examination of applicants.

Goodison Thresher Co. v. *Township of McNab* (1910), 44 S.C.R. 187 does not assist appellant. The section of the Act considered was conclusive. The words were "before crossing any such bridge it shall be the duty of the driver," etc., to take certain precautions, *viz.*, to lay down planks. A preceding section provided that "before it shall be lawful to run such engines over" the bridge "it shall be the duty of the person" doing so, to do certain things. It would only assist if our Act read: "Before entering upon the highway . . . , a licence . . . must be procured." Further, as stated by Mr. Justice Duff at p. 194, "the mishap was caused by the failure of the plaintiff's servants to perform the conditions under which alone they were entitled to take the engine upon the bridge." The damage was consequent upon the failure to comply with the Act. The damage, in the case at Bar, was not caused by the absence of a permit. True Duff, J. says, at p. 195, "the sections present an inviting field for controversy." That controversy was avoided by the facts and the wording of the Act.

One may be lawfully on the highway and be guilty of an unlawful act while upon it. All are entitled to use the King's highway. But restrictions may be imposed on the user. If a statute provided that no one should drive upon a highway with a vehicle more than 8 feet in width with appropriate penalties for the breach an offender would not be a trespasser. He would be lawfully on the highway although guilty of an offence. If,

of course, an accident occurs, traceable to the breach, he would be guilty of negligence.

Halpin v. *Grant Smith & Co.* (1920), 2 W.W.R. 753 supports the view I have outlined. There the plaintiff failed to comply with the provisions of The Motor Vehicle Act of Alberta (1911-12, Cap. 6) by failing to register. Section 17 thereof provided that:

> No person shall operate a motor-vehicle upon a public highway after this Act takes effect, unless such person shall have complied in all respects with the requirements of this Act.

This section is quite as explicit (no person shall operate upon a highway) as the section considered in *Etter* v. *Saskatoon, supra.* There is I think no difference between the position of the defendant in this case—a contractor on irrigation works constructed under statutory authority—and the appellant in the case at Bar. The judgment of the late Mr. Justice Beck is of assistance in this inquiry. He points out the many restrictions imposed on owners of cars—common to all motor-vehicle Acts—and that penalties are recoverable for a breach. They are, he states, "police regulations" contained in the statute itself. That is one element in construing the Act although other rules of construction may be applied in deciding whether or not a civil right has been taken away when the breach of the statute is in no way connected with the accident. He further states (p. 756):

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> The breach of any such provisions is of course not a criminal offence; crimes can be created only by Dominion legislation passed for that purpose.

The breach of the provisions of a Provincial Act is a crime (*Chung Chuck* v. *The King* (1930), A.C. 244). "A part of the criminal law," it was said by the Judicial Committee, at p. 254, "was within the competence of the Provincial Legislature" and p. 257 "their Lordships think it is a criminal matter" and p. 258 "leave to appeal in a criminal case" would not be given. Are his civil rights thereby affected? I think not. We need not consider the question of a trap because I do not think the barrier was a trap. He had a right to use the highway and was not a trespasser. No civil rights were lost because he might be guilty of a criminal offence.

Returning to *Halpin* v. *Grant Smith & Co., supra,* Beck, J. goes on to say at p. 756:

> Now it is contended on behalf of the defence that inasmuch as the

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plaintiff was at the time of the accident in the state of guiltiness of a breach of one of these police regulations, *i.e.*, was not registered, he is thereby prevented from recovering damages arising from the default of the defendant, that default being mere negligence although the plaintiff's breach of the particular police regulation in no way contributed to the accident. The argument is that the plaintiff in such circumstances is a "trespasser" and that, to quote the law as laid down, *e.g.*, in Halsbury, Vol. 21, tit. "Negligence," p. 394, "the occupier of premises owes no duty to persons who come upon them as trespassers" or in 29 Cyc., tit. "Negligence" p. 442, "The general rule is that no duty exists towards trespassers, except that of refraining from wantonly or wilfully injuring them. But is such a person a "trespasser" within the sense of the decisions upon which this proposition of law is founded?

The deceased was not a trespasser, in the sense that denotes outlawry in which case he could only complain of traps or malicious injury. He was merely careless in failing to obtain a licence and to make a new application for a permit. There is no suggestion that he was denied a licence and operated his car despite a refusal to grant one. At p. 757 Beck, J. quotes comments of Lord Halsbury on the decision in *Lowery* v. *Walker* (1911), A.C. 10 referred to in the report where the word "trespass" was used in a misleading way.

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The learned judge [said Lord Halsbury] used an ambiguous word. I suppose nine out of ten people would distinguish between a person who was at a place as of right and a person who was there as a mere trespasser. The learned judge did, I think inadvertently, in the first instance use the word "trespasser," which would have carried the learned counsel for the respondent [defendant] all the way he wants to get, to a somewhat difficult and intricate question of law upon which various views may be entertained. But seeing that there was a misapprehension, or might be a misapprehension, in the sense in which he used the word "trespasser" the learned judge himself points out in terms that he does not find, and did not intend to find, —as I think the whole substance of his judgment shews that he did not intend to find,—that the injured man was a trespasser in the sense in which that word is strictly and technically used in law.

The latter observation applies to the position of the deceased chauffeur.

It was submitted on the merits that the verdict of the jury was perverse. I can find, however, no ground for interference. We must assume from the charge (to which no objection was taken) that the finding of the jury was adverse to the appellant on the question of primary, contributory, and ultimate negligence. We cannot say that on any of these points, that there was no evidence to support such a finding. I referred to some features at the

outset, in outlining the facts, from which negligence might be found. The jury might accept, and doubtless did accept, the evidence of the witness Hogg who testified that he drove over the viaduct slowly, with his car under "absolute control" about an hour before the accident. He saw only one light on the barrier. It looked like the tail light of a car. This light, he said, was approximately in the centre on the barrier. "There was no protection out to my left—no red light." That he was able to avoid it, he said "was good luck." "I was driving with great caution but I also had an element of luck." Although this evidence seems to border on advocacy and might be criticized in view of the fact that all the standard cluster lights on the viaduct were burning yet the jury might accept it and I am not suggesting that they should not do so. I am only surprised at the difficulty encountered in view of the illumination and the many cars that passed safely by the barrier on the night in question. It was however for the jury to decide.

This evidence, as to only one light burning on the barrier, is important. A light should have been maintained at the north end of the barricade because if, as many witnesses testified, this light (or lights) looked like the tail light of another car it would only be necessary to turn out a few feet to pass a car after getting close to it, whereas a larger swerve would be necessary to pass the barrier. It was important therefore that it should be recognized as a barrier before coming too close to it to swerve with safety. A sharp turn at the barrier coupled with an attempt to recover the line of travel when beyond it doubtless caused the deceased's car to skid. These facts, if believed, might satisfy the jury that the deceased could not, by exercising ordinary care, have avoided the accident. I have already indicated the failure of the deceased to procure a permit could not be a factor on the question of contributory negligence. There was evidence too that he was driving carefully and not at an excessive speed. He was compelled through, as the jury must have found, no fault of his own, to swerve at an angle so sharp that when trying to get back to the right, or even before that effort was necessary, his car got beyond control through skidding. The emergency was not created by him but by the barrier not properly illuminated.

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Appellant's counsel also referred to section 5, subsection (2) of the Motor-vehicle Act Amendment Act, 1924, providing that any person upon any highway in a city driving at a greater speed than 20 miles an hour shall *prima facie* be deemed to be driving or operating the motor-vehicle in other than a careful and prudent manner.

It may be established by rebuttal evidence that notwithstanding a greater speed he was driving carefully in view of all the facts. A speed limit of twenty miles an hour across this viaduct is, I am sure, seldom observed by motorists. No side roads lead into it. If deceased had lived and was prosecuted for reckless driving (because his speed was 30 miles) his only difficulty in rebutting the presumption of negligence would be the presence of the light or lights ahead. He could without negligence approach the light—believing it to be a tail-light—at 30 miles an hour. When he found the light was stationary—still believing it to be a parked car—he could I think still pass by without negligence at that rate; at all events by slightly decreasing his speed in approaching it. There is no need to reduce speed materially in order to pass a parked car on a wide roadway as the turn required is slight. We must not test this point therefore on the assumption that to his knowledge the barrier was there. The Act recognizes the right to drive at a greater speed than 20 miles an hour but, if questioned, the driver must justify it. We must assume it was justified in this case. If the accident occurred in a busy city street it would not be possible for a jury to exonerate him in travelling 30 miles an hour. I will not examine the evidence further. I studied it carefully in the light of able arguments presented by counsel and upon independent consideration I am satisfied that we cannot interfere with the verdict of the jury.

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I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *J. B. Williams.*
Solicitors for respondent: *Beck & Grimmett.*

LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE v. CRYSTAL DAIRY LIMITED.

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LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE *v.* CRYSTAL DAIRY LTD.

Constitutional law—Dairy Products Sales Adjustment Act—Sales adjustment committee—Powers of—Taxation—Whether direct or indirect—Validity of Act—B.C. Stats. 1929, Cap. 20, Sec. 2; 1931, Cap. 14, Secs. 4 and 9.

The Sales Adjustment Committee appointed under the Dairy Products Sales Adjustment Act were empowered under said Act to compel those dairymen who enjoyed the fluid-milk market to make returns of their sales, and to levy upon the gross product of these sales a sum sufficient to compensate the dairymen who otherwise disposed of their milk at lower prices. Said committee were further empowered to make levies to defray the expenses of the Act. It was held that the imposts so authorized are indirect taxes and the Act is *ultra vires* of the Provincial Legislature.

Held, on appeal, affirming the decision of MURPHY, J. (MACDONALD, J.A. dissenting in part), that the Adjustment Committee was to tax one class and give to another so as to equalize their earnings, and thus prevent congestion of the fluid-milk market and relieve or prevent competition. It appears from the preamble to the Act that the tendency of the levy would be to reduce congestion in the fluid-milk market, and the tendency of that purpose would be to increase the price to the consumer. This is therefore an indirect tax and the Act is *ultra vires* of the Provincial Legislature.

APPEAL by plaintiff from the decision of MURPHY, J. of the 26th of September, 1931 (reported, 44 B.C. 508), in an action for a *mandamus* commanding the defendant as a distributor by section 2 of the Dairy Products Sales Adjustment Act, as amended by 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 during the month of March, 1931, as required by subsection (*c*) of section 9 of said Act, as amended by section 7 of the amending Act of 1931, and for damages. It was held on the trial that the Act in question was *ultra vires* of the Provincial Legislature and the action was dismissed. Statement

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The appeal was argued at Vancouver on the 17th, 18th and 19th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE v. CRYSTAL DAIRY LTD.

Argument

Maitland, K.C. (*McQuarrie, K.C.*, with him), for appellant: For some fifteen years prior to the passing of the Act there was a surplus of milk on the Vancouver market and the surplus was either thrown away or used for manufactured products, *i.e.*, cheese, butter, etc. The powers of the Committee of Adjustment are very limited, they can after investigation make the class getting more than the others, pay over a portion to those getting less. About 25 per cent. of the farmers are on the fluid and 75 per cent. on the receiving end, the fluid market being much the more profitable. The cost of administration is one-twenty-fifth of a cent. per quart. On our general power to pass this legislation see *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *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; *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73; *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211; *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575; *Fairbanks* v. *The City of Halifax* (1926), S.C.R. 349 at p. 365; (1928), A.C. 117; *Cotton* v. *Rex* (1914), A.C. 176; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561; *Rex* v. *Caledonian Collieries Ltd.* (1926), 22 Alta. L.R. 245 at p. 257; (1928), A.C. 358; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357; *In the Matter of Validity of Manitoba Act* (1924), S.C.R. 317. The only man we take a tax from is the man that milks the cow: see *In re Grain Marketing Act, 1931* (1931), 2 W.W.R. 146; *Rex* v. *Ferguson* (1922), 31 B.C. 100.

J. W. deB. Farris, K.C., for respondent: Both the levy and the adjustment are taxes and they are both indirect taxes. The levy for expenses makes the machinery go and this tax being involved and being indirect the Act goes by the board. Both

Lawson v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357 and *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934 apply to this case. That this is a tax see *Canadian Pacific Ry. Co.* v. *Workmen's Compensation Board* (1919), 27 B.C. 194; (1920), A.C. 184. This is in its nature an excise tax.

Maitland, in reply, referred to Cooley on Taxation, 3rd Ed., Vol. 1, p. 6.

Cur. adv. vult.

5th January, 1932.

MACDONALD, C.J.B.C.: The Dairy Products Sales Adjustment Act, Cap. 20, B.C. Stats. 1929, was, I think, as the preamble shews passed for a Provincial purpose, namely, to relieve or prevent congestion of the fluid-milk market and to eliminate loss to dairymen by reason of other disposal of the surplus. With the object of remedying this condition the Act was passed and the Sales Adjustment Committee appointed. Under the authority of its provisions, the Committee was empowered to make adjustments in this way. Speaking generally they were empowered to compel those dairymen who enjoyed the fluid-milk market to make returns of their sales and to levy upon the gross product of these sales a sum sufficient to compensate the dairymen who otherwise disposed of their milk at lower prices so as to bring their respective gross earnings up to the level of those of the first class after the levies thereon. In other words the Adjustment Committee was to tax one class and give to another so as to equalize their earnings and thus prevent the congestion of the fluid-milk market or in other words thus relieve or prevent competition. To take a simple illustration, A, a seller of fluid milk, earns $10,000 on his sales; B, who disposes of a like quantity of his milk otherwise than by sales on the fluid-milk market earns $5,000. The Committee is authorized to make a levy on A of a sum which when paid to B will bring B's earnings up to an equality with A's; thus making the receipts of these several dairymen for the year equal. It was argued that the Committee's powers were merely to adjust between these two parties their earnings and that the compulsory levy upon A is not a tax although made under the authority of the Provincial Legislature

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and that that levy will not tend to increase the price of milk to the consumer because B would have no incentive to compete in the fluid-milk market with A. I think the effect would be the opposite. B, having no incentive to enter the fluid-milk market and A having had taken from him a large percentage of his earnings, by reason of the levy which is made without his consent, would naturally desire to increase the price of milk to the consumer to make up or I think try to make up for his loss. B would necessarily not object to this by coming into the market since there would be an increased production to the fund by A of which B would receive his share. I see no real distinction between the effects of this Act and that of the Workmen's Compensation Act. In the latter there is a Committee authorized to take from the employer money with which to compensate workmen for their injuries. It is argued that the employer gets the benefit because he is relieved from actions for damages for injuries to his workmen, but the vendor of fluid milk gets this benefit unless legislation is to be looked upon as confiscatory. He is relieved from the pressure of competition and the class of dairymen who do not enter the fluid-milk market get a sum to compensate them for refraining to compete with the others. The incentive to pass the levy on to the consumer does not depend upon the amount of the levy which is to cover the Committee's expenses. The levy however is a very substantial one and when a substantial tax is taken from any class of business men the tendency doubtlessly is to induce them to add to the price of their product for the purpose of making up their loss. I think the levy made by the Committee is just as much a tax as the levies made by municipal corporations for the purpose of carrying on their business.

Now are these levies, which are taxes (*Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357) direct or indirect taxes? Levies of the Committee in that case were held to be indirect and the test applied was stated by Lord Haldane at p. 938 of his judgment in the *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934. He said:

> Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test.

And in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, Lord Hobhouse at p. 582 said:

> The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

That language is very applicable here. The Legislature by the preamble has made it apparent that the tendency of the levy would be to reduce congestion in the fluid-milk market and I am satisfied that the tendency of that purpose would be to increase the price to the consumer no matter what the present fact in that respect should be ascertained to be. The fact that milk is selling at present at a lower price than that paid in past years is no test of the tendency of the legislation. Other factors such as economic depression which exists at present probably accounts for the low price of milk at present. As Viscount Haldane said in *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co., supra,* p. 938:

> The question of validity could not be made to impose on the Courts the duty of separating out individual instances in which the tax might operate directly from those to which the general purview of the taxation applies. An exhaustive partition would be an impracticable task.

I do not think that even if the case depended upon the trifling amount of the levy which is applicable to the costs of the Committee that the smallness of that amount would not affect the defendant's claim of *ultra vires.* That is one of the facts which is not within the test. Whatever the fact is at present the tendency to take money from dairymen supplying the fluid-milk market, however small, would be to induce them to pass that expense on to the consumer. A substantial increase in that tax might very well take place in the future. That point is perhaps not important in this case in my view of the substantial tax upon the dairymen who supply the fluid-milk market.

I would, therefore, dismiss the appeal.

MARTIN, J.A. would dismiss the appeal.

GALLIHER, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.: The appeal in this case is from a judg-

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ment of Mr. Justice MURPHY. The learned judge with great care and with considerable elaboration has canvassed the pertinent decisions bearing upon the construction which should be put upon the Dairy Products Sales Adjustment Act which has the general title "An Act for the Relief of Dairy Farmers (B.C. Stats. 1929, Cap. 20; 1930, Cap. 13; 1931, Cap. 14) and the result of his very able analytical examination was that the Act was in its nature the imposition of an indirect tax. I confess that I would have been more satisfied to have come to a contrary conclusion but feel constrained and bound by controlling decisions, decisions which are binding upon this Court. The learned trial judge has dealt with some of them. In *Cotton* v. *Regem* (1913), 83 L.J., P.C. 105 at p. 114 we find Lord Moulton saying:

> "Their Lordships pointed out that the question was not what was direct or indirect taxation according to the classification of political economists, but in what sense the words were employed by the Legislature in the British North America Act. At the same time they took the definition of John Stuart Mill as seeming to them to embody with sufficient accuracy the common understanding of the most obvious *indicia* of direct and indirect taxation which were likely to have been present to the minds of those who passed the Federation Act. The definition referred to is in the following terms: 'A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another such as the excise or customs.' In the present case, as in *Lambe's* case (1887), 56 L.J., P.C. 87; 12 App. Cas. 575, their Lordships think the tax is demanded from the very person whom the Legislature intended or desired should pay it. They do not think there was either an expectation or intention that he should indemnify himself at the expense of some other person." Their Lordships are of opinion that these decisions have established that the meaning to be attributed to the phrase "direct taxation" in section 92 of the British North America Act, 1867, is substantially the definition quoted above from the treatise of John Stuart Mill, and that this question is no longer open to discussion.

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I had occasion in *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.* (1926), 37 B.C. 481 at pp. 500 to 507, to give very careful attention to the question here arising and upon the particular facts of that case was of opinion that the tax was not indirect but direct and therefore within the powers of the Legislature of British Columbia. The case went on appeal to the Privy Council, after an appeal to the Supreme Court of Canada, and the view of their Lordships was that it

was indirect although the fact was that undoubtedly the Railway Company was the entity that would pay the tax and so intended and desired to pay it by the Legislature, with no intention upon the part of the company to dispose of the fuel oil but to consume it in the operation of its undertakings. Upon the appeal their Lordships of the Privy Council held that the tax so provided for was not a direct tax and was invalid applying the test laid down as to what was a direct and what an indirect tax in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561; 94 L.J., P.C. 146. Affirming the decision of the Supreme Court of Canada (1927), S.C.R. 185, Lord Haldane said in the appeal in *Attorney-General of British Columbia* v. *Canadian Pacific Ry.* (1927), 96 L.J., P.C. 149 at pp. 151-2:

It was laid down by the Board that while a direct tax is one that is demanded from the very person who it is intended or desired should pay it, an indirect tax is that which is demanded from one person in the expectation and with the intention that he should indemnify himself at the expense of another, as may be the case with excise and customs. A tax levied, as in that case the tax was, on brokers and agents and factors, as well as on sellers, obviously fell within the definition of indirect taxation. The meaning of the distinction had been settled by the exposition given of it by the political economists, whose broadly phrased definition had been adopted in earlier decisions, such as *Attorney-General for Quebec* v. *Reed* [(1884), 54 L.J., P.C. 12; 10 App. Cas. 141] (Lord Selborne); *Bank of Toronto* v. *Lambe* (Lord Hobhouse); and *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* [(1897), A.C. 231; 66 L.J., P.C. 34] (Lord Herschell). It was true that the question of the meaning of the words used in sections 91 and 92 was one, not of political economy but of law. Still, as Lord Hobhouse pointed out, the legislation must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to these tendencies. The definition given by John Stuart Mill was accordingly taken as a fair basis for testing the character of the tax in question, not as a legal definition, but as embodying with sufficient accuracy an understanding of the most obvious *indicia* of direct and indirect taxation, such as might be presumed to have been in the minds of those who passed the Act of 1867. Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test. The question of validity could not be made to impose on the Courts the duty of separating out individual instances in which the tax might operate directly from those to which the general purview of the taxation applies. An exhaustive partition would be an impracticable task.

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Taking the principle so laid down as the guide to the solution of the present question, the result does not seem doubtful. There are two fuel oil companies which are associated in business in a close fashion. The Union Oil Company of California sells its oil to the Union Company of Canada,

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which has large storage tanks at Vancouver which the former company keeps replenished according to directions from the Canadian company. The respondents purchase oil in British Columbia from the latter company. It is sought to tax them as first purchasers under section 3, and as holders of the oil for consumption under section 6, which has to be read with reference to section 3. It may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to include resale of the oil they have bought. The principle of construction as established is satisfied if this is practicable, and does not for its application depend on the special circumstances of individual cases. Fuel oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one.

Therefore, as pointed out the principle of construction of the statute law "does not for its application depend on the special circumstances of individual cases." Here we have the statute declared a relief measure for the dairy-farmers engaged in the dairy industry and selling milk, a commodity vital to the life and well being of the people and to preserve and foster the industry might well be said to be proper legislation upon the part of the Legislature of the Province of British Columbia and within its legislative powers conferred by the British North America Act and not within the powers of the Legislature of the Dominion of Canada, notably, section 92 of the Act, heads (13) and (16):

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92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:— . . .

(13) Property and civil rights in the Province:

(16) Generally all matters of a merely local or private nature in the Province.

It might perhaps be reasonably said that the impugned legislation here under consideration is within the language of the two classes above quoted and that unless it contravenes the controlling decisions and has a compelling incidence in the light of the decisions that it partakes of indirect taxation; it should be deemed to be *intra vires* legislation. It cannot be said that the question is too clear for argument that the legislation may not be *ultra vires* and as all cases must be decided upon their peculiar facts it is by no means an easy task to determine the exact line of demarcation between the legislative powers of the National and Provincial Legislature, *i.e.*, between the Parlia-

ment of Canada and the Parliament of the Province as conferred by the British North America Act. Under section 91 dealing with the Legislative authority of the Parliament of Canada we have this:

Section 91, head (3):

The raising of money by any mode or system of taxation.

The Provincial powers as to taxation are: Section 92, head (2):

Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

Then it is well to note that at the end of section 91 where the legislative authority of the Parliament of Canada is set forth we find this significant language:

And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects of this Act assigned exclusively to the Legislatures of the Provinces.

This language gives one cause to pause and not be too confident of one's view even where we have the great benefit and advantage of the most erudite decisions of the Privy Council and the Supreme Court of Canada. It is always the duty of the Courts, where possible, to make the constitutional ambit of authority conferred upon each Parliament workable and capable of operation so that all proper and necessary authority may be exercised.

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In a country as large as Canada with the varying conditions existent many matters are of a local and private nature and vital to the community and it is conceivable that we have here legislation which is peculiarly necessary and that there should be legislation such as this challenged Act. The preamble of the Act reads as follows:

Whereas the demand for milk and cream in fluid form is not always equal to the supply, and consequently some dairy-farmers, in order to avoid a congestion of the fluid-milk market, are obliged to market a portion of their milk in the form of manufactured products at world market prices, which prices are much lower than the price obtained for milk in fluid form:

And whereas the whole body of dairy-farmers benefits from the consequent relief of the fluid-milk market:

And whereas it is just and equitable that the result of such sale of milk products be equally distributed over the whole body of dairy-farmers in the district:

Therefore, His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

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Now of course it is not the province of Courts to deal with the policy that actuates the passage of legislation, that is wholly a matter for the Parliaments, yet it is I conceive within the province of the Courts to give the closest and most minute scrutiny to all challenged legislation and only after this is done should legislation solemnly enacted—which Courts must assume is in the way of forwarding public policy—be declared to be *ultra vires* legislation especially where as in Canada the whole ambit of authority is distributed between the Parliament of Canada and nine Provincial Parliaments each Parliament endeavouring to carry out its conferred powers in furtherance of the well being of the people. We have here legislation which comes home peculiarly to the people of each community and it is a matter of vital importance that there should not be a failure in an industry absolutely necessary for their well being. It, therefore, might be that the legislation could be supported as being

> within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects . . . assigned exclusively to the Legislatures of the Provinces":

section 91, B.N.A. Act (30 & 31 Vict.), c. 3 (Imperial).

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In the *Attorney-General of British Columbia* v. *Canadian Pacific Ry. Co.* (1926), 37 B.C. 481 at pp. 505-6, I made use of language which I thought then and think now permissible and germane to the subject although perhaps somewhat extra-judicial.

I would particularly refer to the judgment of the Lord Chancellor (Viscount Cave) in *Halifax (City)* v. *James P. Fairbanks' Estate* (1927), 97 L.J., P.C. 11; it was there held that the business tax was a "direct tax" falling within the authority of section 92, head (2) of the British North America Act, 1867, as it was a tax on property and though the taxpayer might seek to pass it on to others the nature and general tendency of the tax and not its incidence in particular or special cases must determine its classification and validity. I would refer to what the Lord Chancellor said at pp. 14-16, and although the quotation is somewhat long I think it is instructive in this case and well indicates the necessary limitation that must be put on Mill's formula which had been theretofore ennobled into a legal classic.

The views of an economist cannot be accepted as a definition of the law that can only authoritatively be a pronouncement of the Court applying its mind to the particular facts of the case.

The latest pronouncement upon this subject, *i.e.*, direct and indirect taxation under the provisions of the British North America Act, by the Supreme Court of Canada, was given in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357. The legislation there considered has some analogous features to that of the legislation here under consideration and it was there held that the legislation was *ultra vires* of the Provincial Legislature. In that case at p. 372 Newcombe, J. concluded his judgment by saying:

> Now I wish to exclude, for the purposes of this judgment, any conclusion as to what the result would be if the Produce Marketing Act of British Columbia were not within any of the Dominion enumerated powers; there it appears that differences might emerge, and these are subjects of debate in which it is not necessary that we should now engage, because I am in complete agreement with the majority of my learned brothers that the legislation is referable to the exclusive Dominion power to regulate trade and commerce.
>
> I thought there were two ways, either of which would serve to demonstrate the invalidity of the Act, and I had proposed to shew, independently of s. 91, that the legislation was neither property and civil rights nor private and local matters in the Province; and, consequently, not within any of the Provincial enumerations—a *ratio decidendi* which I thought free from difficulty. But, seeing that the majority of the Court has reached practically the same result by the other route, holding that the subject-matter is embraced in the regulation of trade and commerce, where I think it strictly belongs, I am content, for the present purposes, to leave the extent of the Provincial field, as defined by s. 92 unexplored.

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It is to be observed that Newcombe, J. indicates that unless the legislation is clearly within one of the Dominion enumerated powers "differences might emerge and these are subjects of debate in which it is not necessary that we should now engage." I certainly am not of the view that in the present case there is not room for debate nor am I of the view that the case reaching the ultimate Court of Appeal it could be at all as definitely stated as in the *Lawson* case that the legislation is *ultra vires* of the Provincial Legislature. The question to here determine is difficult of decision as each new piece of legislation calls up for consideration many points that remain untouched by the precedents up to the present time.

In the present case it cannot possibly be so clearly stated, or

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possibly not at all, that the legislation falls within the *ratio decidendi* of the *Lawson* case, *supra, i.e.,* trade and commerce was in that case the turning point of the case and the majority of the Court—Duff, Newcombe, Rinfret and Lamont, JJ.—deciding that the legislation there under consideration was referable to the exclusive Dominion power to regulate trade and commerce and upon the facts of that case had relation to products in the main being marketed outside the Province and contracts made in relation thereto outside the Province. Here we have nothing of that nature, the legislation is referable only it may be well argued to property and civil rights and relative only to private and local matters in the Province.

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In view of the decisions I have referred to the matter here under consideration cannot but be said to have complex features and whilst I feel that there is much doubt as to whether the legislation under review is *ultra vires* yet in view of the controlling decisions which would seem to be pertinent and which are binding upon this Court, I do not find myself at liberty to go the length of saying that the judgment of the Court below is wholly wrong trusting that in due course the matters in question will have the consideration of the ultimate Court of Appeal.

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MACDONALD, J.A.: Appeal from the judgment of Mr. Justice MURPHY holding that it was beyond the competency of the Provincial Legislature to enact the Dairy Products Sales Adjustment Act, B.C. Stats. 1929, Cap. 20, and amending Acts. Evidence was admitted shewing conditions in the dairy industry in the past fifteen years. It is, I think, permissible to shew the state of facts upon which legislation is based; the condition the Act was designed to remedy in order to ascertain the true import of the legislation. In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561 it is recited in the judgment of Viscount Haldane, at p. 565, that:

> An agreed statement of facts put in by the Attorneys-General concerned shews the course of the business in the sale and disposal of grain to which the Act may apply.

The facts should be ascertained to determine whether the levies imposed and adjustments made is a tax in the sense the word is used in the Act of 1867 and, if a tax, whether direct or indirect.

Local conditions over a number of years revealed that at all times there was an over-supply of milk and cream in fluid form because of a restricted local market. The unsaleable surplus was converted into manufactured by-products (butter, condensed milk, cheese, etc.) and sold at world market prices for less than that obtained for milk and cream in fluid form. Increased sales in the manufactured form would lessen congestion in the local fluid market to the advantage of all engaged in the dairying industry. Because of more profitable returns the tendency of all before the Act was passed was to sell milk and cream in fluid form. To promote therefore the common interest this legislation was passed to permit adjustments to be made so that the producers of fluid milk and of manufactured products would share equally in returns. That in brief is the scheme of the Act.

True over-production of milk and cream would have a tendency to lessen the price to the consumer. Voluntary or compulsory curtailment would however avert that tendency and if by an Act of the Provincial Legislature dairy-farmers were compelled to limit production it would not be *ultra vires*. We are concerned therefore only with the details of the legislation, creating machinery for its operation, involving the imposition and collection of levies through a committee and the adjustment of returns received.

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A corporation known as a Committee of Adjustment was created by the Act consisting of three members, one appointed by the Lieutenant-Governor-in-Council and the other two by dairy co-operative associations. The committee might ascertain monthly (section 9) the standard price of milk and manufactured products sold in the local area over which it had jurisdiction, and spread the difference in total value between the two sums realized over the whole body of dairy-farmers within the district. It had power to compel any dairy-farmer to pay to it his proportion of the difference in total value and to apportion and pay to other farmers a share of the contribution so obtained in order that returns received by all would be practically equalized.

The Committee is authorized to employ officers, servants and agents to perform the clerical duties involved and to rent or

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purchase premises and equipment necessary in carrying out the duties assigned. This involved an outlay and to obtain the necessary funds it was enacted (9 (*i*)) that "for the purpose of defraying expense of operation" it might

> impose levies on milk and (or) manufactured products sold or disposed of, which shall be payable at such rates and in such manner and at such times as may be fixed by the committee.

Section 11 provides that:

> Where the amount levied on a dairy-farmer by a committee under section 9 is not paid by him within any time fixed for payment, the committee may sue and recover the amount as a debt due to it by the dairy-farmer.

By section 14 (1) no dairy-farmer, unless exemption is obtained, may sell or dispose of his milk or manufactured product without obtaining a licence from the committee. All necessary control is exercised to enable the committee to carry out the basic purpose of the Act. Failure to comply with orders and regulations is an offence against the Act for which penalties are imposed.

It is submitted that both the "levy" and the "adjustment" constitute (1) a tax and (2) an indirect tax. Whatever may be said of the "levies" it is, in my opinion, going far afield to describe as a "tax" a sum of money taken from the larger returns received by A for his product to compensate B for the smaller returns obtained for his product to the end that by pooling joint receipts each may share alike in revenue from an industry in which both are engaged, although in different branches. A is really sharing the losses of B for the joint benefit of both. Better to do so than to allow a situation to continue where surplus milk and cream, for want of a market, would go to waste, or where (by all attempting to share in that market) prices would be depressed. If A sells milk at 70 cents a pound and B sells butter at 30 cents, 20 cents per pound is taken from A's return and given to B. The resemblance of this "adjustment" to a tax is too faint to be visible to the mental eye. Twenty cents is not taken from A, or, if the term is preferred, imposed upon A (as taxes are) for public purposes, nor yet given to B for public purposes. It is for the benefit of A and B, particularly B and others in the industry (*i.e.*, private owners); not for the benefit of the public. It was suggested that A was taxed and a bonus paid to B. That is not, to my mind, the true interpretation

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although it bears some resemblance to confiscation on the one hand and a grant on the other. I am assuming for the moment, that this scheme is carried out by a public body. One should not resort to a strained interpretation of the true nature of a transaction to compel it to take the form of a tax. Substantially it is in the nature of an agreement with legislative sanction to pool receipts, an arrangement between previously competing vendors, carried out through a committee, by which returns are adjusted and receipts divided, either to do away with injurious competition or, to relieve over-production in the highest market by making it equally profitable to sell in a lower market. To say that this is "the raising of money by any mode or system of taxation" (section 91 (3) of the Act of 1867) or some kind of "direct taxation within the Province in order to the raising of a revenue for Provincial purposes" (section 92 (2)) is unwarranted. In my opinion the amount taken from A's return is not a tax at all.

I deal now with the question of "levies." First, is it a tax? The taxation sections of the Act of 1867 should be interpreted and applied in the light of changing conditions in industry. Acts designed to divert trade from its ordinary channels and to control the marketing and distribution of commodities is a feature of modern legislation. It is in some aspects contemplated, if not resorted to, in matters affecting international trade. Whether wise or otherwise such legislation may be enacted by Provincial Legislatures if civil rights within the Province only are affected, no indirect taxation imposed or trade and commerce in the general sense interfered with. All such legislation however limited its scope as to area or as to the products affected, involves the procuring of revenue, usually infinitesimal in amount when distributed, to defray administrative costs unless defrayed by the government. In my view the word "tax" should not be applied to the collection of incidental expenses for the payment of salaries, etc., even although obtained from the sale of products controlled by the Act. A tax from the earliest times has been regarded as a compulsory levy on persons, property, commodities, etc., for the support of governments, or of corporate creations of governments, exercising public rights.

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The essence of taxation is that it is imposed by superior authority without the taxpayer's consent, except in so far as representative government operates by the consent of the governed: *City of Halifax* v. *Nova Scotia Car Works, Limited* (1914), A.C. 992 at p. 998.

It includes levies for the payment of work carried on by county, township or municipal authorities. It is also applied to levies by small local bodies but, as if in harmony with the view that the word "tax" and "taxation" is more appropriate for the wider domain of government, the word "rates" is often applied to the levies of local bodies. I am not suggesting of course that such rates are not a tax. I merely refer to it to indicate that the word "tax" gradually disappears as we leave the wider domain of government and enter less exalted spheres. Taxation appertains to the levies of public bodies for public purposes. I do not think, strictly speaking, that the committee should be regarded as a public body although it may not be necessary to go that far; in any event it is difficult to say that these funds are obtained for public purposes. True the word "levy" as used suggests a "tax" but we should regard the substance rather than the form. The word "dues" or "membership fees" might, with equal propriety, describe the moneys obtained, none the less so because imposed by a body clothed with legislative authority to collect and to enforce payment. The Legislature can give authority to collect sums of money other than taxes.

It is true that in *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184 the "accident fund" under the Act in question secured by assessments on the pay-rolls of industrial concerns, to pay for injuries to dependent workmen and to create a reserve fund, etc., was regarded as direct taxation and of course necessarily as a tax. It was not treated as an indirect tax doubtless because it did not attach to the selling price of the product although the inherent tendency would be to enhance the price even although controlled by world markets. World prices must be appreciably affected by costs of production everywhere and one of the items of cost would be assessments of this nature. It would appear that the question as to whether or not it was an indirect tax was not raised in this case. If the Workmen's Compensation Board (assuming it was

constituted an independent body) had only power to collect from the industries affected, a comparatively small amount for administrative expenses the government itself by levy collecting the large assessments to accumulate an "accident fund" the latter would be a tax but the former should not be so regarded. The levy for expenses would not be made for a public purpose. The assessments to create and maintain the "accident fund" were, I assume, treated, as in effect, a tax imposed by the government, acting through a Board. Viscount Haldane, at p. 190, said:

> Nor can it be successfully contended that the Province had not a general power to impose direct taxation in this form on the respondents if for Provincial purposes.

That is the only reference to the point. The levy, in effect, is imposed by the Province, therefore it is a tax. By a section of that Act (section 34) the Lieutenant-Governor-in-Council might direct payment annually out of consolidated revenue to form part of the "accident fund" a sum not exceeling $50,000. The minister of finance too is the custodian (section 53) of all moneys and securities; moneys received are accounted for as part of the consolidated revenue and payments out, drawn from the Provincial treasury. Further reference to the relation of the Board to the government may be found in the judgment of MACDONALD, J. in *In re Sid. B. Smith Lumber Co.* (1917), 3 W.W.R. 844 at p. 848 wherein he finds (rightly I think), after outlining many sections of the Act that it "is simply an adjunct or administrative body exercising its powers and acting for the Provincial government on behalf of the Province:" and "moneys payable to the 'Accident Fund,' are due to the Province."

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In *Rosebery Surprise Mining Co.* v. *Workmen's Compensation Board* (1920), 28 B.C. 284 it was held that the Board is the servant or agent of the Crown. In this view the levies imposed by the Board are made by a public body and, if for public purpose, constitute a tax. The committee in the case at Bar has, in reality, none of the characteristics referred to. The funds obtained by it for incidental administrative expenses (I refer to the levy) cannot be compared to the levies made, practically by the government itself to accumulate an accident fund.

However, while I venture to express the opinion that the levy under consideration in this appeal is not a tax I am bound by

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the decision of the Supreme Court of Canada in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357 to so regard it unless that decision might have been different if the levy was not associated with an Act regulating trade and commerce. I think, however, I must assume that the Act considered in the *Lawson* case, while wider in its ramifications and raising questions not involved in this appeal, was regarded in so far as the question of levies is concerned as of similar import. This Act is found in B.C. Stats. 1926-27, Cap. 54. Section 10 (*k*) thereof provided that:

> For the purpose of defraying the expenses of operation, to impose levies on any product marketed which shall be payable at such rates and in such manner and at such times as may in the case of the Interior Committee be fixed by the Federation, and in the case of any other committee, by the committee; and to borrow or raise money and to secure the repayment of the same by charging any such levies or otherwise.

At p. 363 Mr. Justice Duff said:

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> That they are taxes, I have no doubt. In the first place they are enforceable by law. Under s. 13 they can be sued for, and a certificate under the hand of the chairman of the Committee is *prima facie* evidence that the amount stated is due; and the failure of a shipper to comply with an order to pay such a levy would appear to be an offence under the Act by s. 15. Then they are imposed under the authority of the Legislature. They are imposed by a public body. This Committee, of which the chairman is appointed by the Lieutenant-Governor-in-Council, and which is invested with wide powers of regulation and control over the fruit and vegetable industry within a great extent of territory, constituted by, and acting in every way under, the authority of the statute, exercising compulsory powers as well as inquisitorial powers of a most exceptional character is assuredly a public authority. The levy is also made for a public purpose. 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. Indeed, when one considers the number of people affected by the orders of this Committee, and the extent of the territory over which it executes its orders and directions, it becomes evident that, in point of their potential effect upon the population of the territory and of the interest of the population of the territory in the Committee's activities, the operations of the Committee, as contemplated by the statute, greatly surpass in public importance many municipal schemes, the levies for the support of which nobody could dispute, would come under the head of taxation.

While, as I think we are bound by that judgment, I trust I may, without presumption and with the greatest respect for the views of so eminent a judge, express my personal dissent. The analogy to municipal levies and the impositions of public bodies

is drawn because it is recognized that it is in that field the word "tax" receives its ordinary and appropriate designation. To support that analogy the "wide powers" of the committee are referred to. I do not think the question of dimensions is a conclusive factor. I think, without discussing it in detail, that the inherent characteristics of a "public body" are not found in a committee, clothed though it may be with legislative authority, dealing with a single marketable product even though of general use and utility. One may conceive of a single commodity, so regulated, produced only by a small number in a given area, and consumed by a limited number. Yet the administrative committee would have to be regarded as a public body and the purpose in collecting revenue from the sale of the product, perhaps to pay a single secretary, a public purpose. But whether a public body or not no public purpose is served, I would suggest, with deference, in obtaining funds, no matter from what source, to pay salaries of officials and to meet running expenses. Judgments are only decisive in relation to the facts under review but, unless the word "tax" is restricted to apply only to levies made by "public bodies for public purposes" in the true sense in which the words ought to be employed, we may by analogy be carried far afield in legislation affecting industrial and other activities. If a safe anchorage is neglected in defining the word "tax" we may drift into unsafe currents. If, as suggested, "wide powers of regulation and control" and "great extent of territory" is to be the criterion, where is the line to be drawn? At what point will such functions reach the stage of public activities? The characteristic features associated with the words "public purposes" should be found before the fund in a treasury for administrative purposes should be classified as the proceeds of a tax.

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Assuming, however, as we must, that the "levy" (not the "adjustment") is a tax is it indirect? It is infinitesimal in amount. No satisfactory evidence however detailed could, at this stage, prove that it affected the selling price. That however is not the test. Yet the facts may be referred to. There has always been a surplus of milk for the local market and production has been increasing; also of course the number of con-

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sumers. That governs the price. The levy amounts to approximately one-twenty-fifth of a cent on a quart of milk. That might be increased if overhead expenses increased. For fifteen years milk was always sold on the basis of a certain number of quarts for a dollar—eight, nine, or, as at the present time, twelve quarts for that sum. With that method of sale it would be difficult, if not impracticable, to add one-twenty-fifth of a cent to each quart sold. It was testified that the Act had "nothing to do with the price of milk." The following evidence was also given:

> Now on the question of the levy that is assessed, can you tell me any possible way that that twenty-fifth of a cent could be passed on to the Vancouver consumer in purchasing his milk at so many quarts for a dollar? Oh, no, that is not possible: it is not practical; it could not be done; you just could not.

There is another element. About 75 per cent. of the dairy-farmers are on the receiving end (in respect to the adjustment) and 25 per cent. on the paying end: in other words 25 per cent. are marketing all their milk on the fluid market while 75 per cent. market a portion of their milk as manufactured products. Additional returns obtained by adding the small levy to the selling price received by the smaller number would mean a slightly larger payment in adjustments, only however to an infinitesimal extent. It would scarcely be noticeable. But additional returns for milk and cream would induce more competition by the other group. The evidence is that the fluid market is more attractive, "nobody seems anxious to manufacture." I mention these features to raise for consideration the question—Will the law regard trifles when considering the tendency of a tax? However small as it is (and it would disappear altogether if dairy-farmers themselves undertook to do the work of the committee voluntarily) it must be either part of the cost of production or part of the selling price of the commodity. I have no doubt that at present it disappears in production costs. The manner in which milk is sold makes that evident. Certainly if the evidence is to be accepted literally the levies do not enter into (nor yet affect) the price of milk and cream in the fluid-milk market. I do not think this small levy would either enable the producers to raise prices, or, on the other hand, prevent them from doing so.

MACDONALD, J.A.

While, however, the foregoing facts may be considered I am compelled to find that the levy (assuming as I do that it is a tax) is an indirect tax. I think the *Lawson* case, *supra,* decides this point. Mr. Justice Duff, at p. 362, says:

> I think the contention of the appellant is well founded, that such levies so imposed, have a tendency to enter into and to affect the price of the product. I think, moreover, that levies of that character, assuming for the moment they come under the head of taxation, are of the nature of those taxes on commodities, on trade in commodities, which have always been regarded as indirect taxes.

The first part of the quotation makes it clear that under the Act then considered the "tax" was indirect because of its tendency to affect the price. If the levy was larger in amount, as in nearly all other cases reviewed by the Courts, no difficulty would arise. I think, however, any difficulties disappear when we apply the principles stated by Lord Hobhouse (and often quoted) in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at pp. 581 and 582. The passage referred to was quoted by Lord Warrington of Clyffe in *The King* v. *Caledonian Collieries* (1928), A.C. 358 at pp. 361 and 362. It must be taken as applicable to the facts under review but principles of general application are enumerated. "It must not," his Lordship states, "be forgotten that the question is a legal one, *viz.*, what the words mean, as used in this statute." To ascertain the meaning of the words one must take its setting and the course of business in the industry affected by the Act. That involves a consideration of the facts and the fact already mentioned relied upon by appellant, *viz.,* the practice for years of selling the product at the basic price of $1 for a certain number of quarts. An extra quart could not very well be withheld because of the levy of one-twenty-fifth of a cent on each quart.

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All the foregoing facts might be regarded as conclusive by writers on political economy. Lord Hobhouse at p. 581 refers to the opinions of writers who are "always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct,' and 'indirect,' according as they find that the burden of a tax abides more or less with the person who first pays it." It is conceivable that on the facts economists might find in the case at Bar that the burden remains with the producer, as part of the cost of production because of the practical

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inability or futility of any attempt to pass it on. Lord Hobhouse quotes too Mr. Fawcett who "makes remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment." But these references are made only to be criticized as an unreliable guide. They have value doubtless "in an economical discussion" but "that very excellence impairs its value for the purposes of the lawyer." After pointing out the probability that in every indirect tax some persons may be "the first and final payers of it" and that every direct tax "affects persons other than the first payers" he says (p. 582):

> The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

I think this disposes of the view that because in this particular case the tax may be absorbed by the purchaser it is therefore direct. That is not the general tendency of such a tax nor yet "the common understanding of men" in respect thereto. In *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934 at p. 938 Viscount Haldane said:

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> Validity in accordance with such tendencies, and not according to results in isolated or merely particular instances, must be the test. The question of validity could not be made to impose on the Courts the duty of separating out individual instances in which the tax might operate directly from those to which the general purview of the taxation applies. An exhaustive partition would be an impracticable task.

In that case, on the facts, as they appeared at the time the action was launched, the commodity taxed was not resold at all and the tax could not be passed on. But conditions might change so that resales might be made because it was a marketable commodity. In the case at Bar it is conceivable that overhead outlays might increase bringing about a larger levy but apart from that, perhaps remote possibility, the tendency is there and no matter what the fact may be at present the levy—assuming it to be a tax—is indirect.

As in my view the "adjustment" is not a tax I do not think it necessarily follows that because the "levy" must be regarded as an indirect tax the whole Act is invalid. Conceivably the Legislature might enact it without subsection (*i*) of section 9. In

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that event dairy-farmers might by personal contribution in another form provide for these outlays.

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

Solicitors for appellant: *McQuarrie, Whiteside & Duncan.*
Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

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KAPOOR LUMBER CO. LTD. *v.* CANADIAN NORTHERN PACIFIC RY. CO.

KAPOOR LUMBER COMPANY LIMITED v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY.

Practice — Discovery—Affidavit of documents — Examination — "Officer"— Subrogation—Chose in action—Assignment of—Rules 354 and 370c (1).

The plaintiff brought action against the defendant for the loss of its plant and lumber by a fire it alleged was negligently started by the defendant and allowed to spread to its plant. The plant and lumber were insured in fifteen insurance companies, and after an adjuster engaged by the insurance companies had adjusted the loss, the insurance companies paid the plaintiff $105,131. The plaintiff's action is for the sum of $234,285.63, claiming that a portion of the property burned was not covered by the insurance. After payment under the policies the insurance companies obtained from the plaintiff a document reciting: "With reference to the loss by fire which occurred on August 18th, 19th, 1930, to our property at Kapoor, Vancouver Island, B.C. In consideration of your paying us the sum of $105,131 and any subsequent amounts which may be paid to us, in full settlement of all our claim or claims against you, we hereby subrogate all the rights we may possess, now or hereafter, against any party or parties to the amount of such payment and we agree to allow you to make use of our name in any proceedings. . . . ." The defendant applied for and obtained an order, *inter alia*, that it was entitled to an affidavit by each of the insurance companies, stating what documents are or have been in its possession or power relating to the matters in question in the action, and that it be at liberty to examine for discovery Percy G. Shallcross, the adjuster referred to, as an officer or past officer of the insurance companies.

Held, on appeal, reversing the decision of MORRISON, C.J.S.C., that an adjuster of a loss by fire is not an "officer" within the meaning of rule 370c and is not subject to examination for discovery.

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Held, further, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A. (MARTIN, J.A. dissenting), that although an assignment of the whole cause of action by the insured to the insurer is a good assignment, a cause of action cannot be assigned in part. The alleged assignment is therefore invalid and the defendant is not entitled to production of documents from the insurance companies under rule 254.

Per MCPHILLIPS, J.A.: That it is impossible under the law of the land to assign an action in tort, and the alleged assignment is therefore invalid.

Statement

APPEAL by plaintiff from the order of MORRISON, C.J.S.C. of the 15th of February, 1932, in so far as the same orders that the defendant is entitled within 21 days to an affidavit made and sworn by each of the fifteen insurance companies in which the plaintiff was insured, stating what documents are or have been in their possession or power relating to the matters in question in this action, and that the defendant be at liberty to examine for discovery herein Percy G. Shallcross, as an officer or past officer of the said insurance companies, he having been in charge of the adjustment of the plaintiff's claim against the insurance companies, owing to the loss of its plant by the fire in respect of which this action was brought.

The appeal was argued at Vancouver on the 5th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Maitland, K.C. (*J. G. A. Hutcheson,* with him), for appellant: We say the railway company let the fire spread that destroyed our property. There were fifteen insurance companies. It was ordered that the insurance companies make affidavits of documents and that the fire "adjuster" be examined. The insurance companies are not parties to the action. Under rule 354 only a party to the action or for whose immediate benefit the action is brought must make discovery: see *James Nelson & Sons, Limited* v. *Nelson Line (Liverpool), Limited* (1906), 2 K.B. 217. The cases of *Isitt* v. *Hammond* (1924), 34 B.C. 133 and *Willis & Co.* v. *Baddeley* (1892), 2 Q.B. 324, are both distinguishable. Shallcross was an "adjuster" and as such is not subject to examination for discovery under rule 370c: see *Trusts and Guarantee Co.* v. *Smith* (1915), 33 O.L.R. 155; *Stow* v. *Currie* (1909), 14 O.W.R. 223; *Duncan*

v. *City of Vancouver* (1917), 24 B.C. 267; *Anderson* v. *City of Vancouver* (1909), 14 B.C. 222.

Mayers, K.C., for respondent: This turns precisely on a particular document, and *James Nelson & Sons, Limited* v. *Nelson Line (Liverpool), Limited* (1906), 2 K.B. 217 is authority for the order. *Isitt* v. *Hammond* (1924), 34 B.C. 133 is also in point. As to the difference between subrogation and assignment of a right of action, subrogation is a question of law and the company can only sue in the name of the insurer when there is an express assignment: see MacGillivray on Insurance, 734-5; Halsbury's Laws of England, Vol. 17, p. 519, sec. 1025; *Commercial Union Assurance Company* v. *Lister* (1874), 9 Chy. App. 483. Subrogation only arises when the whole damage has been paid, but in this case there is a clear assignment of the right of action and the *Nelson* case applies. An adjuster is an "officer" within the meaning of rule 370c: see *King Lumber Mills* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 26; *Hyslop* v. *Board of School Trustees of New Westminster* (1930), 43 B.C. 201; *F. W. Woolworth Co. Ltd.* v. *Pooley* (1925), 35 B.C. 324; *Macdonald* v. *Norwich Union Ins. Co.* (1894), 10 Pr. 462; *Minkler* v. *McMillan, ib.* 506. As to joining Indor Singh as a party see Halsbury's Laws of England, Vol. 4, p. 362, sec. 774 and p. 391, sec. 829; *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454 at p. 462.

Argument

[On the 14th of March, 1932, further argument proceeded by leave of the Court].

Mayers: As to the validity of an assignment of a cause of action in tort see English & Empire Digest, Vol. 4, p. 432, item 91; *King* v. *Victoria Insurance Co.* (1896), 65 L.J., P.C. 38; Salmond on Torts, 7th Ed., p. 209; *Defries* v. *Milne* (1912), 82 L.J., Ch. 1 at pp. 3 and 6; *Glegg* v. *Bromley* (1912), 3 K.B. 474; *Randal* v. *Cockran* (1748), 1 Ves. Sen. 97.

Maitland, in reply: There was property burned and not insured, and property insured that was not burned: see English & Empire Digest, Vol. 8, p. 432, item 93. As to the fruits of a judgment being assignable see *Stow* v. *Currie* (1909), 14 O.W.R. 223; *McCormack* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 656.

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18th March, 1932.

MACDONALD, C.J.B.C.: The appeal is against an order for production of documents by the plaintiffs and examination for discovery of the adjuster of the insurance companies who had insured the plaintiff's property consisting of timber limits, etc. This production and examination are founded on rules 354 and 370c of the Rules of Court. The property in question is alleged to have been burned by reason of the acts of the defendants, and the insurance companies, some fifteen in number, have paid the sum of $105,131 as the amount that they were responsible for to the plaintiff under policies of insurance. The plaintiff's claim in the action is for $234,285.63. Some of the property burned was not covered by the insurance and the value of the property burned is alleged to be more than the amount received by the plaintiff from the insurance companies. The insurance companies claim to have been subrogated to the rights of the insured. The action is brought, as far as the material before us shews, by the plaintiff itself. The insurance companies have besides their equitable right to subrogation, if any, obtained from the plaintiff a document, which is as follows:

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> To the Companies Concerned:
>
> With reference to the loss by fire which occurred on August 18th, 19th, 1930, to our property at Kapoor, Vancouver Island, B.C. In consideration of your paying us the sum of $105,131 and any subsequent amounts which may be paid to us, in full settlement of all our claim or claims against you, we hereby subrogate all the rights we may possess, now or hereafter, against any party or parties to the amount of such payment and we agree to allow you to make use of our name in any proceedings which you may desire to take against such party or parties, conditionally on your holding us free from any expense incurred therein.
>
> Yours truly,
> Kapoor Lumber Company Limited.

Counsel appearing on behalf of the defendant did not put his case on the footing of subrogation. He said the document mentioned above is in reality an assignment of the company's claim against the defendant, and that they, the insurance companies, are the real plaintiffs herein and are therefore entitled to have the production and examination above referred to from the adjuster of the companies and the learned judge below having ordered such production and examination the plaintiff has appealed from that order to this Court.

The question was raised as to the assignability of a cause of action for a tort, which this action is, and a number of cases have been cited on each side which I do not think it necessary to refer to in view of the decision in the Privy Council in *King* v. *Victoria Insurance Co.* (1896), 65 L.J., P.C. 38. Their Lordships there held in an analogous case that an assignment of the whole cause of action by the insured to the insurer was a good assignment; that the cause of action was a legal chose in action and was assignable under statutes similar to our Laws Declaratory Act although that Act does not apply here since the action here is equitable. I therefore do not think it can be said that all claims *ex delecto* are unassignable but they are so where the assignee has an interest in the cause of action as here but the whole must be assigned. Prior to the alleged assignment above mentioned the insurers were interested in the property consumed by fire. The assignment was therefore not an assignment, a bare cause of action for a tort and was made *bona fide* and cannot therefore be said to infringe on the laws of maintenance and champerty. It is true that their Lordships refrained from expressing an opinion on the general question of the assignment of causes of action for torts doubtless because there are differences between them which are vital matters but there can be no doubt that they clearly decided that the assignment of the whole cause of action in a case like the present would be a good assignment but it is another question, and a quite different one, as to whether an assignment can be made of a part of the cause of action. In my opinion it cannot, but upon principle and I think from inferences to be drawn from decided cases, an assignment of a part of the cause of action is invalid as such. I cannot imagine a right of action for a tort being split up by an assignment of one part to one person and another part to another. Now it will be noted in the above mentioned document, which we are asked to treat as an assignment, the cause of action is assigned "to the amount of such payment," *i.e.*, the payment by the insurers to the plaintiffs, thus limiting the rights of the insurance companies to sue to the amount for which they were responsible to the insured. That the cause of action cannot be split I think is indicated by the case of *National Fire Insurance*

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Co. v. *McLaren* (1886), 12 Ont. 682. That being so, the alleged assignment has passed nothing to the defendant and therefore the insurance companies are not the real plaintiffs in the action at all and defendant is not entitled to the production of documents under said rule 354 and is not entitled to examine for discovery as an officer of the insurance companies under rule 370c. I think, moreover, that the adjuster was not an officer in the true sense of that word. He was simply engaged by the insurance companies to make the adjustment and if this be so it is a second answer to the respondent's claim. I may also refer to *Dawson* v. *Great Northern and City Railway* (1905), 1 K.B. 260 and to *McCormack* v. *The Toronto R.W. Co.* (1907), 13 O.L.R. 656. The former indicates I think that the action cannot be split and the latter gives an example of an assignment of a chose of action for a tort which was not good.

The appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: This is an appeal on two grounds from an order made by Chief Justice MORRISON directing, first, that the defendant is entitled within 21 days to an affidavit of the documents respecting the insurance policies mentioned therein, and, second, that the defendant be at liberty to examine for discovery as an officer or past officer of the insurance companies the person who made the adjustment of the loss after the fire.

Taking the latter ground first, I am in agreement with my learned brothers that, under the circumstances of this case, this adjuster cannot be considered to be "one who has been one of the officers of such corporation" within the meaning of rule 370c (1). It is to be observed that in the case of a past officer there is no power to examine him as a servant, so the rule is restricted to him as such officer alone.

The question as to what "officer" includes within the scope of this rule has often been considered by this Court, and quite recently we did so in *Johnson* v. *Solloway, Mills & Co., Ltd.** on the 30th of October last. A great many cases were cited and the matter was gone into very thoroughly and in giving my reasons for judgment I said:

The first question is as to whether or no the person sought to be exam-

* Since reported, *ante* p. 35.

ined under Rule 370c (1) is one who has been an officer of this corporation, and that, as this Court has laid down in consonance with the decisions of other Courts of Canada, means having regard to all the circumstances of the case.

It is very difficult to draw the line and to say what is included within that term and, as regards an adjuster, his position was considered by the Supreme Court of Canada in the case of *The Atlas Assurance Company* v. *Brownell* (1899), 29 S.C.R. 537, wherein Mr. Justice Sedgewick, in giving the judgment of the Court, said (p. 545) that "we must take his duties and powers to be no greater, no less, than the evidence shews them to have been," and points out that the word "adjuster" is a "somewhat inaccurate" expression. There is no evidence, really, here as to the scope of this adjuster's authority but, having regard to the fact that we have an Insurance Act, chapter 20, 1925, which deals with the matter of such policies, we are justified, indeed it is necessary, to look at that statute, to see what are the powers of these persons. We find the adjusters of this Province are licensed, and their *status* is thus defined by section 183:

"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.

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In section 187 there is this significant provision:

(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.

There are also in sections 190, 196, 197, 200-6, 216, 220, 229, 230 and 232, various references to these persons, and *e.g.*, in distinction, to "every officer, employee or agent of an insurer," repeatedly. Without taking up time unnecessarily to go further into the consideration of it, I have no doubt that what was done here by this person would not constitute him an officer within the meaning of the rule or of the statute. It might be that an adjuster who, under statutory condition 13 was empowered, as an accredited agent, to make an appraisement, would later, under arbitration condition 17, acquire other duties, but at first, whatever might later happen, his prime duty is that to his employer *ad hoc;* that is, for the purpose of making a valuation, and I cannot see that to call in a man to do that gives him any more power than to call in any other person to make a valuation. For

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example: supposing the books in the library of the Law Society were burned and somebody was called in to appraise them, would that make him an officer of the Law Society? I do not think for a moment that it would be suggested it would, and, therefore, I cannot feel that the principle should be unduly extended. Also take this very case: supposing the standing timber was injured, and a timber cruiser was called in to make a report upon it, to value it by agreement between the parties, would that constitute him an officer? I should say not, but simply an accredited agent *ad hoc*. It is true you can, by mutual agreement, bestow further powers upon an adjuster so as to make him your joint agent, something in the way of an officer of arbitrament, such as happened in *Toronto Railway Co., &c.* v. *National British, &c., Millers Insurance Co.* (1914), 111 L.T. 555, and in such case it might turn out that you had brought him within the scope of something partaking of a *quasi*-judicial office. I only refer to that *ex abundanti cautela,* because, having regard to the circumstances of this case, and after very careful consideration of it, as it is of considerable practical importance, I do not entertain any doubt that, with all respect, the order of the learned judge appealed from goes too far, and so the appeal should be allowed to that extent.

With respect to the first ground of appeal, I have the misfortune to differ from my learned brothers, not without some hesitation, but I am forced to the conclusion that the learned judge took the right view of the matter, and that what really happened here brings the case within the very position postulated by the Master of the Rolls, Lord Collins, as he was shortly after, in the leading case on the subject of *James Nelson & Sons, Limited* v. *Nelson Line (Liverpool), Limited* (1906), 2 K.B. 217 at 222 where he preserves the very distinction which the respondent relies upon here, pointing out in that case, which the appellant relied on so strongly, that the way in which the underwriters came in is only by way of subrogation to the rights of the assured. Their right is not that of assignees of the cause of action . . . And Lord Justice Cozens Hardy at p. 225, says that he desires to retain an open mind as to what might be the result if the underwriters had paid the whole of the loss sus-

tained by the plaintiffs. Now, in this case the underwriters have settled and have paid the whole of the loss claimed against them by the insured. It is true that in this present case there is a further claim in that the whole claim is for $254,000 and that the amount that has actually been paid by the insurers in full settlement of their liability to the insured is $107,688. That brings us to a consideration of the document which was relied upon as having the effect of an assignment and, in my opinion, after careful consideration of it, having regard to all the circumstances of the case, it has that effect. It must be remembered that though this is a claim for $254,000 which the plaintiff company is bringing, yet it may turn out that as between that insured and the defendant railway company it will get nothing at all because the defendant may be able to set up and establish the defence that the insured was not entitled to anything, *e.g.*, because it was an incendiary, or for half a dozen grounds that might well be postulated. Or the claim might be reduced on assessment of damages to $50,000 and it might also turn out that the insurers, by fraud or otherwise, had overpaid this plaintiff to the extent of, say, double the real amount due to it. I refer to that in regard to the present circumstances because the material before us shews that ground for suspicions arose during investigation of the insured's claim and the whole matter will doubtless be investigated to its full extent. Therefore, turning to the document relied upon in the light of these circumstances we find it reads thus:

> With reference to the loss by fire which occurred on August 18th, 19th, 1930, to our property at Kapoor, Vancouver Island, B.C. In consideration of your paying us the sum of $105.131 and any subsequent amounts which may be paid to us, in full settlement of all our claim or claims against you, we hereby subrogate all the rights we may possess, now or hereafter, against any party or parties to the amount of such payment and we agree to allow you to make use of our name in any proceedings.

Of course, the expression "subrogate" there is an error because parties are entitled to subrogate—the Privy Council has decided, and the House of Lords—and it is admitted the insurers here acquired the right of subrogation without any assignment at all, but it is an additional security to them under the peculiar circumstances, or even if there were only general circumstances, but there are general circumstances here plus peculiar. It has

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been suggested that the result of the language "against any party or parties to the amount of such payment" means only a partial assignment, and that is the crux of this matter. I can only say that, after giving it very careful consideration, I am unable to take that view. I think the most that can be fairly said of that document is the insured intended precisely what they said—"with regard to the loss by fire to our property," that is "all our property, all our rights that we may possess, now or hereafter, are put in your care and control" and that would preserve the excess, if any, that might be recovered, and for which the insurance company would be the trustee of the plaintiff. It is perfectly clear that at least it must be held there that the insurance company is *dominus litis* of the whole matter and no compromise of the case could be made without its consent. I just put that feature forward to shew in a striking way what the far-reaching result of this transaction must be held to include.

Being then faced with a document of that unusual description, and under these unusual circumstances, I have, with the greatest respect to my learned brothers, come to the conclusion that I would not be justified in disturbing the order of the learned judge below, and therefore the appeal on the first ground should be allowed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of the opinion the appeal should be allowed. The case is certainly a most important one. Mr. *Mayers* I do not see here and I speak with deference when I refer to his argument. Mr. *Mayers* advanced a startling proposition to this Court, that was that this document which my brother MARTIN has just referred to constituted an assignment and he did not rely upon subrogation at all. I quite agree with my brother MARTIN in this, that subrogation does not need to be a matter of agreement. It is a part of the law of the land and it is always available to the insurance company. Now, with regard to the submission made by Mr. *Mayers* that this, although a tort, and unquestionably a tort was capable of assignment, such a submission astounded me. Upon research I am still further confirmed in my view that the cause of action here is not capable of being assigned, being against public policy. He relied upon *King* v. *Victoria Insurance Company* (1896), A.C.

250. It is plain when we turn to that case that the Privy Council gave no judgment to that effect, that is that it was capable by way of an assignment of a chose in action to assign a tort. Lord Hobhouse at the close of his judgment said this:

Their Lordships do not express any dissent from the views taken in the Court below of the construction of the Judicature Act with reference to the term "legal chose in action." They prefer to avoid discussing a question not free from difficulty, and to express no opinion what limitation, if any, should be placed on the literal meaning of that term.

In the face of language so positive and definite from the Privy Council, how is it possible for counsel at this Bar or any other Bar to advance the proposition here made? It would be revolutionary in its effect if the law of England should be changed by any such decision. Of course, a Privy Council decision would not change the law of England anyhow, but it is binding elsewhere in the Empire. I would refer upon this point to *Defries* v. *Milne* (1913), 1 Ch. 98, where in the Court of Appeal in England, it was

Held, also, that if the assignment had purported to assign any such right the assignment would have been invalid, inasmuch as such a right is not assignable, according to the established rule which has not been changed.

At the outset of the head-note it says:

A right of action for damages in the nature of waste being in respect of a tort is, on grounds of public policy, not capable of assignment.

Sir Frederick Pollock in his work on Torts does not even cite *King* v. *Victoria Insurance Company, supra,* and Mr. Salmond in his work only refers to it on the ground of subrogation, confines it to that—therefore, I know no eminent legal writer nor any Court which has said that the law, as we have known it from our student days, does not yet prevail. I might draw now attention to a case which counsel concerned in this case may not be familiar with. If they should not happen to be, I think it well to draw attention to it. *National Fire Insurance Co.* v. *McLaren* (1886), 12 Ont. 682. This case is signally like the present one. Lawyers search for analogous cases or cases in line with what is engaging their attention, and often do not find them. Now this case came before Chancellor Boyd of Ontario, perhaps one of the greatest Chancery lawyers we have had in Canada and a very distinguished judge. He had the advantage of having the argument upon the one side of Christopher Robinson, Q.C., one of the greatest lawyers Canada has ever produced,

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and on the other side D. McCarthy, Q.C., who was a tower of strength at the Bar of Ontario, the Supreme Court of Canada, and the Privy Council. The fire insurance company sued McLaren, who was a great lumberman, after he had sued the railway company, recovered large damages from the railway company, where the timber had been burned by fire through the negligence of the railway company, analogous to this case. The insurance received was $50,000 and he sued for $150,000 and got a verdict from the jury for $100,000. We have this position here, $107,000 or $108,000 paid by the insurance company and a claim of $234,000 made upon the railway company. Why is it made? Because the insurance did not cover all the property that was burned. The insurance policies were limited to certain properties, and in this case there is a very considerable amount of property which was not covered by insurance. In the case we have it stated in the head-note:

There can be no such thing as subrogation to the right of a party whose claim is not wholly satisfied.

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There we have the principle laid down and in this case the Kapoor Lumber Company have not had their loss wholly satisfied although they got insurance to the extent of $107,000 or $108,000.

In a case of partial insurance where a third party is liable to make good the loss, the assured is not clothed with the full character of trustee *quo ad* the insurance companies until he has recovered sufficient from the wrongdoers to fully satisfy all his loss as well as expenses incurred in such recovery.

In other words, when the assured is put in as good a position by the recovery from the wrongdoer as if the damage insured against had not happened, then for any surplus of money or other advantage recovered over and above that, the insurer is entitled to be subrogated into the right to receive that money or advantage to the extent of the amount paid under the insurance policies. The defendant having been paid $50,000 insurance moneys under various policies effected by him upon certain lumber, which had been burnt by a spark from an engine of the C.C.R.W. Co., afterwards brought action against the railway company and recovered a verdict of $100,000; the jury finding that that "was the actual value of the lumber destroyed." The insurance companies now brought this action against him, claiming that he was trustee for them for so much of the $100,000 as represented the excess of the total moneys received by him over the amount of his loss, contending that he was estopped by the verdict from asserting his loss to be greater than that amount. The defendant, however, contended that his actual loss had exceeded the whole $150,000.

Held, that he was not concluded from so contending by the finding of the

jury in his action against the railway company, and that the utmost right of the plaintiffs was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiffs for insurance in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the Master.

Now, Sir Christopher Robinson, as he afterwards was, submitted this:

The owner of a property insured against fire is, on its being burnt down by the wrongful act of another solely interested in the loss until the insurance moneys are paid, when the loss becomes a joint loss, and if the owner then sues the wrong-doer he sues for both himself and the insurers. In that sense we are privies to the judgment against the railway company. We are bound by it, and could never claim more against the wrong-doer than was awarded by it.

That was the argument of this very distinguished lawyer, but distinguished lawyers even sometimes do not succeed. And then what did Mr. Dalton McCarthy say:

No doubt on payment of all that the insured has lost the insurance company is entitled to the assignment of all he has which gives him the right to recover against the wrong-doer; but there is no such right on payment of only part of the loss. The insurers could not require the assignment of half the cause of action, nor compel the insured to sue the wrong-doer, nor exact a declaration of trust from him. We are arguing on the theory that our loss is over $100,000 in addition to what has been paid by the insurance companies. In the action against the railway company the great doubt was whether the railway company were liable at all; now if the present defendant had wished to compromise that action for $75,000

(that was Mr. McLaren and that is like the Kapoor Lumber Company in this case)

could the insurance companies have hindered him from doing so?

MCPHILLIPS, J.A.

That brings it out perfectly clearly that the insured is entitled to go on and not be incommoded by the insurance money being paid. Now, that case was referred to in *Globe & Rutgers Fire Insurance Co.* v. *Truedell* (1927), 60 O.L.R. 227, before the Appellate Division:

Held, that it is only in a case where the insurance moneys paid are sufficient to cover the whole fire loss that the insurer is subrogated to the rights and remedies of the assured.

The notion that upon payment of a part only of a loss by an insurer there is subrogation *pro tanto* rests upon a misapprehension of the foundation and extent of the doctrine.

The defendant was the master of the action he had commenced against the wrongdoer to recover damages for his loss by fire occasioned by the wrongful act; lack of diligence or lack of *bona fides* not having been estab-

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lished, the settlement of the action made by him could not be impugned; and the plaintiffs were not entitled to recover.

In 62 O.L.R. 25 (1928), we have the case of the *Royal Exchange Assurance* v. *Grimshaw Brothers Ltd.* It is true that was only in Chambers, but it came before Mr. Justice Middleton, now a distinguished member of the Appellate Division in Ontario. The head-note states:

> The plaintiffs could not maintain the action as constituted, a right of action for a tort being incapable of assignment. If they should be permitted to amend by adding the owners as co-plaintiffs, the action would still be a common-law action.

National Fire Insurance Co. v. *McLaren,* which I referred to was referred to there.

Now, of course, the important case here on this question of assignment is *McCormack* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 656, where Mr. Justice Anglin, now Chief Justice of Canada, dealt with the case of *King* v. *Victoria Insurance Company,* which I called attention to, and which Mr. *Mayers* relied upon. Mr. Justice Anglin, when a judge of the Court in Ontario, had this point up, and at that time *King* v. *Victoria* MCPHILLIPS, J.A. *Insurance Company* (1896), A.C. 250, was referred to, and greatly relied upon. The plaintiff brought the action for damages for personal injuries sustained by his being run down by the car of the defendant and for the killing of his master's horse which he was leading at the time, and in respect to which he claimed under an assignment from his master. Mr. Justice Anglin went through all the law, the leading cases up to that time, and definitely decided that an assignment of a tort was incapable of being given any validity, and does it with such clarity and such force that the Divisional Court in Ontario said this (p. 660):

> *Per Curiam.* We think the judgment appealed from quite correct, exhaustive, and complete.

I do not think that really it is necessary to say anything more, but certainly when startling propositions of law are advanced, and subversive of the law as well understood, it is the province, in fact the duty, of the Court to make a pronouncement thereon at the earliest moment. While it might be that the law is not always logical, yet there are certain mileposts in it. We should remember them. We should study them. Of course, there may

be variations and changes, but I have no hesitation in saying that is is utterly impossible under the law of the land to assign an action of tort, and that is what is attempted to be set up here.

I would allow the appeal.

MACDONALD, J.A.: I agree with the views expressed by my brother MARTIN as to the adjuster not being an officer within the meaning of the rules, subject to examination for discovery.

On the main point, I do not regard the document, Exhibit "B," as an assignment of the whole cause of action to the insurance company. I appreciate there is much to be said for the viewpoint taken by my brother MARTIN in respect to the scope of the document, and the outcome of the case depends solely upon the interpretation we give to it. I prefer the other view, and for this reason it is a badly-drafted document, prepared under a misconception as to the law, and in order to treat it as an assignment at all it is necessary to recast it, discard some of the words, for example "subrogation," and substitute the word "assign." I do not think a document so obscure should be given a wide interpretation. The words found in it "to the amount of such payment" should be taken as limiting its scope, and I think, too, it carries out the view that the draftsman really had in mind. It was felt that the plaintiff had an independent interest in respect to property damaged but not covered by insurance, and this document did not purport to assign that part of the right of action to the insurance company. As has been pointed out, a cause of action cannot be assigned in part. It is clear, if one takes this view of the matter, the insurance companies are not *dominus litis* in respect to the conduct of the whole action.

I would allow the appeal.

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

Solicitors for appellant: *Maitland & Maitland.*
Solicitor for respondent: *R. W. Hannington.*

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Jan. 5.

PLANTA v. GREENSHIELDS

PLANTA AND PLANTA v. GREENSHIELDS AND REIFEL.

Will—Legacy—Executor to pay bequests when and how he likes—Interest—Date from when it runs.

A testator who died in 1916 bequeathed his house and grounds to his wife and $1,200 a year during her lifetime, this to be a first charge on the estate. He then made bequests to two nieces of $10,000 each. The will further recited that "the executor has the power given him to pay these bequests when and how he likes; the estate not to be sacrificed in any way to pay them." The wife's annuity was paid in full up to the time of her death in 1930. There remains in the estate sufficient to pay the bequests with a balance over of about $7,600. On the application of the nieces it was held that they were not entitled to interest on the legacies bequeathed to them.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the rule is that a legacy payable at a future day carries interest only from the time fixed for its payment. The executor was given discretionary power to postpone payment, this power being given for the benefit of the residuary legatees. A time was therefore fixed for the payment of the legacies and interest is not payable until the end of the period in which the discretion might be exercised.

APPEAL by plaintiffs from the order of MORRISON, C.J.S.C. of the 10th of September, 1931, on an originating summons of the 28th of August, 1925, as amended by the order of GREGORY, J. of the 27th of June, 1930, on the question as to whether Laura Alma Hunter and Amy Planta or their personal representatives are entitled to interest on the legacies bequeathed to them under the will of the late William Rowley Robb, who died at Comox on the 5th of January, 1916. By his will William Rowley Robb left his house and $1,200 a year to his wife for life. He then made three bequests, namely $10,000 to his niece Laura Alma Hunter, $10,000 to his niece Mrs. Amy Planta and $1,000 to Mrs. Nellie Davis. Jane Robb, the wife of the testator, died in March, 1930. Her annuity was paid in full up to the time of her death, and there now remains in the hands of the executor sufficient to pay the bequests without

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interest, and a balance remains over of about $7,600 as residue. The distribution of the residuary estate would be one-half to the estate of the late Mrs. Robb and one-half to the said nieces of the late W. R. Robb. It was held by MORRISON, C.J.S.C. that the said nieces are not entitled to interest on their legacies.

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

Harold B. Robertson, K.C., for appellant: The right to interest does not depend on the time when the money is recovered: see *Wood* v. *Penoyre* (1807), 13 Ves. 325*a*. There is nothing to shew that there was no intention to pay interest, the time of payment not being fixed, the general rule is that it is paid from one year after the death: see *Freeman* v. *Simpson* (1833), 6 Sim. 75; *Toomey* v. *Tracey* (1883), 4 Ont. 708 at p. 711; *In re Wm. Whiteley* (1909), 25 T.L.R. 543; *Walford* v. *Walford* (1912), A.C. 658 at p. 664. Assuming the will does fix a time for payment, the legacies bear interest from the time so fixed: see Williams on Executors, 12th Ed., pp. 955-6; *Thomas* v. *Attorney-General* (1837), 2 Y. & C. 525; *Olive* v. *Westerman* (1884), 53 L.J., Ch. 525. Argument

H. A. Maclean, K.C., for respondent: The case of *Walford* v. *Walford* (1912), A.C. 658 gives the general rules correctly, but the facts here are quite different and the whole will must be considered: see *Donovan* v. *Needham* (1846), 9 Beav. 164 at p. 167; *Re Scadding* (1902), 4 O.L.R. 632; *Tempest* v. *Lord Camoys* (1882), 21 Ch. D. 571. Interest should only be paid when the legacy is not paid at the time the law says it should be paid: see *Thomas* v. *Attorney-General* (1837), 2 Y. & C. 525; *Re Robinson* (1892), 22 Ont. 438; *Re Olive; Olive* v. *Westerman* (1884), 50 L.T. 355.

Robertson, in reply, referred to Theobald on Wills, 8th Ed., pp. 131 and 134; *Pearson* v. *Pearson* (1802), 1 Sch. & Lef. 10; *Owners of the Ship Swansea Vale* v. *Rice* (1911), 104 L.T. 658 at p. 659.

Cur. adv. vult.

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

MARTIN, J.A. concurred in dismissing the appeal.

MCPHILLIPS, J.A.: The question of the right to interest upon the legacies was very fully and ably argued. I am not able to accede to the submission made by Mr. *Robertson* that this is a proper case for the payment of interest. The delay in distribution was, upon the facts, in conformity with the terms of the will:

> It is distinctly understood that the executor has the power given him to pay these three bequests when and how he likes—the estate is not to be sacrificed in any way to pay them.

After all the duty of the Court is to carry out the intention of the testator. Here was a case which might rightly be deemed one of salvage. Without skill and care the whole estate might well have been swallowed up. It was a case for delicate nursing, it was successfully accomplished, it might have failed. This is significant language: "It is distinctly understood that the executor has the power given him to pay these bequests when and how he likes, the estate is not to be sacrificed in any way to pay them." The intention of the testator was the preservation of the estate until the opportune time when a sale could be made—then and then only could the legacies be paid. Mr. Justice Eve's judgment in *In re Wm. Whiteley* (1909), 25 T.L.R. 543, in my opinion, is not decisive of this case. The learned judge in his judgment in that case said at p. 544:

> The testator did not therefore provide that the legacy should not be paid before any fixed time.

Here we have as above quoted "when and how he likes the estate is not to be sacrificed in any way to pay them." This can only mean that the legacy was not payable until the executor determined the date when without sacrifice the legacies could be paid which, in effect, amounted to a postponement of time of payment left solely to the executor and rebuts any contention that would admit of interest running on the legacies. I think the Lord Chancellor's (Viscount Haldane) language in *Walford*

v. *Walford* (1912), A.C. 658 at pp. 663-4, covers the present case:

> The principle of law is laid down by Lord Cairns in a passage in his judgment in *Lord* v. *Lord* [(1867)], 2 Chy. App. 782, at p. 789, which is quoted by the Master of the Rolls in his judgment in this case. Lord Cairns says in *Lord* v. *Lord*: "The rule of law is clear and there can be no controversy with regard to it, that a legacy payable at a future day carries interest only from the time fixed for its payment. On the other hand, where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of a year after the testator's death, even though it be expressly made payable out of a particular fund which is not got in until after a longer interval." The question therefore is whether, upon the words in controversy in this case, the legacy is not directed to be paid until a future date. The burden appears to me to be upon those who assert that that is so to make it out, because otherwise the general rule applies, as pointed out in *Lord* v. *Lord* [*supra*], that the right to the payment of the money arises at once, although it is directed to be paid out of a particular fund which will not fall in until afterwards.

MCPHILLIPS, J.A.

Can there be any doubt here but that the legacies were to be paid at a future date? And the time was to be at such time as the executor liked and the executor was under the obligation whenever he did make payment of the legacies to be sure that the estate was not "to be sacrificed in any way to pay them"—it could only be at some future date that he could so advise himself, *i.e.*, when satisfied no sacrifice of the estate would result.

In my opinion the learned Chief Justice of the Supreme Court arrived at the proper conclusion when he disallowed interest upon the legacies.

The appeal, therefore, in my opinion, should be dismissed.

MACDONALD, J.A.: The point is—must the executor and trustee pay interest on the legacies from the period of one year after the death of the testator or from a later period when certain property was sold out of which the legacies were paid? The will provided that

> the executor has the power given him to pay these three bequests when and how he likes: the estate is not to be sacrificed in any way to pay them.

MACDONALD, J.A.

The balance of the estate was left in the hands of the executor "to aid and help any worthy cause or causes as he shall think fit." On a former appeal we held the latter devise did not constitute a good charitable bequest so that the residuary estate goes to the next-of-kin. It is of value, however, in this appeal,

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bearing as it does on the intention of the testator to dispose of the residue of his estate in the manner indicated.

The executor, acting prudently, under the direction to pay the legacies "when and how he likes" disposed of the estate many years after the death of the testator and resists the claim for a large payment of interest for the long period elapsing since one year from the death of the testator. Had he sold at an earlier period the legatees might have received little, if any, of the legacies left to them. Due, however, to the sagacity of the executor these legacies, apart from this large claim for interest, may be paid in full with about $6,000 left for the next-of-kin.

The demand is highly unreasonable and I do not think we are compelled to accede to it. If a definite time for payment of the legacies had been fixed by the will interest would be payable from that date. It is somewhat anomalous to suggest that when, under special circumstances, and for the best of reasons, the deferred period for distribution is left to the discretion of the executor not merely for the convenient administration but in order that a surplus might be realized for other purposes and the legacies paid that the legatees should procure a double advantage. It was to their interests that the time for distribution should be deferred. Interest is in the nature of a payment because of delay in distributing on the part of the executor and it is impossible to charge him with delinquency in that respect.

The general rule is that interest is payable from one year after the testator's death unless some other period is fixed by the will in which event it is reckoned from the latter date. If, however, an executor is given discretionary power to postpone payment and this power is given for the benefit of the residuary legatee interest is not payable until the end of the period in which the discretion might be exercised. A time was fixed for the payment of the legacies. It need not be a definite date (*Re Robinson* (1892), 22 Ont. 438). If it could be shewn that the executor should have sold earlier other considerations might arise. I think too there was a residuary legatee within the meaning of the rule referred to. It is immaterial that it lapsed and consequent thereon other beneficiaries substituted, *viz.*, the next-of-kin.

We are concerned in applying this rule with the intention of the testator as revealed by the will. I think the will was framed and the discretion given to insure not only the payment of legacies but the accumulation of a substantial sum for a charitable purpose. It is immaterial that the scheme failed. The point is that postponement was permitted for a definite purpose, *viz.*, to provide a fund, apart from the legacies, and when the postponement was allowed for that purpose, not merely for the more convenient administration of the estate it is just as effective as if a definite time was fixed, subject only to the reasonable exercise of the authority given.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Heisterman & Tait.*
Solicitors for respondents: *Elliott, Maclean & Shandley.*

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BALDWIN v. BELL

BALDWIN AND BALDWIN v. BELL AND HAY.

Negligence—Damages—Collision between automobiles—Proof of negligence —Finding of trial judge—Appeal.

On the 4th of November, 1930, at about six o'clock in the evening, when it was very foggy, the plaintiff in a Chevrolet roadster (about 5 feet, 10 inches wide) and the defendant in an auto-truck with an overhanging rack (about 7 feet wide) approached a small bridge or culvert, from opposite directions, on a highway near the City of Kelowna. The bridge was twelve feet long and its width between the railings on each side was seventeen and one half feet. The defendant's truck reached the bridge first, and when he had cleared or nearly cleared the bridge the overhanging rack scraped the left side of the plaintiff's car as he was about to enter on the bridge. As the plaintiff was driving he allowed his left elbow to protrude slightly from the open window to his left, and the rack striking his elbow, smashed his arm badly. It was found by the trial judge that the defendant's truck in crossing the bridge was as near the right railing as he could safely go, that the real cause of the accident was the overhanging rack on the defendant's truck, of which the defendant had knowledge but the plaintiff did not, owing to fog and darkness. He found both drivers at fault, awarding one-fourth of the fault to the plaintiff and three-fourths to the defendant.

Held, on appeal, reversing the decision of MCDONALD, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the respondent cannot succeed unless he can prove the appellant was guilty of negligence, and irrespective of whether the accident was on the bridge or to the north of it, there is an insurmountable barrier to the respondent's case in the finding of the trial judge (based upon satisfactory evidence), that the appellant crossed the bridge on his own side of the roadway, the rack of his truck being within a few inches of the railing, and on reaching the north side he turned his truck to the right off the travelled highway, leaving ample room for the respondent to cross on his own side of the bridge. On this state of facts it is impossible to find negligence on the part of the appellant and the action should be dismissed.

Statement

APPEAL by defendants from the decision of MCDONALD, J. of the 2nd of July, 1931, in an action for damages for injuries sustained by the plaintiff Gordon St. George Baldwin, owing to the alleged negligence of the defendant Hay while driving a motor-vehicle belonging to the defendant Bell. On the 4th of November, 1930, at about 6.30 p.m., when it was very foggy, the plaintiff Gordon St. G. Baldwin was driving a Chevrolet auto-

mobile in a southerly direction on the Okanagan Mission Road towards Okanagan Mission, and was approaching a small bridge or culvert across a stream at about the same time that the defendant Hay was approaching the bridge from the opposite direction in a Chevrolet auto truck which was fitted with an overhanging rack that protruded on each side. The bridge was about twelve feet long and was protected by rails on each side which were seventeen and one-half feet apart. The defendant's truck (the overhanging rack of which was about seven feet wide) reached the bridge first and had cleared or almost cleared the bridge when the rack scraped the left side of the plaintiff's car (a Chevrolet about 5 feet 10 inches wide). The plaintiff's left elbow protruded slightly from the open window on his left hand side, and as the cars passed, the rack as it scraped along struck the plaintiff's elbow, smashing the bones of his arm and occasioning severe physical injuries. The plaintiff St. George P. Baldwin, the father of the injured plaintiff, recovered $1,086.34 as special damages and Gordon St. George Baldwin recovered $2,250 as general damages.

Statement

The appeal was argued at Vancouver on the 28th to the 30th of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

W. B. Farris, K.C., for appellants: The evidence shews the accident took place substantially on the bridge. The bridge being only seventeen feet wide there was very little room to spare, and the real cause of the accident was the careless way the plaintiff had his left elbow protruding from the open window. This was inexcusable when meeting a car on a narrow bridge on a foggy evening: see *Wintle* v. *Bristol Tramways and Carriage Co., Lim.* (1916-17), 86 L.J., K.B. 240, 936.

Argument

Maitland K.C., for respondents: The difference between accident and no accident was the rack on the defendant's car. Owing to its unusual width he should have taken special care when meeting other cars. The plaintiff could not anticipate meeting a car like this in the evening. He was well on his side

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of the road. The damages should have been larger as the plaintiff is permanently injured.

Farris, replied.

Cur. adv. vult.

5th January, 1932.

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

MARTIN, J.A.: In this case no good cause has been shewn, in my opinion, for disturbing the judgment below (though I do not wholly adopt the reasoning on which it is founded) and therefore the appeal should be dismissed, and likewise the cross-appeal, for though I should have felt disposed to award higher damages had I been trying the case, yet, to be consistent with our many decisions, I cannot go the length of saying that, under the circumstances, the award is so small that we ought to increase it as being so manifestly inadequate as to imply some error in the principles of assessment employed by the learned trial judge.

MARTIN, J.A.

GALLIHER, J.A. would allow the appeal.

GALLIHER, J.A.

MCPHILLIPS, J.A.: Upon the facts of this case I have no hesitation whatever although I observe the learned trial judge and with great respect says that he reached his conclusion "after much hesitation." To well understand the situation at the *locus in quo* it is well to bear in mind that at the time of collision a dense fog existed, stated to be the worst fog known of in the district. Hay the driver of the Chevrolet auto-truck had thereon an overhanging rack which in itself is always a danger owing to the oscillation that always takes place when in motion. The driver of the truck sees the motor-car of the plaintiff approaching him. Noting the lights, and nearing a small bridge, the driver of the truck, notwithstanding the fog, determines that he will increase his speed and it was at 25 miles an hour or more. He then attempts to cross the bridge ahead of the approaching motor-car thus precipitating what occurred. It is no answer to say that the hub of the truck was against the right-hand side of the bridge railing as the bridge was a narrow one. It was a foolhardy action and the accident which ensued constituted an

MCPHILLIPS, J.A.

actionable wrong. He took chances and must be held answerable for what occurred. The driver of the motor-car approaching was placed in a perilous position and there is no evidence that he proceeded with other than due caution. It is quite understandable that what was done by the driver of the truck precipitated the accident and he was, in my opinion, solely liable for the accident. Some question has been advanced that the accident was not on the bridge but glass and a door handle upon the bridge from off the approaching car gives clear enough evidence that the bridge was where the impact took place. The infant plaintiff received serious bodily injuries. Nothing turns upon the point that he had his arm—as many drivers of motors do—upon the door of the motor-car when driving; it was not beyond the overhang of the car. That which caused the impact unquestionably was the overhanging rack and the defendant Hay must be held to have known this and the additional danger he was creating by his precipitate action in truth inviting an accident. Now the Court of Appeal is to rehear the action and although we have here the stated hesitation of the trial judge we are not to be deterred by that. We have the evidence before us and there is no question of credibility here; that is, nothing has been said to discredit any witness.

MCPHILLIPS, J.A.

Upon a complete review of the evidence—and it was elaborated by counsel upon both sides and ably canvassed—I see nothing which would admit of my differing with the judgment of the learned trial judge, in truth what occurred could have been reasonably expected to have occurred. The defendant Hay with this overhanging rack upon his truck taking a chance as he did and accelerating his speed and rushing upon the bridge was guilty of gross negligence and it might not be too harsh to say guilty of criminal negligence in doing what he did. The learned trial judge has said:

> The real cause of the accident was I think that the defendant's rack over-hung the truck and took more space than would an ordinary car. The defendant Hay knew this and the plaintiff did not know it. All that could be seen by either driver were two headlights and this is the case whether the accident took place actually upon the bridge or a few feet off the bridge.

If I had been the trial judge I would not have considered it a case for the application of the Contributory Negligence Act.

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However, I do not propose to differ in that—the case was one of fact—and the decision of the learned trial judge should be final unless considerations are shewn and definitely established which would impel the Court of Appeal to disagree with the learned trial judge. I find nothing to cause me to disagree with the conclusions of the learned trial judge.

I would refer to what Lord Sumner said in the House of Lords in *S.S. Hontestroom* v. *S.S. Sagaporack* (1927), A.C. 37—that was a collision case—at pp. 47 and 48 and in particular this language:

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> . . . the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

I would, therefore, affirm the judgment of the learned trial judge and dismiss the appeal.

MACDONALD, J.A.: One may sympathize with the position of the respondent; he suffered serious injuries but cannot obtain damages from appellant unless he can prove him guilty of negligent acts. His counsel advanced the view that the collision occurred on the bridge. I do not think the evidence so indicates, but, if it did occur at that point, respondent is confronted with an insurmountable barrier, *viz.*, that by the finding of the learned trial judge (based upon satisfactory evidence) appellant crossed it on his own side of the roadway—in fact maintained a position where one side of his truck, with its overhanging rack was within a few inches of the railing. Respondent, on the other hand, asserts that he too kept to his own side of the roadway. It is impossible on that state of the facts to find negligence by appellant unless the finding in respect to his position on the bridge in crossing it is set aside and the evidence recast to read that in fact, he invaded respondent's territory.

MACDONALD, J.A.

It was suggested that appellant driving a truck on a misty or foggy night with an overhanging rack ought to take special care. That may be conceded. The duty of the driver to take care (particularly with such a vehicle) would increase as the visibility decreased. Respondent however must establish that such special care was not taken and by reason thereof this accident

occurred. Far from failing to take special care the appellant drove across the bridge in the manner already mentioned. Ample space remained for respondent's car to pass on the other side. It was suggested too that appellant crossed the bridge at an excessive rate of speed in view of all the circumstances. I doubt if the speed was excessive, but assuming that to be true, respondent again must shew that it brought about the collision.

Respondent, although suggesting that the collision occurred on the bridge, fares no better if in fact the cars collided a short distance beyond it. Appellant, after crossing the bridge, turned his truck to the side of the road partly off the travelled highway to avoid respondent's on-coming car. The marks of appellant's car wheels were shortly afterwards plainly discernible. True the witness Lysons had to accept appellant's statement that the marks shewn to him were made by appellant's truck but the trial judge accepted appellant's evidence on that point reinforced by Lysons's confirmatory statement. He could very well treat it as improbable that in so short a time other cars made these marks. He said: "I am satisfied the defendant's wheel marks were those which were afterwards seen by the defendant Hay and the witness Lysons." That finding is explicit and cannot reasonably be discarded. The wheelmarks were traced not only across the bridge but on to the roadway and to the side of the road beyond the bridge. Respondent therefore had practically the whole roadway available if the accident occurred at this point. I think from all the evidence it did take place beyond the bridge. While respondent's car approached appellant's truck at an angle he might, naturally enough, turn it parallel thereto before the collision actually occurred thus explaining the markings found on the cars. It is obvious therefore that a collision could not have occurred unless respondent (a seventeen year old boy with little experience) invaded appellant's area departing from his own side of the road in so doing. Appellant, therefore, in any aspect of the case, cannot be held liable because, far from causing the collision, he got off the roadway in an effort to avoid it.

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It was also suggested that appellant, in view of the width of the vehicle he was driving and the degree of visibility, should

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have stopped before he reached the bridge to allow respondent's car to pass. Again, assuming that to be so, evidence was not led to shew the relative distances of the respective cars from the bridge when each came into view of the other in order to establish priority in this respect. Indeed the evidence available tends to shew that respondent failed to appreciate the fact that he could not cross the bridge before appellant reached it while appellant apparently reached it first and only increased his speed in order to be able to cross respondent's car on the north side of the bridge where there was greater leeway.

The appeal should be allowed.

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

Solicitors for appellants: *Farris, Farris Stultz & Sloan.*
Solicitors for respondents: *Maitland & Maitland.*

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WORKMEN'S COMPENSATION BOARD v. NICHOLS

WORKMEN'S COMPENSATION BOARD AND DINNING v. NICHOLS *ET AL.*

Bankruptcy — Company—Trustee for bond-holders—Assessment of Workmen's Compensation Board—Wage-earners—Unsecured—R.S.B.C. 1924, Cap. 52, Sec. 24—Rule 967.

The property of the Campbell River Mills, Limited, was destroyed by fire in July, 1930, and in the following month the company became bankrupt. On an issue heard on April 2nd, 1931, to ascertain the priorities of the various claimants the claims of the wage-earners were held to be out of Court on the ground that they did not file their claims for lien within the time limited by the Woodmen's Lien for Wages Act. An appeal by a portion of the wage-earners was heard by the Court of Appeal on the 16th of June, 1931, and quashed. On the application of two wage-earners an order was then made by FISHER, J. on the 9th of September following appointing three wage-earners to represent themselves and all wage-earners of the insolvent company other than those represented by counsel on the appeal above referred to, that the order should be deemed to have been made at a date prior to said judgment, and that said applicants be at liberty to appeal from the judgment of April 2nd, 1931, the time being extended for filing notice of appeal until September 23rd, 1931. On the appeal coming on for hearing:—

Held (MCPHILLIPS, J.A. dissenting), that there is no authority in the Court below to make an order extending the time in which the appellants might appeal, and as no application was made to the Court of Appeal or a judge thereof for an extension of the time within which to appeal under section 24 of the Court of Appeal Act, the appellants are out of Court.

It appeared from the evidence that the wage-earners of the insolvent company were advised by the trustee in bankruptcy not to obtain woodmen's liens against the property of the insolvent company, but to permit the trustee in bankruptcy to look after their interests, and on that advice no liens were obtained by the wage-earners.

Held, that the trustee in bankruptcy took an unwarranted course in assuring the wage-earners that they need not obtain liens, as he had no right to derogate from the rights of several creditors and the result of his attempted short cut to save the rights of the wage-earners was fatal to their claims.

APPEAL by certain wage-earners, formerly employed by the Campbell River Mills, Limited, from the decision of MCDONALD, J. of the 2nd of April, 1931 (reported, 43 B.C. 477), in an issue brought by the trustee of the debenture-holders of the Campbell River Mills, Limited, with various other claimants, Statement

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in order to ascertain the various priorities with respect to $29,404.20 received on fire-insurance policies, the company's plant having been destroyed by fire in July, 1930, and on the 27th of August following, the company having become bankrupt. By the above order it was held that one Ingham, who had made a loan to the company after the fire was entitled to a first charge, the claim of the Workmen's Compensation Board being next entitled for the amount of its claim, and the trustee for the debenture-holders the balance. The wage-earners were declared out of Court on the ground that they did not file their liens within the time limited by the Woodmen's Lien for Wages Act. An appeal was taken by the trustee for the bond-holders, and by a portion of the wage-earners, when the appeal of the wage-earners was quashed and the trustee for the bond-holders was given priority over the Workmen's Compensation Board. Then in July, 1931, two wage-earners, named Nicholls and Cullam, applied to be appointed to represent the wage-earners of the insolvent company, except those that had been represented by counsel under the name "wage-earners" in the said appeal, and on September 9th, 1931, an order was made by FISHER, J. that Nicholls, Cullam and Anderson, appellants herein, be appointed to represent themselves and all wage-earners of the insolvent company other than those who had appeared or who were represented by counsel in said issue, and that that order should be deemed to have been made as at a date prior to said judgment, and that the said appellants on behalf of themselves and all other wage-earners whom they were appointed to represent should be at liberty to appeal from the said judgment of the 2nd of April, 1931, and that the time for filing the notice of appeal be extended to the 23rd of September, 1931.

Statement

The appeal was argued at Vancouver on the 27th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

McGeer, K.C., for appellants: We claim a wage-earners' priority over the trustee for the debenture-holders. Under section 142 of the Companies Act we are entitled to preference. Under section 9 (4) of the Bankruptcy Act the property is under the authority of the Court: see *Peruvian Guano Co.* v. *Dreyfus*

Argument

Brothers & Co. (1892), A.C. 166 at p. 187. The trustee in bankruptcy took possession for the debenture-holders and we have preference under said section 142.

Alfred Bull, for respondents: That a debt by agreement is to be paid out of a certain fund is an equitable assignment of that fund see *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763 at p. 777; *West and Wright* v. *Newing* (1900), 82 L.T. 260; *Ex parte Brett; Re Irving* (1877), 37 L.T. 507; *Riccard* v. *Prichard* (1855), 1 K. & J. 277. This claim of ours is founded on an equitable assignment. Section 142, *supra,* does not apply because the conditions under which that section applies do not exist here: see Palmer's Company Law, 13th Ed., 524; *In re Glyncorrwg Colliery Co.* (1926), Ch. 951. The money first comes to the trustee for the bond-holders in order that he may make a distribution: see *Davey* v. *Gibson* (1929), 11 C.B.R. 138. If bankruptcy intervenes then the Dominion Act controls: see *Hoffar, Ltd.* v. *Canadian Credit Men's Trust Association* (1929), 40 B.C. 454; *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada* (1894), A.C. 189; *Tennant* v. *Union Bank of Canada, ib.* 31; *Parker-Eakins Co.* v. *Royal Bank* (1922), 3 C.B.R. 211; *In re Lewis Merthyr Consolidated Collieries* (1929), 1 Ch. 498.

Argument

McGeer, replied.

Cur. adv. vult.

5th January, 1932.

MACDONALD, C.J.B.C.: This appeal arises out of bankruptcy proceedings in which a question arose as to the priority of creditors. Judgment was pronounced on the 2nd of April, 1931, in an issue in which the plaintiffs were the respondents herein and defendants were "wage-earners." The priorities were fixed as between the two respondents and "wage-earners" failed to establish any priority over the said respondents. An appeal was taken from that judgment by Dinning as appellant and the Workmen's Compensation Board as respondent, and by "wage-earners" appellants and Workmen's Compensation Board respondent. The case came before this Court on the 16th of June, 1931, the appeal of "wage-earners" was quashed and the

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said Dinning was given priority over the Workmen's Compensation Board. Thereafter, namely, on the 8th of July, 1931, a motion was made on behalf of appellants Nicholls and Cullam to be appointed to represent the wage-earners of the insolvent company except those that had been represented by counsel under the name "wage-earners" in the said appeal and the said motion coming on for hearing before FISHER, J., on the 9th of September, 1931, an order was made that Nicholls, Cullam and Anderson, appellants herein, be appointed to represent themselves and all wage-earners of the insolvent company other than those who had appeared or who were represented by counsel in said issue and that that order should be deemed to have been made as at a date prior to said judgment and that the said appellants on behalf of themselves and all other wage-earners whom they were appointed to represent should be at liberty to appeal from the said judgment of the 2nd of April, 1931; that the time for filing notice of appeal should be extended to the 23rd of September, 1931, and that the appeal books used in the aforesaid appeal to this Court filed by said Dinning should be used in this appeal.

MACDONALD, C.J.B.C.

The case is unusual and unfortunate in this respect: The "wage-earners" of the said insolvent were advised by the trustee in bankruptcy not to obtain woodmen's liens against the property of the insolvent company but to permit the trustee in bankruptcy to look after their interests and on that advice no liens were obtained by the wage-earners. The said trustee, of course, had no authority to fix the priority of the creditors and particularly no authority to give wage-earners who are unsecured creditors priority over Dinning who was a secured creditor. What I have said above shews the position in which the parties have got themselves into. The present appellants and those whom they represent were not parties to the issue above mentioned nor to the appeal from the judgment therein. They now bring an appeal which is out of time unless Mr. Justice FISHER's order has effectually extended the time in which they might appeal. I can find no authority for that order. Section 24 of the Court of Appeal Act gives the Court of Appeal or any judge thereof power to enlarge or abridge the time in which the notice of appeal should be given but no application was made to this

Court or a judge for extension of time and hence assuming the legality of the other proceedings above mentioned the appellants herein are out of Court. I think Supreme Court Rule 967 is not applicable to an appeal to the Court of Appeal.

Now when the appeal of the "wage-earners" was quashed on the ground that they were a non-entity and had no right to appear in litigation at all I was of opinion that had they been proper parties by representation they could not succeed for the reasons stated in the appeal of *In re Campbell River Mills Ltd. Dinning* v. *Ingham,* namely, that they were unsecured creditors not having obtained liens under the Woodmen's Lien for Wages Act, and therefore could not compete with Dinning who was a secured creditor under a mortgage on all the debtor's property. My reasons for this conclusion were handed down in writing (see 44 B.C. 412) and I need not repeat them now.

I held that the Workmen's Compensation Board was an unsecured creditor and as such could not compete with Dinning for priority. The same reasoning is applicable to the present appeal which in my opinion is governed by it. The only thing I wish to say in regard to these reasons is that without having any evidence of the fact I assumed that Dinning had valued his security whereas it now appears that he filed his claim for his whole debt amounting to $276,657.58, far beyond the amount distributable among the creditors of said insolvent. That erroneous assumption is, however, immaterial under the Bankruptcy Act. There is, therefore, no reason why the unsecured creditors should raise a question as to priority between themselves since there will be no money to distribute to such unsecured creditors; but should I be mistaken in this I think the priority between the appellants and the Workmen's Compensation Board who are in the same class should be that given by the Bankruptcy Act, section 121, 3rd clause.

I may add that I think the trustee in bankruptcy took an unwarranted course when he assured the wage-earners that they need not obtain liens. He could, of course, have had no right to derogate from the rights of the secured creditors and the result of his attempted short cut to save the rights of wage-earners has been fatal to their claim.

I would dismiss the appeal.

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

MCPHILLIPS, J.A.: In my opinion the wage-earners are entitled to priority in the bankruptcy proceedings upon a similar line of reasoning expressed by me in my judgment which developed to be a dissenting judgment in *In re Campbell River Mills Ltd. Dinning* v. *Ingham* (1931), 44 B.C. 412. Here we have to consider as well the Woodmen's Lien for Wages Act, Cap. 276, R.S.B.C. 1924. The appellants were entitled to liens and made their claim upon the trustee in bankruptcy but apparently did not go on and file the statements with the registrar of the County Court—the bankruptcy having intervened—the sections of the Act requiring this being sections 4, 5, and 6. The appellants apparently were advised by the trustee in bankruptcy that owing to section 24 of the Bankruptcy Act, R.S.C. 1927, Cap. 11, there was a stay of proceedings. In my opinion the statute did stay these proceedings. The only question that remained was to establish the liens to the satisfaction of the trustee in bankruptcy. The appellants had by section 3 (1) of the Woodmen's Lien for Wages Act express liens on the logs and timber for the amount due for labour and services. That being so there only remained the establishment to the satisfaction of the trustee in bankruptcy that the labour and services had been performed. All of the Provincial legislation as to steps to be taken to enforce the claims in the County Court have no force whatever. The policy of the law is that automatically bankruptcy occurring then to the denial of all Provincial legislation as to procedure all proceedings would thereafter be in conformity only with the Dominion legislation and it is not possible for the Provincial legislation to write down or write out statutory liens existent at the time of bankruptcy. Section 125 of the Bankruptcy Act reads as follows:

> 125. 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.

It is seen that the last words are "nor prejudice or affect any lien or charge in respect of such property created by any such

laws." Here the workmen admittedly did the work and had the statutory lien but before filing the statements in the County Court the bankruptcy occurs. Immediately the Bankruptcy Act applies and all proceedings stand stayed. The trustee in bankruptcy had only one duty to perform and that was to have proof laid before him of the right to the liens with no requirement upon the woodsmen to take steps in no way called for by the Dominion legislation. And as I understand it the trustee in bankruptcy did not call for this being done. It is to be observed that section 125 of the Bankruptcy Act starts with the words "Nothing . . . shall interfere . . . nor prejudice or affect any lien or charge in respect of such property created by any such laws." In *In re West & Co.* (1921), 2 C.B.R. 3, Mr. Justice Orde had under consideration the question of priorities and his view is well expressed in the editor's head-note:

> In the winding up of an insolvent estate under the Bankruptcy Act, Can., the priorities of creditors depend upon the provisions of the Act itself; no priority given by any Provincial statute can be of any avail unless that priority is preserved by the Bankruptcy Act.

MCPHILLIPS, J.A.

When the provisions of Acts of both the Dominion and Provincial Parliaments are to be considered, each being entitled to be considered, and no question of *ultra vires* arising, then it would seem to me that the policy of the statute law is to be carefully considered and matters should be so ordered as to work out what was the intention of both legislative authorities. The staying of proceedings (section 24, Bankruptcy Act) must be held to mean that as to the priority of a statutory lien the persons entitled shall have that statutory lien as of the date of the bankruptcy. Here that right existed and the liens could have been gone on with and perfected under the Provincial law but were prevented by the Dominion law. The combined legislation must be given a liberal construction and the policy of the law carried out by the Courts if possible. Now, I think, that is possible and I trust that my sympathy for the wage-earners in this present matter does not carry me too far when I arrive as I do—not without some hesitancy—at the view that the wage-earners should succeed in this appeal. It is really contrary to natural justice that the debenture-holders enforcing the trust deed should thereby exploit the wage-earners out of the moneys they should

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receive for the cutting down of and fashioning the trees of the forest into a commercial product and that the commercial value thereof should go to the debenture-holders to the denial of payment of justly-earned wages which produced that commercial product. Particularly is this so when the policy of the statute law is to protect the wage-earners. If in the end the result is that the wage-earners fail clearly it will be a matter for legislation to effectively carry out the undoubted intention of both Parliaments.

I would allow the appeal.

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

Appeal dismissed, McPhillips, J.A. dissenting.

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Husband and wife—Husband handing over savings to wife—Investment of savings by wife—Active interest of husband in interests acquired—Husband's interest in investments.

In an action by a husband against his wife for a declaration that he was entitled to a half interest in four lots he alleges were purchased in part with his money; that money in a bank in his wife's name was a joint account, and that he was jointly interested with her in six head of cattle and in a dairying and poultry business, an issue was directed and it was held on the trial that the husband had an interest in the lots in question, and reducing his interest to the terms of money it was ordered that he should recover the six head of cattle and $1,000 clear of the $4,000 on deposit in the bank.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MARTIN, J.A. dissenting in part), that the evidence on the whole, although unsatisfactory, affords justification for the view that the husband gave all his earnings to his wife on the agreement or understanding that their mutual savings should be invested in real estate and in the dairying and poultry business, and that while the wife made the investments and put the property in her own name, but with the active assistance of the husband, the assets acquired should be regarded as a joint property. The precise interest is difficult to determine but the judge below reached a conclusion as accurate as the facts permitted.

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APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 25th of June, 1931, on an issue of the 21st of May, 1931, pursuant to an order of MCDONALD, J. of the 15th of May, 1931. The plaintiff and defendant are husband and wife and the plaintiff affirms and the defendant denies that certain lots in Nanaimo District were purchased with moneys belonging to the plaintiff, and that the defendant holds said lands as trustee for the plaintiff as to the whole or some interest therein. The defendant has in her possession or control moneys belonging to the plaintiff, and the defendant has received from the plaintiff moneys from time to time which the defendant ought to account for. The plaintiff is entiled to a declaration that the defendant holds the said lands and moneys, or part thereof, or an interest therein, as trustee for the plaintiff. The plaintiff and defendant have in their possession six head of cattle and said cattle are the joint property of the plaintiff and the defendant. The issue having been tried, it was held that the plaintiff had an interest in the property in question, that he was entitled to the six head of cattle and $1,000 of the moneys held by the defendant and deposited in the Canadian Bank of Commerce at Nanaimo.

Statement

The appeal was argued at Vancouver on the 9th, 15th and 16th of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Cunliffe, for appellant: The burden is on the plaintiff to prove what interest he had, not only in the lands in question but in the moneys held by the defendant. He has failed to prove that he has any interest in the lands and has not given any detailed statement of the amounts he had paid over to the defendant.

A. Leighton, for respondent: The burden of proof is on the wife: see Halsbury's Laws of England, Vol. 16, p. 353, sec. 708. Savings by the wife of moneys given her by her husband belong to the husband: see *Birkett* v. *Birkett* (1908), 98 L.T. 540. The recipient of moneys from another must prove it was the intention of the deliverer to make a gift: see *Johnstone* v. *Johnstone* (1913), 12 D.L.R. 537; *McKissock* v. *McKissock*

Argument

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(1913), 18 B.C. 401. Where the funds are mixed up the wife is a trustee.

Cunliffe, in reply, referred to *Cook* v. *Addison* (1869), 38 L.J., Ch. 322 at p. 327; *Dudgeon* v. *Dudgeon and Parsons* (1907), 13 B.C. 179 and *Roper* v. *Hull* (1921), 30 B.C. 405.

Cur. adv. vult.

5th January, 1932.

MACDONALD, C.J.B.C.: This case raised a dispute between husband and wife for property which the husband alleged had been purchased, at least partly, by his money although the actual purchase was made by the wife and in some cases in the wife's name. The evidence is most unsatisfactory. No definite segregation of their respective moneys was made at the trial and indeed it would appear from the whole proceedings that such a segregation would be impossible. The husband while employed as a miner earned money the balance of which after paying bills he handed over to his wife apparently for the purpose of avoiding an administration of his estate in case he should be killed in his dangerous occupation. Such moneys were invested by his wife along with, as the evidence would appear to indicate, moneys owned and earned by herself. What amounts of their respective moneys went into these investments it is impossible to tell. A number of cows and poultry were purchased beside the real estate and a small dairy business was carried on through the efforts of the husband and wife. What amount of her money or his went into this business it is impossible to say on the evidence. She did not, however, carry on that business apart from her husband. Over $4,000 had been deposited in the bank and remained there at the time of the trial which each of them claims. The deposits were in the wife's name and had been made at least partly through the husband's earnings. The learned trial judge in the predicament of not knowing from the evidence what interest each of them owned gave the real estate to the wife and gave the cows to the husband and gave him $1,000 out of the moneys on deposit. The judgment must be regarded as an equable division between them arrived at by the learned judge on such facts or impressions as he acquired. It

MACDONALD, C.J.B.C.

was the best the learned trial judge could make of an utterly impossible situation and I am unable to say that his disposition of the case should be interfered with. There is no doubt in my mind that the value of the cows given to him and the $1,000 from the bank is quite within the limits of the amount of money which he is entitled to claim from his wife and as he is not cross-appealing and is accepting the judgment I would not interfere except as to the scale of costs which I think should be taxed under column 1 of the Appendix N, not under column 2, as ordered.

MACDONALD, C.J.B.C.

No costs of appeal.

MARTIN, J.A.: I would allow this appeal in part: as to the cattle.

MARTIN, J.A.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal involves the consideration of a judgment of the learned Chief Justice of the Supreme Court of matters of difference between husband and wife and in reviewing the judgment attention must be given to the Married Women's Property Act, Cap. 153, R.S.B.C. 1924. It is provided in that Act that determination of disputes may be decided in a summary way. It would not appear that the parties really took advantage of the summary procedure but, nevertheless, in my opinion, the learned Chief Justice was well entitled to proceed under the statutory powers given by section 29 of the Act, which reads as follows:

29. In any question between husband and wife as to the title to or possession of property, either party, or any corporation, company, public body, or society in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise, in a summary way, to any judge of the Supreme Court, and the judge may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit; or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit.

Here we have elaborate issues directed wholly unnecessary adding greatly to the costs; however, both sides are answerable for this and the party failing must pay the penalty of costs. The argument was at some length and all the facts were fully gone

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into and after the fullest consideration I am satisfied that the learned Chief Justice arrived at a correct conclusion as to the respective rights of the parties. I may remark that I cannot view with any approval the very extravagant claims advanced upon the part of the wife—wholly regardless of the legitimate claims of the husband—as to the one matter alone, the dairy business, which was really built up and sustained by the money of the husband and carried on by the husband, yet the wife ruthlessly denies the husband any interest therein. I am wholly of the same opinion as that arrived at by the learned Chief Justice and whilst it is very regrettable to note these differences as between husband and wife yet the statute law may be rightly invoked to adjust matters of this nature, *viz.*: "as to the title to or possession of property." The learned Chief Justice in his judgment has made an order that the plaintiff (respondent) has an interest in the property in question and directed that the six head of cattle in the possession of the defendant (appellant) shall belong to the plaintiff and that $1,000 clear of the moneys lying on deposit in the Canadian Bank of Commerce, Nanaimo, shall belong to and be paid over to the plaintiff and as to the costs that they be taxed under column 2, Appendix N, and to be paid to the plaintiff out of the balance of the moneys lying in the Bank of Commerce. I cannot agree that the learned Chief Justice has in any respect wrongly arrived at his conclusions; on the contrary I am wholly in agreement therewith and am of the opinion that the judgment should be affirmed and the appeal dismissed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The respondent (husband) sought a declaration (as against his wife, the appellant, from whom he is separated) (1) that he was entiled to a half interest in four lots in Nanaimo purchased, he alleged in part with his money; (2) that money in the bank in his wife's name was a joint account; (3) and that he was jointly interested with her in six head of cattle and in the dairying and poultry business. An application was made to the Court for an adjudication of rights under section 29 of chapter 153, R.S.B.C. 1924 (Married Women's Property Act) and an issue was directed. It might

MACDONALD, J.A.

have been disposed of in a summary way. On an application of this character under the Act the judge might make such order "as he thinks fit" not of course by disregarding the evidence or by proceeding upon wrong legal principles but by endeavouring to reach, as best he might, a just and equitable conclusion. I mention this because it was not possible to be entirely accurate in deciding the points in issue and the learned trial judge doubtless appreciated this fact.

About $4,000 was accumulated as a surplus (and deposited in the bank) derived from appellant's original capital and from profits in the business carried on, in part, with the aid of the respondent's earnings. True his earnings were largely absorbed in house-keeping expenses—an outlay which he, as the bread-winner, was obliged to make—but the trial judge evidently felt that, in the economical fashion in which they lived a considerable part of his wages could be used, and was used, in the purchase of the lots referred to and in the conduct of the dairying and poultry business. He made a declaration that "the husband had an interest in the property." He does not necessarily find that he had an undivided one-half interest, doubtless feeling that he could not say so with any reasonable degree of accuracy. But he did find some interest and converting its value in terms of money and part of the personal property ordered that the husband (respondent) should "get the cows at the present home" and "$1,000 net of the account in the Bank of Commerce." This award, by comparing it with the total valuation, can be converted into a fractional interest.

MACDONALD, J.A.

I think the language of section 29 of the Married Women's Property Act is elastic enough to allow the Court to make an order in this form. Are there any grounds for interfering? I think not. It was submitted that it must be presumed that any money he gave appellant (apart from outlays for maintenance) must be treated as a gift unless the contrary is proven. Much may be said on the question of "gifts" but assuming the presumption, what follows? Certainly there is no more than a presumption where the whole question is the intention of the parties (Lush's Husband and Wife, 3rd Ed., 211). It may be shewn that the money was advanced for the purchase of the lots,

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for the joint benefit of both. The husband testified "I did not buy the property; I earned the money" (*i.e.*, the money used in part at least to make the purchases). "My wife bought it under my instructions and bought it in her own name." There would be no need of instructions if it was a purchase of separate property. He gives the reason for following this course. "If anything happened in the mine—I let my wife buy it in her name so that there would be no transfer for her." He was following a dangerous occupation. Then, as to the cows and poultry he said "we have kept cows and poultry. I done the milking and delivered the milk and everything besides and the wife handled my money." He mentioned other sums handed to her in addition to his wages, small of course, but worthy of notice. He gave her, *e.g.*, approximately $200 which she said was a loan. That apparently was not believed. All this, and other evidence, rebuts the plea of a gift. If one man purchases property in the name of another, *e.g.*, a stranger there is a resultant trust. The latter is a trustee for the real purchaser. If the real purchaser is under obligation to provide for the other the usual presumption must be repelled by evidence shewing that at the time the former intended to buy for his own benefit. The evidence referred to is sufficient for this purpose.

MACDONALD, J.A.

As to the dairy and poultry business, it cannot be regarded as appellant's business because her own separate funds were employed, in part, in conducting it. It must be shewn that she was carrying on these two activities independently of respondent and without being liable to account. It is a question of fact with various elements to consider. There is considerable evidence of the identity of the husband with the work and while I might have reached a different conclusion I cannot say that on this question of fact the trial judge was clearly wrong. The law is that,—

> Where the parties live together at the premises on which the business is carried on, the burden of proving that it is a separate trade so as to entitle the wife to claim the profits as her separate property lies on her:
> Halsbury's Laws of England, Vol. 16, p. 353.

On the whole I think the evidence, unsatisfactory as it is, affords justification for the view that (as in *McKissock* v. *McKissock* (1913), 18 B.C. 401) the husband gave all his earn-

ings to his wife on the agreement or understanding that their mutual savings should be invested in real estate and in the dairying and poultry business and that while the wife made the investments and put the property in her own name and ostensibly carried on the business, in her name but with the active assistance of the husband the assets acquired should be regarded as joint property. The precise interest was difficult to determine but the trial judge reached a conclusion as accurate as the facts permitted.

It was submitted that the costs should be taxed under column 1 of Appendix N rather than under column 2 as directed. The evidence does not appear to accurately disclose the value of the lots, dairy and poultry business but, adding their combined approximate value to the $4,000 in the bank, I do not think the value of the interest claimed by the husband amounted to $3,000. The costs therefore should be taxed under column 1.

MACDONALD, J.A.

I would dismiss the appeal.

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

Solicitor for appellant: *F. S. Cunliffe.*
Solicitor for respondent: *A. Leighton.*

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Jan. 8.

ANDLER *v.* DUKE

ANDLER *ET AL.* v. DUKE *ET AL.* (No. 2).

Injunction—Motion to stay execution of judgment pending appeal—Judgment duly entered—Jurisdiction.

On motion by the defendants to the Court of Appeal for an injunction to stay execution of a judgment of said Court pending an appeal therefrom to the Supreme Court of Canada, it appeared that the judgment, which was previously drawn up and entered, ordered without reservation that the lands in question in the action be vested in the plaintiffs.

Held, MCPHILLIPS, J.A. dissenting, that upon the judgment being duly entered this Court became *functus officio*, there is no jurisdiction to grant the injunction, and the motion should be dismissed.

MOTION to the Court of Appeal for an injunction for stay of execution of a judgment of said Court (reported, *ante*, p. 96) pending an appeal to the Supreme Court of Canada.

Statement

The motion was heard at Victoria on the 5th of January, 1932, by MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

A. D. Crease, for the motion: This is an application for preservation of the *res* pending an appeal to the Supreme Court of Canada. A successful appeal would otherwise be ineffective: see *A. R. Williams Machinery Co.* v. *Graham* (1916), 23 B.C. 481; *Wilson* v. *Church* (1879), 11 Ch. D. 576; *Polini* v. *Gray* (1879), 12 Ch. D. 438.

Argument

Alfred Bull, contra: The rule is limited to appeals to this Court. Judgment was delivered by this Court on November 16th last and was entered. This Court is now *functus officio* as regards this case and there is no jurisdiction to make the order: see *Galloway* v. *Corporation of London* (1865), 3 De G. J. & S. 59. In the cases referred to the orders were not entered, but in this case it was.

Crease, in reply, referred to *Davies* v. *McMillan* (1893), 3 B.C. 72, and *Gibson* v. *McVeigh* (1922), 1 W.W.R. 147.

Cur. adv. vult.

8th January, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an application for an injunc-

tion to stay execution of a judgment of this Court [reported, *ante,* p. 96] pending an appeal to the Supreme Court of Canada. The jurisdiction of this Court to grant the injunction is denied because it was a final judgment of the Court and was drawn up and entered before the application for the injunction was launched.

There was no reservation of any kind in the judgment and upon the entry of it I think this Court became *functus officio.* The Court had finally parted with its jurisdiction in the action and hence could not make the order applied for. In support of this, *Galloway* v. *Corporation of London* (1865), 3 De G. J. & S. 59; 46 E.R. 560, was cited as authority. The application there was to the Court of Appeal on an appeal to the House of Lords. The Court of Appeal had dismissed the appeal without reservation. Turner, L.J. in that case said (p. 62):

> I confess, however, that on looking at the case of *Oddie* v. *Woodford* [(1821), 3 Myl. & Cr. 584; 7 L.J., Ch. 117], I cannot but think, that by reason of the dismissal of the bill, the power of the Court is gone. I think that the plaintiff, if he intended to appeal to the House of Lords, ought at the hearing to have asked the Court so to frame its order as to keep alive its jurisdiction pending the appeal.

MACDONALD, C.J.B.C.

There the contention was that the Court of Appeal had not retained its jurisdiction and that is the case here. In *Polini* v. *Gray* (1879), 12 Ch. D. 438; 49 L.J., Ch. 41; 28 W.R. 360, the same point arose and in that case it was pointed out by Jessel, M.R. that the order of the Court of Appeal had not been entered so that the Court had not parted with its jurisdiction, and therefore the injunction was continued. The only question there was the propriety of the order. Jessel, M.R. refers to Order LII., r. 3, of the Judicature Act, which is the same as rule 659 of our Supreme Court Rules, as conferring power to make the order. That rule conferred the power to make an order when, as I think, the Court is not *functus officio.* I think a distinction must be drawn between jurisdiction and power of the Court to make an order, and I think the rule above mentioned has reference, not to the jurisdiction, but to the power, to make the order, having jurisdiction. It is true that the Court in that case does not clearly distinguish jurisdiction from power but, I think, the judgments do indicate that the

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judges were well aware of their jurisdiction from the fact that they had not parted with the case and all that was necessary for them to deal with was their power to make the order asked.

It is true that Sir George Jessel leaves it a little doubtful as to whether he meant that Order LII., r. 3, alone would give jurisdiction but it is not to be forgotten that he had already said that the Court had retained it. He was not troubled with whether that rule conferred jurisdiction or not. Our rule was not referred to in the argument but was called to my attention afterwards, but I am convinced that a Court which is *functus officio* cannot as a Court make an order in a lost cause unless indeed the jurisdiction is clearly renewed by rule or statute for that purpose.

MACDONALD, C.J.B.C.

MARTIN, J.A. (oral): This motion for an injunction to stay the implementing or execution of the judgment in this Court, [(1931), *ante*, p. 96; (1932), 1 W.W.R. 257] vesting the property in the plaintiffs, pending the ultimate determination of the question by the Supreme Court of Canada is an appeal to that Court which it is proposed to bring, raises a question of very considerable importance, and which, in its special form, has never come before this Court before.

Mr. *Bull*, for the successful plaintiff, does not say this Court has no jurisdiction to make an order of this description, *i.e.*, preserving the property pending the decision of the Supreme Court of Canada, which, of course, is an entirely distinct tribunal from this and constituted under a national statute, but he does say that such an application to this Court must be made before the entry of the judgment contemplated to be made, and in this case that judgment has been entered, as is set out in the affidavit of the applicant, on November 20th, following delivery of judgment by this Court on the 10th day of that month.

MARTIN, J.A.

At the time we delivered that judgment, and so that there should be no doubt at all of the grounds and importance of it, we took the precaution to hand down a special minute, which I hold in my hand, shewing the principle upon which we proceeded in arriving thereat, and, as it is in one way material, I shall read the first two paragraphs thereof as follows:

Appeal allowed in part by varying the judgment below by striking out the first adjudicating paragraph thereof and reframing the second paragraph so as to vest the lands in question in the plaintiffs pursuant to this Court's sole adjudication based upon its jurisdiction to implement the California judgment in a proper case, as this appears, *ex facie*, to be.

Leave to the plaintiffs to amend their statement of claim within a week by setting up an alternative cause of action invoking the assistance of this Court to give effect to the California judgment by vesting the title of the British Columbia real property in the plaintiffs as aforesaid.

Then we dealt with the question of costs and concluded by saying that reasons will be handed down later, and Mr. Justice McPHILLIPS dissented from that disposition of the matter.

Following that the judgment was formally entered in this registry as aforesaid, and the submission now is that thereupon this Court became *functus officio* because it had finally and completely disposed of the whole matter and, as there is no reason for saying, and it is not said, that this judgment did not represent the judgment that this Court intended to make, we cannot accede to any proceedings that would tend to alter that final determination.

Such being the case, the further submission of the plaintiff in opposition to this present motion is that no authority can be cited in support of a stay or injunction being granted under the present circumstances, and that it is contrary to the established practice of this Court and of the Courts of England to stay execution of their judgments in such case, because there is no jurisdiction to do so, and reliance is primarily placed upon several decisions which will be found cited in these three cases, *viz.*: *Galloway* v. *Corporation of London* (1865), 3 De G. J. & S. 59; 46 E.R. 560; *Wilson* v. *Church* (*No. 2*) (1879), 12 Ch. D. 454; 28 W.R. 284, decided on July 4th, and the case of *Polini* v. *Gray* (1879), 12 Ch. D. 438; 49 L.J., Ch. 41; 28 W.R. 360, decided on July 23rd thereafter, all being decisions of the Court of Appeal.

MARTIN, J.A.

Then there is also the case of *Oddie* v. *Woodford* (1821), 3 Myl. & Cr. 584, at 624-5; 7 L.J., Ch. 117, a decision of Lord Chancellor Eldon, which is of importance because it was made the foundation for the judgment of the Lords Justices in Chancery in the appeal in the *Galloway* case, *supra,* which was an appeal from the Master of the Rolls, and in that case where the

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point was raised exactly as it is raised here today by a very distinguished counsel, Sir Hugh Cairns (afterwards the great Lord Chancellor Cairns) after considering the *Oddie* case, the Lords Justices agreed that it was a correct exposition of the law, and they held that on an appeal, after the order had been entered, the Court had no power to exercise further jurisdiction in the matter. Lord Justice Knight Bruce said this (pp. 62-3):

> I have at least as much inclination as I ought to have to accede to the plaintiff's application, but, having regard to the course of the Court and to the authorities, especially the case of *Oddie* v. *Woodford*, I think that we should be going too far if we were to make such an order as is asked.

And Lord Justice Turner said:

> After the opinion which I expressed at the hearing in favour of the plaintiff's case, it may be supposed that I have every disposition to grant this injunction, and if my learned brother had been of opinion that it ought to be granted, I should have been ready to defer to his opinion. I confess, however, that on looking at the case of *Oddie* v. *Woodford*, I cannot but think, that by reason of the dismissal of the bill, the power of the Court is gone. I think that the plaintiff, if he intended to appeal to the House of Lords, ought at the hearing to have asked the Court so to frame its order as to keep alive its jurisdiction pending the appeal. This not having been done, we should be departing from what I understand to be the course and practice of the Court, if we were to grant the plaintiff the injunction he asks.

MARTIN, J.A.

That case has never been questioned; not only so, but in *Polini* v. *Gray, supra,* it was treated, as it must have been, as a binding decision by the Court consisting of the Master of the Rolls, Jessel, James, L.J., Brett, L.J., and Cotton, L.J., which is important, because, with the exception of the Master of the Rolls, it was the same Bench which, a few days before, had sat on the *Wilson* v. *Church* case, *supra,* in which the point, however, did not arise, so that it was in the *Polini* case that for the first time, as reported, since the *Galloway* case, *supra,* the point had come up.

What those Courts agreed upon was that they had no jurisdiction for a rehearing after the judgment had been drawn up, the Master of the Rolls distinguishing that case from the *Galloway* case at once on that ground, saying, p. 361 (W.R.):

> There it was a dismissal without any reservation. There can be no question of re-hearing in this case: the order has not been drawn up.

And so on that distinction the Court was enabled to make the order for an injunction. This distinction becomes even more

apparent, if you look at p. 360 (W.R.) in the recital of the facts that the application was made to the Court against the decision of the Vice-Chancellor to stay on the ground that an appeal would be taken to the House of Lords, and the Court directed that the order should not be drawn up for a week, and that while the order was still undrawn the Court of Appeal was applied to for an injunction pending the appeal to the House of Lords and the Court directed that the application be put in the paper to be argued on the question of jurisdiction before the four judges. So there is this exact point raised in the most precise manner and the order (p. 362) that the Court of Appeal made directed that the injunction would be discharged "if a petition of appeal to the House of Lords be not presented and proceeded with without delay."

In the Admiralty Court, when the proceedings are *in rem*, the practice is laid down in the cases of *The Khedive* (1879), 5 P.D. 1; 41 L.T. 392; *The Annot Lyle* (1886), 11 P.D. 114; 55 L.J., P. 62; and *The Ratata* (1897), P. 118 at 131; 66 L.J., Adm. 39. In all these cases the *res*, or its bail, was still in the custody of the Court for the purpose of working out its judgment by assessing damages before the registrar pursuant to the special practice of the Court, and that is the basis upon which its jurisdiction to stay, pending a proposed appeal to the House of Lords, was invoked and upon which the order was given. It is, moreover, to be noted in those cases that the Court sometimes refused the application and was very particular in laying down the rule that the circumstances must be special and that there must not be undue delay in such matters; and, in order that the rights of the parties might be preserved without the evil consequences of delay, the stay was conditioned upon an undertaking to speed the presentation of a petition to the House of Lords.

MARTIN, J.A.

Finally, and as to a certain observation in the well-known case of *The Zamora* in the Prize Court (1916), 2 A.C. 77; 85 L.J., P. 89, and to be found best reported in 2 P. Cas. 1. The point here did not arise there, and could not arise, because that was an interlocutory appeal, which went straight from the Admiralty Division to the Privy Council, and the *res* there was still before the Court on that interlocutory application, and the

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question was: Did the learned judge of the Prize Court have the power to requisition at the instance of the Crown a cargo of copper that had been seized as contraband of war? The Privy Council reversed the learned judge below upon his exercise of that power, under the circumstances, and the reasons are particularly set out at pp. 19 and 23 by Lord Parker, speaking, of course, under the circumstances of the *res* being before the Court, at p. 23:

> The legal property or dominion is, no doubt, still in the neutral, but ultimate condemnation will vest it in the Crown, as from the date of the seizure as prize, and meanwhile all beneficial enjoyment is suspended.

The "ultimate condemnation," of course, had not been attained in that case, as it had not been heard. He goes on:

> In cases where the ships or the goods are required for immediate use this may well entail hardship on the party who ultimately establishes his title.

On p. 19, speaking, of course, as he was of the duty of the Court as regards the *res* in its custody:

> It cannot, in their Lordships' opinion, be held that the Court has any such inherent power as laid down by the President in this case. The primary duty of the Prize Court—as indeed of all Courts having the custody of property the subject of litigation—is to preserve the *res* for delivery to the persons who ultimately establish their title.

MARTIN, J.A.

Lord Parker's observations therefore have no application to the facts of this case. It must be borne in mind with regard to all these Admiralty cases that the practice consistent with them is pointed out in Roscoe's Admiralty Practice, 5th Ed., p. 372, where he states the general rule:

> The taxation of costs and the reference in a collision action will therefore proceed unless execution be stayed.

And the principles upon which it will be stayed are those already cited.

Such being the unbroken continuity of the decisions on the subject it is to me quite apparent that for us to make this order would be an unwarrantable assumption of a jurisdiction based not upon the powers which have been conferred upon us but upon the inclination to make an order for which no foundation in law can be found, and therefore the application must be dismissed.

I will only add that there are two noteworthy cases on granting leave, at the proper time, of course, *viz.*, first, *Waldo* v. *Caley* (1809), 16 Ves. 206 at 213; 33 E.R. 962, wherein the

Lord Chancellor (Eldon) pointed out, when he was sitting in appeal from the Master of the Rolls, that both this Court or the House of Lords upon application in special cases could make a special order, and to the same effect is the expression of the Lord Chancellor in 1833 (Lord Brougham) in *Walburn* v. *Ingilby,* 1 Myl. & K. 61 at 86; 39 E.R. 604 (an interlocutory appeal) where he points out that such applications can be made in the House of Lords. I cite these cases because I think it desirable that it should be understood that the learned counsel for the defendant in this case, Mr. *Crease* (who, if I may say so, has shewn such ability and industry in the conduct of this appeal that it has been a pleasure to listen to him) has at least two Lord Chancellors saying that if he had brought his appeal to the Supreme Court of Canada in the manner pointed out by me in *Albion Motor Express Co.* v. *City of New Westminster* (1918), 3 W.W.R. 23, he would be in just as favourable a position before the Supreme Court of Canada as he would be before the House of Lords.

MARTIN, J.A.

McPHILLIPS, J.A. (oral): I may say, with great respect to my learned brothers who have preceded me in giving judgment in this matter, that I take a very different view.

In my opinion there is jurisdiction in this Court to stay the proceedings. I do not know that it was necessary exactly to make an application in as extensive a form as has been done but a stay of proceedings would, of course, be complete in itself, if granted.

It has not been the practice in British Columbia to append a note to any judgment, given provisions such as found in Ontario and sometimes in England, that the judgment lie in the registry for a certain time—it has not been our practice to do that; the judgment is taken out in due course. It is fundamental that all Courts have jurisdiction over their own records and here we have a case where judgment is given. The judgment itself declares the rights of the parties but there are several things that may be done, and one is that an application may be made to the land title registry office now, in view of the judgment of the Court, to have the title vested in them.

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Now that is the situation. This, I think, is a very serious situation; it is one unique in our practice that it should be advanced that this Court cannot preserve the *res* pending an appeal to the Supreme Court of Canada. We have a judgment of the Court of Appeal of British Columbia, which adopts and accepts the finding of the Superior Court of the county of Alameda, California, which means that the title—to put it in an apt way—the title which now stands registered in A is to be in B—land in British Columbia adjudicated upon by a foreign Court, not the Court of territorial jurisdiction. The judgment of this Court [(1931), *ante,* p. 96; (1932), 1 W.W.R. 257] is with respect (I dissented) that because the Superior Court of California has declared that the title should be in B and not in A—a foreign Court's decision—that that shall be accepted as an adjudication upon the merits by the Supreme Court of British Columbia, and now by the Appellate Court of British Columbia, being a determination as to the title to land. There is not one case that can be found in the books where that was ever done before. Mr. Justice Kay, in his time one of the greatest Chancery lawyers, has, in a judgment that I have referred to in my reasons for judgment, *In re Hawthorne. Graham* v. *Massey* (1883), 23 Ch. D. 743; 52 L.J., Ch. 750, said that there is no such case where the Courts of England ever endeavoured to do a thing of that kind. Now that has been done here. The property in question is very valuable property, situate in the City of Victoria. An action was brought by these same plaintiffs, which, if proceeded with, might have been the determination, upon the merits, in this Province, as to the parties that should have title vested in them. That action has never been brought to trial. Mr. Justice MURPHY made an order, still extant, appointing a receiver, Mr. Bridgman, who, as I see on the material, managed that property in an excellent manner.

Now it has been sometimes said, and I think there is a great deal of merit in it, that Courts should not be too vigilant to say that they lack jurisdiction; certainly they should not be too vigilant to say that there is no jurisdiction when the interests of justice are at stake. Here we are the highest Court in the Prov-

ince, and judgment has been delivered by the highest Court in the Province, and here we are face to face with the possibility of irreparable damage, and we have it submitted by counsel that the intention is to appeal to the Supreme Court of Canada. This Court is appealed to and the proposition is that this Court is unable to prevent an irreparable wrong being perpetrated, because if the title will pass from A to B in the Land Registry office and B makes a *bona-fide* sale of that property, there is irreparable loss, and it is further to be remembered that these plaintiffs are outside this jurisdiction; and further, how derogatory it is to the dignity of the administration of justice in this country that when an appeal is about to be brought from the Court of Appeal of British Columbia to the National and ultimate Court of Canada, that this Court should find itself unable to preserve the *res*.

I may say that, during some 40 years that I can speak about, the *res* was always preserved in this country, following judgment given, and as I say it was not the practice to put in any of these provisions as they put in England, and as they put them in the Province of Ontario at times, but even in both of such jurisdictions there is always a preservation of the *res*.

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Now I have not had time to go into an intricate survey of all the authorities but I am satisfied that what I have said is in conformity with the practice of this Court for long years, and, when we have practice extending over a long period of time, why should a Court, in a case so vital, refrain in preserving the *res?* The result of the appeal might be absolutely nugatory, because the property might be irretrievably lost to the persons declared by the ultimate Court entitled thereto.

I would refer to what Lord Parker of Waddington said in *The Zamora* (1916), 2 A.C. 77 at p. 99; 85 L.J., P. 89; 2 P. Cas. 1:

> The primary duty of the Prize Court (as indeed of all Courts having the custody of property the subject of litigation) is to preserve the *res* for delivery to the persons who ultimately establish their title.

Now the learned law lord says "custody," applying the word to a ship. Can there be anything more the *res* in the terminology of the law than land? In this case we have the judgment of the Court of this Province taking the *res* from A and putting it in

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B, and yet this Court it is submitted is powerless to prevent this being done, when the intention is to appeal to the ultimate Court of Appeal in Canada and there is still time to perfect such appeal.

Now the case I have just referred to was referred to by Lord Sumner in *The Oscar II.* (1920), A.C. 748 at p. 752; 89 L.J., P. 221, and he said:

> This matter came before their Lordships' Board in *The Zamora* (1916), 2 A.C. 77, and, at least as regards liability for dealings with the *res* during the proceedings to the prejudice of the parties ultimately successful, the question was decided.

With great respect to all contrary opinion, even although the judgment has been taken out and entered, there remains the power to preserve the *res*—it is not in any way changing or altering the judgment, it is merely a preservative order from time immemorial exercised by all Courts. And see Order LII., r. 3.

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

Motion refused, McPhillips, J.A. dissenting.

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Statute, construction of—Judgment—Registration — Mortgage — Executed prior to judgment but registered after registration of judgment—Priority—R.S.B.C. 1924, Cap. 217, Secs. 34, 42 and 175-7; Cap. 83, Sec. 35.

The plaintiffs were the holders of a mortgage duly executed by the mortgagees in accordance with the Land Registry Act, on the 24th of January, 1931. Judgments held by the defendants against said mortgagor were registered against his lands on the 16th, 20th and 24th of February following. On the 3rd of March, 1931, the plaintiff applied for registration of his mortgage claiming registration in priority to the judgments. An action for a declaration that the plaintiffs as holders of said mortgage are entitled to registration in priority to said judgments was dismissed.

Held, on appeal, reversing the decision of FISHER, J. (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting), that in view of the amendments to the Land Registry Act since the decision of *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338 (*i.e.*, sections 34, 42, 175, 176 and 177, Cap. 127, R.S.B.C. 1924), applications to register of this class do not come within that case but are governed by the decision in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51. The plaintiff's mortgage is therefore entitled to be registered as a charge in priority to the defendant's judgments.

APPEAL by plaintiffs from the decision of FISHER, J. of the 18th of May, 1931, dismissing an action for a declaration that the plaintiffs are entitled to be registered in the Land Registry office at Kamloops as holders of a mortgage dated the 30th of August, 1930, made by one W. E. McArthur as mortgagor and the plaintiffs as mortgagees to secure payment of $5,024.50, covering certain blocks of land in the Similkameen Division of the Yale Land Registration District in priority to certain judgments against the said W. E. McArthur, registered in said Land Registry office by the defendants. The said mortgage was signed on the 24th of January, 1931, and the certificate of the maker under the Land Registry Act completed on said mortgage on the 24th of January, 1931. The defendants' judgments were registered in the Land Registry office at Kamloops, some on the 16th of February, 1931, some on the 20th of February, 1931, and the balance on the 24th of February, 1931. Application was made

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to register the mortgage in said registry office on the 3rd of March, 1931. Notice under section 175 of the Land Registry Act was served on the judgment creditors on the 13th of March, 1931, the mortgagees claiming priority. Notices of motion were taken out by the judgment creditors under the Execution Act and certificates of *lis pendens*, containing copies of the notice of motion were obtained and registered in the Land Registry office. An order for reference was made and served on the plaintiffs in the execution creditor's actions. Appointments for reference were taken out and served, and the registrar's certificate was made on April 24th, 1931, and an order was made by the local judge confirming the registrar's certificate.

The appeal was argued at Vancouver on the 19th and 20th of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, K.C., for appellants: They cite *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338. But we say first that we are not within this case, and secondly it is no longer the law on account of the amendment to the Land Registry Act in 1921. That mortgage executed before registration of a judgment has priority see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 at p. 290; *Howard* v. *Miller* (1915), A.C. 318; *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 at p. 54. The case of *Gregory* v. *Princeton Collieries* (1918), 25 B.C. 180 is the same as ours: see also *White* v. *Neaylon* (1886), 11 App. Cas. 171. A year after the *Hartery* case both sections of the Act referred to in that case were amended. There is an absolute continuity of the law as to the relations of an unregistered mortgage and a subsequent registered judgment. The local judge has no jurisdiction to make an order confirming the registrar's certificate: see *The Law Society of British Columbia* v. *Stewart* (1928), 40 B.C. 401; *Hanna* v. *Costerton* (1918), 26 B.C. 347; *Royal Trust Co.* v. *Liquidator of Austin Hotel Co., ib.* 353; *Toronto Railway Co.* v. *Toronto Corporation* (1904), A.C. 809 at p. 814. The parties before the local judge are not the same as in this action. Any estoppel must be mutual: see *Spencer* v. *Williams* (1871), L.R. 2 P. & D. 230 at p. 237. As to a foreign judg-

ment being set up as a bar see *The Delta. The Erminia Foscolo* (1876), 1 P.D. 393; *The King* v. *Fraser* (1911), 45 N.S.R. 218.

O'Halloran, for respondents: There is no distinction between this case and the *Hartery* case, *supra.* The Act was amended in 1921 but the amendment does not affect the principle laid down in that case. The registered document has priority: see also *McRae Brothers* v. *Brownlow* (1924), 33 B.C. 395.

Cur. adv. vult.

5th February, 1932.

MACDONALD, C.J.B.C.: The appellants' counsel, I think, proceeded on the assumption that the Legislature by amendments made since the decision of the Supreme Court of Canada in *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338 intended to restore the doctrine of *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282, that an execution creditor could take only his debtor's property subject to all charges, liens, or equities as the same was subject to in the hands of the debtor and that since the appellant had a mortgage executed before but not registered until after the respondent's judgment had been registered the mortgagee could take advantage of the provisions of the Execution Act and the Land Registry Act to apply to the registrar of the Land District in which the lands were and to the Courts to give him priority by registering the mortgage in priority to the judgment. No doubt these Acts do permit an application of such a nature to be made but not, I think, for the purpose of restoring the doctrine of *Jellett* v. *Wilkie* but for other reasons such as that the registered judgment is defective or has been obtained by collusion or that the mortgage contains evidence from which consent of the judgment creditor to give the mortgage such priority may be inferred and perhaps for other reasons which I need not recite. While there may be other remedies to correct such matters there is nothing unreasonable in the assumption that the Legislature intended to provide for such priority in a summary way such as is provided for in the said Acts, so that the sections relied on by the appellant are consistent with other reasons than the restoring of *Jellett* v. *Wilkie.*

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To begin with *Jellett* v. *Wilkie* was displaced by the Supreme Court of Canada in *Bank of Hamilton* v. *Hartery* and priority according to priority of application for registration was declared to be the rule under the Land Registry Act. The Legislature of this Province set out to protect purchasers and chargees against just such a rule as was enunciated in *Jellett* v. *Wilkie*. The Act is based upon notice of application to register an instrument or the actual registration of it to all other persons who might by want of such notice or protection be entrapped. All legal or equitable rules with regard to the transfer of real estate were made subservient to the statutory rules laid down in the said Act. The rule being such as was declared by the Supreme Court of Canada in *Bank of Hamilton* v. *Hartery* the appellants must shew that the amendments made in the Land Registry Act since that decision have restored the doctrine of *Jellett* v. *Wilkie*. If it intended to restore that doctrine it might have done so in a few words but it left the salient rules laid down by the Land Registry Act of 1911 practically intact. There is nothing in sections 175, 176, and 177 of the consolidated Act of 1924 which suggests the restoration of that doctrine, but much to suggest the contrary. These sections are, speaking generally, a redraft of similar sections in the Act of 1911. The mortgage and the registered judgment are both charges and, in my opinion, though I do not think it essential, the judgment is on an equality with the mortgage. Section 35 which is a re-enactment of the old section makes a registered judgment equivalent to an instrument executed under the hand and seal of the debtor: that also is the kind of an instrument which a mortgage is. The fundamental principle is retained that in general priority of registration gives priority of right as it must if full effect is to be given to the doctrine of notice and certainty of protection among those concerned with the stability of titles. It makes no difference under the Act whether the applicant for registration in priority is a judgment creditor or a mortgagee. If it had been intended to restore the doctrine of *Jellett* v. *Wilkie* it would be only the person holding an instrument actually under the hand and seal of the debtor who would be entitled whereas one who is "deemed

to be" the holder of an instrument executed by the debtor under his hand is entitled to apply.

Appellants' counsel cites several clauses of the Land Registry Act the phraseology of which has been amended in 1921 and in 1924, and in some respects enlarged but not as I think in a manner to run counter to the undoubted intention of the Legislature to provide such notice to subsequent purchasers or chargees as it had provided in the legislation of 1911.

Much emphasis was placed upon section 34 of the Land Registry Act as it now is, which gives the person holding an unregistered instrument his rights against the maker of the instrument sought to be registered while depriving him of any rights against the holders of registered instruments. This does not advance the matter at all. His right to apply for registration does not mean that registration is dispensed with. He must obtain registration before his interest in the land actually passes to him. It may have been agreed before this conditionally but as against prior charges it has not so passed. In my opinion, section 104 does not affect the question. The judgment creditor is entitled to rely on the declaration that "no instrument executed . . . and taking effect after the 13th 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' either at law or in equity . . . until the instrument is registered in compliance with the provisions of this Act," but it gives the grantee gratuitously the right to apply for registration. This section with the exception of the first line of it is taken from the Act of 1911. The only other alteration in it is "shall become operative to pass any estate or interest" instead of "shall pass any estate or interest" which makes no change in the sense or construction of the section. That read in connection with section 42 of the Act "When two or more charges appear entered upon the register affecting the same land the charges shall as between themselves have priority according to the date on which the applications for registration thereof were received by the registrar and not according to the dates of the execution of the instruments. That is still the statutory rule with the exception of the addition "but subject to the con-

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trary intention appearing from the instruments creating the same." Considerable emphasis was laid upon those latter words "appearing from the instruments" not appearing "in the instruments." I do not see any point in that distinction. It is a distinction without a difference. It is clear that a contrary intention cannot be drawn from circumstances outside the instrument. It must appear by the terms of the instrument itself and was evidently intended to apply to a case where the parties to the competing charges either expressly or by intendment agreed by words incorporated in the document itself that the one should have priority over the other. Again the several sections relied upon by appellant referring to the word "charge" is not confined either in the present Act or in the Act of 1911 to a charge upon an "interest" of the debtor. It is a charge upon the "property" or the "land" or interest, which means, I think, the registered interest of the debtor. It is not the nature of the instrument which is to be regarded but the inference which is to be drawn from these words which are meant in section 42.

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Then it was contended that because section 40 of the present Act states that the registered owner was to be "deemed" to be entitled to the "estate" or interest in respect of which he is registered, subject to prior registrations that the word "deemed" is to be read as if it were "deemed *prima facie*" and the case of *The King* v. *Fraser* (1911), 45 N.S.R. 218, was cited in support of this. An examination of that case will shew that the majority of the Court held the word deemed not conclusive because the context shewed a contrary intention. The reason I apprehend that the word "deemed" was used here is because the judgment could not have been actually signed and sealed by the debtor but was intended to be made equivalent to the actual instrument signed and sealed and therefore should be read in the context of this Act as being so equivalent. On the whole I am convinced that the judgment in *Bank of Hamilton* v. *Hartery* is good law today notwithstanding the consolidation of the Land Registry Act, and that the appeal must be dismissed.

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MARTIN, J.A.: It is submitted by the appellants' counsel that this case should be distinguished from our decision, and that of

the Supreme Court affirming it, in *Bank of Hamilton* v. *Hartery* (1918), 26 B.C. 22; (1919), 58 S.C.R. 338, on two principal grounds, *viz.*, first, that this is a contest between a registered charge, and an unregistered mortgage, while in the *Hartery* case both the opposing charges, as here a mortgage and judgment, were registered; and, second, because of certain changes in the Land Registry Act, Cap. 127, R.S.B.C. 1924, since the decision in the *Hartery* case. At that time the principal section of the Land Registry Act, R.S.B.C. 1911, under consideration in that case was 73, as follows:

> When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

The construction of that section determined that case, as Chief Justice Davies said, p. 339:

> The case before us . . . is simply one as to the priority of charges under section 73 of the Land Registry Act and the rule which should govern in a contest on that point and is not one as between an equitable right to the fee as against a charge.

But in the present case only one charge is "entered upon the register," the judgment, and as to the mortgage it is only in the position of an application to register, and the present action is to declare the mortgagee's right to have it entered upon the registry in priority to the defendant's judgment which the registrar of titles has refused to do (*cf.* secs. 34, 40-2 and 163-177). This application was made after the registration of the defendant's judgments which were recovered and registered after the plaintiff's mortgage was executed but not registered.

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In the same case Mr. Justice Anglin, Mr. Justice Mignault agreeing with him, said, pp. 345-6:

> 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* [(1908)], 14 B.C. 51, by merely declining to apply it to facts not absolutely identical with those there dealt with. Even if some estate or interest was created in the debtor's land by the appellant's unregistered mortgage upon its execution, as against another chargee who had registered his charge before that mortgage was registered, the interest or estate so created could not avail. Section 73 in terms so provides, unless it be entirely meaningless. As Mr. Justice MARTIN says: "If this were a case between two 'charges' of the same kind, *e.g.*, mortgages, would there be any doubt as to the 'priority' that ought to be declared?" But by section 27 of the Execution Act the lien created by a

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judgment when registered is the same as if such judgment had been "charged in writing by the judgment debtor under his hand and seal," *i.e.*, is the same as the lien created by a registered mortgage. Reading these two statutory provisions together, as they must be read, I entertain no doubt that the judgment appealed from is correct and should be upheld.

In like manner the determination of this case should be restricted to its particular facts.

It is only possible to bring this case within *Hartery's* by holding two distinct things, first, that an application to register a charge is in the same class as a registered charge itself and therefore comes within said section 73; and, second, that the subsequent changes in the statute have had no substantial effect upon that decision.

As to the first, no authority has been cited that would justify our holding that the mere "right to apply to have the instrument registered" under section 34, can be translated into the right to have it registered, which can only accrue after the application has been entertained and passed upon by the proper statutory officer: in other words, before the right to register can be acquired there must be an adjudication upon the merits of the application authorized to be made to acquire it: therefore mere applications to register charges are excluded from section 73 because they are not "charges . . . entered upon the register" as defined thereby, nor by that section as amended in 1921, Cap. 26, Sec. 42, which now is section 42 in Cap. 127, R.S.B.C. 1924, *viz.*:

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> When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, but subjct to a contrary intention appearing from the instruments creating the same, have priority according to the date at which the applications for registration thereof respectively were received by the registrar, and not according to the dates of the execution of the instruments.

Our decision in *McRae Brothers* v. *Brownlow* (1924), 33 B.C. 395 is based on this section.

As to the second point, there can to my mind be no doubt that the relevant changes in the statute since *Hartery's* case are very substantial and must be given due effect and application. They are to be found in amended section 42, just cited; in the significant addition (by section 34 of Cap. 26 of 1921; now section 34 of Cap. 127, R.S.B.C. 1924) of the opening words "Except as against the person making the same"; and in sections 175-7

of said Act of 1921, now carried into the said Revised Statutes under the same "Part IX., Division (2)—Judgments."

On the one hand as regards the present judgment creditors, by section 35 of the Execution Act, Cap. 83, R.S.B.C. 1924, their judgments upon registration

> form[ed] a lien and charge on all the lands of the judgment debtor in the several land registration districts in which the judgment is registered, in the same manner as if charged in writing by the judgment debtor under his hand and seal . . .

which has been held in the *Hartery* case, *supra,* to be "the same as the lien created by a registered mortgage," and therefore comes within the definition of "instrument" as being a "document in writing . . . dealing with or affecting land" in section 2 of said Cap. 127.

On the other hand the plaintiff holds a prior "instrument" of mortgage "charged under the hand and seal of the judgment debtor" upon the same land which is effective at least against him as "the person making the same" under said section 34, and to enforce that charge in a proper case the mortgagee is given the right by the same section "to apply to have the instrument registered" as aforesaid, and upon his making that application the said new sections 175-7 come into operation in a vital manner, the registrar of titles being empowered to call upon the registered judgment creditor by formal notice to support the *status* or validity of his charge against the applicant's claim to register his own charge or to cancel the existing one of the judgment creditor, and if that creditor still "claims a lien by virtue of his judgment" he must "enforce his charge" by taking the proceedings specified in sections 38 to 44 of the said Execution Act, and in default of so doing

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> the judgment shall no longer form a charge upon the lands as against the registered owner thereof or the holder of the charge so registered.

Section 39 of said Execution Act provides that:

> 39. Upon any application under the last preceding section, such proceedings shall be had, either in a summary way or by the trial of an issue, or by inquiry before an officer of the Court, or by an action or otherwise, as the Court or judge may deem necessary or convenient, for the purpose of ascertaining the truth of the matters in question, and whether the lands, or the interest therein of the judgment debtor, are liable for the satisfaction of the judgment.

And section 40 goes on to declare that:

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Where an order is made upon any application under section 38, there shall be included in the order a reference to a district registrar of the Supreme Court to find what lands are liable to be sold under the judgment, and what are the nature and particulars of the interest of the judgment debtor in the lands and of his title thereto, and what judgments form a lien and charge against the lands and the priorities between the judgments, and to determine how the proceeds of the sale shall be distributed, and to report all such findings to the Court. The district registrar shall deal with all judgments registered against the lands whether prior or subsequent to the judgment upon which the proceedings are taken. . . . The district registrar shall cause all persons affected by his inquiries to be served with notice. Such report when made shall require confirmation by a judge of the Supreme Court, and all persons affected thereby shall have notice of the application for confirmation, and upon such application the judge may confirm the same in whole or in part, and may alter the same or may refer the same back to the district registrar.

Then the consequences of the failure of the judgment creditor to substantiate his claim are thus declared by said section 177:

177. Where proceedings are taken under sections 28 to 44 of the Execution Act, and fail by reason of the finding of the Court that the instrument under which the applicant for registration or cancellation claims is entitled to priority over the registered judgment, the Court may, in its discretion, dismiss the proceedings without costs, or allow costs to the judgment creditor, if in the opinion of the Court the judgment creditor was justified under the circumstances, including the delay in application for registration, in requiring the applicant to have judicially established the *bona fides* and validity of the execution of the instrument under which the applicant claims.

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It is important to note that this section specially contemplates and provides for cases, such as this one, where the applicant claims under his unregistered "instrument" to be "entitled to priority over the registered judgment," and not to applications aimed to cancel the opposing charge, thus markedly emphasizing the distinction and the application of the amending sections as a whole to contests of priority such as the present, wherein the "*bona fides* and validity of the execution of the instrument under which the applicant claims" are not challenged.

Section 176 also makes special provision, in a certain class of case, to enable the judgment creditor, at the applicant's expense, to "investigate the *bona fides* of the claim of the applicant that he is entitled to priority to the judgment" after notice is served upon the creditor, and that section applies to the facts of this case.

After a careful consideration of all these new and elaborate statutory proceedings carried on in the special tribunals created

to adjudicate thereupon, I can only reach the conclusion that as regards applications to register of the class now before us the decision in the *Hartery* case has ceased to have application and they are governed by the decision in *Entwisle* v. *Lenz* (1908), 14 B.C. 51, the result being that the plaintiff's mortgage is entitled to be registered as a charge in priority to the defendants' judgments.

In support of this conclusion it is not, in my opinion, necessary to resort to said section 42, even if it were applicable, which I think it is not, because it only relates to cases "when two or more charges appear entered upon the register affecting the same land," as in *Hartery's* case, and therefore no conflict can arise thereunder with such an unregistered charge as we alone have under consideration.

The same reasoning also applies to section 40, the conflicting operation of which is confined to "such exceptions and registered charges as appear existing on the register," and has no reference to the special tribunals and proceedings in contestation set up as aforesaid.

MARTIN, J.A.

It follows that the appeal should be allowed though I do not reach this conclusion without some hesitation, not merely owing to the able way in which Mr. *O'Halloran* presented the respondents' case, but also because my feeling of respectful dissatisfaction with the said judgment of the old Full Court in the *Entwisle* case (as expressed in the *Hartery* case, p. 24, *supra*) has been justifiably increased by the way it was blown upon by two of the judges of the Supreme Court in *Hartery's* case, p. 345, *supra,* but as that Court did not go the length of actually overruling it, I am once more constrained to follow it leaving the final solution of the difficult and entrapping questions and pitfalls it creates to the early, I trust, attention of the proper tribunal, the Legislature of this Province.

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

GALLIHER, J.A.

MCPHILLIPS, J.A.: This appeal brings up a question that was considered by this Court and in the Supreme Court of Canada in *Bank of Hamilton* v. *Hartery* (1918), 26 B.C. 22; (1919), 58 S.C.R. 338. Since the decision of the case in the

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Supreme Court of Canada legislation has been passed which in my opinion absolutely sets at rest the difficulty presented when *Bank of Hamilton* v. *Hartery, supra,* was disposed of. The decision there went upon the language of section 73 of the Land Registry Act (Cap. 43, B.C. Stats. 1914). Mr. *Mayers* the learned counsel for the appellants in his very able argument demonstrated that the Legislature had definitely restored the state of the law existent before the judgment of the Supreme Court of Canada which was based upon the then existent statute law and it was a case exactly within section 73—two registered charges—and the Supreme Court confined its decision to that state of circumstances. Here we have only one registered charge, *i.e.,* the judgment. The mortgage is not as yet registered but application to register has been made, so we do not have an identical case. In the *Bank of Hamilton* v. *Hartery, supra,* Mr. Justice Anglin (now Chief Justice of Canada) said (pp.345-6): [already quoted by MARTIN, J.A.].

Now, in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51, the then Full Court held that the Judgments Act gives the judg-

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ment creditor only a right to register against the interest in lands possessed by the judgment debtor. . . .

In *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 Sir Henry Strong, C.J. stated that the common law rule is 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." In accordance with the well understood rule that the Legislature is to be held to be acquainted with the decisions in the Courts it is not difficult to come to the conclusion that the subsequent changes in the statute law were made advisedly. In any case the present state of the statute law renders it impossible to contend that as against the facts in the present case the judgment creditor can be admitted as having priority of right of registration as against the mortgagee. I do not find it necessary to further pursue the matter, being of the opinion that the statute law now supports the views I expressed upon the point in this Court in *Bank of Hamilton* v. *Hartery* (1918), 26 B.C. 22, pp. 24-30.

I would allow the appeal.

MACDONALD, J.A.: Appellants are the owners of an unregistered mortgage on certain lands in the Yale Land Registration District given by one McArthur. The respondents hold registered judgments against this property. The mortgage was executed and acknowledged before the registration of the judgments. Appellants applied to register and the registrar of titles refused to enter it except subject to the judgments. Appellants seek a declaration that they are entitled to registration in priority thereto.

Under section 175 of Cap. 127, R.S.B.C. 1924 (Land Registry Act), the registrar caused a notice to be given respondents that he would at the end of fourteen days register the mortgage unless respondents within that time followed the procedure outlined in sections 38 to 44 of the Execution Act (Cap. 83, R.S.B.C. 1924). Respondents proceeded accordingly and an order for reference was made followed by the registrar's report in which the facts were outlined as above. The report also stated that appellants commenced this action to establish their right to have their mortgage registered in priority to the judgments. This report was confirmed by the local judge. Counsel for appellants formally attended before the registrar and upon the application to confirm the registrar's certificate merely stated their contention without argument. The defence of *res judicata* was raised by respondent because of appellant's association with these proceedings but it was abandoned during the argument.

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Counsel for appellant submits that the principle enunciated in *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 at pp. 288-9 applies, *viz.*:

> 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 debtors

and that the right of appellants to register after registration of the judgments remains unaffected; or, as stated in *Entwisle* v. *Lenz & Leiser* (1908), 14 B.C. 51 at p. 54:

> It was the clear intention of the Legislature to subject to the claim of an execution creditor only those lands in which the judgment debtor has a real or beneficial interest.

And again, "his execution creditors cannot claim to stand in any better position than [the judgment debtor] himself." This

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latter decision has been questioned but not overruled. The point is—has subsequent legislation abrogated these principles?

Section 34 of Cap. 127 (Land Registry Act, R.S.B.C. 1924), after stating that unregistered instruments do not pass any estate or interest, provides that

> every such instrument shall confer on each person benefited thereby . . . the right to apply to have the instrument registered.

By section 175, when application is made to register, the registrar may "in his discretion" cause a notice to be given to the judgment creditor of intention to register and if the judgment creditor fails to proceed with an application under the provisions of the Execution Act the registrar may register the charge and the judgment "shall not longer form a lien upon the lands as against the registered . . . holder of the charge so registered." It does not follow therefore that the mere fact of registration of the judgments prevents registration of the charge in priority thereto. The judgment creditor cannot rely on his registration; he must initiate the proceedings referred to. An inquiry is directed, obviously not as a formality, but to ascertain

> the truth of the matters in question, and whether the lands, or the interest therein of the judgment debtor, are liable for the satisfaction of the judgment:

R.S.B.C. 1924, Cap. 83, Sec. 39.

Section 176 of the Land Registry Act recognizes the claim of the applicant for registration to an adjudication of the claim "that he is entitled to priority to the judgment." Section 177 too contemplates that a finding of the Court may be made,

> that the instrument under which the applicant for registration . . . claims is entitled to priority over the registered judgment.

The fact that costs are provided for and may be given to the judgment creditor if he was

> justified under the circumstances, including the delay in application for registration, in requiring the applicant to have judicially established the *bona fides* and validity of the execution of the instrument under which the applicant claims

is equally suggestive. These sections do not conclusively establish the point in issue but indicate that the question of priority as between the applicant to register a mortgage and the registered judgment creditor is not settled by the mere fact of prior registration of the judgments. If that were so further inquiries would be futile. In that event no finding by the Court could

be made "that the instrument under which the application for registration . . . claims is entitled to priority over the registered judgment" (section 177).

In the *Bank of Hamilton* v. *Hartery,* 58 S.C.R. 338 decided in 1919 the view prevailed (on the then existing statutes), that a judgment registered on an application made after the date of the execution of a mortgage by the judgment debtor, but before the application to register the mortgage, took priority over the mortgage under section 73 of the Land Registry Act as it then read. This section is found in R.S.B.C. 1911, Cap. 127 and provided that:

> When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests.

This decision superseded the rule laid down in *Jellett* v. *Wilkie, supra,* because by the terms of section 73, taken in conjunction with relevant sections of the Execution Act of that year, the two charges were of the same nature. The judgment when registered was of the same effect as if "charged in writing by the judgment debtor under his hand and seal" and as between the two charges, both registered, the date of application determines priority. Another section of the Land Registry Act in respect to unregistered instruments under consideration in *Bank of Hamilton* v. *Hartery* is found in R.S.B.C. 1911 as section 104, and is quoted in full in the judgment of Mr. Justice Anglin, now the Chief Justice of Canada, at p. 344. This section was afterwards amended (B.C. Stats. 1921, Cap. 26, Sec. 34) to read as follows:

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> 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 such instrument in any proceedings inci-

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dental or auxiliary to registration, and that whether or not a party has since died or become legally incapacitated.

This section is repeated in the R.S.B.C. 1924, Cap. 127, Sec. 34. The material changes are the addition of the words "except as against the person making the same" and (of lesser import) "shall become operative to pass any estate or interest" instead of "shall pass any estate or interest" in the earlier statute. I referred to the section of the Act dealing with priority of registrations in force at that time (R.S.B.C. 1911, Cap. 127, Sec. 73). This section was also amended in 1921 and in chapter 26, section 42 reads as follows:

> When two or more charges appear entered upon the register affecting the same land, the charges shall, as between themselves, but subject to a contrary intention appearing from the instruments creating the same, have priority according to the date at which the applications for registration thereof respectively were received by the registrar and not according to the dates of the execution of the instruments.

Two changes will be observed in the later section. It is carried into the R.S.B.C. 1924, Cap. 127, as section 42.

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What alteration, if any, was effected by the addition of the words in 1921, after the decision referred to, "except as against the person making the same" in section 34 of Cap. 26? It means that as against the maker, *i.e.*, the judgment debtor, some estate right or interest at law or in equity in the land passes to the holder of an unregistered instrument. The latter acquired the beneficial right to the fee with a statutory right to apply to register it. That the debtor under his hand and seal parted with some interest is I think indisputable. It is equally clear that whatever interest passed to the appellant by grant from the debtor cannot also pass to someone else except by the act of appellant. The judgment creditor can only sell the property of his debtor as he finds it. He cannot "take A's land to pay B's debt" (*Entwisle* v. *Lenz & Leiser, supra*, p. 556). I think the Legislature intended to restore the law as it stood before the decision in *Bank of Hamilton* v. *Hartery, supra*, when we consider all the relevant sections. Both sections considered in that case were altered. Section 73 as stated was replaced by section 42 and the words were added "but subject to a contrary intention appearing from the instruments creating the same." One cannot pass over these words assigning to them no significance. By

this section registered charges have priority according to the dates of application for registration "and not according to the dates of the execution of the instruments" with one exception. The exception must mean that if a contrary intention appears from the instrument the general rule as to priority being governed by registration will not apply: in other words, when that intention is manifested by the nature of the instrument itself one registered charge may be given priority apart from the respective dates of application to register. It also means that "the dates of the execution of the instruments" may be a matter for consideration when that "contrary intention" referred to is disclosed by the nature of the competing charge. A judgment is an instrument; it deals with or otherwise affects lands (definition "instrument" section 2). But unless the right is given by statute to follow the estate the judgment affects only the interest of the debtor. That is disclosed in law by the nature of the instrument. I think counsel was right in pointing out the significance of the words used—"appearing from" not "expressed in" the instrument.

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With the foregoing conclusion accepted sections 175, 176 and 177 already referred to (R.S.B.C. 1924, Cap. 127) are given a place in the scheme of the Act which would otherwise be wanting. Prior enactments shewing the history of these sections may be found in B.C. Stats. 1914, Cap. 43, Sec. 70; 1915, Cap. 33, Sec. 16; 1916, Cap. 32, Sec. 28 and 1921, Cap. 26, Secs. 175, 176 and 177.

Referring to appellant's unregistered mortgage the "*bona fides* and validity of the execution of the instrument [may be] open to question" (sec. 177) or other facts may be disclosed on the proceedings which may be taken by the judgment creditor failing which the registrar may "register the charge . . . free from the judgment" (section 175). He could not do so if respondents' interpretation of sections 34 and 42 is final and conclusive. Section 177 did not appear until 1921 and it clearly contemplates that the unregistered owner of a charge may be successful in the inquiry over the holder of a registered judgment because where such proceedings, taken under the Execution Act by the judgment creditor, "fail by reason of the

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finding of the Court that the instrument under which the applicant for registration . . . is entitled to priority over the registered judgment" it provides that certain results may follow.

I think it was always intended by the Legislature that equitable principles originally accepted should be preserved and if section 73 (Cap. 127, R.S.B.C. 1911) as interpreted by the Courts interfered with those principles it was felt that the old rule should be restored by substituting section 42 in the 1921 Act containing the exception referred to and by adding the amendment found in section 34. Nor do I think section 40 of the Land Registry Act (R.S.B.C. 1924, Cap. 127) assists respondent. It reads:

> 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.

We are not dealing with the registered owner of a charge in so far as appellant is concerned and in respect to a charge held by others the interest "in respect of which he is registered" may not be the original estate of the debtor dependent upon the nature of the instrument. The registered owner too is only "deemed" to be entitled, *i.e., prima facie* entitled—not "deemed conclusively" (*The King* v. *Fraser* (1911), 45 N.S.R. 218 at 222). Nor can any guidance be obtained from cases where there is conflict between one registered charge (*e.g.*, a lien as in *McRae Brothers* v. *Brownlow* (1924), 33 B.C. 395) and another registered charge, *viz.*, a mortgage. We are concerned with interests and rights acquired under an unregistered instrument. Section 36 of R.S.B.C. 1924, Cap. 127, was also referred to. It goes little further than section 34. It provides that upon registration the estate or interest is secured. It does not deprive appellant of his right "to apply to have the instrument registered" (section 34). Appellant has the beneficial right to the fee and he may enforce whatever rights he possesses at law as against a registered judgment creditor under section 175 and following sections of the Act. As already intimated no effect can be given to these sections unless it is true that appellant can, if the facts warrant it, secure registration in priority to a judgment registered after the execution of the mortgage charge on

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judicially establishing "the *bona fides* and validity of the execution of the instrument" under which the applicant claims.

I would allow the appeal.

Appeal allowed, Macdonald, C.J.B.C. and Galliher, J.A. dissenting.

Solicitors for appellants: *Hamilton, Wragge & Hamilton.*
Solicitors for respondent: *Pincott & Pincott.*

PRICE v. FRASER VALLEY MILK PRODUCERS ASSOCIATION AND DORNAN.

Negligence—Collision between automobile and milk-wagon—Horse with wagon moving without driver—Contributory negligence—Damages—Distribution of—Costs—B.C. Stats. 1925, Cap. 8.

In an action for damages owing to a collision between the plaintiff's car driven by himself with his infant daughter sitting beside him, and the defendant's milk-wagon drawn by a horse and moving along the street when the defendant driver was away delivering milk, the plaintiff driver being slightly injured and the infant very severely injured, the learned trial judge apportioned the liability as 60 per cent. on the part of the defendant and 40 per cent. on the part of the adult plaintiff. The infant plaintiff's damages were fixed at $8,000, said sum to be paid into Court by the defendants, and the adult plaintiff's damages at $724.65, to be recovered from the defendants but to be set off against the judgment against him, that the defendants recover against the adult plaintiff $3,229.32, payable upon proof of defendants having paid the amount of the judgment recovered by the infant, and that the plaintiffs recover 60 per cent. of their taxed costs from the defendants.

Held, on appeal, varying the decision of FISHER, J. (MARTIN and MCPHILLIPS, JJ.A. dissenting in part), that the Court should not interfere with the learned judge's award of responsibility, but the infant plaintiff is entitled to the whole of her verdict for $8,000 and to her costs here and below without deduction, the adult plaintiff and the defendants are jointly and severally liable to pay the verdict and are subject to the provisions of the Contributory Negligence Act, so that if either pay the whole or part of the infant's claim beyond his own liability the party so paying is entitled to contribution from the other.

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As to the adult plaintiff's damages and the defendants' damages they shall be added together and apportioned 60 per cent. to the plaintiff and 40 per cent. to the defendants.

Held, further, that the costs of the adult plaintiff in the action and in the appeal with the costs of the counterclaim below and on appeal shall be added together and shall be borne by the adult plaintiff and the defendants in the proportion aforesaid.

Per MARTIN and MCPHILLIPS, JJ.A.: That the damages should be assessed 60 per cent. against the plaintiff and 40 per cent. against the defendants.

APPEAL by defendants and cross-appeal by plaintiffs from the decision of FISHER, J. of the 6th of July, 1931, in an action for damages for negligence. On the morning of the 5th of October, 1930, the plaintiff, F. T. Price, was driving his automobile easterly on 25th Avenue, his young daughter, the plaintiff, Mary C. Price, sitting beside him in the car. As they approached the intersection of Carolina Street a milk-wagon drawn by a horse and owned by the defendant was standing facing easterly on the south side of the road close to the curb, a short distance west of the intersection. When the plaintiff, who was going at about twenty miles an hour, was about 60 feet back of the milk-wagon, the horse started of its own accord and gradually turned northerly with the apparent intention of going north on Carolina Street. The horse turned immediately in front of the plaintiff. The road was wet and slippery and the plaintiff, in endeavouring to stop, skidded and ran into the milk-wagon. The plaintiff, F. T. Price, suffered injuries to his face, head and right side, and the plaintiff, Mary C. Price was severely injured, losing her left eye and being permanently disfigured about the face. The defendants counterclaimed for damages to his wagon and the contents thereof. It was held on the trial that the plaintiff Mary C. Price recover from the defendants $8,000 and that the plaintiff F. T. Price recover from the defendants $724.65, to be set off against the judgment against him, and that the defendants recover from the plaintiff F. T. Price $3,229.32, which shall be payable upon proof of the defendants having paid the amount of the judgment recovered by the infant plaintiff.

Statement

The appeal was argued at Vancouver on the 6th and 9th of

November, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, K.C., for appellants: Price saw the horse turning in front of him but owing to excessive speed his car skidded when he put on the brakes. There was lack of care considering the wet pavement and ground for finding negligence on his part: see Taylor on Evidence, 11th Ed., p. 237, sec. 319; *Brown* v. *Eastern and Midlands Railway Co.* (1889), 22 Q.B.D. 391; *Hales* v. *Kerr* (1908), 2 K.B. 601; *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 at p. 65. On the question of allowing evidence of a system see *Larson* v. *Boyd* (1919), 58 S.C.R. 275; *Blake* v. *Albion Life Assurance Society* (1878), 4 C.P.D. 94 at p. 101. The horse was evidently turning to go north on Carolina Street. There is no breach of duty in allowing a horse on the highway unguided: see *Lefeunteum* v. *Beaudoin* (1897), 28 S.C.R. 89 at p. 93; *Heath's Garage, Limited* v. *Hodges* (1916), 2 K.B. 370 at p. 376; *Yonker* v. *Servant* (1931), 1 W.W.R. 433. On the question of ultimate negligence see *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J., P.C. 23 at p. 26; *Davies* v. *Mann* (1842), 10 M. & W. 546; *Farber* v. *Toronto Transportation Commission* (1925), 56 O.L.R. 537 at p. 540.

Argument

Hossie (*Ghent Davis*, with him), for respondents: There is evidence to shew that the horse turned too soon when turning to go north on Carolina Street. On admissibility of evidence of the habits of the horse and its driver see *Joy* v. *Phillips, Mills & Co., Lim.* (1916), 85 L.J., K.B. 770 at p. 773; *Lewis* v. *Jones* (1884), 1 T.L.R. 153; *Gordon* v. *Mackenzie* (1913), S.C. 109 at p. 111; *Rex* v. *White* (1926), 37 B.C. 43; *Hales* v. *Kerr* (1908), 2 K.B. 601 at p. 605; Phipson on Evidence, 7th Ed., pp. 148 and 163-4; *Carter* v. *Van Camp et al.* (1930), S.C.R. 156 at p. 172. As to liability of owner of horse unattended see *Illidge* v. *Goodwin* (1831), 5 Car. & P. 190; *Lynch* v. *Nurdin* (1841), 1 Q.B. 29; *Turner* v. *Coates* (1916), 33 T.L.R. 79; *Stevens* v. *Saskatchewan Taxicab Co., Ld.* (1919), 1 W.W.R. 958. It was their ultimate negligence that caused the accident. This case is very like *Price* v. *B.C. Motor Transportation Ltd.*

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Argument

(1931), 44 B.C. 24; see also *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719; *Brenner* v. *Toronto R.W. Co.* (1907), 13 O.L.R. 423 at p. 440; *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at p. 143; *The Bywell Castle* (1879), 4 P.D. 219 at p. 227. The girl is in the same position as a wife: see *Key* v. *British Columbia Electric Ry. Co.* (1930), 43 B.C. 288; *Smith* v. *Canadian Pacific Ry. Co.* (1921), 3 W.W.R. 300 at p. 302; 62 S.C.R. 134; *McCulloch* v. *Star Construction Co., Ltd.* (1928), 1 W.W.R. 211; *MacDonnell and Jordan* v. *Pech and Lovette* (1930), 3 W.W.R. 455. As to allowing the amendment under our protest see *Edevain* v. *Cohen* (1889), 43 Ch. D. 187 at p. 190; *Owners of S.S. "Pleiades" and Page (Master)* v. *Page (Master) and Owners of S.S. "Jane" and Lesser* (1891), A.C. 259; *The "Tasmania"* (1890), 15 App. Cas. 223 at pp. 225 and 230; *The Cairnbahn* (1912), 29 T.L.R. 60; *Sale* v. *The East Kootenay Power Co., Ltd.* (1931), 44 B.C. 141 at p. 150; *Mara* v. *Hartley* (1931), O.R. 69 at pp. 73-4.

Mayers, in reply, referred to *Forman* v. *Union Trust Co.* (1927), S.C.R. 1 at p. 7; *Joy* v. *Phillips, Mills & Co., Lim.* (1916), 85 L.J., K.B. 770; Salmond on Torts, 7th Ed., p. 488; *The Cairnbahn* (1914), P. 25 at p. 32; *The Umona, ib.* 141 at p. 143.

Cur. adv. vult.

5th February, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This is an action for damages suffered by the parties by reason of a collision between the plaintiff Price's automobile and the defendant's milk-wagon. The learned judge found a verdict for $8,000 for the infant plaintiff who was guilty of no negligence. He found the plaintiff Price and the defendant each guilty of negligence and assessed the fault of the plaintiff at 40 per cent. and that of the defendants at 60 per cent. The defendants have appealed and claim that the injury was caused entirely by the plaintiff Price's own negligence. They also claim by way of counterclaim damages to the milk-wagon. The defendants claim that there was wrongful admission of the evidence of Mrs. Bennett, Miss Bennett and Mr. Raptis who gave evidence, from former observations, that

the horse would go of its own accord along 25th Avenue to the corner of Carolina Street and turn regularly into that street. That evidence was objected to. The learned judge appears to have given no effect to it since he held that the horse did not pursue that course on the occasion in question but turned into the middle of 25th Avenue where the collision occurred. Assuming that the evidence was inadmissible the Court of Appeal can disregard it and I am of opinion that it could have no bearing upon this case in view of the learned judge's finding, even if admissible. The defendants were therefore found guilty of negligence in allowing the horse and milk-wagon to stand on the street unattended while the driver was delivering milk to customers. Evidence was given by the defendants that the horse moved along 25th Avenue in the manner stated to have been its habit by the said three witnesses evidenced by the milk that was spilled along the right-hand side of the street. But this evidence apparently was not accepted as proving that the horse did not turn into the centre of 25th Avenue. I think I am obliged to accept the learned judge's finding in that behalf. The plaintiff, as found by the learned judge, saw the milk-wagon on the right-hand side of the street when he was two blocks away and came on without lessening his speed although he observed at the same time that a truck was standing on the opposite side of the street which might interfere with his getting through; the learned trial judge also found that the plaintiff Price saw the horse moving into the centre of the street when he was 50 feet away but excuses his negligence in not stopping or slackening his speed sufficiently to get control of his car by saying that he thought the driver was in the wagon and that his signal by the horn would be recognized whereas the driver was not in the wagon but between the gate and the house of one of his customers. Nevertheless he blames the driver of the automobile for not making sure of his safety and the safety of the little girl, his passenger. I should have decided, if I were trying the case in the first instance, to place the greater part of the blame upon the plaintiff Price but following custom in such a case I think I ought not to interfere with the learned judge's award of responsibility.

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Now the infant plaintiff not having been guilty of any negligence is I think entitled to the whole of her verdict for $8,000 and also to the costs in the Court below and in this Court without deduction. The plaintiff Price and the defendants are jointly and severally liable to pay that verdict and are subject to the provisions of the Contributory Negligence Act. Therefore, if either of them shall pay the plaintiff either the whole or part of her claim beyond his own liability to the other, the party paying shall thereupon be entitled to contribution from the other. See *The Cairnbahn* (1914), P. 25, a decision wherein a similar position under the Mercantile Conventions Act arose where the Court ordered a like division of the damages. At first sight it might seem that section 2 of the Contributory Negligence Act, Cap. 8 of the statutes of 1925, might not permit of this contribution but it is in effect the same as section 1 of the Mercantile Conventions Act where the three learned judges in the case put the construction upon it which I am putting upon it under section 2 and with deference that construction seems to me to be logical. The damage was caused by their joint negligence and when one of them is found at fault his loss is the amount which he is compelled to pay as between himself and the other tort-feasor to the infant plaintiff. This damage was brought about by the adult plaintiff in part and I see no reason why the joint tort-feasor should not recover it in the event of his having to pay the judgment or more than his share of it.

The disposition of the costs made in the judgment appears to me to be incorrect. The judgment provides for the taxation of the costs of the plaintiffs and payment of 60 per cent. thereof by the defendants to the plaintiffs. This I think wrong, the infant plaintiff should have her full costs including the general costs of the action and of the appeal since she succeeded in holding her judgment. I deal with the other plaintiff separately.

The judgment fixed the adult plaintiff's damages in the action at $1,207.75 and the defendants' damages at $74.33. These should be added together and should be apportioned 60 per cent. to the plaintiff and 40 per cent. to the defendants.

The costs of the adult plaintiff in the action and those in the appeal and the costs of the counterclaim below and in appeal

shall also be added together and borne in the proportion aforesaid, and there will be judgment with these variations accordingly, proper set-offs allowed.

MARTIN, J.A.: I would allow this appeal and assess the damages 60 per cent. against the plaintiff and 40 per cent. against the defendants and dismiss the cross-appeal.

GALLIHER, J.A.: I would dispose of this appeal in accordance with the decision of the Chief Justice.

MCPHILLIPS, J.A.: I concur generally in the judgment of my learned brother the Chief Justice save that I would assess the fault of the plaintiff at 60 per cent. and that of the defendants at 40 per cent. and the costs should be borne at the same ratio.

MACDONALD, J.A.: Respondent Franklin Price, driving easterly in a motor-car with his infant daughter, Mary C. Price (respondent by her next friend) along 25th Avenue in the City of Vancouver towards Carolina Street (running northerly therefrom) collided with appellant's horse drawn milk-wagon. Serious injuries were sustained, particularly by the child—she lost an eye. Appellant's servant (Dornan) while delivering milk on 25th Avenue near Carolina Street allowed the horse to proceed slowly, unattended, while he called at adjoining houses to deliver milk. His route in calling upon customers called for a turn to the north on to Carolina Street. Respondents' complaint is that while unattended (the driver being occupied in delivering milk) the horse either turned to the left on 25th Avenue a short distance away from the intersection or proceeded to "cut the corner" diagonally, and because of that unexpected move, the respondent Franklin Price approaching from behind was unable to stop his motor-car in time to avoid a collision. The respondents in the motor-car were about 50 or 60 feet behind the milk-wagon when, as it is submitted, this improper turn to the left was made (or at all events commenced) and although the brakes were applied (at first gently to avoid skidding) and the horn sounded, in the hope (as was thought) that

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the driver of the milk-wagon would repair the mischief by returning to the right side of the road, this movement did not take place; on the contrary the horse continued diagonally across the road to the left towards Carolina Street and a collision was inevitable.

It was, of course, important to respondents' case to establish by proper evidence that the horse turned to the left across their path drawing the milk-wagon after him. With that fact established, indicating negligence on the part of the driver, whether he was on the wagon or not, further questions touching contributory negligence and ultimate negligence, if any, could be solved.

The learned trial judge found "that the horse without any warning, being uncontrolled, turned out with the wagon and was cutting the corner into Carolina Street across in front of the plaintiff Price." If it can be said that this finding was based upon direct evidence or upon inferences from established facts no difficulty would arise. The opening sentence in the reasons for judgment, however, has, properly enough, given rise to an argument, if not to an insurmountable difficulty. It is as follows:

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> In view of the evidence of the witnesses Mrs. Bennett Miss Bennett and Mr. Raptis, I find that the horse was in the habit of turning the Carolina corner unattended to the knowledge of the driver Dornan.

It was urged that the finding first quoted, *viz.*, that the horse "cut the corner" was based upon the evidence of these three witnesses who testified regarding the habits of the horse on previous occasions and that it was inadmissible. There is some ground for this view but there is a short answer to it, *viz.*, that the three witnesses testified to one thing, *viz.*, as to "turning the Carolina corner" (and that did not cause this accident) whereas the trial judge's finding is in respect to another fault altogether (and it did contribute to the accident) *viz.*, "cutting the corner." We should not assume that the trial judge overlooked this distinction.

As intimated the finding, concerning the habits of the horse, was based upon the evidence of witnesses who did not see the accident. The first witness testified that on former occasions she saw "the horse go on by itself" unattended, presumably around the corner, although that is not definitely stated. The

second witness said that on other occasions "when the milkman delivered the milk, the horse keeps on going by itself and turns the corner" (I assume properly) and the third gave similar evidence limited however to one occasion before the accident.

It was necessary for respondents to prove two things (1) that the horse turned to the left or "cut the corner" immediately preceding the collision and (2) that this movement caused the accident. The first fact could not be established by the evidence of absentee witnesses shewing that the animal was in the habit of doing so on other occasions. I am assuming now (contrary to the fact) that they said its habit was "to cut the corner." We are not concerned with the habits of the horse. The question of the propensities of animals or their customary habits is not pertinent. We are concerned with the conduct of the driver. This animal was controlled by man either directly or indirectly. It might properly be submitted in the case of a collision that if a driver knew that his horse would continue to move along the street when unattended and turn abruptly to the left or turn a corner at an intersection he would be negligent if he permitted it to do so. It would still be necessary, however, to prove that this negligent act was committed when the accident occurred. The driver in that event would be found guilty of negligence apart altogether from the habits of the horse. A vehicle whether horse-drawn or otherwise propelled, in turning a corner should be controlled by a driver on all occasions in order that following and approaching traffic might be warned by appropriate signals. A driver too should be there to take whatever care the exigencies of traffic at an intersection might demand. I do not think we should say that a driver of a milk-wagon should not allow his horse to move slowly on the right side of the street between the houses of customers while he is delivering milk. That sort of movement will not occasion accidents. It is different at an intersection. If these precautions are neglected at an intersection there is a breach of duty on the part of the driver towards the one injured through his neglect but bad habits of man or beast in the past, in turning corners, or committing other offences cannot add to his negligence any more than good habits could excuse him.

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It follows that respondents were obliged to establish, as a fact, not as a surmise, based on what occurred at other times, that on the day in question the horse either "cut the corner," or turned out to the left in the street before reaching the intersection. We have that finding clearly stated. If the trial judge found that this false movement must have taken place, because it was just the thing the animal was likely to do in view of the evidence of the three witnesses referred to, it would be erroneous. Conduct on other occasions is not the subject of this inquiry. As intimated I do not think we should assume that he was led into this error, although admittedly the suggestion is plausible. Nor do I think, notwithstanding the decision in *Larson* v. *Boyd* (1919), 58 S.C.R. 275, that it was necessary for the trial judge to disclaim being influenced by their testimony. Under our rules we have power to draw proper inferences of fact from the evidence. I am aware that the Saskatchewan Court of Appeal Act in force at the time contained somewhat similar powers but the point was not raised, or at all events it is not referred to in the reports. I think it was felt on the facts in that case that the conclusion of improper influence was irresistible.

MACDONALD, J.A.

We should not find, therefore, that the trial judge misconceived the evidence of these three witnesses notwithstanding the gratuitous observations in the first sentence of the judgment. They did not, as intimated, say that the habit was to turn out to the left in the street from its own side of the road or to "cut [not turn] the corner." They only say it turned the corner unattended, and for aught we know it may (when under observation by these witnesses) have maintained its proper position on the right side of the highway until the centre of the intersection was passed, afterwards turning to the left. If it did so on this occasion, the accident clearly would not have occurred. Respondents would be past the wagon before such a turn could be made. All that would be lacking would be the warning signal for a left turn. That omission, however, would not cause the accident if the horse proceeded in the manner indicated. True, respondents complain that no signal was given. But, if, as alleged, the horse turned to the left that movement took place on 25th Avenue within the block and opposite a customer's

house where the driver was delivering milk to the occupants. It might be suggested that with a slow-moving vehicle the sign for a turn should be given a considerable distance back from the intersection. But we must take the facts as we find them. Appellant's driver was in the act of delivering milk at a place comparatively close to the intersection and his evidence was that the horse was in the act of stopping (slowing down to stop) to enable him to remount the wagon before turning the corner. However, I will assume that it did not actually stop. It would not be of any value to give a turning signal some distance back, if after giving it, the intention was to dismount to deliver milk before reaching the intersection. It would have to be repeated again and additional precautions would be necessary after the driver returned. On remounting the wagon the driver's duty, so close to the corner, would be to look about him and regulate his conduct by the condition of traffic in the two streets. He might be obliged to permit a car a block behind him to pass before he reached the turning point in the intersection. He would perform his whole duty, after returning from a house so close to the corner if he acted in the manner suggested and executed the turn after making the observations referred to, and giving, of course, the signal as an additional precaution. It follows, therefore, that if the horse simply turned the corner in the manner testified to by the three absentee witnesses this accident would not have taken place. Respondents' faster driven car would have passed the wagon before the turn would be made and the absence of a signal for a left turn would not be material. The mischief occurred because of a diagonal crossing on the part of the horse made for the purpose of reaching Carolina Street, not by turning the corner, but by taking the shortest possible course to effect the movement. There is a finding that this was done but it cannot be based upon the evidence of the three witnesses referred to for the reasons stated.

Had the trial judge sufficient evidence of a direct character to justify a finding on proper evidence that the horse "cut the corner"? He had only the direct evidence of the drivers of the two vehicles as to the oblique course taken by the horse, one asserting, the other denying, together with evidence afforded by

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a trail of spilled milk, found after the accident, which, while not conclusive, affords some support to appellant's contention that the horse did not turn to the left at all, at least to any appreciable extent. It is true that both drivers were disbelieved on other points. On this point, however, I think he accepted the evidence of the respondent Franklin Price, the driver of the motor-car. He might have derived assistance in making that finding by reasonable inferences from other facts. The accident occurred not at the intersection, but within the block, or at least about twelve feet from the nearest extended property line on Carolina Street. Why, for example, should the respondent Price sound the horn if the horse and wagon was safely on the south side of the roadway? If disbelieved on this point why should a collision occur if the horse did not turn to the left? Did the mere fact, as suggested in evidence, that the horse may have only turned its head as horses will, disconcert the respondent leading him to anticipate a greater turn, apply the brakes—go into a skid and collide with the milk-wagon? That suggestion was rejected by the trial judge. These considerations might induce the Court to accept the direct evidence of the respondent Franklin Price on this point and I think the trial judge did so.

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On the question of ultimate negligence I would not interfere with the conclusion reached by the trial judge based upon the facts. He found that the joint negligence of the drivers of the two vehicles brought about the accident. The driver of the motor-car was travelling too fast in view of the fact that the channel for traffic ahead of him was somewhat narrow by reason of the presence of the milk-wagon on one side of the highway and a parked truck on the other. He can only be charged with sole responsibility if notwithstanding the negligence of the other in permitting the horse to "cut the corner" he might have avoided the accident. He was 50 or 60 feet away when the horse first turned to the left. He was justified in believing that the driver was on the milk-wagon and upon hearing the horn (he would almost instinctively sound it) would turn his horse to the right. When this movement did not materialize the respondent Franklin Price was then too close to the wagon to avoid hitting it. I think this accident occurred (at all events

there was evidence on which such a finding might be made) through the concurring negligence of joint tort-feasors.

On the question of working out the judgment and the disposition of costs I agree with the Chief Justice.

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Decision of trial judge varied, Martin and McPhillips, JJ.A. dissenting in part.

Solicitors for appellants: *Mayers, Locke, Lane & Johannson.*
Solicitors for respondents: *E. P. Davis & Co.*

ECCLESTONE v. UNION MINING AND MILLING COMPANY LIMITED.

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Mines and minerals—Sale of mineral claims—Commission—Assignment of interest in—Proof of—Put in on trial without objection—Evidence—Costs.

On the trial of an action to recover commission for bringing about the sale of certain mineral claims, two assignments previously made by two companies entitled to a portion of the commission, and appearing regular on their face, were put in as evidence on the trial without objection from defendant's counsel. Later objection was taken that the assignments were not strictly proven and the plaintiff then, by way of precaution, applied for and obtained leave to join the two assignors as parties plaintiff. The plaintiffs succeeded in the action, and on appeal the defendants contended they were entitled to the costs up to the time the assignors were added as parties plaintiff.

Held, that when the assignments were put in as evidence in the presence of defendant's counsel, their character being fully indicated, if their due proof were contested objection should then have been taken, but being in without objection the defendant must be taken to have assented to their being used as evidence. The assignments were in these circumstances sufficiently proved and the costs were properly awarded to the plaintiffs.

APPEAL by defendant from the decision of MORRISON, C.J.S.C. of the 14th of July, 1931, in an action for commission on the sale of mining property in the Similkameen Division of

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Statement

Yale District, British Columbia, consisting of the Union mineral claim, the Idaho mineral claim and two fractions adjoining. In the summer of 1926 the plaintiff communicated with the defendant as to the price of said group of claims, and was told that the price was $160,000. He then told them that as a broker he was quoting a price of $175,000, the difference to be his commission, to be payable ten per cent. on moneys received by the defendant. He interested the Hecla Mining Company, a United States corporation, in the property and in the spring of 1927 they made an examination of it. In October, 1927, they purchased the property from the defendant for $175,000. Up to the time of the commencement of this action the purchasers have taken from the property very large sums from which a considerable sum has been paid to the defendant on account of the purchase price.

The appeal was argued at Vancouver on the 20th to the 23rd of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

O'Halloran, for appellant: We submit (1) That it is not proven that the plaintiff is the assignee of Ecclestone, Limited or of Miller Court & Co. Ltd. (2) There was no contract express or implied between the defendant company and Ecclestone. (3) If there was a contract the defendant was to first get $160,000. (4) Neither the plaintiff nor his assignors were the *causa causans* of the sale. Proof of the assignments is essential when bringing the action in his own name: see *Read* v. *Brown* (1888), 58 L.J., Q.B. 120; *Moises* v. *Thornton* (1799), 3 Esp. 4. That there is no contract express or implied see *Barnett, Hoares & Co.* v. *South London Tram. Co.* (1887), 56 L.J., Q.B. 452. The secretary had no power to bind the company: see *George Whitechurch, Lim.* v. *Cavanagh* (1901), 71 L.J., K.B. 400 at p. 403; *Houghton & Co.* v. *Nothard, Lowe & Wills, Ltd.* (1927), 97 L.J., K.B. 76. They did not bring about the sale: see *Bell-Irving* v. *Macaulay, Nicolls, Maitland & Co.* (1931), 1 D.L.R. 381 at p. 382. For six months before the sale they did nothing: see *Bridgman* v. *Hepburn* (1908), 13 B.C. 389; 42 S.C.R. 228; *Burchell* v. *Gowrie and Blockhouse Collieries, Lim.* (1910), 80 L.J., P.C. 41; *Prentice* v. *Merrick*

(1917), 24 B.C. 432; *Macaulay, Nicolls, Maitland & Co.* v. *Bell-Irving* (1930), 42 B.C. 140 at p. 160; (1931), S.C.R. 276.

Grossman, for respondent: There was general employment: see *Prentice* v. *Merrick* (1917), 24 B.C. 432. As to proof of assignment to the plaintiff see *Bain* v. *Whitehaven and Furness Junction Railway Company* (1850), 3 H.L. Cas. 1. As to the effect on us of Hull doing wrong see *Hambro* v. *Burnand* (1904), 2 K.B. 10 at pp. 23 and 25. On the question of authority see *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1905), A.C. 454 at pp. 463 and 465; *McKnight Construction Co.* v. *Vansickler* (1915), 51 S.C.R. 374 at p. 382.

Argument

O'Halloran, in reply, referred to *Harvey* v. *Facey* (1893), A.C. 552; *Little* v. *Hanbury* (1908), 14 B.C. 18; *Cole* v. *Sumner* (1900), 30 S.C.R. 379 at p. 382.

Cur. adv. vult.

5th February, 1932.

MACDONALD, C.J.B.C.: The claim in this action is for commission upon the sale of the appellant's mines near Grand Forks. I am satisfied upon reading the evidence in the case which is largely documentary that the learned judge arrived at the right conclusion that the plaintiff was entitled to his commission.

A question arose as to proof of the assignment of this commission by other parties interested in it to the plaintiff before the action. The two assignments, one from Ecclestone Ltd., and the other from Miller, Court & Company, Ltd., to the plaintiff which appear regular on their faces were put in at the trial without any objection from defendant's counsel. Later objection was made that these assignments had not been strictly proven and by way of caution the plaintiff asked leave to join the said assignors as parties plaintiff which application was allowed and these parties were by their respective consents in writing added as parties plaintiff.

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The question of costs arises out of this transaction, it being contended by the appellants that they are entitled to the costs of the action up to the time when these parties were added notwithstanding judgment in favour of the respondents. In my

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opinion the said assignments were sufficiently proved at the trial. They were put in as evidence by the respondents in the presence of appellant's counsel. Their character was fully indicated at the time. They were referred to as assignments by the said parties to the plaintiff and having gone in without objection I think the appellant must be taken to have assented to their being used as evidence. It is true that the appellant in its statement of defence said that it did not admit the assignments to the plaintiff; but it seems to me that notwithstanding that when they were put in at the trial, if their due proof was contested, they ought to have been objected to. Therefore, in my opinion, there is no question that the costs were properly awarded to the plaintiff in the judgment appealed from.

In Taylor on Evidence, 12th Ed., Vol. I., p. 493, sec. 783, it was said, referring to *Urquhart* v. *Butterfield* (1888), 37 Ch. D. 357, that

> where counsel on both sides so conduct a cause as to lead to an inference that a certain fact is admitted between them the Court or the jury may treat it as proved, and, though the counsel do so with respect to some fact which goes to support one issue only, that fact, it seems, may be taken for granted for all purposes and as to the whole case.

MACDONALD, C.J.B.C.

See also at page 511, where this quotation is made from Lord Tenterden in *Fairlie* v. *Denton* (1828), 3 Car. & P. 103:

> "What is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it."

Notice of these assignments were duly proven. Counsel for defendant at the trial stated his defence, first that the sale had not been brought about by the efforts of the plaintiff or his assignors, and secondly, that defendant was liable to pay a commission only when it had received the whole of its purchase-money, namely, $160,000. These were the real issues contested in the action. With regard to the latter the appellant wrote the purchaser a letter dated the 11th of February, 1930, as follows:

> Referring to the sale to you of our mining properties situate near Grand Forks, British Columbia, we hereby transfer, assign and set over unto Miller Court & Co. Ltd., of Stock Exchange Building, 475 Howe Street, Vancouver, B.C., the sum of $15,000 out of the moneys to be paid to us by you on the purchase of our said mine. This sum of $15,000 is to be paid to Miller Court & Co., Ltd., in amounts limited to 10% of each payment made to us under our agreement. We, therefore, instruct and authorize

you to pay to Miller Court & Co., Ltd., 10% of each payment due or to become due to us under our agreement up to a total sum of $15,000.

That I think disposes of the defence that the action is premature. I may add here that the defendant on receipt of the first instalment of the purchase-money appropriated in its books plaintiff's proportion thereof although it has not paid it over.

I would dismiss the appeal with costs.

MARTIN, J.A.: I agree that the judgment may be supported on the facts before us, and, under the circumstances, and having regard to the manner in which a long list of letters and documents was, in effect, put in evidence as exhibits without objection, am of opinion that the necessary assignments were sufficiently proved and therefore there is no necessity to add parties.

It follows that the appeal should be dismissed.

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

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

MACDONALD, J.A.: The point was raised that it was not proved that the appellant Ecclestone was the assignee of Miller Court & Company Ltd., and Ecclestone Limited. From the manner in which the documentary evidence was adduced at the trial this objection is not maintainable.

There is, I think, no doubt that respondents earned a commission on the sale of appellant's mining property to the Hecla Mining Company. The only serious controversy concerns the mode and time of payment. The respondent defends a judgment obtained from the Court below for the payment to them of ten per cent. commission on all instalments of the purchase price as and when received by appellant as provided for in the option until the sum of $15,000 is received; whereas appellant contends, first, that no commission was earned, or in the alternative it is payable only after the purchaser pays to appellant the sum of $160,000. The property was sold for $175,000 on special terms and appellant submits that in any event respondents are only entitled to receive the final sum of $15,000 paid by the purchasers.

The contract to pay respondents a commission, if any, was

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effected by S. T. Hull, appellant's secretary. As he was merely the servant of the company "to do what he was told" it was submitted that he could not bring appellant into contractual relations with the respondents. This point was not pleaded nor raised at the trial. Further appellant by resolution recognized the binding effect of some contract to pay a commission entered into on its behalf by Hull, the point of difference being the terms of that contract. Apart therefore from failure to plead, and the fact that appellant conducted the trial on the basis, not that Hull lacked authority, but that no contract to pay a commission was entered into, or if entered into only to pay at a future date, the appellant by the course followed disclosing that the contract, whatever its terms, was well known to all engaged in the direction of the affairs of the company, cannot now be heard to deny that it was a party to the engagement. It is not an answer to say that this recognition by resolution can only be treated as directed to the special contract alleged, *viz.*, to pay respondents $15,000 after $160,000 is received by the appellant. That depends upon the constructions of the letters exchanged and the acts of the parties. No distinction can be made as to Hull's authority depending upon the outcome of two possible events.

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On the first point as to whether or not any commission was earned there cannot, I think, be any serious controversy. It is not material that the sale may have been consummated by Hull on behalf of the appellant. The evidence justified a finding that the relationship of buyer and seller was brought about by the exertions of the respondents. A claim to a commission is not defeated by a sale behind the agent's back to a purchaser introduced by the agent. On some of the facts disclosed a trial judge would be justified in giving the fullest possible weight to all evidence, documentary and inferential, favourable to the respondents. Hull's letters indicate that he and appellant were anxious enough to secure respondent's services, without however (as it was thought) making definite commitments. The letters were purposely evasive. If, however, a contract to pay a commission, in some manner, was arranged, Hull not satisfied with his own earnings from the sale (he was to receive a 10 per cent.

commission) wanted to share also in respondent's commission. Without disclosing that he was being well paid for his work, if any, he wrote to respondents saying:

> Should a deal be consummated at the price asked by you and you should be entitled to a commission, . . . in all fairness, a portion of that commission should be allowed to me.

He added:

> I have no fixed amount in my mind . . . but will consider any reasonable amount.

He returns to the attack later stating:

> I fully explained to you [he wrote] the several grounds on which I feel I am entitled to consideration [and] I cannot remove entirely from my mind the thought that without my assistance the outcome might have been very different.

He adds that although he believes some in the brokerage business are "devoid of a sense of fairness" still "I refuse to believe your company comes within this category." Mr. Hull too thought of others. The directors of appellant company who received $175,000 for the property conditional upon the purchase price being fully paid, should also be considered. Hull later wrote to respondent saying:

> It appears to me to be an opportune time to remind you of the request we made some time ago that you make an allowance to cover expenses the directors were put to in order to consummate the deal with the Hecla Company. This matter has been discussed by the directors and they are firmly of the opinion that an allowance should be made.

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The directors may suggest that Hull was not telling the truth. They did not testify, however, at the trial, but did put forward Hull as a truthful witness. My own view is that Hull did not manufacture the contents of that letter.

However, it is not necessary to resort to the foregoing incidents to support respondent's claim for a commission in some form. Hull admitted, though seeking to qualify it afterwards, that Ecclestone "was very largely instrumental" in effecting the sale. He also said "as far as I know there has been no question about Mr. Ecclestone's claim being paid: the only question was as to when it was to be paid." And again, "the directors did not dispute the payment of the commission." The property was listed with respondents and the evidence shews that the sale was effected by them.

The point arises—when and how is the commission payable?

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This depends upon the construction of the letters exchanged and the acts of the parties concerned. Respondents advised appellant (April 9th, 1926) that they had clients interested in purchasing a mining property and asked for price and terms, adding "we believe we can interest them in the Union." In reply on April 16th, appellant wrote, through its secretary, as follows:

I am authorized to offer the assets of the Union Mining and Milling Company for the sum of $160,000 net to the company. Terms to be arranged.

Some months later (August 9th, 1926) respondents wrote "we have interested an American company" who will "send two engineers to examine within a month." The proposed purchaser, the respondents stated would, if the property appeals to them be agreeable to working the property for six months, and pay royalty on any ore shipped" and "make a payment at the end of six months and the balance at intervals of six months," adding "we are quoting $175,000, being your figure of $160,000 plus approximately 10 per cent. This commission would be payable to us 10 per cent. on moneys as and when received.

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Hull replied on August 21st saying the Union was "still on the market," and "we will be glad to hear from you further regarding your interested parties." On August 25th Hull wrote to respondents as to terms saying the directors suggested "a payment of $5,000 in six months, the balance within a further period of two years" and

if your principals are the right people . . . rather more favourable terms might be made . . . other details such as . . . royalty, minimum amount of work to be done, etc., to be mutually agreed upon.

On September 6th Hull wrote direct to the Hecla Mining Company enclosing a booklet giving detailed information concerning the property. One or two other letters were exchanged between Hull and the company but they are not material.

On December 17th, 1926, the respondents wrote to the ultimate purchaser, the Hecla Mining Company at Wallace, Idaho, giving a full description of the property, extracts from an engineer's report, etc., and the terms upon which it could be purchased.

The property is held [the letter stated] at $175,000 and an option giving ample time to do the work suggested by Mr. Larsen (the reporting engineer) could be arranged, and if the property proves up to the satis-

faction of the option holder a $5,000 cash payment will be accepted and favourable terms granted on the balance, or lease on royalty basis would be entertained; all being subject to final approval by the owners.

This was the first time the property was presented to the purchasers by respondents, or by anyone else (because the previous letters referred to written by Hull were of a general character) although respondents presented it to several other possible purchasers. The Hecla Company replied to this letter on December 21st, 1926, advising that it hoped to make an examination in the Spring. On March 5th, 1927, respondents advised appellant that the Hecla Mining Company would examine the property.

On March 25th, 1927, Hull again wrote to respondents in respect to terms stating:

> They [appellant company] are willing to execute a lease and bond arranged on a basis of 20 per cent. royalty of value recovered instead of fixed cash payments

the amount to be spent in development to be arrived at by negotiation with the purchasers after examination. It was on this royalty basis that the sale was made with a total purchase price of $175,000. Respondents at once advised the Hecla Mining Company (March 28th, 1927) that the property

> can now be acquired on lease and bond with 20 per cent. royalty on values recovered to apply on the purchase price. The amount to be expended annually to be agreed upon after examination.

The Hecla Company replied on April 8th that it would examine the property shortly and asked to be referred to the man who could shew them over the property. This information was given to them.

On April 16th, 1927, respondents wrote appellant, enclosing copies of letters received from the Hecla Mining Company; stating also that "the La Rose and Huronian people will also examine" and adding:

> We have quoted all these people a price of $175,000 which is your price on the property plus the usual commission. In the event of a sale we are agreeable to this commission being paid at the rate of 10 per cent. on the moneys received, by the owners, as and when received.

Hull replied to this letter in a general way.

The situation was now developed to the point where, at the instance of respondents, the price and terms upon which the property could be purchased was placed before the ultimate

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purchasers with the approval of the vendors, and appellant was again informed of the terms upon which the respondents, as agents, were prosecuting the work of effecting a sale. Notwithstanding this the manager of the Hecla Mining Company on July 14th, 1927, wrote to Hull saying in part:

> I would be glad to know what the terms are on which this property might be bought.

He stated he had correspondence with the respondents and inquired "is there any conflict in this situation?" Hull replied on July 18th giving them terms already well known and adding "there is no conflict between Miller Court and Company [one of respondents] and this office." He apparently was satisfied concerning the terms of respondents' engagement. One would be justified in assuming that these letters amounted to by-play. It may be, however, that the manager overlooked the terms of the correspondence with the respondents although he referred to it. He testified on appellant's behalf at the trial, stating that he purchased through Hull, and would not have purchased at all had not certain additional claims, of which respondents had no knowledge, been included. The first part of the manager's evidence at all events was not accepted and as to the additional claims for which comparatively small amounts were paid, the vendor cannot defeat a claim for commission because other claims were procured at the same time by independent negotiations; nor should we find, when the learned trial judge did not, that this was the decisive factor in bringing about the sale.

On October 28th, 1927, the bond agreement was executed. It transferred the four mineral claims listed with the respondents, the total purchase price was $175,000 quoted by respondents, and later repeated by Hull. It was to be provided by payment of 20 per cent. of the net smelter returns from ores and concentrates mined and shipped by the purchaser. These terms were given by respondents to the purchaser. The working arrangements were settled as it was agreed with respondents they might be settled, as a detail between the vendors and the purchaser.

The sum of $42,000 was received by appellant on account of the purchase price when the writ was issued and no doubt a much larger amount at present upon which Hull is receiving 10

per cent., while respondents, who effected the sale, are asked to wait until $160,000 is paid, an event that might never occur, as in case of default, the property reverts to the vendors.

Was there a contract to pay commission on the basis alleged by the respondents? There is no doubt that they were employed to sell the property and it is equally clear that the agents told appellant the terms upon which the work and labour would be performed by them. Did appellant expressly or impliedly accept the terms submitted? The actions of appellant may be looked to in considering the question of acceptance. When respondents wrote appellant on February 11th, 1930, asking for payment on the basis of the first smelter returns there was no repudiation but simply an acknowledgment made and excuses offered for delay. On March 27th, 1930, Hull wrote respondents stating that a meeting of the directors had not yet been held and might not be for a couple of weeks. They apparently met to discuss some matters because it is in this letter that Hull requests, as already stated, that respondents should make a payment to the directors. It is open to the suggestion that compliance in an attractive form would result in payment in the manner demanded by respondents. Without repudiating respondents' claim he states that no moneys "have as yet been received by the Union Company in respect of this deal."

On April 8th, 1930, a meeting of appellants' directors was held. The minutes disclosed that $1,352.15 had been received from the first car of concentrates shipped. Ten per cent. of this amount was paid to Hull and it was also directed that $135.20 (*i.e.*, ten per cent.) should be paid to respondents with the note added "to be held pending further instructions." This is inconsistent with the claim now put forward that respondents could only share after $160,000 was paid. It was a recognition of a pre-existing contract to pay 10 per cent. to respondents as the money was received. What the "further instructions" referred to were is not clear. I think the truth is that appellant thought respondents might change their mind in respect to the demand made on behalf of the directors for "an allowance" because

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when a further demand was made by respondents' solicitors Hull writes on June 13th, 1930, as follows:

> In reply to your letter of the 6th inst., we would refer you to our letter of the 27th of March addressed to Miller Court & Company Ltd.

There is no denial of respondents' claim, although the directors met in the meantime, but a reminder that on March 27th a demand was made for a contribution for the benefit of the directors. This demand was not made on behalf of the company. It was for the directors personally. On August 31st, 1930, in a letter to respondents' solicitors Hull again reminds them of the letter of March 27th. "No doubt," he says, "your client is acquainted with the contents of that letter" and "we shall be pleased to hear from them or you in this connection." They were still waiting for compliance with this proposal while the $135.20 ordered to be paid to respondents was held pending surrender to that demand. No defence was offered by appellants' counsel for the conduct of Hull nor presumably for the directors in this regard. The company claimed that it had to pay $750 in acquiring the additional claims already referred to but that fact did not justify a demand even for a payment to the company, much less to the directors personally.

On September 13th, 1930, appellant's directors met and passed a resolution authorizing an offer of a partial payment of 3 per cent. of royalties received with other conditions added, including therein a deduction of the $750 referred to. This again in part is a recognition of respondents' claim. Finally two days afterwards (and for the first time in three years) Hull wrote appellant's solicitors, stating that respondents' claim

> is premature and that the Union Company is under no obligation to pay any commission until the full sum of $160,000 has been received by it.

I think the foregoing facts disclose a contract as claimed by the respondents. If one engages an agent to perform certain services and the agent in turn stipulates that for doing so his remuneration will be a specified sum, payable in a specified manner, and the other without referring to the special terms but after receipt of them, instructs the agent to proceed, or permits him to do so, and the work is performed by the agent and

accepted by the other, a contract is concluded or assented to for payment in the manner specified. Further, the resolution passed by the company and the setting aside of the $135.20 referred to coupled with the conduct of the appellant throughout may be looked to as a recognition of a pre-existing contract. Acceptance of an offer may be shewn by conduct unequivocally indicating acceptance. No special form of acceptance is necessary.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Pincott & Pincott.*

Solicitors for respondent: *Grossman, Holland & Co.*

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RAHAL v. RAHAL

RAHAL v. RAHAL *ET AL.*

Partnership — Dissolution — Covenant by retiring partner — Breach — Liquidated damages—Conspiracy to injure business—Damages.

The plaintiff and the defendant R., having dissolved partnership, R. agreed not to carry on or be interested in the same business within a certain area for a certain period of time, R. covenanting to pay $1,000 if he should break the agreement. In the course of the trial R. admitted liability and damages for this sum were given against him. A second issue was raised in the case against R. and two other defendants for conspiring to break the agreement, on which the plaintiff was awarded $50 as nominal damages. The plaintiff appealed on the grounds that the Court having found that all three defendants had conspired to bring about the breach, one sum by way of damages should have been awarded against them all and the amount awarded should be increased. The defendants other than R. cross-appealed.

Held, affirming the decision of MORRISON, C.J.S.C. (MCPHILLIPS, J.A. dissenting in part, and allowing the cross-appeal), that there was sufficient evidence to justify the judgment of the Court below and it should not be disturbed.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. of the 29th of July, 1931, in an action for damages for breach of covenant and for conspiracy. The plaintiff and the defendant John Rahal, formerly carried on a dry-goods business in partnership in the City of Fernie, B.C. In November, 1928, the partnership was dissolved and the plaintiff bought out John Rahal's interest for $14,700, John Rahal covenanting not to carry on or be engaged or concerned directly or indirectly in the business of a dry-goods merchant within a radius of twenty miles of the City of Fernie for a period of two years, and for every breach of said covenant he would pay the plaintiff $1,000 as liquidated damages. Within the said period John Rahal entered into a dry-goods business in Fernie in partnership with the defendant Ross Colgur and Victoria Colgur. It was held on the trial that the defendants infringed a legal right that the plaintiff had under his contract and judgment was given against John Rahal for $1,000 for breach of covenant and against the other defendants for $50. The plaintiff appealed against that part of the judgment awarding $50 damages

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against the defendants Ross Colgur and Victoria Colgur, claiming that such damages should be increased and that the judgment on the plea of conspiracy should be against all the defendants.

The appeal was argued at Victoria on the 11th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Higgins, K.C., for appellant: John Rahal started business with the other defendants across the road from our premises. They took away our saleswoman and we shew that there was a loss of sales amounting to $16,000. There was a substantial loss for which we are entitled to substantial compensation: see *Lerik* v. *Zaferis* (1929), 41 B.C. 526. Conspiracy was proved and so found on the trial; it is a separate claim: see *Thomas* v. *Moore* (1918), 1 K.B. 555.

Mayers, K.C., for respondent: The Court does not punish in a civil action. The plaintiff received $1,000, and when he takes his choice he is bound by it: see Pollock on Torts, 13th Ed., 563. He has taken his judgment in contract and he is bound by it. If you sue in contract and in tort and get your judgment in contract the action in tort goes by the board. The contract was not broken as against the other defendants: see *William Cory & Son, Limited* v. *Harrison* (1906), A.C. 274 at p. 276. The evidence is that John Rahal loaned money to his co-defendants, there is nothing to shew he got any profits from the business: see *Robinson* v. *Robinson and Lane* (1859), 1 Sw. & Tr. 362 at p. 365; *Lumley* v. *Gye* (1853), 2 El. & Bl. 216 at pp. 226, 229 and 233. On the question of loss of profits see *Riding* v. *Smith* (1876), 1 Ex. D. 91 at p. 92.

Argument

Higgins, in reply, referred to *O'Keefe* v. *Walsh* (1903), 2 I.R. 681 at p. 689; *Larkin* v. *Long* (1915), A.C. 814 at pp. 832-4; *Brown* v. *Jarvis* (1860), 2 De G. F. & J. 168 at p. 171; *London Trade Protection Association* v. *Greenlands* (1916), 85 L.J., K.B. 698 at p. 710.

Cur. adv. vult.

1st March, 1932.

MACDONALD, C.J.B.C.: The cause of action is for damages for breach of an agreement not to carry on business in compe-

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tition with the plaintiff's business within a limited space and time. The defendant covenanted to pay $1,000 should he break this covenant. In the course of the trial a letter was read which in the opinion of his counsel was fatal to his cause and he thereupon admitted his liability for that sum. A second issue was raised in the case against John Rahal, Ross Colgur and Victoria Colgur of conspiracy to break the said agreement. When John Rahal admitted his liability on the covenant the case was allowed to proceed presumably to hold the other defendants for the conspiracy. At the close of the trial the learned judge reserved this question but gave judgment shortly afterwards awarding damages of $50 to the plaintiff which he described as nominal damages. I would not disturb the judgment. It is clearly right as against the defendant John Rahal and in the opinion of the trial judge $50 was sufficient to meet the plaintiff's claim against the other two defendants.

The appeal is dismissed.

MARTIN, J.A.

MARTIN, J.A.: I concur in dismissing this appeal and cross-appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal of the plaintiff and allow the cross-appeal of the defendants. The plaintiff elected to sue for breach of contract. Having done so and entered up judgment for $1,000, he cannot be admitted to have damages in tort arising out of or having reference to the same contract. In truth, upon the facts of this case, it was in my opinion not established satisfactorily that the contract sued upon was broken or caused to be broken and I would refer to *William Cory & Son, Limited* v. *Harrison* (1906), A.C. 274, 275, 276, and 277 and what Lord Chancellor Halsbury, Lord Robertson and Lord Lindley said in that case.

MACDONALD, J.A.

MACDONALD, J.A.: The statement of claim charged the respondent John Rahal with breach of a covenant not to engage in a competing business for a limited period. A material part of the covenant is:

> And for every breach of this covenant the said John Rahal will pay to the said Nicholas Farris Rahal [appellant] the sum of $1,000 as liquidated damages and not as [a] penalty.

His two co-respondents are charged with inducing or procuring him to commit the breach and all of them with conspiring to injure appellant's business by carrying on a rival business with the financial assistance of the respondent, John Rahal, within the prohibited area. The learned trial judge found that the respondent John Rahal

> committed a breach of this covenant by beginning and carrying on business under the name of the Fernie Dry Goods Company of the same kind in the same street as that in which the plaintiff [appellant] carries on business,

and gave judgment for damages against him for breach of contract in the sum of $1,000.

The trial judge also found that the other two defendants (respondents)

> knew of . . . John Rahal's design and lent themselves in aid of carrying it out and acted in concert and damage has resulted to the plaintiff [appellant] by their combined action,

and assessed damages against them in the sum of $50.

The appellant, successful at the trial, to the extent referred to, asks this Court to find that the trial judge erred in awarding $1,000 damages against the respondent John Rahal alone for breach of covenant and instead, having found that all three conspired to bring about the breach, one sum by way of damages should have been awarded against all of them founded upon tort and that the amount awarded should be increased. The respondent John Rahal submitted to the judgment against him but his co-respondents cross-appeal on the ground that there was no evidence of conspiracy nor of damages suffered to the extent of $50 or to any extent.

MACDONALD, J.A.

Whatever might be the result, if the appellant refused to accept judgment against John Rahal for breach of contract and had insisted upon a judgment against all in tort, it is now too late to raise the question. The tort was waived by the acceptance of the judgment for breach of contract. The admission of liability during the course of the trial in so far as the respondent John Rahal was concerned was in respect to a breach of contract. That was not repudiated. After further evidence relating to the conduct of his co-respondents was received damages in the sum of $1,000 were formally awarded against John Rahal with the question of damages in tort as against the co-respondents "consequent upon the infringement by them of

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the plaintiff's legal rights" deferred for further argument. While the record is silent we must assume that further argument was heard because later damages were assessed against the co-respondents in the sum of $50. Appellant, as stated, could waive the tort and accept damages for breach of contract and it must be held that he did so in the absence of evidence that the judgment was settled and entered over his protest. I may add that there is no justification for increasing the amount. The contract contemplated payment of $1,000 upon a breach.

As to the cross-appeal, I think, there is enough evidence to justify the damages awarded.

I would dismiss the appeal and cross-appeal.

Appeal and cross-appeal dismissed, McPhillips, J.A. dissenting in part.

Solicitor for appellant: *F. C. Lawe.*

Solicitors for respondents: *Herchmer & Mitchell.*

FOLSETTER v. THE YORKSHIRE & CANADIAN TRUST LIMITED.

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1932

Feb. 5.

FOLSETTER v. THE YORKSHIRE & CANADIAN TRUST LTD.

Contract—Parol—Part performance—Statute of Frauds.

In 1915 the plaintiff agreed to become housekeeper for H. at $20 per month, H. agreeing at the same time to give her half his mining interests if she continued in his service as housekeeper. In April, 1922, the plaintiff became dissatisfied and threatened to leave him, owing to considerable arrears in payment of her monthly wages. H. then promised that if she continued as his housekeeper up to the time of his death he would pay her monthly wages regularly and in addition to the mining interests he would leave her by will the house in which they lived with adjoining property. She then continued in his service up to the time of his death in April, 1929. For two years prior to his death he paid her monthly wages regularly, but paid only a small portion of it prior to that time. In an action for specific performance the plaintiff recovered $2,545.30 for wages, a half interest in the mining interests held by H. at the time of his death, and the house occupied by deceased and lands in connection therewith.

Held, on appeal, varying the decision of MCDONALD, J., that there was a parol agreement and such performance thereof by the plaintiff as to take the case out of the Statute of Frauds entitling her to specific performance. She is entitled to one-half of deceased's mining interests as of the date of the agreement in 1922, for the ascertainment of which there will be a reference, and to the house and lots appurtenant thereto, but her claim for wages should be limited to six years prior to the action, less the amounts paid within that period.

APPEAL by defendant from the decision of MCDONALD, J. of the 14th of April, 1931. The defendant is the administrator of the estate of E. A. Haggen, deceased. In April, 1915, the plaintiff entered into an agreement with the said Haggen to become his housekeeper for $20 a month and board and room, Haggen at the same time agreeing to give her one half of his mining stocks and mining ventures. The plaintiff entered into Haggen's service as housekeeper at once, and continued in this position until April, 1922, when she threatened to quit as his housekeeper, as he was considerably in arrears in payment of her monthly wages, and had not given her any share of his

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mining interests. Haggen then promised that if she would continue as his housekeeper until his death he would pay her $20 per month with board and room and leave her by will the house in which they lived on Langara Avenue, with the furniture and contents and four other lots that he owned, also that he would leave her by his will one half of his mining stock and ventures. Haggen died on the 22nd of April, 1929, the plaintiff having continued in his service up to that time. During the two years prior to his death he paid her regularly the $20 per month but paid her very little prior to that time. She claimed specific performance of the agreement of April, 1922, $2,865 in wages, a conveyance of the house and lands aforesaid and the furniture and the mining interests. Judgment was given in her favour for $2,545.50 and a declaration that she was entitled to a one-half interest in the "mining shares" owned by deceased at the time of his death, and to the house occupied by the deceased and the lands in connection therewith.

The appeal was argued at Vancouver on the 1st, 2nd and 3rd of December, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Ian A. Shaw, for appellant: The deceased Haggen had a wife and children but they were separated prior to the plaintiff entering into his service as housekeeper. A contract of this nature will not be enforced unless it is certain, fair and just: see Fry on Specific Performance, 6th Ed., pp. 155 and 179. There is a strong element of uncertainty in the plaintiff's claim: see *Lord James Stuart* v. *The London and N.-W. Railway Co.* (1852), 15 Beav. 513; Halsbury's Laws of England, Vol. 7, p. 331, sec. 682, note (*a*); *Macphail* v. *Torrance* (1909), 25 T.L.R. 810; *Waring & Gillow (Limited)* v. *Thompson* (1912), 29 T.L.R. 154; *Alderson* v. *Maddison* (1880), 5 Ex. D. 293; (1883), 8 App. Cas. 467 at p. 472; *Bligh* v. *Gallagher* (1921), 29 B.C. 241; *In re Fickus* (1899), 69 L.J., Ch. 161. The contract for the house was not proven and she claims eleven years' wages. The Statute of Limitations applies and she is only entitled to six years' wages. She was in fact a confidential secretary rather than a housekeeper. On the reception of books

in evidence see *Symonds* v. *The Gas, Light and Coke Company* (1848), 11 Beav. 283. The cheques paid during the last two years were accepted as payment in full: see *Campbell* v. *Imperial Bank of Canada* (1924), 55 O.L.R. 318; Falconbridge on Banks and Banking, p. 699; *Peterson* v. *Flack* (1923), 1 W.W.R. 1289 at p. 1293; *Day* v. *McLea* (1889), 22 Q.B.D. 610. As to the Statute of Limitations see Leake on Contracts, 8th Ed., 687. If uncorroborated she is only entitled to $600: see *Rawlinson* v. *Scholes* (1898), 79 L.T. 350; *Elgin* v. *Stubbs* (1928), 62 O.L.R. 128 at pp. 131 and 135. Evidence consistent with two views is not corroboration: see *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213; *Holliday* v. *Turner* (1929), 65 O.L.R. 206 at p. 211; *Blacquiere* v. *Corr* (1904), 10 B.C. 448; *In re Finch* (1883), 23 Ch. D. 267 at pp. 272 and 277; Lightwood on The Time Limit on Actions, 374; Halsbury's Laws of England, Vol. 19, pp. 67-8; *Mills* v. *Fowkes* (1839), 5 Bing. (N.C.) 455; 132 E.R. 1174; *Tippets* v. *Heane* (1834), 1 C.M. & R. 252; 149 E.R. 1074; *Waugh* v. *Cope* (1840), 6 M. & W. 824. On the question of costs: see *Raser* v. *McQuade* (1904), 11 B.C. 161.

Argument

Beeston, for respondent: This is an enforceable contract: see *Hart* v. *Hart* (1881), 18 Ch. D. 670 at p. 685. We would be entitled to damages in lieu of specific performance: see Fry on Specific Performance, 6th Ed., p. 604; *Elmore* v. *Pirrie* (1887), 57 L.T. 333 at p. 335; *Kinsey* v. *National Trust* (1904), 15 Man. L.R. 32 at p. 45. To the house property he added two lots, otherwise she would not have stayed with him. Cheques were produced in corroboration of the plaintiff's claim and payments made in 1927 revived the old claims: see *Scott* v. *Allen* (1912), 26 O.L.R. 571; *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213 at p. 221.

Shaw, replied.

Cur. adv. vult.

5th February, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff claims that she entered into an agreement with the deceased E. A. Haggen in the following terms: She called on him in answer to an advertisement for

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a housekeeper. He offered her $20 a month; she said it was not enough. He said he was in financial difficulties and could not give her any more but if she stayed on he would give her in addition one half of the mining shares of any mining interests he had. She accepted the post on that understanding. She received her wages for the first year but not afterwards. Then in 1922 she became dissatisfied that she had not been paid her wages and because he had bought some lots which she thought he ought not to have bought, when the following conversation occurred between them:

> Just explain what arrangement was made? He said if I would stay with him.
>
> Until how long? Until he died, he would leave me the house and property and he would keep his promise for the mining shares.

And:

> THE COURT: And you state that you agreed to stay? Yes.
>
> *Beeston*: What I want to make plain is, it is important, she said she would stay until Haggen died. Yes, until he died.

MACDONALD, C.J.B.C.

Now it seems to me that this is a complete parol agreement and the only question against its enforcement is that it was not in writing as required by the Statute of Frauds. The answer to the Statute of Frauds is that there was part performance or to put it more accurately, complete performance of her part of the agreement. She not only agreed to stay on until he died but she actually did so and then claimed fulfilment of the agreement from the executor. In *Maddison* v. *Alderson* (1883), 8 App. Cas. 467 at p. 472, Lord Chancellor Selborne stated the agreement in that case upon which the plaintiff claimed. He said the plaintiff contemplated leaving Thomas Alderson's service and so informed him. He told her of his expectations from his uncle; that his uncle wished him to make it all right by leaving her Moulton Manor Farm which he promised to do when she lived with him. "And so," she said, "therefore I took his advice. I remained on by his promise. I did not leave because he advised me not." She did not afterwards press him for wages but at his death brought an action against his administrator for them which was dropped before or at the time when

the subsequent action was brought. The learned Lord Chancellor then proceeds:

> The case, thus presented, was manifestly one of conduct on the part of the appellant (affecting her arrangements in life and pecuniary interests) induced by promises of her master to leave her a life estate in the Moulton Manor Farm by will, rather than one of definite contract, for mutual considerations, made between herself and him at any particular time. There was certainly no contract on her part which she would have broken by voluntarily leaving his service at any time during his life; and I see no evidence of any agreement by her to serve without, or to release her claim to, wages. If there was a contract on his part, it was conditional upon, and in consideration of, a series of acts to be done by her, which she was at liberty to do, or not to do, as she thought fit; and which, if done, would extend over the whole remainder of his life. If he had dismissed her, I do not see how she could have brought any action at law, or obtained any relief in equity.

Now the facts in that case differ from those in the present. In this case there was an executed contract on her part founded upon mutual consideration. He offered her the property if she would remain with him for life. She accepted that offer and agreed to remain with him for life. Therefore, neither could disregard the agreement without a breach of contract. The fact that the contract was not enforceable in law does not affect that question. It is not enforceable because of the Statute of Frauds which does not affect the validity of the contract but only the evidence by which it may be proven. The performance of her part has reference to the contract and the same is true with regard to the deceased. In *Maddison* v. *Alderson, supra,* there was no contract verbal or otherwise and their Lordships held that what was said between them was a mere expression of his intention towards her binding upon neither party and was not a contract at all. I think, therefore, that that case does not decide the present one. I think there was such performance as takes the contract out of the Statute of Frauds and that there should be specific performance of it. There should be a reference to ascertain her share of his mining interests as at the date of agreement in 1922. The real property is sufficiently indicated in the agreement. It was his house and lots which she was

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promised and I think that includes all the lots appurtenant to the house.

She has no claim for wages except for six years prior to action and must credit any paid within that period.

The appeal should be allowed to this extent.

MARTIN, J.A.: I concur in allowing this appeal in part.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of the learned Chief Justice and would allow the appeal to the extent therein set forth.

MACDONALD, J.A.

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

Appeal allowed in part.

Solicitor for appellant: *Ian A. Shaw.*
Solicitor for respondent: *C. B. Beeston.*

SYRJA v. SYRJA AND HILL.

MURPHY, J.

1931

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SYRJA v. SYRJA AND HILL

Conveyance of land—Preferential assignment—Transfer between near relatives — Suspicious circumstances — Corroborative evidence — R.S.B.C. 1924, Cap. 97.

The plaintiff commenced divorce proceedings against the defendant S. in November, 1930, obtained a decree absolute of divorce in February, 1931, and an order for permanent alimony in June, 1931. In January, 1931, the defendant S. sold a property to the defendant H., who was his brother, for $1,000, of which $950 was paid after the plaintiff had obtained judgment for her costs in the divorce action. In an action to set aside the conveyance under the Fraudulent Preferences Act:—

Held, that there were suspicious circumstances affecting both defendants with regard to this conveyance, and the rule is that where there are suspicious circumstances coupled with relationship a case of *res ipsa loquitur* is made out, which a tribunal of fact will generally treat as a sufficient *prima facie* case, and the defendants not having satisfied the onus cast upon them, the conveyance should be set aside.

ACTION against plaintiff's husband to set aside a deed of conveyance of land, whereby the husband conveyed certain property to his brother John Hill, the plaintiff invoking the provisions of the Fraudulent Preferences Act. On the 19th of November, 1930, the plaintiff commenced divorce proceedings for dissolution of her marriage to the defendant, and on the 21st of November following filed her petition for *interim* alimony in said proceedings against her husband. On the 10th of February, 1931, she obtained a decree absolute of divorce and on the 18th of June, 1931, an order for permanent alimony. On the 20th of January, 1931, the defendant Jacob Syrja conveyed his property at Chase River, consisting of a house and four acres of land, to his brother John Hill, the alleged consideration being $1,000, and of this sum $950 was paid over after Mrs. Syrja had obtained judgment for her costs of the divorce action and registered said judgment in the Land Registry office, and after her petition for permanent alimony had been filed. Tried by MURPHY, J. at Nanaimo on the 21st and 22nd of October, 1931.

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V. B. Harrison, and *E. C. McIntyre,* for plaintiff.
Cunliffe, for defendants.

27th November, 1931.

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MURPHY, J.: In my opinion the facts of this case bring it within the principle of *Koop* v. *Smith* (1915), 51 S.C.R. 554. I find there are suspicious circumstances surrounding this transaction and it is admitted the defendants are brothers. I think both defendants were well aware at the time the divorce petition was filed that the result might well be that the wife would become entitled to money from her husband by Court order. The husband admits his determination that his wife should get no further money from him if he could prevent it. With that end in view he dissipated, in part at any rate, his liquid resources. In view of the close connection of defendant Hill with his brother, as shewn, amongst other things, by his placing, according to his statement, his money in his brother's deposit-box, and, in view of his interest in his brother's matrimonial troubles both before and after the signing of the conveyance and in view of the fact that no money was paid over when the conveyance was signed, although Planta drew the attention of both brothers to the matter, for I reject the evidence led to shew that $50 was then paid, I hold that suspicious circumstances exist affecting both defendants. Under such a state of facts the principle to be acted upon is set out in the judgment of Duff, J. in *Koop* v. *Smith, supra,* at p. 559 as follows:

Judgment

> I think the true rule is that suspicious circumstances coupled with relationship make a case of *res ipsa loquitur* which the tribunal of fact may and will generally treat as a sufficient *prima facie* case.

I so regard the case at Bar.

The defendants have not satisfied to my satisfaction the onus thus cast upon them. So far as defendant Syrja is concerned, as stated, he admits an intention to prevent his wife getting anything further and admits action taken by him previous to the date of the conveyance to accomplish this purpose. As to Hill, it is true that he shews possession of $1,000 but his account of how he came by this money is entirely unsatisfactory to me. It is true also that he proved to my satisfaction that he handed over $950 to his brother but this was not done until the divorce proceedings had resulted in a judgment for costs against

his brother and after petition for permanent alimony had been launched. I am not convinced that this was a *bona fide* transaction. My opinion is that it was not. I reject defendant's explanation of why he made the trips to Victoria.

The price set is, in my opinion, a sacrifice price. I hold the ordinary market price of the property conveyed would be in the neighbourhood of $2,000 but, as already stated, I am not convinced that there was any *bona fide* payment made by Hill to his brother on this alleged purchase.

Judgment

The defendants not having satisfied the onus that I consider the facts cast upon them, I give judgment for plaintiff with costs.

Judgment for plaintiff.

ORR v. BROWN *ET AL.*

Practice—Parties—Authorizing one or more to defend on behalf of all—Service out of jurisdiction—Affidavit in support—Rules 64 (f), 67 and 131.

The plaintiff claimed that certain proceedings by a commission appointed by the General Assembly of the Presbyterian Church in Canada, to inquire into his conduct as a Minister of the Church, were irregular, invalid, void and *ultra vires*, and should be vacated and set aside. He obtained an *ex parte* order from MURPHY, J. naming four representatives of the Church to defend on behalf of all the members of the Church the action proposed to be brought by the plaintiff, that the plaintiff be at liberty to issue a writ of summons against said defendants and to issue concurrent writs of summons for service upon them in Saskatoon, Toronto and Brandon. The plaintiff's affidavit in support of the application recited: "The said commission convened and held several sessions in the City of Vancouver, B.C., and purported without jurisdiction or authority and contrary to the Rules and Forms of Procedure of the Presbyterian Church in Canada to act as a trial Court and wrongfully and without jurisdiction or authority proposed to adjudicate upon the said Central Church, Vancouver case, and wrongfully and without jurisdiction or authority purported to try and adjudicate upon certain charges and matters affecting me, and without a fair and proper trial and without any trial as prescribed by the Rules

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and Forms of Procedure of the said Presbyterian Church in Canada, purported to find me guilty of certain alleged offences, and wrongfully and without authority or jurisdiction, purported to depose me from the office and to degrade me from the rank of a Christian Minister and purported to prohibit me from exercising the functions of the Christian Ministry or any part thereof."

Upon motion of the defendants it was ordered that the above order of MURPHY, J. be discharged and that the writ of summons and service thereof on the defendants be set aside.

Held, on appeal, affirming the order of MCDONALD, J. (MACDONALD, C.J.B.C. dissenting), that rule 67 governs and the material in support of the application must disclose by reasonable evidence a cause of action. In his affidavit in support the plaintiff expresses the opinion that the proceedings were illegal and that in his opinion he had not a "fair and proper trial or any trial" without any facts to suggest that the proceedings were conducted in a manner inconsistent with the requirements of justice. The material does not shew that the plaintiff has a cause of action, it is not a proper case for leave to issue a writ for service outside the jurisdiction, and the appeal should be dismissed.

APPEAL by plaintiff from the order of MCDONALD, J. of the 30th of November, 1931, setting aside and discharging an *ex parte* order of MURPHY, J. of the 26th of August, 1931, and setting aside the writ of summons in this action and the service thereof on the defendants. The plaintiff's claim against the defendants sued on their own behalf and on behalf of all other members of the Presbyterian Church in Canada, is for a declaration that the proceedings of a certain Commission appointed by the General Assembly of the Presbyterian Church in Canada, on the 9th of June, 1928, to inquire fully into the Central Church, Vancouver case, including in such proceedings all decrees, orders or findings alleged to have been made by the said Commission as against the plaintiff, were and are irregular, invalid, void and *ultra vires*, and should be vacated and set aside; for judgment vacating and setting aside all such proceedings, decrees, orders and findings purported to have been made by said Commission; for an injunction to restrain the defendants and all others the members and officers of the said The Presbyterian Church in Canada from perpetrating, continuing or enforcing any such decrees, orders or findings. By the order of MURPHY, J. of the 26th of August, 1931, the Moderator of the General Assembly of the Presbyterian Church in Canada and the Secretary of the General Assembly with the two mem-

Statement

bers of the Commission nominated to inquire into the Central Church case, were named as representatives of the Presbyterian Church to defend the proposed action, and the plaintiff was given liberty to issue a writ of summons against said defendants and to issue concurrent writs of summons for service on said defendants at Saskatoon, Toronto and Brandon.

The appeal was argued at Victoria on the 13th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: The plaintiff claims the proceedings of the Commission were irregular and *ultra vires,* and he prays for an injunction from perpetuating their orders. As to the power of the Court to deal with this case see *In re Robert Evan Sproule* (1886), 12 S.C.R. 140; *Bishop of Columbia* v. *Cridge* (1874), 1 B.C. (Part 1) 5. That we have the right to apply to the Court for the relief claimed see *Andrews* v. *Salmon* (1888), W.N. 102; *Wood* v. *McCarthy* (1893), 1 Q.B. 775. On the question of bringing an action against an unincorporated class see *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1901), A.C. 426; *Thellusson* v. *Viscount Valentia* (1906), 1 Ch. 480; *Walker* v. *Sur* (1914), 2 K.B. 930; *Mercantile Marine Service Association* v. *Toms* (1916), 2 K.B. 243; *Hardie and Lane Ld.* v. *Chiltern* (1928), 1 K.B. 663. That we are entitled to an injunction see *Labouchere* v. *Earl of Wharncliffe* (1879), 13 Ch. D. 346; *Gray* v. *Allison* (1909), 25 T.L.R. 531; *Cassel* v. *Inglis* (1916), 2 Ch. 211; *Law* v. *Chartered Institute of Patent Agents* (1919), 2 Ch. 276; *Baird* v. *Wells* (1890), 44 Ch. D. 661; *Duder* v. *Amsterdamsch Trustees Kantoor* (1902), 2 Ch. 132; *Badische Anilin und Soda Fabrik* v. *Henry Johnson & Co. and Basle Chemical Works, Bindschedler* (1896), 1 Ch. 25.

Argument

J. A. Campbell, for respondent: The affidavit in support of the application does not shew a cause of action nor does it shew the plaintiff was a minister of the church. Courts will not interfere in church affairs until remedies within the church are exhausted: see *Ash* v. *Methodist Church* (1900), 27 A.R. 602; *Dawkins* v. *Antrobus* (1881), 17 Ch. D. 615. He must state the essential facts alleged to constitute a cause of action: see

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Tate v. *Hennessey* (1900), 7 B.C. 262. It must be a proper case for service *ex juris:* see *Royal Bank of Canada* v. *Skeans* (1916), 24 B.C. 190; *Volansky Clothing Co.* v. *Bannockburn Clothing Co.* (1919), 3 W.W.R. 913 at p. 915. That the Court will not interfere with the rules of the church for the regulation of its own affairs see *Forbes* v. *Eden* (1867), L.R. 1 H.L. (Sc.) 568; *Ash* v. *The Methodist Church* (1901), 31 S.C.R. 497 at p. 498; *Essery* v. *Court Pride of the Dominion* (1883), 2 Ont. 596; *Field* v. *Court Hope of Ancient Order of Foresters* (1879), 26 Gr. 467. There must be evidence that a contract has been entered into: see *Hemelryck* v. *William Lyall Shipbuilding Co.* (1921), 1 A.C. 698; *Rigby* v. *Connol* (1880), 14 Ch. D. 482 at p. 487. On the question of jurisdiction the domicil of the church is in Toronto: see *Jones* v. *The Scottish Accident Insurance Co.* (1886), 17 Q.B.D. 421; *Watkins* v. *Scottish Imperial Insurance Co.* (1889), 23 Q.B.D. 285. There was a judgment on the contract in January last and the matter has really been determined: see *Societe Generale de Paris* v. *Dreyfus Brothers* (1887), 37 Ch. D. 215. On the question of service out of the jurisdiction see *Yorkshire Tannery* v. *Eglinton Chemical Co.* (1884), 54 L.J., Ch. 81; *De Bernales* v. *New York Herald* (1893), 2 Q.B. 97 (n.); *Cassidy* v. *Stuart* (1928), 62 O.L.R. 374. As to parties defendants see *Walker* v. *Sur* (1914), 2 K.B. 930 at p. 937.

Argument

MacInnes in reply: *Res judicata* was never pleaded or raised in the Court below.

Cur. adv. vult.

1st March, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The plaintiff's claim by his writ is for a declaration that the proceedings of a certain commission appointed by the respondent, the church, to inquire into the alleged misconduct, including in such proceedings all decrees, orders or findings of the commission against the plaintiff, were irregular, invalid, void and *ultra vires* and should be vacated and set aside, and for judgment accordingly and for an injunction restraining the church and its officers and members from perpetuating, continuing or enforcing the same.

Mr. Justice MURPHY made an order that the named respond-

ents residing respectively in other Provinces of the Dominion should be representatives of the church and its members, which is an unincorporated body and very extensive in numbers; and, secondly, that concurrent writs of summons might be served upon the said representatives in the said Provinces. The first question is, Was the order good as to foreign service? The cause alleged in the writ is covered by rule 64, subsection (*f*). The alleged inquiry, decrees, orders, etc., complained of are operative within British Columbia and would injuriously affect the plaintiff since they prevent him from following his vocation and have deprived him of his remuneration as a minister in that vocation and will injuriously affect him in the future in his vocation in this Province and elsewhere. These, I think, are good grounds for granting an injunction.

The propriety of the order for *ex juris* service is also sustainable if it complies with the rules authorizing the granting of it. Section 1 of the said rule 64 provides that service *ex juris* may be allowed in a case within said subsection (*f*). Rule 67 directs that the application shall be supported by an affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action and stating where the defendants may be found and that they are British subjects. It provides that the order shall not be made unless it shall be made sufficiently to appear to the Court or judge that the cause is a proper one for service out of the jurisdiction under this order, namely Order XI. These conditions, I think, have been amply fulfilled by the plaintiff's affidavit sworn on the 20th of August, 1931, and filed on the application. That affidavit recites the appointment of the commission and the names and addresses of its members and that the commission was convened and had held several sessions at the City of Vancouver and

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without jurisdiction or authority and contrary to the Rules and Forms of Procedure of the Presbyterian Church in Canada, to act as a trial Court and wrongfully and without jurisdiction or authority purported to adjudicate upon the said Central Church, Vancouver, case and wrongfully and without jurisdiction or authority purported to try and adjudicate upon certain charges and matters affecting me without a fair and proper trial, and without any trial as prescribed by the Rules and Forms of Procedure of the said Presbyterian Church in Canada, purported to find me guilty of certain alleged offences, and wrongfully and without authority or jurisdiction, purported to depose me from the office and to degrade me from the rank

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of a Christian Minister, and purported to prohibit me from exercising the functions of the Christian Ministry, or any part thereof.

The affidavit further sets out that the representatives respondents are qualified to act as such representatives and that all of them are British subjects and reside in British territory. It further recites that he is advised and verily believes that he has a good cause of action against the Presbyterian Church in Canada and that he was,

as above set out, wrongfully and without jurisdiction or authority and without a fair or any trial in accordance with the Rules and Forms of Procedure of the said Church deposed from his office and degraded from the rank of a Christian Minister and prohibited from exercising the functions of the Christian Ministry, or any part thereof.

That order made by MURPHY, J. was set aside by the order appealed from and the writ of summons was also set aside.

There appears to me to be no doubt that the Courts may interfere in a matter of this kind. The cases cited by counsel on both sides amply shew this. The case of *Gray* v. *Allison* (1909), 25 T.L.R. 531; and *Labouchere* v. *Earl of Wharncliffe* (1879), 13 Ch. D. 346, where a committee of a club expelled the plaintiff without conforming to the rules and forms of the club. Many other cases which I need not refer to shew that the Courts will interfere when something not in accordance with the rules of the body concerned or not in accordance with natural justice has been done and is complained of. The only two cases directly bearing on the terms upon which the order for *ex juris* service should be granted are *Tate* v. *Hennessey* (1900), 7 B.C. 262, where it was said by Mr. Justice MARTIN that "the second objection is that the affidavit on which the order was obtained discloses no cause of action." He quotes the then rule 47, which says that no such leave shall be granted unless it sufficiently appears to the Court or a judge to be a proper one for service out of the jurisdiction. The effect of the present rule I have already referred to. It requires that the deponent must state a good cause of action and shew where the defendants are to be found and if they are British subjects or not, and the grounds upon which the application is made and that it must be made to appear to the Court or a judge that the case is a proper one for service out of the jurisdiction. All these conditions have been performed. In the above case it was

MACDONALD, C.J.B.C.

held that one of the essential facts did not appear, namely, that the affidavit did not shew a good cause or any cause of action. This was the ground upon which the order was set aside in that case. The next case was the *Royal Bank of Canada* v. *Skeans* (1916), 24 B.C. 190 at p. 192, the decision of this Court in which I said that "so far as the order for service is concerned that was not supported by a sufficient affidavit under the statute." MARTIN, J.A. said: *"Dickson* v. *Law and Davidson* (1895), 2 Ch. 62, is authority that a good cause of action must be shewn; the Court must be satisfied of that," and he refers to *Tate* v. *Hennessey, supra.*

Now, I cannot conceive wherein the affidavit here does not disclose all that the statute requires to be disclosed and that very fully. This, therefore, with the full disclosures of all matters affecting the validity of the claim, has to be proved, as was said in *Wood* v. *McCarthy* (1893), 1 Q.B. 775 at p. 779:

MACDONALD, C.J.B.C.

> It has been suggested that section 4 of the Trade Union Act, 1871, applies, and that this action will not lie; but that is not before us now, for it is not possible to settle that point without considering the whole of the rules, which are not before us on this motion. If there is anything in the point it can be raised hereafter.

namely, at the trial.

This case is of very considerable importance to all practising lawyers. It is quite clear that the statute never intended that when it is sought to obtain an order for service *ex juris* the party applying should prove his case. He states his cause of action and ought to state it in clear and precise terms. The truth of that cause of action is to be proven at the trial and not on the application for *ex juris* service.

I would, therefore, allow the appeal and restore the order of Mr. Justice MURPHY.

MARTIN, J.A.

MARTIN, J.A. I concur in dismissing this appeal.

MCPHILLIPS, J.A.

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

MACDONALD, J.A.

MACDONALD, J.A.: This appeal may be disposed of on one ground. The material in support of the application must disclose, by reasonable evidence, a cause of action. (*Hemelryck* v. *William Lyall Shipbuilding Co.* (1921), 1 A.C. 698 at p. 701).

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The cause of action alleged is that certain proceedings by a commission appointed by the General Assembly of the Presbyterian Church in Canada were "irregular, invalid, void and *ultra vires* and should be vacated and set aside." It could hardly be submitted that if the deponent simply expressed the opinion that these proceedings were illegal, basing it upon his own views, and upon the advice of counsel, that it would comply with the rules. Yet stripped of non-essentials that is all the affidavit contains. The material part is: [Already set out in the head-note] and in the judgment of MACDONALD, C.J.B.C. followed by the sworn statement that he has in his own belief and on the advice of counsel, a good cause of action.

Rule 67 governs. The application must be "supported by affidavit or other evidence" . . . and disclose "the grounds upon which the application is made." The Court must be satisfied, before permitting non-residents to be brought into this Province to defend an action, not that the plaintiff can establish his cause of action at the trial but that the facts (not opinions) deposed to on the application, if proved, reasonably disclose a cause of action. For aught we know the facts deposed to do not do so. The affidavit shews that a sovereign body, the General Assembly of the Presbyterian Church in Canada constituted a Court by issuing a commission to named individuals for a special purpose, either, I assume, with power to act, or to report for confirmation or otherwise. The appellant apparently appeared before it, without objection so far as the evidence shews, and now by affidavit expresses the opinion (a matter for the Court) that the proceedings were illegal. He states too, that in his opinion he had not a "fair and proper trial or any trial" without any facts to suggest that the proceedings were conducted in a manner inconsistent with the requirements of justice. The suggestion in argument was that by church law an altogether differenct course should have been followed. If that is true the Rules and Forms of Procedure of the Presbyterian Church in Canada, in whole, or in part, could have been exhibited to support the allegation. If I resorted to my own limited knowledge I would say that while in matters of discipline over ministers primary jurisdiction belongs to the Presbytery, yet if it fails or neglects to act when enjoined to do so, the Synod as a Superior

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Court, or one constituted by the General Assembly may deal with and dispose of the matter. So far as the material discloses it may well be that the Presbytery for some reason declined to act and if so a Court constituted by the General Assembly would have jurisdiction. If it is so it could be stated in the affidavit that the Presbytery did not refuse to institute proceedings.

It is not, therefore, shewn that appellant has a cause of action and it follows that it is not a proper case for leave to issue a writ for service outside the jurisdiction and the appeal should be dismissed.

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

Solicitors for appellant: *MacInnes & Arnold.*
Solicitors for respondents: *Congdon, Campbell & Meredith.*

HART v. YARWOOD.

Landlord and tenant—Chattel mortgage—Distress for rent—Agreement between landlord and chattel mortgagee for sale by landlord for benefit of both—Breach by landlord—Invalid sale—Damages.

A landlord cannot, in the absence of an agreement with all parties interested, be purchaser at a sale under a distress for rent. The sale must be to a third person and pursuant to the levy.

Moore, Nettlefold & Co. v. *Singer Manufacturing Company* (1904), 1 K.B. 820 followed.

After a landlord and a chattel mortgagee had issued distress warrants with relation to the same chattels, they agreed that the landlord should proceed with the sale on behalf of both, retain sufficient of the proceeds to cover his own claim and pay the balance to the mortgagee. Under an arrangement, unknown to the mortgagee, between the landlord and a prospective new tenant, the landlord conducted a sale at which the prospective tenant bid in the goods for the landlord so that the landlord might sell them to him. Negotiations with the prospective tenant fell through and he refused to pay for the goods, the result being that the landlord obtained possession of them for himself and resold a large portion of them. In an action by the mortgagee for return of the goods or their value and damages for detention, and in the alternative for the portion of the amount realized on them in

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excess of the landlord's claim and damages for breach of the agreement, the plaintiff recovered judgment for $100.

Held, on appeal, varying the decision of FISHER, J., that the mortgagee should be given judgment for damages for breach of the agreement, and that, since actual fraud was not alleged or evidenced, the proper amount at which to fix the damages was the excess of the amount realized at the sale over the landlord's claim.

APPEAL by plaintiff from the decision of FISHER, J. of the 13th of April, 1931, in an action by the plaintiff as mortgagee for the return of certain goods or their value and for damages, or in the alternative for part of the amount realized on the sale of the chattels in excess of the landlord's claim, and damages for breach of agreement. The defendant, owner of the Vanderhoof farm in the district of New Westminster, leased the farm to one Hartshorn in January, 1925, for one year, and at the end of the year again leased to Hartshorn for five years. In February, 1927, Hartshorn executed a chattel mortgage in favour of the plaintiff for $2,700 secured by his goods, chattels and stock on the farm. In November, 1929, the rent being in arrears, the defendant who was landlord, entered into an arrangement with the plaintiff whereby the defendant would seize the goods and chattels on the farm and cause them to be sold by public auction and pay the plaintiff any surplus of the proceeds over the sum of $5,000. Prior to the sale the defendant entered into negotiations with one Parberry with the intention of leasing the farm to Parberry and selling him the said chattels, and it was arranged that Parberry should bid in all the goods and chattels he would require on the farm on behalf of the defendant, and they would then make a deal after the sale if they could come to a mutual agreement. The sale took place in December, 1929, and the chattels realized $6,294. All the goods and chattels referred to in the plaintiff's mortgage were bid in at the sale, the defendant being in fact the purchaser of all the goods and chattels sold. Parberry then failed to carry out his arrangement with Yarwood, and Yarwood then assumed possession and control of the goods and chattels. The plaintiff then brought action to recover the goods and chattels by virtue of his chattel mortgage.

Statement

The appeal was argued at Victoria on the 25th and 26th of

January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

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Craig, K.C. (*Lewis,* with him), for appellant: We got judgment for $100 but we claim the full amount advanced with interest, namely, $3,200. We say Yarwood bought in at his own sale through negotiations with a prospective tenant, the plaintiff knowing nothing of this. Parberry bought as agent for Yarwood. After the sale negotiations between Yarwood and Parberry fell through. Yarwood sold $3,300 worth of the chattels to another person. Yarwood had no right to sell our goods unless he had become the purchaser thereof at the sale held by him. It is therefore proved that Yarwood was the purchaser at his own sale. Under these circumstances he cannot set up a lien for his rent against the plaintiff. The learned judge said we are estopped by what took place at the sale, but we knew nothing of Yarwood buying in himself. A landlord cannot be both vendor and purchaser: see Barron & O'Brien on Conditional Sales, 3rd Ed., 110. The sale must be to a third person. We are entitled to maintain trover for our goods: see *Williams* v. *Grey* (1874), 23 U.C.C.P. 561 at pp. 567-8; *Tingley* v. *Sharpe* (1906), 3 W.L.R. 159; *Turner* v. *Ford* (1846), 15 M. & W. 212; *Attack* v. *Bramwell* (1863), 3 B. & S. 520; *Grunnell* v. *Welch* (1905), 2 K.B. 650 at p. 653. Yarwood having bought himself, is liable. In any case he is accountable on the arrangement between the plaintiff and the defendant as to the sale.

Argument

J. A. MacInnes, for respondent: They arranged between themselves to seize under their combined powers and Yarwood was to get the first $4,200. Parberry brought about all the trouble by backing out. There was no such thing as buying in by Yarwood: see *Enfante* v. *Enfante* (1931), 44 B.C. 472.

Craig, replied.

Cur. adv. vult.

1st March, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The learned trial judge has found that there was an arrangement between the parties that the sale by the landlord should be made in the interests of both the landlord (respondent) and the mortgagee (appellant) and should be

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carried on under the direction of the landlord and that they were to be entitled to the proceeds, the respondent to $5,000 and the appellant to the balance up to the amount of his claim which amounts to upward of $3,000 under his chattel mortgages. Each delivered a distress warrant to the bailiff and the sale was duly advertised and held. There is no complaint in this action of any irregularity up to the time of sale. The landlord was putting an end to his tenant's lease and was in negotiations with another prospective tenant but had come to no conclusion with regard to the lease. There had, however, been the suggestion by the respondent to the prospective tenant that the chattels would likely bring $5,000 and that the prospective tenant should not have to pay more than that sum for them. In the course of the sale it was realized that the goods would fetch more than $5,000 and there appears to have been some arrangement between the respondent and the prospective tenant by which the respondent was to assure the goods to him at a price not exceeding $5,000 and had asked the prospective tenant to bid them in for him so that this arrangement could be carried out. This private arrangement was unknown to the appellant although it appears that he had heard rumours that the chattels were being bought in. The sale realized in all $6,294, all but a small portion being bid in by Parberry, the prospective tenant. The negotiations for the new lease came to nothing and Parberry refused to pay for the goods he had bid in and the respondent brought an action therefor. This was settled between the parties, without the participation of the appellant, by which Parberry was to deliver up the goods to respondent. He was released from the payment of certain hay consumed by the cows which hay was part of the chattels sold and was covered by the appellant's mortgage. Parberry paid $25 in costs and the parties gave mutual surrenders of all causes of action. The result was that the chattels came into the possession of the respondent who appears to have treated them as his own and not to have consulted the appellant about them at all. Subsequent to this transaction the respondent sold part of the chattels for $3,379 to one Scott and took a conditional agreement for sale therefor. The appellant demanded to be informed what the respondent had done but received no satisfaction and com-

menced this action to recover possession of the goods included in his mortgage which were really, I think, identical with those sold at the sale. In his prayer in the statement of claim he asks for (a) the return of the said goods and chattels or the sum of $3,000; (b) the sum of $500 damages for the detention of said goods and chattels as interest or otherwise; (c) in the alternative, the sum of $1,294 being the excess over and above $5,000 for which all the goods and chattels on the said farm were sold at the said auction sale and the sum of $2,000 damages for breach of contract whereby the defendant schemed or planned to dispose of the said goods and chattels to the said Parberry prior to the date of the said auction sale in fraud of his arrangement with the plaintiff; (d) his costs of this action; (e) other relief.

The learned trial judge has made one or two findings with which, with respect, I cannot agree, and I will mention them now. It appears that the tenant consented that the respondent might bid at the sale which is not disputed. The learned trial judge found that the appellant must have been aware of that or he must have been aware that the respondent by his agents was bidding in at the sale and that if he did not consent he was estopped because he did not act on said rumour from disputing the respondent's right to bid. I think it is clear upon the evidence that the appellant neither consented to respondent's bidding in nor is he estopped from disputing his want of consent. I may add here that the tenant's consent to respondent's bidding would not bind the appellant. *King* v. *England* (1864), 4 B. & S. 782. Now as against the respondent the tenant has no right to complain of respondent's bidding. This, I think, disposes of any contention that he was a necessary party for if he had not consented he would still be the owner of the goods subject to said mortgages, the sale being illegal and null as against him without such consent.

I may also add that the $5,000 mentioned as the respondent's claim for rent and other amounts which it was agreed between the parties should entitle him to $5,000 in priority to the appellant's claim has since been reduced by more careful calculation. It was contended by the respondent that the said arrangement made to govern the sale was a *nudum pactum*. I

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think it was not. They were both interested in the chattels and both concurred in concluding that they should be sold on the terms above mentioned. I am satisfied from the evidence and from the circumstances of the settlement between the respondent and Parberry that the respondent did have the goods bid in by Parberry for him (the respondent). In the settlement with Parberry he dealt with part of the hay which if the goods were not his he had no right to surrender to Parberry. Also in the selling of the bulk of the goods to Scott he dealt with them as his own and not as he would have been obliged to have dealt with them. Therefore, the respondent took and held possession of the goods against the appellant without any right to do so. I think it a question of some importance to consider whether or not he was fraudulent in this. The respondent got back the goods into his possession by a private arrangement with Parberry inconsistent with the notion that he had bought them from Parberry, if that would affect the case at all, and he did this without regard to the appellant's right as mortgagee or to his rights under the said agreement for sale. The appellant, I think, has two alternative rights to complain, breach of the said agreement or conversion. Assuming the sale by auction to have been illegal as against him, as it was, yet the tenant could not claim the goods back since it was legal as against him by reason of his consent. In that case they would belong to the appellant as well by law as under his warrant of distress and be liable to sale by him free from the respondent's lien for rent and he could have realized the full amount of his claim and since the respondent converted the chattels to his own use the full amount of appellant's claim would be his measure of damages in this action. This, however, takes no notice of the agreement under which this sale was conducted. I think that that agreement was not a *nudum pactum*. The illegality of the sale deprived the respondent only of a share of the proceeds under the law. But under the agreement he was entitled to his full claim, and since, I think, that there was no actual fraud on respondent's part I would fix the damages as hereinafter mentioned which if the parties cannot agree upon the amount may be referred to the registrar to find.

Since the tenant cannot be heard to dispute this sale to the

respondent having consented that he might become the buyer, he is, therefore, not a necessary party to this action since there will be no surplus coming to him.

I do not think that the respondent's actions in this matter can be said to have been fraudulent and in such case the Courts look at all the circumstances to find, if it can, a course which will do justice without imposing hardship upon either party. *Henderson* v. *Astwood* (1894), A.C. 150, is an example of this. Here the appellant from the beginning expected only to get the surplus over respondent's claim. This was all he was entitled to had the sale been legally carried out, and if he now gets it he is not hurt. Holding, therefore, that the respondent pursued a mistaken course but with no fraudulent intent the appellant should recover from him the excess over respondent's claim realized under the distress warrants with costs here and below.

The appeal should, therefore, he allowed and the excess over respondent's just claim, and interest from the date of the sale to judgment should be allowed to the appellant.

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

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

MACDONALD, J.A.: Respondent is the owner of the "Vanderhoof Farm." In 1925 he leased it to one Hartshorn for ten months and the following year renewed the lease for five years. Hartshorn executed a chattel mortgage (finally acquired by the appellant) for $2,700 on the security of his farm chattels and stock used by him on the Vanderhoof Farm. This sum with interest amounted to $3,201 in November, 1929.

In November, 1929, the respondent seized the goods covered by this chattel mortgage and other chattels for arrears of rent amounting to $3,305.61 and $914.27 due to him on a conditional sale agreement (a total indebtedness of $4,219.88) and on the 19th of December, 1929, pursuant to an agreement with appellant for a joint levy, caused the chattels to be sold by auction; at all events a form of sale took place. A distress warrant was issued by both the appellant and the respondent for the amount of their respective claims but by the agreement referred

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to the respondent undertook to conduct the sale on behalf of both, retain the amount of his own claim in priority, and pay to the appellant the balance realized.

Before the sale, *viz.*, November 25th, 1929, respondent and Hartshorn entered into an agreement reciting that the "goods and chattels" on the premises "have been seized for rent" and that the tenant was indebted to the respondent in the sum of $5,179.25 made up of the sum of $1,873.64 under three conditional sale agreements for cows sold to him by respondent and $3,305.61 for arrears of rent. It provided that the chattels should be sold by auction and the proceeds paid respondent, the latter also to be at liberty at his own sale "to buy any cattle or goods and chattels sold at the auction." Respondent also, before the sale (and without consulting the appellant) with the double purpose of selling the chattels and procuring a successor to Hartshorn as tenant entered into negotiations with one Parberry to lease the farm for five years at $1,800 a year and also to buy at the auction sale the chattels (subject to the distress) "the outfit," as Parberry called it, for the sum of $5,000. He wanted to rent a fully-equipped farm. What would happen if more than $5,000 was realized at the sale did not appear to be finally settled. Parberry was instructed by respondent, to attend the sale and "bid in" all the goods and chattels, whether on his own or on respondent's behalf remains to be determined. According to Parberry's evidence he was to pay only $5,000 for the chattels, regardless of the amount actually offered at the sale. Parberry submitted bids along with two or three others who purchased only a small amount; the auctioneer accepted them but no money was paid over by Parberry in respect to his purchases. From the bids it would appear that over $6,294 in all would have been realized at the sale if collected. Parberry had no intention of paying the amount he offered to pay by his bids, while the respondent claims that he insisted upon him doing so. He later issued a writ against Parberry claiming payment of $5,779, the value of the chattels presumably purchased by him at the sale. This action was not prosecuted. It was settled by an agreement under which Parberry returned the chattels to the respondent releasing his claim thereto. Respondent thereupon took possession of the chattels. At no

time, since the agreement with appellant whereby the respondent undertook to conduct an auction sale on behalf of both, did he consult or advise with him in reference to this course of procedure. The chattels he agreed to sell on behalf of both were now in respondent's possession and as alleged owner on February 15th, 1930, he sold a large part of them to one Scott for $3,378 under a conditional sale agreement, respondent retaining the balance of the chattels.

The gist of appellant's claim is that respondent failed to discharge the trust assumed of selling the chattels, covered by appellant's chattel mortgage for the joint benefit of both, and instead, having regard to his own interests only, and the desire to procure a new tenant, in breach of trust, conducted a pretended sale, the final outcome of which was that respondent obtained possession of the chattels himself.

On these facts, supplemented by detailed evidence, the learned trial judge found that "this matter is in such a position at present that" he "could not fully dispose of it" and "should not attempt to do so." He awarded appellant $100 damages

> sustained since the 15th of February, 1930, [the date of the sale to Scott] by reason of the wrongful acts of the defendant [respondent] in failing up to this date to sell for the joint benefit of the plaintiff and defendant the goods distrained or seized.

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without prejudice to the assertion later by the appellant and others of further claims. With the greatest respect all the matters in issue may and should be disposed of as between the parties to this action—it is quite possible to do so.

It was submitted that the auction sale was illegal because respondent was the real purchaser at his own sale, Parberry acting as his agent. It would appear to follow from the finding of the learned trial judge "that the sale here cannot be supported" and "the sale of such goods was abortive and the rights with respect to them were and are the same as though no sale had taken place" that he too treated Parberry as respondent's agent. I think that is the proper inference from the evidence although on this and other points, it is vague, inconclusive and contradictory. Parberry testified that respondent said "You bid it in for me." When asked if he had intended to pay the amount that was offered through bids for the chattels at the sale he said "No, never." Respondent's counsel stated during the

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course of the trial that his position was that the appellant "knew about this man buying it in for Mr. Yarwood." Parberry's son testified that respondent said to his father "Go ahead and bid in for me." However, even if it should be held that Parberry purchased the chattels for himself what follows? Respondent's duty was to compel payment, retain the amount of his claim and pay the balance to the appellant. If he could not enforce payment it was his duty to consult appellant and decide upon a course of action. Instead, behind appellant's back, he repossessed himself of the goods, treated them as his own and sold a large part to Scott trusting possibly that so long as a form of auction sale had taken place by subsequent dealings appellant's claim would disappear. I think it was the respondent who purchased the chattels at this sale. He might do so with the consent of the tenant Hartshorn (and he had his consent) if the rights of others did not intervene. It was impossible to do so in view of appellant's interest.

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The trial judge found, in effect, that the appellant was a party to what occurred at the sale and did not make any complaint and is now estopped from complaining "merely on the ground that the defendant [respondent] bid in the goods." With respect, the evidence does not support that view. He did not consent to Parberry's purchase on behalf of respondent. Appellant testified that during the progress of the sale he heard some rumours that the chattels were being bought in by respondent. He thought, however, that Parberry was purchasing for himself. He said:

> Before the sale was over I learnt through hearsay that there was an agreement with Parberry to buy this stuff in and he was to have the whole thing for a certain amount and if anything sold outside he was to have credit for what was sold outside, off the place,

and he added:

> I was not consenting to anything: I had an agreement with Yarwood that is in regard to the distress sale.

When respondent on the other hand was asked what knowledge appellant had at the time of the sale in reference to the method pursued he said "he had no talk with him." We are not concerned therefore with any question of alleged estoppel or consent to a sale conducted in this manner.

The respondent could not, in the absence of an agreement

with all parties interested, be both vendor and purchaser. The sale must be to a third person. (*Moore, Nettlefold & Co.* v. *Singer Manufacturing Company* (1904), 1 K.B. 820.) The sale too was made pursuant to the levy. Two warrants were issued but by agreement one only was acted upon. With the sale abortive the respondent's lien for rent was lost: he could not distrain again and the chattels are now subject only to appellant's chattel mortgage—clearly all that took place down to the sale to Scott indicated abandonment of the seizure. He can no longer claim a lien for his rent. I cannot agree with respondent's submission that because of the agreement for a joint sale the law applicable to distress and sale thereunder does not apply and that rights must be determined under that agreement alone. Yet, as already intimated, even if right in that view there was a breach of the agreement. Respondent did not sell on behalf of both. He acted for himself alone. The whole object of the agreement was frustrated by his conduct. He undertook to bring about a proper sale. The interests of the appellant were ignored in every step taken. He finally sold part on his own account and asserts title as to the balance. Demand for delivery before action was refused. He is therefore liable to pay damages for breach of that agreement.

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If judgment should be given, as it might, on the basis that the appellant should be free to realize upon his chattel mortgage or in the alternative obtain damages he would recover $3,201. As however there is no charge of fraud I would award damages on the basis of respondent's failure to carry out his agreement: compel him to account to appellant in respect of the proceeds of the sale, and fix the damages at the difference between respondent's claim ($4,219) and the amount realized at the auction sale ($6,294).

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Cassady & Lewis.*
Solicitor for respondent: *D. C. Durrant.*

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Constitutional law—Action for damages—False arrest and imprisonment in foreign country—Criminal Code, Secs. 1143 to 1148—Limitation of action—Power of Dominion Parliament—Rule 282.

Section 1143 of the Criminal Code provides that "Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to Criminal Law, shall, unless otherwise provided be laid and tried in the district, county or other judicial division, where the Act was committed and not elsewhere, and shall not be commenced except within six months next after the act committed."

On the 9th of April, 1930, the defendants who were police constables in the City of Vancouver caused the plaintiff to be arrested and given in custody of a police officer in the City of Los Angeles in the State of California, U.S.A., as being a fugitive from justice charged with the murder of one Mrs. Perrin in the City of Vancouver, and on the 11th of April following he was released from custody without any explanation. In an action for damages for false arrest and imprisonment and malicious prosecution an order was made at the instance of the plaintiff under rule 282 that the action be set down for the determination of the following points of law: (a) Does the Criminal Code of Canada (sections 1143 to 1148 inclusive) afford protection to police constables for actions taken by them outside of Canada, where such police constables purport to act under the provisions of the Criminal Code of Canada? (b) Are the said sections of the Criminal Code or any of them, *ultra vires* of the Parliament of Canada inasmuch as they purport to deal with property and civil rights, civil procedure and limitations of civil actions? It was held that if the plaintiff's right of action is to be taken away then the most direct and positive language must be used and the intention of Parliament must be clear. As such intention does not clearly appear in the above sections question (a) must be answered in the negative.

Held, on appeal, affirming the decision of MCDONALD, J., on an equal division of the Court, that section 1143 cannot be invoked as having application to a tort committed in a foreign country.

Statement

APPEAL by defendants from the decision of MCDONALD, J. of the 4th of November, 1931, in an action for damages for false arrest, imprisonment and malicious prosecution. The plaintiff claims that on the 9th of April, 1930, the defendants who are police constables in the City of Vancouver, without lawful

* Affirmed by Supreme Court of Canada.

authority assaulted him in the City of Los Angeles, caused him to be arrested, gave him into the custody of a police officer in Los Angeles upon false charges of the murder of one Mrs. Perrin in the City of Vancouver, and of being a fugitive from justice; that he was photographed and finger printed for record purposes and paraded publicly before an audience in the police station in Los Angeles as a murderer. After being detained in the said police station until the 11th of April following he was released from custody by the gaoler at said police station without any explanation. Upon the application of the plaintiff an order was made by MACDONALD, J. on the 22nd of September, 1931, for the determination of the following points of law raised by the defendants in their statement of defence.

(a) Does the Criminal Code of Canada (Secs. 1143 to 1148 inclusive) afford protection to police constables for actions taken by them outside of Canada where such police constables purport to act under the provisions of the Criminal Code of Canada?

(b) Are the said sections of the Criminal Code, or any of them *ultra vires* of the Parliament of Canada inasmuch as they purport to deal with property and civil rights, civil procedure and limitations of civil actions?

Statement

The questions of law were argued before MCDONALD, J. at Vancouver on the 4th of November, 1931.

J. A. MacInnes, and *Arnold,* for plaintiff.
Lord, for defendants.

10th November, 1931.

MCDONALD, J.: The plaintiff sues the defendants, who are detectives belonging to the police force of the City of Vancouver, for damages for false arrest and imprisonment alleged to have taken place in Los Angeles, California.

If the necessary facts can be proven and if the acts committed outside the jurisdiction were wrongful both in British Columbia and in California the action will lie. *Machado* v. *Fontes* (1897), 2 Q.B. 231.

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The defendants plead (in effect) sections 1143 to 1148 of the Criminal Code as a defence and bar to the action. Argument has been heard upon the question of law so raised. Section 1143 provides in the first instance that this action cannot be brought since the acts complained of were not committed in any district, county or other judicial division in Canada. Aside altogether

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from any question, as to whether or not such legislation is *ultra vires* the Federal Government, I would hold that if the plaintiff's right of action is so to be taken away then the most direct and positive language must be used and the intention of Parliament must be clear. In my opinion such intention does not clearly appear in the section mentioned.

The two further important provisions in question are contained in sections 1143 and 1144 which provide that any such action shall not be commenced except within six months next after the act committed and further that notice in writing of the action shall be given one month before action brought. These matters it seems to me are entirely matters of procedure and must be governed by the law of the forum—in this case the law of British Columbia.

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It does not seem to me to be necessary to decide the general question as to whether the sections in question are *ultra vires* the Federal Parliament and it seems that there is no direct authority for deciding that question one way or the other.

As stated it is not in my opinion necessary to reach a decision on the broad question in this case. I place my judgment upon the grounds above stated and hold that the provisions in question are not available to the defendants.

From this decision the defendants appealed. The appeal was argued at Victoria on the 12th and 13th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

McCrossan, K.C. (*Lord,* with him), for appellants: The first question is whether sections 1143 to 1148 of the Criminal Code afford protection to police constables acting outside of Canada: see Clement's Canadian Constitution, 3rd Ed., pp. 114-5; 1 Can. B.R. 343; 8 Can. B.R. 257; *Attorney-General for Canada* v. *Gilhula* (1906), A.C. 542; *In re Criminal Code Sections Relating to Bigamy* (1897), 27 S.C.R. 461 at pp. 480-3; Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 111; Dicey's Conflict of Laws, 3rd Ed., pp. 761 and 763; 1 Sm. L.C. 13th Ed., pp. 683 and 685; *Lopez* v. *Burslem* (1843), 4 Moore, P.C. 300; Banning on Limitation of Actions, 3rd Ed., 11; *Toronto*

Corporation v. *Toronto Railway* (1907), A.C. 315 at p. 324. The three rules of interpretation applicable are: (1) A section shall have effect as a substantive enactment without introductory words: (2) the grammatical and ordinary sense of the words is to be adhered to; (3) the words of the statute shall not be added to or subtracted from. The action was not brought within six months as required by the section: see Banning on Limitation of Actions, 3rd Ed., 2. It is the policy of Parliament to give protection to officers enforcing the criminal law: see *Webster* v. *Leard* (1912), 7 D.L.R. 429; *Levesque* v. *New Brunswick Railway Co.* (1889), 29 N.B.R. 588; *Northern Counties* v. *Canadian Pacific Ry. Co.* (1907), 13 B.C. 130; *Westholme Lumber Co.* v. *Grand Trunk Pacific Ry. Co.* (1918), 25 B.C. 343; Clement's Canadian Constitution, 3rd Ed., 756-7; *Danyleski* v. *C.P.R. Co.* (1916), 27 Man. L.R. 364 at pp. 367-8; *West* v. *Corbett* (1913), 47 S.C.R. 596; *Greer* v. *Canadian Pacific Rway. Co.* (1915), 51 S.C.R. 338; *Canadian Northern Rway. Co.* v. *Pszenicnzy* (1916), 54 S.C.R. 36. The sections are not *ultra vires* of the Dominion Parliament: see *Grand Trunk Railway of Canada* v. *Attorney-General of Canada* (1907), A.C. 65; *Curran* v. *Grand Trunk R.W. Co.* (1898), 25 A.R. 407 at pp. 410-11; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409; *Valin* v. *Langlois* (1879), 3 S.C.R. 1 at p. 77; *Toronto Corporation* v. *Canadian Pacific Railway* (1908), A.C. 54 at p. 59; *Toronto Corporation* v. *Bell Telephone Company of Canada* (1905), A.C. 52. The case of *McArthur* v. *Northern & Pacific Junction R.W. Co.* (1890), 17 A.R. 86 appears against me but the Court was divided and the decision does not coincide with the other cases on this point. As to the criminal law and the validity of the statute in barring further civil proceedings see Lefroy's Legislative Power in Canada, p. 322; *In re Vancini* (1904), 34 S.C.R. 621 at p. 626; *Ward* v. *Reed* (1882), 22 N.B.R. 279 at p. 283; *Wilson* v. *Codyre* (1886), 26 N.B.R. 516; *Flick* v. *Brisbin* (1895), 26 Ont. 423; *Trinca* v. *Duleba* (1924), 20 Alta. L.R. 493; *Dowsett* v. *Edmunds* (1926), 3 W.W.R. 447 at p. 450; *Nevills* v. *Ballard* (1897), 1 Can. C.C. 434 at p. 437; *Hardigan* v. *Graham, ib.* 437 at p. 440; *Larin* v. *Boyd* (1904), 11 Can. C.C. 74; *Rice* v. *Messenger* (1929), 2 D.L.R. 669 at p. 681. As to section 1149 of the

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Criminal Code see *Geller* v. *Loughrin* (1911), 24 O.L.R. 18 at p. 23; Clement's Canadian Constitution, 3rd Ed., pp. 587-8; *Doyle* v. *Bell* (1884), 11 A.R. 326. These sections have stood for forty years: see also *Mack Sing* v. *Smith* (1908), 1 Sask. L.R. 454 at p. 461, and *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328 at p. 337.

Lennie, K.C., for Attorney-General of Canada, adopted the argument of *McCrossan* on the question of the validity of the sections in question.

Argument

J. A. MacInnes, for respondent: The closest analogy to this case is section 734 of the Criminal Code and the principles governing section 734 as to *ultra vires* apply to section 1143: see *Wilson* v. *Codyre* (1886), 26 N.B.R. 516; *Flick* v. *Brisbin* (1895), 26 Ont. 423; *Rice* v. *Messenger* (1929), 51 Can. C.C. 147. Section 734 is *ultra vires* as far as civil rights are concerned: see *Dowsett* v. *Edmunds* (1926), 46 Can. C.C. 211; *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328 at p. 337. The pith and substance of the enactment is to deal with civil rights. This is expressly for the local Legislatures. This is not incidental but is the establishment of a whole code governing every action against a police officer. This being an attempt to create a code by an invasion of civil rights it is *ultra vires*. It is not necessary for the enforcement of criminal law. They had no power to pass extra-territorial legislation: see *Nadan* v. *The King* (1926), A.C. 482; *Dunphy* v. *Croft* (1931), S.C.R. 531 at p. 535. The sections as drawn shew they were never intended to apply to a foreign tort: see *Canadian Pacific Ry. Co.* v. *Workmen's Compensation Board* (1919), 27 B.C. 194 at p. 208; *Canadian Pacific Railway* v. *Parent* (1917), 86 L.J., P.C. 123; *Cope* v. *Doherty* (1858), 2 De G. & J. 614; *Tomalin* v. *S. Pearson & Son, Limited* (1909), 2 K.B. 61 at p. 64. The legislation cannot be extended to causes that arose outside of Canada.

McCrossan, in reply: The pivot around which this legislation evolves has to do with the criminal law and the defendants were carrying out their duty under the criminal law. The *Tomalin* case and *Canadian Pacific Railway* v. *Parent* deal with civil rights and are distinguishable.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: Canadian police officers of the City of Vancouver are sued for damages for false arrest and imprisonment of the plaintiff at the City of Los Angeles in the State of California. Sections 1143 and 1144 of the Criminal Code of Canada are pleaded in answer. These sections are as follow:

1143. Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division, where the act was committed, and not elsewhere, and shall not be commenced except within six months next after the act committed.

1144. Notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

It is manifestly impossible that the plaintiff could have brought this action here, in view of the said sections. They are questions of procedure and therefore governed by the law of the forum.

No question of *ultra vires* of said sections can be sustained as they relate to matters arising out of criminal law. It is quite clear to me that the condition applicable under section 1143 cannot be complied with. The acts complained of were not committed in any "district, county or other judicial division" in Canada, and, in my opinion, with deference to the learned judge below, there is no doubt as to the meaning of the words or of Parliament's intention, nor can there be any doubt of Parliament's intention respecting said section 1144. No notice under the latter section has been served. The plaintiff has chosen the wrong forum. The appeal must, therefore, be allowed and the action dismissed.

MARTIN, J.A.: This appeal should, in my opinion, be dismissed for the reason that, briefly, after a careful consideration of section 1143 in the light of the authorities cited, and others, I find myself unable to say that the learned judge below took a wrong view of the effect of that section which, while somewhat obscurely drawn, yet, to my mind, contemplates its application only to acts which are done in Canada and therefore capable of a Canadian territorial venue, and the limitation of commencement of action cannot be severed from acts of that class and

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extended ex-territorially: in other words, the section is self exclusive from the circumstances of this case.

MCPHILLIPS, J.A.: In my opinion the learned judge in the Court below arrived at the right conclusion. It would seem to me that it is impossible to invoke sections 1143 and 1144 of the Criminal Code as having application to a tort committed in a foreign country. The sections read as follows: [already set out in the judgment of MACDONALD, C.J.B.C.].

The learned counsel for the respondent submitted that the legislation in any case was *ultra vires* of the Dominion Parliament and adopted the reasons for judgment of Boyle, J. in *Dowsett* v. *Edmunds* (1926), 3 D.L.R. 367, where that learned judge very ably discussed the validity of section 734 of the then Criminal Code and held that it could not be held to constitute a bar to a civil action. I do not find that it is at all necessary in the present case to pass upon this phase of the matter and that was the view of the learned judge from whose judgment this appeal is taken. In passing I might refer to what was said by Mr. Justice Duff in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328 at p. 337:

> The question now to be decided is whether, in the frame in which this legislation of 1917 is cast, that part of it which is so enacted can receive effect as a lawful exercise of the legislative authority of the Parliament of Canada in relation to the criminal law. It has been formally laid down in judgments of this Board, that in such an inquiry the Courts must ascertain the "true nature and character" of the enactment: *Citizens' Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96; its "pith and substance": *Union Colliery Co.* v. *Bryden* (1899), A.C. 580; and it is the result of this investigation, not the form alone, which the statute may have assumed under the hand of the draughtsman, that will determine within which of the categories of subject-matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be "scrutinized in its entirety": *Great West Saddlery Co.* v. *The King* (1921), 2 A.C. 91, 117. Of course, where there is an absolute jurisdiction vested in a Legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing.

MCPHILLIPS, J.A.

I cannot persuade myself that the sections of the Criminal Code here relied upon could in any way be held to apply to or be stretched to apply to the cause of action here sued for, *viz.*, for

false arrest, imprisonment and malicious prosecution taking place at the City of Los Angeles, State of California, one of the United States of America. That sections 1143 and 1144 of the Criminal Code should be held to apply to a tort committed in a foreign country by way of implication or otherwise I would refer to Mr. Justice Duff's language in *Dunphy* v. *Croft* (1931), S.C.R. 531 at pp. 534-5:

The decision in the well-known case of *Machado* v. *Fontes* (1897), 2 Q.B. 231 may well be referred to in the present case indicating the rights and remedies for a wrong committed in a foreign country. This case was referred to by Lord Haldane in *Canadian Pacific Railway Company* v. *Parent* (1917), A.C. 195 at p. 205. Rigby, L.J. in the *Machado* case said at pp. 234, 235, 236:

> I do not propose to decide this case on any technical consideration as to what may be the precise meaning of the allegation that is proposed to be introduced into the defence; I give it the widest possible construction it can reasonably bear; and I will assume it to involve that no action for damages, or even no civil action at all, can be maintained in Brazil in respect of a libel published there. But it does not follow from that that the libel is not actionable in this country under the present conditions, and having regard to the fact that the plaintiff and defendant are here.

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> Willes, J., in *Phillips* v. *Eyre* [(1870)], L.R. 6 Q.B. 1 was laying down a rule which he expressed without the slightest modification, and without the slightest doubt as to its correctness; and when you consider the care with which the learned judge prepared the propositions that he was about to enunciate, I cannot doubt that the change from "actionable" in the first branch of the rule to "justifiable" in the second branch of it was deliberate. The first requisite is that the wrong must be of such a character that it would be actionable in England. It was long ago settled that an action will lie by a plaintiff here against a defendant here, upon a transaction in a place outside this country. But though such action may be brought here, it does not follow that it will succeed here, for, when it is committed in a foreign country, it may turn out to be a perfectly innocent act according to the law of that country; and if the act is shewn by the law of that country to be an innocent act, we pay such respect to the law of other countries that we will not allow an action to be brought upon it here. The innocency of the act in the foreign country is an answer to the action. That is what is meant when it is said that the act must be "justifiable" by the law of the place where it was done. It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be. The remedy must be according to the law of the country which entertains the action. Of course, the plea means that no action can be brought in this country in respect of the libel (if any) in Brazil. But I think the rule is clear. It was very carefully laid down by Willes, J. in *Phillips* v.

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Eyre [(1870)], L.R. 6 Q.B. 1; and in the case of *The M. Moxham* [(1876)], 1 P.D. 107 all the learned judges of the Court of Appeal in their judgments laid down the law without hesitation and in a uniform manner; and first one judge and then another gave, in different language but exactly to the same purport and effect, the rule enunciated by Willes, J. So that if authority were wanting there is a decision clearly binding upon us, although I think the principle is sufficient to decide the case. I think there is no doubt at all that an action for libel published abroad is maintainable here, unless it can be shewn to be justified or excused in the country where it was published. James, L.J. states in *The M. Moxham* [(1876)], 1 P.D. 107 what the settled law is. Mellish, L.J. is quite as clear upon that point as James, L.J. in laying down the general rule; and Baggallay, L.J. also takes the same view. We start, then, from this: that the act in question is *prima facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorized, or innocent or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it, and this appeal must be allowed with costs.

MCPHILLIPS, J.A.

It is clear to me that the respondent in the present case has a right of action in this country in respect of an act committed outside Canada if the Act be wrongful both in this country and in the country where it was committed and all parties to the present action are resident in the Province of British Columbia. The appellants rely upon sections 1143 and 1144 as being a peremptory bar to the jurisdiction of the Supreme Court of British Columbia in that there has been non-compliance with the sections in that the action has not been commenced within six months after the act was committed (1143) and no notice in writing one month before the commencement of the action (1144). It is plain that if section 1143 is applicable it would mean that no action could even be brought in this jurisdiction as the language is that every action and prosecution must "be laid and tried in the district, county or other judicial division where the act was committed and not elsewhere." That would be the City of Los Angeles in the State of California, United States of America. It is immediately evident the legislation relied upon is not capable of being invoked nor is it by any reasonable or proper intendment applicable to a case of a tort committed in a foreign country.

I would dismiss the appeal.

MACDONALD, J.A.: The respondent brought this action for damages for false arrest and imprisonment and malicious prosecution under the following circumstances as revealed in the statement of claim. He was arrested and detained at Los Angeles, California, by a police officer in that city, acting on the instructions of appellants, upon the charge of murdering one Mrs. Perrin at the City of Vancouver in this Province. Two days thereafter he was released doubtless because it was apparent that there were no grounds for his further detention. Appellants, who reside in this Province, by their defence, raise points of law upon which the Court was asked to pass preliminary to the trial of the action, and from a decision against them on the questions raised bring this appeal. The points of law are:

(1) Does the Criminal Code of Canada (sections 1143 to 1148 inclusive) afford protection to police constables for actions taken by them outside of Canada, where such police constables purport to act under the provisions of the Criminal Code of Canada?

(2) Are the said sections of the Criminal Code, or any of them, *ultra vires* of the Parliament of Canada, inasmuch as they purport to deal with property and civil rights, civil procedure and limitation of civil actions?

The material sections are 1143 and 1144 requiring the action to be commenced within six months after the commission of the alleged tort, and notice of action in writing one month, at least, before its commencement. The respondent did not comply with these conditions.

Two questions arise—do these limitations and requirements as to notice apply to this action, and if so, is it within the competency of the Federal Parliament to impose restrictions on civil rights, in respect to an action arising out of the administration of the criminal law. There is no doubt of the competency of Parliament to legislate in respect to occurrences outside of Canada and to formulate rules of procedure applicable to actions in our own Courts irrespective of where the subject-matter of the action arose. Remedies are governed by the *lex fori*. Can section 1143 be fairly interpreted as applicable to this action? I think it may. The subject-matter dealt with is first referred to, *viz.*:

Every action . . . against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law.

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We are concerned with such an action. Two rules, one relating to venue, the other to a time limitation for the commencement of the action, both applicable to actions brought in the Canadian Courts, are laid down. Whether or not the proviso, as to venue can be given effect to, is not material unless so interwoven with the whole section that without it, it is meaningless. An intention, clearly expressed, to impose a six months' limitation, not on a limited number of actions, but on "every action," of this character, cannot be defeated because difficulty may be encountered in giving effect to another clause relating to venue. The clause relating to venue may be an effective bar to the action, but I do not rest on that. It must, in any event, be commenced within six months after the commission of the acts complained of.

The applicability of section 1144 is, I think, clear. One month's notice in writing is required of "such action." This relates back to section 1143, and the action referred to is one of the character under discussion.

MACDONALD, J.A.

These sections, too, in my view, are not *ultra vires*. Section 734 of the Criminal Code has been considered in this aspect by Provincial Courts and in general the same principles are applicable. (*Wilson* v. *Codyre* (1886), 26 N.B.R. 516; *Rice* v. *Messenger* (1929), 51 Can. C.C. 147; *Trinca v. Duleba* (1924), 42 Can. C.C. 292; *Dowsett* v. *Edmunds* (1926), 46 Can. C.C. 211 and (1926), 3 W.W.R. 447).

True, a right of action is not taken away by sections 1143 and 1144 and the question of exercising one of two options, *viz.*, to prosecute or to institute a civil action does not arise. But if the civil right to sue at all may be taken away by section 734 *a fortiori* it may be subjected to restrictions. The Federal Parliament, as an ancillary power, has jurisdiction to protect its officials to whom it entrusts the administration of the criminal law, against proceedings which might impose undue burdens upon them. Safeguards, regarded as just and expedient, may be provided to ensure performance of official acts in apprehending criminals. Other sections of the Code are open to attack on this ground, and while the point may be debatable, I would not, in any event, feel justified, in view of the decisions referred to,

on a section of like import, in holding that it was enacted without authority.

I would allow the appeal.

The Court being equally divided the appeal was dismissed.

Solicitor for appellants: *J. B. Williams.*
Solicitors for respondent: *MacInnes & Arnold.*

RAYNER v. NEURAUTER.

Garnishment—Debts, obligations and liabilities owing, payable or accruing due—What constitutes—R.S.B.C. 1924, Cap. 17.

Where a contractor has completed all that he is required to perform under his contract, there is an accruing obligation subject to attachment by garnishing order, even though the contract provides that payment is not to be due until after performance of other acts by the other party to the contract. A subsequent assignment of the money payable under the contract will not affect the garnishing order.

DEFENDANT took out ties under contract for the Canadian National Railways and piled them on the railway company's right of way. The contract provided that the ties remained the property and at the risk of the contractor until after inspection and acceptance by the railway company's tie inspector, and that payment for the ties would be made in the month following such inspection and acceptance. On May 21st, before the inspection, the contract moneys were garnisheed by the plaintiff. Inspection and acceptance took place on June 27th. Assignment of the contract moneys was made on July 14th to the Canadian Bank of Commerce, and notice thereof received by the Canadian National Railways on July 18th. The latter made payment into Court under the garnishing order but with notice of the claim of the Canadian Bank of Commerce. The plaintiff then applied for payment out of Court on his judgment, with notice to the Canadian Bank of Commerce, which then opposed the application and claimed the money under its assignment.

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The application was heard at Smithers on the 23rd of March, 1932, by YOUNG, Co. J.

L. S. McGill, for plaintiff: Judgment has been entered, and the money should be paid out of Court on the judgment. The garnishing order was issued and served on May 21st, while the assignment was not made until July 14th, and notice of it not received by the garnishee until July 18th.

J. T. Harvey, for Canadian Bank of Commerce: The garnishing order was premature, as the contract provides that the ties remained the property of and at the risk of the contractor until inspection and acceptance, which was on June 27th. Nothing was owing, payable or accruing due until after that date. The assignment was on July 14th, and the money is payable under the assignment: *Webb* v. *Stenton* (1883), 52 L.J., Q.B. 584 at p. 586. Conditions affecting this contract had not been performed at the time of garnishment: *Ryall* v. *Nelson* (1917), 3 W.W.R. 647.

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McGill, in reply: Though the Canadian National Railways had yet to inspect and accept the ties, the purpose of such inspection was the grading, different prices being paid for the different grades of ties. But there was nothing optional or conditional about this contract and at the time of garnishment the contractor had completed all that he had to do. There was then an unconditional accruing obligation subject to attachment under the British Columbia Attachment of Debts Act which is different from the English Act. *Girard* v. *Cyrs* (1896), 5 B.C. 45; *G. A. Hankey & Co.* v. *Vernon* (1926), 36 B.C. 401; *Moore* v. *Nyland* (1930), 42 B.C. 444; *Boyd & Elgie* v. *Kersey* (1927), 38 B.C. 342. "An accruing debt is one not yet payable but still an existing obligation": *per* MACDONALD, J.A., in *Vater* v. *Styles* (1930), 42 B.C. 463 at p. 467.

Judgment

YOUNG, Co. J.: Under the circumstances shewn in the material placed before me, I must follow the cases cited by Mr. *McGill,* and hold that there was at the time of the garnishing order an accruing obligation which was properly attached. There will be an order for payment out in accordance with the application.

Application granted.

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Company—Bankruptcy—Holders of shares partially paid for—Transfer of shares to escape liability—Validity—Power of directors—Practice—Bankruptcy—Appeal—Notice and entry—Security for appeal—Time for payment in—Bankruptcy rules 68 to 71.

Judgment was delivered in this case on the 1st of October, 1931, and notice of appeal was filed on the 9th of October following. The appeal was set down for hearing and the appeal books filed on the 26th of December, 1931, when $100 was deposited as security for costs.

A motion to quash the appeal on the ground that the appellant did not comply with Bankruptcy rule 68, in that he did not lodge in the Court the sum of $100 within ten days after the pronouncing of the decision as required by said rule, was dismissed (MACDONALD, C.J.B.C. dissenting).

R. P. Clark and Company Limited assigned in bankruptcy on the 18th of November, 1930. The defendant, who had held shares in the company upon which $5,900 was owing, was the wife of R. P. Clark, president of the company, and she had executed a power of attorney authorizing him to deal with her interests as he saw fit. Four of the five other directors of the company owed various amounts on the shares that each of them held. R. P. Clark was also president of a second company named R. P. Clark and Company (Estates) Limited, and three of the aforesaid directors were also directors of this company. On the 29th of January, 1930, the defendant, by her agent R. P. Clark and the five directors, met informally and formulated a scheme to relieve themselves (with the exception of the one director who owed nothing on his shares) of liability on their shares, and immediately after on the same day held a directors' meeting and passed a resolution that "the directors do hereby approve of the proposed sale and transfer by Mrs. Clark to R. P. Clark and Company (Estates) Limited of 59 fully paid original shares of the capital stock of this company registered in her name." Shortly after, on the same day, a second directors' meeting was held, when a resolution was passed that "this Company do purchase from Mrs. Clark 59 fully paid original shares in the capital stock of R. P. Clark and Company (Estates) Limited for $5,900 which said sum shall be payable by crediting the same in full settlement of the debit balance of $5,900 outstanding against Mr. Clark in this company's stock purchasing account." R. P. Clark voted on both resolutions. Similar resolutions were passed with respect to R. P. Clark and the other directors owing money on their respective shares, each director refraining from voting on the resolutions with respect to his own shares. An application by the trustee in bankruptcy to set aside the above settlement made by the directors and for an order that the trustee do recover against Mrs. Clark the sum of $5,900 was dismissed.

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Held, on appeal, reversing the decision of MACDONALD, J., that the transaction cannot be regarded as a *bona fide* one; it was a hollow sham and fraudulent transaction in which the defendant was involved through her husband who held her power of attorney enabling him to carry out the transaction. It should be set aside and the defendant declared to be still the company's debtor for the moneys owing on the shares.

Per MCPHILLIPS, J.A.: Two directors formed a quorum for passing a resolution. R. P. Clark voted on the resolutions with respect to his wife's shares and the other directors, save as to one, were all interested and they refrained from acting as directors. R. P. Clark held his wife's power of attorney and she left all her business matters to him, he was her business agent and was therefore disqualified from voting. The resolutions with respect to his wife's shares were invalid. She is not released from her debt and should be placed upon the list of contributories.

APPEAL by the trustee in bankruptcy of the Estate of R. P. Clark & Co. (Vancouver) Limited from the decision of MACDONALD, J. of the 1st of October, 1931, dismissing the said trustee's motion for an order that a certain settlement made by the directors of the debtor company on the 29th of January, 1930, whereby an indebtedness of Mildred Hope Clark (wife of Brigadier-General R. P. Clark, president of the debtor company) to the debtor company of $5,900 was cancelled, and released in exchange for the transfer to the debtor company of 59 shares in the capital of R. P. Clark and Company (Estates) Limited by the said Mildred Hope Clark, be set aside and for an order that the said trustee do recover against the said Mildred Hope Clark the said sum of $5,900 and the costs of said motion.

Statement

The appeal was argued at Victoria on the 5th, 6th and 8th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

McPhillips, K.C. (*G. Bruce Duncan*, with him), for appellant.

Harold B. Robertson, K.C., for respondent, took the preliminary objection that the appellant had not lodged the sum of $100 in the Court within ten days, as required by rule 68 (2) of the Bankruptcy Rules. Judgment was delivered on the 1st of October, 1931, but the notice of appeal and the appeal books were not filed until the 26th of December following, and at the

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same time the $100 for security for costs was provided. The $100 was not put up within ten days as required by said rule: see Wilson's Judicature Act, 7th Ed., 434; *In re Taylor* (1909), 1 K.B. 103 at pp. 104-5; *In re Dallmeyer* (1906) (1909), 1 K.B. 105; *In re Barley* (1923), 1 Ch. 177 at p. 180; Holmested's Ontario Judicature Act, 4th Ed., pp. 1089 and 1093; Williams's Bankruptcy Practice, 14th Ed., 548; *Eastern Trust Co.* v. *Lloyd Manufacturing Co.* (1923), 3 C.B.R. 710 at pp. 713-4.

McPhillips, was not called on.

MACDONALD, C.J.B.C.: On this point I think Mr. *Robertson* is right. I think under these rules the notice of appeal is the bringing of the appeal; and that subsection (2) of the rule, which provides for paying the money into Court—which must mean if it is done before the notice is served—must mean into the Supreme Court; it cannot be into a Court which has no jurisdiction until the notice is served. And that when that is done the registrar sends the documents, including money, to the registrar of this Court. And whether it is necessary to set it down or not, that is the procedure which the rule points out—it may not be necessary to set it down, it may not be necessary to resort to our Supreme Court Rules at all, it is governed by the rules 68 to 70, and that is an end of it.

MACDONALD, C.J.B.C.

However, my learned brothers have come to a contrary conclusion; and I do not wish to hold back the decision by reserving the point.

MARTIN, J.A.: In my opinion the motion to quash should be dismissed. Little if any assistance, perhaps I should say rather the reverse, is to be derived from a consideration of the English Bankruptcy Rules of 1860, to which we have been referred, because they are so grouped and framed as to present an aspect of the matter which is quite distinct from the provisions of sections 68 to 79, so much so as to be misleading. Under the head of "Appeals to Appeal Court," our Bankruptcy Rules, I think, as Mr. *Robertson* has suggested in his forceful and able presentation of the matter, provide a code in themselves. And therefore I do not think that the decision in the English Court of Appeal,

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In re Dallmeyer, 1906, reported in (1909), 1 K.B. 105, in the foot-note, is of any real assistance to us. Take the language particularly of Lord Justice Romer, in the second column of p. 105, relating to the notice of appeal—"Merely serving notice of appeal is not bringing an appeal"; that shews the distinction that exists between the English practice and ours in that regard. They have no section which in reality corresponds with our Bankruptcy Rules. There is no rule in these rules, for example, which corresponds in essence to our rule 68. And my view of that rule is this, that immediately upon the notice being served and filed with the registrar (which there means the registrar of the Court appealed from, as appears from rule 69), then, as the rule says, that appeal is "brought"—the same word being used as in rule 3 of this Court. Therefore, that appeal having been "brought" to the Court of Appeal it can only mean that thereafter it is within the sole jurisdiction of this Court, and subject to the interference of no other tribunal whatsoever, unless a higher appellate one after our judgment is delivered, and therefore all the subsequent proceedings in that appeal, so brought within the sole jurisdiction of this Court, must proceed in accordance with its practice and its rules, and it follows that "entering an appeal" in the second paragraph of section 68 must in the circumstances of this case mean the entry of it in this Court, and not in the Court below. And that distinction is borne out by the fact that in England, in order to preserve a contrary effect, it is specially provided that the Court there shall mean the Court below. Here, having regard to the context of the sections, and the direction by the second rule that the definition of "Court" must be considered in regard to the "context or subject-matter," that must have the result that all proceedings subsequent to that notice of appeal must be carried on in this Court; and that the expression "party intending to appeal" in (2) should be understood in the wide sense of intending to prosecute the appeal then entered. Section 9 of our Court of Appeal Act declares that:

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> 9. Subject to the Rules of Court and save as hereinafter provided, after notice of appeal has been given all further proceedings in relation to the appeal shall be had and taken in the Court of Appeal.

I find nothing, in looking at the rules at large, which would

interfere with that construction which gives effect to the general tenor and intention of the rules, and bears out the operation of rule 71, which, broadly speaking, provides that appeals when they are brought in the Courts "shall be regulated by the rules . . . . in relation to civil proceedings" in the Court appealed to. I do not wish to be understood as saying that the matter is not without doubt or controversy, as is shewn by Mr. *Robertson's* good argument; but I can say this, that it is very doubtful indeed that the strict construction that has been submitted can properly be given effect to because—which is something to be borne in mind—the consequences of it would be so very serious that before assuming the responsibility for giving effect to it we should be very certain that we are proceeding upon the right path.

MARTIN, J.A.

In regard to the "entry" of appeals in this Court, that is dealt with by section 19 of our Court of Appeal Act and by our rule number 11, under the heading, "Entry of Appeals."

It follows that the motion to quash this appeal should be dismissed.

McPHILLIPS, J.A.: I may say that I am in full accord with what my learned brother MARTIN has said. I merely wish to add a word or two on the point, which is no doubt a matter of considerable importance to practitioners. It seems to me that there can be really no doubt upon the matter. Firstly, we have to recognize this, as my brother MARTIN has pointed out, you cannot rely with any certainty whatever upon the English decisions here because the statute law is different. Now the language is "Appeals to Appeal Court." Now, the Court of Appeal is distinct from the Supreme Court of British Columbia. And what is the language of the rule? "No appeal from a judge to the Appeal Court [that must be to this Court, not to the Supreme Court of British Columbia] shall be brought unless notice thereof is filed with the registrar." I would not find it difficult to say that that registrar is the registrar of the Appeal Court. I have looked for an interpretation of Appeal Court in this statute and I find none. With regard to registrar I find something which gives very little information—"registrar"

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includes any other officer who performs duties like those of a registrar.

Now, as pointed out by my brother MARTIN, when the notice is served the appeal is brought. That means the notice has been served. In this case we deal with an appeal brought, because the notice is served, and this matter is within the jurisdiction of this Court.

Then I find no difficulty with regard to the first three words of rule 68 (2). "At or before the time of entering an appeal" —now of course it would be simple, in a jurisdiction where there is only one Court, but with us you have to take one horn or other of the dilemma in dealing with this language—"At or before the time of entering an appeal"—well, under the true canon of construction of statute law, we are to make the statute law and the rules, as they happen to be here, in conformity with the statute workable. I find no difficulty in making this workable. We know very well there is only one place to enter an appeal in British Columbia to the Court of Appeal, and that is in the Court of Appeal. And we have, again, a differentiation from other jurisdictions. We have the Court of Appeal sitting in Vancouver and the Court of Appeal sitting in Victoria. The notice was to the Court of Appeal sitting in Victoria. Well, there was only one place that that could be entertained, and that was in the City of Victoria. And as I see here the entry was made in Victoria. It is provided that "At or before the time of entering an appeal the party intending to appeal shall lodge in the Court"—now what Court is that? It must be the Appeal Court—the heading of the rule is "Appeals to Appeal Court." It is reasonable, it is consistent with ordinary common sense, when you look at the rules and also the practice which has obtained here for so many years. It would be an extraordinary thing indeed, to my mind, for a solicitor to walk up to the registrar in the City of Vancouver and present him with security of $100, when the registrar in the City of Vancouver says, I know nothing whatever about your appeal. You would naturally go where they did go in this case, and pay the money in in the Victoria registry.

I do not think that anything very much is gained by too close a refinement in regard to matters of this kind. The real sub-

stance of this matter is, a notice was served, which constituted the bringing of the appeal; and the real substance is that the law says that there shall be security in $100. Well, there is security in $100, and the security is in the proper place. Now what is to be cavilled at? I see no difficulty. I do not think that practitioners ought to have any difficulty in the matter at all.

Therefore I think the motion should be denied.

MACDONALD, J.A.

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

Motion dismissed.

McPhillips, on the merits: There were six directors and with the exception of Ross they all owed different amounts on their stock, aggregating $93,000. Mrs. Clark owed $5,900. Each director was relieved of his debt by resolutions passed by the others present at the meeting, each refraining from voting on the resolution with respect to his own shares. General Clark voted on the resolution with respect to his wife's shares but he was disqualified from so doing as (a) he was her agent and (b) he held shares himself. There was therefore no transfer of her shares: see *In re The Royal British Bank, Ex parte Nicol* (1859), 28 L.J., Ch. 257; *Thorpe* v. *Tisdale* (1909), 13 O.W.R. 1044 at p. 1048; *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488 at p. 501; *Cree* v. *Somervail* (1879), 4 App. Cas. 648 at p. 652. That this was not a real sale see *Common* v. *McArthur* (1898), 29 S.C.R. 239; *Macdougall* v. *Jersey Imperial Hotel Company, Limited* (1864), 2 H. & M. 528 at p. 535; *Ooregum Gold Mining Company of India* v. *Roper* (1892), A.C. 125 at p. 134; *Re McGill Chair Co. Munro's Case* (1912), 26 O.L.R. 254 at p. 260. You cannot sell a share except for money or money's worth, and it is admitted that in this case they received in consideration for these shares the shares of another company that were of no value whatever. To avoid liability she must sell the shares out and out, but in this case the sale was made with the intention of getting them back, and this the law will not allow: see *Hyam's Case* (1859), 1 De G. F. & J. 75; *Costello's Case* (1860), 2 De G. F. & J. 302

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at p. 307; *Lindlar's Case* (1910), 1 Ch. 312; Halsbury's Laws of England, Vol. 1, p. 210, secs. 427-430. She is responsible for General Clark's action in this case: see *Hambro* v. *Burnand* (1904), 2 K.B. 10 at p. 19; *Montaignac* v. *Shitta* (1890), 15 App. Cas. 357. The whole transaction shews on its face that it was a fraud. It does not come within the Statute of Elizabeth, but when the transaction is tainted it makes no difference whether it does or not: see Parker on Frauds on Creditors and Assignments, 4; *Tucker* v. *Young* (1877), Man. R. *temp.* Wood 186; *Harman* v. *Fishar* (1774), 1 Cowp. 117; *Barnes* v. *Freeland* (1794), 6 Term Rep. 80; *Codogan* v. *Kennett* (1776), 2 Cowp. 432 at p. 434; Halsbury's Laws of England, Vol. 20, p. 762, sec. 1787; *Jackson* v. *Duchaire* (1790), 3 Term Rep. 551.

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Robertson: Mrs. Clark's shares were transferred at the meeting of January 29th, 1930, and that was her last transaction, she had nothing to do with the directors' meeting in April following, and she never got her shares back at any time. The trustee has no greater rights than the company: see *Canadian Credit Men's Trust Association* v. *Reaume* (1931), 12 C.B.R. 429. There is no evidence to shew the companies were bankrupt on January 29th, 1930, and the statements put in of August, 1929, and February, 1930, were never proved. Dividends of 10 per cent. were paid regularly on the stock up to August, 1929, and the power of attorney to General Clark only applied to Clark & Co. and not to the "Estates" company. Two directors formed a quorum, Ross had no shares, and General Clark had no beneficial interest in the shares in his name. The shares in his name were registered "in trust." As to Clark being his wife's agent see Bowstead on Agency, 8th Ed., 366-7 and 371; *Hiern* v. *Mill* (1806), 13 Ves. 114. As to the duty of the agent to communicate to the principal see *Deep Sea Fishery Company's (Limited) Claim* (1902), 1 Ch. 507 at p. 511. In all the cases referred to the director had a substantial financial interest, but Clark himself had no beneficial interest: see *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506. The company went into bankruptcy November 8th, 1930, and these proceedings were taken on September 3rd, 1931, nearly a year later. Fraud must be clearly established: see *Beatty* v. *Neelon* (1886),

13 S.C.R. 1 at p. 5. On the question of ratification by the shareholders see *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314 at p. 321; (1901), 32 S.C.R. 719; *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366 at p. 375; *Grant* v. *United Kingdom Switchback Railways Company* (1888), 40 Ch. D. 135; *Boschoek Proprietary Company, Limited* v. *Fuke* (1906), 1 Ch. 148; Street on Ultra Vires, 393. If there is no proof of insolvency then the debtor company takes Mrs. Clark's shares in "Estates, Ltd." in satisfaction of the balance owing on her shares: see *In re Wragg, Limited* (1897), 1 Ch. 796 at pp. 814 and 836; Palmer's Company Law, 13th Ed., 59. As long as the contract stands they will not go into the adequacy of the consideration. Under section 231 of the Companies Act the trustee cannot bring this action unless he shews the money is required to pay the company's debts. There has been no compliance with this section.

Argument

Duncan, in reply, referred to *Lindlar's Case* (1910), 1 Ch. 312; Phipson on Evidence, 7th Ed., 30 and 36; *In re The Ominum Investment Co.* (1895), 2 Ch. 127; 64 L.J., Ch. 651; *In re The Leicester Mortgage Company, Limited* (1894), W.N. 108; *Betts & Co., Limited* v. *Macnaghten* (1910), 1 Ch. 430.

Cur. adv. vult.

1st March, 1932.

MACDONALD, C.J.B.C.: It is settled law that a shareholder may even on the eve of bankruptcy of the company transfer his shares though only partially paid up to a "man of straw" with the intention of escaping his liability thereon provided the sale and transfer is an out and out one, that is to say, that the person parting with the shares shall retain no interest whatever in them. *Lindlar's Case* (1910), 1 Ch. 312.

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If there had been a *bona fide* sale and transfer out and out of the shares here this case would be governed by *Lindlar's Case* and *Costello's Case* (1860), 2 De G. F. & J. 302, but was there such a sale and transfer? The shares were shares of R. P. Clark & Company (Vancouver) Limited, hereinafter referred to as the company. They were paid up except $5,900 and were held by the respondent. The respondent is the wife of said R. P. Clark who was president of the company. There was a

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second company named the R. P. Clark and Company (Estates) Limited, which I shall hereinafter refer to as the Estates Limited. There were six directors of the company including R. P. Clark, three of whom including the said Clark were also directors (with another) of the Estates Limited. They were a majority of such directors. The company assigned in bankruptcy to the authorized trustee (the appellant) on the 18th of November, 1930. In 1929 there had come a crash in stocks and many brokerage companies became insolvent and this state of affairs continues up to the present time.

On the 29th of January, 1930, the said directors of the company with one exception, J. C. Ross, were indebted to the company upon shares held by them upon which they owed in the aggregate $87,100 which with the indebtedness of the respondent amounted to $93,000. These directors of the company, the said three directors of the Estates Limited, and the respondent by her agent R. P. Clark met informally on the said 29th of January and formulated the following scheme afterwards adopted in resolutions of the company, Exhibits 7 (i) and

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7 (ii) and on the same day passed the resolutions for the purpose of carrying the said scheme through, each director of the company refraining from voting on any part which affected himself. In short the scheme was that the defendant should part with her said shares to the Estates Limited, in exchange for shares of that company for like amounts and that the other directors debtors of the company should be partially relieved of their said debts. The resolution referring to the plaintiff's debts is as follows:

> Resolved that the directors do hereby approve of the proposed sale and transfer by Mrs. Mildred Hope Clark to R. P. Clark and Company (Estates) Limited of 59 fully paid original shares of the capital stock of this Company now registered in her name.

Her husband and agent voted on this resolution as did the said Ross who had no interest in the matter except as a director. The other resolutions contained in the minute which was made at a meeting of the directors of the company on the 29th of January, 1930, at 10 a.m., made somewhat similar provisions for relieving these directors from the whole or part of their respective indebtedness, each of the other directors refraining

from voting on that which affected himself and explaining his interest therein.

In the resolution affecting the respondent her shares are erroneously referred to as fully paid up. On the same day, namely the said 29th of January, a second meeting of the company was held at 4.30 p.m., the minutes of which appear as Exhibit 7 (ii) at which a resolution was passed that the company should purchase from the respondent

> fifty-nine fully paid original shares in the capital stock of R. P. Clark and Company (Estates) Limited, for the price or sum of $5,900 which said sum shall be payable by crediting the same in full settlement of the debit balance of $5,900 outstanding against Mrs. R. P. Clark [respondent] in this company's account—known as "Stock Purchase Account."

This was carried unanimously and similar resolutions for the relief of the debtor directors of the company were passed.

The directors of the Estates Limited accepted Mrs. Clark's shares in the company in exchange for an equal number of shares in the Estates Limited which were passed on to the company in pursuance of the said resolutions.

It was argued by counsel for the respondent that the first resolution mentioned was passed by a quorum of the company consisting of the said Ross and the respondent's agent R. P. Clark and that even discarding the votes of the other directors on the same resolution the resolution was good, a quorum of the board of directors being two. I express no opinion on this point since I find my opinion substantially on another ground.

The effect of these transactions was that respondent's debt to the company was cancelled in return for the transfer to it of the said Estates Limited shares. By this transfer respondent is said to have been relieved from the debt although the company received no substitute debtor in her place, but only the shares of the Estates Limited the value of which has not been proven and which appears to be *nil*.

In my opinion this transaction cannot be regarded as a sale and transfer of the respondent's shares in the company to another person solvent or insolvent. It was I think a fraudulent transaction in which the respondent is involved through her husband who held a power of attorney enabling him to carry out such a transaction and the fruits of which she has accepted and now insists upon retaining.

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The transaction cannot be described as a *bona fide* one. It was a hollow sham and is not within the cases in which it has been held that a *bona fide* transfer of shares even to an insolvent person made for the purpose of getting rid of a liability is maintainable in the Courts. It therefore should be set aside and the respondent declared to be still the company's debtor for the moneys owing upon said shares.

There were several other questions argued before the Court, for instance it was argued that this transaction at best was a sale of shares other than for cash; it was argued also that it was in effect a transfer of respondent's shares to the company for $5,900 and as that could not be made directly it was equally invalid if attempted to be made indirectly which I think was the case here. These contentions may be maintainable but I do not think it necessary in view of the conclusion to which I have already come as stated above to express an opinion upon them.

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The appeal will therefore be allowed.

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The respondent, the wife of R. P. Clark of R. P. Clark & Company (Vancouver) Limited, was a shareholder in the R. P. Clark & Company (Vancouver) Limited (hereinafter referred to as the Clark Company) holding certain shares issued as fully paid—not really fully paid as promissory notes were taken in payment and at the time the matters here to be gone into the respondent owed the Clark Company upon these shares $5,900. Under the constitution of the company the shareholders of the Clark Company could not sell or otherwise dispose of their shares save with the leave of the directors to be evidenced by a resolution of the board of directors. It was conceded in the argument that if R. P. Clark, who was one of the board of directors who granted leave to the respondent to sell or exchange her shares was disqualified for any reason then the leave granted would be invalid as no lawful quorum of the directors would have acted—in truth only one qualified director remained. That being the case no valid consent or approval could be said to have been granted. My reason for arriving at the conclusion that R. P. Clark was disqualified is based upon

the ground that R. P. Clark was the business agent for his wife, the respondent, and the respondent said she left all her business matters to the decision of her husband R. P. Clark. Moreover, her husband held her power of attorney, therefore, R. P. Clark stood in a fiduciary position to both parties, *i.e.*, to the Clark Company, and his wife, the respondent, and could not be said to be disinterested. The other directors, save as to one, were all interested and they refrained from acting as directors. The learned Chief Justice has in his judgment dealt with the directors' proceedings and recounts the scheme adopted to bring about, as was thought, payment on account of the respondent of her debt due to the Clark Company. The learned Chief Justice has refrained from passing upon the validity of the resolution basing his opinion subtantially upon other grounds in which I agree. I unhesitatingly am of opinion that there was no valid resolution in that the facts as developed shew that R. P. Clark, the husband of the respondent, was interested and stood disqualified and that being so the resolution of course would be invalid and upon this point alone the whole fabric would fall and the respondent would not stand released from her debt but would be rightly placed upon the list of contributories of the bankrupt company, the Clark Company. The impugned resolution, which I consider invalid, reads as follows:

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> Resolved that the directors do hereby approve of the proposed sale and transfer by Mrs. Mildred Hope Clark to R. P. Clark and Company (Estates) Limited of 59 fully paid original shares of the capital stock of this Company now registered in her name.

Later on—the same day though—a meeting was held by the Clark Company at which a resolution was passed in these terms:

> Resolved: That this company do purchase from Mrs. Mildred Hope Clark [respondent] 59 fully paid ordinary shares in the capital stock of R. P. Clark and Company (Estates) Limited for the price or sum of $5,900 which said sum shall be payable by crediting the same in full settlement of the debit balance of $5,900 outstanding against Mrs. R. P. Clark in this company's account known as "Stock Purchase Account."

The respondent then by this illegal and void scheme—as I look upon it—was presumptively relieved of her debt of $5,900 due to the Clark Company. The respondent having the same day exchanged her Clark Company shares for shares of the R. P. Clark and Company (Estates) Limited, the fraud perpetrated upon the Clark Company consisted in this: that a

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debtor to the extent of $5,900 was allowed to sell to R. P. Clark and Company (Estates) Limited, as fully paid shares, shares of the Clark Company which were not fully paid and known not to be so by R. P. Clark, a director of the Clark Company, and there was accepted in lieu thereof fully paid shares in the R. P. Clark and Company (Estates) Limited. It is attempted to be set up that the R. P. Clark and Company (Estates) Limited shares have some value. That view I cannot accept. In any case the scheme was an illegal scheme and fraudulent in law. As I view the matter the respondent still remains a shareholder of the Clark Company upon the one ground alone—that no valid consent was given for the sale or exchange of her shares. That R. P. Clark, the needed member of the board of directors to constitute a quorum, was interested and disqualified from acting is well established by what Swinfen Eady, L.J. said at p. 503 in *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488 at p. 503:

MCPHILLIPS, J.A.

> Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is in our opinion within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. It is immaterial whether this conflicting interest belongs to him beneficially or as trustee for others. He is bound to do as well for his *cestuis que trust* as he would do for himself. Again the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of a contract have been the best obtainable for the interest of the *cestui que trust*, upon which subject no inquiry is permitted.
>
> The case of *Todd* v. *Robinson* [(1884)], 14 Q.B.D. 739 is an instance of a very small interest as shareholder of a company being held to make a person "interested" in a contract.

R. P. Clark was on the books of the Clark Company as holding 414 shares.

I do not find it necessary to go into the other points dealt with by the learned Chief Justice other than to say that I am in agreement therewith.

I therefore am of the opinion that the appeal should be allowed.

MACDONALD, J.A.: The trustee of the bankrupt estate of R. P. Clark and Company (Vancouver) Limited (hereafter called the debtor company) seeks to set aside an arrangement made by its directors on January 29th, 1930, by which an indebtedness of the respondent Mildred Hope Clark (wife of R. P. Clark, president) of $5,900 representing an unpaid balance on fifty-nine shares held by respondent in the debtor company was cancelled. The contention is that the balance is still unpaid and available for creditors. The directors were Clark (president), Ross, Erlbach, McDonald, Jukes and Graves and on the date referred to all of them (except Ross) owed in the aggregate the sum of $87,100 in respect to shares purchased by them in the debtor company. The respondent was not a director. She executed a power of attorney authorizing her husband to

> enter into, manage and carry out for me and in my name or in my name in trust, any and every legal and financial transaction with R. P. Clark & Company (Vancouver) Limited and particularly but not so as to restrict the generality of the foregoing, to endorse and transfer any certificates of the said company standing in my name, and generally for him to do and transact any business in my name with the said R. P. Clark & Company (Vancouver) Limited which I could transact in person.

Respondent, so far as the record discloses, had no personal knowledge of subsequent events. Referring to her husband she "left everything to him."

In view, doubtless, of the financial situation the directors, other than Ross, regarded their indebtedness (including respondent's) as an embarrassing liability and resorted to the device complained of to escape payment. We are concerned with it only in so far as it affects the respondent. The scheme was carried out by an arrangement with another company, *viz.*, R. P. Clark and Company (Estates) Limited (hereafter called Estates Limited). Respondent's husband was president of Estates Limited and its directors held that office in both companies. On January 29th, 1930, minutes of a meeting of the directors of the debtor company disclose a resolution, reading in so far as it affects the respondent, as follows:

> Resolved that the directors do hereby approve of the proposed sale and transfer by Mrs. Mildred Hope Clark to R. P. Clark and Company (Estates) Limited of fifty-nine fully paid ordinary shares in the capital stock of this company now registered in her name.

The latter company thus became a shareholder in the debtor

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company while respondent in consideration of the transfer received 59 fully paid shares in Estates Limited. These shares were transferred to Estates Limited free from the unpaid liability of $5,900; there was no desire to load that debt on the latter company. It was hoped that it would disappear in the shuffle. An identical resolution of approval was passed in respect to a sale and transfer to Estates Limited of the shares held by five of the directors of the debtor company upon which as stated $87,100 remained unpaid, with a notation after each resolution that the director immediately concerned refrained from voting "having declared his interest in the resolution." Each of the directors received equivalent fully-paid shares in Estates Limited. It is obvious that, with the common purpose of escaping payment of a debt, all of the directors (except Ross) were in reality financially interested in each transfer. It was a case, if I may say so, of reciprocal back-scratching. However, I do not find it necessary to pass finally upon that point. These shares too were transferred as "fully paid." It was further directed that upon presentation for transfer of the share certificates they should be cancelled and in lieu thereof equivalent shares in the debtor company should be issued to Estates Limited.

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The shares transferred to Estates Limited by the directors were as stated treated as fully paid, presumably because promissory notes were given for the purchase price. The debtor company's point of view was explained by Erlbach one of the directors as follows:

> The purchases of stock [*i.e.*, originally] were made by means of getting notes and the understanding being these notes should be paid out of dividend payments and bonuses that would be received on that stock. At this time the business was not so very good after the New York crash and various other things that happened and the suggestion was therefore made that instead of these accounts remaining as they were and in view of the fact or probability there would not be dividends or bonuses for some time some other means or form of paying them should be found.

They were not, of course, fully-paid shares.

Having transferred the shares to Estates Limited in return for shares in that company, the directors of the debtor company in the afternoon of the same day met and passed the following resolution:

> Resolved that this company do purchase from Mrs. Mildred Hope Clark

[respondent] 59 fully paid ordinary shares in the capital stock of R. P. Clark and Company (Estates) Limited, for the price or sum of $5,900 which said sum shall be payable by crediting the same in full settlement of the debit balance of $5,900 outstanding against Mr. R. P. Clark [respondent] in this company's account known as "Stock Purchase Account."

For 59 shares in the debtor company with a heavy liability attached, she received equivalent shares in Estates Limited free from any liability. These the debtor company purchased from her for $5,900 the amount of the debt and it disappears. The debtor company cancelled the debt and on completion of the deal held, by purchase from respondent, 59 shares in Estates Limited. The same course was followed in respect to the shares of the five directors of the debtor company. Their liability was liquidated in the same way and again a notation placed after each resolution that the director affected refrained from voting. In the result the debtor company wiped out an account receivable for $93,000 and became a large holder of shares of doubtful value—or possibly of no value—in Estates Limited.

A balance sheet of Estates Limited under date 31st January, 1930, is in evidence. It would be difficult to say, after perusing it, that the directors of the debtor company, for its benefit, made a *bona fide* investment in the shares of that company. It discloses a deficit of $6,752.06 after making an allowance for good-will of $3,000 and discloses a condition, particularly in view of well-known economic stress, growing at the time more acute, that would cause an investor to avoid purchasing stock in the company. However, it is not necessary, as I view it, to shew that the stock of Estates Limited was valueless. It may have had agencies and connections justifying a good-will valuation.

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What is the position of the respondent—can this sale and transfer and subsequent cancellation of the indebtedness be supported in law? Respondent, through her agent, might transfer her partly paid-up shares to Estates Limited, or to a pauper, for the express purpose of escaping liability and (unless the articles contained a clause authorizing the directors to reject it) compel the directors to register the transfer provided however that it is "an out and out" transfer reserving to the transferor no beneficial right to the shares direct or indirect. Whether or not the transfer is of that character is a question of fact. (*Lindlar's Case* (1910), 1 Ch. 312). Lindlar, holder of unpaid shares,

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believing the company to be *in extremis*, sold them to a man of straw for a nominal consideration and to escape liability. Upon bankruptcy the liquidator failed in an application to the Court to rectify the register by substituting therein Lindlar's name for that of the purchaser. Buckley, L.J., in giving the judgment of the Court at p. 316 said:

> In the absence of restrictions in the articles the shareholder has by virtue of the statute the right to transfer his shares without the consent of anybody, to any transferee, even though he be a man of straw, provided it is a *bona fide* transaction in the sense that it is an out and out disposal of the property without retaining any interest in the shares—that the transferor *bona fide* divests himself of all benefit.

At p. 320 the Lord Justice stated that:

> . . . the liability of the transferor in every case arises . . . upon the fact that he has reserved to himself a benefit in respect of the shares.

In referring to *Costello's Case* (1860), 2 De G. F. & J. 302, shewing, if authority is required, that the point is available to the liquidator, apart from equities as between the transferor and transferee, he said at p. 319:

> *Costello's Case*, again in the matter of the same company, is not in conflict with the principle of the cases already mentioned, if it be borne in mind that both judges rest their decision upon the fact that there was not an out and out transfer. Knight Bruce, L.J. says that there was no real bargain, no true contract.

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In *Costello's Case*, the transfer was made to an insolvent. Estates Limited may not be insolvent but that is not material. Briefly as stated by Knight Bruce, L.J. at p. 306 "The transaction impeached . . . was a transaction entirely false and hollow." It was not a *bona fide* transaction.

That the transfer by respondent's agent of the 59 shares to Estates Limited was "false and hollow" I have no doubt. A benefit also was in effect retained by respondent. She was enabled by this colourable transaction to secure the release of a debt. In arriving at this conclusion of "retention of benefit" we are not confined to the first transfer to Estates Limited. We should look at the whole play, resulting in the cancellation of the indebtedness; it is one act. The directors moved from the board room of one company to that of the other to complete a deal utterly devoid of business merit. The truth is "no real bargain; no true contract" was made in respect to respondent's shares. It was a pretended sale of something she did not own, *viz.*, 59 fully paid up shares. Respondent "is purporting to do one thing and in fact doing another" (*Lindlar's Case, supra*, p.

318). The liability was not permitted to pass. The Estates Limited with its directors drawn from the debtor company was guarded against that burden. The liability of $5,900 was ignored or rather held over or reserved for further treatment. It was not an "out and out" transfer.

In *Hyam's Case* (1859), 1 De G. F. & J. 75 a shareholder to avoid liability in respect to mining shares that passed by delivery of the certificates, placed them in the hands of a broker for sale but himself found a purchaser, *viz.*, a clerk in his own employ and by introducing him to the broker a sale was made. The Lord Chancellor at pp. 78-9 said:

> According to those decisions it is incumbent upon a shareholder to prove that he has actually parted with all interest in the shares. That onus rests upon him.

It was suggested that the alleged purchaser was to be merely a trustee for the vendor—that it was a nominal transfer. Turner, L.J. stated at p. 81:

> It is clear that the intent in the present case was to cover the real ownership by the creation of a fraudulent trust.

It is enough, however, to shew a reservation of interest or its equivalent on the part of the transferor. The Lord Chancellor at p. 79 said: MACDONALD, J.A.

> . . . . it is incumbent upon a shareholder to prove that he has actually parted with all interest in the shares. That *onus* rests upon him. His Honour the Master of the Rolls was not satisfied with the evidence produced before him to shew that the appellants in this case had actually parted with their interest. I think that the evidence now before us clearly demonstrates that they have not parted with their interest; that it was a mere fable they were acting; that they intended all that passed to have no operation whatever as between themselves and the pretended transferee. The questions that have been suggested about whether the liability to be placed on the list of contributories rests upon a trustee or upon his *cestui que trust* do not arise here, for the relation of *cestui que trust* and trustee was never established between these parties. It was a mere fable they were acting, not intended to have any real operation, and it is quite clear to me that this was a contrivance on the part of these two gentlemen for the purpose of enabling them to get rid of their liability, if there should be liability cast upon them by reason of this being a losing concern, but, if by some unforeseen possibility an advantage should arise, to claim the benefit that might be claimed from their still being actually shareholders in the company.

It was urged that the respondent was not a party to the manipulation of these shares. The acts of her agent were, not only professedly, but actually performed on her behalf and for

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her benefit and within the scope of the authority conferred. It was said the power of attorney was restricted to dealings with the debtor company "to manage and carry out for me . . . . any and every legal and financial transaction with R. P. Clark and Company (Vancouver) Limited." The agent had authority to transfer the shares to Estates Limited and incidental thereto, receive equivalent shares in that company. The subsequent act, *viz.*, the professed sale of the shares so received to the debtor company was within the authority conferred. The point was not raised here or apparently below, as an alternative plea, that no authority was conferred to do illegal or fraudulent acts. The words used in the power of attorney are "to carry out . . . any and every legal and financial transaction." Without expressing any opinion I would not now treat the point as available. The respondent accepted the benefit.

MACDONALD, J.A.

It is unnecessary to follow the subsequent acts of the directors and shareholders of the debtor company. The question of alleged later ratification by shareholders and the validity of the notice convening the annual meeting where the question of ratification was dealt with, is no longer material. A ratifying resolution could not give validity to acts, not irregular, but wholly illegal and ineffective. The same observation may be made in respect to the question of alleged financial interest of the directors in the subject-matter of the resolution bearing on the question of the requisite number of directors qualified to vote.

We were referred to section 231 of the Companies Act (B.C. Stats. 1929, Cap. 11). It was not shewn by the appellant trustee, it was submitted, that moneys were required for the purposes therein outlined. Without expressing an opinion on the construction of this section, or on the question of possible conflict, I would say that appellant in this action is within his rights in proceeding as herein under the Federal Bankruptcy Act and Rules. The provisions of section 70 of that Act cannot be open to question.

I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *McPhillips, Duncan & McPhillips.*
Solicitors for respondent: *Robertson, Douglas & Symes.*

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Evidence—Production of documents—Tending to incriminate—Protection—R.S.B.C. 1924, Cap. 82, Sec. 5.

On the trial of an action for damages for failure to execute orders placed by the plaintiffs with the defendants as brokers, defendants' counsel, who had charge of certain books of which production in Court was demanded, refused to comply on the plea that their production would tend to criminate the defendant company. The judge ruled that they be produced, otherwise the statement of defence would be struck out. Defendants' counsel then produced the books and used them in the course of the trial in the conduct of the defence. On appeal from this ruling:—

Held, affirming the decision of MURPHY, J., that having produced the books and used them on the trial, he made his election without reservation which was in effect a withdrawal of the objection and conclusive.

APPEAL by defendants from the decision of MURPHY, J. in an action tried by him at Vancouver on the 16th to the 28th of September, 1931, for damages for failure to execute orders placed by the plaintiff with the defendants as brokers, for loss and damages through wrongful sale or conversion by the defendants of shares, stocks, or bonds deposited as collateral with the defendants by the plaintiff and for an accounting and payment of the moneys found due. The facts are set out in the judgment of the trial judge. Statement

G. L. Fraser, and *Sears*, for plaintiff.

J. W. deB. Farris, K.C., and *Sloan*, for defendants.

5th October, 1931.

MURPHY, J.: The point to be decided in this case falls within a narrow compass and, to my mind, presents no difficulty. Plaintiff proved that he had made a contract with defendant company as brokers to buy and sell shares for him on margin on the Vancouver Stock Exchange. To secure defendants against possible loss he delivered to them collateral in the shape of stocks and bonds. He proved that defendant company has sold this collateral and has pocketed the proceeds. No attempt MURPHY, J.

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to controvert these facts was made by defendants. They rested their defence on the contention that the onus was on plaintiff to prove that they had not the right to sell his securities. Admittedly then they have money obtained from the sale of plaintiff's securities which they propose to retain. Admittedly also they had no right to sell these securities except on the coming into existence of certain conditions set out in the contract between them and plaintiff, *i.e.*, that they had dealt in securities according to his orders and that he had allowed his margin on such securities to drop below the agreed figure. Whether these conditions have arisen or not depends upon facts exclusively within their own knowledge. They and they alone know whether or not they in fact dealt in the securities for plaintiff which they alleged in statements to him they had dealt in. They and they alone know if they did so deal what prices ruled and consequently whether or not plaintiff's margin had fallen below the agreed figure. I, therefore, hold that plaintiff is entitled to judgment. If I am wrong, as to the onus of proof, then I hold that plaintiff has made out a *prima facie* case that defendants did not carry out the terms of their contract with plaintiff upon the fulfilment of which they must base their claim to retain plaintiff's money. Exhibit 87, which admittedly is a correct analysis of defendants' books shews that on the sixteen different days therein dealt with on which defendants purported to execute orders on plaintiff's behalf on the Vancouver Stock Exchange they were on each day short in their Vancouver office on shares claimed to have been dealt in by them on behalf of plaintiff and other clients. This means that on each of these days *prima facie* defendants were purporting to carry out deals on the Vancouver Stock Exchange and charging clients, including plaintiff, commission on such deals when in fact they were not doing so. No shares were ear-marked for plaintiff. It is contended that defendants might have had sufficient shares to cover their transactions in some of their other offices in Canada and that their bargain with clients other than plaintiff might have been that they could furnish such shares to them. If so I think that onus was shifted to the defendants to shew this was the case since no shares were ear-marked for plaintiff. Exhibit 87 shews also that on numerous occasions defendants would purport to purchase

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shares on the Vancouver Exchange on behalf of plaintiff and other clients and that they would cancel such purchases by selling off the Exchange back to the broker with whom they purported to deal on the floor of the Exchange the same number of shares at the same price and would not report such off-exchange sales to the Stock Exchange officials. This is in direct contravention of the rules of the Stock Exchange. In law the rules of the Stock Exchange are to be considered as incorporated in the contract—*Cartwright* v. *McInness* (1931), S.C.R. 425. Since no shares were ear-marked for plaintiff this in itself, standing unexplained, would, in my opinion, *prima facie* invalidate any right of defendants based on the contract to sell plaintiff's securities and to retain his money for the defendants had broken a vital term of that contract and one, in my opinion, placed in the Stock Exchange rules for the protection of clients. Obviously by pursuing this practice the market was laid wide open to manipulation against clients by brokers who were themselves short on such shares since a few hundred, or at most a few thousand shares, could be made to do duty over and over again to meet Exchange clearing-house requirements thereby covering up innumerable alleged deals on the floor of the Exchange which in turn would, or at any rate might, affect the price of such shares against clients' interests.

Further since the sales off the Exchange cancelled the purchases on the floor the result was that defendants' short position was increased by the number of shares involved in these deals. The clients for whom they purported to make these purchases must look to defendants for the shares. Defendants' short position *prima facie* meant this so far as their clients were concerned. Either defendants had the necessary shares or they did not. If they did not have them they were bucketing. If they did they were selling their own shares to their clients. It is impossible on the record to determine absolutely which position was held by defendants for their house account has disappeared and no explanation of such disappearance is forthcoming. In either case defendants would not be carrying out their contract with plaintiff for it will not I think be contended that a broker can sell his own shares to a client unless the client is aware that this is being done and expressly agrees. No shares having been

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ear-marked for plaintiff and he having *prima facie* proved this condition of things I think the onus is shifted to defendants to shew they actually did purchase shares on the Vancouver Stock Exchange for him as alleged.

In my view, as stated, even if the onus is on plaintiff, as contended, he is not required to prove fraud. All he has to do is to shew *prima facie* that the terms of the contract were not carried out. But if he has to prove fraud I think he has made out a *prima facie* case. The continuous short position of defendants, coupled with the refusal to allow clients to sell short, the unexplained disappearance of defendants' house account, which, if produced, would throw a flood of light on the matters in question, as the entries set out in Exhibit 87 indicate, and the unreported dealings off the Exchange are, in my opinion, *prima facie* proof of fraud.

There is evidence that defendants explained to brokers with whom they made these deals on the Exchange the method whereby such deals would be cancelled off the Exchange without the knowledge of the Stock Exchange officials. The great number of these transactions and the direct violation of a Stock Exchange rule made I think for the protection of clients, through concealment from Stock Exchange officials of what was being done off the Exchange, are, in my opinion *prima facie* evidence that these transactions were fraudulent, were in fact not *bona fide* transactions at all but were carried out to influence the market against, amongst others, the plaintiff or to cover up defendants' short position. The defendants had their office manager and other employees in Court. If these transactions were honest nothing could have been easier than to lead evidence shewing such to have been the case. I therefore hold that plaintiff has made out his case and is entitled to judgment. As to the amount, only one question arises since plaintiff, with one exception, has accepted defendants' figures, as to the amount received by them for his collateral. Defendants in a statement furnished to plaintiff informed him that they had sold out his Cities Service shares in November, 1929. At the trial, however, evidence was adduced that defendants had sold 212 of these shares late in September, 1929. The matter is important because between these dates the price of the shares had dropped pro-

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nouncedly. It is objected that the pleadings allege a conversion in or about November and that this cannot cover a conversion in September. No particulars of this pleading were demanded. The matter is one peculiarly within the knowledge of defendants. The evidence went in without objection although attention was specifically called to the reason for its introduction by a discussion as to proof of the price of these shares in September. No application for an adjournment to meet this evidence was asked for. Had such application been made it would, of course, have been granted if shewn to have been necessary. The Vancouver office manager and some other employees of defendant company in that office were in Court during the trial and could easily have been called. I hold that under these circumstances plaintiff is entitled to recover the amount which represents the price of those shares late in September and find that price to be $58. Plaintiff is therefore entitled to judgment for this amount plus the amount admitted by defendants to have been received by them for the other securities, the property of plaintiff which they sold and 5 per cent. interest by way of damages from the date of each respective sale less $4,918.13, the amount of money admitted by plaintiff to have been received by him from defendants.

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Plaintiff is entitled to costs.

From this decision the defendants appealed. The appeal was argued at Victoria on the 18th of January, 1932, before MACDONALD, C.J.B.C., MCPHILLIPS and MACDONALD, JJ.A.

Statement

J. W. deB. Farris, K.C., for appellants: The value of the stocks ordered by the plaintiff went down on the market and when the collateral was sold out it was barely sufficient to square the account. The defendants were wrongfully compelled to produce their books. Documents and evidence will not be ordered produced when it tends to incriminate. This is modified by the Evidence Act, but as to the common law see Bray on Discovery, 313; *Lamb* v. *Munster* (1882), 52 L.J., Q.B. 46; *Attorney-General* v. *Kelly* (1916), 10 W.W.R. 131; *Webster and Kirkness* v. *Solloway, Mills & Co. Ltd.* (1930), 3 W.W.R.

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445. When the evidence is improperly received below this Court should reject it: see *Jacker* v. *The International Cable Company Limited* (1888), 5 T.L.R. 13. That the defendants were empowered to sell, an action for trover is not maintainable: see *Donald* v. *Suckling* (1866), 35 L.J., Q.B. 232 at pp. 242 and 248; *Halliday* v. *Holgate* (1868), 37 L.J., Ex. 174.

G. L. Fraser, for respondent: The cases referred to on privilege apply to discovery only and not to proceedings on the trial: see Taylor on Evidence, 12th Ed., 930 and 934; Phipson on Evidence, 7th Ed., 206; *Waterhouse* v. *Wilson Barker* (1924), 2 K.B. 759 at p. 777. The rule of privilege has no application to principal and agent: see Halsbury's Laws of England, Vol. 27, p. 222, sec. 443; Meyer on Stockbrokers and Stock Exchanges, 294. There can be no shifting of burden of proof by unnecessarily traversing: see Odgers on Pleading, 10th Ed., 153-4; Best on Evidence, 12th Ed., 251; *Sunderland* v. *Solloway, Mills & Co. Ltd.* (1931), 44 B.C. 241. As to effect of form of pleading on the burden of proof see C.J., Vol. 22, p. 69; *Lonergan* v. *Peck* (1884), 136 Mass. 361 at p. 363; *Abhau* v. *Grassie* (1914), 104 N.E. 1020. There must be notice before being closed out: see C.J., Vol. 9, p. 547 (note 20), and p. 546 (note 12); Meyer, *supra,* pp. 363-4. They bucketed every order and only had one-third of the certificates necessary to fill customers' orders on hand. They must have enough shares to cover all orders: see *Greene* v. *Corey* (1912), 97 N.E. 70 at p. 72; *Richardson* v. *Shaw* (1908), 209 U.S. 365 at p. 375; *Taussig et al.* v. *Hart* (1874), 58 N.Y. 425 at p. 429; *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601 at p. 606; Meyer, *supra,* pp. 276 and 330; *Cook* v. *Flagg* (1918), 251 Fed. 5 at p. 10. On the question of election see *Morrison* v. *The Universal Marine Insurance Co.* (1873), L.R. 8 Ex. 197.

Argument

Farris, in reply, referred to *Lamb* v. *Munster* (1882), 52 L.J., Q.B. 46 at p. 47; *Spokes* v. *Grosvenor Hotel Co.* (1897), 2 Q.B. 124 at p. 130; *Webster and Kirkness* v. *Solloway, Mills & Co. Ltd.* (1930), 3 W.W.R. 445 at p. 447; *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57; Meyer on Stockbrokers and Stock Exchanges, 281-2.

Cur. adv. vult.

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MACDONALD, C.J.B.C.: The defendants' counsel who had charge of the books of which production in Court at the trial was demanded refused to comply on the plea that their production would tend to criminate the defendant company. After much argument the judge ruled that they be produced and announced that if production were still refused he would be obliged to strike out the statement of defence.

The situation was therefore clearly put up to the defendants' counsel—produce the books or the defence will be struck out. Thereupon defendants' counsel elected to produce the books and did so, and this in my opinion ended the question with respect to the production of the books. There was an unequivocal election made with full knowledge of the material facts and the trial proceeded with the books produced. That election is, I think, conclusive and cannot be disregarded.

The books have been produced and evidence founded on their contents having been taken there can, I think, be no doubt on that evidence of the justness of the plaintiff's claim which I think has been duly proven.

I would, therefore, dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal in my opinion should be dismissed. The learned trial judge, Mr. Justice MURPHY, has given a considered, correct, exhaustive and complete judgment in the case according to my view. The trial extended over seven days and the evidence led upon the part of the respondent is most convincing and exhibits the most flagrant fraud and dereliction of duty upon the part of the appellants. The appellants were contumacious throughout the hearing in the Court below. The position of broker and customer is well known and here we have brokers taking the collateral of the customer, converting it to their own use, *i.e.*, realizing on it in cash, and dealing with the proceeds thereof without making any disclosure of transactions to warrant any such procedure. It would be impossible for any Court to give heed to the submissions made. At the trial the appellants at first refused production of their books shewing the alleged transactions upon the plea that it would incriminate them—this was advanced by counsel as the

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excuse for non-production. Eventually the books were produced and became part of the evidence in the case. The refusal to produce the books in itself was an exhibition of distrust in the books of accounts being able to explain the alleged transactions and support the defence. The belated production of them has demonstrated the well-grounded fear of the defendants. In *Attorney-General* v. *The Dean and Canons of Windsor* (1858), 24 Beav. 679 at pp. 706-7 we have Sir John Romilly, M.R., saying:

> Evidence is always to be taken most strongly against the persons who keep back a document, and the circumstance that the body keeping it back is a corporation does not in the slightest degree affect this principle, although it exonerates the present members from blame in that respect.

There is no exoneration in the present case. No attempt was made to in a proper manner claim privilege in any way, that is, as required in practice. To do this it would have been necessary for some proper officer of the appellants to have gone into the witness box and have sworn that the production of the books would incriminate the appellants. No doubt the fear was that there would be a possible opportunity for cross-examination.

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Cogent evidence that the appellants were unwilling to make that disclosure which the law requires of transactions of brokers on behalf of their customers is—that notwithstanding all the evidence led by the respondents the appellants sat tight and although the office manager and other employees of the appellants, who could have reasonably given evidence shewing the alleged transaction as brokers on behalf of the respondents were present in Court, none of these parties was called. The learned trial judge remarks upon this in his reasons for judgment in the following terms:

> The defendants had their office manager and other employees in Court. If these transactions were honest nothing could have been easier than to lead evidence shewing such to have been the case.

Whilst the rules of the Stock Exchange are applicable in this case we have the most reckless disregard of those rules on the part of the appellants. In the present case there is no evidence whatever to shew that the respondents were ever undermargined and notwithstanding that the appellants sold the respondent's securities placed with the appellants and that without even notice to the respondent. (Meyer on Stockbrokers and Stock

Exchanges, pp. 364, 382, and cases cited.) I am satisfied that the evidence amply discloses in this case that there was a wrongful conversion of the collateral securities placed by the respondent with the appellants and there is no answer made to that evidence. I would refer to what Mr. Justice Duff said in *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601 at p. 618, which is peculiarly applicable to the present case where the appellants have absolutely defaulted in every respect in making a full and complete disclosure of their transactions on behalf of the respondent—in truth have not even attempted to verify their transactions in any particular:

> It is not a question, in my view, whether Ames & Co. did something analogous to a conversion of the defendant's stock in procuring from Chandler & Co. an advance of a portion of the purchase money on the terms on which it was procured. The advance by Chandler & Co. and the purchase, must, I think, be treated as a single transaction; and the real question put in the form most favourable to Ames & Co. is: Had they as a result of the transaction in question 300 shares of the specified stock which on payment of the sums referred to they were legally entitled to appropriate and deliver to the defendant? To shew that they had was, I think, part of the respondents' case.

The appellants here are in the position the respondents were in the *Conmee* case. It is plain by not adducing evidence shewing and duly accounting for the collateral securities here in question that there was a conversion thereof. I would adopt the concluding sentence of Mr. Justice Duff above quoted as being peculiarly applicable to this case—"To shew that they had was, I think, part of the respondents' [here the appellants'] case."

The futility of this appeal is only too apparent—a sale of collateral securities without warrant or authority and no accounting therefor—a plain case of conversion.

I would dismiss the appeal.

MACDONALD, J.A.: I will not express an opinion on the debatable point as to whether or not the appellants were improperly compelled to produce books in respect to which privilege was claimed on the ground of tendency to incriminate (*Attorney-General* v. *Kelly* (1916), 10 W.W.R. 131; *Webster and Kirkness* v. *Solloway, Mills & Co. Ltd.* (1930), 3 W.W.R. 445). I agree with the Chief Justice that the point cannot be raised at this stage. After strenuous objection the order to produce was

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complied with; true to avoid the immediate consequences of non-compliance but yet without reservation. Appellants' counsel might have insisted upon his rights, submitting to judgment and launching an appeal. Instead he produced the books and made use of them in the course of the trial in the conduct of the defence. By following that course the objection was in effect withdrawn.

On the merits, after full consideration, I am not prepared to differ from the learned trial judge. An important point, as to the burden of proof, arises in the consideration of the evidence. It was discussed in *Sunderland* v. *Solloway, Mills & Co. Ltd.* (1931), 44 B.C. 241, but as the Supreme Court of Canada in dismissing the appeal did not assign reasons I feel that I must be guided by the record and assume that the views of the majority expressed in the decision of this Court prevailed.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Farris, Farris, Stultz & Sloan.*
Solicitor for respondent: *J. Edward Sears.*

McDONALD v. WOLVERTON AND BARRETT.

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McDONALD v. WOLVERTON

Mines and minerals—Agreement to perform assessment work—Action for work and labour—Pleadings—Absence of material fact—Delay in applying to amend—Part of the costs disallowed.

In an action for work and labour in connection with the performance of assessment work on mineral claims, the plaintiff failed to include in his plaint as filed the essential averment that "the work was done at the request of the defendant" and the defendant by his dispute note and at the trial took the objection that the plaint disclosed no cause of action. The plaintiff did not apply to amend until the hearing of the appeal, when the application was granted and the judgment given in the plaintiff's favour in the Court below was affirmed, but the Court signified its disapproval of the delay in applying to amend by allowing the plaintiff only two-thirds of the costs he would otherwise be entitled to in the Court below and on appeal.

APPEAL by defendant Wolverton from the decision of YOUNG, Co. J. in an action to recover $717.50 for performing the assessment work on the Grandview group of mineral claims in the Omineca Mining Division in the County of Prince Rupert in the months of May and June, 1930, under an agreement between the plaintiff and the defendants. Judgment was given for plaintiff for the amount claimed. Statement

The appeal was argued at Vancouver on the 16th and 19th of October, 1931, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A.

O'Halloran (*C. F. R. Pincott,* with him), for appellant: The defendant Barrett died shortly after the action was brought. The action arose over the assessment work done on the Grandview group consisting of seven claims, by the plaintiff in May and June, 1930. We say first, that the plaintiff does not plead that the work was done at the request or authority of Wolverton, and secondly, that there was no privity of contract as between the plaintiff and Wolverton. Failing to plead ratification is fatal: see *Decow* v. *Pearce* (1919), 1 W.W.R. 93; *Roberts* v. *Pollock* (1926), 3 W.W.R. 705 at p. 706. Argument

L. S. McGill, for respondent: As to pleadings see *Philipps* v.

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Philipps (1878), 4 Q.B.D. 127 at p. 130. He should have asked for further particulars. In any case I can apply to amend now and I do so. Wolverton's evidence was not taken by a judge and should be struck out: see *Scott* v. *Fernie* (1904), 11 B.C. 91.

O'Halloran, in reply, referred to *Donkin* v. *Disher* (1913), 49 S.C.R. 60; *Canadian Bank of Commerce* v. *Patricia Syndicate* (1921), 64 D.L.R. 663; *Johnson* v. *Johnson* (1913), 18 B.C. 563; *Airey* v. *Empire Stevedoring Co.* (1914), 20 B.C. 130 at pp. 133, 135-6; *Bushby* v. *Tanner* (1924), 34 B.C. 270.

Cur. adv. vult.

5th January, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I concur in the reasons for judgment handed down by my brother M. A. MACDONALD.

MARTIN, J.A.

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

GALLIHER, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The action was one for work and labour done on the Grand View group of mineral claims in the Omineca Mining Division, being the required statutory assessment work, but the plaint as filed did not contain the essential averment that the work was done at the request of the defendant Wolverton (appellant) and although the amended dispute note, paragraph 11, read "The defendant Wolverton says that the plaint discloses no cause of action against him," and that point was taken upon the trial by the defendant, the plaintiff (respondent) made no application to the learned trial judge for the necessary amendment. At this Bar application was made, *i.e.*, for that necessary amendment and leave was given to amend but in view thereof and the late date of amendment the Court, to signify its disapproval of the lateness of application, reserved the question of what costs should be allowed the respondent if the judgment of the learned trial judge should be affirmed by this Court.

I am not able to come to any different conclusion upon the facts than that arrived at by the learned trial judge and the facts fully support the required request and the work done

enured to the advantage of the appellant and preserved the mineral claims, *i.e.*, kept them in good standing. I find myself quite unable to say that the learned trial judge was wholly wrong; on the contrary my conclusion is that the learned judge arrived at the right conclusion. In cases of this character where oftentimes the work has to be done with time pressing—otherwise irreparable loss will ensue—it requires the very closest scrutiny to determine whether or no due authorization has been given and in the interests of justice when the work has been performed and has enured to the advantage of the owner of the claims it does not do to be too critical of the facts and circumstances, always bearing in mind, though, that the conclusion is based upon sufficient facts to warrant the holding that there was that request which the law requires. A further matter to keep in mind is that oftentimes the work done has to be carried out in remote and almost inaccessible areas. In view of the lateness of the application made to amend I think that it may well be ordered that the respondent whilst succeeding upon the appeal should only be allowed two-thirds of the costs he would otherwise be entitled to in the Court below as well as here.

MCPHILLIPS, J.A.

I would dismiss the appeal.

MACDONALD, J.A.: Objection was taken by appellant at the trial and on appeal that respondent's plaint disclosed no cause of action. The claim was for assessment work "done and caused to be done by the plaintiff [respondent] for the defendant [appellant] and for fees paid to the mining recorder to record the same." The objection is sound. The "material facts on which the plaintiff relies" (Order I., r. 4, County Court Rules) must be set out in the plaint and a necessary averment is "at the request of" the defendant. The plaint must shew that the defendant made himself liable to the plaintiff for the work done. (Bullen & Leake's Precedents of Pleadings, 8th Ed., 257-8; *Roberts* v. *Pollock* (1926), 3 W.W.R. 705). The respondent on the hearing of this appeal asked to be allowed to make the necessary amendment. The application should be granted. A question of costs arises. No cause of action was disclosed by the plaint. I would allow the plaintiff (respondent) two-thirds of the costs here and below.

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The trial judge "preferred to accept the evidence submitted by the plaintiff" [respondent].

The defence is: (1) That appellant did not authorize the work; (2) that a co-defendant (Barrett) who died between service of plaint and the trial was alone responsible; (3) that appellant and Barrett were not partners (no proof of it) and in any event appellant was not sued as a partner; (4) that the debt arose out of a separate contract made by the deceased Barrett.

I think the trial judge was justified in finding, in effect, that the work was done by respondent for the appellant upon the request of his agent Barrett. I would put it on that ground. Appellant examined the property. He asked respondent to set a price on it and in his own name took an option for ten days. Appellant did not say he was acting on behalf of others. When that option expired another was taken (the price $60,000) appellant being the purchaser. It provided that

> The purchaser will pay any taxes, rates, levies, assessments, charges, moneys, liens, costs of suit or matters relating to liens or encumbrances which he the purchaser may contract.

MACDONALD, J.A.

The claim in this action is for assessment work done by respondent, without which the claims would otherwise have lapsed. It is a meritorious claim and it is sought to evade responsibility by shifting liability on a co-defendant, now deceased. Appellant, after taking the ten-day option, told respondent to call at his office in Vancouver (*i.e.*, for instructions, etc.) and "if he [appellant] was not there his partner J. A. Barrett would be there." He told respondent that Barrett was his partner. This need not mean a partnership in the legal sense. The true construction of the statement to respondent is —that, in the event of appellant's absence from the office when respondent called, Barrett would be there to act as his representative and to take his place. He in effect told respondent that Barrett would be his agent and later wires shewed that Barrett acted in that capacity. Having held out Barrett as having authority to act in his place he cannot now be heard to say that he acted beyond the scope of his actual authority. Barrett's act therefore, as agent, in requesting respondent to

> Do assessment work and register same for $700 as agreed: also bring out samples and ship to us [*i.e.*, to Barrett and appellant]

is binding on the principal, with respect to the respondent dealing in good faith with the agent. It is not necessary therefore to rely on the clause in the option above referred to. It is only confirmatory of the contract. Nor need the assignment of the claims to a company be referred to.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Pincott & Pincott.*
Solicitor for respondent: *L. S. McGill.*

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EBERTS v. TAYLOR.

Costs—Lien for—Equitable charge—Absence of ground for—Partnership dealings—Action for accounting—Point not raised in notice of appeal nor on the argument.

EBERTS v. TAYLOR

Where one party succeeds in an action and is awarded costs, there is no authority for charging these costs against the property of the other party, irrespective of any equity in the successful party's favour. It is only when there is an equity that an equitable charge can be created.

MOTION to settle minutes of judgment of the Court of Appeal. The action was that an account be taken of the partnership funds and assets of the late law firm of Messrs. *Eberts & Taylor,* and for judgment for such sum as may be found due from the defendant. For a declaration that the plaintiff is entitled to an undivided one-quarter interest in section 10, Rupert District, known as Haddington Island Quarry, and a conveyance of said interest from *W. J. Taylor* to the plaintiff, further for an account of all moneys received by said *W. J. Taylor* in respect of said quarries and judgment for one-half of the moneys so received. An accounting of the partnership assets was ordered but the registrar found that owing to the length of time which had elapsed and to the fact that the books of the late firm were so incompletely and irregularly kept, it was impossible to ascertain the *status* of the partners of said firm. By the judgment of GREGORY, J. of the 20th of February, 1931, the registrar's certificate was confirmed and the defendant *Taylor* was ordered to execute a conveyance of a three-twelfths' interest in the said quarry to the plaintiff. It was further ordered that the plaintiff was entitled to a lien on the remaining three-twelfths' interest in the said quarry, held by the defendant *Taylor* for all costs ordered to be paid by the defendant to the plaintiff in the action, and that the costs of the reference be paid by the defendant to the plaintiff forthwith after taxation. On appeal from the decision of GREGORY, J. it was held on the 6th of October, 1931, *per* MACDONALD, C.J.B.C., GALLIHER and MACDONALD, JJ.A. (MARTIN and MCPHILLIPS, JJ.A. dissenting), that the learned trial judge in disposing of the costs of all

Statement

proceedings in the Court below in the plaintiff's favour was not warranted in making them a lien on the defendant's three-twelfths' share in the Haddington Island Quarry, but with this variation the appeal should be dismissed.

The motion to settle the minutes of judgment was argued at Vancouver on the 20th of November, 1931, before MACDONALD, C.J.B.C., GALLIHER and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for the motion: As to our lien for costs against defendant's remaining interest in the Haddington Island Quarry. This point was not raised in the notice of appeal nor was it argued on the appeal. Rule 3 of our Court of Appeal Rules differs from the English rule in that it requires that the notice of appeal "shall set out the grounds of appeal." This distinction is pointed out in *Warmington* v. *Palmer* (1901), 8 B.C. 344 at p. 346; see also *Petty* v. *Daniel* (1886), 34 Ch. D. 172 at p. 180; *Manley* v. *Collom* (1901), 8 B.C. 153 at p. 165. Where there is no merit leave to add a ground of appeal will not be given: see *Fordham* v. *Hall* (1914), 19 B.C. 80. Even if the point were raised in the notice, as it was not argued it is deemed to be abandoned: see *Warmington* v. *Palmer, supra; The Custodian* v. *Blucher* (1927), S.C.R. 420 at p. 428. Even in England they are held strictly to the grounds of appeal: see *Wilson* v. *United Counties Bank, Ld.* (1920), A.C. 102 at p. 106. Argument

Hossie, contra, referred to *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672; *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (1912), A.C. 788 at pp. 807-8; *Attorney-General* v. *Simpson* (1901), 2 Ch. 671; 70 L.J., Ch. 828 at p. 839.

Per curiam: Although the question of the right to a lien for costs against the plaintiff's remaining interest in the Haddington Island Quarry was not a ground of appeal in the notice of appeal and was not raised in the argument before this Court, counsel should be heard on this point on Tuesday, the 24th of November, 1931. Judgment

Robertson, for the motion: The jurisdiction of the Court of Argument

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Chancery in partnership matters was practically exclusive: see Snell's Equity, 20th Ed., 487. Real estate was subject to an equitable lien: see Story on Equity, p. 288. No partner ordinarily has any specific interest in partnership assets. Partnership assets should be sold and after payment of claims the balance is divided between them according to respective interests. Costs of a partnership are on the same footing as costs of administration and come out of the partnership assets: see *Bonville* v. *Bonville* (1865), 35 Beav. 129; *Chapman* v. *Newell* (1891), 14 Pr. 208. In the case of an action owing to the misconduct of a partner, he is made to pay the costs: see *Hamer* v. *Giles* (1879), 11 Ch. D. 942; *Butcher* v. *Pooler* (1883), 24 Ch. D. 273; *Norton* v. *Russell* (1875), L.R. 19 Eq. 343; *Warner* v. *Smith* (1862), 9 Jur. (N.S.) 169. Unless we have a lien for our costs we are in no better position than we would be if there had been no misconduct on the part of *Taylor*. As to the right to a lien see *Mycock* v. *Beatson* (1879), 13 Ch. D. 384; *Ex parte King* (1810), 17 Ves. 115; *Middleton* v. *Magnay* (1864), 2 H. & M. 233; *Turner* v. *Marriott* (1867), L.R. 3 Eq. 744.

Argument

Hossie, contra: Although a partnership action it is the same as any other action as to costs, and a lien will not be granted except in the case of fraud or misconduct: see *Butcher* v. *Pooler* (1883), 24 Ch. D. 273. The costs come out of the estate unless there is fraud or misconduct. Equitable execution is not open to him, other remedies must first be exhausted: see *Neate* v. *The Duke of Marlborough* (1838), 3 Myl. & Cr. 407; *Morgan* v. *Hart* (1914), 2 K.B. 183; *Davidge* v. *Kirby* (1903), 10 B.C. 231; *Miller* v. *Pridden* (1856), 5 W.R. 171; *Flockton* v. *Peake* (1864), 10 L.T. 369.

Robertson, replied.

Cur. adv. vult.

5th January, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The trial judge in awarding the plaintiff costs added the term that she should have a lien upon the property of the defendant to secure them. The action was for an account of partnership dealings extending over 30 years. The registrar found on the reference to take the account that owing to the absence of books and because of the imperfect

manner in which those that were produced were kept it was impossible to take an account and so reported to the judge who confirmed the report. This left to be disposed of only the property of the partnership in existence at the present time which consists of a stone quarry known as the Haddington Island Quarry. It was decided that this should be partitioned between the parties in equal shares. Therefore, the action was reduced to that of a partition action and the said order was made in that action charging the plaintiff's costs upon the defendant's share of the partitioned property. Neither party was in possession of the Haddington Island Quarry. There was no possessory lien nor any lien at all in the true sense of the word. What the judge did was to make an order charging the costs upon the defendant's property. It was argued that an equitable lien was a charge but there were no equities one way or the other; both were equally responsible for the failure of the partnership account and neither was guilty of any impropriety in connection with the partition action. Therefore, there was no equity in favour of the plaintiff to give her a claim upon the defendant's property or to enable the judge to make a charge against it. It would, I think, be unfortunate to lay down a rule that where one party succeeds in an action and gets costs the judge may charge those costs against the property of the other party irrespective of any equity in her favour. I can find no authority for such a thing and I do not propose now to create one. It is only when there is an equity that an equitable charge can be created.

MACDONALD, C.J.B.C.

GALLIHER and MACDONALD, JJ.A. concurred in dismissing the motion.

GALLIHER, J.A.
MACDONALD, J.A.

Motion dismissed.

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STOBIE FORLONG ASSETS LTD. v. BARKER

STOBIE FORLONG ASSETS LIMITED AND MARTIN v. BARKER.

Stock-brokers—Bankruptcy—Trustee—Action to recover amount paid for shares for customers—Obligation to have shares available—Customer's obligation to tender amount due.

In an action by the trustee in bankruptcy of a stock-brokerage firm to recover moneys paid for shares on behalf of the defendant, the evidence disclosed and it was found by the trial judge, that the plaintiff was always in a position to deliver the certificates for the shares purchased by the defendant if he wanted them, and judgment was given for the amount claimed.

Held, on appeal, affirming the decision of GREGORY, J. that the identical shares purchased for the defendant need not necessarily be ear-marked and kept available for him, but the brokers must have available for delivery on demand and payment, enough of the kind of shares ordered by him; the defendant must however tender the amount due the brokers before he can insist on delivery of the shares. As he has not done so and enough shares are available for him, the plaintiff is entitled to recover.

APPEAL by defendant from the decision of GREGORY, J. of the 11th of May, 1931, in an action by Stobie Forlong Assets Limited as assignee of the trustee under the Bankruptcy Act of the property of Malcolm Stobie and Charles J. Forlong, trading as Stobie Forlong and Company, for money paid between the 12th of April, 1929, and the 8th of October, 1929, by said Stobie Forlong and Company, as stock-brokers for the defendant, and at his request in and about the purchase of stocks and shares and for commission and brokerage due from the defendant to said firm.

Statement

The appeal was argued at Vancouver on the 10th and 12th of November, 1931, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Gillespie, for appellant: We say the plaintiffs Stobie Forlong Assets Limited purchased shares for us in accordance with instructions, and then sold them. Later they purchased shares to cover our orders. This we say they cannot do and are not entitled to judgment: see *Cartwright & Crickmore, Ltd.* v. *MacInnes* (1931), S.C.R. 425; *Langton* v. *Waite* (1868), L.R.

Argument

6 Eq. 165; *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (1925), A.C. 489; *Clarke* v. *Baillie* (1911), 45 S.C.R. 50 at p. 80; *Hardwick* v. *Lea* (1847), 8 L.T. Jo. 387; *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601 at p. 609; *Clarkson* v. *Snider* (1885), 10 Ont. 561; *Peck* v. *Sun Life Assurance Co.* (1905), 11 B.C. 215 at p. 227; *Taussig* v. *Hart* (1874), 58 N.Y. 425.

A. H. MacNeill, K.C. (*Christopher Morrison,* with him), for respondents: We never sold his shares. This man bought on margin and always owed us money on the purchases we made for him. We always had stock on hand to cover the stocks he purchased: see Dos Passos on Stock-Brokers, 2nd Ed., p. 389; *Richardson* v. *Shaw* (1908), 209 U.S. 365; *Gorman* v. *Littlefield* (1913), 229 U.S. 19; *Langton* v. *Waite* (1868), L.R. 6 Eq. 165; *Clarke* v. *Baillie* (1911), 45 S.C.R. 50 at p. 76; *In re Stobie-Forlong-Matthews Ltd.* (1931), 1 W.W.R. 817 at p. 822. Argument

Gillespie, replied.

Cur. adv. vult.

5th January, 1932.

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

MACDONALD, C.J.B.C.

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

MARTIN, J.A.

MCPHILLIPS, J.A.: The learned trial judge, Mr. Justice GREGORY, in my opinion, arrived at a proper conclusion and the appeal should be dismissed. I do not think it necessary upon the facts to state other than that I am in full agreement with the capitulation of them as set forth by the learned trial judge. The case has to be viewed as one where the appellant was speculating in stocks and the respondent company made advances from time to time to the appellant and finally these advances stood at $27,161.02, when the action was brought by the respondent trustee in bankruptcy, the learned trial judge allowing in his judgment the sum of $22,361.72.

One specific finding of fact may perhaps be well set forth before I proceed to discuss relevant questions of law and that reads as follows:

I find as a fact, in case this case is going any further, that the plaintiffs did have stock on hand, and were able to deliver it if called upon. Since

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the assignment the certificates have gone backward and forward and apparently they are lost, [this was referring to four certificates only] some of them; but of course, unless they can produce them today, they are not entitled to recover for their missing stock.

And this accounts for the reduction of the amount of the claim, counsel for the plaintiffs (respondents) agreeing at the trial that there should be such deduction. The learned trial judge, in my opinion, was fully justified in making the finding of fact above set forth. In *Clarke* v. *Baillie* (1911), 45 S.C.R. 50 at p. 80, we find Anglin, J. (now Chief Justice of Canada) saying:

> It is well established that where a broker, who is under agreement to purchase and carry stock for a client, sells that stock without authority, leaving himself without other stock of the same kind available to satisfy his client's claim upon him, he becomes liable in equity, at the option of his client, to account to him for the proceeds of the sale, or the value of the shares as upon a conversion thereof to his own use, and he cannot escape that liability by purchasing and tending to the client the same number of similar shares.

There are two decisions in the Supreme Court of the United States that may be usefully referred to in the present case, *viz.*, *Richardson* v. *Shaw* (1908), 209 U.S. 365, and *Gorman* v. *Littlefield* (1913), 229 U.S. 19. In the head-note in the *Gorman* case we have the following statement:

MCPHILLIPS, J.A.

> Where the trustee of a bankrupt broker finds in the estate certificates for shares of a particular stock legally subject to the demand of the customer for whom shares of that stock were bought by the bankrupt, the customer is entitled to the same although the certificates may not be the identical ones purchased for him. *Richardson* v. *Shaw* [(1908)], 209 U.S. 365.

In the present case the appellant was entitled to the shares and entitled at any time to have them delivered to him—conditional, of course, upon his paying the amount due to the brokers—but no demand was made accompanied by the amount owing by him to the brokers (now, of course, to be paid to the trustee in bankruptcy).

In *Clarke* v. *Baillie, supra,* Anglin, J. said at p. 76:

> 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 *In re Stobie-Forlong-Matthews, Ltd.* (1931), 1 W.W.R. 817, we have Fullerton, J.A. saying at pp. 822-3:

> The claimant here on October 14, 1929, bought through the insolvent's head office at Winnipeg 500 shares of San Antonio Gold Mines, Ltd., and paid for them in full. He received the usual "bought note" but never received the certificates for the shares. The transaction is shewn in the books of the insolvent as a purchase of stock on his behalf upon which payment had been made in full. The evidence shews that the insolvent forwarded the order for the shares to their Toronto agents and received a reply advising that the shares had been purchased. On the date of the winding-up there were sufficient San Antonio shares to satisfy the demands of all the purchasers of San Antonio shares. Under these circumstances, can the claimant ask that 500 of the shares now in the possession of the liquidator be handed over to him? The answer of the liquidator is that the claimant must identify his shares. He, however, does shew that the moneys of the several purchasers of San Antonio have gone into the purchase of the very shares now in the possession of the liqudator. It would follow that these shares are the property of these purchasers and did not pass to the assignee.
>
> It is impossible to find English authority, for the reason that the customs and usages of stock-brokers there are very different from those in vogue in this country. In *Clarke* v. *Baillie* (1911), 45 S.C.R. 50, at 76, Anglin, J. (now C.J.) said: "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."
>
> 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.

MCPHILLIPS, J.A.

The above quotation is exceedingly apt as indicating the true legal position in the present case. In the present case though, no difficulty arises at all. The trustee in bankruptcy demonstrated

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at the trial that all the securities that the appellant could call for (save as to four in some way mislaid) were available for delivery to the appellant, the appellant paying the amount due to the brokers to the trustee in bankruptcy, the person entitled thereto, but the appellant failed in doing this and naturally the judgment now under appeal was duly entered.

In my opinion there can be only one result and that is that the appeal should stand dismissed.

MACDONALD, J.A.: The appellant resists payment of a claim of $22,361.72 made by respondent, trustee in bankruptcy of Stobie Forlong Assets Limited in respect to a balance due arising out of the purchase of stocks and shares by Stobie Forlong Assets Limited as stock-brokers, for and at the request of the appellant, on the ground that in so far as purchases are concerned the shares bought became the property of appellant and the latter is entitled to delivery of the identical shares purchased before an action for the purchase price can be maintained.

Respondents submit that the action is brought to recover moneys paid for the purchase of shares at the request of the appellant and that upon the purchase, the money paid therefor is due from appellant and an action may be maintained to recover it. The submission is that, while shares purchased must be delivered, in so far as the form of the action is concerned the appellant must claim delivery by way of counterclaim. The true view, I think, is that the respondents must be ready and willing to make delivery of shares purchased and cannot obtain judgment without doing so. But respondents must take the first step, *viz.*, make the necessary payment.

MACDONALD, J.A.

It was not necessary, however, that the identical shares bought for appellant should be ear-marked and kept available although shares must be available for delivery when demanded and upon payment. The respondent had in its possession, and was at all times ready to deliver, and during the trial did deliver, enough shares of the particular stocks purchased, free from the demands of others, to satisfy the only demand respondents could properly make upon making payment. In *Richardson* v. *Shaw* (1908), 209 U.S. 365 (and Chief Justice Anglin in *Clarke* v. *Baillie* (1911), 45 S.C.R. 50 at p. 76 points out the value of American

decisions in cases of this sort), it was pointed out that the stock certificates were not the property, but the evidence of it, and unlike articles of personal property shares representing precisely the same kind and value may be substituted for the shares purchased on the order of the client without making any material change in the property rights of the customer.

In *Stobie-Forlong-Matthews, Ltd.* (1931), 1 W.W.R. 817, it was held that where the relationship was that of principal and agent it was sufficient if the certificates on hand held available for the client were of a kind and number sufficient to meet the demands of all purchasers of such shares.

On the point of failure to tender shares before the writ was issued it was enough if—as was the fact—respondents were in a position to deliver shares against payment. The appellant, as already stated, was first obliged to pay before he could demand delivery. It was for him to tender the amount due before demanding that respondents should take the second step, *viz.*, deliver the shares.

Appellant's view is not supported by such cases as *Ellis & Co.'s Trustee* v. *Dixon-Johnson* (1925), A.C. 489, where, not the balance due in a general trading account in various stocks was considered, but rather where specific securities were deposited with stock-brokers for any debit balance which might be owing from time to time and these securities were sold, without the knowledge or authority of the client. The latter had a right to redeem or demand upon payment of the debt and to have his securities returned upon doing so in accordance with the equitable rule that when a creditor holding a security sues for his debts he must upon payment hand over the security. Even there, however, the disposition made by Lawrence, J. of ascertaining the market value of the missing shares and crediting it on the debt was not interfered with.

In *Conmee* v. *Securities Holding Co.* (1907), 38 S.C.R. 601, also certain shares were pledged with other brokers for a greater sum than was due from the client and the pledgors were not in a position to make delivery on payment by the customer of the amount owing. On the general question in issue in this appeal Davies, J. at p. 609 said:

> I take it there cannot be much difference of opinion as to the law regu-

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lating the broker's rights and liabilities towards his customer on the purchase of stock on margin. The broker must at all times have on hand stock sufficient in quantity to deliver to his client upon the payment by the latter of the amount due by him upon the stock. The purchaser does not rely upon nor does his right depend upon an engagement with the broker to procure and furnish the shares when required but upon the latter's duty and obligation to purchase and hold for the customer the number of shares ordered by the latter subject only to the payment of the purchase price or such part of it as may be unpaid.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *W. D. Gillespie.*
Solicitor for respondents: *A. H. MacNeill.*

IN RE IMMIGRATION ACT AND MUNETAKA SAMEJIMA.

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Immigration Act — Order for deportation — Habeas corpus — Reasons for rejection insufficient in order—Discharge of immigrant—Amendment of order—Immigrant rearrested—Held for deportation—Habeas corpus —Writ quashed—Appeal—R.S.C. 1927, Cap. 93, Secs. 23, 33 (7) and 42.

Munetaka Samejima, who was detained under a deportation order of the Board of Inquiry at Victoria, was discharged on *habeas corpus* proceedings on the ground that the reasons for rejection were not sufficiently set out in the deportation order. The order was amended, setting out the reasons for rejection, and he was rearrested and held for deportation without further inquiry. A further application for his discharge under *habeas corpus* proceedings was dismissed.

Held, on appeal, *per* MACDONALD, C.J.B.C. and MCPHILLIPS, J.A., that under section 23 of the Immigration Act the Court cannot interfere with the order of the Board except by reason of citizenship or domicil, neither of which arise here, and the Board had entire jurisdiction in the matter. The order made by FISHER, J. was therefore a nullity and the Crown has the right to stand on the original order and detain the immigrant for deportation. The appeal should therefore be dismissed.

Per MARTIN and MACDONALD, JJ.A.: That the jurisdiction to review the proceedings of the Board of Inquiry remains in two cases in addition to those expressly conferred by section 23, namely, where the Board has acted without jurisdiction, and where the wrongful acts of the Board amount to a violation of the essential requirements of justice. Mr. Justice FISHER has set aside the order of deportation complained of and no appeal has been taken from that order. Under the circumstances the order of Mr. Justice FISHER was a proper order to make and should not be interfered with. Further, even if the proceedings under the amended order could be invoked, there is the incurable defect that after the rearrest there was no reinvestigation of the accused on the definite charge that was for the first time laid against him, but he was condemned on said charge without being given an opportunity to meet it, and sentenced to deportation in his absence. For both reasons the appeal should be allowed.

The Court being equally divided the appeal was dismissed.

APPEAL by accused from the order of MURPHY, J. of the 30th of October, 1931, dismissing his application on the return to a writ of *habeas corpus*, and quashing the writ. Munetaka Samejima came to Canada in September, 1928, as a domestic servant, but on arriving he found that a Japanese merchant who was to employ him as a servant was no longer in a position to do so. Statement

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Statement

He could not get employment as a domestic servant, and worked for seven months as a labourer and then worked in the mills at Chemainus. He was arrested by the Immigration officials in April, 1931, and was ordered to be deported by the Board of Inquiry at Victoria on the 29th of April, 1931. On *habeas corpus* proceedings he was discharged from custody by order of FISHER, J. of the 8th of July, 1931, and the order for deportation was quashed. He was rearrested at Duncan and brought to Victoria and detained for deportation pursuant to an amended order for deportation on the 23rd of September, 1931. A further writ of *habeas corpus* was issued on the 30th of September, 1931, and on the 30th of October this writ was quashed.

The appeal was argued at Victoria on the 28th and 29th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

O'Halloran, for appellant: After the deportation order was quashed by FISHER, J. on the 8th of July, he was arrested on an amended deportation order. My submission is that this was no order and the whole proceedings a nullity. They had not acted in accordance with the provisions of the statute and there was no jurisdiction to make the order: see *In re Immigration Act and Munetaka Samejima* (1931), 44 B.C. 317. Section 23 of the Immigration Act does not apply here as there was no order. As to the order of Mr. Justice MURPHY, he assumed to follow *Rex* v. *Governor of Brixton Prison. Ex parte Stallmann* (1912), 3 K.B. 424, but that case is against him. See also *In re Low Hong Hing* (1926), 37 B.C. 295 at pp. 301-2; *Re Munshi Singh* (1914), 20 B.C. 243; *Re Pappas* (1921), 29 B.C. 318 at p. 319; *Rex* v. *Nat Bell Liquors, Lim.* (1922), 91 L.J., P.C. 146 at p. 159. There was no jurisdiction to make the amending order as they deprived us of the right of a hearing, also of the right to appeal to the minister. Non-compliance with these formalities cannot be overlooked: see *The Ash-Temple Co.* v. *Wessels* (1926), 36 B.C. 424 at p. 427. If there was no jurisdiction section 23 does not apply and a deportation order can only be made after an arrest and an inquiry: see *Rex* v. *Chin Sack* (1927), 39 B.C. 223 at p. 225; *Eshugbayi* v. *Nigeria Government (Officer Administering)* (1931), 100 L.J.,

P.C. 152; *In re Jeu Jang How* (1919), 27 B.C. 294 at p. 297. Without express words in the statute *habeas corpus* cannot be taken away: *Re Harry K. Thaw (No. 3)* (1913), 13 D.L.R. 715; *Rex* v. *Lantalum; Ex parte Offman* (1921), 62 D.L.R. 223; *In re Immigration Act and Mah Shin Shong* (1923), 32 B.C. 176 at p. 182. He was arrested the second time on the same charge: see *Rex* v. *Brixton Prison (Governor); In re Stallmann* (1913), 82 L.J., K.B. 8. There must be another hearing on the second arrest.

Clay, for respondent: If the accused is not a Canadian citizen or has not Canadian domicil there is no appeal under section 23 of the Act: see *Re Munshi Singh* (1914), 20 B.C. 243; *In re Immigration Act and Munetaka Samejima* (1931), 44 B.C. 317; *In re Wong Shee* (1922), 31 B.C. 145. The Board did comply with the provisions of the Act and FISHER, J. had no jurisdiction to hear the case: see *Rex* v. *Nat Bell Liquors Ld.* (1922), 2 A.C. 128 at pp. 151-2; *In re Henderson* (1930), S.C.R. 45 at p. 51. The order was amended but this was a continuing arrest when he was taken into custody the second time. There was no necessity for a further inquiry in the case of his being improperly discharged: see *Rex* v. *Goldberg* (1919), 33 Can. C.C. 320 at pp. 327-8; *Attorney-General of Hong Kong* v. *Kwok-a-Sing* (1873), 12 Cox, C.C. 565 at p. 573; *Arscott* v. *Lilley* (1886), 11 Ont. 153; *Rex* v. *Governor of Brixton Prison; Ex parte Stallmann* (1912), 23 Cox, C.C. 192 at p. 208; *Lawrie* v. *Lees* (1881), 7 App. Cas. 19 at pp. 34-5.

Argument

O'Halloran, replied.

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

The first thing to be considered in the case is the jurisdiction of the Board of Inquiry. That jurisdiction is given by the Immigration Act. The Board, therefore, entered upon its duties with jurisdiction to decide whether this man was properly in Canada, or whether he was not.

MACDONALD, C.J.B.C.

Having made an inquiry and come to the conclusion that he should not remain in Canada, section 23 of the Immigration Act says that no Court, and no judge or officer thereof, shall have jurisdiction to interfere with that order, either to quash it or review it, except for two reasons, one by reason of citizenship,

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and the other of domicil, neither of which is involved in this case, because this man had neither citizenship nor domicil.

But the Court has given another reason. If the Board had no jurisdiction, then the Court had a right to set the judgment aside.

In this case I think the Board had entire jurisdiction in the matter. How they proceeded is not a matter of interest at all. They may have been absolutely wrong in finding that he ought to be deported; they may have gone right in the teeth of the evidence, but nevertheless the Parliament of Canada has said, on no ground whatever is it to be interfered with. So there is no question in my mind that the Board's order was properly made and could not be interfered with by Mr. Justice FISHER, or any other Court, and therefore Mr. Justice FISHER'S order was a nullity.

MACDONALD, C.J.B.C.

There are two courses open to the Crown. The Crown might say, we will treat Mr. Justice FISHER'S order as a nullity, keep the person where he is and deport him; or if we want to get rid of that order, move by way of appeal to set it aside. The Court would have power to review the order of the judge, but not the order of the Board.

They let the man go, and they afterwards amended the order by adding a few words which did not go to the jurisdiction at all, and they rearrested him on another warrant. That was unnecessary; they could do that at any time under the original order and have held him for deportation. Therefore what they did was futile. There was no right to amend. They should have stood upon that order, and in fact they have done so, since it is in effect. They are right now in standing upon that order. They have the right to detain him for deportation.

With that view of the case, and that seems to be the only possible view to take in view of the sections of the Immigration Act, the appeal cannot succeed.

MARTIN, J.A.

MARTIN, J.A.: In my opinion this appeal should be allowed, with all deference to contrary views.

This Court has already decided unanimously in the case of *In re Low Hong Hing* (1926), 37 B.C. 295, on the corresponding section 38 (now 37) of the Chinese Immigration Act, Cap.

95, R.S.C. 1927, which is identical in relevant essentials with section 23 of the Immigration Act, Cap. 93, now under consideration, that in the proper construction of the language of Parliament employed therein, the jurisdiction of the Court to review, quash or otherwise interfere with the proceedings of the Board of Inquiry still remains in two cases at least, in addition to those expressly conferred, where the person detained has Canadian citizenship or domicil, *viz.*, first, where the Board has acted without jurisdiction; and second, where what has been wrongly done in the exercise of its jurisdiction amounts to a violation of the "essential requirements of justice," I shall not refer further to that case, it speaks for itself and is a judgment of this Court and binding upon us.

In the exercise of that jurisdiction, Mr. Justice FISHER, sitting as the Supreme Court of British Columbia, set aside the order of deportation complained of, *i.e.*, "reviewed and quashed" it, to use the words of the statute and so employed in the order of the Court over which he presided and given under its seal as set out on p. 27 of the appeal book, wherein it was declared that the present appellant "be discharged from the custody of [the Immigration authorities] . . . and that the order . . . for [his] deportation be and the same is hereby quashed."

MARTIN, J.A.

No appeal was taken from that judgment and it was pronounced under circumstances in which the Court could properly have had jurisdiction and as there is nothing on its face to shew any want of jurisdiction it must be presumed that it existed, and so it is improper for this Court to interfere with it or go behind it while it stands as a valid judgment, for we cannot now assume the functions of a Court of Appeal over it—*cf.*, even in the case of inferior Courts, *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; *Reg.* v. *Bolton* (1841), 1 Q.B. 66, and *Rex* v. *Morn Hill Camp Commanding Officer* (1917), 1 K.B. 176, wherein it was said, p. 180, that the same principles apply in *habeas corpus* as in *certiorari*.

When the matter came before Mr. Justice MURPHY, on the second application for *habeas corpus* after the second arrest, he very properly did not, as his reasons shew, essay to base his judgment and his consequent order upon the ground that Mr. Justice FISHER's said order was invalid upon the facts before

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him, but took another ground which was properly open to him to take, *viz.*, he thought that even though there had been a second arrest of this appellant upon an amended order of deportation, nevertheless that amended order could be justified by the decision of the King's Bench Division in England, in *Rex* v. *Governor of Brixton Prison; Ex parte Stallmann* (1912), 3 K.B. 424; 23 Cox, C.C. 192.

Now if that case had been on a par with the present one, I would, even though it is not binding on us, have little to say under its particular circumstances, but, as was pointed out by Mr. *O'Halloran,* for the appellant, it contains in fact and law fundamental distinctions, and when it is thoroughly understood it is not an authority in support of the decision now appealed from, but is against it. We find, for example, Mr. Justice Phillimore saying, at p. 449, that though there may be a rearrest (in proper circumstances) on an extradition warrant, yet if one is made even on a valid warrant, then the case of the arrestee must also be "fully investigated before his committal" thereupon. And, again, the charge in the original British warrant upon which the applicant was rearrested was the same as that upon which he was arrested and liberated in India and because there had been in law a real decision in India of the charge upon the merits, it was held that the original charge could be proceeded with in England.

Now the primary complaint in the present case is that the original order of the Board has been accepted and acted upon by itself as unsound and insufficient to support a rearrest, and so it improperly assumed jurisdiction to amend its proceedings by setting out, for the first time, a definite charge against the appellant and arresting him thereunder; that was the whole and sole reason for the amended order, because the first order for release was defective, as Mr. Justice MURPHY says, owing to the fact that the particular breach of the Immigration Act was not set out as is required. But the Board having illegally amended its proceedings and reframed the charge so as to formulate it particularly and properly for the first time against this person, and arrested him thereunder, proceeded to deport him without giving him an opportunity to shew cause against that very grave punitive proceeding.

My mind is shocked by such a miscarriage of justice, and I am sure that if anything of the kind had been before the King's Bench Division in the *Brixton Prison* case they would have given it no sanction whatever, and I feel it is our duty to do likewise herein.

I therefore put my decision on two grounds: first, that under the circumstances the order of Mr. Justice FISHER was a proper order to make, and we are not justified in interfering with it; and, second, that even if the proceedings upon the Board's amended order could be invoked at all they contain the incurable defect that after the rearrest there was no reinvestigation of the accused on the definite charge that was for the first time then laid against him but, on the contrary, he was in effect condemned upon that amended charge without being given any opportunity to meet it and sentenced to deportation in his absence. It is a coincidence, but it was upon that very ground (violation of natural justice) that the applicant in the *Brixton* case had been liberated from his arrest on the first warrant in India, by the High Court of Justice there, in that he had not been given an opportunity to present evidence to meet the charge against him: in other words, no real trial of the charge had been held.

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With respect to the suggestion that the Board can now, at the eleventh hour, abandon its amending proceedings and the arrest thereunder by amended order, and fall back upon the first order and justify the second arrest thereunder, there are two complete answers to it, *viz.*, first, the original order is defective as aforesaid; and, second, even if it were not, the return of the immigration agent, Roff, dated 23rd October, 1931, to the writ of *habeas corpus* upon which the deportee is now detained by him shews, as it states specifically, that this detention is solely

> under and by virtue of an order of deportation a true copy of which is hereto annexed . . . and that the said Munetaka Samejima is detained by me by virtue of the said order of deportation and for no other reason whatsoever.

Now the "order annexed" is the amended and not the original order, and therefore the immigration agent has elected to justify and bring up the body in accordance with his return and no other return is before us or can be relied upon by the said agent or even considered by us—*cf.* Crown Office Rule (Civil) 241.

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As the case in this Court of *Re Munshi Singh* (1914), 20 B.C. 243 has been cited and misconceived I refer to it only to say that it clearly supports, if support were needed, our later consistent decision in *Low Hong Hing's* case, *supra,* as appears by the judgments of four members of the Court at pp. 258, 263, 269 and 277. For example, at p. 258 the learned Chief Justice gave some illustrations of cases wherein this same section 23 does not take away the remedial jurisdiction of the Court, *viz.*:

> Had the Board of Inquiry acted without jurisdiction, or upon orders in council made without authority, or upon a statute which was unconstitutional, no doubt the Court could and would interfere to prevent what in that case would be an illegal detention.

In my opinion it is apparent *ex facie* that the "essential requirements of justice" have been violated in this case by the proceedings of the Board and an unfounded jurisdiction exercised, and therefore the appeal should be allowed and the deportee set at liberty forthwith.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal, and I am in agreement with my learned brother the Chief Justice, upon the facts and the law.

There could be no misconception from the start, of the question to be inquired into. The evidence is complete, that the authorities had the suspicion that Munetaka Samejima came into Canada by misrepresentation. That is the threshold of the matter. I cannot agree that there was any failure of the statutory tribunal to proceed in due course, and nothing was done which was against natural justice. Munetaka Samejima was held, the claim being that he came here making the misrepresentation that he was going to be a domestic servant, with a named person, and that was false; there was nothing to support the truthfulness of that statement.

The case of *Re Munshi Singh* (1914), 20 B.C. 243, is a decision of this Court which determined that no Court had jurisdiction to review or reverse any decision of any Board of Inquiry, unless the case was one who possessed Canadian citizenship or Canadian domicil, section 23 inhibiting it where the case was not one of Canadian citizenship or Canadian domicil.

I go to page 263 (in *Re Munshi Singh, supra*) where Mr. Justice IRVING made use of this language:

Section 23, [that is the section we are considering] to which our attention was particularly invited, deals with two classes of persons, namely, Canadian citizens and persons having a Canadian domicil—that is one class; the other class is "any rejected immigrant, passenger or other person, not being a Canadian citizen or having a Canadian domicil." With respect to the first class, in my opinion, the rights of the civil Courts to intervene have not been taken away. In such cases the Courts have a right to interfere by *certiorari*. With reference to the second class, the jurisdiction of the Court to review, quash, reverse, restrain or otherwise interfere, I shall not say has been taken away, but does not exist. The right to *certiorari* in the second class is limited to want of jurisdiction, or excess of jurisdiction, or fraud. In cases where the right of *certiorari* is taken away by statute, the Courts can, nevertheless, inquire as to the facts which go to the jurisdiction—that is, facts collateral to the matters they are to determine; but as to the merits of the case, the tribunal appointed is the sole judge. A person may apply to a civil Court to determine whether he falls within one class or other, but once it is established that he is a rejected immigrant or passenger, under the authority and in accordance with the Act, and is not a Canadian citizen or has not Canadian domicil, then the civil Court has no jurisdiction to investigate the correctness of the decision.

Now that is this case; and I am surprised that the learned judge gave the judgment he did; there must have been some oversight. There was no authority, with great respect, for the learned judge upon a *habeas corpus* proceeding to set aside anything, which he presumed to do, *i.e.*, set aside the Board's order for deportation. His whole duty was to apprise himself as to whether or not a person is illegally detained. Now when the matter came before the learned judge, how impossible it was for him to say that he was not rightfully held when, in the face of section 23 he could not enter into the subject-matter at all, or, in the language of my late brother IRVING:

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> With reference to the second class, the jurisdiction of the Court to review, quash, reverse, restrain or otherwise interfere, I shall not say has been taken away, but does not exist.

Notwithstanding, the learned judge made the order quashing the Board of Inquiry's decision. That can only be an order made without jurisdiction, a nullity, and one that this Court has no power, even to right, to consider—Parliament is the highest Court in the land.

Now with respect to the *Low Hong Hing* case, referred to by my learned brother MARTIN, with great respect I do not think it can have any bearing upon the matter we have now before us. In the first place, it is upon a different statute, and I am

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reminded of what Lord Parmoor once said in the Privy Council, that the decisions upon other statutes are not very helpful, and I do not think that any decision based upon the Chinese Immigration Act can be at all helpful to us in this matter. We have here a section which is so clear and precise that there can be no question of a doubt about its meaning. It reads:

> No Court, and no judge or officer thereof shall have jurisdiction to interfere with that order

unless such a person is a Canadian citizen or has Canadian domicil. Can there be any question of doubt as to the meaning of this? The appellant in this case had ample notice of his rights given to him, and when we turn to the proceedings, at pp. 28-29 of the appeal book we find this—this is the Board's finding, and this notice is appended:

> If you claim to be a Canadian citizen or to have acquired Canadian domicil you have the right to consult counsel and appeal to the Courts against deportation.

But the appellant did not come within either class. Now that was a plain intimation to the appellant of the situation of things. It is not advanced at this Bar—I asked Mr. *O'Halloran* precisely whether or not his client, the appellant, was a Canadian citizen or had achieved Canadian domicil. The learned counsel was not able to say that his client came within either class, *i.e.*, Canadian citizen or Canadian domicil. Well then, the appellant also was apprised and had notice of this:

> In all other cases [and here was one of these cases not having Canadian citizenship or domicil] you may appeal to the minister of immigration and colonization against any decision of the Board of Inquiry, or officer in charge, whereby you are ordered to be deported, unless such decision is based upon a certificate of the examining medical officer that you are affected with a loathsome disease, or a disease which may become dangerous to the public health. The formal notice of appeal will be supplied to you by the immigration officer in charge upon request.

Where was there any failure to give the appellant every opportunity, as in a Court of justice, to make out his case and to take his proceedings? The utmost care has been taken, as I see it, by the National Government in all the proceedings that took place.

I could go on in detail and go through this material to shew that there was not a thing left undone to rightly proceed and rightly inquire into the whole matter.

Then, a question comes up as to compliance with Form C of

the Act, *i.e.*, that the order was not properly filled up. I have as to this this observation to make: the Board it is true did not state in their first order the reasons in full, but there is no question about what their reasons were; they were orally stated to the appellant, as the proceedings shew, and all that was done later on was to fill in a blank space that which had been omitted, *i.e.*, any Court may at any time, so could this statutory tribunal, set forth the order actually pronounced. Now if it were necessary—and my learned brother the Chief Justice has indicated the non-necessity for it—but if it were necessary that there should be any amendment, I am of opinion that the amendment could rightfully be made, and made with legal warrant, because, after all, the filling in of the reasons for rejection can very well in a case of this character be said to be merely directory, and their absence not fatal.

In section 33, subsection 5 of the Act:

> An order for deportation by a Board of Inquiry or officer in charge may be made in the form C in the schedule to this Act, and a copy of the said order shall forthwith be delivered to such passenger or other person, and a copy of the said order shall at the same time be served upon the master or owner of the ship or upon the local agent or other official of the transportation company by which such person was brought to Canada; and such person shall thereupon be deported by such company subject to any appeal which may have been entered on his behalf under this Act.

MCPHILLIPS, J.A.

Now can it be said with any truth or with any force that the appellant did not know why he was to be deported? Why the whole inquiry was on this question of misrepresentation throughout, and it was pointed out how he said that he came in for his stated purpose, and he intimated that he was going into service in that certain capacity, which he never carried out. We have the word misrepresentation, it has no magical meaning. Misrepresentation is an English word not surrounded by the perplexities that arise in some specific legal terms. He made a statement to the Government officer at the time of his entry that was false and has been proved to have been false; that was the gravamen of the charge and that was what was inquired into. And the evidence is clear to demonstration that the appellant made no sufficient answer to the charge.

The only appeal was to the minister, and when you look at the proceedings, the appellant was so advised by the chairman of

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the Board, *i.e.*, that he had a right of appeal to the minister; and he could as well have said, as it would have been truthful: "You not being a Canadian citizen and not having a Canadian domicil are not now even without any opportunity for relief." But in effect the chairman had said this: "This order may be reversed by the minister; you have the right of an appeal to the minister." And the appellant then and there said: "I intend to appeal." Can there be any question about his knowing what he was going to appeal about—all exhibited to him, stated to him, and he did appeal to the minister, one of the Cabinet of the Government of Canada, and his appeal was denied.

So that under the statute law of this country this appellant has been treated fairly, in conformity with the law, and in accordance with natural justice throughout. He had a fair hearing, a proper inquiry, every opportunity was afforded to him to make out his case, and he exhausted his right of appeal. It would certainly be an anomaly if this Court, the highest Court of the Province, should solemnly give the judgment that they did in the case I have referred to (*Re Munshi Singh, supra*), that it would be possible for a judge in the Court below to absolutely disregard it and give a judgment not in conformity with it, when the decision of the Court of Appeal was based upon a statutory inhibition contained in the Dominion Immigration Act (section 23, Cap. 93). That is what occurred here. I feel confident, though, that some misunderstanding has taken place as to this Court's decision. It is true that since the amending provisions in the Court of Appeal Act allowing appeals in *habeas corpus* proceedings, it has been decided that in accordance with a view I always maintained—the decision is one of the Privy Council—that an application may be made to any judge, and even if the applicant has appealed and failed, and the learned judge below would have had the right to hear the application and grant the applicant his liberty, as Mr. Justice FISHER did, were it not in a case where there was express statutory inhibition, and therefore a nullity. Here the appeal is from Mr. Justice MURPHY, the appellant being again apprehended, under the Board's order for deportation, and that learned judge refused him his liberty. And we have been hearing a case on appeal from a learned judge who did not proceed

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in the same manner as Mr. Justice FISHER. This appeal is from an order made by Mr. Justice MURPHY, and Mr. Justice MURPHY had these authorities that I have referred to placed before him, and Mr. Justice MURPHY refused to release the appellant. It is not difficult to know upon what ground he came to that conclusion, but I should think he could well come to it on the ground of the merits themselves; and secondly he could also come to the conclusion naturally in view of our decision (*Re Munshi Singh, supra*) that I have referred to that he had no authority whatever to intervene in the matter, there being in this case the statutory inhibition.

So that I would conclude by saying that the appellant was, in accordance with British and Canadian justice, apprised of his misrepresentation complained of by the Crown, made upon his entry into Canada, and the Board of Inquiry held that he was wrongfully in Canada, he having every opportunity to meet the case that was outlined to him, and he attempted, I suppose as well as he could, to meet it. The Board, exercising its jurisdiction, found against him and made an order for deportation. If he had been a Canadian citizen or had Canadian domicil, he would have had recourse to the ordinary Courts of the land, but not being that, he was apprised that he would have an appeal to the minister, and that appeal he took, as referred to above. That appeal was a further examination of all the proceedings and all the evidence adduced, and the minister determined that the order of the Board was right in the premises.

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Now that is the history of this case, and it would be indeed deplorable if all the machinery that has been provided in Canada could be treated as provisions of naught, after fair, open and complete investigation, with not one supportable contention that there was any miscarriage of justice in one particular.

MACDONALD, J.A.: I have little to add to the views outlined by my brother MARTIN, beyond expressing concurrence. I think there is no doubt that under certain circumstances, outlined in the cases, and indicated by the section of the Act under review, it was open to Mr. Justice FISHER to review the decision of the Board of Inquiry. Whether or not he reached the proper conclusion is not material. If error crept in it could only be cor-

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rected by an appeal to this Court, and the time for doing so has expired. His order quashing the first order of deportation must therefore be regarded as final.

Having reached that conclusion further difficulties, if any, disappear. The so-called amended order was made without the observance of statutory prerequisites and without any further inquiry taking place. The first inquiry cannot be resorted to as a basis for the amended order. That being so, an essential principle of justice, *viz.*, an inquiry before sentence, was not observed. I would allow the appeal.

The Court being equally divided, the appeal was dismissed.

Solicitors for appellant: *O'Halloran & Harvey.*
Solicitor for respondent: *J. L. Clay.*

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GOWER v. CAMPBELL

GOWER v. CAMPBELL.

Peddler—Selling polish from door to door—Licence—By-law requiring—Appeal—Security for costs—"Includes"—Interpretation—B.C. Stats. 1919, Cap. 99, Sec. 18 (f)—R.S.B.C. 1924, Cap. 179, Sec. 2; Cap. 245, Sec. 78 (2).

On appeal by the informant from the dismissal of his complaint against the respondent for peddling goods without a peddler's licence under the Trades Licence By-law of the City of Victoria, preliminary objection by the respondent that there was no jurisdiction to entertain the appeal as the appellant had not furnished security for his appeal, was overruled, the Court holding that an informant appellant was not required to furnish security.

The definition of the word "peddler" in section 2 of the Municipal Act is an extension of the ordinary meaning of the word. The respondent therefore, who was peddling a "polish" from door to door that he made on his own premises was liable for the licence fee under the Trade Licence By-law, and the appeal was allowed.

Statement

APPEAL by the informant from the dismissal by the police magistrate at Victoria of an information against the defendant

for selling a polish from house to house without a peddler's licence under the Trades Licence By-law of the City of Victoria, under powers conferred by the Victoria City Act. Preliminary objection was taken by the defendant that the appellant not having furnished security for his appeal, there was therefore no jurisdiction to entertain the appeal. Argued before LAMPMAN, Co. J. at Victoria, on the 5th of February, 1932.

C. L. Harrison, for appellant.
F. C. Elliott, for respondent.

9th February, 1932.

LAMPMAN, Co. J.: The defendant Campbell lives in the City of Victoria and at his residence he uses certain materials and with them makes a polish which he puts into bottles and goes from house to house selling the bottles of polish or canvassing the householders to buy the polish. Some of the polish he sells to people who telephone for it and some of it he sells to a druggist in Victoria. In respect to this business he paid no peddler's licence fee to the City and an information was laid against him by licence inspector Gower who claimed that under the Trades Licence By-law he should have a peddler's licence. By section 18 (*f*) of Cap. 99, B.C. Stats. 1919, the City has power to pass a by-law to license "any hawker, peddler or huckster" and by section 2 of the said Act it is provided (in part):

Judgment

> In defining any word or expression used in this Act not by this Act expressly defined, reference may be had to the provisions of the Municipal Act . . . relating to the interpretation of words and terms used therein respectively.

In the interpretation clause of the Municipal Act, Cap. 179, R.S.B.C. 1924, it is stated that "hawker, peddler or huckster includes all persons," etc., and Mr. *Elliott* contends that because the respondent, Campbell, does not come within the persons included in this clause he is not required to have a peddler's licence.

The determination of the question depends on what construction should be put on the word "includes." If it is equivalent to "means and includes" Mr. *Elliott* is correct but if it is used in the ordinary sense in which it is generally used in interpretation clauses, that is, to enlarge the meaning of words or phrases occurring in the headings of the statute, then Mr. *Harrison* is

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correct in his contention. In *Dilworth* v. *Commissioner of Stamps* (1899), A.C. 99 at p. 106, Lord Watson says that the word "include" is susceptible of another construction (that is another than that which I have just stated above as its general meaning) which may become imperative if the context shews that it was not merely employed for the purpose of adding to the natural significance of the words defined. Applying this test I can see nothing to support the respondent's contention. The enlarging definition was probably intended to cover a class that it might have been contended were outside the terms used but who the law-makers thought should pay a licence. The licence fee required from them is $50 for 6 months whereas in the respondent's case it is only $30. Considerable stress was laid by Mr. *Elliott* on the fact that the respondent mixed the ingredients of his polish at his house and then sold it from door to door and he likened him to the baker and the milkman who distributes his goods from door to door. The analogy seems to me a very poor one as in the ordinary case neither the baker nor the milkman does any canvassing whereas the essence of a peddler's calling is to puff up his wares and at each call he has to make a bargain whereas the baker and the milkman deliver regularly according to the family's needs.

I think the respondent is liable for the licence fee and therefore the appeal is allowed.

Appeal allowed.

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CHAPELAS v. COUKES

Deserted Wives' Maintenance Act—Garnishee—Claim by third party for moneys garnisheed—Refusal by magistrate—Right of appeal—R.S.B.C. 1924, Cap. 67, Secs. 11 to 14.

At the instance of a wife, an attaching order was issued by a police magistrate under section 11 of the Deserted Wives' Maintenance Act, and served on the City of Vancouver (the city owing certain moneys to the husband at the time) and the money was paid by the city under the order to the magistrate. A third party, claiming the moneys had been assigned to him, his application to the magistrate to have the issue tried was refused. On appeal from said refusal to the County Court:—

Held, that the right of appeal is limited to the provisions of section 13 of said Act and there is no jurisdiction in the County Court to hear the third party's appeal.

APPEAL by a third party from the order of police magistrate *George R. McQueen*, Esquire, refusing to have an issue tried in relation to certain moneys paid to the magistrate by the City of Vancouver. Doris Coukes, the plaintiff, having proceeded against her husband under the Deserted Wives' Maintenance Act, applied for and obtained from the magistrate an attaching order which was served on the City of Vancouver, the city at the time owing certain moneys to her husband, and the money was paid by the city under the order to the magistrate. The appellant (third party) claims that he was entitled to the money as it had been assigned to him. The appeal was argued before ELLIS, Co. J. at Vancouver on the 15th of February, 1932. Statement

Hunter, for appellant.
G. W. Scott, for respondent.

ELLIS, Co. J.: This is an appeal by one Harry Chapelas, who claims as a third party the ownership or interest in money, in the sum of $267.58 attached by the order of *George R. McQueen*, Esquire, one of the magistrates of the City of Vancouver, under the provisions of section 11, Deserted Wives' Maintenance Act, being chapter 67 of the Revised Statutes of British Columbia, 1924. The magistrate refused the applica- Judgment

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tion of said Chapelas, and the matter was brought up to me by way of appeal.

Sections 11, 12, 13, and 14 of the Deserted Wives' Maintenance Act make provision for attaching orders in proceedings under the Deserted Wives' Maintenance Act. The legislation or the provisions limiting the attachment of debts under the Deserted Wives' Maintenance Act differ to some extent from the provisions in the Attachment of Debts Act, under which moneys are attached and proceedings are taken in this Court. It was apparently the intention of the Legislature when it passed the legislation to make provisions for deserted wives when the magistrate had found them to be so deserted within the meaning of the Act, and the Act provides the machinery by which the orders made by the magistrate can be enforced. In this case, as I understand, the facts are, the attaching order issued by the magistrate under section 11 of the Deserted Wives' Maintenance Act was served on the City of Vancouver, who had no notice of an assignment, and the money was paid by the city under the order to the magistrate. The appellant claimed that he was entitled to the money, and now appeals from the refusal of the magistrate who dismissed his application, to have the issue tried.

Judgment

As I read the Act, the attaching sections provide a summary means to protect the deserted wife and to enforce the order made by the magistrate. It goes farther than ordinary legislation, and provides that the garnishee can pay to the magistrate, to the wife, or to her solicitor, the moneys which are attached. The words of the section of the Act are:

> If the garnishee admits his indebtedness to the husband, he shall forthwith pay to the magistrate, or to the wife, or to her solicitor, the amount of the indebtedness to the husband, or the amount limited by the attaching order.

It is apparent to me that in using the language it does the Legislature intended the magistrate, after issuing the order, to be in the same position as the solicitor or the wife herself in so far as receiving the money is concerned, and that when the money is paid by the garnishee, the solicitor or the magistrate, as the case may be, are trustees for the wife, and must account to her for the moneys received.

Section 13 further provides that:

If any garnishee does not forthwith pay to the magistrate, or the wife, or to her solicitor, the amount attached, or the garnishee disputes the indebtedness, the wife, or any person entitled to make complaint on her behalf under this Act, may take the like proceedings as are prescribed in the Attachment of Debts Act in similar cases, and for the purpose aforesaid the proceedings may be transferred to the County Court of the county in which the husband resides, or in which the cause of complaint has wholly or in part arisen.

As I read the section, the right of appeal to this Court is limited to the cases set out in section 13, and no further. It is true that section 15 of the Act makes provision for appeals as provided by the Summary Convictions Act, but I cannot see that that enlarges the rights of the appellant in this case, and the jurisdiction of this Court to hear an appeal under the attachment of debt clauses of the Deserted Wives' Maintenance Act is limited to those cases expressly set out in section 13.

Judgment

I must hold that there is no jurisdiction for me to hear the appeal of the appellant. If he has any rights, they are not, it would seem, to be taken by him by way of appeal to this Court. As I hold that this Court has no jurisdiction to hear the appeal, it is unnecessary to decide any other phase of the matter. The appeal will be dismissed.

I think that the order should provide that the money paid into this Court be paid back to the magistrate.

Appeal dismissed.

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Stock-broker—Bankruptcy—Trustee's right of action against other brokers based on "bucketing"—Fraud—Personal liability of directors—R.S.C. 1927, Cap. 11, Secs. 23 and 43 (c).

The trustee in bankruptcy of a stock-broker firm brought action for damages against another stock-brokerage company and the individual directors thereof, the action being based on the alleged "bucketing" of orders given by the bankrupt company to the defendant company.

Held, that the trustee could bring the action as one relating to property of the debtor divisible among its creditors, as the evidence shewed that the bankrupt company had been a customer of the defendant company and not merely an agent.

On the contention that the moneys and securities forwarded by the bankrupt to the defendant to buy stocks were trust funds, said moneys and securities were found not to have been ear-marked by the defendant company, and long before the bankruptcy so lost their identity that they could not be followed or identified as the property of any individual client of the bankrupt; the only course therefore was an action by the trustee for the benefit of the estate.

In case of a stock-broker not obeying a customer's orders in making sales and purchases, but reporting to him fictitious transactions, it is not necessary for the customer in order to make out a cause of action for the recovery of the money paid to, and the value of the securities deposited with, the broker, to prove that all the transactions reported were fictitious.

A director of a company who is a party to a fraud or other wrong committed by the company is personally liable for the damage caused thereby.

Statement

ACTION by the trustee in bankruptcy of Theo. Frontier & Company, Limited, against I. W. C. Solloway and Harvey Mills and Solloway, Mills & Co. Ltd. for damages for bucketing orders given by the bankrupt company to the defendant company. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 23rd of November, and the 8th to 10th of December, 1931.

G. L. Fraser, for plaintiff.

W. B. Farris, K.C., and *Sloan*, for defendants.

15th February, 1932.

Judgment

FISHER, J.: The plaintiff brings the action herein as trustee of the estate of Theo. Frontier & Company, Limited, in bank-

ruptcy, against Solloway, Mills & Company, Ltd., and Solloway and Mills as individuals or directors.

On behalf of the defendants it is first submitted that the plaintiff cannot bring or maintain the action and section 43, subsection (*c*) and section 23 of the Bankruptcy Act are relied upon. Under section 43, subsection (*c*) the trustee may, with the permission in writing of the inspectors, which was obtained here, bring an action relating to the property of the debtor and section 23 defines or refers to such property as that which is divisible amongst the creditors and states that it shall not include property held by the debtor in trust for any other person. Counsel on behalf of plaintiff contends that anything recovered in this action would be properly divisible amongst the creditors of the said bankrupt though he admits that while Frontier & Company, carrying on a brokerage business in Kamloops, B.C., were sending moneys from time to time to the defendant company to buy shares moneys were also being paid to Frontier & Company by other parties with orders to purchase some of the said shares. Counsel on behalf of the plaintiff submits that Frontier & Company became a large customer of the defendant company while buying or speculating in stocks for themselves and also other parties who, according to the contention of the plaintiff, were the customers or clients of Frontier & Company. On the other hand counsel for the defendant submits that Frontier was the agent of defendant company and that the right of action, if any, would lie in each client. Exhibits 53, 54, 55 are particularly referred to, being letters passing between the parties at the time the arrangements were made between them. It may be noted that in the letter of April 21st, 1928 (Exhibit 54), Theo. Frontier & Company wrote as follows:

> As stated in our previous letter we still have our connection with W. F. Irwin Company and we will retain this connection until we hear definitely from you as to what arrangements can be made with your firm. At the present time we are getting C.N.D. service twice a day which is very helpful to us. They pay one-half of this service and we pay one-half and the commission is also divided on a fifty-fifty basis. Messrs. Irwin & Co. pay for their own wires and we pay for ours. The same thing applies to the drafts. They pay for their drafts when drawing on us and we pay for our drafts when drawing on them. In this way the expenses are also divided on a fifty-fifty basis.

On the 25th of April, 1928, the defendant company wrote

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in reply to the above letter a letter reading in part as follows (Exhibit 55):

> Referring to your letter of 21st instant and also to your earlier letter, we are prepared to handle your account on the terms mentioned by you, that is, we will pay half C.N.D. service and divide commission on a fifty-fifty basis. We will draw on you at our expense, and you will draw on us at your expense. We will deal with you on margin on the basis of 33-1/3% with interest at 8% per annum on the unpaid balance. We might state that the 7% rate mentioned by you applies only to accounts in our Toronto office.
>
> We deal only in mining and oil stocks listed on the Vancouver Stock Exchange, Calgary Stock Exchange, and the Standard Stock & Mining Exchange at Toronto. . . . In all your orders be careful to specify, "Buy" or "Sell," "Open Order" or "Day Order," and "Cash" or "Open Account." We would ask you to scrutinize carefully the class of stock your clients will wish carried on margin. We do not wish to accept any order on this basis where the price is below 25c. per share. We would also ask you to at all times endeavour to keep your margin no lower than one-third, and if possible, to request your clients to put up an amount in excess of that figure. . . . Upon your advising that these arrangements are satisfactory to you we shall get in touch with the C.N.D. service so that we may take care of our half of the cost.

It must be admitted by plaintiff that the commission was either divided as suggested in the correspondence or that a rebate was given from time to time by the defendant company to Frontier & Company which amounted to the substantial sum of $16,461.89 and there is also some evidence tending to shew that Frontier & Company at one time wished to advertise themselves locally as agents for the defendant firm. It may be noted however that in a letter of January 19th, 1929, the defendant company enclosed sample of the "buy" and "sell" slips used in their office but stated as follows:

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> So that there will be no confusion it will be necessary for you to have these slips printed with your own firm name at the top instead of Solloway, Mills & Company Limited as on the enclosed copies.

It may also be noted that the defendant company in its correspondence and dealings treated the account as one between the defendant company and Frontier & Company from time to time stating that the account was under-margined. The buy and sell confirmations (see Exhibit 41) used by the defendant company were addressed to Frontier & Company and stated that defendant company had bought or sold as the case might be "for your account" which would mean for the account of Frontier & Company. On the other hand the buy and sell orders given by

the clients of Frontier & Company Limited (see Exhibits 61 and 62) were addressed to Frontier & Company Limited. When the defendant company was claiming that the account was under-margined and asking for a settlement it is apparent from the Exhibits 87, 88 and 89 that it dealt direct with Frontier & Company or the trustee and filed a claim with the trustee against the estate. Mr. Duns, examined as a past-officer of the company, says in his examination for discovery that Frontier was "our principal" and that the company wrote to him for margin just like it would any other customer though it paid him half brokerage as a result of his voluminous business. It is also to be noted that on October 17th, when the defendant company purported to sell out the securities which had been deposited by Frontier & Company on account of margin, no attempt was apparently made by the defendant company to identify any one of the securities as the property of any individual client of Frontier & Company but the amount apparently received was applied on the general indebtedness of Frontier & Company. From all this it would appear to me that the right of action would lie in Frontier & Company but it is further submitted by counsel on behalf of the defendants that moneys given to a stock-broker to purchase stock are trust funds and the decision of my brother W. A. MACDONALD in *In re R. P. Clark & Co. (Vancouver) Ltd.* (1931), 44 B.C. 301 is cited. On the other hand counsel for the plaintiff contends that in any event these moneys cannot be followed; that they have lost their identity and that at the time Theo. Frontier & Company went into bankruptcy all it held was a chose in action. Counsel on behalf of defendants takes the position that at the time of the bankruptcy the shares of all the various clients had not been sold by Solloway, Mills & Company and that those shares could be followed and identified and reference is made to Exhibit 63 being one of the statements sent out by Frontier & Company to one of its clients shewing stocks bought and sold for him but the contention of the plaintiff is that the stocks were never bought at all by the defendant company for the plaintiff or its clients and that it was continually short in all the active stocks in which Frontier & Company dealt. For reasons hereinafter more fully set out I find that this contention of the plaintiff is well founded. It may be noted that

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the securities forwarded by Frontier & Company to the defendant company, being duly endorsed, were treated as street certificates and became the same as ten dollar bills as Mr. Duns, a past-officer of the defendant company, says in his examination for discovery. I have also noted that certificate No. 38734 for 25 shares of McLeod received from Theo. Frontier on February 6th, 1929, and apparently not sold out until October 17th, 1929 (see Exhibit 82), would appear, according to an entry in the stock register (Exhibit No. 1) to have been delivered to another party on February 7th, 1929. I am satisfied that there were no shares ear-marked for either Frontier & Company or any of their clients at the time of the bankruptcy and, in my opinion, both the moneys and the securities forwarded by Frontier & Company to the defendant company had in any event long before the bankruptcy so lost their identity that they could not be followed or identified as the property of any individual client of the bankrupt and all that remained was a right of action on the part of the trustee for the benefit of the estate.

This brings me to the consideration of the cause of action alleged herein which may be shortly stated as follows: The contract between the defendant company and Frontier & Company may be described as one under which the defendant company was to purchase and carry for the plaintiff shares of stock on payment by Frontier & Company of a percentage (one-third) on the purchase money of the stock called "margin" and Frontier & Company was to keep up its margin in case of a fall in the value of the stock and it is apparent that it was agreed that the defendant company which was also to sell for Frontier as ordered would either advance or borrow the money to take care in the meantime of the balance of purchase money for which Frontier & Company would pay interest at 8 per cent.

Judgment

The plaintiff's transactions, which were many during the period in question, extended from in or about the month of April, 1928, to about the date of the bankruptcy, which was the 18th of September, 1929, for and during which time the Frontier Company sent the sum of $120,063.48 (in addition to certain securities) to be applied on the open or margin account and confirmation slips are produced confirming the filling of "buy" and "sell" orders given from time to time. The plaintiff

contends that the defendant company did not buy or sell stock for the plaintiff as ordered and that the company never had and did not carry any stock ear-marked for the plaintiff but were, as it is termed, "short" on the various stocks in which the plaintiff dealt. The plaintiff contends that in a great many cases the stock was never bought at all by the defendant company and in any event was not bought for Frontier & Company in accordance with the contract as it was not ear-marked but the certificates if and when bought were thrown into what has been called a bin or cage. From the cases of *Long* v. *Smiley* (1912), 23 O.W.R. 229 and *Cartwright & Crickmore Ltd.* v. *MacInnes, infra,* it might be argued that the defendant company under certain circumstances might be justified in not allotting certificates to its particular customers, if the defendant company had at all times on hand sufficient to deliver to the plaintiff and the rest of the clients the stocks ordered but if it was not in such a position or, in other words, was "short" my view is that it is not justified in doing so as it substitutes the personal liability of perhaps an insolvent broker for the real security of the stock which it cannot do. See *Sutherland* v. *Cox et al.* (1884), 6 Ont. 505. One of the issues therefore to be decided in this case is whether or not it is a fair inference from the evidence that the defendant company was "short" on the stocks in which the plaintiff dealt. It would appear from the evidence that the defendant company was in the habit of using the services of agent brokers and the number of documents produced with the symbolic words "sold to" or "bought from" thereon indicate that on numerous occasions the defendant company would purport to buy or sell shares on the Vancouver Stock Exchange for the plaintiff and other clients through one of these agent brokers and sell to or buy from the same broker the same number of shares at the same price off the Exchange, such latter transactions not appearing in the Stock Exchange records at all contrary to the Stock Exchange Rules which are to be deemed part of the contract—see *Cartwright & Crickmore, Ltd.* v. *MacInnes* (1931), S.C.R. 425. There is also evidence that sometimes the shares were not bought on the Exchange at all but were sold right out of the house. The effect of these practices is apparent from the material before me. In this connection reference might be

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made to the evidence given by W. E. Willans on his examination for discovery as a past-officer of defendant company reading in part as follows:

> Do you know of any practice along that line? If you do, explain it to me. I will explain the practice, yes. Supposing that the market rallies tremendously on any stocks, my duty was to go ahead and sell some of those stocks with the intention of making a profit, and that is the reason that an agent broker or an agent, or what you call an agent broker, would get some selling orders. For instance, we might have a very large order on any stock from a client.
>
> A buying order? Buying order from a client, it might be advisable to give to an agent broker a selling order in order that somebody might have the stock—the stock particularly at a price. . . .
>
> Well, I understand what you said, that that practice that you have told me now was the practice as you understood it, that is what caused or would cause a short position? It would eventually end up—it proved to end up with a large short position.
>
> Now, isn't it a fact that during the fall or summer of 1929—early 1929—the stocks were not bought on the exchange at all, but were sold right out of your house? That is so, yes.
>
> And that would create a short position as well? Yes.

Elsewhere in his examination, speaking of the time when the Frontier account was liquidated, Mr. Willans says:

> It is quite possible that I did give buying orders to agent brokers to help support the market, incidentally covering up an accumulation of shortage.

Judgment

I pause here to note that I have not overlooked the fact that the evidence of Willans, as given at the trial, and also upon his later examination for discovery, is somewhat different from evidence given by him on his original examination for discovery but I must consider his evidence along with the documentary evidence before me from which it is quite apparent that there was a real "accumulation of shortage" *e.g.*, the "teller's blotter" (Exhibit 20) which indicates the actual "physical" position as to share certificates, shews that on October 17th, 1929, when the account of Frontier & Company was liquidated, the defendant company on that day had at the beginning of business 30,355 shares of Grandview, delivered 1,400, received 2,500, having at the close of that day's business 31,455 shares on hand and yet it purported to sell for Frontier alone that day 54,100 shares of Grandview (see Exhibit 86). In connection with this stock (Grandview) Exhibit 57, pp. 28-31, relating to transactions on January 16th, 1929, might also be noted according to which buy confirmations had been sent out for that day shewing 16,000

shares bought for Frontier and 40,400 shares for other customers, making a total of 56,400 whereas only 43,050 shares are shewn as having been bought on the Vancouver Stock Exchange but 24,700 shares are shewn on p. 30 as having been sold out of the house that day. The evidence of Willans and that of the witnesses Beck and Glass, at one time employed by the defendant company would also indicate that continually there was a definitely "short" position at Vancouver in the active stocks traded in by Frontier & Company. Then Calgary House Ledgers (Exhibits 90 and 91) are produced in which, according to the evidence of Mr. Willans, the position of the defendant company, whether long or short, is shewn and it is quite obvious from those exhibits that there was what counsel for plaintiff has called a "colossal shortage" in some of the stocks dealt in by Frontier & Company. I think sufficient evidence has also been given to establish a *prima facie* case as to a short condition existing in the Toronto office of defendant company. During the period in question herein therefore I find that the defendant company was continually in a short position with respect to all the active stocks in which Frontier & Company were dealing. I am satisfied that the real situation continuing generally throughout such period was that the defendant company had not possession of all the shares of stock it had undertaken to buy and hold for Frontier & Company and other customers. Nevertheless the evidence shews that on some days the defendant company did actually buy and sell sufficient shares to take care of all the orders in accordance with the confirmations sent out. It is also admitted by the plaintiff that during the period in question there were many cash transactions in the course of which Frontier & Company received certificates for shares according to the buy confirmations. As the plaintiff's case is not based upon conversion of the shares but upon "bucketing" of the orders by the defendant company, counsel for the defendant company submits that in any event the evidence shews that some of the orders were fulfilled by the defendant company for the plaintiff in strict accordance with the orders received and that therefore the plaintiff must fail as in order to make out his cause of action the plaintiff must prove that every transaction claimed by the defendant company to have been made was

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fictitious or in any event that the plaintiff can only succeed on the alternative claim for money had and received with respect to particular transactions actually shewn by the evidence not to have been carried out in accordance with the terms of the contract. It must be remembered however that I have found that the defendant company was continually short in all active stocks traded in by the Frontier Company. I also find from the evidence that even where stocks were duly purchased on the exchange they were not ear-marked or allotted to any particular customer but were immediately consigned to the particular securities cage or bin for the stock so purchased. Such a system simply meant that the defendant company kept on hand in such bin sufficient to meet the demands of margin and cash customers but, the company being short as aforesaid, the system was contrary to the law which regulates the transactions between broker and customer and substitutes the personal liability of perhaps an insolvent broker for the real security of the stock (see *Sutherland* v. *Cox et al., supra*). My view therefore is that even where stocks were delivered to Frontier and Company the transaction was not carried out in accordance with the terms of the contract. It must also be noted that the witness Beck states that clients were not allowed to sell short while it is apparent that the defendant company acting as their broker was doing so and, as I find, was selling short against its own clients' accounts. I have already referred to the practice of the defendant company in selling from their house account. Clients would be charged at the current price and a fair inference is that the defendant company was gambling against its clients and hoping to make a profit at their expense.

Judgment

Having given due consideration to the fact that not all the orders were "bucketed" I am satisfied that the margin transactions reported to Frontier & Company were for the most part fictitious and throughout the whole series of dealings based upon the cash and securities deposited as margin the defendant company was failing to execute the plaintiff's orders in the expectation of making a profit for itself through the fluctuation of the market. Under such circumstances I do not think that the plaintiff in order to make out his cause of action must prove that every transaction claimed by the defendant company to have

been made was fictitious. In this connection reference might be made to certain American authorities and before citing them I might refer to what the Court said in the *In re R. P. Clark & Co.* case, *supra,* at pp. 304-5:

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."

Upon the facts as I have found them in this case certain American authorities would seem to be applicable. In 26 A. & E. Encycl. of L., 2nd Ed., p. 1066, para. 3 reads as follows:

Where a broker does not obey his client's orders in making actual sales and purchases, but reports to him fictitious transactions, the client may recover from the broker any money or other securities deposited as margins or any payments made to the broker in settlement of such transactions; and it is not necessary for the client, in order to recover, to shew that all of the transactions reported were fictitious.

Judgment

Prout v. *Chisholm,* 21 N.Y. App. Div. 54 is cited as authority for this statement in which case the Court said in part as follows:

In the years 1891 and 1892 the plaintiff was a customer of the defendants, and through them speculated in stocks. During this period he deposited with the defendants as margins, or to secure them against loss, in fulfilling orders, $29,000 in money and railroad bonds of the par value of $15,000. The transactions of the plaintiff through the defendants' firm were very numerous. It is stated that they approximated in number 2,000. At the end of the dealings between the parties the defendants claimed that the plaintiff's deposit, or margin, had been exhausted, and that he was indebted to them in a large sum. The plaintiff claims that at this time he discovered that the transactions reported to him by the defendants as made in the fulfillment of his orders were fictitious; that as a matter of fact they neither bought stock when he ordered a purchase nor sold stock when he ordered a sale. Thereupon he instituted this action; and in it he sought to recover the money paid the defendants and the value of the securities deposited with them. . . . The Court was also asked to charge that, in order to make out his cause of action, the plaintiff must

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prove that every transaction claimed by the defendants to have been made was fictitious; and also that, to render a verdict in favour of the plaintiff for the sum demanded by him, the jury must be satisfied of the same fact, that is, that every one of the transactions was fictitious. We think this refusal was right. To make out the plaintiff's cause of action it was not necessary to prove that every transaction was fictitious; but if any of them were fictitious he was entitled to have such transactions rejected from the accounts. Nor, to entitle him to recover the whole sum demanded in the complaint was it necessary that all the transactions represented by that account should have been unreal.

In *Fiske* v. *Doucette* (1910), 92 N.E. 455 at p. 458 the Court said:

> Although there was evidence that in a number of transactions the defendant did have in his control certificates for the stock purchased for the plaintiff's account, yet as to many there was either no such evidence, or definite evidence that he did not have them. The whole series of dealings based upon the bonds deposited with the defendant was thus tainted with illegality and the plaintiff is entitled to recover. *Way* v. *Greer* [(1907)], 196 Mass. 237-245, 81 N.E. 1002; *Kennedy* v. *Welch* [(1907)], 196 Mass. 592-595, 83 N.E. 11; *Embrey* v. *Jemison* [(1889)], 131 U.S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172.

In *Greene* v. *Corey* (1912), 97 N.E. 70 at p. 72 Sheldon, J. said:

> The broker, to put himself right in such a case as the one now before us, must shew that he has under his control, free from the just demands of other customers and available for delivery to the particular customer whose case is in question, the stocks of which that customer upon payment will be entitled to demand delivery. This is the doctrine declared in *Fiske* v. *Doucette*, *supra*, and we adhere to it.

Judgment

I have therefore to consider what relief if any the plaintiff is entitled to and have no hesitation in holding that under the circumstances the plaintiff has not lost the right to relief by any settlement made by or on his behalf as any such settlement was made in ignorance of what had transpired. In *Sutherland* v. *Cox et al., supra,* it was held that the defendants having failed to carry out the agreement to purchase and carry the stock for the plaintiff, the latter was entitled to receive back from the defendants the money paid as margin. In *Prout* v. *Chisholm, supra,* the Court elsewhere said:

> It is, therefore, wholly immaterial in this case whether in fact the plaintiff suffered any loss by the failure of the defendants to execute his orders, or whether as a matter of fact the plaintiff is better, or at least no worse off than if his orders had been executed. A broker, agent or servant cannot speculate on the orders of his employer or master. . . . If, therefore, they fail to execute the plaintiff's orders in the expectation of making a profit for themselves through the fluctuation of the market, they

were not only subject to condemnation as gambling, but were guilty of fraud. We think the trial Court erred in speaking of this as mere legal fraud. The conduct of the defendants, if the charges made against them by the plaintiff were established, was dishonest and fraudulent, in morals as well as law. Even had they acted in good faith and for the purposes of executing the plaintiff's orders, either sold to the plaintiff their own stock or bought from him his stock, the plaintiff would have had the right, at his election, to repudiate the transaction. . . . If this be the rule, even where a broker acts in good faith towards his principal, it applies with much greater force to a case where the broker purposely fails to execute the principal's order, and the principal, instead of having the stock ordered to be purchased, has simply the personal responsibility of the broker to make good any profits that might have accrued on the purchase had the purchase been actually effected. The matter, however, is too clear to require or even justify further discussion. The sole right of the defendants to retain the plaintiff's money was to pay them for their commissions on purchases or sales, and to reimburse them for losses on those dealings. If there were no such dealings, the plaintiff had the right to reclaim his money and securities.

As was held by the Court in the *Prout* case so I would hold in the present case on my findings that the defendant company was guilty of fraud. I also hold that the whole series of dealings was tainted with fraud and the plaintiff has the right to repudiate and be relieved from any liability and to recover the money paid to the defendant company and the value of the securities deposited with it. I think such right remains unaffected even though the cash transactions are considered part of the same series of dealings. If the cash transactions should be so considered it might be argued that, Frontier & Company having taken delivery of certain shares upon payment of the cash required, the plaintiff cannot now repudiate the dealings as a whole having parted with at least some of the shares so taken. Reference might be made here however to a portion of the judgment of Anglin, J. (now Chief Justice) in *Clarke* v. *Baillie, supra,* where at p. 92 he says:

Judgment

The defendants are, of course, entitled in an equitable accounting to credit for the value of the shares at the time they were so accepted. But they cannot insist on the plaintiff's returning, or tendering a return of such shares before suing for such accounting. If, in circumstances such as those of this case, a broker had this right, he might put a client, who had innocently parted with shares so taken over, in a position of serious difficulty; he might effectually deprive him of his right of action. The broker, whose misconduct has led to such a difficulty, cannot complain if his client elects to retain the securities giving him credit in the accounting for their market value when received.

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If in the present case the contract with regard to the margin transactions must be considered as including the cash transactions then I would hold that the principle stated in the above citation from the *Clarke* case should be applied as otherwise, as suggested, the broker might put the client who had innocently parted with shares so taken over in a position of serious difficulty and effectually deprive him of his right of action. On the other hand, if the cash transactions should be considered separately, I see no good reason for the application of the principle for though, as already indicated, I do not think that they were carried out strictly in accordance with the orders given on account of their being dealt with under the fraudulent system prevailing as aforesaid, nevertheless delivery of shares was made practically forthwith and under the circumstances I cannot see that any actual damage could be shewn in an accounting to have been sustained as a result of the wrongful performance of a contract covering the cash transactions alone or that an action would be maintainable solely in connection therewith to establish a right to a nominal recovery. My own view is that the plaintiff's right to relief in connection with the margin transactions may be considered without reference to the cash transactions but, if this view is incorrect then I would hold that in any event the plaintiff is entitled to repudiate, claim an accounting and give the defendant credit in the accounting for the market value of the shares when received which, as a matter of fact, would be the same (or practically the same) as the amount with which the account would be debited in connection with such shares so that the net amount to be recovered by the plaintiff would not be affected.

Judgment

There is still to be decided however the question whether or not the plaintiff is entitled to judgment against the individual defendants as well as against the company.

In the *Prout* and other cases above mentioned in which the right of the plaintiff to recover from the defendant, to whom the money was paid, was upheld the question as to the liability of directors in case of the defendant being a company was not discussed. In view of the decision in *Salomon* v. *Salomon & Co.* (1897), A.C. 22 (see also *Mackee* v. *Solloway, Mills & Co., Ltd.* (1931), [44 B.C. 401]; 2 W.W.R. 928) the individual

defendants as directors cannot be considered as being the company to which the moneys in question herein were paid. It is clear however that conduct on the part of the defendant similar to that here has been treated as fraud and breach of trust in the cases above referred to. It is clear also that a director who is a party to a fraud or the commission of any other wrong is personally liable for damage resulting (see Masten & Fraser's Company Law, 3rd Ed., p. 629). In the present case I find on the evidence admissible against the individual defendants respectively that each of them took an active part in the operation of the affairs of the defendant company and in bringing about the co-operation necessary for the short selling as aforesaid and that each of them knew of the short position of the company with respect to at least some of the active stocks traded in by the Frontier Company and other clients. Under such circumstances I think they must both be deemed to be parties to the wrong done to the clients and liable for the resulting damage. Counsel for the defendants contends that the plaintiff cannot repudiate and at the same time claim damages. In this connection reference might be made to the case of *Frankenburg* v. *Great Horseless Carriage Company* (1900), 1 Q.B. 504 where Lindley, M.R. says at p. 508:

Judgment

> It is an action brought by a gentleman against a company and its directors—I say nothing at present about the executors of a deceased director—for what? Simply for relief to which he is entitled in respect of an improperly issued prospectus. That is the foundation of his claim. His relief is various in detail; but that is one cause of action in the wide sense, apart from all technicalities. He says, "You have all, both company and directors, been guilty of a breach of your duty or obligation to me in issuing this prospectus to me." What conceivable injustice or irregularity is done in bringing one action against all those who have done that which he complains of? It is true that, as against the company, he does not ask for damages; but he asks for rescission of contract, because by rescission he will get all he wants as against the company—that is, he will get rid of his shares and get his money back. The company may, however, be in such a state of impecuniosity that it cannot give him his money back, and therefore he asks for damages against the directors.

At p. 510 Romer, L.J. says:

> The remedy given to the plaintiff who applied for shares and had shares allotted to him on the faith of that improper prospectus is different as against the several defendants, but not so much in substance as in form. As against the company his remedy is rescission and repayment of the purchase money with interest. As against the directors who issued the prospectus his remedy is one of damages, because the prospectus as against them was fraudulent, and he may not by the relief against the defendant company get full compensation by way of damages for the injury he has sustained.

FISHER, J.

1932

Feb. 15.

JOHNSON v. SOLLOWAY, MILLS & CO. LTD.

In *Johnson* v. *Johnson* (1913), 18 B.C. 563 at p. 572, MACDONALD, C.J.A. says:

> The appellants' counsel contended that no loss or damage had been proven in this case. I think it sufficiently appears from the evidence that the loss and damage suffered by Clark, assuming that he was entitled to succeed at all, was the amount of money he had paid for his shares, namely, $2,500. He is within the *Frankenburg* case above mentioned, and not *McConnel* v. *Wright* (1903), 1 Ch. 546, and *Shepheard* v. *Broome* (1904), A.C. 342, where the shareholders still held their shares and were suing for their losses without seeking cancellation.

In the present case the Frontier Company paid over the margin money and deposited the securities upon receipt of reports of fictitious transactions and I think the measure of damages would be the amount of money so paid and the value of the securities deposited. Interest at 5 per cent. per annum should also be allowed (see Underhill on Trusts, 7th Ed., p. 460). As to the value of the securities it may be noted that I have already found that the defendant company dealt with them in the same way as currency. The defendant company might still contend however that ultimately it had the right to sell the securities of Frontier & Company but this right of course would only arise if the defendant company had honestly bought and sold in accordance with the orders of Frontier & Company and that the latter company had allowed itself to become "undermargined." I have found otherwise however and on my findings the defendant company never had the right to sell the said securities. The defendant company gave credit for such securities on the 17th of October, 1929, in the amount of $5,064.75 and, as the plaintiff would appear to have elected to accept the said company's figures as of such date, I adopt this basis of valuation.

Judgment

There will therefore be judgment in favour of the plaintiff against all defendants for the sum of $103,666.34 with costs and interest at 5 per cent. per annum from the date of each respective payment as shewn on page 75 of Exhibit 57 and interest on the said sum of $5,064.75 from October 17th, 1929, with an adjustment or off-set with regard to interest (from the date of each respective payment) upon the sums of $5,000 and $16,461.89 admitted by plaintiff to have been received from the defendant company.

Judgment for plaintiff.

REX v. GOLDSMID.

MORRISON, C.J.S.C.

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March 2.

REX v. GOLDSMID

Constitutional law—Food and Drugs Act—Regulations and amendments—Validity—Adulterated meat—Not injurious to health—Offence to sell —R.S.C. 1927, Cap. 76, Sec. 23 (b).

On appeal by way of case stated from a conviction for the sale of adulterated meat under section 23 (*b*) of the Food and Drugs Act, the appellant contested the validity of said Act, particularly sections 3, 4 and 23 thereof, in so far as the Act assumes to legislate with reference to adulteration of food where such adulteration is not deemed to be injurious to health. The question in the case stated was answered in the affirmative and the appeal was dismissed.

APPEAL by way of case stated from a conviction by *George R. McQueen,* Esquire, deputy police magistrate for the City of Vancouver under the Food and Drugs Act. The facts are set out in the case stated which is as follows:

1. An information was preferred on the 17th day of September, A.D. 1931, by the respondent against the appellant under the provisions of the Food and Drugs Act, chapter 76 of the Revised Statutes of Canada, 1927, and regulations and amendments made thereunder "for that G. M. Goldsmid, the appellant, on the 10th day of July, 1931, at the City of Vancouver, Province of British Columbia, did unlawfully sell an article of food, to wit, a meat product namely sausage which was adulterated within the meaning of the Food and Drugs Act, chapter 76 of the Revised Statutes of Canada, 1927, and regulations and amendments made thereunder, which is an offence under section 23 of the said Act, contrary to the form of the statute in such case made and provided.

Statement

2. The said information came on for hearing on the 23rd day of September, 1931, and upon an adjourned hearing of the said information on the 21st day of October, 1931, both parties being represented by counsel and judgment being reserved by me until the 28th day of October, 1931, and again reserved until the 5th day of November, 1931, I did convict the appellant upon the said information.

3. The appellant being dissatisfied with my determination as being erroneous in point of law, duly applied to me in writing to state and sign a case, setting forth the facts and the grounds on which the proceeding is questioned for the opinion of this Honourable Court, in pursuance whereof this case is now stated and signed by me.

4. Upon the hearing of the said information, all the facts charged in the information were admitted by counsel for the appellant, and it was further certified by the certificate of a Dominion analyst filed pursuant to section 13 of the Food and Drugs Act that such adulteration of the said sample is of a nature deemed to be for the purposes of the Act not injurious to the health of the person consuming the same.

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5. On behalf of the appellant it was contended that the Food and Drugs Act, being chapter 76 of the Revised Statutes of Canada, 1927, and regulations and amendments thereunder and in particular sections 3, 4 and 23 of the said Food and Drugs Act are *ultra vires* of the Parliament of Canada in so far as the said Act and the regulations and amendments made thereunder and the specified sections of the said Act above referred to assume to legislate with reference to adulteration of food when such adulteration is not deemed to be injurious to health.

6. On behalf of the respondent it was contended that the said facts constituted an offence under the said Act regulations and amendments, which are within the powers of the Parliament of Canada.

Upon the foregoing facts and upon the foregoing contentions I am of opinion that the contentions upon behalf of the respondent were correct and I accordingly convicted the appellant of the charge set forth in the information.

The question submitted for the opinion of this Honourable Court is whether upon the above statement of facts, I came to a correct determination in point of law, in convicting the appellant as aforesaid, and if not, what should be done in the premises?

The appeal was argued before MORRISON, C.J.S.C. at Vancouver on the 15th of February, 1932.

Argument

Sloan, for appellant, referred to *Re Geo. Bowack* (1892), 2 B.C. 216 at p. 224; *Attorney-General for Canada* v. *Attorney-General for Alberta* (1916), 1 A.C. 588 at pp. 595 and 597; *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396; *Rex* v. *Garvin* (1909), 14 B.C. 260; *Russell* v. *The Queen* (1882), 7 App. Cas. 829; *Citizens Insurance Company of Canada* v. *Parsons* (1881), *ib.* 96 at p. 113; *Rex* v. *Collins* (1926), 4 D.L.R. 548; *Regina* v. *Wason* (1889), 17 Ont. 58; (1890), 17 A.R. 221; *Rex* v. *Wakabayashi* (1928), 39 B.C. 310.

Maitland, K.C. (*Ford,* with him), for the Crown, referred to *Hewson* v. *Ontario Power Co.* (1905), 37 S.C.R. 596; *Russell* v. *The Queen* (1882), 7 App. Cas. 829; *Regina* v. *Wason* (1890), 17 A.R. 221; *Regina* v. *Stone* (1892), 23 Ont. 46; *Rex* v. *Garvin* (1909), 14 B.C. 260; *In re Lucas and McGlashan* (1869), 29 U.C.Q.B. 81; *Rex* v. *Wakabayashi* (1928), 39 B.C. 310; *Reference re Validity of the Combines Investigation Act and of S. 498 of the Criminal Code* (1929), S.C.R. 409, and on appeal (1931), 1 W.W.R. 552.

2nd March, 1932.

Judgment

MORRISON, C.J.S.C.: The answer is in the affirmative. The conviction is upheld.

Appeal dismissed.

PATRICK v. THE ROYAL BANK OF CANADA.

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March 1.

PATRICK v. THE ROYAL BANK OF CANADA

Banks and banking — Stock certificates endorsed in blank — Negotiable security—Deposited with broker subject to certain conditions—Certificates pledged to bank by broker—Suspicious circumstances—Duty of bank to make enquiry.

The plaintiff, concluding that he would buy, under certain conditions, preference shares of the B.C. Bond Corporation, deposited with the manager of said corporation certain share certificates endorsed in blank as evidence that he would, when the conditions were performed, complete the purchase. The manager of said corporation then pledged the share certificates to the defendant bank as collateral security for the corporation's account. Shortly afterwards the B.C. Bond Corporation went into liquidation, and the bank then sold the shares to cover the corporation's indebtedness to the bank. In an action to recover the share certificates it was held that there were suspicious circumstances that called upon the bank to make further enquiries as to the manager's authority to pledge the certificates, and the plaintiff was entitled to recover.

Held, on appeal, reversing the decision of GREGORY, J. (MACDONALD, C.J.B.C. dissenting), that the share certificates in question were negotiable instruments and the bank was the *bona fide* holder of them for value as collateral to the Bond Company's current account and received in the course of a long series of transactions. There were no substantial suspicious circumstances to put the bank upon further enquiry.

London Joint Stock Bank v. *Simmons* (1892), A.C. 201 applied.

APPEAL by defendant from the decision of GREGORY, J. (reported, 44 B.C. 448) of the 17th of June, 1931, in an action to recover from the defendant bank two share certificates for 100 shares of Cities Service Common each, or in the alternative for damages for the conversion by the defendant of said two share certificates to the use of the defendant without title or colour of right. The plaintiff, who had been a customer of the B.C. Bond Corporation verbally agreed with one Boorman, the manager of said company, under certain conditions to buy preference shares in the said company, and he was induced by Boorman to deposit with him certain share certificates as evidence that he would, when the conditions were performed, complete such purchase, and he executed transfers of said certificates leaving the name of the transferee in blank. The

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conditions under which the plaintiff was to buy said preference shares were never fulfilled and he never became liable to purchase them. Shortly after receipt of the share certificates Boorman took them, on the 24th of September, 1930, to the defendant bank and deposited them with the bank as security for advances, the bank at the time having other securities on deposit and against which the B.C. Bond Corporation was entitled to credit in such sums as represented the marginal value of the securities on deposit. On the 9th of October, 1930, the B.C. Bond Corporation made an assignment and the bank then sent the plaintiff's shares to its New York agent who filled in the blank transfer to himself and had the new shares issued in his own name, the bank claiming ownership in the shares.

The appeal was argued at Victoria on the 26th and 27th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

A. D. Crease, for appellant: There were two distinct transactions. Patrick had dealings with Boorman in stocks and Boorman induced Patrick to buy preference shares in the B.C. Bond Corporation in furtherance of which Patrick gave Boorman two share certificates endorsed in blank, each of 100 shares in Cities Service Common. Then as a second transaction Boorman deposited these certificates in the defendant bank as security for advances to the B.C. Bond Corporation. The learned judge found the witnesses credible: see *Groff* v. *Herman* (1931), 3 W.W.R. 417; *Coghlan* v. *Cumberland* (1898), 1 Ch. 704. The Court found the bank had knowledge that put them on enquiry, but there was no evidence of this. It was merely an inference drawn from the evidence. The Bond Company had a line of credit up to $250,000 and security to cover went back and forth continually, including the two certificates in question which were endorsed in blank. This was done in the usual course of business: see *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201 at p. 223; *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333; *Lorsch & Co.* v. *Shamrock Consolidated Mines Limited* (1917), 39 O.L.R. 315 at pp. 322-3. Stevens, the manager of the bank, did not see these securities; they passed in the usual course of business

through members of his staff. They rely on *Smith* v. *Prosser* (1907), 2 K.B. 735 but in that case the instrument was not in negotiable form. On the question of constructive notice in commercial transactions see *Manchester Trust* v. *Furness* (1895), 2 Q.B. 539 at p. 545; *Thomson* v. *Clydesdale Bank, Limited* (1893), A.C. 282 at p. 285; *Ray* v. *Willson* (1911), 45 S.C.R. 401 at p. 421; *Bank of Montreal* v. *Isbell* (1925), 2 D.L.R. 30; *Colonial Bank* v. *Cady and Williams* (1890), 15 App. Cas. 267. On the effect of crime upon transfer see Halsbury's Laws of England, 2nd Ed., Vol. 2, p. 664; *Castleman* v. *Waghorn, Gwynn & Co.* (1908), 41 S.C.R. 88 at p. 97; *Macdonald* v. *Bank of Vancouver* (1915), 22 B.C. 310; *Smith* v. *Rogers* (1899), 30 Ont. 256 at p. 266; *McLeod* v. *Brazilian Traction Light and Power Co. Ltd.* (1927), 60 O.L.R. 253 at p. 260. These certificates were negotiable securities taken by the bank without notice and in good faith: see *Currie* v. *Misa* (1875), L.R. 10 Ex. 153; *Cox* v. *Canadian Bank of Commerce* (1912), 46 S.C.R. 564; *Royal Bank of Scotland* v. *Tottenham* (1894), 2 Q.B. 717; *Bank of British North America* v. *Warren* (1909), 19 O.L.R. 257; *Bank of Nova Scotia* v. *Harvey* (1912), 8 D.L.R. 476.

Argument

Maclean, K.C., for respondent: This case is concluded by *Smith* v. *Prosser* (1907), 2 K.B. 735, which was followed in *Ray* v. *Willson* (1911), 45 S.C.R. 401 at p. 422. See also *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333 and *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201. An instrument endorsed in blank is not a negotiable instrument except by custom and no custom is proved in this case. On the question of notice see *May* v. *Chapman* (1847), 16 M. & W. 355 at p. 360.

Crease, replied.

Cur. adv. vult.

1st March, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The learned judge relied throughout largely on the cases of *Earl of Sheffield* v. *London Joint Stock Bank* (1888), 13 App. Cas. 333 and *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201. The first of these cases, I think, has no real application to the present one. Their Lordships held

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that the bank had notice of the appellant's limited title in the securities pledged with the bank and was only entitled to retain them for that limited amount. In the other case they held that there was no notice and no circumstances which put the bank on enquiry.

The question here is was there as between the broker and the bank circumstances in evidence sufficient to put the bank on enquiry as to the broker's want of title to the securities in question or his want of authority to pledge the same in support of his general line of credit. Their Lordships in the *Simmons* case, *supra,* at p. 212, approve of the words of Abbott, C.J., in *The King* v. *The Bishop of Peterborough* (1824), 3 B. & C. 47, wherein he said:

> That the holder of a negotiable instrument "has power to give title to any person honestly acquiring it."

The question therefore is was the appellant the holder for value without notice? I think the cases above referred to shew that the shares in question were negotiable instruments passing from hand to hand and that apart from the question of notice the bank was the holder for value. The circumstances relied upon by the respondent as putting the bank upon notice are these, but before stating them I wish to say this, the B.C. Bond Corporation were brokers. They were in financial difficulties. They had a scheme by which they were to sell preference shares of the corporation for the purpose of raising money and overcoming their financial difficulties. They approached the plaintiff who agreed to take $5,000 in shares provided certain conditions were complied with and he to guarantee his agreement to take them if the conditions were complied with transferred to the corporation the shares in question with a certificate of transfer thereof on the back. Boorman, the manager of the corporation on the demand of the bank to provide further security before paying a cheque to the corporation took these shares without plaintiff's authority and offered them to the bank as such security. There seems to have been some discussion between him and the manager Mr. Stevens with regard to the financial condition of the corporation and Mr. Stevens seems to have been convinced that the corporation was insolvent and should make an assignment for the benefit of its creditors and so advised

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Mr. Boorman. He, however, resented the advice and finally induced the bank to take the securities. Cross-examined on what then took place Mr. Stevens said:

> Then you had some idea, had you, Mr. Stevens, that he might get into trouble by the scheme he had in mind for raising fresh capital [the sale of preference shares]? Only from the state of mind the man seemed to be in.
>
> You could see that he was in a reckless mood? He seemed to be reckless. I felt that—well, that he was very apt to do something that was not just right, and he said—he told me, I am making no move, I am doing absolutely nothing without the advice and consent of my lawyers.

(That would have been an appropriate time to ask him if he had consulted his lawyers about what he was then doing.)

The Bond Company made an assignment for the benefit of its creditors on the 8th or 9th of October. The said conversation occurred on the 24th of September. At the same interview Mr. Stevens says that Boorman told him that they were selling preference shares of the company and Stevens said:

> I remember intimating that I did not care particularly where the money came from as long as their account was to be put in shape.

Lord Herschell on p. 221 in the *Simmons'* case, *supra,* said:

> 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 inquiry.

MACDONALD, C.J.B.C.

It may be contended here that there was nothing to indicate in the transaction in question that these shares were not offered in good faith. I think, however, that when a bank is made aware of the financial difficulties of its customer who is struggling to get on his feet and is in a reckless mood and is asking for credit, and the bank is convinced that he will not succeed, as the manager appears to have been convinced in this case, that is a circumstance which ought to put him on enquiry as to his title to the shares.

The learned judge has highly commended Mr. Stevens and his assistant Mr. Robertson for the character of their evidence and I think deservedly so. But the question we have now to decide is not one depending upon the character of their evidence nor does it depend upon the statement made by Boorman that he was proceeding in his affairs to obtain capital on the advice of his solicitors. We have plainly in evidence what took place and to my mind it was calculated to arouse suspicions and those

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suspicions having been aroused it was appellant's duty to make reasonable enquiry as to the soundness of the transaction which it was invited to enter into. Throughout the judgment in *London Joint Stock Bank* v. *Simmons, supra,* their Lordships have referred to the fact that the offending person had hitherto borne a good reputation for honesty with the manager of the bank and that there was nothing to indicate anything to the contrary. If this had been so in the present case there would be good reason for sustaining the bank's title but unfortunately for the bank this is not so and it could not rely upon the honour of the corporation when the conduct of its manager intimated to the banker that he might do something in connection with his financial business though not with this transaction which was "not quite right." That impression should have led him to make enquiries before taking the shares. He could easily have got into communication with the plaintiff who had signed the endorsement who was a substantial man of business, not a speculator, and found out the real truth which was that the corporation was committing a breach of trust. The banker learned that the manager of the corporation was very apt to do something to keep his company from bankruptcy which was "not just right."

I am, therefore, of opinion that the finding of the learned trial judge should not be interfered with.

MARTIN, J.A.

MARTIN, J.A.: There is no substantial, if any, dispute upon the facts of this case, which are so fully set out by my learned brothers that it is unnecessary to restate them, and so what remains is to draw the proper inferences therefrom, and in this respect I am in entire accord with the views expressed by my brothers MCPHILLIPS and M. A. MACDONALD, and, as I understand it, we are all of the opinion that the share certificates in question were negotiable instruments and that, apart from the question of the bank's notice of Boorman's wrong-doing as against the plaintiff, it was the *bona fide* holder of them for value as collateral to Boorman's company's current account, and received in the course of a long series of transactions.

It is clear that if the circumstances did not call upon the bank to make further enquiry when Boorman brought in the share

certificates (in the form known as "street certificates") as additional security to support his company's overdrawn account in response to the bank's general demand for further security before it would honour any more of the company's cheques, then the case is within the decision of the House of Lords in *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201, and the defendant is not liable to the plaintiff.

The learned trial judge says in his reasons for judgment (44 B.C. at p. 456):

> 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 he proceeds to give his views for this opinion saying: "I cannot believe that if Mr. Boorman had been questioned he would not have disclosed the facts," though why he should have entertained the belief for that mere speculation is not apparent any more than is the necessity on the bank manager's part to make any further enquiry because there was no reason for him to assume that Boorman, though he had been for some time in a "reckless" mood, would disregard his timely advice not to do anything illegal but the contrary, because Boorman had responded thereto by the reassuring answer that he was "doing absolutely nothing without the advice and consent of my lawyers." Such being the case there is in my opinion an absence of substantial suspicious circumstances which would properly put the bank upon further enquiry, and the following language of Lord Halsbury in the *Simmons'* case, *supra,* at p. 208 is entirely and conclusively applicable to the circumstances before us, *viz.*:

MACDONALD, C.J.B.C.

> There is not, to my mind, the least reason to suppose that the bank did not take these bonds in the ordinary course of business, and with a full belief that the person from whom they received them was either the owner or had full authority to deal with them, as, in fact, he did deal with them.

In his reasons the learned judge below placed considerable reliance upon *Smith* v. *Prosser* (1907), 2 K.B. 735, but apparently overlooked the crucial fact pointed out by Lord Justice Buckley at p. 755:

> . . . this appeal fails on the ground that the promissory notes never became negotiable instruments, the reason being that the defendant never issued them, nor authorized anyone else to issue them, as negotiable instru-

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ments . . . and the authorities as to negotiable instruments have no application.

It follows that the appeal should be allowed.

MCPHILLIPS, J.A.: This appeal calls for the consideration of section 75, subsection (*c*) of the Bank Act, R.S.C. 1927, Cap. 12. The section and subsection, in so far as same are pertinent to the matters in issue in the present case read as follows:

> 75. 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 . . .

Now in the present case the facts shew that the bank (the appellant) in the ordinary course of the business of banking and in pursuance of the above set forth statutory powers did make advances upon the security of some 200 shares of Cities Service Common numbered respectively No. W.H. 16198 and No. W.H. 17199. It would appear that the bank became entitled to the said shares by delivery to the bank in the ordinary course of banking business by the British Columbia Bond Corporation Limited, and the bank made advances upon the security of the said shares the same being taken as collateral security for loans made by it. The transfer of the shares it would appear were executed by the plaintiff (respondent) and were handed by the plaintiff to the British Columbia Bond Corporation Limited in negotiable form and no notice whatever was brought home to the bank of any want of authority in the British Columbia Bond Corporation Limited in dealing with the said shares and negotiating same with the bank. It is idle in my opinion to claim that upon the facts of the present case there is any right in the plaintiff to recover possession of the shares or damages for the loss thereof. The plaintiff by his own act in executing under his hand the transfer of the shares rendered the shares negotiable and it would appear that the bank in good faith and in pursuance of the statutory powers in the carrying on of a banking business became entitled to the said shares, the same being taken as collateral security for loans made by it. It would appear that the powers of the bank in pursuance of the statute are the same in dealing with and in respect of stocks, bonds,

MCPHILLIPS, J.A.

debentures and obligations of corporations as with regard to bills of exchange and promissory notes. It is unquestionable that the bank in the present case became possessed of the shares in the way of banking business and made valuable advances of money by way of loan upon the shares, the same being in negotiable form. (*In re Barned's Banking Co.* (1867), 3 Chy. App. 105; *Royal Bank of India's Case* (1869), 4 Chy. App. 252.) The bank was not called upon to make any enquiries, in truth, it would be impossible to carry on banking business were that necessary. The facts disclose that the bank acted in good faith and in the ordinary course of business and in the exercise of its statutory powers, therefore it should be confirmed in its right to the shares. Here there was valuable consideration and present advances made. In my opinion the analogy is complete and the statement of the law is fully applicable to the circumstances of the present case as expounded and laid down by the Lord Chancellor (Lord Cairns) in *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476 at pp. 489-91.

The facts do not disclose in my opinion in any way that there was any infirmity of title in the British Columbia Bond Corporation Limited to deal with the shares. I would refer to the concluding portion of the Lord Chancellor's (Lord Halsbury) speech in *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201 at pp. 211-12:

MCPHILLIPS, J.A.

> The inferences derived from the business carried on by the money-lender in *Lord Sheffield's Case* [(1888)], 13 App. Cas. 333 were peculiar to that case, and have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities. The deposit of securities as "cover" in a broker's business is as well-known a course of dealing as anything can possibly be, and the phrase that they are deposited *en bloc* seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. 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. It would, therefore, to my mind, be as totally different from the facts proved or inferred in *Lord Sheffield's Case* as anything could well be.
>
> I do not think that in that case any countenance was given to the notion that because Mozley, the money-lender, was assumed to be the agent for the owners of the property, that circumstance alone put the bank upon inquiry as to his title to the property with which he dealt. To lay down as a broad proposition that in every case you must inquire whether a known agent has

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the authority of his principal would undoubtedly be a startling proposition, and certainly nothing said in *Lord Sheffield's Case* could justify so novel an idea.

The broad proposition laid down by Abbott, C.J., 3 B. & C. 47, that whoever is the holder of a negotiable instrument "has power to give title to any person honestly acquiring it," seems to me to be decisive of this case.

The property in question, for reasons I have already given, was, or must be presumed to be negotiable. I think there was nothing in the evidence to raise a doubt that it was honestly acquired by the bank, and I am therefore of opinion that the judgment of the Court of Appeal should be reversed.

MCPHILLIPS, J.A.

I cannot view the facts of this case other than as a transaction in the ordinary course of business by the bank. Thousands of similar happenings are taking place from day to day throughout the length and breadth of Canada and Parliament has protected the banks. In the course of business as authorized by statute, people must conduct themselves in business life with care and circumspection and with due regard to the state of the law. It would be impossible to have stable banking conditions if it were possible to succeed upon the facts of the present case. Every security held by a bank would be capable of being challenged upon the plea that although regular upon its face and in a form negotiable carrying the signature of the person complaining yet valueless, even in the hands of a bank, clothed with statutory authority to make advances thereon. No doubt if there was an absence of good faith and the bank did not honestly acquire title to the shares different considerations would arise and need attention but that is not the present case.

The action should be dismissed and the appeal allowed in my opinion.

MACDONALD, J.A.

MACDONALD, J.A.: The plaintiff (respondent) left with Boorman, manager of the B.C. Bond Corporation, Cities Service share certificates purchased by him some time before for $7,200. He had business relations with the company involving possible financial obligations, and as an evidence of good faith, and to ensure performance deposited the share certificates. Respondent before delivery executed a transfer of the shares by signing in blank the usual form attached thereto. The B.C. Bond Corporation was a customer of the appellant bank, and had a general current checking account with it and a line of credit up to $250,000 with a call loan account secured by the hypothecation

of stocks and bonds at agreed upon marginal values. Among the securities deposited with the bank from time to time were other shares of Cities Service stock in which respondent had no interest. Notes were given by the customer from time to time, the proceeds going to its credit.

As appellant bank required additional security the manager of the B.C. Bond Corporation brought in and deposited with it respondent's Cities Service shares. Mr. Stevens, appellant's manager, on being asked "When did you first know that the B.C. Bond had brought Cities Service shares in as part of their securities?" said:

> That is a hard question to answer: they had Cities Service with us all the time for months: they had sometimes several hundred shares of Cities Service under hypothecation.

The shares were in fact received by an assistant accountant acting under the supervision of the chief accountant Mr. Robertson. On that date, the bank, properly enough, withheld payment of a company cheque for $2,228 until further securities were deposited.

Before hypothecation the share certificates were "witnessed and guaranteed" by the signatures of two officials of the B.C. Bond Corporation. The bank, following the usual course, required this guarantee of respondent's signature to the transfer. It had no knowledge that the B.C. Bond Corporation did not own, or had no authority to treat these shares as its own. A value of $4,400 was placed upon them, an extension of credit given and cheques of the B.C. Bond Corporation paid.

The respondent brought this action to compel the bank to deliver up the shares or pay damages for conversion and obtained judgment at the trial. The principles of law are settled by the decision of the House of Lords in *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201, and it is only necessary to ascertain the facts with the assistance of the findings of the learned trial judge, draw the true inferences therefrom and apply the legal principles therein set out.

The learned trial judge found that 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,

also that the B.C. Bond Corporation was practically insolvent. A short time before receipt of the shares appellant's manager

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advised it "to make an assignment for the benefit of creditors," and he testified:

> Boorman was in such a state of mind as to be reckless [and] very apt to do something that was not just right,

not necessarily in relation to these shares but in connection with a scheme for refinancing the company. In this respect, however, he appeared to be reassured by Boorman's statement that he was acting under legal advice.

In his reasons for judgment the trial judge also said:

> Mr. Stevens did not say that he knew that this particular document in question (*i.e.*, the shares) 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.

With deference, the evidence does not warrant this view.

On the other hand it is important to notice that the trial judge said that the bank manager and chief accountant gave their evidence "in a most unexceptional way" and made "not the slightest effort to conceal anything." We must review the facts, therefore, giving, as the trial judge did, full credence to their evidence. We must also give weight to the findings of fact of the learned trial judge and unless a wrong inference was drawn from admitted facts, be bound thereby.

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In September, 1930, when appellant received these certificates the B.C. Bond Corporation was indebted to it, in the sum of $211,500 for which the bank held as collateral bonds and stocks listed on the various Exchanges. The following evidence was given by Mr. Stevens on discovery:

> What securities had you for the debt?—Speaking generally? We had securities that were all bonds and stocks listed on the various exchanges, with margins in favour of the bank.
>
> Do you mean that the margins were put up with you? Yes.
>
> In money? Oh no, in securities.
>
> These were shares or stocks, or bonds, were they, that were put up by clients of the B.C. Bond Corporation as margin? Presumably, yes.
>
> And which they handed over to you? Yes, some of them were their own and some were clients'. We were not interested; we were dealing with the B.C. Bond Corporation.
>
> You were aware that to a large extent they were clients' securities? We were aware—just what proportion we were unable to say.

It is not fair to draw the inference from this evidence alone that Mr. Stevens knew Boorman was pledging shares without a legal right to do so. Many of the securities deposited were listed stocks and if transferred were negotiable. It should not

be suggested, from this evidence, that in the case of each share certificate an enquiry should be instituted to ascertain whether or not the act of the transferor, in signing it, did or did not, indicate full authority to the broker to treat it as his own. The following evidence given by Mr. Stevens at the trial must be considered with that quoted so that a true inference may be drawn from all of it:

> There is one other question Mr. Stevens: I do not know whether I have ever asked you point blank did you know or have any suspicion of Mr. Patrick's claim in this matter? No, Mr. *Crease*, none whatever.

supplemented by the following evidence of the accountant who actually received the shares:

> Now when you took these in had you any reason to know that the B.C. Bond were not entitled to pledge these securities? No sir, none whatever.
>
> Then had you any knowledge when you took these to Mr. Robertson that there was any reason why the B.C. Bond should not pledge them? No sir, I had not.

When an inference is to be drawn from the evidence of a reliable witness it must be taken not from part but from all of it, especially if the part relied upon is, to some extent, incomplete and inconclusive.

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As to the knowledge of the bank of the financial condition of the B.C. Bond Corporation in so far as it bears on the point of putting the bank upon enquiry, dates are important. The shares were deposited on September 24th, 1930. At that time we find the ordinary pressure of a bank on an impecunious customer to maintain collateral for the line of credit extended. In the following month Mr. Stevens found that Boorman

> had been unable to raise the additional capital which he stated would have carried them over their difficulties and that he would have to assign.

Shortly before the 24th of September, 1930, he told Boorman as intimated that the best thing he could do was to assign. Boorman strongly combatted this view and told Stevens he was "trying to knock the business." When Stevens was asked if he was convinced that sometime before September 24th the company was practically insolvent he answered:

> I was, at least they were unable to meet a call in New York at that time. They did meet a call later, but they were unable, and he said if we could get the outstanding accounts in, the market has broken to such an extent that our clients won't pay up, and we are unable to meet the demands, and I said the only thing to do is to make an assignment, and he said, you are

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crazy, we are getting more capital and if you would not talk as you do and discourage me things would be all right.

Did you know that he then formulated some sort of a scheme to obtain capital? I knew he was working on a scheme.

That he was trying to induce people in Victoria to buy this preferred stock? I did not know what he was doing.

And in connection with that he was making some sort of promise with regard to the Adelphi property? He mentioned the Adelphi Block. He told me he was arranging for additional capital, and was going to give his equity in the Adelphi Block as additional. He did not tell me more.

It does not follow that because a banker is apprehensive about a customer's account and the latter insists that he could and would strengthen it he must necessarily believe that the customer will resort to dishonest acts in doing so. Nor is it evidence of bad faith—quite the contrary—that he warns the customer, as he did, not to resort to illegal methods. He might well believe that his advice, if necessary, would be accepted, and also feel reassured when told as he was that he was taking legal advice.

As the facts are all important I may be permitted to quote further from Mr. Stevens's evidence:

Did you ask him whom he expected to get this new capital from? No.

Did he mention Mr. Patrick's name? I cannot say that he mentioned any name to me.

MACDONALD, J.A.

Did you hear Mr. Patrick's name at all in connection with his proposed endeavour to get fresh capital? I cannot say definitely. Boorman mentioned that he had a number of people, he had so many friends in Victoria that were coming to his assistance, and he enumerated perhaps a dozen. I was not interested, I told him, I do not mind how you get this money if you are going to get it all right, but you want to be very careful what you do that you do not get into a very unenviable position with the law. And he said, you are trying to knock me, you are trying to prevent me getting this company on its feet, and think how all the creditors will suffer if you as a banker force this company to the wall.

When did that talk take place? In September.

Before the 24th September? I would think it was.

Then you had some idea, had you, Mr. Stevens, that he might get into trouble by the scheme he had in mind for raising fresh capital? Only from the state of mind the man seemed to be in.

You could see that he was in a reckless mood? He seemed to be reckless. I felt that—well, that he was very apt to do something that was not just right, and he said—he told me, I am making no move, I am doing absolutely nothing without the advice and consent of my lawyers.

Between September 24th and the 9th of October, 1930, when the B.C. Bond Corporation assigned for the benefit of creditors Mr. Stevens said that:

The account was continued to be operated until the date of assignment, in the same manner as formerly. Their borrowing fluctuated according to their requirements if they furnished additional collateral they got additional advances, if they took out collateral they provided funds to cover. As the market values fell off they called upon their clients to furnish additional collateral, or we assume they did, they at least brought in those additional collateral to cover the falling off which the market shewed from time to time.

And during this time you were cashing their cheques? We were, yes; we were paying their cheques.

It was submitted that the Cities Service shares endorsed in blank by respondent were not negotiable. Mr. *Maclean* argued that, as they left respondent's hand they were not in complete negotiable form (1) because the name of the transferee was not filled in (that is not material) and (2) because the evidence as to custom adduced by appellant shewed that it was necessary to have the signature of the transferor guaranteed (as was done) by the signature of the customer. A witness called for the appellant speaking of custom or usage said:

My experience is that they are negotiable documents, and they are transferable from hand to hand. Immediately they are signed in blank they become negotiable.

That is true. Any additional signatures, which for greater precaution, may be taken do not add to, nor detract from the negotiability of the document. It is common knowledge in mercantile life that these certificates, so signed, pass from hand to hand, without further notation, and it is quite immaterial that a bank on receipt of it, as collateral, may for its own, or for any purpose, require the guarantee of another that the transferor actually signed it. The evidence that it was usual amongst brokers for a certificate of that sort to be handled provided signatures were properly authenticated and witnessed does not mean that without this addition, it is not a negotiable instrument. They were made negotiable, not when the guarantee was added but when the transfer was executed. On the point of negotiability the witness said, in answer to the question:

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Share certificates endorsed in blank by the registered owner are or are they not transferable by delivery? My understanding is that they are. I have always understood that.

The point was rather confused, and not fully elucidated in the evidence but that fact is clear.

In ascertaining the law applicable to the facts, we need not, as intimated, go further than *London Joint Stock Bank* v.

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Simmons, supra. We were referred to, and the learned trial judge dealt with, *Smith* v. *Prosser* (1907), 2 K.B. 735, but it is not relevant. The paper signed in blank in that case was not a negotiable instrument. Buckley, L.J. points out the distinction at p. 754, stating that *London Joint Stock Bank* v. *Simmons* is quite a different case. In the latter case the plaintiff left property with brokers under circumstances that gave them no authority to dispose of it, and unless property rights were acquired by others it should be restored to him. Did appellant know, or should it have known, that Boorman was not entitled to negotiate the shares; or was it in possession of facts that should put it upon enquiry as to the infirmity in the title?

Lord Halsbury, L.C., raised the true question at p. 208:

> Did the bankers receive these bonds in good faith, and, though it was almost involved in the proposition, without any reason to suppose that the person from whom they received them had no right to so dispose of them? —and I am of opinion that they did. There is not, to my mind, the least reason to suppose that the bank did not take these bonds in the ordinary course of business, and with a full belief that the person from whom they received them was either the owner or had full authority to deal with them, as, in fact, he did deal with them.

MACDONALD, J.A.

The facts in the case at Bar are, of course, as usual, entirely different. There the bank was held not liable because as Lord Halsbury put it at p. 210:

> 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.

He states that the question as to whether or not the banker relied on the broker's honesty "makes the whole difference." "To lay down," his Lordship said, at pp. 211-12

> . . . as a broad proposition that in every case you must inquire whether a known agent has the authority of his principal would undoubtedly be a startling proposition, and . . . The broad proposition . . . that whoever is the holder of a negotiable instrument "has power to give title to any person honestly acquiring it," seems to me to be decisive of this case.

Lord Watson at p. 213 said:

> In my opinion it necessarily follows from the negotiable character of the documents, that Delmar, who was lawfully in possession of them for a special purpose, was nevertheless in a position to give a valid title to any person acquiring the bonds from him in good faith and for value, although the transaction on his part involved a fraud upon the respondent.

Lord Herschell at pp. 216-17 deals with the alleged failure of the bank to make enquiries saying:

But the statement of claim goes on to allege that the bank "made no specific inquiries as to the ownership of the said securities, or the authority (if any) which the brokers had to deposit the same, or the interest (if any) which the brokers had therein by reason of advances on such securities or otherwise." It is upon this allegation that the bank had notice that Delmar held these bonds in the capacity of an agent that reliance is placed. I defer entering upon the inquiry whether it has been proved that the bank had either notice or knowledge that Delmar's title to the bonds was that of an agent only. Assuming for the moment that this was proved, what is its effect? It is contended on behalf of the respondent, as I understand, that it put the bank upon inquiry as to the title of the person with whom they dealt, and as to the authority which he possessed; and that having made no such inquiry, they obtained as against his principal no better title than he had. It was admitted that anyone buying from Delmar would have obtained an unimpeachable title, notwithstanding his knowledge that Delmar was a broker, and that the bonds were the property of his principal. What ground is there for the position that in regard to a pledge the case is different, that one may safely take a negotiable instrument by way of sale from an agent without inquiry, but cannot so take it by way of pledge? It is surely of the very essence of a negotiable instrument that you may treat the person in possession of it as having authority to deal with it, be he agent or otherwise, unless you know to the contrary, and are not compelled, in order to secure a good title to yourself, to inquire into the nature of his title, or the extent of his authority.

At p. 218 his Lordship deals with what the authorities shew to be

the conditions necessary to give a good title to a person taking a negotiable instrument from one who had, as against the true owners, no authority to transfer it.

He questions cases where it was held that "care and caution in the taking of such securities has been treated as essential to the validity of his title," and at p. 219 says:

The law has now for some time been settled on this point in accordance with the view indicated by Parke, B. In *The Bank of Bengal* v. *Fagan* [(1849)], 7 Moore, P.C. 72, Lord Brougham said: "It may be taken as established that whatever may have been the law laid down in *Gill* v. *Cubitt* [(1824)], 3 B. & C. 466, and *Down* v. *Halling* [(1825)], 4 B. & C. 330, and one or two other cases, and not abandoned, at least as far as language went which the Court used in subsequent cases, is now law no longer, and that the negligence of the party taking a negotiable instrument does not fix him with the defective title of the party passing it to him." This passage was quoted by Willes, J. in delivering his judgment in *Raphael* v. *Bank of England* [(1855)], 17 C.B. at p. 175, where it was treated as undoubted law that negligence did not invalidate the title of a person taking a negotiable instrument in good faith and for value. I think, therefore, that the rule of law enunciated by Parke, B. as firmly established is the existing law.

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He concludes at p. 221:

In any other case the tribunal must investigate the facts for itself and determine whether those who claim to hold a negotiable instrument have made out that they took it in good faith and for value. One word I would say upon the question of notice, and being put upon inquiry. I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. 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 inquiry.

As to making enquiries no doubt if Mr. Stevens demanded it Boorman would assert his right to pledge the shares. True he might have enquired of the respondent, who was a customer of the bank, but can it be laid down as a rule of general application that in such cases the man whose name appears as transferor must be sought out? That would be impracticable. It may have passed through a score of hands in the meantime. The man whose name appears as transferor may no longer be the owner of the shares. The case is fully put by Lord Herschell at p. 223:

MACDONALD, J.A.

But I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; of course, if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.

These observations furnish a safe guide. Good faith is the governing factor. The application of the principle is not free from difficulty. I have already referred to reasons, based upon the facts, for holding that the banker acted in good faith. Good

faith is the test and the knowledge obtained from Boorman and from the state of his accounts must be viewed in its bearing upon that question. Appellant was only obliged to enquire into title if reasonably convinced that Boorman might use the property of others to advance his own interests. It is probably true that many customers of banks are in financial difficulties: that is no evidence that they may act dishonestly. In fact, the customer's difficulty is the banker's opportunity to extend generous treatment, or at least to permit him to carry on as long as possible by following ordinary mercantile usages.

With the learned trial judge reaching his conclusion "not with entire confidence in its correctness" and the acceptance, as I take it, of the truthfulness of appellant's witnesses concerned with this transaction, we are free to draw our own inferences from the evidence thus accepted. Their honesty is in itself inconsistent with bad faith. The fear of possible bankruptcy was met by assurances, that by continuing to afford ordinary banking facilities he could by a stock-selling scheme avert disaster. There is no ground for suggesting—nor do I think it was suggested by anyone—that Mr. Stevens knew that fraud would be resorted to by Boorman in trying to escape bankruptcy.

MACDONALD, J.A.

The learned trial judge in his reasons states that the bank "sincerely believed that it had the right" to accept these shares. That is really a finding of good faith. He relied too (wrongly, I think) on *Smith* v. *Prosser, supra,* and it doubtless influenced his line of thought. I cannot regard it as a fair inference from the evidence to hold that on September 24th, Mr. Stevens should have warned his accountant not to accept negotiable documents from Boorman until after investigation; or that the accountant should report receipt of them to the manager, in other words that either of them knew that Boorman was in such a condition mentally and financially that he was likely to commit a criminal act. It is not enough to charge negligence. Lack of good faith must be found. While sympathizing fully with the innocent respondent, I must allow the appeal.

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

Solicitors for appellant: *Crease & Crease.*

Solicitors for respondent: *Elliott, Maclean & Shandley.*

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MOTORCAR LOAN CO. v. WARNER

MOTORCAR LOAN COMPANY LIMITED v. WARNER.

Practice—Summons for judgment—Order XIV., r. 1—Delivery of defence—Application subsequent thereto—Delay—Jurisdiction.

The proper time to apply for final judgment under Order XIV., r. 1, is before a defence is delivered in the usual course, and although the delivery of a defence is not an absolute bar to a subsequent application, the onus is on the plaintiff to explain the delay and shew that he is entitled to judgment.

McLardy v. *Slateum* (1890), 24 Q.B.D. 504 followed.

APPEAL by plaintiff from the order of ROBERTSON, Co. J. of the 6th of January, 1932, dismissing an application for judgment under Order XIV., r. 1 of the Supreme Court Rules. The statement of claim in this action was filed on the 23rd of October, 1931, and the statement of defence was filed on the 16th of November, 1931. The summons on this application was issued on the 4th of December, 1931.

Statement

The appeal was argued at Vancouver on the 7th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Wood, K.C., for appellant: There are two agreements and the defendant took possession of the cars. There is no defence to the action: see *Easefelt* v. *Houston and Johnson* (1911), 16 B.C. 353; *Canadian Bank of Commerce* v. *Indian River Gravel Co.* (1914), 20 B.C. 180; *Edwards* v. *Davis* (1888), 4 T.L.R. 385. On the question of commission being allowed in lieu of costs see *Cornwall & Archibald* v. *J. Joseph Doyle Contracting Co.* (1931), [*ante*], p. 81; (1932), 1 W.W.R. 8; *Lord Hanmer* v. *Flight* (1876), 35 L.T. 127 at p. 129.

Argument

R. O. D. Harvey, for respondent: There is no suggestion that the defence is a sham. The learned judge below has a discretion under Order XIV. that will not be interfered with: see *Golding* v. *The Wharton Railway and River Salt Works Company* (1876), 34 L.T. 474 at p. 475. There were many transactions between the parties that justify the action going to trial. As to commission in lieu of costs see *Jacobs* v. *Booth's Distillery*

Company (1901), 85 L.T. 262. They were too late in making the application: see *Sterling Securities Corp.* v. *Waffle* (1931), 4 D.L.R. 765; *McLardy* v. *Slateum* (1890), 24 Q.B.D. 504; *Foster* v. *Dlugos* (1917), 3 W.W.R. 183; *Wing* v. *Thurlow* (1893), 10 T.L.R. 151.

Wood, in reply, referred to *Victoria Lumber Co.* v. *Magee* (1905), 2 W.L.R. 1; *Auld* v. *Taylor* (1915), 21 B.C. 192.

MACDONALD, C.J.B.C.: The appeal is from an order refusing leave to enter judgment under Order XIV. I think that the evidence for the defence on affidavit is insufficient to shew a good defence, and if the appeal depended wholly upon that I should be inclined to allow it, except on the question of costs; but the rule as to time for making the application was well settled as long ago as 1890 in England, in the case of *McLardy* v. *Slateum,* which was a decision of Mr. Baron Pollock (62 L.T. 151 at pp. 152-3). After consultation with other judges and the masters, he said:

> As far as I can learn, Field, J. appears to have adopted the view that, in the absence of fraud or misconduct, the intention as appearing on the face of the order was that the plaintiff should make his application after service of the writ, but before the delivery of the defence. We do not think the rule is so absolute as that, though, no doubt, the intention of the rule is that the plaintiff should make his application after issue of writ, and before the statement of defence is delivered in the usual course.

MACDONALD, C.J.B.C.

Then further down he proceeds to say:

> We think that, when a defence has been delivered in the ordinary way, if the plaintiff afterwards applies under the order, the onus is cast on him of shewing why he has not applied earlier; the normal time for applying is at the end after issue of the writ, and at the other before defence in the usual time; after that time the onus is on the plaintiff to shew that he is entitled to judgment.

Now, there has been no attempt to shew any reason why this application for leave after defence filed was not made within the time which I think was ample. The period between the 5th of November and the 16th of November gave the plaintiff time to communicate with his client in Vancouver and to get the affidavit back. I agree with a good deal of what Mr. Justice Wetmore said in *Victoria Lumber Co.* v. *Magee* (1905), 2 W.L.R. 1. While the practice he lays down may be quite applicable to the condition which he was dealing with, I do not think it is quite applicable here and I prefer to follow the judg-

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ment of Mr. Baron Pollock to that of Mr. Justice Wetmore. I think it would be a mistake to have any doubt about when the application ought to be made and since this case falls clearly within the rule of *McLardy* v. *Slateum*, I think we ought to follow it.

Therefore, I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: I agree. I wish only to add that in the circumstances before us there appears to be a triable issue, within the scope of our decision in *Auld* v. *Taylor* (1915), 21 B.C. 192. The observations of the Court of Appeal in *Wing* v. *Thurlow* (1893), 10 T.L.R. 151, *per* Lord Halsbury, are appropriate to this case, that is to say:

> The rule of this Court is that it will not interfere with the decision of the Divisional Court when unconditional leave to defend is given, unless very special circumstances are shewn.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I might say that I am also in favour of dismissing the appeal. I think the very fact that we have had a long, and I might say interesting, argument in this matter is a demonstration in itself that it is not a simple matter at all, to be disposed of in Chambers. It is a very grave right that every subject of His Majesty has, to have the action go to trial where there is any triable issue. It is evident that in the action there will arise matters of account which would be comprehensive of all the dealings that have taken place between the parties and the balancing of accounts, and no certainty at all that the defendant would be indebted to the plaintiff, and the indebtedness is denied. It would not be just that under Order XIV. an order should go for judgment against the defendant, when there would reasonably be set-offs that could be advanced. I would point out that this is not a case of a conditional sale agreement and promissory notes alone endorsed by the defendant; it is an assignment, and in the assignment we have this language:

> And for value as aforesaid I/we, the undersigned, guarantee payment by the purchaser(s) of all moneys payable by him/them under the said agreement.

The liability is by way of guarantee, and this involves many considerations. There ought to be an accounting. The truth of

the matter is there is more than one triable issue here; and that being so, the action ought to go to trial. I do not wish to indicate more precisely what the triable issues are, because it is not thought to be proper to do so when the action is to go to trial because of possible embarrassment in the Court below; the Court should be free to arrive at its own conclusion. *Jacobs* v. *Booth's Distillery Company* (1901), 85 L.T. 262.

The principle upon which the Court acts is that where the defendant can shew by affidavit that there is a *bona fide* triable issue, he is to be allowed to defend as to that issue without condition:

Annual Practice, 1931, p. 191, and further on we find this language at the same page:

MCPHILLIPS, J.A.

Once a reasonable ground of defence is shewn there is no power under Order 14 "to go into the merits of the case at all" (*Jacobs* v. *Booth's Distillery Company, supra*).

Further, these proceedings were not taken in the required time, *i.e.*, before defence. There must be certainty of practice.

I would dismiss the appeal, being of the opinion that the action is one that should proceed to trial in ordinary course.

MACDONALD, J.A.: I view the matter in the same way as the Chief Justice. I would only add that the appropriate application, after the statement of defence is delivered, would be for judgment on the admissions in the pleadings, in which proceedings, and in aid of them, if necessary, the defendant might be examined for discovery.

MACDONALD, J.A.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Wilson & Wilson.*

Solicitor for respondent: *L. S. McGill.*

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March 8.

ROBERTSON v. ROBERTSON.

Slander—Action for—"Misappropriating Government funds and threatening to blow up the hotel"—Conflict of evidence as to exact words used—Finding by Court.

ROBERTSON v. ROBERTSON

The plaintiff was foreman of a gang of men doing relief work on the west coast of Vancouver Island, and the defendant was a returned soldier interested in the welfare of returned men. Thinking the returned men were not receiving proper treatment from the plaintiff, the defendant was alleged to have said to three of the men working under the plaintiff "that he [defendant] was going to take their foreman [the plaintiff] down town with an escort and put him in gaol" and on being asked by one of the men what the charge was, he said "Oh, yes, misappropriating Government funds and threatening to blow up the hotel." One of the defendant's witnesses swore he heard the plaintiff say he would like to blow up the hotel, and the witness told the defendant of this. The defendant denied using the word "misappropriated" but that he did use the word "diverted." In an action for damages for slander it was found by the trial judge that the three men with whom the defendant talked did not have a clear recollection of the words really used: that the plaintiff did use the words deposed to by the defendant's witness the import of which was repeated to the defendant, but he did not find that the defendant had used the words alleged by the plaintiff's witnesses as to "misappropriation."

Held, that on the run of the whole incident the remarks uttered by the defendant relative to the plaintiff and his activities amounted to no more than gossipy expressions of suspicion which caused no damage, special or otherwise, to the plaintiff, and did not affect or tend to affect his character. The action was dismissed.

Statement

ACTION for slander. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Victoria on the 19th and 29th of February, 1932.

Moresby, K.C., for plaintiff.
Stuart Henderson, for defendant.

8th March, 1932.

Judgment

MORRISON, C.J.S.C.: This is an action in which the plaintiff seeks damages from the defendant alleging slander. Compendiously put, "slander is an oral statement published without lawful justification or excuse calculated to convey to those to whom it is published an imputation on the plaintiff injurious to

him in his trade or holding him up to hatred contempt or ridicule." Slander is always vulgar, seldom true and often injurious. In the case of libel where the alleged imputations are usually in writing there is little difficulty in determining what the words were of which complaint is made. In slander, however, the ascertainment of the exact words or the manner in which they were used is difficult, depending upon a variety of elements. What in the paddocks of Caliente would be taken as a term of endearment might in the drawing rooms of Rockland Avenue conceivably be construed as slanderous.

Except in certain enumerated cases, spoken words are not actionable without proof of special damage, and such damage, if any, must flow directly from the use by the defendant of the words complained of, *i.e.,* not be too remote (Underhill's Law of Torts, 12th Ed., 115).

No proof, however, of special damage need be given in the case of words imputing, as alleged here, misappropriation of public moneys and of threats to destroy property.

Words imputing mere suspicion of a crime are not actionable without proof of special damage—*Simmons* v. *Mitchell* (1880), 6 App. Cas. 156. That the words complained of as defamatory are true in fact is an absolute defence in an action of defamation.

Judgment

If the defendant relies upon the truth as an answer to the action, he must plead that matter specially; because the truth is an answer to the action, not because it negatives the charge of malice (for a person may wrongfully or maliciously utter slanderous matter though true, and thereby subject himself to an indictment), but because it shews that the plaintiff is not entitled to recover damages. For the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess:

Per Littledale, J. in *M'Pherson* v. *Daniels* (1829), 10 B. & C. 263 at p. 272.

The alleged slander is stated in paragraph 3 of the statement of claim, and is in the following words:

That he the defendant was going to take their foreman (meaning thereby the plaintiff) down town on Monday with an escort and put him in gaol and then said to the three men, namely, the said Louis Divall, Robert Elliott and Frank Hunger, the following words: "You won't like that," and the said Divall said to the defendant: "Might I ask you what charge," and the defendant said the following words: "Oh, yes, misappropriating Government funds and threatening to blow up the hotel."

The defendant denies he made use of these statements but

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admits that what he did say on the occasion in question was that the plaintiff was using funds of the Government otherwise than as voted and also that the plaintiff had threatened to dynamite the hotel at Renfrew Harbour.

It appears that the plaintiff, a bachelor farmer, was foreman of a gang of men who were employed in expending relief moneys on roads in and about Port Renfrew, a remote and secluded settlement on the West Coast of Vancouver Island. The witnesses called on behalf of the plaintiff were employees under him and were labourers and ex-logging camp workers—one was a camp cook. It does not appear what, if any, is their permanent abode.

The defendant is a returned soldier interested in the welfare of the returned men, and had, as he thought, grounds for complaining of alleged discrimination by the plaintiff against returned men. He endeavoured through the medium of the department of government having to do with the expenditure of the relief funds to redress what he thought were grievances in regard to the way the plaintiff was carrying on the work, and particularly that he was diverting some of the moneys in an unfair and improvident manner, ignoring those portions of his district for which the moneys were allotted. There was, of course, the usual gossipy criticism and a serious rumour that the plaintiff had threatened to dynamite the hotel with which the defendant had something to do. All the parties knew each other and what each was saying about each other. In fact were it not for this subject of gossip and the expenditure of Government money, the little wind-blown hamlet of Port Renfrew would be as dead as the proverbial door nail. Having seen all the parties and heard them and visualizing the scene during the time material to the issue herein, I cannot believe anyone took anyone else seriously. The very afternoon after the defendant is alleged to have slandered the plaintiff and after the plaintiff was told what the defendant was alleged to have said, they met, conversed and were apparently on their usual terms each with his torpedo nets down and the plaintiff did not disclose that he had been slandered. This is important in arriving at the credibility of the witnesses and as to the way the plaintiff must have viewed whatever it was that was told him by the three witnesses.

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Coming now to the evidence at the trial which I endeavoured to keep within bounds, I do not think that the three men with whom the defendant talked had any clear recollection of what words were really used. The defendant stated emphatically that he did not use the word "misappropriate" or "misappropriation," or any words of such import. He said he did not know and did not believe and did not say that the plaintiff had misappropriated anything. The word he says he did use was "diverted." The plaintiff had diverted moneys from one part and from work for which moneys had been allotted to other kinds of work and to other sections. And he adhered to that position at the trial. The defendant called a witness who is a farmer at Port Renfrew, Denis Sullivan, who impressed me favourably, who swore that he heard the plaintiff say that he would like to blow up the hotel. This he told the defendant and it was for that reason the defendant spoke to the other workmen and to which he had reference when he intimated that the plaintiff would likely be escorted to Victoria. There is no doubt that if the defendant used the words attributed to him and had said that in that connection the plaintiff would go out under escort he is liable for slandering him.

I find that there was no special damage suffered by the plaintiff. I also find that the plaintiff did use the words deposed to by the witness Denis Sullivan and the import of which was repeated by the defendant. I do not find that the defendant used the other words or expressions alleged by the plaintiff's witnesses to have been used by him as to misappropriation. On the run of the whole incident I am of opinion that any remarks uttered by the defendant relative to the plaintiff and his activities amounted to no more than gossipy expressions of suspicion and which caused no damage special or otherwise to the plaintiff, and did not affect or tend to affect his character or reputation in the little remote community amongst those to whom they may have been spoken.

A stereotyped form of question (true it was taken from a recognized authority) was put to each of the plaintiff's witnesses in turn by counsel for the plaintiff which they promptly answered in the affirmative. I attach very little importance to their answers thus obtained.

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The action fails. The parties belong apparently to the ranks of the unemployed from which it may be inferred they cannot make a monetary response to any order for costs that may be decreed. A successful party can only be deprived of the fruits of his victory (in this case costs) for good cause. I shall venture to characterize the incidents of this case "good cause" and order each party to pay his own costs.

Action dismissed.

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CORPORATION OF DISTRICT OF PENTICTON v. LONDON GUARANTEE & ACCIDENT CO.

CORPORATION OF THE DISTRICT OF PENTICTON v. LONDON GUARANTEE AND ACCIDENT COMPANY LIMITED.

Insurance—Bond of indemnity—Misappropriation of funds—Action on bond—Defence of misrepresentation—Materiality—"Owe"—Interpretation.

A bond for $2,000 was executed by the defendant company on the 16th of December, 1922, in the plaintiff's favour and renewed from year to year, the last renewal being issued for one year upon the 11th of December, 1929. The condition of the bond was that if one F. B. White would faithfully fulfil the duties of assistant municipal clerk, secretary-treasurer and tax collector to the plaintiff and honestly account for and pay over to the plaintiff all the moneys coming to his hands on behalf of the plaintiff during his employment, the said bond should be void. Between the 11th of December, 1929, and the 11th of December, 1930, said White dishonestly appropriated to his own use $1,956.70. In an action to recover this sum on the bond the defence was raised that in the original application for the bond there was a statement that the practice of the municipality was to audit its books by an independent auditor quarterly during the year, this statement being a term of the contract. This was the practice at the time the contract was entered into, but some years later a system came into vogue termed a "continuous audit," and this system was adopted, whereby the auditor appeared at his own convenience and unknown to officials and made one report at the end of each year. The company was not notified of this change. A further defence was that the "questionnaire" signed by the plaintiff for the purpose of obtaining a renewal of the bond in December, 1929, included a question: "Does he [White] owe any moneys to you?" This was answered in the negative, when in fact White owed the plaintiff a considerable amount of money,

the greater portion of which he had embezzled during the fall of that year, but the clerk of the municipality, signing on its behalf, was not aware of any indebtedness.

Held, as to the first point raised by the defence, that the materiality of misrepresentation is a question of fact and there was not such a breach of the terms of the bond as to affect its validity, and as to the second that the word "owe" does not cover an indebtedness arising out of criminality on the part of White as well as any civil liability, therefore the bond so renewed is binding on the defendant company to the extent of White's defalcations during the year covered by the last renewal certificate.

ACTION to recover $1,956.70 on a bond of indemnity. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 16th of March, 1932.

Statement

J. W. deB. Farris, K.C., and *Colquhoun*, for plaintiff.
Craig, K.C., and *Carmichael*, for defendant.

MACDONALD, J.: Plaintiff municipality seeks to recover from the defendant, $1,956.70 and interest thereon from the 11th of December, 1930. It bases its claim upon a bond for $2,000, given by the defendant company in its favour. The bond was executed on the 16th of December, 1922, and was renewed from year to year thereafter. A renewal certificate was issued in respect of said bond, for one year, upon the 11th day of December, 1929.

The condition of the bond was to the effect that, if Frederick Bernard White would faithfully fulfil the duties of assistant municipal clerk, secretary-treasurer and tax collector to the plaintiff and honestly account for and pay over to the plaintiff all the moneys coming to his hands on behalf of the plaintiff during such employment, the said bond should be void. The said White between the 11th of December, 1929, and the 11th of December, 1930, dishonestly appropriated to his own use the said sum of $1,956.70. Upon discovery of such misappropriation, the plaintiff duly notified the defendant company thereof and defendant became liable to pay the amount to the plaintiff under its bond, unless relieved upon any of the grounds set up in the defence.

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There are two defences, either one of which it is contended is sufficient to render the bond ineffective, for the purpose

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intended and relieve the defendant from any liability. The first ground taken by the defendant is, that in the original application by the plaintiff, upon the strength of which the bond was issued, there was a statement made that the practice of the plaintiff municipality was to audit its books, by an independent auditor, quarterly during the year. The statement in that connection, appears by a question and answer thereto. I think it is advisable to read these at length.

How often will a thorough examination of the applicant's office be made by an independent auditor or expert accountant? Quarterly, next 31st December, 1922.

This statement became part of the contract between the parties and affected the bond, so that the defendant is entitled to ask for performance of such condition, leaving aside for the moment the question as to its materiality. There was no misrepresentation made by the plaintiff at the time, because the practice of such municipality was to have such quarterly audits. But a few years afterwards, this practice was changed and a system came into vogue of having what has been termed a "continuous audit." I understood from the evidence, that this system was, to have the auditor appointed for a year and that he would at his convenience, at certain times unknown to the officials whose books might be investigated, appear, inspect, and make such audit as he deemed advisable at the time. He would not give a report to the municipality of the result in a concrete form, but would reserve disposition of a final audit until the close of the year. When this practice was changed, no notification was given to the defendant company, and in December of 1929, when the bond was sought to be renewed the custom of a "continuous audit" followed in the previous years was pursued. A series of questions, contained in a document which has been termed a "questionnaire" were submitted by the defendant to the plaintiff. B. C. Bracewell, clerk of the plaintiff municipality, answered these questions, and thereupon the requisite premium was paid and the renewal of the bond took place. There is no reference in the "questionnaire" to the mode in which the auditing is being carried on by the plaintiff. So to some extent one might conclude that in the framing of this questionnaire, it was not considered of moment from the defendant's standpoint. The only reference upon this point was as to the auditing of the

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said White, and up to what date it had taken place apparently. The question submitted was this: "When were his books or stock last checked and audited and up to what date?" "November 29th, 1929," is the answer thereto. To that extent only the defendant apparently deemed it advisable to obtain information from the plaintiff. It was correct and presumably important to defendant. This defence is based, not on the ground that there was a misrepresentation, which induced the execution of the bond, but on the ground that a term of the contract so entered into was broken, by the change in auditing. In other words, it is a question of breach of contract, as distinguished from misrepresentation, upon which a contract has been executed.

It is submitted that by the terms of the bond, the defendant undertook its liability, upon the basis that "the method of examining and checking the accounts should remain in every material particular in accordance with" the statement and declaration, to which I have already referred.

The question then for me to determine is whether the change in auditing was of such a material nature, as to become such a breach of the contract as to invalidate and render void the bond, so that it was of no further benefit to the plaintiff.

Judgment

If I were dealing with the question of misrepresentation, I would then have to decide as a fact, whether the misrepresentation was material or otherwise. I think that this statement of the law with respect to misrepresentation is a guide, in determining whether the breach of a contract, is of such a nature as to avoid a contract. In support of the statement that the materiality of misrepresentation is a question of fact, I refer to the case of *Mutual Life Insurance Co. of New York* v. *Ontario Metal Products Co.* (1925), A.C. 344; (1925), 1 W.W.R. 362. There their Lordships of the Privy Council said, in dealing with the question of misrepresentation (pp. 351-2):

> It is a question of fact in each case whether, if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

Whether counsel had in mind this case or not, a question was submitted along these lines to Mr. Janion who is the representative in British Columbia of the defendant company. He very candidly and frankly answered upon the question of auditing

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by quarterly audits as compared with continuous audits, it would not have affected his company in issuing a policy. So that from such a source I derive assistance, in determining the question of materiality of this alleged breach of the contract.

Then again in *The Nova Scotia Marine Insurance Company* v. *Stevenson* (1894), 23 S.C.R. 137, a statement of the law appears as follows:

> The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter in weighing the risk and considering the premium.

It also strengthens me in the conclusion I have reached, that there was not such a breach of the terms of the bond, as to affect its validity or disentitle the plaintiff to recover thereunder.

Then I have to consider the other ground of defence, which is of a different nature and arises under other circumstances. I have already referred to the "questionnaire" submitted in December, 1929. This was signed by the plaintiff for the purpose of obtaining a renewal of the bond for the ensuing year. Amongst other questions submitted and answered was the following:

> Does he [meaning Frederick B. White] owe any moneys to you? [meaning the plaintiff municipality] at the present time? If so how much; state particulars?

Yesterday, when I was considering this ground of defence, I was in somewhat the same position as Mellor, J. refers to in *Fowkes* v. *Manchester and London Assurance Association* (1863), 3 B. & S. 917; 122 E.R. 343 at p. 348. I felt that there was considerable weight attached to this defence, because the facts shew that, at the time when this statement was made, and upon which the renewal certificate was issued, the said White really owed the plaintiff a considerable amount of money, the greater portion of which he had embezzled during the fall of that year. So that, strictly speaking, the answer which was given to that question, as to indebtedness was wrong. The said White had not only rendered himself criminally liable, but he was also in a position where the municipality could successfully sue him for the money so embezzled, during the year 1929. I was further impressed with the view that a correct answer to this question might be important from the defendant's standpoint. It is, however, common ground that the answer thus given to the defendant was honest, and that the clerk of the

plaintiff municipality, signing on its behalf, was not aware of any indebtedness whatever. He certainly was not aware of any such dishonest acts as were later disclosed, the major part of which had taken place during that year. Then it is contended that this misrepresentation, even although made in ignorance, avoided the contract. In other words, that a municipality desiring to have one of its officials bonded and being requested by the bonding company to state, as to whether any indebtedness exists, would lose the benefit of a bond, for which premium had been paid, if as a matter of fact such official had already stolen an amount of money, the extent of which would not be of importance. It would thus practically guarantee the honesty of the official in his employment up to that time. I hesitate to decide that this forms a basis, upon which bonds of this nature are sought by bonding companies and obtained by municipalities. It was not apparently deemed necessary in the original application for the bond. The reservation in the bond itself was perchance deemed sufficient from a bonding standpoint. I will refer to this later on. Then in the argument presented by counsel for the plaintiff this morning, he pointed out that the construction to be placed upon the word "owe" in that question should not be of the strict nature contended for by the defendant, but should be given the construction, which the Court thought was the intention of the parties at the time. There is no doubt that the trend of authority is in the direction of endeavouring to find what the parties intended and to construe a contract accordingly. My view, in this connection is, that the Court should adopt such a construction as explains the meaning of the parties. Thus a learned judge said:

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> I think we should not adhere to the literal meaning of words to do injustice, but rather that we should permit the meaning of the parties to be shewn, that justice may thereby be done between them.

There has been no evidence as to the precise view taken by the parties, but a reasonable construction should be adopted, and all the surrounding circumstances taken into consideration.

I return then to a consideration of the effect to be given to the word "owe." Does it cover an indebtedness arising out of criminality, on the part of White as well as any civil liability on his part towards the plaintiff? I think not. I do not think that the parties intended that such a construction should be placed

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upon such question and answer. I have already intimated that from the plaintiff's standpoint it would have been perfectly ineffective to accomplish the end desired. It is true that the auditing had taken place and to that extent, the clerk of the municipality was justified in answering the question as he did. The reason why I have come to this conclusion is that the bond itself refers to a situation such as here presented, at any rate, to a limited extent. One of the provisions of the bond is that it is made on the express understanding that the employee has not to the knowledge of the employer at any former period been a defaulter or been guilty of any fraudulent or dishonest conduct while in the service of the employer or of any other person in whose employment he may have been. It was deemed advisable to have this very proper provision inserted in the bond. The "field," if I might so term it, has already been covered in the bond. The defendant seeks by this defence to go further, and introduce another provision, namely, that if the employee has during any prior period embezzled money, even without the knowledge of the plaintiff, that this will result in the bond being avoided, and the defendant company relieved from liability.

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I am aware that counsel are anxious to appear in another case or I would discuss this phase of the situation at greater length. Suffice it for me to say, that I have reached a conclusion, that the bond so renewed is binding on the defendant company to the extent of the defalcations of said White, during the year covered by the renewal certificate, namely, from 11th December, 1929, to the 11th of December, 1930.

Reference has been made to sections 14 and 15 of the Insurance Act, B.C. Stats. 1925, Cap. 20. In view of what I have already stated, I do not deem it necessary to discuss these sections at any length. I simply refer to section 15 as supporting my remarks, already made, as to the question of the materiality of a misrepresentation, being one of fact. It is so stated in the statute. It affords this assistance, and is along the line of the authorities, which I have already mentioned. I need only add that the plaintiff in submitting its argument laid stress upon the benefit to be derived from that statute.

The result is that there will be judgment for the plaintiff for $1,887.80 and interest thereon from the 11th day of December, 1930, at 5 per cent. and costs.

Judgment for plaintiff.

ZAVAGLIA AND PRESTON v. ROGERS AND DANFORTH.

MACDONALD, J.

1932

March 24.

ZAVAGLIA v. ROGERS

Contract—Agreement to contest in Walkathon for prize—Contest proceeds for nearly two months—Remaining contestants agree to gradually fall out and then divide prize money—Effect on original agreement.

The plaintiffs, as a couple, agreed with the defendants who were proprietors of a walking-endurance competition, to become contestants and to comply with the rules governing the competition, the defendants agreeing to give three cash prizes to the last three couples remaining in the competition. The contest started on June 1st, 1931, with thirty-three couples, and continued until the 22nd of July, when the eleven remaining couples entered into an agreement to gradually drop out one by one according to the drawing of lots and divide the prize money among themselves. The contestants then gradually dropped out in accordance with this agreement, and on the morning of the 24th of July, when only three couples remained on the floor (including the plaintiffs) the defendants, hearing of the arrangement the contestants entered into, terminated the contest without giving any prizes. The plaintiffs claimed compensation by reason of the defendants ending the competition and preventing the awarding of prizes.

Held, that the very essence of a contest requires that the prizes should be awarded according to merit and not divided amongst contestants irrespective of success. The arrangement of the remaining eleven contestants to gradually drop out and divide the prize money was inconsistent with a *bona fide* contest and was a breach of the original contract, which justified the defendants in terminating the contest and the plaintiffs were thereby deprived of any remedy.

ACTION on breach of contract, the defendants, who were proprietors of a walking-endurance contest or "Walkathon" terminating the contest without giving prizes by reason of an alleged arrangement between the remaining contestants to gradually drop out of the contest and later divide the prize money among themselves. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 7th of March, 1932. Statement

Sloan, and *Crux*, for plaintiffs.
Gonzales, for defendants.

24th March, 1932.

MACDONALD, J.: Plaintiffs, on the 1st of June, 1931, entered Judgment

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into a contract with the defendants to become contestants in a walking-endurance competition, called a "Walkathon." Upon compliance with certain rules, governing such competition, defendants agreed to pay prizes to the contestants as follows: To the last couple remaining in such endurance competition, a first prize of $1,500; to the second last couple, so remaining, a second prize of $1,000; and to the third last couple, a prize of $500.

Plaintiffs, together with 32 other contestants, commenced walking in the competition and they so continued until the 24th of July, 1931. On that day, the defendants terminated the competition without it being determined whether any of the contestants were entitled to any of the prizes, so to be allotted to them. Plaintiffs contend that, as they were amongst the last three couples remaining in the competition and were willing to continue the same, they are entitled to compensation by reason of the defendants ending the competition and preventing awarding of the prizes. Defendants submit that they were justified in terminating the competition, through the actions of the plaintiffs and other contestants.

Judgment

This endurance contest was a new fangled way of amusing the public, but presumably was entered into in good faith by the contestants. A number of them dropped out of the contest and after almost two months had elapsed, there were only eleven of the original contestants remaining in the competition and eligible to obtain any of the prizes. Then, on the 22nd of July, J. E. Preston, husband of the plaintiff, Mildred Preston, after an effort to arrange a dropping out of contestants, by drawing lots and distributing all the cash prizes amongst the then contestants, consulted with them as to arranging the contest so that they would all participate in the prizes. It resulted in an agreement being entered into and signed by all the eleven contestants (Exhibit 2) to that effect. The object of this agreement is stated, on its face, to be "due to good sportsmanship." This to my mind is inconsistent with a *bona fide* contest, whether it be one of endurance or otherwise. If there be more contestants in any contest than there are prizes to be allotted to the successful parties, then the very essence of a contest requires that the prizes should be awarded according to merit and not divided amongst

the contestants irrespective of their success. This conclusion seems to me so apparent that I deem it unnecessary to discuss it at any further length. When this agreement to so participate was signed it was intended to be operative, amongst the eleven parties thereto. When acted upon it became a breach of the contract entered into by them with the defendants. It was stated by one of the witnesses that this agreement to divide the cash prizes was submitted or came to the knowledge of the defendant Danforth and that he was satisfied therewith. Such defendant was not present at the trial, and, as I understood it, was not available to give evidence. I cannot, in view of the other facts presented, believe that defendant Danforth was satisfied with this arrangement which would affect if not practically destroy a real contest. It would substitute for a contest, an exhibition of walking or rather shuffling on the stage at the Vancouver Theatre. The attitude of the defendants was evidenced on the 22nd of July and shewed their desire to have the contracts fully performed by a notice read to the contestants at that time (Exhibit 5) notifying them that they must observe strictly the conditions as to resting. If they did not do so, the defendants would deem it a breach of contract and regard themselves as free and discharged from all liability. Then again on the 23rd of July defendants had apparently received information as to some agreement having been entered between the contestants of the nature outlined in Exhibit 2. They had not presumably seen the agreement itself, because in their formal notification to the contestants, they referred to it, as one whereby the contestants were to eliminate themselves one by one to a given number. It was stated in the notification that such an agreement was a breach of the contract and would amount to a fraud upon the patrons of the theatre. The intention at the time evidently was to warn the contestants, who had not yet abandoned the contest. If they had then produced the agreement (Exhibit 2) and destroyed it immediately and had not operated under it, the result might have been different. They were unable to secure the advice of their solicitor that evening and I am quite satisfied that, with the exception of one contestant, the unusual dropping out of contestants, during the night of the 23rd of July and the morning of the 24th, was in furtherance

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of the written agreement (Exhibit 2) and also in pursuance of a verbal understanding, that the contestants should gradually drop out leaving only three couples who would be entitled to the prizes. On the morning of the 24th of July the remaining contestants were also to get in touch with their solicitor and three couples, including the plaintiffs, remained in an apparent contest. I find that Exhibit 2 was acted upon and the contestants including the plaintiffs thus committed a breach of their contracts with the defendants. Even if the plaintiffs had honestly decided on the 24th of July to continue walking or shuffling, such decision was too late. They were parties to the breach of eleven contracts including the one they had entered into.

I find that there was a breach of contract by the plaintiffs which justified the defendants in terminating such contract and deprived plaintiffs of any remedy thereunder. The result is that the action is dismissed with costs.

Action dismissed.

COURT OF APPEAL

1932

March 30.

IN RE CLAMAN'S LTD.

IN RE CLAMAN'S LIMITED.

Bankruptcy—Landlord and tenant—Rent—Preferred claim for arrears—Three months accrued due prior to assignment—Interpretation—R.S.C. 1927, Cap. 11, Sec. 126—B.C. Stats. 1924, Cap. 27, Sec. 2 (5).

Claman's Limited assigned on the 12th of September, 1931, and the trustee in bankruptcy occupied the premises from that date until the 10th of November following. Rent was in arrears from the 1st of March, 1931. Under subsection (5) of section 2 of the Landlord and Tenant Act Amendment Act, 1924, "the landlord has a preferred claim against the estate of the lessee for arrears of rent not exceeding three months' rent accrued due prior to the date of the assignment." Under the lease the rent was $865 per month, payable monthly and in advance. The trustee allowed the preferred claim for arrears of rent for the months of July, August and September. An application by the landlord that he be allowed a preferred claim for three months' rent prior to the 12th of September, 1931, was dismissed.

Held, on appeal, *per* MACDONALD, C.J.B.C. and MCPHILLIPS, J.A., that the landlord is entitled to a preferred claim for rent for three clear months prior to the date of the assignment and the appeal should be allowed.

Per MARTIN and MACDONALD, JJ.A.: That as the last rental accruing due prior to the assignment was for the month of September, the landlord's preference claim therefore included September and the two months prior thereto, and the order below should be affirmed.

The Court being equally divided the appeal was dismissed.

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APPEAL by E. D. Farmer Estate from the order of MORRISON, C.J.S.C. of the 19th of January, 1932, by way of appeal from the disallowance of part of the claim of E. D. Farmer Estate, landlord of the premises of Claman's Limited, the bankrupt herein. The premises were rented by Claman's Limited at $865 per month, payable in advance on the 1st of each month. Six months' rent was due and owing on the date of the assignment, namely the 12th of September, 1931, and the trustee in bankruptcy occupied the premises from the 12th of September, 1931, until the 10th of November, following. The trustee only allowed the landlord a preferred claim for rent for the months of July, August and September. The landlord appealed on the ground that as the trustee went into possession of the premises on the 12th of September, he should have been allowed three months' preferred claim for rent prior to that date.

Statement

The appeal was argued at Vancouver on the 29th and 30th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. S. MacKay, for appellant: The assignment was on the 12th of September, 1931, and rent was in arrears since March, 1931. The rent is $865 per month and we are entitled to three months' preference during the lease. The lease terminated on the 12th of September when the trustee went into possession, and we are entitled to three months prior to that date. The trustee included the whole of September in the three months' preference, but the trustee was in possession himself for the latter three weeks of September and the Act provides for payment of rent during the time he is in possession. Subsection (4) of section 2, Cap. 27, B.C. Stats. 1924, should also be read: see *King* v. *Burrell* (1840), 12 A. & E. 460 at p. 468; *Crawford* v. *Spooner* (1846), 6 Moore, P.C. 1.

Argument

J. A. MacInnes, for respondent: We paid him in full for July, August and September: see *Ex parte Fox* (1886), 17

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Q.B.D. 4; *In re Olympia Cafe Co.* (1926), 8 C.B.R. 82; *In re Auto Experts Ltd.* (1921), 1 C.B.R. 418.

McKay, replied.

30th March, 1932.

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MACDONALD, C.J.B.C.: I think the appeal must be allowed. The statute, I think, only provides in subsection 5 that the landlord is entitled to arrears not exceeding three months' rent, accrued due prior to the date of the receiving order. It is true that the September rent had accrued due, but it cannot be met by that, it is not divisible, there is no provision in the Act for dividing it into parts. It is three months that the statute evidently intended to give the landlord as arrears, and the only three months prior to September are August, July and June. Those are the three months for which the landlord is entitled to arrears. To read it otherwise would affect the rights of the general creditors to have the trustee pay the landlord from the time he enters until the time he leaves, because there is a subsection in the statute—I think it is 7—which deals with deductions —sums which he had properly paid in advance. I do not think he would probably pay in advance for part of a month, and therefore he would be entitled, for the benefit of the general creditors, to the full rent by statute under the new lease, because it is a new lease—a statutory one—from the 12th of September to the end of September. There is, of course, this about it also, that one cannot give the other construction to it without doing violence to the language of the statute itself, in inserting words which the Legislature did not think it necessary to insert. Where the statute is clear and there is no ambiguity about it one cannot look at the other sections of the statute for the purpose of putting a different construction upon it to that which the words indicate. Here there are clear words that he is entitled to three months' rent, and that he is entitled to three months' rent prior to the date of the assignment; and that would be read as giving him August, July and June. The trustee then taking possession on the 12th of September has entered into a new lease for which he has to pay occupation rent from then on, giving the general creditors the benefit of such rent.

MACDONALD, C.J.B.C.

I think that is the true construction of this Act, and I do not think the case referred to by Mr. *MacInnes*, in 8 and 1 C.B.R.

(*In re Olympia Cafe Co.* 82 and *In re Auto Experts Ltd.* 418) and again in *Ex parte Fox* (1886), 17 Q.B.D. 4, touch this case at all. The statutes are quite different and they do not help us. The case in Ontario, however (Mr. Justice Orde), may be said to come a little closer to it, but not close enough to affect my conclusion.

In any case, we are entitled to give our opinion free and untrammelled by the judgments in any of those three cases, though, of course, we pay very careful attention to the reasons of the learned judges.

I think the appeal should be allowed.

MARTIN, J.A.: In my opinion, with all due respect to contrary views, the learned judge below has reached the right conclusion, though he gave no reasons, and therefore the appeal should be dismissed. It is not necessary, having regard to the view I take of the statute, to consider the effect of the cases which have been cited by counsel because, having regard to the circumstances in this case (and to which alone I restrict my observations), there is no necessity to make an excursion beyond that. The situation is this, that at the time the trustee went into occupation of these premises, or took them over, whichever you like to call it, there were arrears of rent for three months due at that time, and those arrears were recognized by him and have been paid up to the end of September. That is to say it was quite possible, as I view the matter, that on the 11th of September, when the trustee went in and took possession, if he found the landlord's bailiff in possession, it would be for those three months and no other months—July, August, and September; and he would have had to have paid the bailiff in addition to the rent the costs of distress as provided by subsection (5). I do not think, in the true meaning of the expression, there was any occupation rent, because it had been included in the rent paid in arrears, consequent upon the fact that it is the case (which is the crucial fact) that the rent had been payable in advance, and therefore the exception in subsection (7) provides for such a state of affairs, had it been necessary to provide for it, by recording the payments of the rent in advance as in this language, except that any payment already paid to the landlord as rent in advance—still

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treating it as rent in advance, though occupation had *de facto* occurred.

In such circumstances I have no doubt that the order made was the correct one without embarking upon any disquisition on the point of what might or might not be the particular view to take as to the statement made by Mr. *MacKay* as to whether the term of three months should be that which would be immediately preceding the term. The circumstances in this case exclude the necessity for any investigation of that part of the case.

MCPHILLIPS, J.A.: I am of the view that the appeal must be allowed. This is a question of the construction of statute law, and when I read subsection (5), the landlord shall have a preferred claim against the estate for arrears of rent not exceeding three months' rent, the Legislature had in mind that it might well be more than three months' rent. Now, having in mind that it might be more than three months' rent, they put a limitation on it, that is all—not exceeding three months' rent accruing due prior to the date of the receiving order. If counsel were to be asked to give an opinion on the facts of this case as Mr. *MacKay* indicates them on behalf of the landlord, would not counsel have had to say that all this rent had accrued due prior to the date of the receiving order? Of course he would—he would have to give the opinion that it was accrued due before the receiving order. All that is meant is accrued due before the date of the receiving order; and it rested with the landlord to shew that he had rent that was accrued due before the date of the receiving order, and elect what three months he should claim. It is perfectly immaterial what three months. The Legislature only provided the limitation of three months. The Legislature did not say it should be the last three months, the immediate three months, or the first three months, anything of that kind; and further, when we get down to subsection (7), we have it stated that "except as aforesaid the landlord shall not be entitled to prove as a creditor for any portion of the unexpired term." The bankruptcy brings that about. The Courts are not at liberty to legislate, and that is what is submitted here. It means that there has to be an interpolation of words to give the meaning that has been given by the learned judge in the Court

below. I do not propose to legislate. I follow the language of the statute. It seems to me that the language is perfectly plain and understandable and why should the Court deprive a creditor of moneys that were accrued due to him before the date of the receiving order, save to the extent of the limitation imposed only, *viz.*, three months?

That being my view, I think the appeal should be allowed.

MACDONALD, J.A.: I have reached a firm conclusion on the facts that the appeal should be dismissed. The section deals with three months' rent that accrued due prior to the receiving order or assignment. The last rental accruing due prior to the date of the assignment was for the month of September. It was due on the 1st of that month. The other two months reasonably must be taken as the two preceding months, *viz.*, July and August. The fact that the same section deals with the possibility of a distress for rent and provides that the costs of that distress may be included with the preferred claims assists one in coming to this conclusion.

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *MacKay & Fraser.*
Solicitors for respondent: *MacInnes & Arnold.*

BUDGE v. MARBIN LUMBER COMPANY LIMITED AND MARTYN LUMBER COMPANY, LIMITED.

Insurance, fire—Equitable assignment of—Conditional sale of goods—Buyer agreeing with seller to insure—Seller not mentioned in policies.

The plaintiff sold M. certain machinery under a conditional sale agreement, there being a balance of $1,500 to pay on the purchase price. The agreement included a clause that "The purchaser agrees to insure the mill, machinery and equipment in the sum of $1,500 at least, during the continuance of this indenture, and in the event of loss by fire to pay said sum to the vendor." The policies were placed, but the plaintiff

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was not mentioned therein. A fire took place and in an action that the plaintiff was entitled to $1,500 out of the insurance moneys:—

Held, that the agreement constituted an equitable assignment of the insurance moneys up to the sum of $1,500.

BUDGE
v.
MARBIN LUMBER CO.

Statement

ACTION to set aside an assignment of certain insurance moneys by the Marbin Lumber Company, Limited, to the Martyn Lumber Company, Limited, for the alleged purpose of defrauding its creditors, and for a declaration that a certain agreement between the plaintiff and the defendant, the Martyn Lumber Company with reference to the sale of certain machinery by the plaintiff to said defendant constituted an equitable assignment of said insurance moneys up to the sum of $1,500. Tried by MCDONALD, J. at Vancouver on the 31st of March, 1932.

Locke, for plaintiff.
W. C. Thomson, for defendants.

14th April, 1932.

MCDONALD, J.: In this case one matter remained to be disposed of after the trial and has now been argued.

The plaintiff sold to the defendant, Marbin Lumber Company, Limited, certain machinery, the company paying part of the purchase-money in cash and agreeing to pay the remaining sum of $1,500 in two equal instalments. The agreement contains the following clause:

> The purchaser agrees to insure the mill machinery and equipment in the sum of $1,500 at least during the continuance of this indenture and in the event of loss by fire to pay said sum to the vendor.

Judgment

Policies of insurance were placed but no mention of the plaintiff is made therein. A fire took place and the plaintiff seeks a declaration that he is entitled to $1,500 out of the insurance moneys. Upon reading the authorities cited by counsel it seems quite clear that the case falls within the decision in *Greet* v. *Citizens' Insurance Company* (1879), 27 Gr. 121; (1880), 5 A.R. 596, followed by Mr. Justice Bigelow in *In re Burce* (1923), 2 W.W.R. 872, and that the agreement in question constituted an equitable assignment of the insurance moneys up to the sum of $1,500.

Judgment for plaintiff.

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Practice—Mode of trial—Dislocated hip—Malpractice—Rule 429—Scientific investigation—Order for trial with jury—Appeal.

An application by the plaintiff for a jury in an action for malpractice was opposed by the defendant on the ground that the issues were of an intricate and scientific character and the case came within rule 429. It was held that there was not sufficient ground for departing from the established practice by depriving the plaintiff of his right to a jury.

Held, on appeal, affirming the decision of MACDONALD, J., that although he disclaimed using his discretion in concluding that the plaintiff's right to a jury was not displaced by rule 429 he was exercising some discretion, and there being evidence on which he could so decide his decision should not be disturbed, but apart from this the main complaint is negligence on the part of a doctor, the question up for trial being the expertness of a man in his profession, coupled with due care on his part or want of skill. These matters can be tried by a jury and there is no intricate or scientific question involved that brings the case within rule 429.

APPEAL by defendant from the order of MACDONALD, J. granting the plaintiffs' application heard by him at Vancouver on the 14th of March, 1932, that the action be tried by a judge with a jury. The facts are set out fully in the judgment of the trial judge. Statement

Manson, K.C., for the application.
J. W. deB. Farris, K.C., contra.

MACDONALD, J.: Upon this application for a jury, on the part of the plaintiffs, the defendant opposes an order being granted on the ground that he comes within the provisions of rule 5, Order XXXVI. of our rules.

The rule under which the application is made is rule 6 of said Order XXXVI. and reads as follows: MACDONALD, J.

> In any other cause, matter, or issue other than that referred to in Rules 2A, 3, 4, and 5 of this Order, upon the application within four days after notice of trial has been given of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury.

Then the rule, under which the defendant is resisting the application (rule 5) is as follows:

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The Court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury, or where the issues are of an intricate and complex character.

Rule 6 gives the right to a jury in purely common law actions, subject to rule 5 which I have just read. The plaintiff in this action is thus, in my opinion, being an action for negligence, entitled to a jury, unless the defendant has shewn, that such right should not be granted, under said rule 5. In other words, the plaintiff has a *prima facie* right to a jury, and it is for the defendant to shew that such right does not prevail.

I have been referred to a number of authorities, but as I have already expressed a desire to facilitate the trial of this action, and there are trials awaiting me this morning, I do not consider it necessary to discuss these authorities at any length. Before the Court stenographer was called to take a note of my remarks, each counsel stated he would facilitate the opposite side should an appeal be desired from the order I might make upon the application. It is asserted by counsel for the plaintiff, and not controverted by the other side, that no reported case can be produced where the party complaining of malpractice has not been entitled to have the action tried by a jury. I had occasion lately to try an action of this kind, without a jury, but there was no application in that case for a jury, so the question was not involved.

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Taylor's Medical Jurisprudence refers to the trial of these actions being held by a judge and jury. There is no discussion there or in any English text-book as to whether or no a jury might be refused, upon grounds contended for by defendant on this application. My difficulty arises in connection with the application of the judgment in *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56. It was submitted as an authority supporting the application of the plaintiff, and certainly in the result the order made for a jury, and which was appealed from in that action, was upheld by the Court of Appeal. The judgments, when closely read, do not lend the clear support that it was contended by plaintiff resulted from that case. I think it well for me not to discuss the situation thus presented. I simply repeat that the order for the jury was

upheld in the Court of Appeal. The judgment of the Chief Justice, however, was quite clear cut upon the proposition now being considered. On the contrary, two other judges of the Court of Appeal held the contrary opinion upon the matter, so the result creates a situation which is difficult for me to deal with satisfactorily. I am bearing in mind that in no case has there been any judgment by the Courts of England upon this matter.

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My attention has been drawn to a case decided in 1931, *Mayhead* v. *Hydraulic Hoist Co.* 100 L.J., K.B. 369. In that case Herridge, J., was in charge of the special jury list, and having looked over the pleadings, came to the conclusion that in view of the lengthy particulars of mechanical defects and bad running of the lorry alleged therein, and also as to other defects in other lorries, the case was one which should be taken out of the class of case in which, under Order XXXVI., r. 6, the plaintiff was entitled to a jury. He considered that it fell in the class of cases in which, under Order XXXVI., r. 5, a Court or judge might (if in his opinion the case required scientific investigation), on his own initiative, direct a trial without a jury. It is to be noted there was no application whatever made to him to direct the trial in that manner. The judge informed the parties of the course he intended to pursue, and counsel for the plaintiff vigorously demanded the jury should be retained. Then counsel for the defendant also objected to the official referee acting, and the result was the trial judge transferred the case to the non-jury list. The plaintiff then appealed and the judgments rendered upon such appeal are instructive, as shewing the views entertained by the Court as to the effect of r. 6, Order XXXVI.

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Greer, L.J., in his judgment, refers to the fact that before the Common Law Procedure Act, 1854, the right to trial by jury was absolute. No other mode of trial was provided for. Then the Common Law Procedure Act made certain alterations in the law whereby, in cases of account, or upon agreement between the parties, the common law right to a jury was restricted. Then the rules were subsequently passed which contain a code so far as the question of a jury is concerned. There has been no reference made to rule 7, Order XXXVI. I can recollect where it was invoked during a trial. However,

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consideration of that rule is absent in the present application. Then I have the point to determine whether, with a judgment of our Court of Appeal refusing to interfere with an order for trial by jury, where scientific investigation is alleged to be a matter for consideration, I should establish an important departure in that respect, from any authority which has been presented in the English Courts, and deprive the plaintiff of his ordinary right to trial by jury. While attaching great weight to the objection raised by counsel for the defendant, I do not think, as a judge of first instance, in a matter of this kind, I should so decide in a malpractice case. In almost every action of this nature the question of opinion between different physicians or surgeons comes up for consideration. The party unsuccessful has recourse by way of appeal, should he be dissatisfied with the order made granting a jury. I should add that I am not acting in the exercise of a discretion. I do not think it exists upon such an application. It is a question of right or otherwise.

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The order will be for a jury, whether special or common is a matter to determine, and might as well be spoken to now. I bear in mind the undertaking given by the party thus successful to facilitate any appeal, should defendant decide to take an appeal from the order granting a jury. If such an appeal should not be launched by the defendant, I could not, of course, make any order as to the disposition of an application for adjournment, should he not speedily take the benefit of an agreement thus entered into at the suggestion of the Court. I had better make myself clear in that matter. Time might elapse from which an appeal might be taken from an order made in chambers and the appellant might not be required to take it to the present sittings of the Appeal Court, but at the June sittings, and thereby the trial which I think should take place at an early date would stand over for many months.

Do you wish to speak to the question of a special jury now, Mr. *Manson?*

Manson: I suppose primarily it would be a matter for my friend, but I think on the whole the interests of justice would be better served if we have a special jury. The application is

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one for my learned friend, if your Lordship had not raised the point.

THE COURT: I am not raising it, but if you are going to make an application for a special jury it might as well be made now.

Manson: If the order goes, my friend would probably ask for a special jury, and I could not strenuously oppose it.

THE COURT: You are applying for a special jury?

Manson: I am agreeing to it.

Farris: I am making no application.

THE COURT: You would not hurt your position.

Manson: Then I will make the application, my Lord.

THE COURT: Order.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 5th and 6th of April, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Sloan, for appellant: There are issues of an intricate and complex character. Through an auto collision Plowright's hip was dislocated. We are within Order XXXVI., r. 5: see *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56 at pp. 58-9; *Burchill* v. *City of Vancouver* (1932) [*ante*, p. 169], 1 W.W.R. 641 at p. 642; *Mayhead* v. *Hydraulic Hoist Co.* (1931), 2 K.B. 424; *Jenkins* v. *Bushby* (1891), 1 Ch. 484 at p. 495. The learned judge misinterpreted the *Bradshaw* case, *supra*: see also *Ruston* v. *Tobin* (1879), 10 Ch. D. 558 at p. 565; *Swyny* v. *The North-Eastern Railway Company* (1896), 74 L.T. 88; *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473; (1905), 11 B.C. 280; *Perera* v. *Perera* (1901), A.C. 354. Malpractice cases in Ontario are tried without a jury: see *Town* v. *Archer* (1902), 4 O.L.R. 383 at p. 389; *Gerbracht* v. *Bingham* (1912), 4 O.W.N. 117. Argument

Manson, K.C., for respondents: "Intricate and complex character" is added to our rule 429. The learned judge below has exercised his discretion and should not be interfered with: see *Ford* v. *Blurton* (1922), 38 T.L.R. 801 at p. 804. A jury goes as a matter of right in Common Law cases: see *Calcraft* v.

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London General Omnibus Co. (1923), 2 K.B. 608 at p. 613. This especially applies to malpractice cases: see *Jenkins* v. *Bushby* (1891), 1 Ch. 484 at p. 489. The facts do not bring the case within rule 429: see Taylor's Medical Jurisprudence, 8th Ed., Vol. I., pp. 82-3; *Navarro* v. *Radford-Wright Co.* (1912), 8 D.L.R. 253 at p. 254; *Iron Mask* v. *Centre Star* (1899), 6 B.C. 474; *Welch* v. *The Home Insurance Co. of New York* (1930), 43 B.C. 78.

Sloan, in reply, referred to *Sloan* v. *McRae* (1926), 37 B.C. 464.

MACDONALD, C.J.B.C.: I think the appeal should be dismissed. The question is no doubt a very difficult and serious question, but the learned judge has disposed of it in the Court below, and while he has disclaimed using his discretion, I think with deference that the facts shew that he must have used his discretion. At all events, he came to the conclusion that he ought not to depart from what he considered the general rule that a plaintiff was entitled to a jury unless that right was displaced by rule 5. He has come to that conclusion, at all events, and to do that he had to exercise some discretion. The expression in his judgment may be unfortunate, that he said he would not exercise his discretion, but I think he has. Apart altogether from that phase of it, however, it seems to me that there is no scientific question involved in this case. The principal complaint is negligence on the part of the doctor and unskilfulness in his artificial work, not scientific work. It is merely artificial when, as was done in this case, you reduce a dislocation. That is artificial, requires a certain amount of skill, just as it requires skill on the part of a blacksmith to make a horseshoe, but it is artificial, it is not highly scientific, if scientific at all, and the same is true with regard to the other questions which are raised. There seems to be a tendency to regard expert testimony as scientific testimony. It is not necessarily that at all. A man may be quite expert in his trade and yet he cannot be said to carry on a scientific trade. Now in this case the questions that are up for trial are questions of the expertness of the man in his profession, coupled with due care on his part, or want of skill; but those are not matters which

cannot be tried by jury. The issues are to be tried by the evidence of skilled persons, not unskilled persons, but persons skilled in the performance of duties of this kind. It is true, supported by evidence of skilled persons, and opposed by the same kind of evidence, but that we can regard it as essentially scientific I am quite unable to see.

There is no difference between this case and the ordinary case of negligence, where ordinary witnesses are called to give evidence with regard to the facts, and the jury have to decide not on their own knowledge but on the evidence before them which contention is correct. In this case they will have to decide on the evidence before them, not on their own knowledge, whether the doctor has been guilty of malpractice or not, and they will do that on expert evidence—I do not use the word scientific, but expert evidence on either side. There are other questions, of course, involved which must be considered, the question of damages, which is generally one for a jury, and the question of the credibility of witnesses. So we can say that no case has been made out for depriving the plaintiff of his jury which has been guaranteed to him by the learned judge below; in my opinion, the appeal must be dismissed and the order maintained.

MARTIN, J.A.: In my opinion also this appeal must be dismissed; nevertheless, I recognize that the case is a difficult one, and upon the line, because I think the true principle to be applied in deciding the question as to whether or no the element of scientific investigation is present depends upon the facts in each particular case and is one of degree. I am bound by the decision of my brothers in *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56, and I have already applied it, as is my duty, but I find in that case nothing in the opinion of the majority of the Court which conflicts with what I have just said. The question therein determined was not, as I understand the case, one of principle but of degree. It is true that in the expressions of our learned brother the Chief Justice he seemed to restrict it, as I understand him, in his observations which have been just made, to cases which do not include personal injuries, as would appear from his remarks in the *Bradshaw* case at p. 58, and repeated on p. 112 of the same report upon the application

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to the Privy Council, and therefore, no doubt, that is the reason why the learned judge appealed from experienced that difficulty which he points out at p. 46 of his reasons, and makes the statement at p. 48 that he does not think in disposing of the matter he should exercise his discretion. Well, I say, with respect, that I think this expression is very pertinent in view of what I have said, yet I also think, with all respect, that if he had given closer consideration to the other judgments of the Court he would not have experienced much difficulty, and would have passed upon the element of discretion, and in such case, as Mr. *Sloan* very frankly and very properly said, we would not have had the pleasure of seeing him before us, because on p. 59 of that report I made these remarks, which are very appropriate to what we have heard today:

> Now without labouring the matter I might say that while the question as to whether or no a case may be considered as coming within the classification of scientific investigation depends upon the facts, yet I have no hesitation in saying that this Court should not be prepared to hold that an examination by medical doctors cannot attain the height of a scientific investigation within the meaning of the rule.

MARTIN, J.A.

I was dissenting there, but my brother GALLIHER at p. 61, was careful to express, in slightly different language, the same view when he said:

> I am not unhesitatingly firm in the conviction that it is within the rule, although I recognize that there may be a degree that has to be considered in each case to determine whether it shall be known or treated as scientific evidence.

And my brother M. A. MACDONALD at p. 63 said what, practically, is essentially the same, *viz.*:

> While there is a sense in which all evidence given by medical men in regard to the nature and extent of injuries is scientific, yet I do not think the facts in this case, where two plaintiffs are claiming damages, bring it within the rule.

And my brother MCPHILLIPS, who also shared in the dissent at the time, nevertheless shared my view in regard to the question of degree, and stated in better terms than mine his reasons for coming to that opinion. Therefore, we have it established by at least four members of the Court, though they disagree on other questions, that the test to be applied was as to whether or no the examination by medical doctors had not attained the height of scientific investigation within the meaning of the rule.

Now, such being, as I conceive, the basis upon which we

should view the present matter, I have listened with great attention to all the evidence of what was said, and in view of the learned judge having exercised no discretion upon the matter, two courses are open to us: first, we could, as we have ample power, decide it ourselves and make the order just as though we had been sitting, or, second, we could refer it back to him. It is quite unnecessary to take the latter course because the matter is fully before us, and therefore in the absence of his discretion (it may not be regarded as discretion, though I think it can to a certain extent) it is for us to say, first, whether we think this element of scientific investigation is present, and then as to whether or no that investigation could be conveniently made by a jury in the language of the rule. I do not think it would be profitable to prolong the matter other than to say that, giving the best attention which I have been capable of to the matter before us, and having regard to the material, which I regret to say I think on both sides is scantier than it ought to have been, that we would not be justified in overruling the order that has beeen made below, based upon whatever grounds it may have been. And such being the case, I do not apprehend that any practical difficulty will arise in doing justice between these parties, because I feel sure—at least I may have every reason to expect—that the jury will do justice herein, just as it did, ultimately, in the case of *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473, 28 years ago, in which I thought a jury was the lawful tribunal to decide a matter which several judges at least regarded as highly scientific, nautically, involving the seaman-like course to be pursued in the towing of a vessel which became stranded on Trial Island, and I ventured, at p. 493, to make the following expressions of hope:

MARTIN, J.A.

> With complete direction from the Court, and assisted by apt questions—

I pause to lay stress on that, because we had occasion to remark recently upon the miscarriages of justice which have occurred because of the failure to ask questions in negligence cases—

> and assisted by apt questions, I have every confidence that the jury will arrive at a just verdict, even if the tribunal selected is not the one best adapted to try the case.

I have no reason to believe that the expectations which I there

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entertained, and which were happily subsequently justified, will not be frustrated in the present case.

McPHILLIPS, J.A.: In my opinion the appeal should be dismissed. This Court is entitled to uphold the judgment of the Court below and to support the order of the Court below either upon the ground that the learned judge himself states or upon any other ground which is in conformity with the law.

We have heard this at length, and I must say that I am without hesitation at all in arriving at a conclusion that this is a proper case for submission to a jury. But when we deal with the matter in a concrete way, the rules we have to consider are 5 and 6. I will first say that it was not necessary for the exercise of discretion here in that the judge in pursuance of the rules was well entitled to make the order under rule 6, because 6 says "in any other cause, matter, or issue other than that referred to in rules 2, 3, 4, and 5 of this order." Now, 5 reads, "The Court or a judge may direct the trial without a jury of any cause, matter or issue requiring any prolonged examination of documents or accounts," (we have not that) "or any scientific or local investigation." I have often thought that that "scientific or local investigation" is something entirely different to what one would expect in regard to medical art or medical science. Then we have, "or where the issues are of an intricate and complex character." Now I cannot really say that this case is going to resolve itself into anything like this rule provides for and I am ready and willing to take the responsibility of exercising discretion in the matters, and I unhesitatingly say it is a proper case to have submitted to a jury.

In the *Bradshaw* case—I just speak from recollection—there was a motor accident, but I do not think the extent of the injury received at the actual time of impact was a matter of controversy at all. The whole case largely was the consequential effect upon the voice of the young lady who was training herself, or was already an operatic singer of some experience. The question was whether or not the injury sustained in the motor accident had destroyed her voice and that she would never be able to practise such a profession. It is true, applying my mind to that, I did think that it was a matter of scientific investigation,

and I cannot disabuse my mind of that view to this day. However, in our jurisprudence we have final Courts and we have to get certainty of procedure as much as possible, and I was a dissenting judge in that case. The *Bradshaw* case was decided contrary to my view at that time, but I must loyally abide by it, and I only wish to say this, that I think that the learned judge below, Mr. Justice W. A. MACDONALD, was well entitled to make the order he did in this case, upon the reading of the *Bradshaw* case. Therefore, upon that ground, the learned judge proceeded rightly, as he felt that he was bound, as he was, by the judgment of the Court of Appeal.

Then only a word about what has been said. I must say that I was very much impressed by Mr. *Manson's* very able argument. At the commencement, in a sense, I had to be converted that it was a proper case for a jury at the same time remembering that I was bound by the *Bradshaw* case. My consideration of all the facts that were outlined resulted in this, that I think it is eminently a case for a jury. Where you have conflict of testimony and you have all the happenings connected with this very important action, and then when we have had portrayed that there will be very grave conflict between medical men on the points that will be up for consideration and determination, it is a very severe trial indeed and too much of an obligation upon the part of the learned judge, sitting alone, without the assistance of a jury. After all, why in our jurisprudence were juries constituted? Courts of law have to proceed along lines that are inscrutable in the main—they are inscrutable. The witness goes into the box and makes his statement, another witness is called who diametrically denies the statements made by the previous witness. Now, what is to be done? As I say, it is inscrutable. It is true that a judge is supposed to be skilled to detect the truth, and I think throughout Canada the experience has been a good one, nevertheless the judge very often is not very well trained in the affairs of men. He knows the law, but he may not know the affairs of men, their thoughts, their ideas, their promptings, and all that. There is where the jury is necessary. A judge might have had close contact with the world when he was appointed to the Bench—a large contact with the affairs of men. He becomes a judge, his position

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isolates him, he is largely removed from contact with the affairs of men, and rightly so to a very large extent, and in the passage of years men commence to think differently, act differently, and it is more or less a closed book to that judge. Therefore, the jury are there for the purpose of bringing into Court that acquaintanceship with the people and the affairs of men, and they are an assistance to the judge, and they determine by demeanour and otherwise the truth of the testimony that is advanced in the cause, and I would think in this case—because it is an important case, and one of those regrettable cases—with a professional gentleman of standing charged with neglect of duty and non-exercise of proper professional skill—it is a case eminently for the determination of a jury when there is going to be undoubtedly a very considerable conflict of evidence. And it is satisfactory to know that under the jurisprudence of our country due and proper provision can be made for a true and proper elucidation of the facts, and in this case eminently a jury is one of the factors to bring that about.

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MACDONALD, J.A.: I feel, too, that the appeal should be dismissed. Some difficulty arises because the learned judge below stated that he did not make the order in the exercise of a discretion, and the suggestion is—although it is by no means clear—that he took this course because of difficulty created in his mind by our decision in the *Bradshaw* case. That case should create no difficulty, however. It only decides that the facts there disclosed, to quote the words of my brother MARTIN, "did not attain the heights of a scientific investigation within the meaning of the rule." It is always a question of degree. Each case depends upon its own facts. A judge might hold, for example, that one case of malpractice was within the rule, another case without it, all dependent upon the comparative simplicity or intricacy of the scientific evidence likely to be adduced. It is in deciding this question that discretion arises.

I avoid the difficulty of determining whether or not the judge below really exercised discretion, because I am satisfied that on the material we should not make a different order. We have on the appellant's part no material of any real value shewing that the evidence to be offered at the trial will not only be intricate

and scientific, but also go so far in that direction that the questions involved cannot conveniently be tried by a jury. All the affidavit amounts to is that the evidence will be of a scientific nature. Although my judgment does not turn on the point, I think we should have had better material, and the appellant is the chief sufferer from the lack of it. A layman's evidence is of little value; medical testimony is required. As I stated in the course of the argument, the trial judge later will know after he hears the evidence whether it is so highly scientific and intricate that a jury cannot properly grapple with it. I am not suggesting that we should have virtually minutes of the evidence of witnesses, but do think we should be placed in the position where we could more readily appreciate the precise nature of the evidence as far as it is reasonably possible to do so at this stage.

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Appeal dismissed.

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

Solicitors for respondents: *Williams, Manson, Gonzales & Taylor.*

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LANGER v. McTAVISH BROTHERS LTD.

LANGER v. McTAVISH BROTHERS LIMITED.

Husband and wife—Gift of furniture to wife—Whether further delivery necessary to complete gift—Passing of property—Intention—Evidence.

L., who was about to be married, purchased a house from W. on the 1st of November, 1924, and then agreed with W. to purchase the furniture in the house for $10,000, subject to his intended wife's approval. On the same day she looked the house over and then in the presence of W., L. asked her how she liked it, to which she replied "I think it is beautiful, I could not improve upon it." L. then said "Dearie, it is all yours." L. thereupon purchased the furniture, but there was no physical delivery as he and his intended wife entered into possession of the premises. On the 1st of February, 1932, the furniture was seized under a writ of *fieri facias* on a judgment obtained by McTavish Brothers, Ltd. in the Supreme Court against L. On an interpleader issue it was held that the goods seized were the property of L.'s wife.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that where physical delivery is unnecessary or would be an idle or purely artificial act, as where from the nature of the gift and the position of the parties, the chattels, *ex necessitate*, remain in the same place before and after the gift, the giving and receiving is sufficient to complete the gift as there is nothing more to be done.

Statement

APPEAL by defendants from the decision of MORRISON, C.J.S.C. of the 13th of February, 1932, on an interpleader issue, the plaintiff Jennie L. Langer affirming and the defendants McTavish Brothers denying that the furniture and effects in J. F. Langer's house at No. 3290 Granville Street, Vancouver, seized on the 1st of February in execution under a writ of *fieri facias*, directed to the sheriff for the levying of execution of a judgment recovered by McTavish Brothers against J. F. Langer, were at the time of said seizure the property of Jennie Louise Langer. Langer purchased the house at No. 3290 Granville Street from Mrs. West in November, 1924, and after the purchase of the house he consulted Mrs. West as to the furniture in the house, and she put the price of $10,000 on the furniture. Langer was at this time engaged to be married to the present Mrs. Langer and he said he would take it provided his wife liked it. Shortly after Mrs. Langer looked over the house and

expressed her approval of the furniture in the presence of Langer and Mrs. West, and according to Mrs. West's evidence Langer then said to his wife "Dearie, it is all yours." He then purchased the furniture in the house under agreement for sale and eventually paid for it in full.

The appeal was argued at Vancouver on the 10th and 11th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. W. deB. Farris, K.C., (*St. John*, with him), for appellants: We submit this was not a valid gift from Langer to his wife, as it must be accompanied by delivery of some kind. The law requires strict proof in such cases: see *Sullivan* v. *School Trustees* (1920), 53 D.L.R. 724. Langer gave no evidence and in giving a list of his assets to get a bond he included the furniture: see *Kingsmill* v. *Kingsmill* (1917), 41 O.L.R. 238. Even if what Langer said was true it is not sufficient to constitute a transfer of the furniture: see *Koop* v. *Smith* (1915), 51 S.C.R. 554 at p. 557; *Official Assignee* v. *Khoo Saw Cheow* (1931), A.C. 67. The insurance policy on the goods was taken out in his name. In case of mere words of gift the title does not pass without actual delivery: see *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57; *Re Stoneham* (1918), 120 L.T. 341; *Bashall* v. *Bashall* (1894), 11 T.L.R. 152; *Valier* v. *Wright and Bull (Limited)* (1917), 33 T.L.R. 366; *French* v. *Gething* (1921), 91 L.J., K.B. 276 at pp. 282-3; *In re Breton's Estate* (1881), 17 Ch. D. 416; *Ramsay* v. *Margrett* (1894), 2 Q.B. 18. Evidence of what furniture was to be included in the alleged gift may be taken: see *Macdonald* v. *Longbottom* (1859), 1 El. & El. 977 at pp. 981 and 985; *Smith* v. *Jeffryes* (1846), 15 M. & W. 560; *Bank of New Zealand* v. *Simpson* (1900), A.C. 182 at p. 187. Argument

Mayers, K.C. (*Walkem*, with him), for respondent: As to cases where there is close relationship *Koop* v. *Smith* (1915), 51 S.C.R. 554 applies. The judge sat as a jury and his finding was equivalent to that of a jury. He found that what she said was true. *Sullivan* v. *School Trustees* (1920), 53 D.L.R. 724 has no application. The words found to be used were "this is all yours." In *Kingsmill* v. *Kingsmill* (1917), 41 O.L.R. 238

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the facts are different. As to admissibility of parol evidence varying the words of gift see *Forman* v. *The Union Trust Company Limited* (1927), S.C.R. 1 at p. 7. On the question of possession of the goods see *Grant* v. *Grant* (1865), 34 Beav. 623. Husband and wife can now deal separately with property: see Lush's Husband and Wife, 3rd Ed., p. 207; Halsbury's Laws of England, Vol. 22, p. 393, sec. 796; *Rogers Eungblut & Co.* v. *Martin* (1911), 1 K.B. 19 at p. 23; *Kilpin* v. *Ratley* (1892), 1 Q.B. 582. There was a bill of sale to the wife in 1931 giving all the chattels to Mrs. Langer.

Farris, in reply, referred to *C. C. Motor Sales* v. *Chan* (1926), 3 D.L.R. 712 at p. 717, and *Watts* v. *Driscoll* (1900), 70 L.J., Ch. 157 at p. 160.

Cur. adv. vult.

4th April, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I am of opinion that the appeal should be allowed.

In 1926 Langer was in negotiation for the purchase of a house and furniture in Vancouver belonging to Mrs. West. Before purchasing the furniture he wanted his wife to see it and she, being pleased with it, he said to her "This is all yours." That is all that was ever said between them in the way of expressing a gift. The furniture did not belong to Langer at the time. He had not bought it. He proposed to buy it, but had not bought it. He afterward bought it and a few days afterward he took a bill of sale to himself. That is the way the matter stood until 1931. Something occurred in 1931 which is put forward as a claim by the wife to the ownership of the furniture apart from the statement made by the husband in the beginning "this is all yours." Of course, in the case of a gift there must be delivery—must be possession on the part of the donee. There was nothing of that kind in this case. She was simply told by the husband, who was not the owner, and I do not think it would have made any difference if he had been the owner, "This is all yours." There was no handing over or giving her actual possession of the furniture. He simply took her there to live as his wife, and they enjoyed the furniture together. Now, of course, it is clear on the authorities in a case

of that kind there has been no delivery and the gift is incomplete. In 1931, Langer, being in need of money, offered to sell what is called his own furniture, that is, furniture which was afterward acquired—not part of the West furniture—he offered to sell that to his wife for $2,500, which she accepted and paid for. It must be taken that she paid for it and took a bill of sale. The bill of sale described all the furniture in the house, which would then include the West furniture. It was submitted it was only intended to include the furniture which she had bought, namely, Langer's own furniture. That bill of sale was never registered, so even if it were held to include the West furniture it would not pass any title to it. It was never intended to include the West furniture as the parties regarded that as her furniture under the original gift. Therefore, of course, they did not intend this bill of sale in 1931 to include furniture which belonged to her already.

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The result, of course, is she has never been put in possession of the West furniture. The gift was incomplete and she cannot be sustained in her claim to the goods which were seized by the creditors. It is not well founded, and the learned judge's decision on that point must be set aside.

MARTIN, J.A.: I would dismiss the appeal for the reasons given by Mr. Justice M. A. MACDONALD.

MARTIN, J.A.

MCPHILLIPS, J.A.: I would dismiss this appeal. The circumstances were such that this lady really acquired a good and sufficient title to the furniture. It is true that at the outset the husband did not own the furniture, but he had made an arrangement whereby he would purchase it. This was later carried out by a conditional sale agreement or an agreement for sale upon payment by instalments. Now, it is well known that in equity it is not necessary for a person to be the absolute owner of the legal estate, as it might be termed, in property, but if he has the right to acquire it and to enforce all the necessary documents which are needed, to convey title, then in equity he is deemed to be the owner. In this case we, in equity, are entitled to say that Langer was the owner when he said to his wife "This is all yours, dearie," or some such words. This

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Court has held that on a number of occasions, for instance, in fire insurance we had a case not long ago where the applicant for the insurance in the application said he was the owner of the property and he was not the owner technically at all, because he only held, under an agreement for sale. That was the situation in that case, and I do not think the present case differs in principle.

Now, there was also corroboration of the statement made by the husband; I think it was Miss Edith Wilson, heard what he said, "This furniture is yours, you can do what you like with it." Later, of course, there were subsequent dealings with some of the furniture, but so far as the documents read, it would appear to be all the furniture. There is in law an estoppel here, and the judgment creditor can get no better position than the judgment debtor had, and certainly Langer had parted with any interest he had in this property. That being so, I do not see how, or upon what principle it could be attempted to be made out that this was the property of the judgment debtor. It is the property of the wife.

MCPHILLIPS, J.A.

With regard to whether there was delivery in law, it has been canvassed numbers of times, and my recollection of the authorities, both the English and the Canadian authorities, and they are uniform in this, that since the Married Women's Property Act the wife is to be regarded as a *femme sole*. She may engage in business of her own. She may have property of her own. Take the situation of husband and wife living in the same house, what class of delivery could you say ought to take place? Is the furniture to be moved out of it and then in again, something like that? No. At the moment I am reminded of Lord Shaw's remarks some little time ago in the Privy Council where he said "The law must adapt itself to changes in trade and society." Now, the law in regard to husband and wife is greatly changed, and it is utterly impossible to apply the law as it was before the Married Women's Property Act, and I am in accord with the views of Lord Shaw, the law must adapt itself to changed conditions, and therefore I think there was a delivery in law to the wife at the time the gift was made. So upon these grounds I have no question in my mind, and no hesitation in saying there was a complete gift. There was sufficient delivery

and also corroboration. There is some suggestion that as between members of the same family you must look for some, not suspicion exactly, but with care as to whether or not a case is made out and that there is a proper foundation. The transaction was fair and open, and heard by an independent person, and corroborated, and everything went on for a long period of time, no question as to title raised. In my opinion the judgment creditor has no position whatever with respect to this property, and this lady is entitled to it. It is her property.

For these reasons I would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: This is an issue as to whether certain furniture is the property of the claimant Jennie Louise Langer or of her husband J. F. Langer and (if belonging to the latter) subject to an execution placed in the sheriff's hands under a judgment recovered against the husband by the appellants McTavish Brothers.

On the 1st of November, 1924, the husband by a conditional sale agreement purchased the furniture in question from Mrs. West for $10,000 payable in instalments obtaining however no right title or ownership in or to the chattels until the full purchase price was paid. He had purchased the house and lot from Mrs. West and the furniture owned by her was in the house at the time. Mr. Langer personally negotiated for its purchase and bought it subject to his intended wife's approval; he would not buy the furniture until she saw it. When she arrived with her own daughter, Barbara Farley, to inspect it Langer said to her "How do you like this?" She said "I think it is beautiful; I could not improve upon it." Whereupon he said: "Dearie, it is all yours." The wife's evidence as to the incident is as follows:

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Mr. Langer had agreed to buy the house but he had not agreed to buy the furniture until I had seen it, because he wanted me to select my own furniture, as it was to be my home, and Mrs. West had seen him in regard to the house, and he asked me to go and look at the furniture and to see if I liked it before he finally purchased it, which I did. I went with my daughter and Mr. Langer on Monday afternoon following and looked the furniture over with Mrs. West. After looking through the house from top to bottom we went down to the living room, and Mrs. West was there, and I think Mr. West was there, and Mr. Langer asked me how I liked it, and I said it was very beautiful, and he asked me if I would like to have it

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and I said I certainly would. I thought we could not improve upon it by buying anything else. And Mr. Langer said just exactly what Mrs. West said, "Dearie, it is all yours."

It was after this conversation (corroborated by Mrs. West and by Barbara Farley) that Mr. Langer purchased the furniture and executed the conditional sale agreement referred to. No physical delivery was necessary as the Langers entered into the possession of the premises. They were not, in fact, husband and wife when the alleged words of gift were uttered although living together. Mrs. Langer was waiting for the issue of a final decree of divorce which would enable her to marry Langer. It was obtained in May, 1925, after which the marriage took place and for seven years thereafter they lived in the same house with the same furniture and additions thereto in the form of expensive personal gifts to Mrs. Langer from her husband, who was then a man of wealth, and from other people.

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The trial judge decided that the furniture belonged to the wife. We should therefore hold that the words were in fact uttered and while it is barely possible that there may be room for difference of opinion as to their interpretation I think we should assign to them their ordinary meaning and hold them to be sufficiently clear and unambiguous to support a gift. I think, if necessary, subsequent acts and conduct on the part of the husband may be looked to as an indication of the sense in which he employed the words. Nor do I think the fact of conjugal relationship compels a Court to exact a higher degree of proof than in cases between strangers although the trial judge in his discretion might, if he chose to do so, view such transactions with suspicion. Some observations by Mr. Justice Duff in *Koop* v. *Smith* (1915), 51 S.C.R. 554 at pp. 558 and 559 in reference to "onus" and "burden of explanation" when transactions between near relatives are considered would appear to be in conflict with the more recent decision of *Official Assignee* v. *Khoo Saw Cheow* (1931), A.C. 67 referred to by my brother MARTIN during the argument.

As to the necessity of delivery or change of possession to perfect a gift (*Irons* v. *Smallpiece* (1819), 2 B. & Ald. 551) this, as Lord Esher, M.R. pointed out in *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57 at p. 75 "is one of the facts which con-

stitute the proposition that a gift has been made." Physical delivery, dependent upon circumstances, the nature of the chattel and the relationship of the parties may be, as part of the evidence, a necessary element to establish a completed gift. In other instances (as in the case at Bar) where physical delivery is unnecessary or would be an idle or purely artificial act, as where from the nature of the gift and the position of the parties the chattels *ex necessitate* remain in the same place before and after the gift it is sufficient if we find

> two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do: Lord Esher, M.R., p. 76, *supra*.

The donee was in physical possession of the furniture if not concurrently with the gift, at least subsequently thereto, in the sense that she occupied as of right or with the consent of her future husband the home where the furniture was installed so that "the property in and the possession of the chattels should unite in the recipient." *Re Stoneham* (1919), 120 L.T. 341 at p. 343. Where that union is found the gift is complete. It is immaterial that it is a joint occupation of the premises. When the words of gift were uttered, *qua* the furniture, the subject of the gift, the donee was either already in possession or subsequently acquired it.

We have therefore no difficulty from want of a physical act in respect to delivery. Enough is shewn to indicate that "the husband had done that which amounted to a delivery"—*Bashall* v. *Bashall* (1894), 11 T.L.R. 152 at p. 153. The difficulty arises in view of the incidents of the conditional sale agreement with Mrs. West and the property rights in the furniture outstanding thereunder. In my view the gift could not be perfected until the time arrived when the donee could successfully defend an action at the suit of anyone to recover it. The husband could make a gift of an article he merely contracted to purchase. He might, as here, contract in his own name in order to assume the liability so that after payment by him no further impediment would remain to the perfection of the gift. It was submitted that in the meantime possession was either in the unpaid vendor

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or in the husband as owner of an equitable interest while making payments, or at all events when he paid in full (and, as it was submitted, acquired the legal title) the theory being that "possession" attaches to the title. It is only however "when the possession is doubtful it attaches by law to the title"—*French* v. *Gething* (1921), 91 L.J., K.B. 276 at p. 283. Here the physical possession and the right to possession were in the wife subject to be divested thereof by the vendor only in the event of failure by the husband to carry out his undertaking to make the promised payments and when the payments were in fact made in due course her rights could no longer be defeated and thereupon, in my opinion, the gift was perfected. Furthermore, as regards the vendor, the donee, under the circumstances, stood in her husband's shoes and had acquired the right to make said payments on her own account, if necessary, for her own protection.

I therefore think the trial judge reached the right conclusion, apart altogether from a more conclusive test afforded by a bill of sale executed by the husband in favour of the wife by which he transferred to her all the furniture belonging to him for $2,500. I do not regard this document as ambiguous as contended by appellant's counsel: it was prepared and executed with the true situation in view.

I would dismiss the appeal.

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

Solicitor for appellants: *C. W. St. John.*
Solicitor for respondent: *Knox Walkem.*

REX v. LEE PO.

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REX v. LEE PO

Criminal law—Opium—Possession—Offence of smoking opium—Charge—Can. Stats. 1929, Cap. 49, Secs. 4 (d) and 12—Criminal Code, Sec. 951.

Two detectives entered a Chinese premises in Vancouver and found the accused and a companion lying on a couch. The companion had been smoking opium and an opium-pipe was lying on the couch between them. The accused had a small amount of opium in his fingers preparing it for smoking. The accused testified that he had been asked by his companion to go to the premises where they were found by the detectives, to have a smoke, and when the detectives came in he was just going to start to smoke. Accused was convicted on a charge of having opium in his possession.

Held, on appeal, affirming the conviction of police magistrate *W. M. McKay* of Vancouver (MACDONALD, C.J.B.C. dissenting), that once a person has in his possession any drug, it is immaterial what he proposes to do with it. The case falls and falls only, within section 4 (*d*) of The Opium and Narcotic Drug Act, 1929, it being clear that possession within the meaning of that section has been established and the conviction should be sustained.

APPEAL by accused from his conviction by *W. M. McKay*, Esquire, police magistrate, Vancouver, on a charge of unlawfully having in his possession without lawful authority a drug, to wit: opium. On the 25th of February, 1932, two detectives entered an old cabin on Main Street in Vancouver and found the accused and a companion lying on a bunk. Accused had a package of opium in his hand and there was an opium-pipe on the bunk between him and his companion. His companion had been smoking opium just prior to the time the detectives entered.

Statement

The appeal was argued at Vancouver on the 5th of April, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Killam, for appellant: The charge was "possession" and the evidence does not warrant the conviction. There is no evidence in support of the charge. All he did was to take a little bit of the opium in his fingers in preparation for smoking. This does

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not amount to possession as contemplated by the statute. The other man had the drug and invited him to have a smoke. On the construction of the statute as to "possession" see Maxwell on Statutes, 7th Ed., p. 71; *Cotterill* v. *Lempriere* (1890), 24 Q.B.D. 634 at p. 637; *Wynne* v. *Griffith* (1825), 3 Bing. 179 at p. 193; *Fletcher* v. *Lord Sondes* (1826), *ib.* 501 at p. 581; *Edward* v. *Trevellick* (1854), 4 El. & Bl. 59 at p. 68; *Rex* v. *Mitchell and McLean* (1932), 1 W.W.R. 657 at pp. 658-9.

Argument

Johnson, K.C., for the Crown, referred to *Rex* v. *Louie Yee* (1929), 1 W.W.R. 882, and *Rex* v. *Yuen* (1932), 70 Que. S.C. 119. The question is whether there is lawful authority under the indictment charged.

Killam, replied.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: In my opinion the appeal should be allowed. We have here two sections which might be applicable to this case. I do not think they can be taken together, but either one might be applied: One is subsection (*d*) of section 4, which reads as follows: "Has in his possession"—that is to say the very person who has in his possession—"any drug save and except under the authority of a licence from the Minister first had and obtained, or other lawful authority," is guilty of an offence for which he is liable to a maximum penalty of eighteen months' imprisonment and a maximum fine of $1,000 and deportation, and a minimum imprisonment of six months and to a fine of $200.

Now, in this case there is a fine of $200, and he has been given six months' imprisonment and is liable to deportation on the completion of his sentence. That is a severe penalty.

In the same statute we have section 12:

> Every person who (*a*) smokes opium; (*b*) without lawful or reasonable excuse, is found in any house, room or place to which persons resort for the purpose of smoking or inhaling opium; shall be guilty of an offence and shall be liable, upon summary conviction, to a fine not exceeding one hundred dollars and not less than fifty dollars, or to imprisonment for a term not exceeding three months, or to both fine and imprisonment,

which is not a severe penalty.

In this case we find that the prisoner went to a place which appears to be an opium-joint where smoking was allowed. He did not, according to the evidence, buy the opium himself and

carry it there in person, but when he got there he found that this opium and other paraphernalia was supplied to him by the keeper. He was lying on the couch with this between him and another smoker. It so happens that the constable arrived just as he was preparing the pipe. He was not what one ordinarily strictly would call smoking, inhaling the smoke and puffing it out, but he had the opium in his hand, just as a man might when about to fill his pipe with tobacco. He was charged firstly with smoking and secondly with having opium in his possession. The learned magistrate expressed the opinion that it was a clear case of smoking, and the police prosecutor agreed with him, but the Crown apparently insisted upon having the charge of having in possession, disposed of and the learned magistrate, after looking at a case which really had no bearing upon the thing at all, decided that he ought to hear it, and he did hear it and convicted him of having in possession and sentenced him to six months' imprisonment and $200 fine.

These two sections of the Act will bear some consideration, not so much as to their technical and strict meaning but as to the intention of Parliament. Did Parliament intend that a man who had possession of opium in his pipe and was actually smoking should escape with $100 fine, but the man who was rolling opium in his hand, preparing to put it into the pipe and smoke it, should be liable to a penalty of eighteen months' imprisonment, $1,000 fine, and deportation? What object can be suggested for drawing that wide distinction between the two sections? There could be but one object. A man who was preparing his opium to put in the pipe was just as little menace to the community as the man who is actively smoking, or the man who was actively smoking was just as much a menace as the other. There was no reason why Parliament should have intended to have imposed a heavy sentence upon the one and a light one upon the other. Is the presumption not this, that Parliament thought that the judges who were to try the cases, should use some common sense and should look at the intention and object of the section so as to conclude as to which section the offence belonged? I think that was the intention. I cannot conceive of reasonable men making such a distinction without any reason for it. We have heard a good deal from time to time

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about natural justice, but what would you think of members of Parliament, we will say, passing section 4 (*d*), which imposes a heavy sentence, and in the next sentence passing section 12; that if the man is in the unlawful place and is about to smoke, with the opium in his hand to put in the pipe, that man shall suffer the higher penalty, and the man who is actually smoking, although he is in possession of the opium just as much as the other, shall escape with the light one? One would say that reasonable men would never come to that conclusion at all, and yet that is what is contended for here, that because he was not actually puffing the smoke out of his mouth at the time the police happened to come there—if they had come a minute later they would have found him smoking, but as they did not come a minute later he is to suffer the high penalty. I do not think reasonable men would come to any such conclusion, or have any such notion in their minds when they passed these sections.

It is the duty of the Court to apply the law in accordance with the object and spirit of the law, and it seems to me that here the learned magistrate was right in his first impression, and was disposed to do what I should have expected one who has had a long experience in criminal matters, and has in my opinion always taken a very sound and proper view of the duties of Courts in criminal cases; but he was induced to take the view that smoking meant actual puffing of the smoke out of the accused's mouth, and that anything less than that was not smoking, but was having opium in possession. These are matters that depend upon the finding of the magistrate, they are questions of fact for the magistrate, and he did draw proper conclusions from the facts. If he did not, then, of course, the Court of Appeal should put him right.

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If, on the other hand, a man had a quantity of opium in his possession and was not in a smoking-joint when arrested it would not be sufficient to say, oh, I have this tobacco for the purpose of smoking. That is not sufficient. That is not this case. On a proper view of this case, one can say this man was a smoker at the time he was arrested, and was guilty under section 12 of being in a place used for smokers, and that therefore the lighter penalty ought to have been imposed, and that the learned magistrate was misled when he turned away from that phase of the

case and deemed it to be one of possession. If he had given his judgment in accordance with his sane view in the first place, I think that judgment would be right, and I think he was wrong in coming to the other conclusion. I would therefore set aside the conviction and impose a fine of $100.

MARTIN, J.A.: With all respect to any contrary opinion, I have reached the conclusion beyond any doubt that this was a proper conviction and so it should be sustained by this Court.

As was pointed out in a recent judgment of Mr. Justice Loranger, sitting in the Court of King's Bench in Quebec, delivered on the seventh of last month, in *Rex* v. *Yuen* (1932), 70 Que. S.C. 119, 121-2, there are two entirely distinct offences relevant to our present consideration. The first is for having drugs in possession under section 4, subsection (*d*), and the second is the smoking of opium under section 12: these two charges have no relation one to the other.

In order to understand the present case thoroughly it is necessary to understand the evidence, which shews perfectly clearly that the only offence here disclosed is that of having in possession, and that there was no offence of smoking at all. That is completely apparent from the evidence of the two detectives—not one, but two—who visited this place and found this appellant with another man lying on a couch, and in between them was a pipe; but this man was not holding in his hand at that time a pipe, nor was he filling it. All that he was doing is shewn by the evidence where Detective Sinclair says that he was lying on the bed and that there was a pipe between him and the other man. The other man pleaded guilty to smoking and was convicted, so was disposed of in that way, and as to the appellant, that evidence shews the state of affairs.

Now this packet of opium, which we saw here before us just now, he had in his hands, he was in the act of opening it up, and the pipe was lying on the bed between him and the other man, therefore it is not even a case of his filling his pipe. Even assuming that he had, could that be in any way considered as a man "smoking" within the meaning of the Act? The appellant himself does not say that he had been smoking; on the contrary what he said was: "I was just going to start to smoke." And it

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is for that reason, so that there should be no doubt at all about the matter, that the learned magistrate, after having dealt with the point in the Court below, finally, in reconsidering doubtless that evidence, made his report to this Court, which is, that the man was "just about to engage in smoking opium, and that he had the paraphernalia for that purpose in his possession." So, therefore, it is perfectly clear upon this evidence that the magistrate has correctly reported to us what the two detectives (the second one is Stevenson, who confirms Sinclair) also say, and the appellant himself says, *viz.*, that he was not smoking: that is the fact. Therefore, it becomes irrelevant to consider anything at all relating to the charge under section 12. And when I say that, I bear in mind what one very eminent judge, Lord Bowen, said, in *Cooke* v. *New River Company* (1888), 38 Ch. D. 56 at p. 71, 57 L.J., Ch. 383, upon the desirability—and in no case is it more desirable than in a criminal case—of not embarking upon *obiter dicta,* because, as he said:

> *Obiter dicta,* like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the judges who have uttered them, and are a great source of embarrassment in future cases.

MARTIN, J.A.

Bearing in mind that sound advice, I shall refrain from doing anything of the kind and restrict myself to the one remaining section, 4 (*d*). Now, when we come to that, it is apparent that once a person "has in his possession any drug" it is quite immaterial what he proposes to do with it. The question of intent does not become an added element, though it is an element in many other sections of the Criminal Code, but in this it is of no import whatever. Examples of where it is necessary to shew intent, thereby establishing the crux of the offence, are so many that they will rise to the mind of anyone versed in criminal law, but, just to illustrate, I mention the intent to procure abortion; breaking and entering with intent to commit an indictable offence; having firearms with intent unlawfully to injure; and forgery, the making of a false document with intent that it shall be acted upon as genuine. In each and every one of those the question of intent is the crux of the matter, but there is not a word of such a thing in subsection (*d*). It is bare possession, and here, as I mentioned before in the course of the argument, we have physical possession of the very highest kind, *i.e.*,

manual, as was proved as aforesaid by the two detectives who saw him with this parcel of opium in his hands trying to open it.

Now in such a state of affairs speculation is unnecessary as to what was the object of Parliament, though we must assume that it was to do what is best in the public interest, just as the Court of Appeal of Alberta unanimously held in *Rex* v. *Louie Yee* (1929), 1 W.W.R. 882 at 883, 24 Alta. L.R. 16, 51 Can. C.C. 405, wherein it said, referring to the matter of severe punishments imposed by Parliament upon these various offenders, and in respect to subsequent deportation being an element that the Court should consider:

> There is no doubt that it is true [that deportation is a very serious punishment] but the responsibility for that is not on the magistrate or the Court but on Parliament and it cannot be taken into consideration in the determination of a pure question of law.

MARTIN, J.A.

I therefore decline, as I always have declined, to consider the question as to whether Parliament has fulfilled its duties, and I propose to confine myself to my own duty, which is to place a legal construction upon this statute. And being of the opinion, as I have said, that the case falls, and falls only, within section 4 (*d*), it is clear beyond question that possession, within the meaning of that section, and of the highest kind, has been established beyond peradventure, and therefore the conviction should be sustained and the appeal dismissed.

MCPHILLIPS, J.A.: In my opinion the appeal cannot succeed. It would seem to me to be a clear case. I see nothing to indicate other than that there was complete and positive infraction of the law. It is attempted to say that, if anything, only smoking was being carried on. Well, I think, if I were allowed to refer to a commonplace thing to illustrate smoking, if you said your neighbour's chimney was smoking, that some smoke would have to come from the chimney. In this particular case, we have no evidence at all of smoking. The pipe had not been lit as far as I can see on the evidence, therefore we might as well dismiss that from our minds. That which is said to have been done in this case is within 4 (*d*) of The Opium and Narcotic Drug Act, 1929. To find out what drugs are aimed at we turn to the schedule. Cocaine is one, morphine is another, and heroin is another, and opium is another. This is opium, there can be no

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question about that. We have the analyst's report upon it, and that is clear.

I am in agreement with Mr. Justice Loranger's judgment. I think it is very able and very explanatory of the Act and that which is intended to be hit at by the Act. We find that the National Government has gone throughout all Canada and taken over control of matters of this kind. Why? Because the opium traffic is a menace to our nation. In addressing my mind to this statute, I address it in the way of supporting every justifiable sentence, and I think that is my duty. It is said that the conviction and sentence here is too harsh, and that if it was held to be smoking only the sentence could not be anything as great. I am not deeply impressed by any such submission. Parliament lays down what the sentence may be, and that is not the responsibility of the Courts, save where there is discretion between the minimum and the maximum.

MCPHILLIPS, J.A.

Now, here unquestionably it was not a case of smoking. I can quite realize why Parliament dealt with smoking as a separate and distinct offence, because in the use of opium you can have these pipes and it only takes a puff and you have inhaled the opium, and I can quite understand that if the offence was smoking that there would be great difficulty in proving the offence, because opium burns and is gone, and Parliament therefore made the offence separate and distinct.

Now, it is said, "Oh, it was such a small amount." The Court has nothing to do with that. Parliament says possession of opium. We have the analyst's report that it was opium. It does not matter whether it is a fraction of an ounce or a ton. It is the possession of opium, and once the Court has that established, the *quantum* does not enter into it at all. Therefore, none of these considerations seems to me to have any weight.

This is a plain case of an offence proved up to the hilt, in my opinion, of being in possession of opium, and as a natural consequence the sentence is in conformity with that, being the offence on which the accused was convicted.

I do not think it is necessary to say anything more than this. In all these matters again care should be taken by the Courts that the law be not allowed to be defeated by the ingenuity of

the Oriental mind—always attempting to defeat the officers of the law, who are attempting to stamp out this nefarious and criminal traffic—a menace to the wellbeing of our people.

MACDONALD, J.A.: There is no material difference between this case and that of *Rex* v. *Louie Yee* (1929), 1 W.W.R. 882. That is a decision of the Court of Appeal of the Province of Alberta. It is desirable that there should be uniformity in the administration of the criminal law. While that is not in itself a conclusive reason for following another decision which may not be regarded as sound, still it should be considered as an important element. I find, after giving full consideration to the opposite view and the views just expressed by the Chief Justice and by counsel for the appellant, that I have to reject it. If I could say that this man was engaged in smoking at the time he was arrested, other results would follow. I cannot say so, first because the magistrate does not do so; and second because the evidence will not permit it. The magistrate finds that he was engaged only in the work of preparation. The accused did not have a pipe in his hand; in fact it is not clear that it was his pipe at all, although more than one might smoke from the same pipe. Another man was on the couch with him, and that other was apparently smoking; he pleaded guilty to the charge. I must dismiss the appeal because if not engaged in smoking he must be regarded as being in possession of the drug within the meaning and contemplation of the words of the Act.

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

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RICHARDSON v. THE ROYAL TRUST COMPANY.

Mortgagor and mortgagee—Foreclosure—Order to reconvey on payment of moneys due on mortgage—Duty of mortgagee to reconvey—R.S.B.C. 1924, Cap. 127, Secs. 179 (1) and 183.

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Section 183 of the Land Registry Act provides that "In case of the cancellation of the registration of a charge, the land or estate or interest in respect of which the charge has been registered shall be deemed to be discharged and released from the charge as from the date of entry of cancellation on the register. In cases where a reconveyance, surrender, or transfer would otherwise have been necessary, cancellation of registration as aforesaid shall operate as and shall for all purposes be deemed to be a reconveyance, surrender, or transfer in favour of the person entitled to the equity of the land in question."

On motion for judgment in a foreclosure action an order was made for the taking of accounts and that upon either of the defendants paying into Court the amount due, the plaintiff do reconvey the mortgaged premises to the defendant so redeeming. The defendant company paid into Court the amount found to be due on the mortgage, and on the plaintiff applying for payment out an order was made that the said moneys be paid to the plaintiff upon his lodging with the registrar a discharge of the mortgage and a discharge of the vendor's lien against said premises. The defendant company appealed on the ground that the plaintiff should comply with the order on the motion for judgment, and reconvey said premises to the defendant company.

Held, reversing the decision of MORRISON, C.J.S.C. (MACDONALD, C.J.B.C. dissenting), that notwithstanding the provisions of section 183 of the Land Registry Act the defendant company, upon paying the amount due on the mortgage, is entitled to a reconveyance in accordance with the terms of the mortgage and of the order on the motion for judgment.

Statement

APPEAL by defendant from the order of MORRISON, C.J.S.C. of the 15th of January, 1932, whereby it was ordered that $284,820.20 in Court to the credit of the action be paid out to the plaintiff, upon his lodging with the registrar for delivery to the defendant's solicitors, a discharge of mortgage and a discharge of vendor's lien filed against the mortgaged premises, and that a *lis pendens* filed against the property be discharged. By mortgage of the 20th of February, 1930, the defendant Stimson's Office Buildings Limited mortgaged the property known as the Marine Building to the plaintiff to secure the sum of $250,000, the mortgage containing a clause that upon the

mortgage moneys being paid the mortgagee shall reconvey, and the said defendant having made default in payment of principal and interest, the plaintiff brought action for foreclosure. The Royal Trust Company hold three charges against said property subsequent to the above mortgage. Upon motion for judgment on the 30th of June, 1931, it was ordered that accounts be taken and that the plaintiff recover from the defendant the amount certified to be due, and that upon the defendant or either of them paying into Court the amount certified to be due the plaintiff do reconvey the mortgaged premises to the defendant so redeeming. It was found by the registrar that $284,820.20 was due and payable and this sum was duly paid into Court by The Royal Trust Company. The appellant company claims that the order should have provided that the plaintiff comply with the said judgment of the 30th of June, 1931, and reconvey the said mortgaged premises to The Royal Trust Company.

Statement

The appeal was argued at Vancouver on the 14th and 15th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, and MCPHILLIPS, JJ.A.

Symes, for appellant: We say the original order provides that they should reconvey, upon payment of the moneys found due: see Seton's Judgments and Orders, 7th Ed., Vol. III., pp. 1825-6. The order should be complied with.

E. A. Lucas, for respondent: Sections 179 (1) and 183 of the Land Registry Act provide for the manner in which we are to release the mortgagor from the debt: see Falconbridge on Mortgages, 2nd Ed., p. 299; *Hosking* v. *Smith* (1888), 13 App. Cas. 582 at p. 585; *Teevan* v. *Smith* (1882), 20 Ch. D. 724; *Magnus* v. *Queensland National Bank* (1888), 37 Ch. D. 466; *McLennan* v. *McLean* (1879), 27 Gr. 54.

Argument

Symes, replied.

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MACDONALD, C.J.B.C. (oral): I may say in this case I have come to a conclusion, but may hand down my reasons later, as the matter is of considerable importance to conveyancing counsel, but I will indicate now the ground of my decision. There is no question but that the mortgagor is entitled to a reconveyance when the mortgage has been paid off. Now, in this case the reconveyance tendered to him was a reconveyance under section

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183 of the Land Registry Act. It is in the form of a certificate of discharge, and the Act says that in cases "where a reconveyance, surrender, or transfer would otherwise have been necessary, cancellation or registration as aforesaid shall operate as and shall for all purposes be and be deemed to be a reconveyance." Now, that is a declaration that a certificate of discharge when tendered to the mortgagor is a complete and effective reconveyance of the property. In this case the mortgagor insists upon the old-fashioned reconveyance by deed, and this is the only question before us, that is to say, whether or not he is entitled to insist upon that. He has been tendered the reconveyance mentioned in the statute. I do not see any reason why, where the Legislature has erected a Land Registry office for dealing with real-estate titles, the provisions of the Act should not be followed, unless there is some very good reason otherwise. Now, my conclusion, of course, is, that the appeal should be dismissed. The certificate of reconveyance is a sufficient reconveyance under the Act and is all that the mortgagor is entitled to.

I will hand down my reasons more in detail later.

MARTIN, J.A.

MARTIN, J.A. (oral): This appeal, in my opinion, should be allowed. There are two grounds on which such a decision should be founded. I put the first one in a positive way, and the second one I put in an alternative way and not exactly with the same force, although I think there is also no doubt about it. The judgment relied upon here directed that the plaintiff do reconvey the mortgaged premises comprised in the said indenture—that is the usual judgment upon foreclosure—and it is sought to get away from that by resorting to section 183 of the Land Registry Act. Now, in the first place it is somewhat difficult to see how the Land Registry Act can in any event affect the judgment of the Court with a specific direction that a certain thing should be done, but assuming that such is the case, nevertheless in any event in this case that section of the Land Registry Act can have no application whatever to this case because the section that is invoked to support the substitution for the reconveyance as directed by the judgment in the ordinary course is section 183, but that does not, and cannot come into operation until the conditions precedent to it have been followed. And it is limited,

as the opening words say, to cases where "cancellation of the registration of a charge" has been made, and it goes on to say, that, where that has happened, in cases where a reconveyance, surrender or transfer would otherwise have been necessary, cancellation of registration as aforesaid shall operate as a reconveyance. Therefore, before that Act can be invoked to support any proceedings in the way of substitution of other documents for the reconveyance, it has to be shewn that the cancellation has in fact been made, and it is admitted that nothing of the kind has happened, and so, what we are asked to do is to give effect to a statute where the conditions precedent upon which alone it can be resorted to are non-existent. Upon that ground alone, the learned judge should not have made the order complained of, because he had really no jurisdiction to do so. I do not think that this aspect of the matter could have been brought to his attention. When I drew attention to the matter here no explanation at all was made, and it was conceded that no application to the registrar has been made, and yet in the absence of the grounds upon which alone jurisdiction can be founded, we are invited to set aside the direction in the judgment. That alone is sufficient to dispose of the case, and at present I see no reason to enlarge upon the matter other than to say that the cases which have been handed in by Mr. *Symes* support the other view of the case; that is to say, that the Land Registry Act in any event should not be given a general application and one which would conflict with the judgment of the Court, because there are various circumstances which might arise, and one illustration thereof is that the reconveyance herein is required by the judgment to be to the defendant so redeeming the mortgage premises or to whom it shall in writing so appoint. That is one illustration of the way that power of appointment would be frustrated, and there are other consequences which were drawn to our attention by Mr. *Symes*, and which have later occurred to me, which make it undesirable to make such a sweeping application of the Land Registry Act which is directed to something which has nothing to do with ordinary legal proceedings: it is simply the registration of a title, and it is absolutely foreign to anything that is connected with the history of our jurisprudence because the law of mortgages, and the

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practice leading thereto and the protection of the parties thereunder, are things that were in existence for hundreds of years before anybody dreamed of a system of land registration.

I therefore have the greatest doubt with regard to the application of the Land Registry Act in any event, but as I say, the main ground, which is one of jurisdiction, is that the circumstances have not arisen which would entitle the learned judge to make the order upon the applicant's own shewing, and therefore the appeal should be allowed.

MARTIN, J.A.

McPHILLIPS, J.A. (oral): I am of the opinion that the appeal should be allowed. The point that has arisen here has, I think, with great respect to any contrary opinion, been a settled one for a very long time. As early as 1879 Vice-Chancellor Proudfoot gave a considered judgment upon the point, and legislation in the Province of Ontario was as here that the discharge of mortgage was equivalent to a reconveyance. Nevertheless, the Vice-Chancellor came to the conclusion that a reconveyance must be given. The first thing to get well in mind is this, that when parties make contracts they must live up to them. The Legislature never intends to interfere with contracts, and never is held to have interfered with contracts unless it has done so by apt words, indicating an intention to do so. Now, under the terms of the mortgage there is a covenant that there will be a reconveyance and there is also a covenant that carries it along to all the assigns. Therefore the appellant here can go to the mortgagee and demand all that the mortgagor could demand.

MCPHILLIPS, J.A.

Now, where is there anything in this statute which says that the mortgagee is released from that obligation by way of covenant? Lord Collins once said at one time (speaking of England) "This is a free country. You can make contracts and you can break them, but most likely if you break them you will have to pay damages for it." The law of England, and as we have it, is clear upon the point that if you make a contract you must keep it. Why should a covenant be held to be complied with when there is a mere statement by the Legislature that by pursuing a certain course there will come about that which is equivalent to a reconveyance. That, in itself, does not comply with the covenant. The covenant must be carried out. Further,

the decree in this case calls for the execution of a reconveyance to The Royal Trust Company or to whoever that company may in writing appoint. That was the decree taken out. An application seems to have been made in Chambers whereby it is attempted to change the decree which was duly taken out and entered. I do not see how a learned judge, sitting in Chambers could alter a decree pronounced in Court and duly taken out and entered. The situation is this—there is a covenant for a reconveyance and The Royal Trust Company is in a legal position to enforce that covenant, and the covenant must be carried out. The authorities that have been referred to, in my opinion, completely cover the case, not only the authorities in Ontario, but the authorities in England. Conveyancing counsel know very well that if they want to cut down the right, and not be called upon to give a reconveyance, then due and proper provision is made that the mortgage will be good and sufficiently discharged by the execution of a discharge in the form set forth in the Land Registry Act, and if that had been this case nothing more need be said, but it is not this case. I can quite appreciate that conveyancing counsel would consider that there was grave risk in taking any such covenant, because a chain of title is an absolutely essential thing. It must be complete in all its parts; otherwise no counsel can give an opinion as to the title.

MCPHILLIPS, J.A.

I therefore think that nothing more need be said, and when, as I say, people wish to avoid giving a reconveyance they must do it by the terms of the mortgage, or, on the other hand, too, if the Legislature intends to relieve parties from covenants, solemnly made by them, then we must find apt words to that effect in the legislative enactment and we do not find them here. The relevant authorities are the following: *McLennan* v. *McLean* (1879), 27 Gr. 54, Proudfoot, V.C., at pp. 55-6; *In re Music Hall Block* (1884), 8 Ont. 225; *Young* v. *The Whitchurch and Ellesmere Banking Company* (1867), 37 L.J., Ch. 186; *Rourke* v. *Robinson* (1911), 1 Ch. 480; *Walker* v. *Jones* (1866), L.R. 1 P.C. 50 at pp. 61-2.

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

Solicitors for appellant: *Robertson, Douglas & Symes.*
Solicitors for respondent: *Lucas & Lucas.*

MORRISON, C.J.S.C.

1932

April 14.

ROBINSON v. BANK OF TORONTO.

Banks and banking—Stock certificates endorsed in blank—Deposited by customer with broker to cover margin—Certificates pledged to bank by broker—Bank acting in good faith—Estoppel.

ROBINSON v. BANK OF TORONTO

The plaintiff endorsed stock certificates in blank and delivered them to his brokers as security to cover the purchase price of other stocks that he instructed them to buy. The brokers, although not carrying out the plaintiff's order to buy, pledged the plaintiff's share certificates to the defendant bank as collateral security to cover advances by the bank to the brokers. In an action against the brokers and the bank for conversion:—

Held, that however indefensible may be the action of the brokers, the trend of authority is against visiting the consequences on the bank, and the fact of the shares being in the plaintiff's name, though endorsed in blank, is not sufficient to put the bank on enquiry. As the plaintiff has failed to prove that the defendant bank had notice of the lack of capacity on the part of the brokers to deal with the shares in question and has also failed to adduce any evidence pointing to the lack of good faith of the bank in this transaction, he is estopped by his conduct in converting the share certificates in question into negotiable instruments, from setting up even the fraud of the brokers as vitiating the title of the defendant bank to them.

Statement

ACTION for conversion by R. P. Clark & Co. of certain stocks deposited by the plaintiff with said company as security to cover margin on certain stock that the plaintiff had ordered R. P. Clark & Co. to purchase for him, and as against the bank with whom the stocks were deposited by R. P. Clark & Co. as security to cover advances made by the bank to said company, the plaintiff alleging that the bank had knowledge of such conversion and that it had notice that the stocks in question were the property of the plaintiff at the time it received them. The further necessary facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 14th of December, 1931.

Bray, for plaintiff.
Sloan, for defendant.

14th April, 1932.

MORRISON, C.J.S.C.

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ROBINSON v. BANK OF TORONTO

MORRISON, C.J.S.C.: This action is against the Bank of Toronto and R. P. Clark & Company in bankruptcy. The defendants, R. P. Clark & Co. did not defend, and were not proceeded against. On the 5th of November, 1929, the plaintiff instructed the defendant Clark & Co., as brokers, through their Mr. Ross, to purchase for him 100 shares of Anaconda Copper Mining Company at $85 per share. Clark & Co. did not buy these shares, but that was not then known to the plaintiff. Subsequently at various times up to October 18th, 1930, the plaintiff, at their request, deposited with the said defendant company other stock as further security to cover the margin created amounting to some $8,500, the alleged value of such security at the material times being taken at $22,000. Clark & Co. did their banking with the defendant, the Bank of Toronto, from which they had been and were receiving substantial advances and in turn deposited with them the securities obtained from the plaintiff. The plaintiff, desiring to close his account with Clark & Co., made demand for his securities but found they were in possession of the bank. On 8th November, 1930, he offered payment of the amount owing Clark & Co. and demanded delivery of the Anaconda shares whereupon he ascertained that the defendant company, in violation of their undertaking with him, had not fulfilled the order to purchase. The defendant bank refused to deliver up the stock deposited as aforesaid. This action was then commenced and subsequently the defendant Clark & Co. became and was declared bankrupt. The plaintiff alleges conversion by Clark & Co. and as against the bank that they had knowledge of such conversion and that they had notice that the shares in question were the property of the plaintiff at the time they received them.

Judgment

The shares were in the plaintiff's name who upon delivery to his brokers endorsed them in blank without any restriction. The defendant bank submits that these shares thus endorsed became what is known as "street certificates" transferable by delivery. There is no doubt but that Clark & Co. from time to time hypothecated the shares in question. They well may have been supplying the bank with securities obtained not to protect the interests of the client but rather to bolster their own credit. The

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gravamen of the plaintiff's contention is that the bank knew that Clark & Co. had no right or title to rehypothecate the shares; or that, at any rate, they had such notice as should have put them upon enquiry as to the brokers' exact authority to deal in this manner with his property. The bank contend they were *bona fide* holders of this stock without notice and had acquired the title to such. They also contend that the plaintiff is estopped from asserting title to this security as against them. That the plaintiff by a written transfer conferred upon Clark & Co. all the *indicia* of ownership, and that upon a pledge of such security they advanced moneys to Clark & Co. However indefensible may be the treatment of the plaintiff by Clark & Co. the trend of authority in this branch of litigation is against visiting the consequences upon the bank under the circumstances of such a case as this. The plaintiff had it in his power in writing to restrict Clark & Co. in their dealing with his securities in such a manner that third parties would be held to be on their guard as to the extent to which advances would be made. As far as would appear from the evidence Clark & Co. were at the time a reputable concern in good standing in the eye of the public. As to whether the bank knew aught else from their dealings with them remains undisclosed. I do not think that because the shares were in the plaintiff's name, though endorsed in blank, it is sufficient to put the bank on enquiry. From the bank's point of view it would be difficult for them to transact business of this kind if they were obliged to scrutinize securities in the manner suggested.

Judgment

The principles of law applicable to this case are settled by the decision of the House of Lords in *London Joint Stock Bank* v. *Simmons* (1892), A.C. 201. While the judgments of all the learned Lords of Appeal in the *Simmons* case, *supra,* are authoritative and most illuminative on this branch of the law, I desire to quote from the judgment of Lord Herschell at p. 223 which is most apt and completely covers the case at Bar:

> But I desire to rest my judgment upon the broad and simple ground that I find, as a matter of fact, that the bank took the bonds in good faith and for value. It is easy enough to make an elaborate presentation after the event of the speculations with which the bank managers might have occupied themselves in reference to the capacity in which the broker who offered the bonds as security for an advance held them. I think, however, they

were not bound to occupy their minds with any such speculations. I apprehend that when a person whose honesty there is no reason to doubt offers negotiable securities to a banker or any other person, the only consideration likely to engage his attention is, whether the security is sufficient to justify the advance required. And I do not think the law lays upon him the obligation of making any inquiry into the title of the person whom he finds in possession of them; of course if there is anything to arouse suspicion, to lead to a doubt whether the person purporting to transfer them is justified in entering into the contemplated transaction the case would be different, the existence of such suspicion or doubt would be inconsistent with good faith. And if no inquiry were made, or if on inquiry the doubt were not removed and the suspicion dissipated, I should have no hesitation in holding that good faith was wanting in a person thus acting.

As the plaintiff has failed to prove that the defendant bank had notice of the lack of capacity on the part of Clark & Co. to deal with the shares in question and has also failed to adduce any evidence pointing to the lack of good faith of the defendant bank in this transaction, he is estopped by his conduct in converting the share certificates in question into negotiable instruments from setting up even the fraud of Clark & Co. as vitiating the title of the defendant bank to the same. Whatever those who have given deep thought to the subject may say it is nevertheless true that banks operate on the basis of financial credit rather than upon credit created for purposes of production. If these institutions "will permit individuals to gamble out of bank credits" the law seems impotent to prevent it. While sympathizing fully with the plaintiff in this action, who is the vicarious victim of his brokers, the action must be dismissed as against the defendant bank with costs.

Judgment

Action dismissed.

MARTIN, LO. J.A.

1932

April 15.

SMITH v. THE "RACE ROCK."

Admiralty law — Salvage services—Apportionment—Evidence—Lighthouse journals.

SMITH *v.* THE "RACE ROCK"

The fishing-vessels "Z Brothers" and "Race Rock," both under charter to the same company, left Matilda Creek at about 6 o'clock on the morning of September 3rd, 1931, for the fishing ground in the open sea about 17 miles away and off the entrance to Clayoquot Sound. The "Race Rock" served as a tender for the "Z Brothers" and was under orders from the "Z Brothers" to receive the fish as they were caught. At about 11.30 a.m. the "Race Rock," being filled to capacity with fish, stood off in a direction leading to Matilda Creek, but after proceeding about a mile sea water came into the boat rapidly and it soon became submerged to the pilot house. The "Z Brothers" came to her assistance and with much difficulty attached a line to the bow and towed her towards Matilda Creek. The line parted three times but was made fast again on each occasion under difficult conditions, the wind having increased from a "gentle" to a ""moderate breeze" during the afternoon, with a considerable swell and choppy sea. They succeeded in reaching Matilda Creek where the "Race Rock" was beached at about three o'clock on the following morning. On action being brought by the master and crew of the "Z Brothers" for salvage services, the defendant paid $1,000 into Court to satisfy the claim.

Held, that salvage services of a substantial kind were rendered by the "Z Brothers" and her master and crew to the "Race Rock," mainly in the manner in which she was brought from a situation of peril in the open sea into a place of safety: the value of the "Race Rock" when brought into port was estimated at $6,500, and the gross value of the salvage service rendered by the "Z Brothers" and her master and crew to the "Race Rock" was fixed at $1,250, three-fifths of this amount, namely, $750, being awarded to the master and crew, the plaintiffs in this action.

Held, further, that the diary or journal of the lighthouse keeper at Lennard Island, about 12 miles southeast of the place in question, as duly returned to the agent of the National Department of Marine at Victoria, should be allowed in evidence as "an official book kept under competent authority" to shew the conditions of sea weather in that locality at the time in question.

Statement

ACTION for salvage services rendered to the fishing M. S. "Race Rock" by the master and crew of the salving fishing M. S. "Z Brothers" on the 3rd of September, 1931, off and in Clayoquot Sound, V.I. The facts are set out in the reasons for judgment. Tried by MARTIN, Lo. J.A. at Vancouver on the 8th, 9th and 10th of February, 1932.

Ginn, for plaintiff.
Sidney A. Smith, for defendant.

15th April, 1932.

MARTIN, Lo. J.A.: This is an action for salvage services rendered to the fishing M.S. "Race Rock" on the 3rd of September, 1931, off and in Clayoquot Sound, V.I., and it is unusual in that the claim is preferred by the master and crew of the salving fishing M.S. "Z Brothers" alone, and not by the owners or charterers thereof, whatever their respective rights may be and which are not now necessary to consider.

Both the said fishing-vessels were at the time in question under charter, by charter-parties from their respective and different owners, to the North West Fisheries Limited for a term of 90 days from the 6th and 9th of July, 1931, respectively, and the charter-parties are, in present essentials, identical in form and provide for the delivery by the owners of the vessels to the charterers at Matilda Creek (North Arm of Clayoquot Sound) to be under their orders only and that they should provide the crew and "pay the wages thereof" and provide and pay for all fuel and oils while "employing the vessel in lawful trade in Canada," and containing other provisions of the kind usual in charters of fishing-vessels of this description. On the same day, 18th of May, that the North West Fisheries Co. chartered the "Z Brothers" (length 64 ft.; beam 17 ft., 74 h.p. Dies. eng.) they entered into a contract with the plaintiff William Smith as "contractor," the relevant clauses of which are as follows:

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(1) The contractor covenants and agrees with the packer (*i.e.*, the Fisheries Co.)

(a) That he will during the term hereinafter specified fish for pilchards where and when directed by the packer.

(b) That he will during the said period give his whole time, attention, capacity and energy to the fulfilment of the duties imposed upon him by this agreement and in the furtherance of the interests of the packer herein.

(c) That he will not during the said period engage in any other business or fish for any other person, firm or corporation.

(d) That he will furnish a suitable crew of first class fishermen such men to be at all times satisfactory to the packer, which said crew together with himself will properly operate the boat and equipment furnished by the packer to him for the purpose of said fishing.

(e) That he will provide all labour that may be required to carry out this agreement, that he will board himself and his crew at his own expense and

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personally pay all wages, claims or demands of any nature whatsoever of his crew furnished by him as herein provided, and that he will indemnify and save harmless the packer of and from all liability for the payment of same.

(h) That he will deliver all fish caught by him in good condition and acceptable to the packer alongside the fish elevators at the plant of the packer or on scows or tenders provided by the packer at its option.

(i) That he will assist with the seine boat in the towing of scows to and from the fishing grounds when required by the packer.

Pursuant to this contract Smith was "furnished" with the "Z Brothers" to carry on the seine fishery for pilchards to begin on the 5th of July, and on the preceding day he as "contractor" entered into a written contract (to which the said company was also a party) with each of the six other plaintiffs as "fishermen" which contains the following relevant clauses:

1. The fisherman covenants and agrees that he will faithfully, honestly and diligently serve the contractor in the capacity of a member of a seine boat crew during the pilchard fishing season of 1931, the commencement and termination of such fishing season to be set by the company and/or during the currency of the said agreement between the contractor and the company dated the 18th day of May, 1931.

2. That during such fishing season, and/or the currency of the said agreement, he will devote his entire time, labour, skill and attention to such employment and obey the lawful orders and directions of the contractor.

Judgment

3. That in consideration of such services by the fisherman the contractor covenants and agrees that the fisherman shall be entitled to share equally with the other members of the crew (including the contractor) of which he is a member, in the profits earned by such crew during the said pilchard season, such profits to be determined at the rate of Two Dollars ($2) per ton of pilchards delivered by the said crew to the company and accepted by the said company, and such profit shall be divided at the conclusion of the fishing season. . . .

Fishing operations were duly entered upon under this arrangement and in the course thereof at 6 a.m. on the day in question the "Z Brothers" left Matilda Creek with the seven plaintiffs as master and crew, for the fishing grounds, in the open sea, off the entrance to Clayoquot Sound, about 6 miles S.W. of Bare Island, and having with her as a tender, provided by the company, the "Race Rock" (length 53.8 ft.; beam 15 ft.; 65 h.p. Dies. eng.) with three men only on board, *viz.*, a master, engineer and seaman, because the tender did not primarily actively engage in fishing operations (though also on a lay, not wages), but stood by in attendance upon and under orders from the "Z Brothers" to receive the fish caught by her nets, though

prepared to give a hand when necessary in getting in the fish therefrom, or otherwise according to circumstances. As the result of the fishing the tender was filled to capacity with fish, 34 tons, at about 11.30 and stood off slowly in the direction of the North Channel leading to Matilda Creek, but waiting to see if the "Z Brothers" would do any more fishing. About 20 minutes later and when the vessels were about a mile apart sea water began to come into the "Race Rock" so rapidly (owing, as later appeared upon survey, to a defect in her original construction in the absence of a covering board aft) that despite pumping efforts she speedily settled down at the stern and became submerged to the pilot house. Observing her distressed condition the "Z Brothers" immediately came to her assistance and after one attempt came alongside while her engine was still running and uncontrollable, and thereupon the three men jumped from her aboard the "Z Brothers," all thinking at the time that she was in a sinking condition, and it not being practically possible to get safe access to her dinghy astern. The "Z Brothers" continued to stand-by awaiting developments and in the hope, as Capt. Katnic of the "Race Rock" says, of saving his ship, though shortly after leaving her she went down about a foot deeper, yet she continued to float, despite contrary expectations, and finally displayed such an encouraging sustained buoyancy that he, about 1 p.m., decided to make an effort to tow her to safety, and accompanied by the plaintiff Malcolm Smith, went to her in the "Z Brothers' " large skiff and with considerable difficulty (and commendable agility on the part of Smith, then and later) fixed a line to her submerged bow, and started, about 1.30 to tow her slowly to port (Matilda Creek), a distance of about 16 miles, but in about three-quarters of an hour it was found impossible to continue to do so because she went down too deep at the head, whereupon the master of the "Z Brothers" ordered the line to be chopped, and after some time and further consideration of the situation it was decided to attempt to tow her by the stern, and Malcolm Smith and another man went to her in said skiff and succeeded, after more smart work by Smith, with the seas breaking over him at times, in getting a line fast to her submerged rudder post, and towing was resumed at a slow and careful pace towards the said North Channel but in about an hour's time the line parted, and

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was refastened by the plaintiff Murch under difficult conditions, after which towing was resumed as aforesaid. About 7 o'clock a fog began to settle down, about 3 m. off White Island, which almost obscured all vision and necessitated groping through that narrow passage by means of soundings and echoes. At about 8 p.m. the line parted for the third time, *i.e.*, it was chopped once and broke twice, though the evidence is strangely confused) some 15 fathoms from the "Race Rock," and it had to be picked up in the darkness by a pike-pole and fastened for the fourth and last time, after which towing was resumed and Matilda Creek reached at 3 a.m., when the "Race Rock" was safely beached alongside the company's wharf. It was later found that there were still 15 tons of fish in her, which had, with the rest, become the property of the company upon delivery to her, but they had been spoilt.

Judgment

There is little if any controversy upon the foregoing main facts which substantially represent the outline of the situation though not the detail, which, however, has not escaped my attention but it is not necessary to set it down here. A dispute, however, arose respecting the state of the weather and sea and there is a tendency on the part of the plaintiffs to exaggerate these conditions. I am satisfied on all the evidence that there was no real obstacle to fishing before half-past twelve at the earliest; indeed, the engineer of the "No. 9," which was fishing on the same grounds, said that they completed their last set at 1.30 and shortly thereafter, observing the two other vessels "circling round," came up to them to offer assistance if necessary but none was requested, so they stood-by for about half an hour and watched Smith fixing the tow-line, and the resumption of towing operations. It is a fair statement of sea and weather conditions to say that up to 12.30 the wind (from S.E.) did not exceed a "gentle breeze" (*i.e.*, 8 to 12 m. as defined by the Canadian Meteorological Table), but with a considerable swell from the S.W., and consequent choppy sea, and that thereafter the wind freshened to a "moderate breeze" (*i.e.*, 13 to 18 m.) and the swell increased, but at no time that day was there a "fresh breeze" (*i.e.*, 19 to 21 m.) nor any conditions which would render it unsafe for an ordinary well found fishing-vessel to be out at sea, even though she might not be able to fish, as *e.g.*, the

evidence of Alexander Jamieson of the "Fisher Lassie" shews. There is no reasonable doubt, however, that had not the "Race Rock" been taken in tow as aforesaid she would have been carried, within 24 hours, by the set of the tide in the direction of Estevan Point, about 30 miles to the N.W., and wrecked thereabouts, if the seas breaking over her had not sunk her beforehand, because it is not reasonable to suppose that her unexpected buoyancy, which was fortunately caused by her oil tank, would long have withstood such a battering in the open sea, though it still existed five days after, *i.e.,* on the 8th, in calm water on the beach at Matilda Creek.

After a careful consideration of all the evidence and circumstances it is clear that salvage services of a substantial kind were rendered by the "Z Brothers" and her master and crew to the "Race Rock," mainly in the manner in which she was brought from a situation of peril in the open sea into one of comparative shelter at the entrance to the North Channel, and thereafter in the skilful navigation of that passage in fog and darkness, which would not in all probability have been possible had not the master of the "Z Brothers" been possessed of local knowledge and experience, and therefore his vessel was while towing her tender herself exposed to appreciable extra danger in returning to her own port. There was also, though in a minor degree and for a very brief time only, danger to the lives of the three men on the "Race Rock" (more apparent than real, as it turned out, because she did not sink as expected), but there was none, in the true sense, to those on board the "Z Brothers." On the other hand it is to be remembered that the vessels would have both returned to their same home port that same day in any event, and so far as the "Z Brothers" is concerned her services only meant, apart from the said increased danger of navigation, and a very small degree of danger in taking off the 3 men, a delay of about 11 hours in returning, the loss of part of a seine line, and extra oil fuel to an extent not stated.

Judgment

Applying the principles, which have been so often set out in many reported cases in this Court (beginning with *The Costa Rica* (1891), 3 Ex. C.R. 23, and *The Zambesi* (1891), *ib.* 67, and noting *Clayoquot Sound Canning Co.* v. *S.S. "Princess Adelaide"* (1919), 27 B.C. 526), to the facts at present before

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me, and giving full effect to the public policy of a liberal (*cf. The Vermont Steamship Co.* v. *The Ship Abby Palmer* (1904), 8 Ex. C.R. 446, 460, and *Clifton* (1834), 3 Hag. Adm. 117, 121) though not extravagant award (which latter would defeat that former policy, as was pointed out in *The "Inca"* (1858), 12 Moore, P.C. 189, 198) I have reached the conclusion that the gross value of the salvage service rendered by the "Z Brothers" and her master and crew to the "Race Rock" amounts to $1,250 and the next question is to apportion a just share of that gross sum to the plaintiffs herein (as was done in *The Friesland* (1904), P. 345,354), without present regard to what the rights of the owners or charterers may be *inter se,* because they are not all parties to this special action.

The old rule of apportionment between the owners of a sailing salving ship and her master, officers and crew used to be more in favour of the latter than since the advent of steam or other motive power, as is pointed out by Lord Justice Kennedy's fine work on Civil Salvage, 2nd Ed., p. 168 *et seq.* and he says at p. 171:

Judgment

> In the vast majority of salvage cases nowadays the salving vessel is a steamship, and the chief instrument in effecting the salvage service is the steam power. Naturally, therefore, the number of salvage cases in which it will be found that the larger proportion of the reward has been apportioned to the owners has greatly increased since that which may be called the sailing-ship period. Speaking in the year 1860, in the case of *The Enchantress* [(1860)], Lush. 93, Dr. Lushington, after quoting the passage cited above, from the judgment of Sir Christopher Robinson in *The Jane* [(1831)], 2 Hag. Adm. 338, proceeded to point out that "in later times the introduction of steam power has effected a considerable change in the practice of the Court, and no doubt reasonably, for a steamer is now most frequently the principal salvor. It is equitable in such cases that the owners on whom the chief risk and all the expense falls should be rewarded in a much higher proportion than owners were formerly, and the Court has acted accordingly."

And at p. 172:

> Accordingly, in recent years, the proportion of the reward allotted, under ordinary circumstances, by the Court of Admiralty to the owners of a salving steamship has steadily advanced. The utmost amount ever decreed to them by Dr. Lushington's predecessors was a moiety of the sum awarded. Dr. Lushington himself very seldom gave them a larger proportion. During the thirteen years of Sir Robert Phillimore's judgeship, ending in 1883, wherever the principal service consisted in the towage of the disabled ship, the owners were apportioned occasionally three-fourths, but usually about two-thirds. Since 1883, they have received three-fourths so frequently, that

this may fairly be called, as it was by Butt, J., in his judgment in *The City of Paris* [Shipp. Gaz. Weekly Summary, June 7th, 1890] the "ordinary" apportionment. But the three-fourths share, although the more common, is by no means the invariable apportionment to the owner of the salving steamship at the present time. With reference to an apportionment made on that basis, Lord Esher, M.R., remarked in *The Gipsy Queen* [(1895), P. 176]: "That may be a very good working principle; but there is no such rule. The apportionment must in each case depend upon the particular circumstances."

Compare also *The Farnley Hall* (1881), 4 Asp. M.C. 499; *The Agamemnon* (1883), 5 Asp. M.C. 92; *The Zambesi, supra,* 70; *The Archer* (1894), 3 B.C. 374; *Pickford and Black* v. *The Steamship Lux* (1912), 14 Ex. C.R. 108; *The Friesland* (1904), P. 345, 354; Roscoe's Admiralty Practice, 5th Ed., 139, 154, 162; and Kennedy on Civil Salvage, *supra,* 73 *et seq.*

The present circumstances are distinct from those in any other case cited, or which I have found, in that the plaintiffs are not employed or paid by the owners or charterers but are remunerated on a lay basis in equal shares in the season's profits, pursuant to said contract, and therefore their salvage services were purely voluntary and wholly unremunerated and at their own personal expense as regards extra food and loss of time, though it happened here that owing to increasing bad weather it was not possible to fish any more that day nor the following day. Nevertheless they had the proper disposition (even though most of them were not called upon actively, but stood-by prepared if necessary) and it was their own personal adventure in the matter as it then presented itself, and in which they had no personal interest to serve, and which was wholly outside the contract with the company, and so their claim is distinct from that of the owners or charterers—*The Sappho* (1871), 1 Asp. M.C. 65, wherein it was said by the Privy Council (p. 66):

Judgment

> The true rule appears to their Lordships to be, to consider whether the services are in themselves of the nature of salvage services; and next, whether they are services which are within the contract which the seaman originally enters into, so that he receives remuneration for them by his ordinary wages. If they are not within his contract, so that he does not receive remuneration for them by his ordinary wages, and they are in their nature salvage services, their Lordships are of opinion that there is no good reson why the seamen should not receive the ordinary salvage remuneration which the law gives him.

Of the present claim it may be said, as in *The Farnley Hall, supra,* p. 502:

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[It] does not come within the ordinary rules, and therefore we must consider the case as it presents itself.

Having done so, I am of opinion that its justice will be fully met by awarding to the master and crew the sum of $750 being three-fifths of the said gross award of $1,250.

I was informed by counsel that the plaintiffs did not wish me to apportion the award between them (as I have done, *e.g.*, in *The Prince Albert* (1913), Mayers's Admiralty Practice, 543), so I refrain from doing so, but I feel it proper to say that Malcolm Smith is entitled to special commendation for his very capable services, and, though to a lesser degree, Thomas Murch also.

Something should be said about the value of the vessels concerned for that is also an important element for consideration in determining the amount of the award, though undue weight must not be given to it (*The "Amerique"* (1874), L.R. 6 P.C. 468, 475) upon which question a considerable amount of evidence was adduced by both parties. The assessment of the salved *res* is, as a general rule, and in this case, her market value at the place where and at the time when the salvage service terminated. *The Vermont Steamship Co.* v. *The Ship Abby Palmer* (1904), 8 Ex. C.R. 446, 449; *The Hohenzollern* (1906), 76 L.J., Adm. 17; *The Harmonides* (1902), 9 Asp. M.C. 354; *Dunsmuir* v. *The Otter* (1909), 18 B.C. 435; 12 Ex. C.R. 258; *The Humboldt* v. *The Escort* (1914), 20 B.C. 595; *The San Ononfre* (1917), P. 96; Roscoe's Admiralty Practice, 5th Ed., 170. This market value is not often difficult to determine satisfactorily, and particularly so in times of general depression such as the present, where opinions may well differ greatly, but after applying the proper tests upon the evidence before me, I think the fair value of the "Race Rock" when she was brought into port was $6,500, and that of the "Z Brothers" was $12,000.

Judgment

An important ruling on evidence remains to be noted, *viz.*, that on the authority of *The Maria das Dorias* (1863), 32 L.J., Adm. 163; Br. & Lush. 27 (note (*a*)); 8 L.T. 838; 11 W.R. 500; *The Catherina Maria* (1866), 12 Jur. (N.S.) 380; L.R. 1 A. & E. 53; *The We're Here* (1873), 1 Y.A.D. 138, 140; *The Marechal Sucket* (1911), P. 1, 13; Williams and Bruce's

Admiralty Practice, 3rd Ed., 431; and Roscoe's Admiralty Practice, 5th Ed., 334; the diary or journal of the lighthouse keeper at Lennard Island, about 12 miles S.E. of the place in question, as duly returned to the agent of the National Department of Marine at Victoria, B.C., pursuant to his official duty, was allowed in evidence (per certified copy thereof from said agent) as "an official book kept under competent authority" to shew the conditions of sea and weather in that locality at the time in question.

Judgment will therefore be entered for the plaintiff for $750 as hereinbefore indicated: if necessary the question of costs may be spoken to later, but in any event the defendant ship is entitled to the cost of furnishing bail owing to her arrest on the extravagant claim for $8,000 pursuant to the practice declared in *Vermont Steamship Co.* v. *Abby Palmer* (1904), 10 B.C. 383; 8 Ex. C.R. 462; *The B. B.* (1914), Mayers's Admiralty Practice 544; and *The "Freiya"* v. *The "R. S."* (1921), 30 B.C. 109.

Judgment

Judgment for plaintiff.

CAYLEY, CO. J.

1932

April 28.

O'BRIAN, BELL-IRVING, STONE & ROOK LTD. v. BENTHAM

O'BRIAN, BELL-IRVING, STONE & ROOK LIMITED v. BENTHAM.

Stock Exchange—Contracts for purchase and sale of stocks—Balance due broker—Action to recover—Legality of transactions—Criminal Code, Sec. 231—Effect of.

In an action to recover the balance due the plaintiffs as brokers on the purchase and sale of stocks for the defendant, the defence was raised that the transactions were in violation of section 231 of the Criminal Code.

Held, that the defendant must shew that the plaintiffs had no *bona fide* intention of "selling" the shares ordered to be sold or to make delivery of the shares ordered to be purchased, and having failed in shewing that the plaintiffs participated in any such transaction, section 231 of the Criminal Code does not apply and the plaintiffs are entitled to recover.

Statement

ACTION to recover the balance due the plaintiffs acting as brokers for the defendant on the purchase and sale of certain stocks and shares. The evidence disclosed that all the transactions had taken place on the floor of the Vancouver Stock Exchange and were carried out pursuant to the rules of the Exchange, save in certain instances where orders were carried out in the Toronto Stock Exchange. The evidence further disclosed that the plaintiffs were in a position in all cases to make actual delivery of all shares bought or sold on the defendant's behalf. Tried by CAYLEY, Co. J. at Vancouver on the 19th of April, 1932.

Argument

O'Brian, K.C., for plaintiffs: All transactions were carried out in accordance with the rules of the Stock Exchange and we could always make delivery. Where a party sets up, as the defendant has done, his own illegal purpose he must prove the participation in that purpose of the plaintiff: see *Universal Stock Exchange* v. *Strachan* (1896), A.C. 166; *Medicine Hat Wheat Co.* v. *Norris Commission Co., Ltd.* (1919), 1 W.W.R. 161; *Maloof* v. *Bickell and Company* (1919), 59 S.C.R. 429; *Beamish* v. *Richardson & Sons* (1914), 49 S.C.R. 596; *Weddle, Beck & Co.* v. *Hackett* (1929), 1 K.B. 321; *Woodward & Co.*

v. *Koefoed* (1921), 3 W.W.R. 232; *G. F. Tull & Ardern Ltd.* v. *Shouldice* (1932), 1 W.W.R. 144; *Forget* v. *Ostigny* (1895), A.C. 318.

Thomas E. Wilson, for defendant: The plaintiffs failed to shew they actually bought and sold the stock in question for the defendant. The transactions were tainted with illegality as coming within section 231 of the Criminal Code, and the plaintiffs cannot recover: see *Bank of Toronto* v. *Sweeney* (1927), 2 W.W.R. 597; *Beamish* v. *Richardson & Sons* (1914), 49 S.C.R. 596; *Medicine Hat Wheat Co.* v. *Norris Commission Co., Ltd.* (1919), 1 W.W.R. 161; *B.C. Stock Exchange* v. *Irving* (1901), 8 B.C. 186 and *Hansen* v. *Lechtzier* (1925), 4 D.L.R. 1008.

Argument

28th April, 1932.

CAYLEY, Co. J.: The plaintiffs are a stock-broking firm and the defendant was the representative on the floor of the Stock Exchange of another stock-broking firm, R. P. Clark & Company. The plaintiff firm was represented on the floor of the Stock Exchange by a member of the firm, Stone. In 1929, beginning July 5th and ending November 14th or thereabouts the defendant bought mining and oil shares from the plaintiff firm, buying one day and making a quick sale a day or two later. He never asked for delivery of the shares he bought, nor did he pay cash at the time he bought. His system was to run an account with Stone or the plaintiffs and give a cheque from time to time in settlement if he happened to have made losses. He gave four cheques in all in such settlement but in the end refused to pay the balance $241.35 now sued for. All his transactions are regularly carried out and duly recorded as required by the Stock Exchange regulations. Defendant now takes the ground that his transactions were a violation of section 231 of the Criminal Code and that the plaintiffs are therefore not entitled to recover. I think the defendant has to shew that the plaintiff firm had either (under subsection (*a*) of section 231) no *bona fide* intention of "selling" the shares in question or (under subsection (*b*) of section 231) no "*bona fide* intention to make delivery" of the shares in question. I hold that he has not shewn either of these things on the part of the plaintiffs. In fact, whatever the plaintiffs may have inferred as to whether

Judgment

CAYLEY, CO. J.

1932

April 28.

O'BRIAN, BELL-IRVING, STONE & ROOK LTD. *v.* BENTHAM

Judgment

the defendant was gambling or not they for themselves were engaged in selling shares to the defendant or selling shares for the defendant as ordered in the usual course of business. No evidence was adduced that the plaintiffs were not at all times ready to deliver any shares the defendant bought. To draw conclusions from the fact that the defendant never waited long enough to take delivery or asked for delivery would be to fix a criminal offence on the plaintiffs without adequate proof.

Judgment I think must be for the plaintiffs for the amount sued for.

Judgment for plaintiffs.

MORRISON, C.J.S.C.

1932

April 30.

McGRATH *v.* J. LECKIE & CO.

Negligence — Dangerous premises — Smoke-stack—Equipment supplied for painting—Defective condition thereof—Injury to painter through falling—Damages—Liability of owner of premises.

McGRATH *v.* J. LECKIE & Co.

The plaintiff was employed to paint the smoke-stack of the defendants' tannery on the south bank of the Fraser River near New Westminster. A ladder and other material were placed on the roof for ascending the smoke-stack four years previously, when the defendants' workmen were installing a steam-whistle. The ladder leaned against the smoke-stack, and the lower end gripping the saddle of the roof, was held in place on each side by a cleat nailed to the roof. The plaintiff had used the ladder for the same work two years previously without mishap, but on the occasion in question, when he had finished his work and was coming down the ladder, one of the cleats holding it in place gave away, the ladder slid sideways and he was precipitated to the ground, sustaining permanent injuries. In an action for damages:—

Held, that the cleats were defective, so caused by long exposure to the elements, and the defendants ought to have known of their condition, the ladder known to the defendants and unknown to the plaintiff having long passed the period of its safety, constituting a trap. The defendants owed a duty to the plaintiff to use reasonable care to see that the property and appliances upon it were fit for the purpose for which they were to be used by the plaintiff in the performance of the work for which he was employed. In this the defendants have failed and they are liable in damages for the plaintiff's injuries.

Statement

ACTION for damages for injuries sustained by the plaintiff when engaged in painting a smoke-stack of the defendants'

tannery. The plaintiff used an old ladder of the defendants' that leaned against the smoke-stack and was supported on the roof where it was held by two cleats nailed to the roof. While the plaintiff was using the ladder, one of the cleats gave away, the ladder came down and the plaintiff fell to the ground, sustaining permanent injuries. The ladder had been four years in place, and the plaintiff claims that the defendants permitted him to use the ladder without thought as to its safety, and it was owing to their negligence that the accident occurred. The facts are set out in the reasons for judgment. Tried by MORRISON, C.J.S.C. at Vancouver on the 25th of April, 1932.

Statement

McQuarrie, K.C., for plaintiff.
Donaghy, K.C., for defendants.

30th April, 1932.

MORRISON, C.J.S.C.: The plaintiff is what is known as a steeplejack and was on the occasion in question engaged to paint the smoke-stack of the defendant's tannery on the south bank of the Fraser River opposite New Westminster. The contract of employment, which was verbal, was to paint the stack for $10. Parenthetically, it was submitted on behalf of the plaintiff that he could not have been expected to furnish his own ladders for such a sum. I find that the ladder was intended by the defendants to be used by the plaintiff. He had done this job a year or two before and at that time had used the ladder in question which was placed on the roof near the smoke-stack area some four years before when the defendants' workmen were installing a steam-whistle there. The smoke-stack had a hook fastened at the top to support a wire by which when tied to a rope the workmen ascending could haul themselves up. This wire was there permanently, one end of which was fastened to the roof and the loose end when not being used to the whistle shaft. When being used, as on this occasion, that end was tied on the hoisting rope which the plaintiff had as part of equipment and to which rope he tied his "chair." By means of the rope, which was pulled after being tied to the wire through the hook at the top of the stack, he pulled himself up to the top and painted downwards. After regaining the roof, he then pulled on this gear in order to get the wire down to where it was tied to his rope. After

Judgment

MORRISON, C.J.S.C.

1932

April 30.

MCGRATH v. J. LECKIE & CO.

untying the rope, he would then hitch the wire to the whistle upright—the other end being of course permanently tied to the roof at a proper place—preventing the wire from running through the hook and thus the wire was left until required again. The plaintiff says that after he had finished his job and sitting on the ladder about half way down he was engaged in unfastening the rope from the wire and in coiling it preparing to descend, when he felt the ladder moving. He made attempts at saving himself as best he could, but in vain—the ladder slid sideways and he was precipitated to the ground receiving the injuries complained of. The ladder in question, which I inspected as an exhibit, is 14 feet long and would weigh somewhere near 51 pounds. At the end by which it gripped the saddle of the corrugated iron roof there were two wooden cleats about two and one-half or three feet in length, fastened by three nails in each and at an angle sufficient to grip the saddle of the roof. This ladder had been at least four years in place—had not been inspected by the defendants. There is evidence, which I accept, that the safety-life of this kind of ladder is two years or so, and that when exposed, as this ladder was, to the action of the weather, heat, frost and rain on an iron roof the tendency is to render nails such as were used here quite a precarious means of fastening for cleats such as these were. One of the cleats with the three nails firmly in place was produced. One of the witnesses, when giving evidence and handling the cleat, succeeded in breaking one of the nails rather easily. The other cleat was burned by the engineer who came to the scene of the accident shortly after. He was ordered to replace the old cleats with new ones. The theory of expert witnesses for the plaintiff is that if one cleat were to give way that would cause the ladder to slide from its place. The defendants contend that what must have caused the ladder to leave its place was the act of the plaintiff in pulling so hard on the wire, one end of which he had tied to the ladder, that the ladder was lifted from the roof, thus causing the accident. Several men experienced in work of this kind and familiar with handling cables, ropes and wires stated it would be quite impossible for the plaintiff to have pulled on this thin wire placed as it was unless the plaintiff had wound it around his hand deliberately and then with all

Judgment

his strength tugged at it for which act there would be no apparent reason. Even if the wire end, as suggested by the defendant, had been fastened to the ladder top temporarily it would be difficult to lift the ladder from the roof with the weight of the plaintiff and his chair and other equipment upon it. The plaintiff had been employed before his present occupation as an experienced sailor; and seemed to be alive to the risks of his work. I find that on this occasion he took reasonable precaution for his safety. I find that cleats were defective, so caused by the long duration of exposure to the elements. The defendants ought to have known and the plaintiff did not know its condition. I find also that the defendants permitted the plaintiff to use the ladder and the other part of the equipment owned by them without giving thought as to whether the ladder was defective or not. The ladder known to the defendants and unknown to the plaintiff had long passed the period of its safety and that it therefore constituted a trap. There was an "appearance of safety under circumstances cloaking a reality of danger"—*Willoughby* v. *Horridge* (1852), 12 C.B. 742. The duty, a breach of which gives rise to a cause of action in negligence, is to take care under the circumstances. This duty is reciprocal and is constant.

Judgment

A man who intends that others shall come upon his property of which he is the occupier for purposes of work or business in which he is interested, owes a duty to those who do come to use reasonable care to see that the property and the appliances upon it which it is intended shall be used in the work are fit for the purpose to which they are to be put:

Marney v. *Scott* (1899), 1 Q.B. 986 at pp. 989-90. The duty however is not to make the premises reasonably safe, but to take reasonable care to prevent damage from unusual danger—*Lucy* v. *Bawden* (1914), 2 K.B. 318. I think the defendants failed in that duty.

The plaintiff was injured to such an extent that he is permanently unfit to continue his work. He is 60 years of age. He has apparently led a life of hard work. There was no actuarial evidence of his expectation of life. He claims his earnings amount to $1,600 a year approximately.

There will be judgment for the plaintiff for the amount of special damages proved at the trial and $8,000 general damages.

Judgment for plaintiff.

ELLIS, CO. J.

1932

May 9.

ROBERTSON & HACKETT SAWMILLS LIMITED *ET AL.* v. THE METROPOLITAN TABERNACLE AND FALLS

AND

W. JOHNSON SASH & DOOR FACTORY LIMITED v. THE METROPOLITAN TABERNACLE AND FALLS.

ROBERTSON & HACKETT SAWMILLS LIMITED *v.* THE METROPOLITAN TABERNACLE

W. JOHNSON SASH & DOOR FACTORY LIMITED *v.* THE SAME

Mechanics' liens—Material supplied on construction of building—Consolidated actions against the contractors and for liens—Effect of non-delivery of receipted pay-rolls to owner—R.S.B.C. 1924, Cap. 156, Secs. 8 and 15.

In consolidated mechanics' lien actions for material supplied on the construction of a building:—

Held, that the true construction of section 15 of the Mechanics' Lien Act is that the owner is thereby given statutory protection, and notwithstanding the provisions of section 8 of said Act, if he does not avail himself of this protection he is liable both to the labourer and material man. In the case at Bar, having failed to protect himself, he is responsible to the material men for the amount of their claims.

Statement

CONSOLIDATED mechanics' lien actions. The facts are set out in the reasons for judgment. Tried by ELLIS, Co. J. at Vancouver on the 6th of May, 1932.

Thomas E. Wilson, for plaintiffs Robertson & Hackett Sawmills Limited.

H. M. Drost, for plaintiff W. Johnson Sash & Door Factory Limited.

Wyness, for defendant The Metropolitan Tabernacle.

9th May, 1932.

Judgment

ELLIS, Co. J.: The plaintiffs, Robertson & Hackett Sawmills Limited, and W. Johnson Sash & Door Factory Limited, are material men who supplied material for a church erected by the defendant. By order of this Court, the actions were consolidated and were tried together.

I am satisfied that the plaintiffs have fully discharged the onus on them as to the proof of delivery of the goods for which they are claiming lien.

Counsel for the defendant did not strenuously urge the plaintiffs were out of time and I am satisfied they are within time within the meaning of the Act as amended.

The most important question that I have to consider is a question of law, and involves an interpretation of sections 8 and 15 of the Mechanics' Lien Act. Counsel for both the plaintiffs and the defendants have ably argued the sections, but admit there is no decision of our own Courts which can be taken as a precedent for me to follow. Section 8 of the Act provides as follows:

> With the exception of liens in favour of labourers for not more than six weeks' wages, no lien shall attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor; but this section shall not be construed to apply to liens under section 11.

Section 11 refers to the owner's liability for works on premises held under option, and has no application to the case at Bar. Section 15 provides that receipted pay-rolls are to be posted on the works, and limits the liability of the owner until pay-rolls have been posted. The last paragraph of the section reads as follows:

> And no payment made by the owner without the delivery of such pay-roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate, or interest in favour of any labourer or person placing or furnishing material.

It will be noted that section 8 makes no reference whatever to the material man. I think the true construction of section 15 is that the owner is given by statute protection; if he does not avail himself of this protection, he is liable both to the labourer and the material man.

Judgment

In the case at Bar, the owner failed to protect himself, and, I think, must be held responsible to the material men for the amount of their claim. I cannot see that section 8, which is silent as to material men, conflicts with their rights under section 15.

Fortunately for all parties, the proceedings were taken down in shorthand and it will be easy to have a decisive judgment by the highest Court on the apparent conflict between sections 8 and 15. In the meantime there will be judgment for the plaintiffs for the amounts claimed, the usual declaration for a lien and personal judgment against the contractors. The question of costs will be spoken to later.

Judgment for plaintiffs.

MURPHY, J.

1932

May 11.

HALL AND HALL v. TINCK.

Negligence—Motor-vehicles—Collision at intersection—Right of way—B.C. Stats. 1930, Cap. 24, Sec. 21.

HALL v. TINCK

Section 21 of the Highway Act provides that "a person in charge of a vehicle upon a highway shall have the right of way over the person in charge of another vehicle approaching from the left upon an intercommunicating highway."

Held, that the fact that the vehicle (or car) to the left is within the intersection before the car to the right enters it, does not displace the latter's right to the right of way, and in an action resulting from a collision within an intersection, the person who is on the left will first be called upon to explain how he got into a position where he should not be had he observed the statute.

Statement

ACTION for damages resulting from a collision between two automobiles at an intersection. Tried by MURPHY, J. at Vancouver on the 11th of May, 1932.

A. M. Whiteside, and *P. White,* for plaintiffs.
Branca, for defendant.

Judgment

MURPHY, J.: This is the third action I have tried within the last month on this question of accident at intersections. Judging from the way those cases were conducted, it seems to me there is an impression got abroad, and I am saying this not because it is necessary for decision in this case, but for the information of the public, at any rate those who are here: There seems to have been an impression gotten abroad in this Province that if the person on the left reaches the intersection first that thereupon the rule of the road ceases to operate. That is entirely erroneous. There have been some remarks made in a couple of the judgments of the Court of Appeal which, taken baldly, might possibly receive such a construction as that, but every judgment has to be considered in connection with the facts, and I am certain those remarks are not intended to convey any such decision. If the Court of Appeal had so ruled, I would, of course, follow unquestioningly their decision, as I am in duty bound to do. But I have studied carefully the decisions referred

to, and I feel certain no such construction should be put upon them. I am not speaking on my own authority about this matter of what is the law at intersections. I want to call the attention of the Bar to two cases, one in the Supreme Court of Canada, *Carter* v. *Van Camp et al.* (1930), S.C.R. 156, in which the Supreme Court of Canada says that the person on the right has the legal right to expect that the rule of the road will be observed by the person on the left. Now, that is the first case that I want to call attention to; and the second case, which is exactly in point, is the *Kennedy Lumber Co.* v. *Porter* (1932), 1 W.W.R. 230, a decision of the Court of Appeal of Saskatchewan. The facts there were that the person on the left, that is, the person who had not the right of way, entered the intersection, which was 100 feet wide—he had gotten into it almost 70 feet, I think, when a person to his right, the person who had the right of way, came along. The case was very similar to the case here, one was travelling north, the other travelling west. The man on the right did not enter the intersection until the man on the left had got into it 65 or 70 feet. Each one thought the other ought to stop, and both went on and collided, so the Court was called upon to decide the question whether the person who entered the intersection first, being on the left, would acquire a right to proceed as against the statutory right of the person approaching on the right because he got to the intersection first. It was held that was not so. In fact, it would be straight in the teeth of the statute to so hold, if you only stop to think why that legislation was passed. It was passed for the express purpose of obviating an error in judgment on the part of drivers when they come up to an intersection. There may be circumstances where the rule of the road does not operate, if no traffic reasonably can be said to be approaching from the right, and possibly under other circumstances, but it is pointed out in this case that the person who is on the left is called upon to explain, in the first place, how he got into a position where he should not be had he observed the statute. I mention that because, judging from four cases that I have tried in the last month, there seems to be an impression of what is the law, I suppose based on some remarks of the Court of Appeal, which seems to me to be entirely erroneous.

Judgment

MURPHY, J.

1932

May 11.

HALL
v.
TINCK

I feel there is one other thing I ought to say. In the last week I have tried three of these cases, every one of them occasioned by reckless driving on the part of a minor, by irresponsible youths put in charge of these dangerous machines. In this case, and another one I tried yesterday, the minor driver charged into a main artery in this city in broad daylight, the one yesterday at half-past three in the afternoon on Granville Street, the one today at 7.30, in August, on 10th Avenue, a through street, with an utter disregard to the rule of the road. It is only by the mercy of God people were not killed, both in this accident and the other. It does seem to me it is regrettable that more control is not exercised over these irresponsible youths, when it is shewn, as has been shewn before me in these two cases, the utter recklessness with which these highly dangerous machines are used by them. Certainly, fathers and mothers should take cognizance of what is occurring in the Courts, and not allow irresponsible young people, who have no realization of the danger of what they are handling, to drive motor-cars without any supervision, and the same remark applies to employers employing minors to drive trucks. The law, of course, allows this, but people may have very serious reasons to regret permitting it to be done.

Judgment

This is all *obiter,* but I felt, in view of the fact that I have tried three cases within one week all involving serious accidents and all caused by reckless driving by minors, it was time someone made a statement from the Bench as to the danger of allowing irresponsible young people to handle these highly dangerous machines.

IN RE ESTATE OF JAMES CUNNINGHAM, DECEASED.

COURT OF APPEAL

1932

June 7.

IN RE ESTATE OF JAMES CUNNINGHAM, DECEASED

Will — Construction — Charitable bequest — "Charitable institutions and schemes"—Validity.

A testator, after bequeathing a number of legacies to specific charities, concluded with the following: "I direct my trustees to stand possessed of all the rest, residue and remainder of my 'Residue Fund' (including any gifts which for any reason may lapse or may not be capable of payment as hereinbefore mentioned) in trust, to pay, apply and distribute the same to or among such charitable institutions and schemes already constituted or which may hereafter be constituted within the Province of British Columbia, as my trustees shall in their absolute discretion select, or to, or among any one or more of such institutions or schemes and that in such manner and in such proportions all as they in their absolute discretion may deem proper."

Held, on appeal, affirming the decision of MCDONALD, J., that the bequest of the residue was valid and not void for uncertainty.

APPEAL by the next of kin of James Cunningham, deceased, from the order of MCDONALD, J. of the 2nd of February, 1932, on the petition of the surviving trustees under the last will and testament of said James Cunningham for directions of the Court as to whether or not sub-clause (8) of clause (n) of paragraph 5 (set out in the head-note) is a valid and proper devise of the property therein referred to. It was held that said sub-clause created a good and valid devise of a charitable bequest.

Statement

The appeal was argued at Vancouver on the 10th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C. (*Christopher Morrison,* with him), for appellant: The case of *Dick* v. *Audsley* (1908), A.C. 347 does not apply as it is a Scotch case. As to the difference see *Blair* v. *Duncan* (1902), A.C. 37 at p. 43. The Statute of Elizabeth governs the English law. We submit that the words must be read disjunctively and the will must be construed as of the date of the death of the testator: see *In re Jarman's Estate* (1878), 8 Ch. D. 584 at p. 587. That the bequest is void for uncertainty see Tudor on Charities, 5th Ed., 63; *In re Robb, Deceased* (1931), 43 B.C. 439; Jarman on Wills, 7th Ed., 215; *In re*

Argument

COURT OF APPEAL

1932

June 7.

IN RE ESTATE OF JAMES CUNNINGHAM, DECEASED

Stratton. *Knapman* v. *Attorney-General* (1930), 47 T.L.R. 32; *Dick's Trustees* v. *Dick* (1907), S.C. 953; *Hunter* v. *Attorney-General* (1899), A.C. 309 at p. 317. In construing the word "scheme" the trustees might do anything: see *In re Robinson* (1931), 100 L.J., Ch. 321; *Grimond* (*or Macintyre*) v. *Grimond* (1905), A.C. 124 at p. 126. He has not given a class and the bequest is vague: see *In re Macduff* (1896), 2 Ch. 451; *Gorringe* v. *Mahlstedt* (1907), A.C. 225 at p. 227; *In re Tetley* (1923), 1 Ch. 258 at p. 265; *In re Hummeltenberg* (1923), 1 Ch. 237; *Attorney-General* v. *National Provincial Bank* (1924), A.C. 262 at p. 263.

Argument

Selkirk, for Royal True Blue Children's Home, referred to *In re Tetley* (1923), 93 L.J., Ch. 231 at p. 234; *In re Huxtable* (1902), 71 L.J., Ch. 876; *In re Best* (1904), 73 L.J., Ch. 808; *In re Sutton* (1885), 54 L.J., Ch. 613; *In re Delmar's Charitable Trust* (1897), 66 L.J., Ch. 555; *Cameron's Trustees* v. *Mackenzie* (1915), S.C. 313; *Miller* v. *Rowan* (1837), 5 Cl. & F. 99; Halsbury's Laws of England, Vol. 4, p. 122, sec. 160; *Arnott* v. *Arnott* (1906), 1 I.R. 127 at p. 135.

McQuarrie, K.C., for the trustees.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The trust "to pay, apply, and distribute" a fund vested in testator's trustees "among such charitable institutions and schemes already constituted or which may hereafter be constituted within the Province of British Columbia, as my trustees shall in their absolute discretion select, or to or among any one or more of such institutions or schemes, and that in such manner and in such proportions all as they in their absolute discretion may deem proper" is a good charitable trust —*Dick* v. *Audsley* (1908), A.C. 347.

It was argued on behalf of the appellant that the latter case was decided under Scotch law and is not applicable to this case. He cited in support of that contention *Blair* v. *Duncan* (1902), A.C. 37, which inferentially is against him. There the trust was to apply to "such charitable or public purposes as my trustees think proper" to select. There it was said by Lord Davey:

In the course of the argument there was some discussion as to the meaning attached by Scottish judges to the words "charitable purposes." I think that those words include a wider range of objects than such as are of a merely eleemosynary character, and I find authority for saying so in the opinion of Lord Watson in the *Pomsel Case* (1891), A.C. 531.

The decision in that case was that the charity was not necessarily a charity at all and that the words "or public purposes" being disjunctive would enable the trustee to apply the money to public purposes not charitable purposes. In this case the words are conjunctive "charitable institutions and schemes." That means charitable institutions and charitable schemes, and the words lower down "such institutions or schemes" refer to charitable institutions and charitable schemes.

MACDONALD, C.J.B.C.

The appeal should therefore be dismissed.

MARTIN, J.A.: This appeal should in my opinion be dismissed, the learned judge below having reached the right conclusion, and even though appellant's counsel are right in submitting that he erred in saying that there was not "any difference between English and Scotch law in this regard" (because the difference was pointed out by the Irish Master of the Rolls in the apt case of *Arnott* v. *Arnott* (1906), 1 I.R. 127, 135) yet the error was under the present circumstances in favour of the respondent, as that case shews; and to it I would add the very recent decision of *In re Robinson. Besant* v. *The German Reich* (1931), 2 Ch. 122, and *In re Smith. Public Trustee* v. *Smith* (1932), 1 Ch. 153, which support the judgment. The appeal therefore should be dismissed and with costs.

MARTIN, J.A.

MCPHILLIPS, J.A.: After full and careful attention given to the authorities referred to by Mr. *A. H. MacNeill* counsel for the appellant and consideration of the elaborate argument addressed to the point for consideration here, namely, as to whether a good and valid charitable trust was created, I am satisfied that unquestionably a good and sufficient valid trust was created by the terms of the will and I am of the opinion that the learned judge of the Supreme Court, Mr. Justice D. A. MCDONALD, arrived at a proper conclusion in so holding.

I would dismiss the appeal.

MACDONALD, J.A.: It was submitted that the following words

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in the will of the deceased did not constitute a valid charitable bequest:

> I direct my trustees to stand possessed of all the rest, residue and remainder of my "residue fund" (including any gifts which for any reason may lapse or may not be capable of payment as hereinbefore mentioned) in trust, to pay, apply and distribute the same to or among such charitable institutions and schemes already constituted or which may hereafter be constituted within the Province of British Columbia, as my trustees shall in their absolute discretion select, or to or among any one or more of such institutions or schemes, and that in such manner and in such proportions all as they in their absolute discretion may deem proper.

The learned trial judge following *Dick* v. *Audsley* (1908), A.C. 347 held that the residuary gifts for charitable purposes were not void for uncertainty. This in my opinion is the right view. It was suggested that as that case arose in the Scottish Courts different rules of interpretation are applicable. The only substantial difference is that by the law of Scotland a more restricted meaning, in some cases is given to words of like import. There is no ground for submitting that the words in question would be otherwise construed by the English Courts.

A case in the House of Lords, *viz.*, *Grimond* (*or Macintyre*) v. *Grimond* (1905), A.C. 124 comes closer perhaps than any other to the view of the appellant. There the words construed were "charitable or religious institutions and societies." It is clear however from the argument and the judgment of Lord Moncrieff in the Scottish Courts (referred to by the Earl of Halsbury in his judgment) that these words might be transposed thus—"charitable institutions and societies" or "religious institutions and societies" in which event the latter institutions might not *ex necessitate* be carried on for charitable purposes. It was an alternative bequest.

MACDONALD, J.A.

In the case at Bar there is no question that the institutions and schemes referred to by the deceased are "charitable" in the legal sense. The testator assists his trustees by confining the charitable objects of his bounty to such institutions and schemes as are "already constituted"; in other words recognized as of that character. They are also confined in their selection to institutions and schemes within the Province.

It is the policy of the law to encourage the benevolent impulses of man and to implement his charitable intentions if possible. In this case there need be no uncertainty nor any

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danger that in carrying out the provisions of the will any institution or scheme, not engaged in charitable undertakings, will secure a part of the residuary estate.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *MacNeill, Pratt & MacDougall.*

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

IN RE TAJA SINGH AND NUTTA SINGH.

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IN RE TAJA SINGH

Practice—Solicitor and client—Costs—Taxing officer's certificate—Assignment of debt—Application by assignee for leave to issue execution on certificate—Order granted—Validity—R.S.B.C. 1924, Cap. 136, Secs. 96 and 104—Rules 600, 601, 602 and 604.

A firm of solicitors having rendered certain bills of costs for legal services to N. S. had the bills taxed and the taxing officer's certificate was duly issued for $710.35. On default of payment by N. S. the solicitors assigned the debt by absolute assignment under seal for valuable consideration to T. S., the instrument including an assignment of their solicitor's lien upon the papers and documents of N. S. On the application of T. S. an order was then made giving him leave to issue execution against N. S. upon the taxing officer's certificate for the moneys so assigned.

Held, on appeal, *per* MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. (affirming the order of MORRISON, C.J.S.C.), that the order permitting T. S. to issue execution against N. S. upon said certificate was properly made.

Per MARTIN and MACDONALD, JJ.A.: That under section 96 of the Legal Professions Act, T. S. as holder of the registrar's certificate was entitled to issue execution against the debtor. Rule 601 (*a*) has no application to these proceedings and the order appealed from being superfluous and hence unjustifiable, it should be set aside.

The Court being equally divided the appeal was dismissed.

APPEAL by Nutta Singh from the order of MORRISON, C.J.S.C. of the 15th of February, 1932, granting leave to Taja Singh to issue execution against Nutta Singh upon the certificate of the district registrar at Vancouver. Messrs. *J. A. Russell, Nicholson & Co.* acted as barristers and solicitors for

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the said Nutta Singh and upon having their costs taxed the above certificate of taxation was issued by the registrar on the 10th of December, 1931, for the sum of $710.35. On the 29th of December following, *J. A. Russell, Nicholson & Co.* assigned the debt to Taja Singh, including the solicitors' lien on documents held by them. An application of Taja Singh for leave to issue execution against Nutta Singh on the registrar's certificate was granted.

The appeal was argued at Vancouver on the 11th and 14th of March, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, K.C., for appellant: Execution may be issued on the certificate but this right is not legally assignable: see *Re Victor Varnish Co., Clare's Claim* (1907), 16 O.L.R. 338; *Chesley Furniture Co. Limited* v. *Krug* (1914), 7 O.W.N. 144; *Peuchen* v. *Imperial Bank* (1890), 20 Ont. 325 at p. 339; *In re Russell* (1885), 29 Ch. D. 254 at p. 265. Two English cases, *Baile* v. *Baile* (1871), 41 L.J., Ch. 300 and *Briscoe* v. *Briscoe* (1892), 61 L.J., Ch. 665 are not in point and should not be followed.

Edith L. Paterson, for respondent: Under rule 601 the assignee of a judgment debt must apply for leave to issue execution, and we are in this position: see *Re Bagley* (1911), 1 K.B. 317. There is the right of assignment under the English Solicitors Act: see *Baile* v. *Baile* (1872), L.R. 13 Eq. 497; *Briscoe* v. *Briscoe* (1892), 3 Ch. 543 at p. 547. As to the jurisdiction to make the order see *East End Building Society* v. *Slack* (1891), 60 L.J., Q.B. 359; *Jones* v. *Jaggar* (1886), 54 L.T. 731; *Ingle* v. *M'Cutchan* (1884), 12 Q.B.D. 518. Section 104 of the Legal Professions Act is similar to the English Act. The Court deals with exceptional remedies: see *Lee* v. *Friedman* (1909), 20 O.L.R. 49 at p. 55.

Mayers, in reply: Section 96 does not make the certificate a judgment, it merely says execution can be issued on it as if it were a judgment: see *Baile* v. *Baile* (1872), 41 L.J., Ch. 300. The debt may be assigned but not the remedies.

Cur. adv. vult.

7th June, 1932.

MACDONALD, C.J.B.C.: Nutta Singh was indebted to solicitors on several bills of costs which were duly rendered and taxed and a certificate of taxation issued for $710.35. On default of payment by Singh the solicitors assigned the said costs to Taja Singh, and also a solicitor's lien on documents held by them. The certificate of taxation was issued to the said solicitors before the assignment and while the assignment does not mention the certificate but only the moneys mentioned in it yet no question was raised as to the assignee's right to use the certificate in getting in the moneys mentioned therein. Taja Singh applied to the Chief Justice of the Supreme Court for an order that he might be at liberty to issue an execution against Nutta Singh upon the said certificate for the said moneys assigned. The learned judge made the order permitting Taja Singh to issue execution, and in this, I think, he was right. Section 96 of the Legal Professions Act entitles the solicitor to issue execution on such a certificate of taxation and to take like proceedings for the recovery of the money as he would be permitted to issue and take if he had recovered and signed a judgment against the party chargeable with the costs.

MACDONALD, C.J.B.C.

Rule 600 of the Supreme Court Rules provides:

As between the original parties to a judgment, or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order.

And rule 601 declares that

(*a*) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution; . . . the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect. . . . .

And rule 602 provides that:

Every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect.

Rule 604 provides:

Any person not being a party to a cause or matter, who obtains any order or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to such cause or matter, . . .

Two questions were argued in this appeal. One the matter

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just referred to and the other as to the right of a solicitor to assign his lien. This latter ground does not arise in this case. The order appealed from does not refer to it. That order reads:

It is ordered that the said Taja Singh be at liberty to issue execution against the said Nutta Singh on the said certificate of the district registrar obtained in these proceedings and dated the 10th day of December, 1931.

The appeal should therefore be dismissed.

MARTIN, J.A.: On the 29th of December, 1931, the respondent Taja Singh purchased, "for valuable consideration," by absolute assignment of that date under seal, from a firm of solicitors, *J. A. Russell, Nicholson & Co.,* their claim against the appellant Nutta Singh for $710.35, being the amount of their bill for costs and disbursements, pursuant to the taxing officer's certificate dated 10th December, 1931, and said solicitors by said instrument also transferred and assigned to the respondent their solicitor's lien upon the papers and documents of the appellant, and doubtless at that time the respondent received the said certificate, to which he alone was then entitled, as it is recited in the order of the 19th of February, 1932 (not appealed from), that he was "the purchaser of [the] certain taxation certificates" in question under the said assignment.

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On the 8th day of January the respondent (as recited in the order appealed from, of 15th February, 1932) applied to Chief Justice MORRISON for liberty to issue execution against the appellant "upon the certificate" and after several adjournments the order appealed from was made and is now objected to on two grounds, the first of which is that there was no jurisdiction to make the order, and therefore that initial question must be determined *in limine.*

It is submitted by the appellant that the matter, under present circumstances, is governed solely by section 96 of the Legal Professions Act, R.S.B.C. 1924, Cap. 136, as follows:

96. Such certificate may be filed by the solicitor, and he shall be entitled at the expiration of the date for payment stated in the order of reference to issue such process of execution, and to take the like proceedings for the recovery of the money so found by the certificate to be due, as he would be permitted to issue and take if he had recovered and signed a judgment against the party chargeable with such bill for the amount in the Supreme Court.

Now passing over for the present the second objection that

the solicitor could not assign this certificate because it was a personal right, and assuming in the respondent's favour that the assignment to him was valid and that as "purchaser" of the debt and certificate he stood in the solicitors' shoes on and after the date of the assignment to him, it is clear that he then became the owner of the certificate and alone had the right thereafter to enforce it in any way and in particular to "file it" as required by section 96 and it does not appear from the appeal book nor was it suggested during the argument that the solicitors had taken any steps to enforce it, which it would indeed, have been illegal and improper for them to do after the transfer as aforesaid.

It must then be assumed, in the respondent's favour, that he was the proper actor in setting these special proceedings in motion under section 96 by filing, as the owner of it, the certificate upon which he alone, in due course, "at the expiration of the date for payment," became entitled to the special benefits thereof by such apt proceedings in execution "as he would be permitted to issue and take if he had recovered a judgment against the party chargeable with such bill. . . . ."

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To these special proceedings of enforcement the assigning solicitors never were and could not be a party if their absolute assignment is valid, as the respondent submits and there was not only no necessity of considering them, or their former rights but it would have been improper to do so, and in such circumstances it is difficult to understand why the order appealed from was entertained at all by the learned judge below because unless it is required or authorized by statute or rule there is no authority or necessity for making it as the special section affords complete remedies in itself and any additional application would only at best be superfluous and wastefully expensive and hence unjustifiable.

To overcome these obvious difficulties the respondent's counsel invoked rule 601 (*a*) and submitted that the case came within the words "or any change has taken place by death or otherwise in the parties entitled or liable to execution," and submitted that "or otherwise" would include the said assignment. But it will at once be seen that though upon the "filing" of the said

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certificate the owner of it becomes entitled to execution, yet then the only other "party" to the proceedings thereby initiated is the original debtor who is thereupon placed as against the owner of the filed certificate in the position of a judgment debtor on a judgment "recovered and signed against" him by the filer of the certificate. Therefore, as there was no "change" at all in that relationship between "the parties entitled or liable to execution" the rule invoked has, beyond question, no application to those proceedings and it follows that the order appealed from was, at best, made *per incuriam* and should be set aside and the appeal allowed, without considering, unnecessarily, the second ground.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss this appeal. In my opinion the learned Chief Justice of the Supreme Court arrived at the right conclusion in the matter. It is really a question of practice and procedure and eminently fitting for determination in the Court below. I have no doubt that there was authority in the registrar to have issued the execution without the intervention of the order of a learned judge of the Supreme Court, but in view of the matter being perhaps somewhat new and novel in practice I quite think that an application to one of the learned judges of the Supreme Court was right and proper, as if the registrar had wrongfully refused to issue execution it would have only meant an application to one of the learned judges of the Supreme Court. In future the registrar of course satisfying himself of the sufficiency of the assignment of judgment would, in my opinion, be rightly entitled, in fact required, to act in furtherance of the proved assignment of the judgment and issue execution thereon upon proper demand.

Whilst a great deal may be said upon the question of the propriety of solicitors assigning claims for costs as against their clients and assigning judgments thereon to other than members of the profession, who would always be amenable to the Court as officers thereof, yet when one sees no statutory inhibition in the matter it would not seem to be possible to do other than declare the right in law in accordance with the proved facts.

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

The Court being equally divided the appeal was dismissed.

Solicitors for appellant: *Bird & Bird.*
Solicitors for respondent: *Hamilton Read & Paterson.*

FLEISHMAN v. T. A. ALLAN & SONS.

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FLEISHMAN v. T. A. ALLAN & SONS

Attachment of Debts Act — Proceedings in County Court — Application of Act—Garnishee order before action—"Writ"—Interpretation—R.S.B.C. 1924, Cap. 17, Secs. 2 (2) and 3 (2), Form A.

The Attachment of Debts Act applies to the Supreme Court and the County Court, and the object of subsection (2) of section 2 thereof is to confer like jurisdiction upon those Courts. Regard must be had to the object to be attained by the language used and what the Legislature meant by subsection (2) of section 3 thereof is to authorize "garnishing orders before action," and Form A in the Schedule to the Act, prescribed for use in either Court, exhibits that intention.

What the statute means in subsection (2) of section 3 thereof by the words "has issued a writ for the amount of his claim" is that he has issued the proper process to "commence" an action according to the procedure of the Court which is resorted to, and bearing in mind the expressed intention of the Legislature to apply this Act to the two distinct Courts, the word "writ" should be read as merely descriptive of the nature of that initiating process, and not restricted to the technical name thereof.

An appeal from an order dismissing an application to set aside a garnishee order obtained before action in the County Court on the ground that the word "writ" in subsection (2) of section 3 of the Attachment of Debts Act does not apply to "summons" in the County Courts, was dismissed (MACDONALD, C.J.B.C. dissenting).

APPEAL by defendants from the order of ELLIS, Co. J. of the 30th of November, 1931, dismissing the defendant's application to set aside a garnishee order of the 20th of November, Statement

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1931. The plaintiff claimed $400 under an assignment of the 9th of November, 1931, made by E. D. Allan of this sum that was owing by T. A. Allan & Sons to the said E. D. Allan. The application of the 20th of November was made under section 3, subsection (2) of the Attachment of Debts Act, the affidavit in support being sworn and filed by the plaintiff on the 20th of November in Form A in the Schedule of said Act. The plaint and summons were issued on the 20th of November aforesaid and the East End branch of the Royal Bank of Canada in Vancouver was named garnishee.

The appeal was argued at Victoria on the 25th of January, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Donnenworth, for appellants: The construction of section 3, subsection (2) of the Attachment of Debts Act is the only point at issue, and we submit that the word "writ" applies to the Supreme Court only and does not include "plaint and summons" in the County Court. The Act must be construed strictly: see *In re Busfield* (1886), 32 Ch. D. 123 at p. 124; *Union Finance Corporation* v. *Boyd* (1930), 37 O.W.N. 396.

Argument

F. C. MacLean, for respondent: Under section 2, subsection (2) of the Act the County Court has all the powers and authority conferred on any Court, and the word "writ" in subsection (2) of section 3 is synonymous with "plaint" in the broad sense: see Words & Phrases, Vol. 6, p. 5397; *Shaw* v. *Dutcher* (N.Y.) 19 Wend. 216 and 219; *Ex parte Walton* (1881), 50 L.J., Ch. 657; *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627; *Rex* v. *Ettridge* (1909), 2 K.B. 24; *Rex* v. *Vasey* (1905), 2 K.B. 748 at pp. 750-1; *Cameron* v. *Regem* (1927), 38 B.C. 191.

Donnenworth, in reply, referred to Craies's Statute Law, 3rd Ed., p. 66.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This appeal turns upon the special section of the Attachment of Debts Act, subsection (2) of section 3, and provides that the judge or registrar may issue a

garnishee order on an affidavit made before the action is commenced. It does not affect other portions of the Act at all.

Now the words "and has issued a writ for the amount of his claim" defines the writ, meaning "a writ for the amount of his claim"—a writ of summons in the Supreme Court against the defendant.

Now in Craies's Statute Law, 3rd Ed., p. 66, this is said:

> Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature.

And again, on p. 67:

> And even though a Court is satisfied that the Legislature did not contemplate the consequences of an enactment, a Court is bound to give effect to its clear language.

That is enlarged upon by Lord Herschell in *Cox* v. *Hakes* (1890), 15 App. Cas. 506.

Now we have clear language here that the order of garnishment on affidavit sworn before the writ is issued may be made by a judge, and it is contended here that he may do that in the County Court before the summons is issued. Now that is not in accordance, as I take it, with the clear language of the statute. The clear language of the statute is that a writ, which means a King's writ, which a summons is not, must be issued. Now subsection (2) of section 2 reads as follows:

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> In the application of this Act to proceedings in any County Court, the County Court and the Judges, Registrars and Deputy Registrars thereof shall have and may exercise, both without the territorial limits for which they are appointed, as well as within such limits, all the powers, jurisdiction, and authority by this Act conferred on any Court and the Judges and the Registrars thereof respectively.

Now section 2 does not confer any authority on the judge of the County Court to make the order, unless a writ be issued. The writ, of course, as I have just said, is the King's writ, and means exactly what is said, and is not capable of more than one interpretation, and it is idle to look at the context and see whether you can find some other explanation in the language of the Act itself, because even if there were such language, the plain grammatical meaning of the words used must be given effect to. In this case it seems to me to be an attempt to give a

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County Court jurisdiction in the matter in which it has no jurisdiction. No Court will do that if it can help it. A Court should avoid trespassing upon the jurisdiction of another Court, and here that is what is done. The learned judge has apparently interpreted the writ for the recovery of a debt. That is contrary to the express language of the Legislature and therefore ought not to be adopted.

I would, therefore, allow the appeal.

MARTIN, J.A.: In the present object sought to be attained by this statute, Attachment of Debts Act, Cap. 17, R.S.B.C. 1924, no difficulty in my opinion arises, with all respect to contrary views.

The statute is peculiar; it is not one relating to one Court, but is one relating to two different Courts, and the object of it is to confer like jurisdiction by the same language upon those Courts. That is clearly shewn by interpretation of section 2 which, in effect, says that "Judge" and "Registrar" used throughout the Act shall mean the judge and registrar of the two distinct Courts in relation to their respective proceedings, and that expression "Judge or a Registrar" is under our consideration in the second subsection of section 3. The first subsection refers to the issue of garnishing orders after judgment, and the second one to "like orders" before judgment.

MARTIN, J.A.

Not the slightest indication is given that it was the intention of the Legislature to confer less jurisdiction on the one Court than on the other. This is emphasized by the fact that subsection (2) of section 2 refers to "proceedings in any County Court," and therefore the Act has to be applied to those distinct Courts, and inferentially in the like manner, and so it follows therefrom that when you apply the like Act to the different Courts to accomplish a like result regard must be had to the object to be attained by the language used and full effect given to it to attain the substance of the intention and not frustrate it by the formal names of like processes.

What the Legislature meant in general was to authorize "garnishing orders before action," and Form A in the Schedule,

prescribed for use in either Court, exhibits that intention no less than three times. It begins this way, in the affidavit there prescribed, *viz.*: "Affidavit in support of garnishing order before action"; and goes on:

> 2. I am desirous of commencing an action against the above named defendant in respect of (directions here to state briefly the grounds of the proposed action).

Bearing that in mind we see what the statute is aiming at is, first, the commencement of the action, and that of course will be governed by the two different initiatory processes in the two distinct Courts. Therefore it becomes apparent that what the statute really meant in subsection (2) by "has issued a writ for the amount of his claim" is that he has issued the proper process to "commence" an action according to the procedure of the Court which is resorted to. And we find, when you look at the County Courts Act, that actions therein are "commenced," to use the very word of section 76 thereof, by a plaint, *viz.*:

> . . . all actions of which the County Courts have jurisdiction shall be commenced by a plaint, . . .

And Order I., r. 1, in implementing this direction uses the same terms.

MARTIN, J.A.

Then conjointly with that "commencement" in the County Court, or "thereupon," as the section hath it, there is the issuance of a summons under section 78, which is the process issued under the seal of the Court for service on the defendant, and by rule 18 of said Order it is declared that the plaint "shall be deemed to be part" of the summons. Turning, then, to the interpretation section 2 of the County Courts Act, we find that:

> "Defendant" includes every person served with any process, etc.,

and when we further turn to the definition of "process," it means:

> . . . Any summons, writ, or warrant issued under the seal of the Court, or a Judge's summons or order.

Now we have here a process issued under the seal of the Court which is the process "commencing" the action, and bearing in mind the expressed intention of the Legislature to apply this Act to the two distinct Courts it must follow that it should be applied having regard to the corresponding processes by which

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the action is "commenced" and so the word "writ" is to be read as merely descriptive of the nature of that initiating process and is not restricted to the technical name thereof. I would, therefore, dismiss this appeal.

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MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I may say that I do not think that this appeal can succeed. The learned counsel for the appellant was very frank in his opening, arguing that it was a technicality; and certainly in my view it is a technicality without merit or force in the point taken, in the interests of justice.

Shortly, the Attachment of Debts Act applies to all the Courts, *i.e.*, the Supreme Court and the County Court. The authority to issue garnishee orders is conferred, as I view it, upon any judge of the Supreme Court, and the registrar thereof, and any judge of the County Court, and the registrar thereof.

Now in subsection (2) of section 3 it is contended that owing to the use of the word "writ" that this authority has not by the Attachment of Debts Act been conferred on the County Court—that is, in the County Court proceedings are not commenced by "writ." The Act does not read "writ of summons." I would think it would be just as reasonable to contend that if instead of "writ," "plaint" had been used, then the Supreme Court would have had no jurisdiction; that would be the logical conclusion of Mr. *Donnenworth's* argument.

In my opinion, when we have no interpretation by the statute itself as to the meaning of the word "writ," we will take the plain ordinary meaning of it; and whilst it is true it says "writ for the amount of his claim," that does not seem to me to make it any more difficult of interpretation. That merely means the initiatory process, the plaint for the amount of his claim, or the writ for the amount of his claim, and it is merely the command that issues from out of the Court.

The result of giving effect to this omission would be that the Supreme Court would have the right to issue an attaching order before action, but the County Court would not.

I would first refer to Wharton's Law Lexicon, 13th Ed., p. 920, where he uses this language:

The most used modern writ is the writ of summons, by which (corresponding to the "plaint" in a County Court) an action in the High Court of Justice is commenced.

Now if the draftsman of the Act wrote down the word "writ," and he turned to the above work (Wharton) he would be well advised that "writ" corresponds to "plaint" in the County Court, and he would, I think, be rightly advised that "writ" would be so construed in a Court of law, and cover plaint.

And in connection with this point there is the case of *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, in the head-note of which we have this shortly said:

Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.

Now Lord Hobhouse, at p. 634 of the above case, delivering judgment for the Privy Council, said:

It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used.

Now Lord Alverstone had occasion to refer to this decision in *Rex* v. *Vasey* (1905), 2 K.B. 748, and at p. 750 made use of this language:

I have no doubt in this case that effect must be given to the principle of construction to which reference has been made on behalf of the prosecution. If the effect of our judgment had been to extend the meaning of the statute, whereas by following the strict words of the enactment its operation would be limited, the case would be different. In Maxwell on the Interpretation of Statutes, 3rd Ed., p. 319, the principle of construction is laid down in these terms: "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentences."

Now here can there be any question of a doubt of what the intention of the Legislature was? Lord Alverstone goes on (p. 751):

It seems to me that the object of the section is perfectly plain, and no

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one can doubt that the intention of the Legislature was to prevent the destruction of fish in salmon rivers by putting lime or other noxious substances into the water . . . If, therefore, the exact phraseology of the section of the amending Act is disregarded, and the words "or in any salmon river" are inserted in the earlier section after the words "in any such pond or water," that makes sense, and carries out the manifest object of the amendment.

Now it is to be said here that the manifest intention of the Legislature should be defeated by the use of the word "writ" alone. I would refer to the Oxford Dictionary, in Vol. X., Part II. where "writ" *solus* is dealt with, and as an English word, commonly used in our language:

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> A written command, precept, or formal order issued by a Court in the name of the Sovereign, State, or other competent legal authority, directing or enjoining the person or persons to whom it is addressed to do or refrain from doing some act specified therein.

Now that is all that that word means in the Act, and it is synonymous with plaint; and what is to prevent the Court saying that? "Writ" must be construed in its plain ordinary meaning, as an English word; and it means the initial process issuing out of the Court.

I see no difficulty whatever in giving the word "writ" its plain and ordinary meaning. I would dismiss the appeal.

MACDONALD, J.A.

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

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

Solicitor for appellants: *J. Huntly Gordon.*
Solicitor for respondent: *C. F. MacLean.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

BURCHILL v. CITY OF VANCOUVER (p. 169).—Affirmed by Supreme Court of Canada, 15th June, 1932. See (1932), S.C.R. 620; (1932), 4 D.L.R. 200.

IMMIGRATION ACT AND MUNETAKA SAMEJIMA, *In re* (p. 401).—Reversed by Supreme Court of Canada, 15th June, 1932. See (1932), S.C.R. 640; (1932), 4 D.L.R. 246.

LOWER MAINLAND DAIRY PRODUCTS SALES ADJUSTMENT COMMITTEE v. CRYSTAL DAIRY LIMITED (p. 191).—Affirmed by the Judicial Committee of the Privy Council, 10th November, 1932. See (1932), W.N. 238.

Case reported in 44 B.C. and since the issue of that volume appealed to the Supreme Court of Canada:

REX v. BAMPTON (p. 427).—Reversed by Supreme Court of Canada, 15th June, 1932. See (1932), S.C.R. 626.

Case reported in 43 B.C. and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

VANDEPITTE v. THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK AND BERRY (p. 161).—Decision of the Supreme Court of Canada reversing the decision of the Court of Appeal affirmed by the Judicial Committee of the Privy Council, 4th November, 1932. See (1932), W.N. 229; 76 Sol. Jo. 798.

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COMPANY — *Bankruptcy — Holders of shares partially paid for—Transfer of shares to escape liability — Validity — Power of directors—Practice—Bankruptcy—Appeal—Notice and entry—Security for appeal—Time for payment in—Bankruptcy rules 68 to 71.*] Judgment was delivered in this case on the 1st of October, 1931, and notice of appeal was filed on the 9th of October following. The appeal was set down for hearing and the appeal books filed on the 26th of December, 1931, when $100 was deposited as security for costs. A motion to quash the appeal on the ground that the appellant did not comply with Bankruptcy

COMPANY—*Continued.*

rule 68, in that he did not lodge in the Court the sum of $100 within ten days after the pronouncing of the decision as required by said rule, was dismissed (MACDONALD, C.J.B.C. dissenting). R. P. Clark and Company Limited assigned in bankruptcy on the 18th of November, 1930. The defendant, who had held shares in the company upon which $5,900 was owing, was the wife of R. P. Clark, president of the company, and she had executed a power of attorney authorizing him to deal with her interests as he saw fit. Four of the five other directors of the company owed various amounts on the shares that each of them held. R. P. Clark was also president of a second company named R. P. Clark and Company (Estates) Limited, and three of the aforesaid directors were also directors of this company. On the 29th of January, 1930, the defendant, by her agent R. P. Clark and the five directors, met informally and formulated a scheme to relieve themselves (with the exception of the one director who owed nothing on his shares) of liability on their shares, and immediately after on the same day held a directors' meeting and passed a resolution that "the directors do hereby approve of the proposed sale and transfer by Mrs. Clark to R. P. Clark and Company (Estates) Limited of 59 fully paid original shares of the capital stock of this company registered in her name." Shortly after, on the same day, a second directors' meeting was held, when a resolution was passed that "this Company do purchase from Mrs. Clark 59 fully paid original shares in the capital stock of R. P. Clark and Company (Estates) Limited for $5,900 which said sum shall be payable by crediting the same in full settlement of the debit balance of $5,900 outstanding against Mr. Clark in this company's stock purchasing account." R. P. Clark voted on both resolutions. Similar resolutions were passed with respect to R. P. Clark and the other directors owing money on their respective shares each director refraining from voting on the resolutions with respect to his own shares. An application by the trustee in bankruptcy to set aside the above settlement made by the directors and for an order that the trustee do recover against Mrs. Clark the sum of $5,900 was dismissed. *Held*, on appeal, reversing the decision of MACDONALD, J., that the transaction cannot be regarded as a *bona fide* one: it was a hollow sham and fraudulent transaction in which the defendant was involved through her husband who held her power of attorney enabling him to carry out the transaction. It should be set

PRACTICE — *Action—Application to discontinue without costs before statmeent of claim—Jurisdiction—Rule 286.*] Where a plaintiff applies before delivery of her statement of claim under rule 286 for leave to discontinue her action without payment of costs:—*Held*, that the Court may allow her to discontinue upon such terms as to costs as may seem just and in this case the application should be granted. SHANNON v. KING. (No. 3). - - - - - **65**

2.——*Affiliation order by magistrate—Appeal—Notice—Time of service prior to hearing—Place of hearing—Service of notice of appeal on superintendent of neglected children—R.S.B.C. 1924, Cap. 34, Sec. 16—B.C. Stats. 1926-27, Cap. 9, Sec. 6.*] Section 6, subsection (2) (*e*) of the Children of Unmarried Parents Act Amendment Act, 1927, provides that "Where the notice of appeal is filed more than fourteen days before a sitting of the Court to which an appeal is given, such appeal shall be made to that sitting; but if the notice of appeal is filed within fourteen days of a sitting the appeal shall be made to the second sitting next after such notice of appeal is filed." Notice of appeal from an affiliation order of the police magistrate for the Municipality of Spallumcheen to "the County Court of Yale, holden at Vernon at the next sittings thereof" was filed on the 2nd of December, 1931, and the next sittings of the Court opened at Vernon on the 16th of December, 1931. *Held*, on preliminary objection, that the notice of appeal does not designate the proper sittings at which the appeal should be heard, and that this irregularity is fatal to the appeal. *Held*, further, that not serving the superintendent of neglected children in whose favour the order of affiliation was made, with the notice of appeal as required by section 16 of the Children of Unmarried Parents Act was fatal to the appeal. OGILVIE v. FINLEY. - - - **76**

3.——*Discovery—Affidavit of documents—Examination—"Officer" — Subrogation—Chose in action—Assignment of—Rules 354 and 370c (1).*] The plaintiff brought action against the defendant for the loss of its plant and lumber by a fire it alleged was negligently started by the defendant and allowed to spread to its plant. The plant and lumber were insured in fifteen insurance companies, and after an adjuster engaged by the insurance companies had adjusted the loss, the insurance companies paid the plaintiff $105,131. The plaintiff's action is for the sum of $234,285.63, claiming that a portion of the property burned was not covered by the insurance. After payment under the policies the insurance companies obtained from the plaintiff a document reciting: "With reference to the loss by fire which occurred on August 18th, 19th, 1930, to our property at Kapoor, Vancouver Island, B.C. In consideration of your paying us the sum of $105,131 and any subsequent amounts which may be paid to us, in full settlement of all our claim or claims against you, we hereby subrogate all the rights we may possess, now or hereafter, against any party or parties to the amount of such payment and we agree to allow you to make use of our name in any proceedings. . . ." The defendant applied for and obtained an order, *inter alia*, that it was entitled to an affidavit by each of the insurance companies, stating what documents are or have been in its possession or power relating to the matters in question in the action, and that it be at liberty to examine for discovery Percy G. Shallcross, the adjuster referred to, as an officer or past officer of the insurance companies. *Held*, on appeal, reversing the decision of MORRISON, C.J.S.C., that an adjuster of a loss by fire is not an "officer" within the meaning of rule 370c and is not subject to examination for discovery. *Held*, further, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A. (MARTIN, J.A. dissenting), that although an assignment of the whole cause of action by the insured to the insurer is a good assignment, a cause of action cannot be assigned in part. The alleged assignment is therefore invalid and the defendant is not entitled to production of documents from the insurance companies under rule 254. *Per* MCPHILLIPS, J.A.: That it is impossible under the law of the land to assign an action in tort, and the alleged assignment is therefore invalid. KAPOOR LUMBER COMPANY LIMITED v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY. - - - **213**

4.——*Discovery—Examination of officer of corporation—Amended statement of claim—No defence filed in answer—Rules 370c (1) and 370e.*] The defendant company as stock-brokers employed W. as "chief trader" for its Vancouver offices and at all times material to this action he had complete charge of the order department, his duties including the handling or filing of buy and sell orders for clients and for the company.

Held, on appeal, affirming the order of FISHER, J., that W. could properly be regarded as an "officer" within rule 370c (1), and subject to examination for discovery. Rule 370e provides that "The examination on the part of a plaintiff may take place at any time after the statement of defence of the party to be examined has been delivered or after the time for delivering the same has expired." The statement of defence was delivered in the action on the 22nd of October, 1930, and an amended statement of claim raising a number of new issues was delivered on the 2nd of September, 1931. On the 8th of September following, on the application of the plaintiffs and before the defendants had filed a statement of defence to the amended statement of claim, an order was made for the examination of a past officer of the defendant company. *Held*, on appeal, varying the order of FISHER, J. (MACDONALD, C.J.B.C. and MCPHILLIPS, J.A. dissenting), that the rules contemplate only one examination for discovery and the words "matters in question" in rule 370c (1) mean "the issues in question." The order recites that the examination is "touching the matters in question in this action," but by being made before an amended statement of defence is filed it prevents those very matters in question from being completely raised. An order was made that the carrying out of the order below be postponed till after the amended defence has been filed, or till after the time has expired for so doing. JOHNSON v. SOLLOWAY, MILLS & COMPANY, LIMITED. - **35**

5.——*Mode of trial — Dislocated hip—Malpractice—Rule 429—Scientific investigation—Order for trial with jury—Appeal.*] An application by the plaintiff for a jury in an action for malpractice was opposed by the defendant on the ground that the issues were of an intricate and scientific character and the case came within rule 429. It was held that there was not sufficient ground for departing from the established practice by depriving the plaintiff of his right to a jury. *Held*, on appeal, affirming the decision of MACDONALD, J., that although he disclaimed using his discretion in concluding that the plaintiff's right to a jury was not displaced by rule 429 he was exercising some discretion, and there being evidence on which he could so decide his decision should not be disturbed, but apart from this the main complaint is negligence on the part of a doctor, the question up for trial being the expertness of a man in his profession, coupled with due care on his part or want of skill. These matters can be tried by a jury and there is no intricate or scientific question involved that brings the case within rule 429. PLOWRIGHT AND PLOWRIGHT v. SELDON. - - - - - **481**

6.——*Parties—Authorizing one or more to defend on behalf of all—Service out of jurisdiction—Affidavit in support—Rules 64 (f), 67 and 131.*] The plaintiff claimed that certain proceedings by a commission appointed by the General Assembly of the Presbyterian Church in Canada, to inquire into his conduct as a Minister of the Church, were irregular, invalid, void and *ultra vires*, and should be vacated and set aside. He obtained an *ex parte* order from MURPHY, J. naming four representatives of the Church to defend on behalf of all the members of the Church the action proposed to be brought by the plaintiff, that the plaintiff be at liberty to issue a writ of summons against said defendants and to issue concurrent writs of summons for service upon them in Saskatoon, Toronto and Brandon. The plaintiff's affidavit in support of the application recited: "The said commission convened and held several sessions in the City of Vancouver, B.C., and purported without jurisdiction or authority and contrary to the Rules and Forms of Procedure of the Presbyterian Church in Canada to act as a trial Court and wrongfully and without jurisdiction or authority proposed to adjudicate upon the said Central Church, Vancouver case, and wrongfully and without jurisdiction or authority purported to try and adjudicate upon certain charges and matters affecting me, and without a fair and proper trial and without any trial as prescribed by the Rules and Forms of Procedure of the said Presbyterian Church in Canada, purported to find me guilty of certain alleged offences, and wrongfully and without authority or jurisdiction, purported to depose me from the office and to degrade me from the rank of a Christian minister and purported to prohibit me from exercising the functions of the Christian ministry or any part thereof." Upon motion of the defendants it was ordered that the above order of MURPHY, J. be discharged and that the writ of summons and service thereof on the defendants be set aside. *Held*, on appeal, affirming the order of MCDONALD, J. (MACDONALD, C.J.B.C. dissenting), that rule 67 governs and the material in support of the application must disclose by reasonable evidence a cause of action. In his affidavit in support the plaintiff expresses the opinion that the proceedings were illegal

SLANDER—*Action for—"Misappropriating Government funds and threatening to blow up the hotel"—Conflict of evidence as to exact words used—Finding by Court.*] The plaintiff was foreman of a gang of men doing relief work on the west coast of Vancouver Island, and the defendant was a returned soldier interested in the welfare of returned men. Thinking the returned men were not receiving proper treatment from the plaintiff, the defendant was alleged to have said to three of the men working under the plaintiff "that he [defendant] was going to take their foreman [the plaintiff] down town with an escort and put him in gaol" and on being asked by one of the men what the charge was, he said "Oh, yes, misappropriating Government funds and threatening to blow up the hotel." One of the defendant's witnesses swore he heard the plaintiff say he would like to blow up the hotel, and the witness told the defendant of this. The defendant denied using the word "misappropriated" but that he did use the word "diverted." In an action for damages for slander it was found by the trial judge that the three men with whom the defendant talked did not have a clear recollection of the words really used: that the plaintiff did use the words deposed to by the defendant's witness the

import of which was repeated to the defendant, but he did not find that the defendant had used the words alleged by the plaintiff's witnesses as to "misappropriation." *Held*, that on the run of the whole incident the remarks uttered by the defendant relative to the plaintiff and his activities amounted to no more than gossipy expressions of suspicion which caused no damage, special or otherwise, to the plaintiff, and did not affect or tend to affect his character. The action was dismissed. ROBERTSON v. ROBERTSON. - - - - - - **460**

STATUTE, CONSTRUCTION OF — *Judgment—Registration — Mortgage—Executed prior to judgment but registered after registration of judgment — Priority — R.S.B.C. 1924, Cap. 217, Secs. 34, 42 and 175-7; Cap. 83, Sec. 35.*] The plaintiffs were the holders of a mortgage duly executed by the mortgagees in accordance with the Land Registry Act, on the 24th of January, 1931. Judgments held by the defendants against said mortgagor were registered against his lands on the 16th, 20th and 24th of February following. On the 3rd of March, 1931, the plaintiff applied for registration of his mortgage claiming registration in priority to the judgments. An action for a declaration that the plaintiffs as holders of said mortgage are entitled to registration in priority to said judgments was dismissed. *Held*, on appeal, reversing the decision of FISHER, J. (MACDONALD, C.J.B.C. and GALLIHER, J.A. dissenting), that in view of the amendments to the Land Registry Act since the decision of *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338 (*i.e.*, sections 34, 42, 175, 176 and 177, Cap. 127, R.S.B.C. 1924), applications to register of this class do not come within that case but are governed by the decision in *Entwisle* v *Lenz & Leiser* (1908), 14 B.C. 51. The plaintiff's mortgage is therefore entitled to be registered as a charge in priority to the defendant's judgments. GREGG AND SODERBERG v. PALMER *et al.* - - - - - - - - **267**