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 XLVII.

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1934.

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.
THE HON. WILLIAM GARLAND ERNEST McQUARRIE.

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.
THE HON. HAROLD BRUCE ROBERTSON.

LOCAL JUDGE IN ADMIRALTY:
THE HON. ARCHER MARTIN.

DEPUTY LOCAL JUDGE IN ADMIRALTY:
THE HON. WILLIAM ALFRED GALLIHER.

COUNTY COURT JUDGES:

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. JOHN CHARLES McINTOSH,	Nanaimo
HIS HON. WALTER ALEXANDER NISBET,	West Kootenay
HIS HON. JOSEPH NEALON ELLIS	Vancouver
HIS HON. WILLIAM EDWARD FISHER,	Atlin
HIS HON. ANDREW MILLER HARPER,	Vancouver
HIS HON. CHARLES JAMES LENNOX,	Vancouver

ATTORNEY-GENERALS:
THE HON. ROBERT HENRY POOLEY, K.C.
THE HON. GORDON McGREGOR GLAHOLM SLOAN, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

D

E

F

G

H

I

J

K

L

M

TABLE OF CASES CITED

A

B

C

J

K

L

M

N

O

P

Q

R

T

U

V

W

"COURT RULES OF PRACTICE ACT."

HIS HONOUR the Lieutenant-Governor in Council has been pleased to order that, in pursuance of the "Court Rules of Practice Act," being chapter 224 of the "Revised Statutes of British Columbia, 1924," and all other powers thereunto enabling, Schedule 3 of Appendix M of the "Supreme Court Rules, 1925," as amended, be further amended by adding the following after Item 20 of the said Schedule:—

"DIVORCE FEES.

"20A.	Petition	$2.00
	Affidavit in support	.10
	Sealed copy of petition	.50
	Sealed copy of notice to appear	.50"

GORDON MCG. SLOAN,
Attorney-General.

Attorney-General's Department,
Victoria, B.C., December 1st, 1933.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

WESTMINSTER MORTGAGE CORPORATION LIMITED v. OLIVE ADAIR AND THOMAS ADAIR.

MACDONALD, J.

1932

Dec. 31.

WESTMINSTER MORTGAGE CORPORATION LTD. v. ADAIR

Mortgage — Default — Appointment of receiver — Powers of — Liability of mortgagee for acts of receiver—Foreclosure—Counterclaim for damages.

The defendants having previously mortgaged their farm to the plaintiff, gave a lease to A. for one year at $100 a month, with option for renewal, and at the same time sold him their herd of cattle to be paid for in instalments at $60 per month. A. sold his milk and cream to the Fraser Valley Milk Producers Association, and as security for payment of the rent and the instalments for the cattle he gave an irrevocable order to the defendants on the Dairy Association for $160 a month. Owing to low prices for milk the rent was reduced to $50 per month on the 1st of June, 1930. Payments were made under said order until September 12th, 1931, when the mortgagor being in default the plaintiff appointed B. as receiver under powers contained in the mortgage deed. B. notified A. to pay the rent to him, and after discussion between A., B. and the plaintiff, A. cancelled the order on the Dairy and paid $50 a month to B. for the months of October, November and December, 1931. A. did not renew the lease but remained on until the middle of the following March, when he moved to another farm with his cattle. From the 12th of September, 1931, until the following March, A. collected $714 from the Dairy Association but made no payments other than the $150 to the receiver. In June, 1932, the plaintiff brought action for foreclosure claiming only interest, taxes and insurance. The defendant counterclaimed for an accounting,

MACDONALD, J.

1932

Dec. 31.

WEST-MINSTER MORTGAGE CORPORATION LTD. v. ADAIR

alleging that the plaintiff and the receiver had interfered in an illegal manner in having the order on the Dairy Association cancelled.

Held, that the receiver could not have recovered any more rent than he obtained from the tenant and although the tenant received more money from the Dairy Association than he paid the receiver, the plaintiff, assuming he was responsible for the receiver's actions, would not be liable for more than the amount actually received. Nor even upon the same assumption, did the interference of the receiver in the mode of payment create a liability as against the plaintiff.

ACTION for foreclosure of a mortgage for $6,500, dated the 1st of February, 1929, upon a farm of the defendant Olive Adair at Hatzic Prairie, B.C., the plaintiff only claiming payment of interest, taxes and insurance. Tried by MACDONALD, J. at New Westminster on the 6th of December, 1932. One Alexander rented the farm from the defendants at $100 a month on the 1st of January, 1931, for one year, and at the same time he bought certain stock from the defendants, the purchase price to be paid in instalments of $60 per month. Alexander sold milk and cream to the Fraser Valley Milk Producers Association, and in order to secure payment of the rent and the monthly instalments he gave an irrevocable order upon the Fraser Valley Milk Producers Association to pay the defendant Olive Adair $160 per month until it was cancelled by the defendant. This order was acted upon until the beginning of June, 1931, when owing to the low price of milk and cream, the rent was reduced to $50 per month. On September 12th, 1931, the mortgagors were in default and the plaintiff appointed one Barbaree as receiver under the powers contained in the mortgage. Barbaree then notified the tenant to pay the rent to him. The tenant disclosed the existence of the irrevocable order but after discussion between the tenant, the plaintiff and the receiver, the tenant cancelled his order on the Dairy and paid $50 a month direct to the receiver for the months of October, November and December, 1931. The tenant negotiated for renewal of his lease, but failing in this he moved off the farm in March, 1932, not paying any rent in 1932. This action was commenced in June, 1932, and the defendants counterclaimed, alleging that the plaintiff and receiver had acted illegally in having the order cancelled, that they had wrongfully entered

Statement

into an agreement with the tenant and put an end to the tenancy and that they should have collected $160 per month from the tenant instead of $50 per month.

Milledge, for plaintiff: The tenant did not renew the lease because the defendants would not accede to his terms. The lease was subsequent to the mortgage and subject to the rights of the mortgagee. Assuming the action of the receiver was wrongful, the defendant suffered no damage. The plaintiff relies on the powers contained in the mortgage. Barbaree was the agent of the mortgagor: see *Jefferys* v. *Dickson* (1866), 1 Chy. App. 183 at p. 190; *Law* v. *Glenn* (1867), 2 Chy. App. 634 at p. 641; Kerr on Receivers, 9th Ed., 363. It is the duty of the mortgagor to consult with and assist the receiver: see *Re Allen's Danforth Theatre* (1925), 4 D.L.R. 556; *Lord Trimleston* v. *Hamill* (1810), 1 Ball & B. 377.

Argument

C. R. J. Young, for defendant: The actions of the receiver in receiving moneys owing to the defendants in respect of the farm, create a liability on the part of the plaintiff. From October, 1931, until March, 1932, the tenant was paid $714.86 by the Dairy, and of this he only paid $150 to the receiver. The plaintiff should be charged with the full amount which was wrongfully diverted to the tenant through cancellation of the order, less the $150 paid by the tenant. The clause in the mortgage as to appointment of a receiver cannot be invoked to relieve the plaintiff from responsibility for the acts of the receiver who acted under his direction.

31st December, 1932.

MACDONALD, J.: Plaintiff seeks to foreclose its mortgage for $6,500 dated the 1st of February, 1929, upon the farm of the defendant Olive Adair. As it is only claiming payment of interest, taxes and insurance, it was not necessary to apply for leave of the Court before commencing the action. Default having occurred, as alleged, plaintiff is entitled to exercise its right to foreclosure and also obtain personal judgment against both defendants upon their covenant in the mortgage for the amount found to be due upon a reference, unless the defendants can succeed (totally or partially) upon the counterclaim so as to affect such indebtedness.

Judgment

MACDONALD, J.

1932

Dec. 31.

WESTMINSTER MORTGAGE CORPORATION LTD. v. ADAIR

Judgment

Defendants, on 31st December, 1930, being subsequent to the execution of the said mortgage, leased the farm in question together with another parcel of land to one W. T. Alexander for one year, commencing 1st January, 1931, with the option of a further demise for two years at a yearly rental of $1,200 payable monthly in advance. Defendants also by a conditional sale agreement, of even date with the said lease, agreed to sell their herd of cattle to the said Alexander. As security for the payment of the rent and in order to make payments on account of such purchase, the lease provided that the lessee should give an irrevocable order upon the person or persons to whom he might ship milk or cream, the product of the said cattle or any other cattle brought upon the demised premises by the lessee. Until actual payment of $100 monthly under the said order, the rent reserved should not be considered as having been paid. Pursuant to this provision in the lease, the said Alexander on the 31st of December, 1930, gave an irrevocable order (Exhibit 10) upon the Fraser Valley Milk Producers Association (hereinafter called Fraser Valley Association), Vancouver, B.C., requesting that it pay to the defendant Olive Adair the sum of $160 monthly, until the order was cancelled in writing by such defendant. The said Fraser Valley Association acknowledged receipt of the said order, which included not only the $100 for rental, but this $60 on account of the purchase of the cattle, and stated that it became effective immediately. It mentioned in its acknowledgment that the order would be noted in its records and cheques forwarded in due course, provided said Alexander had sufficient credit established by way of shipments of milk or cream. This order was acted upon and no trouble arose between the parties until default was made on the part of the mortgagors, when the plaintiff invoked the special provisions in its mortgage and appointed a receiver—Mr. T. H. Barbaree—an employee in its office. Such appointment was made under authority in the mortgage which contained a stipulation that a receiver, so appointed, should be considered as acting for the mortgagors. In other words, it was sought thereby to remove any liability from the mortgagee in connection with such receivership and it is now so contended. Defendant complains that the said receiver interfered with payments to be

made by the said Fraser Valley Association, so as to deprive the defendant of the benefit of such irrevocable order. It was submitted that such interference so affected such payments from the month of September, 1931, to the month of March, 1932. This includes a portion of the period included in the lease and also three months of the time which would have been covered if the lease had been renewed.

There is no doubt that the receiver succeeded in diverting money which would otherwise have been payable to the defendant Olive Adair, so that they became directly payable to the said Alexander. This was accomplished without her consent being actually obtained either verbally or in writing. I am quite satisfied however that both defendants became aware of the change through non-receipt of moneys. They did not take any active steps to assert their rights, until long after the said Fraser Valley Association had pursued a new practice of making payments of the moneys direct to Alexander. The price of milk and cream had fallen in the interval and the amounts payable to Alexander were considerably lessened. This condition had been emphasized by a letter from the defendant Olive Adair through her husband as attorney, though it was never fully acted upon. It became so apparent during the summer of 1931 that the rent was lowered to $50 per month for the months of July and August and settlement was also made on that basis for one month thereafter. The situation arose, that the receiver then called upon the lessee to pay the rent to him, instead of to his lessor; but all that he was willing to pay was $50 per month, for the balance of the year 1931. This amount was obtained by the receiver and has been duly credited to the defendants. I think so far as the rent, for the year covered by the lease is concerned, these are the only amounts which are chargeable against the mortgagee. As to the months of January, February and March, 1932, the receiver did not obtain any payment from the lessee. He gave evidence, which I accept, that a renewal of the lease never took place. There was some discussion, but presumably due in a great measure to the depressed condition of the milk industry, the parties never came to terms as to any further leasing of the farm. It resulted eventually in Alexander removing his farming outfit, including the cattle purchased from the

MACDONALD, J.

1932

Dec. 31.

WEST-MINSTER MORTGAGE CORPORATION LTD. v. ADAIR

defendants, to a neighbouring farm. Defendants had assigned in the meantime their interest in the agreement for sale of the cattle, so they were only indirectly interested in the actions in this respect of Alexander. I do not think the receiver could have recovered any more rent than he obtained from Alexander. It is true there were payments made directly to Alexander from the Fraser Valley Association, beyond such sum of $50 per month during the months of October, November and December, 1931. I do not think, however, that this fact made the receiver or the plaintiff, assuming it was responsible for the receiver's actions, liable for more than the amount actually received. Nor, even upon the same assumption did the interference of the receiver in the mode of payment, as I have shortly outlined, create a liability as against the plaintiff. There may be a question whether the Fraser Valley Association is relieved from liability, through having acted upon the request of the receiver and ignored the provisions of the irrevocable order. It is not before the Court, so I refrain from expressing any opinion in that connection, which might in any way prejudice its rights or affect its liability. The counterclaim is thus dismissed with costs.

Judgment

There will be judgment for the plaintiff with the usual reference as to taking accounts and taxation of costs. The registrar however should only allow $12 for the trip of the receiver to Hatzic and the commission on collection of rent of $7.50 should be disallowed, thus leaving, as it were, an amount in the receiver's hands of $14.50 which should be credited to the plaintiff. Upon the certificate of the registrar, as to the amount due in respect of the interest, taxes and insurance, there will be foreclosure in default of payment within the usual time and a personal judgment with costs against the defendants for the amount so certified.

Order accordingly.

BLAND v. AGNEW.

COURT OF APPEAL

1932

Nov. 1.

BLAND v. AGNEW

Practice—Court of Appeal—Application for leave to appeal in forma pauperis—11 Hen. VII., Cap. 12—R.S.B.C. 1924, Cap. 8; Cap. 52, Sec. 29.

Chapter 12 of the statutes of 11 Hen. VII. (1494) entitled "A means to help and speed poor persons in their suits" was introduced into British Columbia on the 19th of November, 1858, as part of the civil law of England, by virtue of the English Law Act of British Columbia.

On an application for leave to appeal *in forma pauperis*, section 29 of the Court of Appeal Act presents no bar thereto, and where the affidavits in support bring the case within the terms of the said statute of Hen. VII., the application should be granted.

APPLICATION for leave to appeal *in forma pauperis* by the parents of an infant from an order of McDONALD, J. of the 17th of June, 1932, as to the adoption of the infant. Heard by MACDONALD, C.J.B.C., MARTIN, GALLIHER, McPHILLIPS and MACDONALD, JJ.A. at Vancouver on the 1st of November, 1932. Statement

O'Halloran, for the application: The parents have no means; the father has been out of work for several months. The affidavits in support of the application lay a proper foundation for the order.

Beckwith, contra: There is no jurisdiction to make the order. They depend on the English Law Act, R.S.B.C. 1924, Cap. 80, but my submission is that this refers to substantive law and not to practice and procedure. On the difference between substantive law and practice and procedure see Salmond on Jurisprudence, 8th Ed., 495; *La Grange* v. *McAndrew* (1879), 4 Q.B.D. 210; *Poyser* v. *Minors* (1881), 7 Q.B.D. 329. The statute of Hen. VII. is not in force here: see *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573. Proceedings *in forma pauperis* were refused in Alberta: see *Augustino* v. *Canadian Northwestern Ry. Co.* (1928), 1 W.W.R. 481. The cases of *Paul* v. *Chandler & Fisher, Ltd.* (1924), 34 Man. L.R. 259; *Coleridge* v. *Coleridge* (1926), 1 W.W.R. 857 are distinguishable. See also *Olsen* v. *Pearson* (1923), 32 B.C. 520; Argument

COURT OF APPEAL

1932

Nov. 1.

BLAND v. AGNEW

Bland v. *Agnew* (1932), 46 B.C. 230. Even if the English Law Act applies it has been varied by subsequent legislation. Section 29 of the Court of Appeal Act provides for security for costs of an appeal and must be complied with.

O'Halloran, in reply: Section 29 of the Court of Appeal Act is directory and does not apply to one entitled to the order applied for here: see *Shipway* v. *Logan* (1916), 22 B.C. 410; *Piper* v. *Burnett* (1909), 14 B.C. 209. That the statute of Hen. VII. is in force here see *Sheppard* v. *Sheppard* (1908), 13 B.C. 486; *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573; *Walker* v. *Walker* (1919), A.C. 947.

MACDONALD, C.J.B.C.: This is an application for leave to appeal *in forma pauperis* to this Court.

There was no order below, and therefore we have simply to deal with the power of this Court to grant the order.

The only substantial objection furnished against our making an order, is that it would be in conflict with section 29 of the Court of Appeal Act, with regard to security for costs on appeal. That section requires the appellant to give security for costs. It was held directory, and in such a case the respondent would have the right to press his case by an application to the Court for security in case it were not given. While it does seem to me that this section goes a long way towards preventing the granting of the order now asked for, yet it is not fatal to it.

MACDONALD, C.J.B.C.

The rule is a general rule and must be construed by the Court with relation to the rules and practice of the Court, to ascertain exactly what the Legislature intended. In the ordinary case of appeal there should be no difficulty about it at all. But it is the extraordinary case, and I am satisfied the Legislature never intended it should be defeated by said section 29. It would not be intended to apply to a case where there could be no costs to secure.

Now, if we take that view of it, then this Court has a right to make an order notwithstanding that section. It has a right because the statute of Hen. VII. gave the right to apply, both in England and here, for aid to poor persons who are about to be sued, or to sue. It is a substantive part of the law,

to use the expression that has been emphasized so much this morning, it is a substantive part of the law that a poor person upon shewing certain things, as to his circumstances, may be given the right to proceed *in forma pauperis*. That is that he should not have any costs to pay. Of course, it will also mean that he shall not be required to give security for costs which cannot be earned.

Once you have established the right, the Court will if necessary provide procedure. Because, if a man has a right, the Court has said that when the right exists it shall not be defeated by want of procedure, and to a large extent procedure is governed by this very Act. I need not read it. It has been read, and it provides up to a certain point, the procedure. It cannot be carried out in full because we have not the Courts which correspond with the English Courts. For instance, the Lord Chancellor was the judge who was to make the order originally, and we have no Lord Chancellor in this country. Therefore, one must appeal to the ordinary tribunals of the country, and doing that, and applying as much of the procedure as we are obliged to apply as set out in the Act, it seems to me that this Court can grant leave to proceed *in forma pauperis*. It was granted in two cases in Manitoba under circumstances very similar to the circumstances in this Province. It was refused once in Alberta because the Court thought it was contrary to their rules of practice, and they seemed to take the view that counsel for the respondent has taken here, that substantive law and practice and procedure are fundamentally different things. I think there is no doubt that it is part of our general law. It is one branch of law, just as much law as any other part of law. And therefore, having got that far, there is no difficulty of procedure unless there is something in our rules which prevents us giving the relief asked. I do not think there is anything in our procedure which does that. Mr. *Beckwith* referred to the rules passed by BEGBIE, C.J. Those rules are no longer in force; they are repealed. So that leaves us without any rule which could be set up against the application made by Mr. *O'Halloran*. For these reasons I think we should grant the application. The foundation has been properly laid by affi-

MACDONALD, C.J.B.C.

COURT OF APPEAL

1932

Nov. 1.

BLAND v. AGNEW

davits. The application comes within the terms of this statute, and the procedure we ought to supply. Application granted.

MARTIN, J.A.: Having regard to the decisions in the cases of *Sheppard* v. *Sheppard* (1908), 13 B.C. 486, and, in the Privy Council, *Watts and Attorney-General for British Columbia* v. *Watts* (1908), A.C. 573, approving *Sheppard's* case at 579, and *Walker* v. *Walker* (1919), A.C. 947, I have no doubt whatever that the statute of Hen. VII. in question, *i.e.*, Cap. 12 of 1494, entitled "A means to help and speed poor persons in their suits," was introduced into this country on the 19th day of November, 1858, as part of the civil law of England not being "from local circumstances inapplicable" thereto (as the B.C. English Law Ordinance of 1867 expresses it) so it is unnecessary to discuss the principles contained in those leading cases.

That brings us to this: is there anything subsequent to said introduction of that statute within the meaning of chapter 80 of the Revised Statutes of this Province, 1924, which can be held to have modified or altered that legislation? In my opinion it is clear there is not, because the only alteration or modification that is substantially put forward is that contained in the section of the Act constituting this Court, and having regard to the decision of the old Full Court in *Piper* v. *Burnett* (1909), 14 B.C. 209, on the old rule, which is the same in essentials as the present statute, and our decision since the establishment of this Court in *Shipway* v. *Logan* (1916), 22 B.C. 410, it is apparent that the said section 29 as therein construed presents no bar to the application of the said statute of Hen. VII.

MARTIN, J.A.

Therefore the result is that, in my opinion, the objection to our jurisdiction to afford the relief asked by permitting this plaintiff to sue *in forma pauperis,* is overruled, and I note, as a matter of practical interest, that in *Paul* v. *Chandler & Fisher, Ltd.* (1924), 2 W.W.R. 577, at 579, Chief Justice Perdue cites a decision of Lord Cranworth shewing that an order of this kind relates to all the subsequent stages of the suit, including an appeal.

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

MCPHILLIPS, J.A.: In my opinion the Laws Declaratory Act introduced into this country the statute of Hen. VII.

Now, in this particular case it seems to me that we are not called upon to consider the question of the security for the costs of appeal. This appeal has come on in due course and been called, and our rule has been that when an appeal is on the peremptory list we will not then hear anything with regard to whether or no security for costs has been given for the appeal. It is too late. Now, in this particular case apparently no application was made to the Court below for security for the costs of the appeal, therefore, in my opinion, we are not called upon to consider that matter at all. If it was a case where security had been directed by the Court below, then of course, if the litigant had been allowed to sue *in forma pauperis,* a very nice question would arise as to whether or no section 29 of the Court of Appeal Act would or would not be operative. At the present moment I do not wish to express an opinion upon that. My opinion with regard to section 29, as at present advised, is this: that if an application had been made in this matter to a judge of the Court below, I would think he would have to exercise the statutory authority and fix the security at a sum not exceeding $200. Then, of course, the question would come up if the party had an order entitling him to sue *in forma pauperis.* I am not of the opinion that I am now called upon to pass upon the matter. It is not necessary at all to consider the question of costs of the appeal, as no order has been made for security.

MCPHILLIPS, J.A.

However, I do not disagree with the order about to be pronounced admitting of the appellant proceeding *in forma pauperis.*

MACDONALD, J.A.: I am satisfied there was no intention in enacting section 29 of the Court of Appeal Act, to prevent the operation of the Act of Hen. VII. as part of the law of this Province. That Act permits the prosecution of suits *in forma pauperis* by a certain class. I am not satisfied that section 29 deals with the point at all; but if it does, it is not mandatory, but directory only.

MACDONALD, J.A.

Application granted.

COURT OF APPEAL

1933

Jan. 10.

WORKMEN'S COMPENSATION BOARD v. SUMAS OIL & GAS CO. LTD.

WORKMEN'S COMPENSATION BOARD v. SUMAS OIL & GAS COMPANY LIMITED

Workmen's Compensation Board—Assessment—Judgment for amount of assessment—Execution—Prior mortgage duly registered on goods seized—Issue—R.S.B.C. 1924, Cap. 278, Sec. 46; Cap. 83, Sec. 16; Cap. 135, Sec. 2 (24).

Section 46 of the Workmen's Compensation Act provides: "Notwithstanding anything contained in any other Act, the amount due to the Board by an employer upon any assessment made under this Act, or in respect of any amount which the employer is required to pay to the Board under any of its provisions or upon any judgment therefor, shall have priority over all liens, charges or mortgages of every person, whenever created or to be created with respect to the property, real, personal or mixed used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workmen by their employer."

An assessment of the Workmen's Compensation Board, not having been paid by the Sumas Oil & Gas Company, the Board obtained judgment for the amount of the assessment, issued execution, and goods and chattels of the company were seized, upon which one Wilson and one Burns held a prior duly registered chattel mortgage. An issue as to priority of claim was decided in favour of the mortgagees.

Held, on appeal, reversing the decision of HOWAY, Co. J., that the Board has by its execution a lien or charge upon the goods and chattels in question, by which it is entitled to priority over the mortgage by reason of section 46 of the Act.

In re Campbell River Mills Ltd. Dinning v. *Ingham* (1931), 44 B.C. 412 distinguished.

Statement

APPEAL by the Workmen's Compensation Board from the decision of HOWAY, Co. J. of the 26th of August, 1932, on an issue between Messrs. Wilson and Burns as plaintiffs (respondents) and the Workmen's Compensation Board as defendant, whereby the plaintiff affirms and the defendant denies that certain goods and chattels of the Sumas Oil & Gas Company, seized in execution on the 21st of June, 1932, under a warrant of the 16th of June, 1932, on a judgment recovered by the Workmen's Compensation Board against the Sumas Oil & Gas Company Ltd., were at the time of the seizure the property of Messrs. Wilson and Burns, the mortgagees of the property in question

under a chattel mortgage dated the 22nd of July, 1929, which was duly registered in accordance with the provisions of the Bills of Sale Act and the Companies Act, and still remains unpaid. Judgment was in favour of the plaintiff on the issue.

The appeal was argued at Vancouver on the 8th and 9th of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Craig, K.C., for appellant: The Board made an assessment and the Sumas Oil & Gas Co., not paying, the Board brought action for the amount of the assessment, and upon obtaining judgment, issued execution, upon which a seizure of the goods and chattels of the Sumas Oil & Gas Co. was made. The plaintiff on the issue held a prior chattel mortgage on the goods and chattels in question which was duly registered, and the sole question is whether the Board has priority under section 46 of the Workmen's Compensation Act. The decision in the case of *In re Campbell River Mills Ltd. Dinning* v. *Ingham* (1931), 44 B.C. 412, does not apply as that was a bankruptcy case. In the present case the execution creditor was in possession and thereby had a lien on the goods. By virtue of the seizure, the Board acquired a charge in respect of the property seized: see *Giles* v. *Grover* (1832), 1 Cl. & F. 72; *Slater* v. *Pinder* (1871), L.R. 6 Ex. 228 at pp. 235, 238 and 241; (1872), L.R. 7 Ex. 95. There is no bankruptcy in this case: see *Ex parte Williams. In re Davies* (1872), 7 Chy. App. 314 at pp. 317-8; *In re Clarke* (1898), 1 Ch. 336. Upon the seizure the person having the charge is in the position of a secured creditor.

Argument

Harold B. Robertson, K.C., for respondent: Under section 16 of the Execution Act, only the equity in the property can be seized. In further answer to his contention that he is in the position of a secured creditor he is precluded by subsection (24) of section 2 of the Laws Declaratory Act. If they take away our common law rights there must be explicit language to this effect: see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 at p. 288. The cases referred to are bankruptcy cases in which there is no mortgage in question. Section 46 expressly excepts liens for wages and does not interfere with the common law rights of any person, as to do so you must find express words in the statute.

COURT OF APPEAL

1933

Jan. 10.

WORKMEN'S COMPENSATION BOARD v. SUMAS OIL & GAS CO. LTD.

He states that if his contention as to section 46 be not accepted the section is meaningless. That this is not so see *Ex parte Sheil. In re Lonergan* (1877), 4 Ch. D. 789; *Ex parte Taylor. In re Grason* (1879), 12 Ch. D. 366 at p. 377; Craies's Statute Law, 3rd Ed., 169. Cut out of our priority we are in a worse position than an ordinary creditor: see *Bank of Hamilton* v. *Hartery* (1919), 58 S.C.R. 338. If his contention is correct, then under section 4 of the Creditors' Relief Act, the right to the equity of redemption would be gone. On the construction of the first words in section 46 see *David* v. *Sabin* (1893), 1 Ch. 523 at pp. 531-2; *Stoney* v. *Eastbourne Rural Council* (1927), 1 Ch. 367 at pp. 390, 399 and 404.

Argument

Craig, in reply: If the section gives us priority over the mortgage we have priority over the ordinary creditor. At common law the mortgage has priority but if section 46 means anything it must give priority over everything, including claims arising under common law: see *Young* v. *Smith* (1846), 15 M. & W. 121; *Regina* v. *Christchurch* (1848), 12 Q.B. 149; *Regina* v. *Trafford* (1850), 15 Q.B. 200. Section 46 commences with the words "Notwithstanding anything contained in any other Act." As to the construction of this phrase see *Browning* v. *Wright* (1799), 2 Bos. & P. 13; *Nokes's Case* (1599), 2 Co. Rep. 481.

Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appellant seized under execution the chattels of the respondent, whereupon mortgagees of the property claimed the goods so seized under a prior mortgage. An issue was then directed to decide whether or not the goods were those of the appellant as against the mortgagees Wilson and Burns. The issue was decided in favour of the mortgagees and from this judgment an appeal is now taken. The appellant founded its case on section 46 of the Workmen's Compensation Act, being Cap. 278, R.S.B.C. 1924, and upon their rights as execution creditors in possession, while the respondent stands upon its mortgage. The said section 46 reads:

46. Notwithstanding anything contained in any other Act, the amount due to the Board by an employer upon any assessment made under this

Act, or in respect of any amount which the employer is required to pay to the Board under any of its provisions or upon any judgment therefor, shall have priority over all liens, charges, or mortgages of every person, whenever created or to be created, with respect to the property, real, personal, or mixed used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workmen by their employer.

The appellant submits that it is not affected adversely by the decision of this Court in *In re Campbell River Mills Ltd. Dinning* v. *Ingham* (1931), 44 B.C. 412, because of its being execution creditor in possession and thereby having a lien upon the goods, as it contends. In the case above referred to it was held that the Workmen's Compensation Board had no lien and were therefore general creditors only and not entitled to compete with a prior mortgagee. That was a bankruptcy case in which the funds were in the hands of the trustee for distribution under the Bankruptcy Act. The cases to which we were referred are unlike in many respects those in the present case and were founded on various statutes and upon facts differing widely from those here. They are at one on this, however, that seizure by the sheriff by *fi. fa.* does not transfer the property in the goods seized, though some of them appear to agree that the seizure is a charge upon the property seized. In *Ex parte Williams. In re Davies* (1872), 7 Chy. App. 314, Sir George Mellish, L.J., at p. 316, said:

MACDONALD, C.J.B.C.

> The general question therefore arises, whether, if a *fi. fa.* is delivered to the sheriff, so that the goods are bound within the Statute of Frauds, the creditor is entitled to the goods as against the trustee under a bankruptcy not having relation to any act of bankruptcy prior to the delivery of the writ to the sheriff.

And again at p. 317:

> Now, at common law the goods were said to be bound from the *teste* of the writ, for the goods which the debtor then had were what the sheriff was ordered to seize, and consequently no dealing with them by the debtor could take away the sheriff's right to seize them if he could find them within his bailiwick. The Statute of Frauds altered this by carrying the time down to the delivery of the writ to the sheriff, but that was only as between the creditor and third parties, for there are cases to shew that as against the debtor himself the goods were still bound from the *teste* of the writ.

In some of the cases to which we were referred there are expressions and findings to shew that the seizure by the sheriff is equivalent only to *caveat* and protects only those obtaining

COURT OF APPEAL

1933

Jan. 10.

WORKMEN'S COMPENSATION BOARD v. SUMAS OIL & GAS CO. LTD.

MACDONALD, C.J.B.C.

rights subsequent to prior encumbrances but in such cases the statute applicable to the case makes this clear. I do not think any helpful purpose would be accomplished by attempting to apply those cases to the present one. None of them deals with cases as wide and sweeping as does said section 46. By its terms it gives the debtor of the appellant priority over all "liens, charges, or mortgages" affecting the property in question "whenever created or to be created" except wages due to workmen, and this notwithstanding any Act to the contrary. If, therefore, the appellant has a charge upon the property seized by the sheriff, section 46 expressly declares that that charge shall have priority over a mortgage whenever created, that is to say whether prior or subsequent to the mortgage. To put it shortly the appellant's lien takes priority of the respondent's mortgage. The appellant here is seeking to enforce its right by execution, and the mortgagees are seeking to prevent it so doing. No doubt they are owners of the property by reason of their mortgage from the debtor, but if the appellant has by its execution a lien or charge upon the property, as I think it has, that lien or charge is entitled to priority over the mortgage by reason of the said section. The Legislature can make that the law which formerly was not the law, and may destroy vested rights both at law and in equity if it expresses its intention so to do. Has it done so by section 46? I am satisfied that it has. There can be no question about the meaning of the words used, though I feel that they would destroy to a great extent confidence in securities of those lending money to employers on mortgage securities, notwithstanding that the securities are executed by the debtor and on registration are protected by the Land Registry Act, but if that is the intent and meaning of the Act, that meaning must prevail in a Court of law and equity. There is, therefore, nothing in the way of appellant enforcing its lien or charge which in equity and without the assistance of section 46 it would not have, but in view of section 46 it has priority not in the equity of redemption but in the property seized. The Legislature had power to give it the whole property and I think meant to do so as security for its lien.

Since the lien is considerably less in amount than the prob-

able value of the goods mentioned in the mortgage and seized by the sheriff, I shall direct that the Board shall receive only the full amount of its claim and the balance of the property shall be left to the mortgagees or if sold the balance of the money shall be paid to the mortgagees.

I also refer to *R. B. Anderson & Son* v. *Dawber* (1915), 22 B.C. 218, in which this Court held that in an analogous case, namely one of attachment, the garnishee order does not transfer the property to the garnishor but is a charge upon it. An attachment is a species of execution just as is a *fi. fa.* and I think should be governed by the same principles.

I would allow the appeal.

MACDONALD, C.J.B.C.

MARTIN, J.A. GALLIHER, J.A.

MARTIN and GALLIHER, JJ.A. would allow the appeal.

MCPHILLIPS, J.A.: This appeal brings up for consideration different facts than those that were before this Court in *In re Campbell River Mills Ltd. Dinning* v. *Ingham* (1931), 44 B.C. 412. I may say that I do not find it necessary in this appeal to do other than refer to my judgment in the above case at pp. 416-18. It is true that my judgment was a dissenting one, but it is applicable to the present case. I now repeat—though in terms—the following, being an excerpt from my judgment above referred to at pp. 416-7:

> What is to be dealt with here in arriving at a decision as to priority or not of the claim of the Workmen's Compensation Board is whether there was a valid assessment under the Workmen's Compensation Act. That would seem to be undoubted and is nowhere challenged. Then we have the assessment which is within the purview of section 46 of the Workmen's Compensation Act, and that assessment "shall have priority over all liens, charges or mortgages." The appellant is at best in the position of a mortgagee before the bankruptcy—the holder of a floating charge only. The respondent has a claim authorized and supported by statute law, *i.e.*, a statutory lien, the highest form of specialty security and the statute law says in terms,—"any assessment made under this Act, or in respect of any amount which the employer is required to pay to the Board under any of its provisions or upon any judgment therefor, shall have priority over all liens, charges or mortgages": section 46, Cap. 278, R.S.B.C. 1924. Now the Legislature of the Province of British Columbia has exclusive authority to legislate in respect to many matters, as it is well known, and section 92 of the British North America Act, *inter alia*, covers "(13) Property and civil rights in the Province." What have we here? A claim as to priority in respect of certain charges against a certain fund and we have the

MCPHILLIPS, J.A.

COURT OF APPEAL

1933

Jan. 10.

WORKMEN'S COMPENSATION BOARD v. SUMAS OIL & GAS CO. LTD.

statutory declaration that "any assessment [under the Workmen's Compensation Act] . . . shall have priority over all . . . mortgages" and the claim of the appellant is that notwithstanding this statute law he has priority of right. It is nothing more than idle contention in my opinion.

I have no doubt that the learned judge in the Court below, His Honour Judge HOWAY, did feel that he was embarrassed by the admission of Mr. *Craig*, the counsel for the Workmen's Compensation Board, as the learned judge in his judgment made use of this language:

> It is admitted by Mr. *Craig* that *In re Campbell River Mills, Ltd.* [(1931)], 44 B.C. 412, is authority for the proposition that the mortgagee would in a contest with a mere claim for an "amount due the Board" have priority.

MCPHILLIPS, J.A.

With this admission before him I am not at all surprised that the learned judge decided as he did. This admission, in my opinion, was too wide if it purported to cover assessments under section 46, and, as I view it, contrary to the plain reading of the statute. Therefore, in my opinion, the issue should have been found in favour of the Workmen's Compensation Board as against the mortgagees, there being priority as to assessments made and due to the Board (section 46, Cap. 278, R.S.B.C. 1924).

I would allow the appeal.

MACDONALD, J.A.

MACDONALD, J.A. would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Craig, Ladner, Carmichael, Tysoe & Downs.*

Solicitors for respondent: *Robertson, Douglas & Symes.*

KAPOOR LUMBER COMPANY v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY.*

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

Negligence—Damages—Railway—Fire on right of way—Origin—Condition of right of way—Spreading of fire—Damage to adjoining property—Evidence—Jury—Answers to questions—R.S.B.C. 1924, Cap. 93, Sec. 114; B.C. Stats. 1925, Cap. 8.

A fire started on the morning of Monday, August 18th, 1930, on the defendant's right of way, about one-third of a mile from the plaintiff's sawmill and lumber yards. A gas-propelled car operated by the defendant passed the fire at about 10.25 a.m. on Monday, when the conductor and engineer saw the smoke but made no report. At about 12.05 the same day a way-freight passed, when the conductor saw the fire, and on the train reaching Kapoor there was a derailment of the engine. At about 1 o'clock the conductor telephoned to one Fraser, the assistant general agent of the defendant company at Victoria, and after advising him of the derailment informed him of the fire on the right of way. The superintendent of the plaintiff, learning of the fire at about 12.30, a foreman with 24 men from the sawmill were sent to the fire, where they arrived about 1 o'clock and remained until 6 p.m. One Dunn, assistant forest ranger, arrived at the fire about 4 p.m., and at his suggestion six men remained on fire patrol duty all night with fire equipment. Fraser arrived at Kapoor at about 4 p.m. on Monday with a gang of men, and after repairing the track where the derailment took place proceeded to the fire with Dunn, when he was advised by Dunn that his men would not be required and he could take them away. Twenty-five men remained in the fire area on Tuesday, but the mill was kept running all morning and until 2 o'clock in the afternoon, the superintendent thinking the fire was safely under control. At 4 p.m. the wind freshened and the fire starting afresh, it jumped the track, soon reaching the lumber yard where a large portion of the plaintiff's lumber was burnt. The plaintiff had a water-tank car which was available for use on Monday afternoon and Tuesday, but it was not put into operation. The jury in answering questions found that the origin of the fire was unknown, that it started on the defendant's right of way, that the right of way was clean, that the fire spread to the plaintiff's land, that the defendant was guilty of negligence in that the crew of the gas-car did not report as to the fire on Monday morning, and the crew of the way-freight did not report as to the fire promptly. They further found that the plaintiff was guilty of negligence in not using its water-tank car when it was possible to do so. The questions put to the jury included the following: "If there was any fault on the part of both parties which was a real and sub-

*Reversed by the Judicial Committee of the Privy Council and action dismissed.

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. *v.* CANADIAN NORTHERN PACIFIC RY. CO.

stantial cause of the ultimate damage, in what degree was each party at fault?" The learned judge in his charge told the jury that they need not answer it, and the question was left unanswered. Judgment was entered in favour of the plaintiff for $117,830.

Held, on appeal, setting aside the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that there should be a new trial.

Per MACDONALD, C.J.B.C.: The Contributory Negligence Act applies in this case and it was the duty of the learned judge to instruct them so that they could dispose of this question, further the jury was not instructed upon the doctrine of ultimate negligence. This Court cannot rectify errors that were made at the trial, and the only course is to send the case back for a new trial.

Per MACDONALD, J.A.: The true issues were not determined by the jury's answers to questions, and a new trial is necessary.

APPEAL by defendant from the decision of MACDONALD, J. of the 30th of July, 1932, and the verdict of a jury, in an action for damages for the loss of lumber in plaintiff's lumber yards at Kapoor, through fire that originated on the right of way of the defendant company and was allowed to spread to the property of the plaintiff's, through the defendant's negligence. The fire started on Monday morning, the 18th of August, 1930, on the defendant's right of way (mile post 35.2) about one-third of a mile from the plaintiff's lumber yards. A gas-propelled car of the defendant passed the fire at about 10.25 a.m. and repassed in the afternoon, the conductor and engineer seeing the smoke on both occasions but making no report of it. A way-freight passed on the same day at 12.05, and the engineer and conductor saw the smoke, and five minutes later this train arrived at Kapoor, where owing to a derailment of an engine, the conductor telephoned one Fraser, the assistant general agent of the railway at Victoria, at about one o'clock, and after telling him of the derailment told him about the fire he had seen on the right of way. Shortly after this some of the mill hands went to the fire with fire-fighting tools and fought the fire. Fraser arrived at about 4 o'clock with an auxiliary to repair the track. One Dunn, assistant forest ranger, arrived at the fire at about 4 o'clock in the afternoon, and at his suggestion six men remained all night on fire patrol duty, at this time the fire being under fair control. At 5 o'clock Dunn went to the mill where he saw Fraser who had with him a crew and fire-fighting equipment, and the two of them went back to the scene of the fire. Dunn

Statement

had been sent there in the first place by Forest Ranger Campbell, for a report on the fire, the area being in Campbell's jurisdiction. After seeing the fire, Dunn told Fraser he could take his men away as the men from the mill were then able to keep the fire under control. On the following morning (Tuesday) the fire was still burning, but apparently under control, but 25 men were still left in the fire area. The superintendent of the mill thought the condition was quite safe until 4 o'clock in the afternoon, as he kept the mill running in the morning and a portion of the afternoon. At 4 o'clock the wind suddenly changed and freshened up and the fire started going again. It jumped the track and soon made its way to the lumber yards of the plaintiff company, a large portion of the lumber being burnt. The plaintiff had a tank-car available for use which had a capacity of 4,750 gallons, the pump being capable of throwing water at the rate of 30 gallons a minute. It could have been used on Monday afternoon and on the following morning, but was never put in operation. The answers to questions by the jury were as follows:

Statement

4. Did the said fire originate on the right of way of the defendant? Yes.

5. If the answer to the 4th question be in the affirmative then (a) did the defendant become aware of the said fire? (b) If so where was the said fire then burning? (a) Yes. (b) On the right of way on right-hand side of track going from Victoria to Kapoor near mile 35.2.

6. If the answer to the 4th question be in the affirmative then did the said fire spread from the defendant's right of way to the plaintiff's lands? Yes.

7. If the answer to the 6th question be in the affirmative then did such spreading of said fire destroy the plaintiff's property? Yes.

10. If the defendant had knowledge of the said fire and if you have found that it originated on its right of way, then did defendant take proper precautions to prevent said fire from spreading from its right of way and doing damage to the plaintiff's property? Yes, except as qualified by answers to questions 15 and 16.

10. (*a*) If so, in what did those precautions consist? Consisted of Fraser, of defendant company securing all available employees of said company with all necessary fire-fighting equipment and proceeding to scene of the fire, and remaining available for fire-fighting purposes until assured by Forest Ranger Dunn that he could withdraw his men as there was a sufficient force available to cope with said fire at that time.

11. Did N. S. Fraser on behalf of the defendant company tender the services of himself and his men for the purpose of fighting the said fire? Yes. To Forest Ranger Dunn.

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

12. Was said Fraser instructed by Forest Ranger Dunn to take his men away or was he informed by him that there was sufficient force available to cope with said fire at that time? Mr. Fraser was informed by Forest Ranger Dunn that there was no necessity to keep his (Fraser's) men at the scene of the fire as there was sufficient force available to cope with said fire at that time.

15. Was the defendant guilty of negligence causing or contributing to the said fire, if so, in what did such negligence consist? Yes. Negligence of crew of gas-car in not reporting the fire on Monday, August 18th, and delay of crew of way-freight in not reporting promptly on arrival at Kapoor the same day.

16. If the defendant company became aware on the 18th of August of said fire was it negligent thereafter in connection with said fire? No, except as stated under answer to question 15.

17. If so, in what did its negligence consist? Specified in answer to question 15.

Statement

18. Was the plaintiff company guilty of negligence in connection with said fire. Yes.

19. If so, in what did its negligence consist? In not using their water-tank car as soon as it was possible to do so.

20. If there was any fault on the part of both parties which was a real and substantial cause of the ultimate damage, in what degree was each party at fault?

This question was not answered.

On motion for judgment the learned trial judge entered judgment in favour of the plaintiff for $117,830.

The appeal was argued at Vancouver on the 20th and 21st of October, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, K.C., for appellant: The plaintiff claims (a) That our engine started the fire; (b) that the right of way was dirty; (c) that we did not prevent the fire from spreading. The jury found in our favour as to these allegations. The only finding against us was that the engineer on the gas-train did not report the fire on Monday morning and that the conductor on the way-freight shortly after did not report promptly. This determines nothing, as Dunn, the assistant fire ranger, took charge of the fire at 1 o'clock on Monday, and at 4 in the afternoon Fraser, the agent for the railway company, was ready with men and equipment to help to put the fire out but was told by Dunn he would not be required, and that he could take his men away. Dunn was our superior and we obeyed him: see *British Columbia Electric Railway* v. *Loach* (1915), 85 L.J., P.C. 23 at p.

28; *Brenner* v. *Toronto R. W. Co.* (1907), 13 O.L.R. 423 at p. 428. Dunn assumed control and could have put the fire out but did not do so: see *The Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S.C.R. 595 at p. 600. Failure to use the plaintiff's tank-car on Monday was the cause of the accident, as they could have put out the fire in two or three hours. On the question of liability for fire loss through fire spreading from another's land see *Job Edwards, Lim.* v. *Birmingham Canal Navigations* (1923), 93 L.J., K.B. 261 at pp. 265 and 272. When we get away from our duties under the Railway Act we are ordinary landowners and subject to liability only as such: see *McAuliffe* v. *Hubbell* (1930), 66 O.L.R. 349 at p. 357. When the forest ranger takes charge the railway is no longer responsible: see *Coates* v. *Mayo Singh* (1925), 36 B.C. 270.

Argument

Maitland, K.C., for respondent: The jury had a view of the *locus in quo*. Under section 114 of the Forest Act the defendant must do its utmost to prevent the spread of fire from its right of way. The case of *Laidlaw* v. *Crow's Nest Southern Railway Co.* (1909), 14 B.C. 169; 42 S.C.R. 355, was decided prior to the Act, but see *Musgrove* v. *Pandelis* (1919), 1 K.B. 314; *Barker* v. *Herbert* (1911), 2 K.B. 633 at p. 645, and *Job Edwards, Ld.* v. *Birmingham Navigations* (1924), 1 K.B. 341. If they allow the fire to continue without taking reasonably prompt and efficient means to put it out they are liable: see Salmond on Torts, 7th Ed., 275; *Ilford Urban Council* v. *Beal* (1925), 1 K.B. 671; *Smith* v. *Great Western Railway Company* (1926), 135 L.T. 112; *Ellis* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 43; *British Columbia Electric Rway. Co.* v. *Dunphy* (1919), 59 S.C.R. 263.

Mayers, replied.

Cur. adv. vult.

27th January, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: There have been several mistakes made on the trial of this action, which I think require me to send it back for a new trial. The cause of action was negligence on the defendant's part for a fire which originated on its right of way, and spread to the plaintiff's land causing damage. I shall deal first with the essential questions answered by the jury.

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

Answers to these questions found that the fire was not started by an engine of defendant; that the origin or start of the fire was unknown; that it originated on defendant's right of way; that the defendant became aware of it; that the right of way was clean; that the fire spread from the right of way to the plaintiff's land, and that it destroyed property of the plaintiff; that the defendant did not take proper steps to prevent it spreading to the plaintiff's land; that the plaintiff was guilty of negligence in connection with the fire; that plaintiff's negligence consisted in not using their water-tank car as soon as it was possible to do so. Question 10 was answered in this way:

If the defendant had knowledge of the said fire and if you have found that it originated on its right of way [which was found] then did defendant take proper precautions to prevent said fire from spreading from its right of way and doing damage to the plaintiff's property? Yes, except as qualified by answers to questions 15 and 16.

Then question 15:

Was the defendant guilty of negligence causing or contributing to the said fire, if so, in what did such negligence consist? Yes. Negligence of crew of gas-car in not reporting the fire on Monday, August 18th, and delay of crew of way-freight in not reporting promptly on arrival at Kapoor the same day.

MACDONALD, C.J.B.C.

It appears that a gas-car of the defendant's passed the incipient fire in the morning at about half-past ten and on reaching Kapoor a few miles away the crew did not report to their head office in Victoria the existence of the fire. Later in the forenoon a freight train passed the same point and there was delay in their reporting to their company. This is the sole negligence found against the defendant.

Then question 20:

If there was any fault on the part of both parties which was a real and substantial cause of the ultimate damage in what degree was each party at fault?

The question was not answered.

We, therefore, have a finding of negligence against the defendant in not reporting as aforesaid, and secondly a finding of negligence against the plaintiff in not using their gas-car tank as soon as they might have done. There is, I think, a case of fault on both sides which falls within the Contributory Negligence Act, B.C. Stats. 1925, Cap. 8, which requires the jury not only to find the negligence but the degree of fault of the respective parties. Question 20 appears to have been pro-

pounded for the purpose set out in said Act. This question was curiously dealt with by the parties and by the learned judge at the trial. In the learned judge's charge to the jury, we find this:

As to question 20, you heard the discussions with regard to that. Counsel both seemed anxious to have that submitted, for as I have already mentioned, it appeared in both sets of questions [meaning proposed questions submitted to the judge for his guidance by counsel]; and you need not pass upon it at all—I will take the responsibility of taking that course.

Then again:

Now, as to the questions, you are, for the purpose of assisting in this trial, not compelled to follow my instructions as to answering these questions; but I prefer that you should do so.

And the learned judge further said:

. . . proceed then to answer as far as you can all the questions, except question 20; and then deal with the question of damages.

After the jury were sent to the jury room they returned several times for further instructions, and question 20 was insisted upon by plaintiff's counsel, but resisted by defendant's counsel, although he had originally asked that it be submitted. Mr. *Maitland,* plaintiff's counsel, said:

I must again ask for an answer to question 20. In view of these answers it seems to me, where by the fault of two parties damage is caused to one, under the Contributory Negligence Act, then they must say in what degree each party is responsible. . . .

MACDONALD, C.J.B.C.

Mayers: I say the Act has no application whatever, in view of the answers to these questions.

THE COURT: Well, has it any application to an action of this kind? I am using that term in a broad sense.

Mr. *Maitland* then presses his view; and his Lordship said:

. . . I have not decided it. In fact, it is the lateness of the hour, and all being tired—a long tedious day—and I trust the jury will not think it is any imposition.

And the Court asked Mr. *Maitland*:

Have you anything further to advance in support of your application to submit what we have termed the 20th question?

Maitland: No, my Lord.

Mayers: My Lord, our objections are two. First, if any such question arises at all, which it is submitted does not, then it can only be a question of ultimate negligence. Secondly, the jury cannot find any degree of fault in the defendant causing the loss or damage, consistently with their answers to the former questions. The only way in which the jury can maintain consistency in their answers, is to find that the fault of the defendant did not in any degree cause the loss or damage. If your Lordship should be against me, then I submit that question 20, in its present form, is in any case improper.

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. *v.* CANADIAN NORTHERN PACIFIC RY. CO.

And

THE COURT: That is the position I am in this morning. I may or may not submit that question. I want to see upon what lines if I do submit it, I will instruct the jury.

And again:

THE COURT: As I understand, you are pressing for the submission of this question in the form that it was submitted originally.

Maitland: Yes, my Lord.

THE COURT: What you have suggested was an endeavour to frame a question in accordance with the Act, as you consider? Because you have got incorporated in this question a point of ultimate negligence, to instruct the jury upon.

Maitland: I think, my Lord, my safest course would be to withdraw my application altogether. I do not want a question of law on that.

The matter ended there and no further reference was made to question 20, or to the principle upon which it should be decided.

Now to my mind there is no question but that the Contributory Negligence Act does apply to this case and that it was the duty of the learned judge to instruct them so that they might intelligently dispose of the question. Usually when questions are submitted to a jury they answer the questions and the judge applies the law, but that rule would not apply to this case, since the statute requires, in specific terms, that the degree of fault must be found by the jury. The result is that one of the most substantial factors in this case has not been decided at all. There is, as I have already pointed out, evidence of negligence on both sides. The terms "original negligence," "contributory negligence," and "ultimate negligence" are nothing more than convenient expressions to distinguish between the different characters of negligence. The defendant's negligence was prior to and was the initial negligence. The plaintiff's negligence was secondary negligence and could, I think, be properly described as contributory negligence. Without, therefore, a finding of the jury as to the degree of fault, it is impossible to enter any proper judgment in this case. Then again no question as to ultimate negligence was submitted to the jury. The reason Mr. *Maitland* ultimately objected to question 20 was his fear that the finding of that question by the jury might imply ultimate negligence, but that is neither here nor there now. The question was not answered; it was not submitted to the jury, and the jury was not instructed upon the doctrine, if I may call it

MACDONALD, C.J.B.C.

such, of ultimate negligence. In both of these cases, therefore, there was at least non-direction on essential points in the case. I think, also, it might be said that there was misdirection when the learned judge told the jury that they need not consider the question of damages, which involved this question of fault; that he would take responsibility for that. That may have been the cause of the jurymen's failure to answer the question.

No other negligence was found against the defendant except that mentioned in question and answer 15.

Under these circumstances, I think that this Court cannot rectify the errors that were made at the trial, and our only course is to send the case back for a new trial.

I would set aside the judgment and order a new trial.

MACDONALD, C.J.B.C.

MARTIN, J.A. (oral): I wish to say, with respect to the form this judgment is taking, that my personal opinion is that the action should be dismissed, because the only ground upon which negligence has been found, or can be attributed by the jury's answers, is failure to warn ("report"), but in my opinion that is neither, under the circumstances, a cause itself of, nor a contribution to the fire, therefore it is impossible to attach any negligence to the defendant. But in view of the fact that two of my brothers are firm in the opinion that a new trial should be ordered, and to avoid any further unnecessary litigation or costs that might arise out of the judgment of this Court, I can at least go with my brothers so far as to say that a new trial should be ordered, though it would please me better, if I may say so with all respect, if we were to hold that the action should be dismissed. I think, however, the proposed judgment is, under the present circumstances, the only proper course to take, in deference to their opinion, having regard to the fact that difficulties might arise if such were not the definite judgment of this Court, because one of its members is prevented by illness from participating therein, today, with regard to the form it should take.

MARTIN, J.A.

GALLIHER, J.A. agreed that there should be a new trial. (*Per* the Chief Justice.)

GALLIHER, J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: The majority of the Court have come to

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

MCPHILLIPS, J.A.

the conclusion that there should be a new trial. With that conclusion I cannot agree. My view is that the learned trial judge was right in entering judgment on the answers given by the jury to specific questions put to them and answered by the jury. Even if it should have to be admitted that the answers of the jury cannot be considered as wholly satisfactory—something which I do not admit—yet even then, as the evidence in the case is in my opinion such "that only one view can reasonably be taken of the effect of that evidence," (I quote from Duff, J.) the evidence is overwhelmingly complete that the railway company was guilty of negligence in failing to promptly extinguish the fire even after long delay in attempting to do so. Its officers and servants becoming aware of the fire were neglectful in reporting the fire to the company, which neglect was really the proximate cause of the fire loss to the plaintiff as the fire was admittedly easily capable of being put out and prevented from passing into and upon the land of the plaintiff with the disastrous consequences which ensued—a fire loss to the plaintiff in the sum of $117,830 as found by the jury. Upon the question of the jurisdiction of the Court—even if the verdict of the jury should be considered unsatisfactory—if it is found that the evidence warrants judgment upon a study of all the evidence judgment may be given. I am satisfied after that study that judgment should be given for the plaintiff. I refer to the case of *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43. At p. 53, Duff, J. said:

> By the law of British Columbia, the Court of Appeal in that Province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.
>
> The power given by O. 58, r. 4, "to draw inferences of fact . . . and to make such further or other order as the case may require," enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.
>
> This jurisdiction is one which, of course, ought to be and, no doubt,

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

Here in my opinion a reasonable view of the evidence did justify a verdict for the plaintiff and the learned trial judge was on the evidence justified in entering judgment for the plaintiff. I would further refer to what Lord Loreburn, L.C. said in *Paquin, Limited* v. *Beauclerk* (1906), A.C. 148 at pp. 160-1:

> The proper construction of Order LVIII, r. 4, has been the subject of criticism in *Millar* v. *Toulmin* [(1886)], 17 Q.B.D. 603; (1887), 12 App. Cas. 746 and *Allcock* v. *Hall* (1891), 1 Q.B. 444. In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value.

MCPHILLIPS, J.A.

In my opinion this case, upon a review of the evidence, "only one conclusion can properly be drawn" and that is, that the defendant was solely guilty of the negligence which caused the plaintiff the serious fire loss sued for in this action. Now the fire that caused the loss here arose on the right of way of the defendant. It is clear under the law of England—and it is the same in British Columbia—that a man is liable for so negligently keeping his fire that the house or property of his neighbours becomes damaged thereby. Further it is *prima facie* evidence of negligence when the fact is that the fire first broke out in his house and that is really the present case—the fire first broke out upon the railway company's right of way (*Wilson* v. *City of Port Coquitlam* (1922), 30 B.C. 449 and the *Municipality of the City of Port Coquitlam* v. *Wilson* (1923), S.C.R. 235).

It was held in *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox* (1918), 1 K.B. 625 as succinctly set forth in the head-note:

> Where upon an appeal by a plaintiff to the Court of Appeal from the verdict and judgment for the defendant it appears that all the facts are before the Court, and the Court is satisfied that the evidence is such that

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

MCPHILLIPS, J.A.

only one possible verdict could be reasonably given, the Court is not bound to order a new trial, but has jurisdiction under Order LVIII., r. 4, and ought to exercise it by directing judgment to be entered for the plaintiff notwithstanding the verdict of the jury. *Millar* v. *Toulmin* (1886), 17 Q.B.D. 603, *Paquin, Limited* v. *Beauclerk* (1906), A.C. 148 and *Skeate* v. *Slaters, Limited* (1914), 2 K.B. 429 considered.

I would also refer to what Swinfen-Eady, L.J. said in the case at p. 630:

> Assuming the verdict was utterly unreasonable having regard to the evidence, such as no reasonable men could possibly have given, what is the proper course for this Court to adopt? His answer was to grant a new trial. Then suppose the same process continued, as it must continue, it must go on, if necessary, *ad infinitum*, because all the Court can do is to direct a new trial and not to draw any inference of fact. In my opinion that is not the law, and although the Court ought to be exceedingly careful in interfering with the verdict of a jury, and still more so in giving a decision contrary to the finding of a jury, yet where it is manifest that all the facts have been ascertained, and that there is only one verdict that can be reasonably given, in my opinion it is the duty of this Court to draw the inference and to decide according to the rights of the parties, and the Court is not confined to sending the case for a new trial. That was the result of *Paquin, Limited* v. *Beauclerk* (1906), A.C. 148 in the House of Lords, where *Millar* v. *Toulmin* [(1886)], 17 Q.B.D. 603 was referred to.

The learned judge has given a very able and complete judgment in the case and my opinion is that the judgment for the plaintiff should be allowed to stand. I do not consider that any case has been made out for the direction of the new trial—on the contrary, as I view the case, both on the facts and the law the judgment of the learned trial judge is right and should be affirmed. I would dismiss the appeal.

MACDONALD, J.A.

MACDONALD, J.A.: In an action to recover damages from appellant railway company for a fire loss the jury answered questions as follows: [already set out in statement.]

Other answers shew that the fire was not started by appellant; that its engine had modern and efficient appliances; its right of way was free from debris and that the origin of the fire was unknown. On motion for judgment the learned trial judge entered judgment in respondent's favour for $117,830 damages.

This fire of unknown origin started on appellant's right of way. It was submitted that no evidence supports this finding: that it might have moved from adjoining land to the right of way. I think there was enough evidence from respondent's witnesses to enable the jury to reach that conclusion.

Appellant is liable as owner of the right of way if found guilty of negligence "causing" the resulting loss. Question 15 refers to negligence, "causing or contributing" to the fire. The jury found appellant negligent (causing or contributing) because the crew on a gas-car did not report a fire noticed by them on the 18th of August at 10.25 a.m., and also because a crew on a way-freight did not report promptly on arriving at Kapoor at noon on the same day. On the question of taking proper precautions "to prevent said fire from spreading" the jury found that proper precautions were taken as set out in the answer to question 10 (*a*) except as qualified by the finding of failure to report promptly.

If it is clear that this fire loss would not have occurred at all had the crew of the gas-car and way-freight (particularly the former) reported promptly: in other words that it was the natural and inevitable consequence of this omission we might be justified in overlooking the words employed in submitting question 15 ("causing or contributing to") and confirm the verdict. If, on the other hand, the evidence shews that the failure to report was a contributing factor only and that other events so intervened that it should not be regarded as the decisive cause then we should assume that the answer was meant to be read in that sense or at least is open to that interpretation. In fact, viewing all the answers, and the failure to find ultimate negligence, it would appear that the jury meant that failure to report was a contributing factor only on the point of liability. If then there is no reasonable evidence to support a finding that failure to report was the effective cause of the fire loss the answer to the question may be assigned to the point of contribution.

MACDONALD, J.A.

A review of the evidence is necessary. The fire started on the morning of Monday, August 18th, 1930, on appellant's right of way at mile post 35.2 about one-third of a mile from respondent's mill where the loss was sustained. A gas-propelled car operated by appellant passed the point of origin about 10.25 a.m., and the conductor and engineer saw smoke from logs and stumps covering a very small area. They repassed it at 3.44 in the afternoon while it was still burning. No report was made by them. Then a way-freight passed on the same day at 12.05

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

MACDONALD, J.A.

noon or a few minutes earlier. The engineer and conductor saw smoke rising from a burnt log or burning stump. On arriving at Kapoor (in less than five minutes) the derailment of an engine caused the conductor to telephone to Fraser, appellant's assistant general agent at Victoria for assistance at 12.55 p.m., or 1 o'clock, and in that conversation he told him:

> that there was a fire back behind us and that the fire apparently (as viewed at this time) was gaining considerable volume as the smoke was rising getting bigger.

He saw some East Indians from respondent's mill going in that direction with fire-fighting tools. Mr. Fraser said "alright I will get out as soon as I can" and he arrived with an auxiliary to repair the track at 4 p.m. We may assume therefore that there was a duty to report soon after 10.25 a.m., and failure to do so until 12.55 or two and a half hours later. Did failure to report for two and a half hours have any possible effect on the course of events? The purpose of a report is to bring men to the scene of the fire to extinguish it. If interested parties sufficiently numerous were aware of its existence and on hand to control or extinguish it a failure to report might not be the cause of the loss. It is necessary to shew that if a report had been made shortly after 10.25 a.m., the fire could have been extinguished and the loss would not have occurred. On this point respondent can rely, with considerable confidence, on this evidence of Reece, appellant's section foreman:

> Well, if you had been notified, at say 10 or 10.30 on Monday morning by your engine-man or conductor that there was a fire on your right of way at 35.2, you would have gone to put it out? Yes.
>
> There is no doubt about that? No.
>
> And are you not supposed to receive from your conductors and engine-men a report of any fires there are? Yes.
>
> And you immediately take steps to put it out? Yes, go right away.
>
> And you got no report from any of your people that there was a fire at 35.2? No.
>
> And if you had, you would have gone and put it out, as it was a small fire—that is correct? Yes.

In our inquiry on this appeal however we have to find if the answer to question 15 should be regarded as exclusively responsive to the word "causing" and in doing so must survey and draw conclusions from the evidence as a whole.

If the existence of the fire was known at 1 o'clock and "controlled" during the afternoon negligence in failing to report

earlier (as a decisive cause) may evaporate. It was equally capable of extinguishment—perhaps with a little greater effort —after 1 o'clock (little increase in area) and if fire-fighters thought it was out—or incapable of spreading (that is the meaning of "controlled") the later conflagration might be due to their neglect in failing to effectively control it. Respondent's superintendent was notified of the fire at 12.30 on the 18th and with the yard foreman went to the spot about 1 o'clock with 24 men. He had 150 available but thought he could put it out with 24 men. The fire then covered less than one-quarter of an acre. A dozen men cut a fire trail around it and another dozen worked with shovels and carried buckets of water from the Sooke River. They remained there until 6 p.m. He said they could not put the fire out but

they had the fire under control between 4 and 5 o'clock on account of having the fire trail cut around the fire.

Mr. Dunn, assistant forest ranger, arrived in the afternoon about 4 o'clock and on his suggestion six men remained all night on fire-patrol duty equipped with shovels, buckets, mattocks and axes. When he left about 5 p.m., "it appeared in good condition," *i.e.*, "the fire was surrounded by a trail and the trail was holding it in." As to the condition of the fire at 5.30 p.m., Teja Singh for respondent gave this evidence:

MACDONALD, J.A.

Just exactly what was the condition of the fire when you left? There was just a small fire, it more or less burned right down.

It had pretty well died down. Yes.

And there was just a slight smouldering or smoking, is that it? Yes.

Yes, no flame? No, I don't think so.

No. So that as far as you could see, it was perfectly safe? Yes.

Mayo Singh gave this evidence as to conditions in the morning:

Did you go to the fire on the following morning, Tuesday the 19th of August, 1930? Yes.

What time? A little after seven.

And what did you see then? I saw some men working there; I did not count them.

How many about? I think about over a dozen.

Over a dozen. Had the fire increased or diminished? About the same.

How long did you stay at the scene of the fire? Oh, about fifteen minutes.

You were satisfied with the condition then? . . .

Now Bal Mukand (respondent's superintendent) as you have told me, reported to you on the Tuesday morning what he had done at the fire on the Monday? Yes, sir.

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

MACDONALD, J.A.

Did he tell you that he had finally got the fire under control? Yes.

And the time when he got the fire under control was 4 o'clock in the the afternoon, he told you that? Monday? I don't know about the time; he just told me fire was under control all right.

Twenty-five men remained on the fire area on Tuesday. Over a hundred were still available but respondent kept the mill running all morning and until 2 p.m. Up to about 4 p.m., the superintendent thought the condition was quite safe. But the wind changed at that time, fanned the embers into flame, starting a conflagration that soon after reached respondent's plant and lumber yard.

Returning to events on the 18th, Mr. Dunn, assistant forest ranger in the employ of the forest branch of the Provincial Government was called by respondent. He arrived at 4 p.m., and remained about an hour. Then he returned to the mill and saw Mr. Fraser, appellant's agent and Mr. Cowan, respondent's accountant. He and Mr. Fraser went back to the scene of the fire. When Dunn left it appeared to be in good condition; also "they had an adequate crew to hold it." He was sent there by Forest Ranger Campbell to get a report on the fire and to report to him. This area was under Campbell's jurisdiction. Dunn had wide statutory powers; he could obtain practically all available help in the neighbourhood. Fraser had a crew and a full fire-fighting equipment with him and a number of men. The jury in answer to question 10 (*a*) commended his efforts and general attitude. Dunn gave this evidence as to their withdrawal:

So that you must have been perfectly satisfied when you let Mr. Fraser and his men go, that there was no danger from that fire at all; isn't that right? The fire was in good condition at that time.

Isn't that what I have said right? Yes.

When you left on the Monday you left the fire in charge of the Kapoor Lumber Company, didn't you? Yes.

In fact the Kapoor Lumber Company had taken over the fire and were fighting it, that is right, isn't it? Yes.

And again:

You saw the manner in which these Hindus were dealing with this fire? Yes.

And the equipment that they had there, that is the buckets and shovels? Which day?

On the Monday. Yes.

And the manner in which that was being carried on, did you expect them to have put that fire out? It would be some little time before the

fire would be out; but it would be quite safe at the time that I saw it . . .

They could have extinguished the fire if they had worked on it, couldn't they? In the course of time.

Now long? It is hard to say.

Well, six hours? No, I wouldn't say six hours; it would take more than six hours.

Twelve hours? how long? It is hard to say. It depends on conditions; it depends on what is burning.

Well, you saw what was burning? Yes.

Well, how long would it have taken to have put that fire completely out? I am afraid I could not give you a definite answer on how long it would take to put any fire out.

It was only a question of getting enough men there to put it out completely, wasn't it? Yes.

The foregoing evidence (except the testimony of Reece) was given by respondent's witnesses. Without referring in detail to the evidence on the point it should be added that the jury found respondent negligent "in connection with" (a loose expression) the fire in not using their water-tank car as soon as it was possible to do so. This finding must be considered in drawing conclusions because its failure in this regard may destroy any inference of negligence causing the damage through failure to report. It also discloses the light in which these respective acts of negligence were regarded by the jury. Respondent's tank-car in two tanks had a capacity of 4,750 gallons. Under normal high speed the pump would throw water at the rate of 30 gallons per minute. The track after derailment was repaired in the afternoon of the 18th and this tank-car could pass freely over the main logging spur. Had it been utilized as soon as possible after the repair of the track the fire could have been, if not extinguished, at least rendered ineffective. The jury evidently thought so.

MACDONALD, J.A.

What interpretation then in the light of all the evidence should be given to the answer to question 15? If the failure to report for two and a half hours is simply an act of negligence *per se;* a dereliction of duty in the course of the day's events, which at best added only to the difficulty of extinguishing or effectively controlling the fire, it is clearly not the sole cause of the loss but rather a contributing factor in a series of incidents culminating in disaster. If too failure to use the tank-car was an effective cause of the damage suffered, or even as the jury found, an act of negligence "in connection with" the fire the

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

verdict cannot stand. Further findings would be necessary. If, notwithstanding original negligence the loss could have been averted, if respondent had not failed, with abundant means at hand in man power and equipment to extinguish it, the appellant would not be liable. The true issues were not determined by the answers. If, again, the combined negligence of both was the real and substantial cause of the ultimate damage, a question of degree of fault would arise under the Contributory Negligence Act. In view of this situation; finding too inappropriate phrases in questions submitted in respect to negligence, *viz.*, 15 and 18 it is reasonable to assume that the jury answered them without proper regard to the question of effective cause. A new trial is necessary.

We are asked, however, to hold that on the law and the undisputed facts the action should be dismissed and this requires examination. We are concerned with the liability of an owner of land in respect to a fire of unknown origin starting on its property. That is, subject to this qualification. This landowner is a railway company and the strip of land a right of way and appellant was subject to all duties imposed by statute and by the orders of the Board of Railway Commissioners. The relevant orders are contained in working instructions and in section 14 of order 362, of the Board. Respondent on its part was subject to the provisions of Provincial Acts. It had to do its "utmost to prevent the spread of the fire" (Cap. 93, R.S.B.C. 1924, Sec. 114) when it reached its own property. It also had the common law right to enter—as it did—upon the right of way where the nuisance existed to abate it or to prevent it from doing damage. I think the principles laid down in *Job Edwards, Lim.* v. *Birmingham Canal Navigations* (1923), 93 L.J., K.B. 261 by Scrutton, L.J. at 267 to 270 are sound. It is a dissenting judgment inasmuch as he would direct a new trial. They are applicable in this case subject to the qualification that we must regard duties imposed by statute. It was the owner's duty to endeavour to abate this nuisance even though innocent of its creation, not necessarily successfully—an honest attempt carried out without negligence is enough. It is important to view its obligations aright when it is suggested that the only way appellant could be exonerated was by the total extinguish-

MACDONALD, J.A.

ment of the fire on the 18th. Sir John Salmond in his Law of Torts, 7th Ed., at p. 275, after stating,

> In the case of a public nuisance, when once the existence of the nuisance becomes known to the occupier of the land it is his duty to endeavour to abate it, even though he is entirely innocent either of causing the nuisance or allowing it to continue.

says, as to a private nuisance:

> But in the case of a private nuisance there is no such duty unless the nuisance is allowed to continue by the occupier's default or negligence. "What will constitute a continuance of a private nuisance so as to create an actionable wrong will depend on the evidence. A deliberate refusal to give an adjoining owner notice of the danger, or an obstruction of that owner in his endeavour to abate the nuisance, may be evidence of a continuance. There may be cases in which the act necessary to abate the nuisance, in the first instance, was of such a trifling nature that it might amount to an act of negligence on the part of the occupier of the land on which the nuisance existed not to take that step." You cannot be said to have permitted that to continue which you could not by any reasonable means prevent. In the absence of any such "continuance," the occupier will not be liable.

The answer to 10 (*a*) would appear to indicate that appellant did "take reasonable means to prevent" the mischief by doing all a reasonable man should be supposed to do in the special circumstances of the case. The difficulty, however, is that this is a question of fact and although question 10 (*a*) and the answers thereto appear to be pertinent, indicating that the owner discharged its full duty yet in view of the way the whole case was presented to the jury I do not think we would be justified in basing a judgment on one isolated question and answer. Further the finding of failure to report cannot be divorced from this asnwer. Counsel for respondent, as the trial judge pointed out, rested his case on the allegation that "appellant negligently let the fire continue to burn on its property and to escape to ours thereby causing damage." That is another way of saying that this nuisance of unknown origin might have been rendered harmless by the exercise of care and skill. Respondent had to shew that there was lack of care and skill and, if so, that it was the effective cause of the spreading of the fire and the subsequent damage. Because of the intervention of other parties acting lawfully several factors enter into the determination of the question. All these factors were not necessarily considered in the answer to question 10 (*a*). The true case therefore was not

MACDONALD, J.A.

COURT OF APPEAL

1933

Jan. 27.

KAPOOR LUMBER CO. v. CANADIAN NORTHERN PACIFIC RY. CO.

MACDONALD, J.A.

tried. I may add that I do not think we derive any assistance from the statement of Anglin, J. (now Chief Justice) in *Laidlaw* v. *Crowsnest Southern Ry. Co.* (1909), 42 S.C.R. 355 at 359, *viz.*, that

> Nothing was there said in argument of the allegation now put forward that the defendants through their servants had notice of the existence upon their right of way of the fire which eventually spread to the plaintiffs' lands and were guilty of actionable negligence in not extinguishing it.

as it is merely a reference to a possible issue which might have been raised without any consideration of the evidence which would have to be considered in that event.

I would direct a new trial.

New trial ordered, McPhillips, J.A. dissenting.

COURT OF APPEAL

1932

Dec. 7.

OVERN v. STRAND

OVERN v. STRAND *ET AL.*

Attachment—Contempt—Order for payment into Court—Sheriff's fees—Delay.

A sheriff seized certain goods and chattels of the plaintiff on writs of *fi. fa.* and realized $4,940 on a sale. By judgment of the Supreme Court of the 9th of December, 1929, it was ordered that "the sheriff do forthwith pay into Court to the credit of this cause all moneys realized by him from the sale of the plaintiff's goods and effects." The sheriff paid $4,000 into Court and retained $940 as his fees. An application for a writ of attachment against the sheriff for not paying all moneys realized into Court in accordance with said order was refused.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., that the rule in regard to attachment of persons requires that proceedings should be taken promptly and the application fails on the ground of delay.

Per MARTIN, J.A.: Orders of this kind, mandatory, should not be granted where there is another appropriate adequate remedy, because the Court will not unnecessarily resort to punitive proceedings.

Statement

APPEAL by plaintiff from the order of MORRISON, C.J.S.C. of the 24th of August, 1932, dismissing an application for a writ of attachment against the sheriff of the County of Cariboo.

In 1928 the sheriff seized the plaintiff's goods and chattels and store at Deserters Canyon in the Cariboo and sold them, realizing $4,940. By a judgment of the Supreme Court of the 9th of December, 1929, the sheriff was ordered to pay the moneys realized into Court. The sheriff paid $4,000 into Court but retained $940 for his fees, and these proceedings are in respect of this sum.

Statement

The appeal was argued at Vancouver on the 30th of November, 1932, before MACDONALD, C.J.B.C., MARTIN and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: The writs of *fi. fa.* under which this seizure was made were improperly executed, and the whole amount realized on the sale should have been paid into Court. The sheriff retained $940.

A. DeB. McPhillips, for respondents: The order for payment in was made nearly three years before this application was made. The delay is fatal to this application: see *The King* v. *The Sheriff of Middlesex* (1831), 1 D.P.C. 53; *The King* v. *Stretch* (1835), 3 A. & E. 503; 111 E.R. 505. The question of the right of the sheriff to retain his fees out of the moneys realized cannot be raised on attachment: see *Rex* v. *Burrell* (1731), Bunb. 305; 145 E.R. 682. On the meaning of the word "realized" see *In re Oxford Benefit Building and Investment Society* (1886), 35 Ch. D. 502 at p. 510. On appeal from a refusal to commit for contempt the learned judge having exercised his discretion this Court will be slow to alter his decision: see *Bristow* v. *Smyth* (1885), 2 T.L.R. 36.

Argument

MacInnes, in reply: The right of the sheriff to his fees depends on the legality of the seizure: see *Russell* v. *The East Anglican Railways Company* (1850), 20 L.J., Ch. 257; *A. McDonald Co.* v. *Cushing* (1918), 3 W.W.R. 89; MacLennan on Interpleader, 322.

Cur. adv. vult.

7th December, 1932.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): This is an application to commit the sheriff for failure to pay a sum of money into Court, as ordered by the judgment. He was ordered to pay the money

COURT OF APPEAL

1932

Dec. 7.

OVERN v. STRAND

in almost three years ago, and paid in $4,000 and retained his fees out of the proceeds of the sale. Now the sale was illegal. He was a trespasser and sold the plaintiff's goods and collected the money. Therefore, he was not entitled to those fees. That was decided in *A. McDonald Co.* v. *Cushing* (1918), 3 W.W.R. 89.

MACDONALD, C.J.B.C.

The rule with regard to attachment of persons requires that proceedings should be taken promptly. There were two cases cited to us to shew that a delay of one term is sufficient to induce the Court to refuse the order. In this case there were several terms elapsed before these proceedings were taken. The order was made three years ago, and has not been obeyed in regard to the amount he should have paid in. Therefore, the attachment proceedings fail and the appellant must pay the costs as well.

MARTIN, J.A.

MARTIN, J.A. (oral): I agree with my learned brother that the case is not one for granting an attachment against the sheriff for failure to obey the order of the Court below of the 9th of December, 1929, that "the sheriff do forthwith pay into Court to the credit of this cause all moneys realized by him from the sale of the plaintiff's goods and effects . . ."

Our present ruling I prefer to put upon the ground that the circumstances are such that attachment is not the proper remedy and another and an appropriate one is open to us. As we pointed out in *Welch* v. *Grant* (1920), 28 B.C. 367 at p. 372, orders of this kind, mandatory, should not be granted where there is another appropriate and adequate remedy, because the Court will not unnecessarily resort to punitive proceedings, and that principle is pointed out in a sheriff's case of *Shoppee* v. *Nathan & Co.* (1892), 1 Q.B. 245, at p. 252, and it applies the more so in a case of the present description because, as Lord Justice Scrutton said in *Union Bank of Manchester, Ld.* v. *Grundy* (1924), 1 K.B. 833 at p. 843:

> It cannot be said that the law relating to sheriffs' charges is in a satisfactory condition. . . .

And it is much more unsatisfactory here than it is in England, because we have not got the Sheriffs Act, 1887, Cap. 55, whereby the law respecting their fees and poundage was more

or less consolidated in that Act, which is relevantly set out at p. 849 in the note to the case just mentioned, and the Sheriffs Act and order thereunder can be found conveniently in the Annual Practice, 1933, pp. 1948-1958, where the subject is thoroughly considered in that excellent book.

But I think it better to regard the matter from another point of view, *viz.*, the alternative claim in general set up in the notice of motion, although I realize fully the strength of my learned brother's views that it is insufficient and indefinite. The notice of motion after moving to attach the sheriff set up the alternative claim: "or for such other order as may in the circumstances seem meet," and had that alternative been more definitely and properly stated and that motion pressed, then, clearly, even under the old practice it should have succeeded. The case of *Blake* v. *Newburn* (1848), 5 D. & L. 601, shews what could have been done below on such a motion, for there a rule had been obtained calling upon the sheriff to shew cause why he should not refund the excess beyond the fees to which he was legally entitled, and also to attach the officer of the sheriff for extortion, and it was held that the rule was in due form to obtain a refund from the sheriff after a report by a master. Therefore I feel it is open to us at least (if it should be thought that there is not enough definiteness in the request for alternative relief that I have cited) and I think justice requires it, to allow the notice to be amended, because that is, obviously, the proper course which should have been adopted below, *viz.*, that the sheriff simply should have been directed to pay the money into Court, or to "refund the excess," as in *Blake's* case (p. 604). In regard to what is meant in the order by "moneys realized," counsel cited some cases on the commercial meaning of moneys "realized" in ordinary business transactions, but that meaning is not used in the same way as "realized" under a writ of *fi. fa.* There is, however, a case which puts that point beyond all doubt, which I have already referred to, the *Union Bank of Manchester* case, where Lord Justice Bankes, with Mr. Justice Eve concurring, says, p. 838:

MARTIN, J.A.

> After hearing argument he [District Registrar] disallowed the sheriff's claim for poundage in respect of any amount above the amount actually realized by the execution; that is to say, the value of the goods seized.

COURT OF APPEAL

1932

Dec. 7.

OVERN v. STRAND

MARTIN, J.A.

We have herein the very same expression, "the value of the goods seized," so Mr. *MacInnes* was right in submitting to us that those proceeds should have been paid into Court, and hence the sheriff was in default and subject to an appropriate order but not, at that stage at least, to attachment, and which was not, in fact, asked for. Therefore I think we should make the proper order that the sheriff do comply with the original order to pay into Court. But having regard to the fact that the matter may not have been technically, perhaps, properly submitted to us in the notice of motion (though personally I am inclined to think it was sufficient) I think justice in this case would be met by refusing to give the appellant, successful to that extent, any costs of the appeal. My judgment, therefore, is that such amendment of said notice as may be necessary should be allowed, following the course taken in *Blake's* case, *supra,* and the appeal should be allowed *pro tanto* without any costs to the partly successful appellant, because he is really obtaining an indulgence, and I think it desirable to put an end to this litigation and for that reason the remedy I refer to, by amendment, should be invoked forthwith.

MACDONALD, J.A.

MACDONALD, J.A.: I agree that this is not a proper case for seeking at this stage a writ of attachment against the sheriff. Nor am I disposed to give effect to the alternative relief asked for, *viz.,* an order for payment, because, primarily, the sheriff was summoned to meet an application for the issuance of this writ. The alleged alternative remedy was not, I think, agitated below, and we should not give effect to it here. It should be regarded as a sort of omnibus clause attached to the notice of application, somewhat similar to the claim "for such further relief as the circumstances of the case may require."

I would dismiss the application.

Application dismissed.

Solicitors for appellant: *MacInnes & Arnold.*

Solicitors for respondents: *McPhillips, Duncan & McPhillips.*

COURT OF APPEAL

1933

Jan. 10.

JENSEN v. HARRISON AND VANCOUVER SECURITIES LTD.

JENSEN v. HARRISON AND VANCOUVER SECURITIES LIMITED.

Sale of goods—Conditional sale agreement—Agency—Re-possession by assignees of vendor—Sale in the ordinary course of business—Priority as against mortgage—R.S.B.C. 1924, Cap. 22, Sec. 20; Cap. 225, Sec. 60 (1).

The defendant company discounted conditional sale agreements given by the purchasers of automobiles and in case of default by purchasers, the car was seized by the company, its practice being to take the car to the defendant Harrison to whom the car was sold, the company taking back from Harrison a chattel mortgage on the car. Harrison then exhibited the car for sale in his premises in the ordinary course of business. The car in question, having been taken back by the defendant company from a former purchaser who was in default in his payments, was handed over to the defendant Harrison in the manner above set forth, who placed it on his premises for sale. The plaintiff purchased the car from Harrison under a conditional sale agreement in March, 1930, and made his payments thereunder without default until May, 1931, when the defendant company seized the car under its chattel mortgage. The plaintiff recovered judgment for the amount paid on the purchase price.

Held, on appeal, affirming the decision of ELLIS, Co. J., that the appeal should be dismissed.

Per MARTIN and MACDONALD, JJ.A.: It is a question of fact whether the sale was made in the ordinary course of business and in this case it is abundantly clear that on its facts it must be regarded as having been so made and the judgment below may be supported on that ground.

Per MCPHILLIPS, J.A.: Here we have the appellant placing in the hands of Harrison a "mercantile agent," the car in question with directions to sell the same. Harrison exhibits it for sale in his sale-room, the plaintiff observing it, purchases the car and pays the purchase price to Harrison. This establishes a complete sale in law and it is not open to the defendant to say that the car is subject to the duly-registered chattel mortgage.

APPEAL by defendant Vancouver Securities Limited from the decision of ELLIS, Co. J. of the 30th of June, 1932, in an action for the return of certain moneys paid on the purchase of an automobile, or damages for the illegal and wrongful seizure and conversion of the automobile. The defendant Harrison carried on business in Vancouver as Kingsway Auto Sales, and

Statement

COURT OF APPEAL

1933

Jan. 10.

JENSEN v. HARRISON AND VANCOUVER SECURITIES LTD.

Statement

the defendant company financed Harrison in the sale and purchase of cars. The defendant company had previously held a conditional sale agreement from a former purchaser of the car but the purchaser being in default the company took possession of the car, and took it to the defendant Harrison, went through a form of sale of the car to Harrison and took back a chattel mortgage for $1,181 on the car on the 18th of April, 1929, which was duly registered pursuant to the Bills of Sale Act. Harrison kept the car on his premises for sale and sold it to Jensen under a conditional sale agreement in March, 1930, for $1,422. Jensen made his payments regularly paying in all $840 to Harrison, and on May 6th, 1931, the automobile was seized by the defendant Vancouver Securities Limited under the chattel mortgage. The plaintiff then sued for the recovery of the money he paid.

The trial judge held that the defendant Harrison was an agent of his co-defendant the Vancouver Securities Limited and based his judgment largely upon that finding. The Court of Appeal, however, considered the question as being whether a *bona fide* purchaser in the ordinary course of business can obtain a good title against the holder of a registered mortgage given by the trader.

The appeal was argued at Vancouver on the 23rd and 25th of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alexander, for appellant: The learned judge below held that Harrison was the defendant company's agent. The car was sold to Harrison by the company and the company took back a chattel mortgage which was duly registered. He cannot be an agent if we are chattel mortgagees. The plaintiff had notice of the mortgage through registration. That Harrison was not an agent of the defendant company see *Barrett* v. *Irvine* (1907), 2 I.R. 462 at p. 471; *Hodgins* v. *Johnston* (1880), 5 A.R. 449; *Belanger* v. *Menard* (1896), 27 Ont. 209 at p. 211.

T. E. H. Ellis, for respondent: The defendant company became the owner of the car when it got it back from Alpine. It claims to have sold it to Harrison but no consideration passed, and it took a chattel mortgage from Harrison, leaving the car

with Harrison for sale. On the evidence he was its general agent, and Jensen purchased the car from him. Jensen was never in default and the law is that the party who puts one in a position to act fraudulently is the party who should suffer: see *Ashmore* v. *Trans-Canada Finance Corp. Ltd.* (1930), 3 D.L.R. 488 at pp. 491-4. Constructive notice is not to be extended to purely commercial transactions: see *Ashmore* v. *Trans-Canada Finance Corp. Ltd.* (1930), 4 D.L.R. 982 at p. 984; *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601 at p. 604. The purchaser in open market has a good title as against the mortgagee: see Benjamin on Sale, 7th Ed., pp. 10 and 13; *National Mercantile Bank* v. *Hampson* (1880), 5 Q.B.D. 177; *Brett* v. *Foorsen* (1907), 17 Man. L.R. 241; *Dedrick* v. *Ashdown* (1888), 15 S.C.R. 227; *Campbell & Co. Ltd.* v. *Steele* (1930), 39 O.W.N. 317 at p. 318; Barron on Conditional Sales, 3rd Ed., p. 86. The chattel mortgage is void as against us under the Bills of Sale Act, because it is subject to a condition not disclosed in the mortgage, namely, that if Harrison made a sale the defendant company was to finance the sale and release the chattel mortgage: see *Doll et al.* v. *Hart et al.* (1890), 2 B.C. 32; *Counsell* v. *London and Westminster Loan and Discount Co.* (1887), 19 Q.B.D. 512; *Pettit* v. *Lodge & Harper* (1908), 1 K.B. 744 at pp. 748-9; *Ball* v. *Royal Bank of Canada* (1915), 52 S.C.R. 254.

Argument

Alexander, in reply, referred to *Taylor* v. *M'Keand* (1880), 5 C.P.D. 358; *Payne* v. *Fern* (1881), 6 Q.B.D. 620; *Case Threshing Machine Co.* v. *Gouley* (1914), 7 W.W.R. 584 at p. 588; *McPherson* v. *Moody* (1900), 35 N.B.R. 51 at p. 65.

Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.

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

MARTIN, J.A.

MARTIN, J.A.: Several points were raised at the hearing of this appeal, but if the sale of the motor-car in question can be said to be one "in the ordinary course of business" then the judgment should be affirmed on that ground, whatever objections may be taken to the reasons upon which it is founded.

It is admitted that the appellant (the defendant company)

COURT OF APPEAL

1933

Jan. 10.

JENSEN v. HARRISON AND VANCOUVER SECURITIES LTD.

did in fact put the car in the custody of the defendant Harrison for the purpose of being sold, whatever the rights and true relations were between them, and that Harrison in order to do so exhibited it for sale in the ordinary way of business in his premises known as the "Kingsway Auto Sales," where he carried on business as a dealer in new and second-hand cars: the company, being financial brokers, did not have any facilities for disposing of it and therefore entrusted it to Harrison for that purpose; and he had "very often" sold cars in that way "in the ordinary course of his business" under similar, if not identical, arrangements with the company. Some difficulty arose between the company and Harrison respecting his "holding himself out as the company's agent" which led to the company amending its notice to purchasers of cars from Harrison to make payments direct to its office, but despite that it continued to send cars to his place for sale as thus explained by its assistant-secretary:

> We notified everybody that there was any money coming from, that they had to pay it to us.
>
> And you still kept on doing business with Harrison? Well, the cars were up there and they had to be sold.
>
> And you kept on doing business with them [him]? Yes.

MARTIN, J.A.

The plaintiff, wishing to buy a car, went with his wife to Harrison's said place of business, on 5th March, 1930, and saw several cars, both new and used, displayed for sale in the showroom or show place in the usual way, and after "looking them over" went back the next day and decided to buy the used car in question for the price of $1,422.77 on the terms of a conditional sale agreement of that date, made between plaintiff and Harrison, paying $350 cash to Harrison and giving 12 notes payable to him for the balance in monthly instalments. He was not told that Harrison had given a chattel mortgage on the car to the defendant company on 12th March, 1929, and registered on March 14th, and made no search for chattel mortgages, but simply took delivery of the car from Harrison and used it till it was seized by the said company over a year thereafter under said mortgage, the plaintiff having meanwhile paid the instalments to Harrison, who subsequently absconded and did not defend this action. The learned judge's finding of fact that the plaintiff was buying from Harrison and not from the company,

and that Harrison was not plaintiff's agent, is amply supported by the evidence, of the plaintiff's wife particularly, and plaintiff was also then informed by Harrison that if he wished he could make his payments to the defendant company, Harrison saying that he was "their agent and notary public, so I handle all their business," but this the company denies. Why Harrison made that statement *re* optional payments is doubtless because he had in view his right under the contract to "discount or negotiate such notes . . . without changing its character as between the parties hereto," and also that he would do so with the said company, as appears from the "Purchaser's Statement" appended to the said agreement, and signed by the plaintiff, which contains this final item: "Service of notice of assignment of this agreement to Vancouver Securities Ltd. is hereby admitted," though in fact the assignment had not then been made, but in any event the circumstance is not of weight.

Upon these facts it is submitted that the plaintiff, as an undoubted purchaser in good faith and without notice of any lack of authority on the part of "the person making the disposition," is in any event or aspect of the case protected by section 60 (1) of the Sale of Goods Act, Cap. 225, R.S.B.C. 1924, *viz.*:

MARTIN, J.A.

(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Several cases were cited to us which, with others, have received careful consideration, *viz.*, *National Mercantile Bank* v. *Hampson* (1880), 49 L.J., Q.B. 480; *Walker* v. *Clay* (1880), 49 L.J., C.P. 560; *Taylor* v. *M'Keand* (1880), *ib.* 563; *Payne* v. *Fern* (1881), 6 Q.B.D. 620; *Musgrave* v. *Stevens and Bradbury* (1883), 1 Cab. & E. 38; *Dedrick* v. *Ashdown* (1888), 15 S.C.R. 227; *Gough* v. *Wood & Co.* (1894), 63 L.J., Q.B. 564; *McPherson* v. *Moody* (1900), 35 N.B.R. 51, 61; *Greenburg* v. *Lenz* (1905), 12 B.C. 395 (my own decision); *Ellis* v. *Glover & Hobson, Lim.* (1907), 77 L.J., K.B. 251, 258; *Hare & Chase of Toronto Ltd.* v. *Commercial Finance Corporation Ltd.* (1928), 62 O.L.R. 601; *W. J.*

COURT OF APPEAL

1933

Jan. 10.

JENSEN v. HARRISON AND VANCOUVER SECURITIES LTD.

Albutt & Co. v. *Continental Guaranty Corporation of Canada* (1929), 41 B.C. 537; *Campbell & Co. Ltd.* v. *Steele* (1930), 39 O.W.N. 317; *Commercial Securities (B.C.) Limited* v. *Johnston* (1931), 43 B.C. 381; and *In re Industrial Acceptance Corporation Ltd. and Service Garage Ltd. and Thomas* (1933), 1 W.W.R. 24; and *cf.* also Barron & O'Brien on Chattel Mortgages, 3rd Ed., 15, 86, 92; and Benjamin on Sale, 7th Ed., 12.

It is clear from these decisions that it is a question of fact, depending upon the particular circumstances of each case, whether or not the sale has been made in the ordinary course of business, and in the present case it is "abundantly clear" (as was said in *McPherson's* case, *supra,* p. 63), that on its facts, which are stronger than in most of the cases cited, the car having been admittedly placed in Harrison's hands for sale, it must be regarded as having been so made, and therefore the judgment may be supported on that ground which was in effect, even if inartistically, raised by the pleadings, and evidence given thereupon, though the learned judge below did not deal with it in his reasons, from which, indeed, the exact ground of his judgment does not appear.

MARTIN, J.A.

It follows that the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This appeal brings up for consideration the protection which is afforded to purchasers of goods from a mercantile agent within the meaning of section 60 of the Sales of Goods Act. The facts establish that the respondent bought the motor-car standing on the floor exhibited for sale in the showrooms of the appellant, a dealer in the sale of motor-cars. Now what were the facts in the case? The appellant the Vancouver Securities Ltd., one of the defendants, was in the position of a chattel mortgagee of the car in question. To best indicate the salient facts I make the following excerpt from the judgment of the learned trial judge, His Honour Judge ELLIS:

> There is no dispute of any serious nature as to the facts in this case. The defendant company, I am satisfied, employed the defendant Harrison to act for it in selling cars for it. In connection with the car in question, the defendant company took possession of the car from a third person, and

according to the evidence of its assistant secretary, Mr. MacInnes, who was called as a witness, they having no facilities to handle the car, took the car to the defendant Harrison for sale. In order to protect themselves they took a chattel mortgage which is put in here as Exhibit 3. The chattel mortgage is dated the 18th day of April, 1929, and called for payment of $1,181.15 on the 9th day of May, 1929, less than a month after its date. The car was sold by the defendant Harrison to the plaintiff in this action, who entered into an agreement to purchase and faithfully made all the payments under the agreement. Approximately two years after the agreement was entered into between Harrison and the defendant company, the defendant company seized the car, took it away from the plaintiff and deprived him of it and now claim they are entitled to it under the chattel mortgage entered into between it and Harrison. It has been satisfactorily established to me that the practice between the defendant company and Harrison was that they took cars to him to sell for them, took back chattel mortgages, and when sales were made to third persons, took assignments. In the case at Bar there is no evidence that any assignment between Harrison and the plaintiff was entered into.

A former purchaser from Harrison being in default in payment to the Vancouver Securities Ltd. (the appellant), it took possession of the car and then redelivered the car to Harrison for sale and when it was held by Harrison for the purpose of sale on behalf of the Vancouver Securities Ltd., in the ordinary course of business, he being a dealer in the sale of cars, sold the car to the respondent and Harrison failed to account to the Vancouver Securities Ltd., for the purchase price of the car, the purchase price being fully paid by the respondent to Harrison without notice in any way that there was a chattel mortgage thereon. The respondent as I view the statute law and the authorities—which are numerous and were referred to—is fully protected in purchasing the car, purchasing the same under the circumstances set forth. In short the case is a very simple one and upon the facts it is impossible for the appellant to contend that the respondent is not so protected. The respondent acted in good faith throughout as I view it. A good deal was attempted to be made out of the statement that the respondent said that Harrison was his agent. I cannot view this as having any legal effect or that it in any way prejudices the position of the respondent. The appellant placed the car in Harrison's hands for sale—that is incontrovertible upon the facts—therefore Harrison was its agent to sell the car and Harrison failing to account to the appellant for the purchase price cannot be held to be a default attributable to the respondent. I make this

MCPHILLIPS, J.A.

COURT OF APPEAL

1933

Jan. 10.

JENSEN v. HARRISON AND VANCOUVER SECURITIES LTD.

further excerpt from the judgment of the learned trial judge upon this point:

> Counsel for the defendant company relies on the statement made by the plaintiff in his evidence that Harrison was acting as his agent. The plaintiff is a seaman, unskilled in business methods, and I am satisfied he had not the slightest idea of the admission he was making and on which counsel for the defendant is relying.

I think the learned trial judge was well entitled to disregard this claimed admission made by Jensen. The learned judge had the advantage which this Court has not of seeing the witnesses and observing their demeanour—a very important consideration in a case of this character—and I do not feel that I would be warranted in taking any different view than that taken by the learned trial judge as to this evidence. Here we have the appellant placing in the hands of Harrison a "mercantile agent" the car in question with express directions to sell the same. Harrison exhibits it for sale in his sale rooms, the respondent observing it under such circumstances purchases it, and pays over the purchase price to Harrison. That in my opinion is the establishment of a complete sale in law of the car and it is not open to the appellant to now come in and attempt to say that the car is subject to the chattel mortgage although it be registered. The respondent acted in good faith throughout. Further, it is impossible for the appellant upon the facts of this case to say that Harrison had not the full right to sell the car; in truth, the car was placed in the hands of Harrison with express and direct orders to effect a sale of the car. I would refer to section 60 (1), (2), (3) and (4) of the Sale of Goods Act, Cap. 225, R.S.B.C. 1924, which reads as follows:

MCPHILLIPS, J.A.

> 60. (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: Provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.
>
> (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition which would have been valid if the consent had continued shall be valid notwithstanding the determination of the consent:

Provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined.

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

(4) For the purposes of this Act, the consent of the owner shall be presumed in the absence of evidence to the contrary.

In my opinion the learned trial judge was right in the conclusion to which he came and his judgment should be affirmed and the appeal dismissed.

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

MACDONALD, J.A.

Appeal dismissed.

Solicitors for appellant: *Tiffin & Alexander.*

Solicitors for respondent: *Buell, Lawrance & Co.*

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. *v.* MOUNT ROYAL ASSURANCE CO.

CAMERON LUMBER COMPANY LIMITED v. MOUNT ROYAL ASSURANCE COMPANY *ET AL.**

Insurance, fire—Lumber company—Fire—Fixed charges during suspension —Earnings in case of no fire—Liability subject to earnings covering fixed charges—Cost of production—Method of arriving at—Jury— Appeal.

Seven insurance policies provided that in case of fire causing a total or partial suspension of business, the insured should be indemnified for the loss of such fixed charges and expenses during the total or partial suspension of business to the extent only that such fixed charges and expenses would have been earned had no fire occurred. The policies provided for a *per diem* liability during total suspension, limited to the actual loss sustained, not exceeding one three-hundredths of the amount of the policy for each business day lost, due consideration to be given to the experience of the business before the fire and the probable experience thereafter, there being a fixed maximum *per diem* amount recoverable. As to cost of production, the plaintiff claimed that the fixed arbitrary value authorized by the Dominion Government for income tax, might be taken, the insurers claiming that the jury should take all the accounting factors into account to arrive at cost of production. The judge told the jury that it must find the cost of production in the way pointed out by the policies, but he later stated in his charge that it might accept the arbitrary figure. The jury adopted the arbitrary figure as the cost of production and returned a verdict for the plaintiff.

Held, on appeal, affirming the decision of MCDONALD, J. (MACDONALD, C.J.B.C. and MACDONALD, J.A. dissenting), that the appeal should be dismissed.

Per MACDONALD, C.J.B.C.: The learned judge should have told the jury that they had nothing to do with the arbitrary figure in which case a very different result might, and on the evidence, would have resulted had the arbitrary figure been disregarded.

MCPHILLIPS, J.A.: As to the right of the jury in taking an arbitrary figure of $15 per thousand as actual cost of production, this system and custom has been well proved in evidence and is accepted in the trade and by Government authorities and it is idle for insurance companies to advance any objection to what is universal custom in the trade. Moreover, even if it were possible to say that the answers of the jury are in their nature ineffective, the evidence itself is so complete and all one way that judgment was rightly entered for the plaintiff. Where all the facts are before the Court, as they are here, and upon the evidence only one possible verdict could reasonably be given, it is not a case for, nor is the Court bound to order a new trial, but judgment should be entered for the plaintiff notwithstanding any frailty in the verdict of the jury, and even against the verdict of the jury.

* Affirmed by the Judicial Committee of the Privy Council.

Per MACDONALD, J.A.: A basis of computation was taken by the jury disclosing earnings that did not exist and as there was no reasonable evidence to justify it in accepting this basis, and on the other hand, having regard to respondent's records and proper methods of accounting, it is evident that fixed charges and expenses would not have been partly earned during the suspension period and the appeal should be allowed.

APPEAL by defendants from the decision of MCDONALD, J. of the 17th of June, 1932, and the verdict of a jury in a consolidated action, the plaintiff company having sued seven insurance companies on insurance policies for fixed charges taken out in each of the companies, said actions having been consolidated by order of the 10th of March, 1932. On the 25th of February, 1931, the plaintiff's saw-mill, lath-mill, wharf and other buildings were burnt and the plaintiff claimed that the fixed charges and expenses which necessarily continued during the suspension of business aggregated $31,157 and of this sum the plaintiff company was entitled to $28,890 under the policies. The companies were liable under the policies for such fixed charges and expenses as must necessarily continue during a total or partial suspension of business to the extent only that such fixed charges and expenses would have been earned had no fire occurred. The defendants claim that the plaintiff would never have earned the moneys so claimed had no fire occurred. The jury answered questions as follows:

Statement

1. What time would have been required with the exercise of due diligence and dispatch to rebuild or replace the buildings and equipment destroyed? Two hundred and twenty one days.

2. (a) Would the company, had no fire occurred, have earned its fixed charges during the last ten months of 1931? No.

(b) If not wholly then to what extent if any, on an average monthly basis would such charges have been earned? One hundred and eleven dollars and sixty-seven cents per day.

3. In answering question 2 have you reached your conclusion by taking as your basis of computation the actual cost of production as set up by the defendant or have you taken the arbitrary figure of $15 per thousand? Fifteen dollars per thousand.

4. (a) In answering question 2 have you considered depreciation in plant as a part of such costs of production? Yes.

(b) If so, how much have you allowed on this account? Thirteen thousand one hundred and twenty dollars per annum.

The appeal was argued at Vancouver on the 18th, 19th and

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. v. MOUNT ROYAL ASSURANCE CO.

20th of October, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Alfred Bull, K.C. (*Alan Maclean,* with him), for appellants: We submit that they would not have earned the overhead had the fire not occurred. The evidence shews there would have been a loss of $778 during the intermission period. They took under lease another mill during the intermission and there was a loss of $51,900. There was no evidence to support the arbitrary valuation; they should have found the actual cost of production. There is only one possible verdict that could be reasonably arrived at and this Court has jurisdiction to dismiss the action, notwithstanding the verdict: see *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox* (1918), 1 K.B. 625. They must prove their case affirmatively.

Mayers, K.C., for respondent: A method of keeping accounts is not a question of law, and their evidence as to accounts was absolutely unreliable. In fact in the year 1930 we made a considerable profit. He repudiates the contract and he cannot rely on any subsidiary or subordinate term of the contract: see *Jureidini* v. *National British and Irish Millers Insurance Company, Limited* (1915), A.C. 499 at p. 505. The jury was not confused; they rejected the evidence of the other side.

Bull, in reply: There was not sufficient allowance for cost of production. The cost of logs alone was $12 per thousand and the cost of manufacture must be added.

Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: This was an action on an indemnity policy. The plaintiff's mill was destroyed by fire. The insurance had been taken out to cover the loss of profits (if any) which the plaintiff might suffer beyond what he would have suffered had the mill been operating.

In arriving at the amount, if any, which the defendants are entitled to under the policy, due consideration was required to be given to the experience of the business before the fire and the probable experience thereafter.

The case involved the determination of the cost of production of the logs and other assets dealt with and that cost of produc-

tion was to be ascertained having regard to the consideration aforesaid. It is quite clear to me that the profit or loss must depend to a great extent upon the cost of production and that the finding of this question was a necessary factor in the ascertainment of the sum, if any, for which the defendants were liable. The learned judge in his charge to the jury stressed this question of the cost of production and told the jury, and quite properly, I think, that they must find this cost in the way pointed out by the contract. During the trial evidence was given of a practice to take an arbitrary figure as the cost of production. The Canadian Government, it was said, authorized lumbermen, for income tax purposes, to adopt an arbitrary figure of $15 per thousand for this purpose, on the assumption that over a period of years the cost of production would approximately amount to that sum. This was heavily stressed by defendants and authorities of a similar practice in some other countries, not amounting to a general custom, not here applicable because of the contract itself, were cited during the trial. Question 2 of those submitted to the jury deals with the cost of production. After instructing them that such due consideration was to be given to the experience of the business before the fire and the probable experience thereafter the learned judge proceeded later in his charge to say:

MACDONALD, C.J.B.C.

> Now before we answer question 2, are we going to take into our consideration $15 per thousand or the cost of production as set up by the defendant? It seems to me that is the only fair and honest way that you can answer question 2.

I think he here advised them to find in accordance with the contract, but with respect, I think, he should have gone further and instructed them that they should not adopt any other mode of finding the cost of production.

The jury were in doubt as to how they should proceed on question 2, and having been recalled by the judge, he further instructed them by saying:

> What else is bothering you now?
>
> The Foreman: No. 2.
>
> THE COURT: Any answer there would be Yes or No.

And at page 387, after the verdict, the judge said to them:

> In answering question 2 have you reached your conclusion by taking as your basis of computation the actual costs of production as set up by the

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. v. MOUNT ROYAL ASSURANCE CO.

defendant or have you taken the arbitrary figure of $15 per thousand? Fifteen dollars per thousand.

In my opinion the learned judge ought to have pointed out what the contract required as he did earlier in distinct terms, and should have told the jury that they had no right to take any other method of computation, arbitrary or otherwise.

I understand that the jury by taking the proper method as pointed out by the contract might and probably would have arrived at a very different figure than $15 per thousand, while on the other hand they might have arrived at that figure, not because it had been adopted as a means of ascertaining the income tax but because it was the right amount as arrived at in accordance with the contract itself; but that apparently is not what the jury did, nor what they were in one part of the charge clearly instructed to do, and therefore they came to a conclusion which may be entirely wrong, and which, on the evidence of the defendants' expert who examined the accounts at great length on the basis of the contract, brings about a result which is entirely different. I think, therefore, there must be a new trial, the jury having been instructed in a way which apparently led them to believe that they could take the arbitrary figure or the other as they saw fit, rather than that provided by the terms of the contract.

MACDONALD, C.J.B.C.

If the charge be right then the jury misunderstood it and came to the wrong conclusion. Their verdict, therefore, cannot stand. I think the learned judge should have told them that they had nothing to do with the arbitrary figure, in which case a very different result might, and on the evidence, would have resulted had the arbitrary figure been disregarded.

I think, therefore, the judgment should be set aside and a new trial ordered.

MARTIN, J.A.
GALLIHER, J.A.

MARTIN and GALLIHER, JJ.A. concurred in dismissing the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the learned trial judge rightly entered judgment for the plaintiff (respondent) upon the findings of the special jury following a long trial extending over seven days. The action is one brought in the way of the enforcement of the provisions of fire-insurance policies issued

by seven companies—defendants in this action (appellants). There is a large volume of evidence and in my opinion it amply supports the findings of the jury and fully warranting the entry of judgment thereon. Ordinarily juries do not give reasons and where questions are asked are content to answer the questions. Here, however, the jury undertook to give some reasons for answering questions. I would think that the reasons might very well have been rejected; they were, however, received and being received by the learned trial judge were no doubt duly considered by him. The reasons would not appear to detract from the force of the answers as made to the respective questions. Upon this point of the jury giving reasons I would refer to what Lord Loreburn, L.C. said in *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326:

> When a finding of fact rests upon the result of oral evidence it is in its weight hardly distinguishable from the verdict of a jury, except that a jury gives no reasons.

A great deal has been said at this Bar as to the right of the jury in taking the arbitrary figure of $15 per thousand as being the actual costs of production. Now I would not look upon that as any formidable objection or objection at all. It might be said to be almost an incalculable matter. It would mean finding out the cost of each log and the lumber manufactured thereout. It is highly unreasonable considering the terms of the insurance policies and the nature of the fire loss to exact any such thing. In estimating the loss sustained the system and custom of arriving at costs of production has been well proved in the evidence and is that accepted in the trade and by the Government authorities. In passing I might remark that the insurance companies embarking on this class of insurance must be held to have a knowledge of that which is well understood in the trade, *i.e.*, lumbering business. It is idle for insurance companies to advance any objection to what is universal custom in the trade that they must know. Surely insurance companies would not be placing this class of insurance without knowledge of the conditions and the system and custom obtaining in lumbering operations and the manufacture of lumber. Upon this point in principle it occurs to me that what Lord Moulton said in *McHugh* v. *Union Bank of Canada* (1913), A.C. 299 at p. 309

MCPHILLIPS, J.A.

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. v. MOUNT ROYAL ASSURANCE CO.

well indicates the scope of judge and jury when assessing damages:

> The tribunal which has the duty of making such assessment, whether it be judge or jury, has often a difficult task, but it must do it as best it can, and unless the conclusions to which it comes from the evidence before it are clearly erroneous they should not be interfered with on appeal, inasmuch as the Courts of Appeal have not the advantage of seeing the witnesses—a matter which is of grave importance in drawing conclusions as to *quantum* of damage from the evidence that they give. Their Lordships cannot see anything to justify them in coming to the conclusion that Beck, J.'s assessment of the damages is erroneous, and they are therefore of opinion that it ought not to have been disturbed on appeal.

Giving every attention and consideration to the argument that was so ably advanced before this Court on the part of counsel for the defendants (appellants) that actual loss was not established by evidence, I consider that the evidence is ample and even were it possible to say that the answers of the jury are in their nature ineffective, with which I do not agree, the evidence itself is so complete and all one way that judgment was rightly entered for the plaintiff. In this connection I would refer to what Mr. Justice Duff said in *McPhee* v. *Esquimalt and Nanaimo Rway. Co.* (1913), 49 S.C.R. 43 at p. 53:

MCPHILLIPS, J.A.

> By the law of British Columbia, the Court of Appeal in that Province has jurisdiction to find upon a relevant question of fact (before it on appeal) in the absence of a finding by a jury or against such a finding where the evidence is of such a character that only one view can reasonably be taken of the effect of that evidence.
>
> The power given by O. 58, r. 4, "to draw inferences of fact . . . and to make such further or other order as the case may require," enables the Court of Appeal to give judgment for one of the parties in circumstances in which the Court of first instance would be powerless, as, for instance, where (there being some evidence for the jury) the only course open to the trial judge would be to give effect to the verdict; while, in the Court of Appeal, judgment might be given for the defendant if the Court is satisfied that it has all the evidence before it that could be obtained and no reasonable view of that evidence could justify a verdict for the plaintiff.
>
> This jurisdiction is one which, of course, ought to be, and, no doubt, always will be exercised both sparingly and cautiously: *Paquin* v. *Beauclerk* (1906), A.C. 148, at page 161; and *Skeate* v. *Slaters* [(1914)], 30 T.L.R. 290.

In later cases in England we find this question dealt with in this way: where all the facts are before the Court—and they are present here—and upon a study of the evidence only one possible verdict thereon could be reasonably given. It is not a case for, nor is the Court bound to order a new trial but judg-

ment should be entered for the plaintiff notwithstanding any frailty in the verdict of the jury and even against the finding of the jury (*Winterbotham, Gurney & Co.* v. *Sibthorp and Cox* (1918), 1 K.B. 625; *Banbury* v. *Bank of Montreal* (1918), A.C. 626; *per* Lord Haldane in *Everett* v. *Griffiths* (1921), 1 A.C. 631 at p. 656). I would refer to what Swinfen Eady, L.J. said in *Winterbotham, Gurney & Co.* v. *Sibthorp and Cox, supra,* at p. 630:

> Assuming the verdict was utterly unreasonable having regard to the evidence, such as no reasonable men could possibly have given, what is the proper course for this Court to adopt? His answer was to grant a new trial. Then suppose the same process continued, as it must continue, it must go on, if necessary, *ad infinitum*, because all the Court can do is to direct a new trial and not to draw any inference of fact. In my opinion that is not the law, and although the Court ought to be exceedingly careful in interfering with the verdict of a jury, and still more so in giving a decision contrary to the finding of a jury, yet where it is manifest that all the facts have been ascertained, and there is only one verdict that can be reasonably given, in my opinion it is the duty of this Court to draw the inference and to decide according to the rights of the parties, and the Court is not confined to sending the case for a new trial.

MCPHILLIPS, J.A.

In my opinion the finding of the jury in the present case and the judgment of the learned trial judge entered upon that finding was right. Here the verdict of the jury was for the plaintiff and in my opinion rightly so, and the learned trial judge rightly entered judgment for the plaintiff thereon and that judgment I would uphold, and I would dismiss the appeal.

MACDONALD, J.A.: A jury awarded respondent $24,679.07 under fire-insurance policies covering loss by a fire on February 25th, 1931, that destroyed its lumber-manufacturing plant, machinery, sawmill, lath-mill, wharf and other buildings. The condition in each policy issued by appellants was that if the plant insured should be destroyed or damaged by fire "necessitating a total or partial suspension of business" respondent should be indemnified for the actual loss sustained (commencing with date of fire) consisting of

MACDONALD, J.A.

> such fixed charges and expenses as must necessarily continue during a total or partial suspension of business to the extent only that such fixed charges and expenses would have been earned had no fire occurred.

The policies provided for a *per diem* liability during total suspension limited to the actual loss sustained not exceeding one

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. *v.* MOUNT ROYAL ASSURANCE CO.

three-hundredths of the amount of the policy for each business day lost due consideration to be given to the experience of the business before the fire and the probable experience thereafter.

The maximum amount that might be recovered was $115.56 a day.

The fixed charges and expenses during suspension of operations amounted to $31,157.05. The time required to replace the plant was fixed by the jury at 221 days and this finding is not questioned. The jury also found that while respondent would not have earned all its fixed charges for ten months after the fire (the time of suspension—really 221 days) it would have earned them in part, *viz.*, at the rate of $111.67 per day. In so finding the jury took into account as part of the cost of production depreciation at the rate of $13,120 per year. It followed that respondent was entitled to recover at the rate of $111.67 a day for 221 days or $24,679.07 in all.

MACDONALD, J.A.

In finding that respondent would have earned its fixed charges to the extent referred to it was necessary to ascertain the cost of production as an element in profit or loss. Rival views were presented to the jury as to the method of ascertaining these costs. Appellants' submission was that the jury should find the real cost of production by taking into account stock on hand at the beginning of an accounting period; the inventory of stock at the close of that period; purchases, wages, outlay, depreciation (without exhausting the list) estimating by ordinary and approved book-keeping methods the profit or loss for that period. Respondent submitted that a fixed arbitrary value of $15 per thousand might be placed on stock on hand consisting of lumber, wood products, etc., *i.e.*, the stock-in-trade at the opening of the accounting period and the same sum at the end of the period so long as $15 per M. was not more than the market price. By this latter method it was urged the profit or loss could be ascertained; at all events with enough accuracy to answer reasonable requirements whether applied over a period of years or to the short period (221 days) in question in this action.

The jury accepted the respondent's method of computation. If right in doing so the verdict should not be disturbed; if not, the action should be dismissed because using the other method

and taking figures disclosed by respondent's books it fell far short of earning any part of its fixed charges and expenses.

The burden was on respondent to shew that it would have earned its overhead wholly or in part during the suspension period if the fire had not occurred having regard to the experience of the business before the fire and the probable experience thereafter.

In discharging that onus it cannot compel appellants to accept a method of computation not provided in the contract although it may be used by many lumber companies in obtaining information for various purposes unless by adopting it results are reasonably accurate. Amounts dependent upon intricate computations can seldom be estimated with scientific accuracy. If therefore this method shews approximate profits and losses for a short period no complaint should be made.

Respondent carried on operations at another mill—the Wilfert mill—during the period of suspension and the probable results likely to follow at the main plant had it continued to operate were tested by their experience at this mill. As it was a totally different operation certain allowances had to be made to shew results fairly comparable with operations at the main plant. These allowances for extra costs and loss of certain sales of power and by-products were duly estimated and accepted by appellants. After doing so respondent submitted that in the ten months' period it would have earned at the main plant a profit of $3,255.29 had the fire not occurred.

In arriving at this profit the stock on hand on March 1st, 1931, immediately after the fire, was valued at $234,549.34 and ten months later, *viz.*, December 31st, 1931, at $157,105, placing it at a cost value of $15 per thousand. That figure respondent's accountant testified bore "no particular relation to the cost of production." He gave this evidence:

In fact that is an arbitrary figure which it has been your custom to use? That is right.

A very conservative method when you are informing your shareholders of the position of affairs? Yes, $15 is a very conservative price.

But when you calculate actual profit or loss it would not be proper to take an arbitrary figure would it? To take the arbitrary value?

I say when you are trying to ascertain actual profit or loss it would not be proper to take the arbitrary value of $15? No.

He later qualifies this evidence but admitted that their

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. *v.* MOUNT ROYAL ASSURANCE CO.

records shewed that the cost of manufacture, including logs at this time, was more than $15 per M. *viz.,* $20.63. This sum would vary from month to month. The cost of manufacturing for February, 1931, was $19.01 per M. and the average for November and December, 1930, and January and February, 1931, $20.30. The profit referred to, *viz.,* $3,255.29, was obtained by taking $15 as the cost of production without regard to the actual costs disclosed by respondent's books. If that is not a proper method the inventory of stock on hand at the beginning and end of the period referred to should be substantially increased in value.

Respondent justified its method of computation on the following grounds:

They said it was impossible to estimate the actual cost of production of stock in the yard at any particular time; that lumber may be in stock for several years and that it accumulates during the year; (it appreciates in value the longer it is stored); if manufactured it may be stored for future orders; it consists of lumber of different dimensions differing in size and quality;

MACDONALD, J.A.

it is not like goods on a merchant's shelves and it is impossible to estimate separate costs; about 25 per cent. of it would be lumber, part of it purchased to supplement their own production, the balance or about 80 per cent. would be shiplap timbers, cross-arms, etc. (all these products, however, are "sold by the thousand feet primarily: even cross-arms:"), different classes of articles are manufactured at different costs, the smaller items costing more, the larger less: cost of production of lumber varies from $6 to $40; some operations are cheap, others more expensive. Hence it was impossible to put any cost production price on specific items in stock. Yet their books shew the average cost of production from month to month from the total stock, and also, taking March 1st, 1931, at $19, going back over a considerable period higher costs are shewn. This attempt to shew accounting difficulties does not of course demonstrate that in taking an arbitrary valuation results approximately correct will be shewn. That it is not an easy task may be conceded: not however that it is impossible. One can visualize a small operation with all the factors referred to included and no special

book-keeping difficulty would be encountered. The same methods and principles would be applied on a larger scale. Modern accountancy I hope is quite equal to the task. Respondent knew at the time of the fire what its logs cost, the cost of labour and the general costs entering into manufacture of the products. It would naturally assume that the business would go along after the fire (had it not occurred) very much as it did before with any variation that might arise from a drop in labour costs and a drop in log costs. The reductions in the labour scale were known. It could estimate the cost of any new material required by the condition of the supply market. It could also assume sales of a corresponding amount. Any exceptional facts would be taken into consideration.

Respondent's sales manager testified:

> Is it practically possible, and does anyone do it, to keep a system of costs of accounting on each piece or pile of lumber? I do not think anybody does. I think it would be a very expensive procedure and would be probably prohibitive.

He uses the word "probably": also "very expensive." I think that feature is exaggerated but if it is necessary to go to some expense to prove a profit or loss it must be undertaken. A wrong method cannot be accepted because the right method may be expensive.

MACDONALD, J.A.

This system of accounting, although in use in the lumber industry (and doubtless fairly satisfactory when taken over a period of years) has never been accepted, as far as I know, to find profit or loss for a limited period. Respondent's sales manager appeared to have that in mind. He said:

> If you started out with an inventory for $20 for the year, you start off in a year not knowing what conditions will be like during the year, the prices would probably go down under $15 and you would take quite a loss. If the selling average went up to $30 you take quite a profit but if you strike an average for a period of years, the average is accepted by all accounting systems and the Government accountant.

We are not concerned with a period of years. It is the experience of the business before the fire (for a reasonable time) and the probable experience thereafter that governs. I cannot agree, that part of that "experience" must be taken to include respondent's method of book-keeping. It is for loss sustained in a limited period that indemnity is provided for and it is not possible to estimate profit and loss aright by using a method

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. *v.* MOUNT ROYAL ASSURANCE CO.

MACDONALD, J.A.

applicable to a long period unless it is shewn to be equally applicable to the shorter term. An independent accountant called by respondent in effect agreed with this view. As this statement might be regarded as subject to qualification I refer to his evidence. After testifying in chief that lumber companies placed a fixed value on inventories at the beginning and end of a period he said on cross-examination:

Did you ever make up a statement for the bank, of the company? Yes.

Well, you know as a matter of fact, Mr. Taylor, do you not, that if you were obtaining credit from a bank for your company, that the bank would not be content with inventories fixed at an arbitrary value? No.

Isn't that correct? That is correct.

They would ask to have those inventories fixed at the cost of production, or the market price, whichever was lower? Yes.

And the purpose of that is in order that the bank can ascertain whether the company was cutting at a profit or not? Yes—not necessarily, if it was running at a profit or not, but that information as a rule the bank requires.

For information as to the true position of the company? It might be for information as to the true value of the security.

Exactly. And in point of fact you could not tell whether the company was making money or losing money over a given period if you fixed your inventories at an arbitrary value? I should say, yes, that the fixed value is better than a fluctuating value.

Surely that is not right, if you are dealing with a limited period of time. I see what you mean over a period of years. It makes no difference to the shareholders. But if an outsider is interested and wants to know whether you are making money over a six months' period, an arbitrary valuation would not be of any assistance, would it? Well, as far as I know, the arbitrary valuation would be taken—would be usually taken then.

But surely, you are an accountant, you can follow what I mean? Yes.

You could not ascertain your profit over a six months' period unless you knew what your stock-in-trade cost you to produce? You would need of course to take a different valuation both at the beginning and at the end of the period.

Yes; you would take your opening valuation at the cost of production, and your closing valuation at the cost of production or the market value, whichever is lower? Yes.

And in that way you would get the true position? Possibly.

These latter questions are directed to methods as applied to a six months' period.

During the year 1930 respondent's accountant made monthly reports of operations shewing costs of production; average sale prices and profit or loss and these accounts were audited by a chartered accountant. It shews a profit earned during the first seven months of $18,279 but in the last five months that profit

was lost and in addition about $7,000 more or a total loss of $25,461 in the last five months of that year. The fire occurred two months later. The vice-president admitted that the statement disclosed this result but endeavoured to shew that it was not accurate because during that year respondent purchased a large quantity of lumber at an average cost of $31.63 or $32 per M. plus the cost of handling and this went into their stock at the arbitrary value of $15 thus explaining a book loss. Some of it was sold and the balance carried forward in the inventory to 1st March, 1931, at $15. This led to the following evidence:

So that illustrates the point that I have been trying to demonstrate in the last two days that the $15 valuation bears no relation whatever to the actual cost of production? Certainly it doesn't.

There would be no justification for placing this particular lumber in the inventory at $15 at any time. It would be an under-valuation. "I would say it is incorrect from a book-keeping standpoint." Mr. Cameron added: It is incorrect from any standpoint except that over a long period with an arbitrary price the over and under valuations may be reasonably self-corrective. In estimating the loss of over $25,000 referred to overhead charges in that period amounted to $15,000 and no allowance was made for depreciation. That, if provided for, would add to the loss. The explanation was given that the plant was over-depreciated some years before but in any event the proper proportion should be assigned to this period. No attempt was made to shew to what extent, if any, this loss should be reduced by the special facts mentioned. I cannot believe either that when accounts are audited by chartered accountants the intention is to give the employer valueless information in respect to book profits or losses regardless of the true facts.

Mr. Grogan's evidence (a chartered accountant—he prepared the claim on which the suit was based) should be regarded as the best available for respondent. All witnesses except Taylor were employed by respondent in some capacity. He agreed that the cost of production as shewn by respondent's books was an average of $18.99 for January and February, 1931, and $20.34 for the four months ending February 18th, 1931. He qualified it by saying it contained items of expense in connection with lumber purchased thus not confined to the cost of lumber manufactured. Taking this into consideration he said:

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. *v.* MOUNT ROYAL ASSURANCE CO.

I presume it would be somewhere between $15 and $19 but it is extremely hard to answer definitely.

He explains this by saying:

if it were a retail store where you had single articles purchase price and cost price could be identified it would not present the same difficulty: it is not possible to identify in the year the cost of any lumber that is there.

Yet they did estimate it with enough accuracy to arrive at an average price placing it in the books in one month at $19 and at higher amounts in preceding months. He said the lumber in the yard when the inventory was taken may not have been the lumber that was manufactured at the prices mentioned. But he admits that if any of that stock of lumber found in the yard on March 1st, 1931, was there prior to this four-month period when the average cost was $20.34 it would cost more than that to produce it: as we go back the cost of production was higher. This computation must be based on experience before the fire and probable experience thereafter and at no time before the fire could the cost be as low as $15 per M.

MACDONALD, J.A.

If the opening and closing inventory for ten months following the fire is taken at cost of production or market price, whichever is lower and taking as a guide the operations at the Wilfert mill as a clue to probable results at the main plant had it continued to operate; also making the allowances already referred to respondent would fall far short of earning its fixed charges and expenses. I refer to Exhibit 17 and the evidence of Grogan in respect thereto shewing that respondent's success depends solely on adherence to this arbitrary valuation. He was taken over the figures in this exhibit and comparing them with his own agreed that apart from inventory valuations they were alike except that he (wrongly) allowed no sum for depreciation. Another difference was an amount in respect to sales, insurance and interest. This statement shews a loss of $66,293.63 after giving credit for excessive cost of operating the Wilfert mill and sale of power and by-products from the old plant had it been running. Following this checking of statements Mr. Grogan gave this evidence:

In order to ascertain the true position you must take the inventory at cost of production or market price, whichever is lower? Yes, provided—if the market price is lower than cost.

I put it to you as a general principle, according to proper accounting, that it is the only fair method. Do you agree or not? Provided your sell-

ing price—provided the actual selling price—if your selling price is lower than your cost you must do it to be conservative.

Whichever is the lower—you agree? Yes.

He then qualifies this admission by saying in respect to the $15 valuation:

I think it does shew the true position of profit and loss; it is a picture you try to draw to shew the state of the business at that time.

There is not much certainty in that statement. Of course two methods leading to results so vastly different cannot both be right.

If a five-month period is considered after the fire, taking the opening inventory value at $20 (the average for the four preceding months) and the closing inventory at $17, respondent would fall short of earning its overhead by $5,000 without regard to depreciation. An attempt was made to shew that this closing cost—$17—was just as arbitrary as the $15 valuation. It was pointed out that where a closing inventory valuation of $17 was given by appellants' accountant part of the stock so valued would be subject to a further cost of about $3 in manufacturing and sold for $47.70; other small parts too with costs added would sell for $68.53. It is apparent however that while it is true part of the stock might be subject to further costs the average cost may be obtained with reasonable accuracy where the inventories shew—as they do—the total stock in the yard with the percentages of upper and lower grades over the period under review.

The method of computation is a question of fact. If respondent's method works reasonably well it may be accepted. It has been challenged and the burden is on the respondent. Have we therefore any reasonable evidence to shew that, as applied to a limited period, *viz.*, 221 days, it discloses with reasonable accuracy the profit or loss? One would expect that independent chartered accountants would have been called. Their absence is significant. Taylor's evidence is not directed to this all-important point. He in effect disproves the theory when applied to a limited period. The evidence of the accountant Campbell is not directed to a limited period. Miller is not an accountant (secretary-treasurer and sales manager). He never studied accountancy in the higher branches and spoke as a salesman. His statement therefore that "it is the only way of determining

COURT OF APPEAL

1933

Jan. 10.

CAMERON LUMBER CO. v. MOUNT ROYAL ASSURANCE CO.

a company's position over a period of years, or even a limited time" is of little value. Yet his evidence, read as a whole, does not support the view that if applied to a limited time a reasonably accurate result would be obtained. Grogan too refers to a period of years:

Mayers: I want you to be quite clear on this. We have put forward our estimate on the basis of valuing inventories at a consistent price throughout. We have adopted $15. Do you, or do you not justify that method of putting forward our calculation? I do.

THE COURT: Would you have got the same result if you had made it $8 —you would have got the same result? Over a long period of years, because the cost of production each year is absorbed into your profit and loss account.

No other witnesses testified for respondent on this specific point and unless we can find in the cross-examination of Barrett-Leonard and Scollard, appellants' witnesses, evidence justifying the jury in accepting this basis the case falls to the ground. Barrett-Leonard assented to a passage read to him from "The Canadian Chartered Accountant" favouring a fixed unit price but it was based on a price fixed "year in and year out." This quoted extract also shewed—as respondent contended—and it is true—that the valuation of lumber inventories for accounting purposes is difficult owing to differences in grades, species, dimensions, etc. There is, however, a great difference between a difficult problem and one impossible of performance.

MACDONALD, J.A.

A basis of computation therefore was taken by the jury disclosing earnings that did not exist and as there was no reasonable evidence to justify it in accepting that basis and as on the other hand, having regard to respondent's records and proper methods of accounting it is evident that fixed charges and expenses were not partly earned I would allow the appeal and dismiss the action.

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

Solicitors for appellants: *Walsh, Bull, Housser & Tupper.*
Solicitors for respondent: *Mayers, Locke, Lane & Johannson.*

HAINES AND HAINES v. WILLIAMS.

WILLIAMS AND WILLIAMS v. HAINES AND HAINES.

FISHER, J.

1933

Feb. 27.

HAINES v. WILLIAMS.

WILLIAMS v. HAINES

Negligence — Damages — Motor-vehicles—Collision—Intersection—Right of way—Stop sign—Apportionment of fault—Liability of owner—Families' Compensation Act—Husband suing for death of wife—Adult son —Rights of—Contributory Negligence Act—B.C. Stats. 1925, Cap. 8— R.S.B.C. 1924, Cap. 85.

H., when driving his car stopped at the "stop sign" before entering an intersection, and saw W. approaching in his car about 200 feet to the right. He then proceeded to cross the intersection, going at about 5 to 6 miles an hour. W., who was travelling at from 25 to 30 miles an hour, ran into H. slightly back of the centre of his car.

Held, that the collision occurred in consequence of the combined negligence of the two drivers, the driver at the left in not keeping a proper look-out while crossing the intersection, and the driver at the right in not respecting the right of way which the other had established, and in not keeping a proper look-out. In view of the finding that the driver at the left had established the right to cross the intersection ahead of the other car, the degrees of fault should be apportioned as two-thirds on the part of the driver at the right and one-third on the part of the driver at the left.

A husband suing under the Families' Compensation Act for the death of his wife shews some pecuniary loss in consequence by shewing loss of services rendered gratuitously by the deceased, there being reasonable prospect of their being rendered freely for a time at least, had not her death been caused by the accident.

A claim under said Act on behalf of an adult son working at home without wages was disallowed.

A plaintiff who has been held responsible for the contributory negligence of another (*i.e.*, the driver of a car owned by the plaintiff) cannot recover on behalf of himself under the Families' Compensation Act without being subject to an apportionment of liability for damages under the Contributory Negligence Act.

Statement

TWO actions resulting from a collision between motor-cars at an intersection were consolidated. In one action the plaintiffs were Frank Archibald Haines and Sylvia Gladys Haines, an infant, by Frank Archibald Haines, her next friend and the defendant was Luther Williams. The other action was between L. Williams, husband suing under the Families' Compensation Act and said L. Williams, plaintiffs, and Hilda Haines and George A. Haines, an infant, defendants, and Joseph Andrew

FISHER, J.

1933

Feb. 27.

Williams, third party. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 26th of February, 1933.

HAINES
v.
WILLIAMS.

Wood, K.C., and *H. I. Bird*, for Haines.
Collins, and *Farrand*, for Williams.

WILLIAMS
v.
HAINES

27th February, 1933.

FISHER, J.: During the argument in this matter reference was made to an unreported decision of my own in *Whittick* v. *Clements* (August 26th, 1932) and I would like to begin by setting out a portion of my reasons for judgment in such case as follows:

> After hearing the evidence of Hamilton at the trial, however, I am satisfied and find that after he reached the property line he looked to his right and saw the defendant's car at such a distance that he calculated he had time to cross, and proceeded to do so. The question arises whether Hamilton was acting with reasonable care in entering upon the crossing of the intersection under the circumstances, and I think it must be admitted that he would not satisfy the onus of proving that simply by establishing the fact that his car was within the intersection before the defendant's car to the right entered it. (See the recent decision of the Saskatchewan Court of Appeal in *Kennedy Lumber Co., Ltd.* v. *Porter* (1932), 1 W.W.R. 230). He must shew that he had reached the intersecting street substantially ahead of the one having the right of way and that the way appeared to be clear, or in other words he must shew, as suggested by MARTIN, J.A. in his judgment in the passage above set out, that he had made a reasonable as well as a substantial prior entry upon the crossing of the intersection, that is, as I understand it, had exercised reasonable care in entering upon as well as continuing the crossing of the intersection, which may be said to be always a possible danger zone.

Judgment

After hearing argument from counsel in the present case I still think that in the *Whittick* case, *supra*, I correctly stated where the onus of proof lies in such cases and what the driver to the left must shew in order to satisfy such onus. Moreover I do not think such statement is in conflict with *Hall* v. *Tinck* 45 B.C. 540; (1932), 3 W.W.R. 104, or *Kennedy Lumber Co., Ltd.* v. *Porter, supra*, in which latter case, at p. 232, the Court said in part as follows:

> . . . and when such an accident occurs it seems to me that the first question to be answered is why the driver to the left did not give way and keep out of the danger zone. He may, of course, be able to shew that, having regard to the distance of the vehicles from the point of possible collision and to the conduct of the other vehicle, and perhaps also to other circumstances, the statutory right of way did not arise.

As both counsel have very properly pointed out, the circumstances of the particular case before the Court must be closely examined. In the present case the two drivers were young men and I have to say that each of them impressed me as honestly trying to recall the actual circumstances and give his evidence accordingly. The driver Haines, though he said at one place in his evidence, that he saw the Williams car the second time about a block away, elsewhere frankly says that he believes he was right in the answer he gave at the inquest which was to the effect that, when he saw it the second time, it was at a distance of about 20 feet away, *i.e.*, right before the impact. It is common ground that Haines stopped at the stop sign but it is contended on behalf of Williams that Haines did not come to a full stop as required by the by-law and reference is made to what Judge Barron says in his work on Canadian Law of Motor Vehicles, p. 444, reading as follows:

"Full stop" as used in this section means more than "ceasing to go forward." A person does not comply with the statute who stops for a fraction of time, and then proceeds. The words mean that the driver must stop, and then look, and then not proceed until he has ascertained that there are no vehicles approaching on the "through highway" from the right or left which he would impede in their course, or with which he would in any way interfere.

Judgment

With all respect, I have to say that I am not prepared at present to accept without qualification the above definition of the expression "full stop," which makes it mean more than "stop and look." I think that a driver, who has ceased to go forward long enough for him to make, and has made, the necessary observations as to all the then existing relevant circumstances, on the "through highway" and elsewhere around him, has come to a "full stop" according to the requirements of the by-law, which still leaves however the question, as to his right to proceed, to be determined according to the then existing circumstances. I am satisfied that Haines stopped long enough to make, and then also did make, the necessary observations as to the existing circumstances as aforesaid. I therefore find as a fact that Haines came to a "full stop" at the "stop" sign. I also find that when he looked to the right he saw the Williams car at such a distance that he calculated he had time to cross and later proceeded to do so. I have therefore now to consider

FISHER, J.

1933

Feb. 27.

HAINES v. WILLIAMS.

WILLIAMS v. HAINES

Judgment

whether or not Haines has in the manner already indicated satisfied the onus which is on him of proving that, though he was the driver to the left, he was acting with reasonable care under the circumstances in entering upon the crossing of the intersection and making use of his right of way instead of giving way and keeping out of the danger zone.

I accept the evidence of the witness Morris as to the position of the cars after the impact. I find that at the time Haines moved forward from the stop sign the front of his car was about 47 feet from the point of impact and that at the moment of impact the whole of his car was almost safely out of the danger zone. As to where the Williams car was at the time the Haines car moved forward there has been considerable argument. I have direct evidence from the two witnesses Rank and Wilson as to where the Williams car was at the time the Haines car moved forward. Rank says that it was at the most 200 feet from the button in the centre of Cambie Street. I do not think I would find that there is very much difference between this and what Wilson says if I considered only their estimates of the distance in number of feet but Wilson also says that he fixes the point where the Williams car was as in the neighbourhood of the second telegraph pole as shewn on Exhibit 1 which would mean that such point was considerably further west than Rank puts it. Wilson impressed me as an independent and competent witness and I would give considerable weight to his evidence. Wilson however says that he is not able to say whether Williams was east or west of the said telegraph pole at the time so that it is evident that he is only locating the point approximately in his reference to it. The average speed of the cars however in approaching the point of impact is another factor that should assist in determining the point. The Haines car was crossing the intersection so slowly that Wilson says it nearly stopped and Williams seems to complain of this. I think it is or must be admitted that the average speed of the Haines car was not more than five to six miles an hour and, considering the evidence as to the speed of the Williams car and the force of the impact, I find the Williams car was travelling at least 25 miles an hour. According to the evidence the Haines car was struck about the centre but nearer to the rear and was 16 feet long. It must have

travelled therefore at least 55 feet and the Williams car 220 feet. On the whole evidence I find that the Williams car was at least that far away from the point of impact when the Haines car started out from the stop sign. As to the distance of each car from the danger zone or nearest point of possible impact the nature of the intersection is so peculiar that there might be some slight difference of opinion but the Williams car would be at least 190 feet from such danger zone whilst the Haines car would enter it after going less than 35 feet and the intersecting street was not a very wide one. Under such circumstances I think that Williams should have permitted Haines to pass on before him and I think it must be held that the way would appear to be clear to a driver looking to the right immediately before he started and so I do not think that it can be contended that Haines did not act reasonably or make a reasonable as well as a substantial prior entry upon the crossing of the intersection even though, having stopped and looked to the right, he did not look again before proceeding to cross. It must be remembered that he also had to look for traffic from other directions. I am not ignoring the obvious fact that the Williams car moved a certain distance while the Haines car was at a standstill at the stop sign, but the relative distances I have given above are those at the time the Haines car started out from the stop sign and if, under such circumstances, the driver in the servient position, who has come to a full stop in the manner aforesaid and is then ready to proceed, cannot move out on to a through street then I do not see how in the case of some through streets he ever would get on them. In this connection reference might be made to what was said in *Hanley* v. *Hayes* (1924), 55 O.L.R. 361, at pp. 366-7:

Judgment

> If a traveller holding the servient position comes to a crossing and finds no one approaching the crossing on the cross-street within such a distance as to indicate danger of interference or collision, he is under no obligation to stop or to wait, but may proceed to use such crossing as a matter of right.

See also decision of MACDONALD, C.J.B.C. in *Lloyd* v. *Hanafin,* 43 B.C. 401 at p. 402; (1931), 1 W.W.R. 415, where he says:

> The vehicle coming from the right has by statute or by-law the right of way, but where the other vehicle has reached the intersecting street sub-

FISHER, J.

1933

Feb. 27.

HAINES v. WILLIAMS.

WILLIAMS v. HAINES

stantially ahead of the one having the right of way he is not obliged to wait upon the other if the way appears to be clear.

Assuming then that Haines had fulfilled the requirements of the by-law by coming to a full stop, as I have found, and assuming that he had, as I also find, displaced the otherwise existing right of way of Williams by having made a reasonable as well as a substantial prior entry upon the crossing of the intersection, I do not think that this disposes of the issue entirely in favour of Haines. As was suggested with regard to the plaintiff, in *Downey* v. *Hislop,* 65 O.L.R. 548; (1930), 4 D.L.R. 578 at p. 581, so I think it may be said here that Haines, after coming to a full stop and then rightfully entering upon and securing a place in the line of traffic in a "through" street, was bound to exercise due care not to injure another at the intersection. I am firmly of opinion that one must not only exercise reasonable care, as I hold Haines did in entering, but also in continuing, upon the crossing of the intersection. See *Lloyd* v. *Hanafin, supra,* where, at p. 405 MACDONALD, J.A. says in part as follows:

> Appellant had the right to cross the intersection ahead of respondent's car but was obliged to exercise due care in doing so.

Judgment

Now in the present case I think it is clear from the evidence of Haines himself that while crossing the intersection he paid no attention to the Williams car approaching from his right though he himself was crossing very slowly and the Williams car was going at 25 to 30 miles an hour when he had last seen it, which was, as I have pointed out, when he stopped. Surely under such circumstances, a driver, though entitled to enter upon the crossing of the intersection, should keep an alert look-out to his right as well as elsewhere so as to be able at least to try to prevent or mitigate an accident by coming to a stop or speeding up in case the other driver continues to come on without stopping or slowing down sufficiently as there is always the possibility of one driver misjudging the rate of speed of another. I think Haines was negligent in not keeping a proper look-out while crossing the intersection and that such negligence contributed to the accident. On the other hand Williams was negligent with respect to look-out as well as right of way. According to his own evidence he was at least 210 feet away from the intersection or possible danger zone when he saw

Haines reach the intersecting street. I am satisfied he was further away, as, according to my finding, he was nearly that when Haines started out, and should reasonably have anticipated Haines attempting to cross. Nevertheless Williams says he immediately "put him out of the picture," continued on his course at the rate of at least 25 miles an hour and never looked for or saw the Haines car again till he was within 20 feet of it though it must have been in full view of him and practically in front of him from the time it started. I think under the circumstances that Williams was keeping a poor look-out and that such negligence contributed to the accident. I cannot find the driver of either car guilty of ultimate negligence and in this connection would refer to my own resons for judgment in *Chambers* v. *Sampson,* 44 B.C. 134; (1931), 2 W.W.R. 251, and the cases there referred to at pp. 137-8.

Judgment

My conclusion on the whole matter is that the collision occurred in consequence of the combined negligence of the two drivers as aforesaid and I come now to the question of the degrees of fault. I have already indicated in what respect each was negligent and, in view of my finding that Haines had the right to cross the intersection ahead of the Williams car, I apportion the liability or degrees of fault as two-thirds on the part of the driver Williams and one-third on the part of the driver Haines.

27th February, 1933.

FISHER, J.: With respect to the liability of the defendant Luther Williams, who is the sole defendant in the action brought by the plaintiffs, Frank A. Haines and Sylvia Gladys Haines, I find that his son, Joseph A. Williams, 23 years old, was at the time of the accident driving the father's car while employed on his father's business and that the said Luther Williams is civilly liable under the circumstances for the damages sustained through the negligence of his said son.

Judgment

With respect to the claim of the plaintiff, Frank A. Haines, I find that he was not a co-owner of the car and that he had not entrusted the car to his minor son, George A. Haines, or exercised any control over it while it was being driven by the son at the time the accident happened. In my opinion, no negligence can be imputed to the said Frank A. Haines and I would assess

FISHER, J.

1933

Feb. 27.

HAINES v. WILLIAMS.

WILLIAMS v. HAINES

his general damages at $500 and his special damages at $148, consisting of the items of $13, $15, $90 (for doctor's services), $5 and $25 as set out in paragraph 7 of the statement of claim.

With respect to the claim of the infant plaintiff, Sylvia Gladys Haines, I find that she was not guilty of any negligence and I would assess her general damages at $750. In this connection reference might be made to *Price* v. *Fraser Valley Milk Producers Association,* 45 B.C. 285 at p. 290; (1932), 2 W.W.R. 65, at p. 67, where MACDONALD, C.J.B.C. says:

> 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.

There will therefore be judgment in favour of the said plaintiff Frank A. Haines and Sylvia Gladys Haines for $648 and $750 respectively with costs against the defendant Luther Williams without any deduction.

I now come to deal with the claims of the said Luther Williams in the action against Hilda Haines and the said George A. Haines. Under the circumstances I hold that Hilda Haines is civilly liable along with the driver George A. Haines for the damages sustained through the negligence of the said driver. I pause here however to state that I find the said Hilda Haines suffered damages in the sum of $300 for repairs to her motor-car and would be entitled to same on her counterclaim against Luther Williams and Joseph Andrew Williams with respect to such, subject to apportionment in accordance with the degrees of fault as already found.

Judgment

With respect to the claim of Luther Williams for damages for the death of his wife, the plaintiff must shew some pecuniary loss in consequence of such, which I hold he has done, on behalf of himself, by shewing loss of the pecuniary value of services rendered gratuitously by the deceased, as there was a reasonable prospect of their being rendered freely for a while at least in the future but for her death by reason of the accident in question herein. See *Berry* v. *Humm & Co.* (1915), 1 K.B. 627; 84 L.J., K.B. 918. I find the condition of the wife's health was such however that the services in order to continue would have had to be limited to comparatively light work and that her expectation of life, at the age of 66, should not be placed at more than five or six years. I cannot allow compensation for

wounded feelings and I think I am doing full justice to the claim of the husband on his own behalf so far as the damages he has suffered are recoverable at law, when I allow him, as I do, the sum of $1,000. I also allow him the sums of $110.40 and $181.40 as claimed in paragraphs 7 and 9 respectively.

With respect to the claim of Luther Williams on behalf of his son, Joseph A. Williams, I have to say that I think it would be extending the principle of the *Berry* case, *supra,* too far if I were to hold that it applied so as to enable damages to be recovered on behalf of a son who, as here, was about 23 years of age, might leave home at any time, and was really while working at home without wages giving some return to his parents for any services rendered him by the deceased. I would therefore disallow any claim on his behalf. Reference has been made by counsel to the case of *Littley* v. *Brooks and Canadian National Ry. Co.* (1932), S.C.R. 462, shewing that, where the deceased has been guilty of contributory negligence and though his degree of fault has much exceeded that of defendant, The Contributory Negligence Act, R.S.O. 1927, Cap. 103, is applicable to enable the action to be maintained and that it is also applicable for the purpose of providing for apportionment of the liability for damages. In the present case I cannot hold that the deceased was herself guilty of any negligence or that she can be held responsible for the contributory negligence of the driver of the car in which she was. See *Littley* case, *supra,* at p. 479, where Rinfret, J. says:

> Another consequence of the application of the Contributory Negligence Act is that it is necessary to have a separate finding of the damages suffered through the death of each of the four victims of the accident, for it might well be that all may not be held responsible for the driver's contributory negligence.

I have to add however that in my opinion Luther Williams, though suing under the Families' Compensation Act, R.S.B.C. 1924, Cap. 85, cannot recover on behalf of himself without being subject to the apportionment of the liability for damages as provided for in the Contributory Negligence Act, 1925, Cap. 8, where I have held that he himself is responsible for the contributory negligence of the driver A. Williams whose degree of fault I have already apportioned at two-thirds. With respect to Hilda Haines and G. A. Haines therefore he is subject to such

FISHER, J.

1933

Feb. 27.

HAINES v. WILLIAMS.

WILLIAMS v. HAINES

apportionment. Following however *The Cairnbahn* (1913), 83 L.J., P. 11; (1914), P. 25, and the decision in *Price* v. *Fraser Valley Milk Producers Association, supra,* I hold that if Luther Williams pays the judgment as aforesaid in favour of the plaintiffs F. A. Haines and Sylvia Gladys Haines either in whole or in part beyond his real liability he is entitled to contribution as claimed from the said Hilda Haines and G. A. Haines according to the degree of fault attributable to them which I have already found to be one-third.

I think I have dealt fully with all matters except the question of costs as between Luther Williams and A. Williams on the one hand and Hilda Haines and George A. Haines on the other. I think justice will be done between them if I direct, as I do, that the costs of all parties be taxed and that the said Luther Williams and A. Williams bear two-thirds and the said Hilda Haines and George A. Haines one-third of the total of such costs.

Judgment

I have to add that I trust I have made my findings clear on a somewhat complicated matter and that these will be sufficient to dispose of the whole consolidated action, but so many different interests are involved that the exact nature or form of the judgment may still create some difficulty for counsel in which case there will be leave to speak further to the matter.

Order accordingly.

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

FISHER, J. (In Chambers)

1933

March 8.

ANDLER v. DUKE

Practice—Plaintiff resident abroad—Security for costs—Application for—Unsatisfied foreign judgment against defendant—Application not affected by.

Plaintiffs resident abroad must give security for costs of action even though they have an unsatisfied foreign judgment against the defendants.

APPLICATION by defendants to compel the plaintiffs to give security for the defendants' costs of action. All parties live in California, and in 1927 the plaintiffs recovered judgment against the defendants in California, whereby plaintiffs were declared entitled to certain lands in Victoria and defendants were ordered to pay them a sum of money. Statement

A former action brought in British Columbia by the plaintiffs to enforce this judgment had been dismissed by the Supreme Court of Canada (*Duke* v. *Andler* (1932), S.C.R. 734). The pending action was founded on the same matters as the action in California. Heard by FISHER, J. in Chambers at Vancouver on the 13th of February, 1933.

Locke, for the application.
Bull, K.C., contra.

8th March, 1933.

FISHER, J.: Application by defendants for security for costs. It is apparently admitted by the defendants that the plaintiffs have an unsatisfied judgment of the Superior Court of California against the defendants for $16,804.11, and that "the California Court had jurisdiction to pronounce their judgment according to California standards and for intra-territorial purposes." Under such circumstances, counsel for the plaintiffs relies on *Bristowe* v. *Needham* (1842), 4 Man. & G. 906, where the head-note reads as follows: Judgment

The plaintiff having an unsatisfied judgment to a large amount against the defendant, the latter obtained a rule *nisi* for security for costs in a subsequent cause, upon the ground that the plaintiff lived out of the jurisdiction. The Court discharged the rule, upon the plaintiff's undertaking

FISHER, J. (In Chambers)

1933

March 8.

ANDLER v. DUKE

that the judgment should be set off against any costs to which the defendant might become entitled.

I think it is a fair inference, however, from the *Bristowe* case, as so reported, that the unsatisfied judgment referred to was not a foreign judgment, but one in a prior cause in the same jurisdiction. I do not think, therefore, that the *Bristowe* case is contrary to the principle referred to in *Crozat* v. *Brogden* (1894), 63 L.J., Q.B. 325, where Lopes, L.J. says, at pp. 327-8:

> In the case of *In re Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Co.* [(1876)], 2 Ch. D. 531 the late Master of the Rolls, Sir George Jessel, said: "The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the Court compelled to give security for costs"; and in *Pray* v. *Edie* [(1786)], 1 Term Rep. 267 Mr. Justice Buller held that if a plaintiff reside abroad proceedings will be stayed until he gives security for costs, upon the ground that if a verdict be given against him he will not be within reach of the law so as to have process served upon him for the costs. Speaking for myself, I always thought that to be the inflexible rule.

Judgment

In the present action in the Courts of this Province it would appear that the same matter is involved as was fought out in the Courts of California and after considerable hesitation I have come to the conclusion that under such circumstances the unsatisfied foreign judgment in favour of the plaintiffs against the defendants, even though admitted by the defendants to be one made by a foreign Court having jurisdiction to pronounce it for intra-territorial purposes, is not a sufficient answer to the present application for security for costs in the action here even upon an undertaking of the plaintiffs resident abroad that the foreign judgment should be set off against any costs to which the defendants also resident abroad might become entitled.

The plaintiffs must therefore give security for the costs of the action and if necessary the amount of such security may be spoken to.

Application granted.

MURPHY, J.

1933

Jan. 23.

WILLIAMS v. TANG AND MITCHELL.

BAKER v. TANG AND MITCHELL.

Negligence—Conflict of laws—Accident in foreign country—Motor-vehicle—Negligence of driver — Injury to gratuitous passengers — Liability of owner and driver—Defence of joint adventure.

WILLIAMS *v.* TANG AND MITCHELL.

BAKER *v.* THE SAME

The defendant Tang who owned a car decided to go to a skiing tournament at Cle-Elum in the State of Washington. At the request of a friend he took three men in his car who were to take part in the tournament. They started from Vancouver without any arrangement as to the expense of taking the car, but on the way, both down and back, the others paid for some meals and a portion of the gasoline used. Tang drove the whole way to Cle-Elum but on the way back he became very tired and asked the defendant Mitchell to drive. Shortly after Mitchell started to drive Tang and the two plaintiffs (who were in the back seat) went to sleep. The road was covered with a wet slippery snow and while Mitchell was driving at about 60 miles an hour on the American side of the boundary-line, the car skidded and running into a telephone post the two plaintiffs were injured. It was found on the trial that the plaintiffs were passengers by Tang's invitation, that Mitchell at the time of the accident was under Tang's control and that Mitchell was utterly reckless in driving at such a high speed under existing conditions.

Held, that under the law of Washington as well as of British Columbia, the plaintiffs had on said findings a *prima facie* right to recover against both defendants, and as neither the defence that the plaintiffs and defendants were engaged in a joint adventure, nor the defence of contributory negligence were sustained, the plaintiffs were entitled to damages against both the defendants.

To make out a defence of joint adventure in the case of an action brought by passengers in a motor-car against the driver and the person in control of the car, it is a *sine qua non* of such defence to prove that as a result of an arrangement, express or implied, made between the plaintiffs and the person in control, they had joint control with him of the car at the time the accident occurred.

Statement

ACTIONS for damages resulting from a motor-car accident. The two actions were consolidated as they arise out of the same accident. The facts are fully set out in the reasons for judgment. Tried by MURPHY, J. at Vancouver on the 16th of January, 1933.

Clark, K.C., for plaintiffs.

Hossie, K.C., and *Ghent Davis*, for defendants.

MURPHY, J.

1933

Jan. 23.

WILLIAMS v. TANG AND MITCHELL.

BAKER v. THE SAME

23rd January, 1933.

MURPHY, J.: These actions were ordered consolidated as the facts in each case and the law applicable thereto are identical. The defendant Tang in February, 1932, was an employee of Pemberton & Sons in Vancouver. He was interested in skiing as was a fellow employee Billingsley and they often talked about this pastime. In February last Billingsley mentioned to Tank that a wonderful ski hill had just been opened at Cle-Elum in the State of Washington. In the conversation, which occurred on a Friday, it came out that a tournament was to be held on this hill the following Sunday. Tang stated to Billingsley that he would like to go down. Billingsley knew that Tang was the owner of an Essex motor-car and asked Tang if he were going down would he take a couple of the boys with him. Billingsley was the president of the Vancouver Skiing Club but Tang at the time of the conversation did not know this, did not even know that there was such a club. He thought Billingsley was referring to friends. Tang intended to take his wife with him. His car would hold three others besides his wife and himself, so he told Billingsley, or else Billingsley knew since he was familiar with the car, that he could take three others and would do so. For some reason Mrs. Tang decided not to go so on Saturday morning Tang informed Billingsley that he could take one more person. Billingsley said that some one or more of those who were to accompany Tang would come to the Pemberton office after closing time on Saturday, which would be 1 o'clock. The Vancouver Skiing Club of which Billingsley was president had decided to be represented in the tournament and Billingsley had arranged that Mitchell and the plaintiff Williams, both being members, should be two of the representatives. He asked the plaintiff Baker, who was likewise a member of his club, to go also as a representative. Baker replied that he would go only on condition that all his expenses would be paid and that arrangements would be made to make sure that he would be back in Vancouver by nine o'clock on Monday morning in time for work; Billingsley apparently agreed. Sixty-five dollars of the club money was given to Williams to pay expenses of the contestants. It was intended that besides the three mentioned some five other members of the

Judgment

Vancouver Skiing Club should also attend the tournament and compete on behalf of the club. Williams hired a drive-yourself car for the remaining members of the party. He paid $28 for this and gave $22 to some one of the other five to defray expenses. This left him with $15 to pay the expenses of Baker, Mitchell and himself. The arrangement between the Vancouver Skiing Club and the Cle-Elum Skiing Club was that the Vancouver contestants should pay their expenses from Vancouver to Cle-Elum and return. The Cle-Elum Club was to defray all their expenses whilst at Cle-Elum. Tang knew nothing about all these arrangements nor did he know before starting on his trip that any of the parties in his car were members of the Vancouver Skiing Club nor that they intended to compete in the tournament. He however learnt that they were such members and intended to compete through their talk on the journey down. At no time, so far as appears from the evidence, did he know of the club having furnished $65 expense money. At the appointed time on Saturday Williams came to Pemberton & Son's office. Tang had seen him in the office several times but did not know him. Billingsley had left by this time and someone else introduced Williams to Tang. Plaintiff Baker came along shortly afterwards. Tang was not acquainted with him but had seen him before. The three got into Tang's car which was an Essex sedan. Tang drove and on instructions from either Williams or Baker he picked up Ormundsen who was also a member of the Vancouver Skiing Club and who was going down to act as a judge at the tournament. He had no previous acquaintance with Ormundsen. The arrangement between the two clubs was that the whole of Ormundsen's expenses were to be paid by the Cle-Elum Club. Tang knew nothing of this nor did he know in what capacity Ormundsen was going down. Next they picked up defendant Mitchell whom likewise Tang did not know. Tang drove his own car from the start and was requested by some member of the party to go to the North Vancouver Ferry to pick up ski. This was Tang's first knowledge that any of his passengers intended to ski at Cle-Elum but he did not know then that any of them were going to compete in the tournament. There was no arrangement made with Tang as to expenses. He says he thought they might do the decent

Judgment

MURPHY, J.

1933

Jan. 23.

WILLIAMS v. TANG AND MITCHELL.

BAKER v. THE SAME

Judgment

thing in reference thereto but nothing whatever was said about the matter. There was a sort of understanding that all would be back in time for work on Monday but no definite arrangement even as to that. Tang filled his gasoline-tank at Vancouver before starting and paid for the supply himself. The party stopped at Bellingham and had a meal. Williams paid for Tang's meal as well as for the meals of the others with the exception of Ormundsen who paid for his own. *En route* to Cle-Elum Tang again purchased gasoline and paid for it himself. Tang drove the car the whole way and, as far as the evidence shews, there was no suggestion on the part of the others that any one of them should relieve him at the wheel. Arrived at Cle-Elum each one of the party, including Tang, was given a strip of tickets which entitled him to hotel accommodation and also to attend a banquet which was given on Sunday evening. Tang did not go next morning with the other members of the party to the scene of the tournament, which was distant something over a mile from the hotel, but he did follow them there later on and watched the tournament. He attended the banquet in the evening and about 11 o'clock the party decided to start for Vancouver. Some one of them other than Tang suggested that they go and have a cup of coffee before starting. This they did and Williams paid Tang's bill for same. He also paid the garage bill. Tang drove as before. Once during the night Ormundsen asked Tang if he were tired and it appears once Mitchell suggested that he (Mitchell) should take the wheel to relieve Tang but Tang declined to allow him to do so. Tang and Mitchell were seated in the front seat, Baker, Ormundsen and Williams in the back seat. They stopped at Everett to obtain gasoline and this time Williams paid for it. Williams made all the payments mentioned as made by him of his own volition without any arrangement in that respect with Tang; in fact, without, so far as appears, any talk with Tang in reference thereto except that in one instance he said: "I will pay for this." After the gasoline was obtained they started on, Tang still driving. His intention was personally to drive the car to Vancouver. He found himself, however, growing very tired and almost dropping off to sleep. He therefore requested Mitchell to take the wheel and drive. He did so as he wished

to get some rest. The car was stopped in order to allow Mitchell and Tang to change places. Whilst it was so stopped the drive-yourself car, which contained the balance of the party, passed Tang's car. The Tang car then started again for Vancouver with Mitchell at the wheel and Tang sitting beside him in the front seat. Tang, as stated, was weary and soon dropped off to sleep. At the time the Tang car stopped to effect the change of drivers Williams and Baker, who had been asleep in the back seat, woke up but they speedily fell asleep again as also did Ormundsen. [While Mitchell was driving the car at, as found by the Court, a speed of fully 60 miles an hour, it skidded and struck a telephone pole.] When the skid began Tang was roused by the action of the car but apparently did not waken up fully. It is stated by Mitchell that Tang grabbed the driving-wheel. Tang says he cannot be sure whether he did or not but that if he did the act was not a conscious one as he was well aware of the danger which such interference on his part would involve. I do not attach any importance to the question as to whether Tang grabbed the wheel or not because I am of the opinion that once the car started to skid, given the rate of speed that Mitchell was driving and the condition of the road covered with wet slippery snow, the accident was inevitable. Baker and Williams were hurt and each of them now sues both Tang and Mitchell for damages. This litigation is being carried on in British Columbia but the scene of the accident is in the State of Washington. The rule of law applicable to this situation is that an act done in a foreign country is a tort and actionable as such in British Columbia if it is both (1) wrongful, *i.e.*, not justifiable according to the law of the foreign country where it was done; and (2) wrongful, *i.e.*, actionable as a tort, according to British Columbia law, or in other words, is an act which if done in British Columbia, would be a tort: Dicey's Conflict of Laws, 5th Ed., p. 771. I need not discuss the word "wrongful" as it occurs in the first of the two numbered clauses because, as will be seen hereafter, I find that both defendants could be successfully sued by the plaintiffs in the State of Washington under the law of that jurisdiction.

Judgment

I find that Mitchell was utterly reckless in driving at such a high rate of speed under the conditions that existed at the time

MURPHY, J.

1933

Jan. 23.

WILLIAMS v. TANG AND MITCHELL.

BAKER v. THE SAME

Judgment

of the accident. This being my view, authority is not necessary for the conclusion that under our law plaintiffs are *prima facie* entitled to damages against him for the injuries they received in consequence of his reckless conduct. As will appear hereafter I find that Williams and Baker were passengers by invitation of Tang in his car and that Mitchell at the time of the accident was under Tang's control.

Because I hold Mitchell, when driving the car, to have been Tang's agent—a matter hereinafter more fully dealt with—I hold that the relationship between him and Williams and Baker at the time of the accident was what is referred to by the expert witnesses from Washington as a host-guest relationship and what we would usually refer to as the relationship of invitor and invitee.

I find that the Washington law holds the host liable only if he has been guilty of gross negligence. By gross negligence the Washington law means absence of a slight degree of care. As stated, in my view, Mitchell failed to exercise any care at all; he acted with utter recklessness. *Prima facie* therefore plaintiffs are, under the law of Washington, entitled to recover damages against him.

Dealing next with Tang's position, as stated, I hold that Mitchell was under Tang's control at the time of the accident. Mitchell took the wheel at Tang's invitation and I hold that Tang did not abandon nor did he intend to abandon control of the car to Mitchell. Had he not fallen asleep and therefore not been aware of Mitchell's reckless conduct he could and, in my opinion, would have compelled Mitchell to drive with proper care or else would have taken the wheel from him. If this view of the facts is correct then, under British Columbia law, Tang is also *prima facie* liable to plaintiffs: *Samson* v. *Aitchison* (1912), A.C. 844; 82 L.J., P.C. 1. I find that in this respect the Washington law is identical with our own and that on the facts as found plaintiffs could *prima facie* recover in that jurisdiction against Tang for Mitchell's negligent act. But it is said by way of defence that the plaintiffs and defendants were engaged in a joint adventure and therefore that these actions must fail.

In dealing with this defence I do not differentiate between

Mitchell and Tang because, as stated above, I hold that Mitchell at the time the accident occurred was Tang's agent. Although Baker, Williams and Mitchell had a common purpose and may indeed have been engaged in a joint adventure so far as attending the tournament and contending therein are concerned that adventure, as will be seen hereinafter, in my view, gave no one of them or all of them combined any control over the car or of the driving. These matters were at all times exclusively the affair of defendant Tang who had no lot or part in the joint adventure—if such it was—in which the three named were concerned. Mitchell, when driving the car, was, to my mind, Tang's *alter ego*. Whatever else may be required in our jurisdiction to make out a defence of joint adventure it seems clear to me on the cases that it is a *sine qua non* of such a defence to prove that, as a result of an arrangement, express or implied, made between the plaintiffs and Tang, they had joint control with Tang of the car at the time the accident occurred: *Dixon* v. *Grand Trunk R.W. Co.* (1920), 47 O.L.R. 115; *Rader* v. *McLellan* (1929), 1 W.W.R. 64; *Kerr* v. *Stephen,* 42 B.C. 518; (1930), 1 W.W.R. 896; *Hammer* v. *Hammer and Luthmer. Luthmer* v. *Hammer and Luthmer,* 41 B.C. 55; (1929), 2 W.W.R. 130; *Victoria U Drive Yourself Auto Livery, Ltd.* v. *Wood,* 42 B.C. 291; (1930), 1 W.W.R. 522, 634.

Judgment

As stated, I find that the car was in the exclusive control of its owner Tang throughout the trip from the time the party left Vancouver until the accident occurred. There was no arrangement express or implied between Tang and any of the others which would give any of them any right whatever to control Tang's car or to control his manner of driving it or to control his delegation of the driving to Mitchell or in fact to interfere with him in any way so far as the car and its driving were concerned. To my mind Tang's own evidence, to which I give full credence, is conclusive on this point. I hold that all the parties in the car were there as guests of Tang.

I find that the law of Washington on this matter of joint adventure is identical with the law of British Columbia in that in motor accident cases it makes joint control of the car, resulting from some arrangement express or implied between the parties concerned, a *sine qua non* of the defence of joint adven-

MURPHY, J.

1933

Jan. 23.

WILLIAMS v. TANG AND MITCHELL.

BAKER v. THE SAME

ture. The contention, that this requirement of Washington law only applies in that jurisdiction to cases brought against third parties, and does not apply to host-guest cases, I find not established by the evidence. I hold therefore that this defence fails.

Then it is alleged that plaintiffs were guilty of contributory negligence. In view of the findings I have already made this defence must also fail. Both plaintiffs were awakened at the time the car stopped to make the change of drivers but fell asleep and were asleep at the time the accident occurred. As I hold them to have been guests without any control whatever over Tang, so far as the car was concerned, there was on the facts as proven no duty cast upon them to watch the driving of the car. Under our law consequently this defence must fail and I find the law of Washington to be the same as ours except that, if contributory negligence were established, it would constitute an absolute bar to the action.

I therefore hold plaintiffs entitled to recover damages from both defendants.

Judgment

As to the amount of damages, the plaintiff Williams, although it is true that he was seriously ill for a short time after the accident and could not return to work for some five weeks, I find that he was then fully recovered. He has a scar running back from his eye but it is not, in my opinion, disfiguring to any extent. He proved special damages of $167.75 and in addition a loss of salary of $122.50. I assess damages on his behalf of $600.

The matter of Baker's damages is more difficult. . . . [The difficulty referred to was that Baker had two years before the accident been treated for tuberculosis, and that as a result of the accident he had so serious a hemorrhage that he had to be given a blood transfusion, which it was alleged had accentuated his tendency to develop the disease; the medical testimony on the point whether it had in fact had such tendency was conflicting.] It would seem to me on this evidence that the contention that Baker's susceptibility to tuberculosis has been accentuated to any marked degree by the accident has not been established. He proved special damages amounting to $574.22 and also proved that a portion of his salary amounting to $107.70 had been deducted by his employers owing to his absence from busi-

ness as a result of the accident. The two items amount to $681.92. I think I will be doing justice to him if I assess the damages at $2,000. Judgment accordingly. Each plaintiff is entitled to his costs on the appropriate Supreme Court scale.

Judgment for plaintiffs.

VANCOUVER BREWERIES LIMITED v. VANCOUVER MALT & SAKE BREWING COMPANY LIMITED.

Company—Licence to brew beer, etc.—Sale of licence—Alteration in document — Evidence of — Power of directors—Articles of association—Indoor management — Presumption — Restraint of trade—Reasonableness—Criminal Code, Sec. 498.

The defendant company (owned by Japanese) holder of a brewer's licence under the Excise Act and engaged in the manufacture of sake in British Columbia, entered into a written agreement with the plaintiff company in 1927, whereby in consideration of the sum of $15,000 it sold to the plaintiff company all its right, title and interest in, to or out of the goodwill of said breweries, licence or renewals thereof, except in so far as the same relates to the manufacture and sale of sake. The vendor further covenanted that during a period of fifteen years from the date of the agreement it would not engage in or carry on the business of brewing or selling beer, ale, porter or lager beer, or any articles in imitation thereof except sake, either itself or through its agents. Later the stock in the defendant company was acquired by one H. and in 1932 H. advised the plaintiff's solicitors that the agreement of 1927 was illegal and he was proceeding at once to erect a plant for brewing beer, ale and porter, in addition to sake. In an action for an injunction and alternatively for a declaration that the respondent is the assignee of the defendant's brewer's licence (except in respect of sake) or that it is held by the defendant in trust for the plaintiff, it was held that the agreement was enforceable and the defendant was restrained from manufacturing beverages other than sake for 15 years. The defendant appealed on the grounds (a) That the agreement had been materially altered after the seal of the defendant had been affixed thereto; (b) that it was executed by two directors of the defendant company without lawful authority as there was no meeting of directors authorizing its execution or the affixing of the seal, a third director not having been notified and having no knowledge of its execution; (c) that the contract was unenforceable

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. *v.* VANCOUVER MALT & SAKE BREWING CO. LTD.

by reason of its being an agreement in restraint of trade and against public policy.

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

Per MACDONALD, J.A.: That on the true appreciation of the facts, the suggestion that the alteration in the deed was made after execution should not be entertained and the finding of fact of the trial judge should not be disturbed. That the two directors had authority to sign the agreement and affix the seal and there was no obligation on the part of the plaintiff to enquire into the regularity of the internal proceedings of the company in regard thereto. On the allegation that the agreement is in restraint of trade, the defendant for the consideration mentioned agreed not to use the licence for the manufacture and sale of beer, ale and porter, this agreement is reasonable both in reference to the interests of the parties concerned and in reference to the interests of the public, and the contract is enforceable.

Per MCPHILLIPS, J.A.: Upon careful consideration of all the facts of the making of the contract here sought to be enforced, I am satisfied that the contract is one against public policy or one unduly in restraint of trade, and is unenforceable. Further that it is a contract unduly to prevent or lessen competition within the meaning of section 498 of the Criminal Code.

APPEAL by defendant from the decision of MCDONALD, J. of the 7th of June, 1932. Both the plaintiff company and the defendant company were incorporated under the laws of British Columbia, and on the 5th of December, 1927, said companies entered into an agreement in writing whereby the defendant assigned to the plaintiff all its right, title and interest in, to, and out of the goodwill of the brewer's licence under the Excise Act, held by the defendant, or any renewal or renewals thereof, except in so far as the same related to the manufacture, sale and distribution of sake. The defendant obtained a renewal of the licence from time to time and held a renewal at the commencement of this action. By said agreement the defendant covenanted and agreed with the plaintiff that during a period of fifteen years from the date thereof it would not engage in or carry on the business of manufacturing, brewing, selling or disposing of beer, ale, porter or lager beer and would not brew, manufacture or sell any article or articles made in imitation thereof other than sake. The defendant further covenanted that at no time during said period would it be engaged in any way in the brewing business other than sake. In 1932 the defendant assembled machinery and apparatus upon its premises suitable

Statement

for and ordinarily used in the manufacture of beer, and one Hewer, who had in the meantime acquired the Japanese shares in the defendant company informed the manager of the plaintiff company that the defendant company intended going into the lager and other beer business in British Columbia. The plaintiff brought action for a declaration that the agreement of the 5th of December, 1927, is valid and subsisting and enforceable against the defendant, for an injunction to restrain the defendant from manufacturing and selling beer, ale, porter and lager, and in the alternative for a declaration that the plaintiff is the assignee for value of the brewer's licence referred to in the agreement and renewals thereof, or alternatively that the defendant holds the licence in trust to the plaintiff. Judgment was given in favour of the plaintiff on the trial.

Statement

The appeal was aruged at Vancouver on the 10th to the 17th of November, 1932, before MACDONALD, C.J.B.C., MARTIN, GALLIHER, MCPHILLIPS and MACDONALD, JJ.A.

Hossie, K.C., for appellant: As to the document upon which the plaintiff relies, we plead *non est factum*. We say first that there was a material alteration in the agreement after it was executed by the defendant company. There was evidence both ways as to this but the expert evidence was in our favour and should have been accepted: see *B.C. Land and Investment Agency, Ltd.* v. *Ellis* (1898), 6 B.C. 82 at pp. 84-5; *Bray* v. *Ford* (1896), A.C. 44 at pp. 49 to 53; *Barrie* v. *Minturn* (1913), A.C. 584. Even if the alteration was made before its execution it is not binding as there should have been a resolution of the directors of the company before the seal was affixed. There was no resolution and no meeting called. The document was so unusual that they should have enquired as to its authenticity. Article 106 of the memorandum of association requires a resolution of the company. The directors had no authority under article 104: see *In re Jewish Colonial Trust Limited* (1908), 2 Ch. 287; *Marshall's Valve Gear Company, Limited* v. *Manning, Wardle & Co., Limited* (1909), 1 Ch. 267; *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (1867), L.R. 2 Ex. 158 at p. 159. One director was in California who knew nothing of the transaction. There was no

Argument

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

meeting and no authority for affixing the seal. The directors must act together as a board, no notice being given of a meeting: see *In re Bonelli's Telegraph Company* (1871), L.R. 12 Eq. 246 at p. 259; *In re Haycraft Gold Reduction and Mining Company* (1900), 2 Ch. 230 at p. 235; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869 at pp. 895 and 899. They will rely on *In re Great Northern Salt and Chemical Works. Ex parte Kennedy* (1890), 44 Ch. D. 472 at p. 481; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (1895), 1 Ch. 629; *Duck* v. *Tower Galvanizing Co.* (1901), 2 K.B. 314, and *Ruben* v. *Great Fingall Consolidated* (1904), 2 K.B. 712. The Canadian cases are the same as the *D'Arcy* case, namely, *Cossitt* v. *Cusack* (1903), 40 N.S.R. 446 at p. 450; *Innes* v. *Cameron Valley Land Co., Ltd.* (1919), 1 W.W.R. 751 at p. 754; *Toronto General Trusts Corporation* v. *Carlile* (1931), 3 W.W.R. 671 at pp. 675 and 677; *Glasgow Lumber Co., Ltd.* v. *Fettes* (1932), 1 W.W.R. 195. There being no meeting and no resolution, there was no authority for the two to sign as agents of the company: see *British Thomson-Houston Co.* v. *Federated European Bank, Ld.* (1932), 2 K.B. 176 (see foot-note, pp. 183-4). This does not fall within the ordinary course of business: see *Houghton & Co.* v. *Nothard, Lowe and Wills* (1927), 96 L.J., K.B. 25, and on appeal 97 L.J., K.B. 76; *Kreditbank Cassel* v. *Schenkers, Ltd.* (1927), 96 L.J., K.B. 501 at p. 509; *Fred T. Brooks Ltd.* v. *Claude Neon General Advertising Ltd.* (1931), O.R. 92 at pp. 107-8.

Argument

R. M. Macdonald, on the same side: The covenant restraining the defendant from carrying on under his licence must be a reasonable restraint of trade: see *British Concrete Co.* v. *Schelff* (1921), 2 Ch. 563 at pp. 574-6; *Townsend* v. *Jarman* (1900), 2 Ch. 698 at p. 702; *Hall* v. *More* (1928), 39 B.C. 346. The contract here is not the sale of a licence, it is merely an agreement that the defendant shall not carry on the business, a purchase of immunity from competition: see *Henry Leetham & Sons, Limited* v. *Johnstone-White* (1907), 1 Ch. 322 at pp. 326-7. Goodwill of a business must be connected with some trade or calling: see *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Limited* (1901), A.C. 217 at pp. 223, 227

and 235; *Metropolitan Nat. Bank* v. *St. Louis Dispatch Co.* (1888), 36 Fed. 722 at p. 724. A covenant in restraint of trade cannot stand unless ancillary to some other transaction. It is contrary to the policy of the Act for a licence to be held by one person and the rights under it be acquired and used by another: see *Turgeon* v. *St. Charles* (1913), 48 S.C.R. 473. The Government is not required to renew a licence. Each licence stands by itself, there is no such thing as a renewal thereof: see *Sykes* v. *Bridges, Routh and Co.* (1919), 35 T.L.R. 464; *Trevalion & Co.* v. *Blanche & Co.* (1919), S.C. 617. The sale of the goodwill of our licence is nothing more than an effort to stop our business; they get nothing. There is no provision for the sale of a licence in the Excise Act. You cannot sell a licence in gross: see *Herbert Morris, Limited* v. *Saxelby* (1916), A.C. 688 at p. 716. Under sections 496 and 498 of the Criminal Code this agreement is not enforceable: see *Weidman* v. *Shragge* (1912), 46 S.C.R. 1. This contract is a world-wide restraint for fifteen years and under no circumstances can it be considered reasonable, and there is no way in which the Court can cut it down: *Dowden & Pook Limited* v. *Pook* (1904), 1 K.B. 45 at p. 52; *Attwood* v. *Lamont* (1920), 3 K.B. 571 at pp. 577-8 and 593; *Allen Manufacturing Co.* v. *Murphy* (1911), 23 O.L.R. 467. In 1923 when the defendant company was formed and the first licence was issued this was a Japanese company and they were to brew sake only, but there are no Japanese interested now, and a new licence was issued yearly. The Courts will not enforce such agreements: see *In re Jewish Colonial Trust, Lim.* (1908), 77 L.J., Ch. 629; *Montreal Park and Island Rway. Co.* v. *Chateauguay and Northern Rway. Co.* (1904), 35 S.C.R. 48.

Argument

J. W. deB. Farris, K.C., for respondent: The action is against the company and not the shareholders. The present shareholders are in no better position than the former ones. As to the change in the document, Jackson had lost interest in the company and his memory cannot be relied on. The finding of the trial judge is in our favour. On the evidence of experts see *London Life Insurance Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.* (1929), S.C.R. 117 at p. 126. On the question of the contract being contrary to public policy because it is in

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

restraint of trade, there are two grounds: (1) That it interferes with the right of man to earn his livelihood; (2) pernicious monopoly, the test being that it enhances prices to the detriment of the public. Section 498 of the Criminal Code does not apply here as the first essential is conspiracy and both must act to the same end: see *Stewart* v. *Thorpe* (1917), 36 D.L.R. 752 at p. 759, affirmed in (1918), 59 S.C.R. 671; *Rex* v. *Gage* (1907), 13 Can. C.C. 415. Here there was no undue enhancement of prices. Contracts in restraint of trade are construed more liberally in case of vendor and purchaser than in cases of employer and employee: see *Herbert Morris, Limited* v. *Saxelby* (1916), 85 L.J., Ch. 210 at pp. 220-1; *Mitchel* v. *Reynolds* (1711), 1 P.Wms. 181. We come within the case of *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1894), 63 L.J., Ch. 908 at p. 915; see also *Attorney-General of Commonwealth of Australia* v. *Adelaide Steamship Co.* (1913), 83 L.J., P.C. 84 at p. 90; *Horner* v. *Graves* (1831), 7 Bing. 735. A contract in restraint of trade if reasonable between the parties is enforceable. The test is, did these people find it beneficial to tie up their business? As to the reasonableness of the contract as to the parties and as to the public see *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1914), 83 L.J., K.B. 530 at p. 531. This contract does not reflect on the public welfare: see *MacEwan* v. *Toronto General Trusts Corporation* (1917), 54 S.C.R. 381 at p. 384. Contracts of service are construed strictly against the covenant: see *Hall* v. *More* (1928), 39 B.C. 346, but the rule is relaxed in cases of business contracts: see *English Hop Growers* v. *Dering* (1928), 2 K.B. 174 at p. 180. We have paid them and the contract is binding as far as the Courts can enforce it. We have their obligation not to use the licence for selling beer: see *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1926), A.C. 108 at p. 123; *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604. This is not a pernicious monopoly and we have a right of action to restrain them from brewing beer: see *McCausland* v. *Hill* (1896), 23 A.R. 738; *In re Price Bros. and Company and the Board of Commerce of Canada* (1920), 60 S.C.R. 265 at p. 279. New licences are subject to the same restrictions as the former ones. As to severance of the agreement see *Dubowski & Sons* v. *Goldstein* (1896), 1 Q.B. 478 at pp. 481 and 485.

Argument

Harold B. Robertson, K.C., on the same side: On the question of *non est factum*. They claim agreement was executed without lawful authority. When we are presented with a document with the company's seal on it and signed by two directors, we can accept it as legal and we are not put upon enquiry as to indoor management of the company: see *The Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *In re County Life Assurance Company* (1870), 5 Chy. App. 288; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869; *D'Arcy* v. *Tamar, Kit Hill and Callington Railway Company* (1867), L.R. 2 Ex. 158; *In re Bonelli's Telegraph Company* (1871), L.R. 12 Eq. 246. The document is regular on its face and we are entitled to infer a meeting was regularly held and that the required resolution was passed. In fact the meeting was held and the resolution passed: see *Duck* v. *Tower Galvanizing Company* (1901), 2 K.B. 314; *Herrmann* v. *Canadian Nickel Co. Ltd.* (1929), 64 O.L.R. 190. That we need not enquire as to internal management see *Bank of United States* v. *Ross* (1932), S.C.R. 150; *British Thomson-Houston Co.* v. *Federated European Bank Ld.* (1932), 2 K.B. 176 at p. 184. That there was a meeting, two was a quorum and they were present together; the third was outside the Province and he was not entitled to notice. All meetings were in Jackson's office: *In re Express Engineering Works, Limited* (1920), 1 Ch. 466; *Barron* v. *Potter* (1914), 1 Ch. 895 at p. 901.

Argument

Hossie, in reply: On internal management see *Montreal and St. Lawrence Light and Power Company* v. *Robert* (1906), A.C. 196; *Pacific Coast Coal Mines Lim.* v. *Arbuthnot* (1917), 86 L.J., P.C. 172. When two directors signed the agreement it is apparent in the face of the articles that enquiry must be made: see *In re County Life Assurance Company* (1870), 5 Chy. App. 288 at p. 293; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (1895), 1 Ch. 629 at pp. 633 and 636. They have not shewn that this contract was reasonable either as between the parties or in the public interest: see *Symington* v. *Reifel* (1931), 43 B.C. 388; Phipson on Evidence, 7th Ed., pp. 10 and 11; *Doe dem Devine* v. *Wilson* (1855), 10 Moore, P.C. 502; *Motchall* v. *Massaud* (1926), V.L.R. 273; *Hurst* v. *Evans* (1917), 1 K.B. 352 at

COURT OF APPEAL

1933

Jan. 27.

357; *Konski* v. *Peet* (1915), 1 Ch. 530 at p. 539; *East Essex Farmers, Ltd.* v. *Holder* (1926), W.N. 230.

Cur adv. vult.

27th January, 1933.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

MACDONALD, C.J.B.C., MARTIN and GALLIHER, JJ.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: At the outset I may say that, in my opinion, it is impossible, upon my weighing of the facts of the case, to hold that the plea of *non est factum* is proved, that is, that any material or any alteration took place after the execution of the contract and I am in agreement with the learned trial judge as to this point. Then I think it must be accepted that the contract has been regularly executed as the facts would seem to support it being so held within the rule in *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327 and the presumption of regularity can be applied when one considers the facts of the present case, that is, that there was no requirement to enquire into the regularity of the internal proceedings and what Lord Hatherley called "the indoor management" and here we have the execution of the contract by proper officers. See also *Mahony* v. *East Holford Mining Co.* (1875), L.R. 7 H.L. 869; *Bargate* v. *Shortridge* (1855), 5 H.L. Cas. 297 at p. 318; *In re Land Credit Company of Ireland* (1869), 4 Chy. App. 460; *In re County Life Assurance Company* (1870), 5 Chy. App. 288. What Atkin, L.J. (now Lord Atkin) said in *Kreditbank Cassell G. M. B H.* v. *Schenkers* (1927), 1 K.B. 826 at 844 gave me some anxious thought:

> If you are dealing with a director in a matter in which normally a director would have power to act for the company you are not obliged to enquire whether or not the formalities required by the articles have been complied with before he exercises that power.

Here it well might be said to execute a contract, such as here under consideration, practically parting with the major part of the corporate powers of the appellant company that the directors were perhaps not acting "in a matter in which normally" directors "would have power to act for the company" and it might well be held that failure on the part of the respondent company to establish that the directors' meeting was regularly held and that all the requisite steps were taken which would admit of the

execution of the contract was a fatal objection to the validity of the contract. However, perhaps this objection is not a matter of necessity as upon different grounds I have arrived at the firm opinion that the contract is unenforceable. In my opinion it was an illegal transaction, that is, the contract, as executed, is in its nature illegal. Here there is not really a sale of the goodwill of a business. That contention was not insisted upon at this Bar as it was not the fact but that which was insisted upon was that the appellant had for the space of fifteen years deprived itself of brewing beer. This class of contract it seems to me is one that falls within what Younger, L.J. said in *British Concrete Co.* v. *Schelff* (1921), 2 Ch. 563 at p. 576 "a covenant in gross against trading however great the consideration is void." Also see Farwell, J. in *Townsend* v. *Jarman* (1900), 2 Ch. 698 at pp. 702-3. Here there was no legal right upon the part of the respondent company to get any such unfair and oppressive restraint as has been upheld in the Court below; it was all aimed at bringing about a monopoly and was in restraint of trade. As a matter of fact the respondent company has no less than two brewing licences in a restricted excise area, namely, Vancouver City and the immediate neighbourhood, and if the contract is a valid one it means that in an area which has almost one-half of the population of the Province the respondent company is the sole possessor of the field as the Government of Canada has intimated that the licences for brewing beer shall not exceed three. The respondent company now holds and controls two licences. If this contract is to be held valid then it occupies the whole field and is in complete command of the field. It is not possible for breweries at a distance to compete as the great volume of business is the sale of beer in bulk and the brewery on the ground has an impregnable position. This punctuates the position of things and demonstrates that the contract is an unreasonable one in the restraint of trade and that the contract is void on the grounds of public policy. I would refer to the quotation made by Farwell, J., in *Townsend* v. *Jarman, supra*:

MCPHILLIPS, J.A.

> I cannot state a better test of reasonableness than that given by Tindal, C.J. in *Horner* v. *Graves* [(1831)], 7 Bing. 735, 743; 33 R.R. 635. He says: "But the greater question is, whether this is a reasonable restraint of trade. And we do not see how a better test can be applied to the ques-

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

tion whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy."

There is the further question as to whether there is any power to assign the brewer's licence or obtain any control over the licence which issues anew each year with new bonds. In this connection I would draw attention to the case of *Turgeon* v. *St. Charles* (1913), 48 S.C.R. 473. Idington, J., at pp. 477-8, said, speaking of a licence under the Quebec Licence Act:

> Not even the Court can have any power or authority directing its curator or anyone else to meddle with such a transfer unless given by said Act the power to do so.

The application of what Anglin, J. (afterwards Chief Justice of Canada) said in the last-mentioned case, at pp. 485-6, is, it seems to me, complete in this case:

> A study of the provisions of the "Quebec Licence Law," however—particularly article 923—has satisfied me that any property which may exist in a licence in that Province is and must remain vested in the holder of the licence, upon whom it confers a personal right or privilege so long as he holds it and is the occupant of the premises and owner of the business in respect of which it issues. Having regard to this essential characteristic of a licence it is inconsistent with the letter and the spirit of the "Quebec Licence Law" that there should be vested in one person the property in a licence held by another under a right intended to be more than merely temporary.

MCPHILLIPS, J.A.

It was held by Darling, J. (now Lord Darling) in *Sykes* v. *Bridges, Routh and Co.* (1919), 35 T.L.R. 464, that a contract for the sale of a permit issued under the Defence of the Realm Regulations by the Commissioners of Customs and Excise and authorizing a particular person to take a certain quantity of wine out of bond is illegal as being contrary to public policy. Darling, J. said at pp. 464-5:

> The practice of trafficking in these permits had been elaborated into a system, and in the circumstances it was clearly contrary to public policy. "Public policy" was a term which connoted the attempt of the Legislature to give the greatest happiness to the greatest number of the members of the State; and it was violated by privileged persons wrongly obtaining profit for themselves to the detriment of the social community. He therefore decided that the agreement in question was illegal and void, and he gave judgment, with costs, for the defendants.

In *Trevalion & Co.* v. *Blanche & Co.* (1919), S.C. 617 the sale of a liquor permit was declared to be illegal and unenforceable. Lord Dundas, at p. 624, said:

> It seems to me obvious that, if such permits could be made the subject of traffic, the whole scheme would be futile; the permits might be bought up by a relatively small number of persons, and all idea of fair and equal distribution would be at an end.

Now the question of the reasonableness is a question for the Court. The surrounding circumstances may be looked at, such as the character of the business and the requirements of the business but it is a question of law. Contracts in restraint of trade are to be construed strictly (*Morris and Co.* v. *Ryle* (1910), 103 L.T. 545; *Cattermoul* v. *Jared* (1909), 53 Sol. Jo. 244) and are *prima facie* invalid and onus of proof on party supporting the contract (*Herbert Morris, Limited* v. *Saxelby* (1916), A.C. 688, 700, 760; *Attwood* v. *Lamont* (1920), 3 K.B. 571, 587-8). It must now be said that the test of a contract in restraint of trade, as to its validity, is what was said by Lord Macnaghten in *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Company* (1894), A.C. 535 at p. 565:

> It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.

Here upon the facts and in the light of the circumstances the contract is one manifestly "injurious to the public": *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1914), A.C. 461, 471.

I would refer to what Lord Shaw said upon the principle that has to be borne in mind in considering the case, in *Herbert Morris, Limited* v. *Saxelby* (1916), A.C. 688 at pp. 717-8, and there it was held that the covenant was wider than was required for the protection of the plaintiff company and was not enforceable and that learned Lord said in his speech:

> My Lords, in my opinion *Mitchel* v. *Reynolds* [(1711)], 1 P. Wms. 181, 190 still remains, among all the decisions, the most outstanding and helpful authority. Lord Macclesfield states the principle in a form which seems to fit and rule many very modern conditions, and many developments of commerce and of contract: "The true reasons of the distinction upon which

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

MCPHILLIPS, J.A.

the judgments in these cases of voluntary restraints are founded, are, 1st, the mischief which may arise from them, 1st to the party, by the loss of his livelihood, and the subsistence of his family; 2ndly, to the public by depriving it of an useful member.

"Another reason is, the great abuses these voluntary restraints are liable to; as for instance, from corporations, who are perpetually labouring for exclusive advantages in trade, and to reduce it into as few hands as possible; as likewise from masters, who are apt to give their apprentices much vexation on this account, and to use many indirect practices to procure such bonds from them, lest they should prejudice them in their custom, when they come to set up for themselves."

These principles, my Lords, are far-reaching and enlightened. In my opinion they may have been now and again in the course of these two centuries obscured; they have never been lost.

When they are applied in the present instance, the case is simplicity itself. It is admitted that on the objective side nothing has been done amiss. I do not see that there were any trade secrets; if there were any, they have not been given away. It is not suggested that they will be, and this is the case also with information about customers, &c.; in fact, the whole of that claim for injunction has been abandoned. As to what remains, namely, the claim against Mr. Saxelby setting up or assisting in a business which does the special engineering work in which he was trained, this is rested upon the likelihood that his own abilities, skill, and knowledge would be of advantage to himself or others as competitors in manufacture and trade. So rested, it is an audacious claim, whether regarded, from the point of view of the parties or of the public.

From the point of view of the appellants it is plainly put, a claim against competition *per se*, a claim to cripple rivals in trade by the denial to them of a supply of all skilled labour which has had the advantage of being performed under the appellants, and accordingly *pro tanto* to compel them to seek for labour in a foreign market.

From the point of view of the respondent it is, justly interpreted, a claim to put him in such a bondage in regard to his own labour that, if he seek to find employment or advancement elsewhere, he must, for seven years of his life, become an exile.

From the point of view of the public one would have thought that it was at least not inconsistent with the public interest to "let knowledge grow from more to more." And under modern conditions, both of society and of trade, it would appear to be in accord with the public interest to open and not to shut the markets of these islands to the skilled labour and the commercial and industrial abilities of its inhabitants, to further and not to obstruct for these *les carrieres ouvertes*. All such considerations are shut down under an appeal to enforce this restraint, and I am humbly of opinion that its enforcement cannot be compelled by law.

Here we have the facts to be only three brewers' licences in the Vancouver Excise District and all three—this contract maintained—get into one hand. The case of *Weidman* v. *Shragge* (1912), 46 S.C.R. 1 where the contract was held not

to be enforceable is peculiarly appropriate to the circumstances surrounding the present case. There it was held to be a contract with the object, as the present case is, of restricting competition and establishing a monopoly, an agreement, unduly to prevent or lessen competition within the meaning of the Criminal Code of Canada. I would particularly refer to the judgment of Mr. Justice Duff at pp. 33-37. Upon full and careful consideration of all the facts of the making of the contract here sought to be enforced I am satisfied that the contract is one against public policy and one unduly in restraint of trade and is unenforceable. Further that it is a contract unduly to prevent or lessen competition within the meaning of section 498 of the Criminal Code and is not enforceable between the parties. The action therefore, in my opinion, should stand dismissed and the appeal allowed.

MCPHILLIPS, J.A.

MACDONALD, J.A.: On December 5th, 1927, the following agreement was executed:

WHEREAS the vendor [appellant Vancouver Malt & Sake Brewing Company Limited] is the holder of a brewer's licence under the Excise Act and is engaged in the manufacture of Sake in the Province of British Columbia;

AND WHEREAS the purchaser [respondent Vancouver Breweries Limited] is desirous of purchasing from the vendor the goodwill of the said brewer's licence and any renewal or renewals thereof so far as the same relates to the manufacture and sale of beer, ale, porter or lager beer,

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the premises and of the sum of $15,000 now paid by the purchaser to the vendor (the receipt whereof is hereby acknowledged) the vendor has bargained, sold, transferred and assigned unto the purchaser, and does hereby bargain, sell, transfer and assign to the said purchaser all its right, title, interest, claim and demand in, to or out of the goodwill of the said brewer's licence or any renewal or renewals thereof, except in so far as the same relates to the manufacture, sale and distribution of Sake,

AND the vendor for itself, its successors and assigns covenants and agrees with the purchaser that during a period of fifteen (15) years from the date hereof it will not engage in nor carry on the business of manufacturing, brewing, selling or disposing of beer, ale, porter or lager beer, and will not brew, manufacture or sell any article or articles made in imitation thereof, other than Sake, either by itself or through its servants or agents or otherwise,

AND the vendor further covenants that if at any time it shall sell its licence to brew or any renewal or renewals thereof any such sale shall be made subject to the foregoing conditions,

AND the vendor further covenants that at no time during the said period of fifteen (15) years will it be concerned directly or indirectly either as

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

MACDONALD, J.A.

principal, agent, manufacturer, servant, financier or otherwise in any brewing business other than that of Sake, and in event of any breach of the covenants herein contained will pay to the purchaser the sum of $15,000 to be recoverable upon every breach of this covenant as agreed, in liquidated damages.

For appellant the agreement was signed by inserting the name of the company with the addition "per K. Sanmiya and Frank Jackson" two of its directors. The corporate seal was affixed thereto. Under the licence referred to appellant had the right to manufacture sake and wholly confined its activities to the production and sale of this product.

Five years later (the shares being acquired in the meantime, September 18th, 1931, by one Hewer) appellant decided to brew beer, ale and porter in addition to sake and in breach of the agreement made preparations to do so. Respondent thereupon sued for an injunction and alternatively for a declaration that the respondent is the assignee of appellant's brewer's licence (except in respect to sake) or that it is held by appellant in trust for respondent. The trial judge held that the agreement was enforceable and restrained appellant from manufacturing beverages other than sake for the remainder of the fifteen-year period. No attempt was made to enforce penalties. From that judgment this appeal is launched.

Appellant's first submission was that respondent did not execute the agreement based upon the fact that the name of another company, *viz.*, "British Columbia Breweries (1918) Limited" was first inadvertently inserted in the document as the purchaser. An alteration was made later with pen and ink striking it out and substituting therefor the name of the respondent. The allegation is that this alteration was made after execution by both parties. The finding of fact of the trial judge, *viz.*, that the alteration was made before execution, should not be disturbed. It was urged that he disregarded the evidence of experts. Their evidence affords no assistance of any value on this point. Mr. *Farris's* suggestion is a reasonable one and it does not impugn dishonesty to anyone, *viz.*, that the alteration was probably made by Jackson. Several copies of the agreement may have reached his hands with alterations made in all but one of them (the present Exhibit 13) and finding this oversight he repaired the omission. I examined the original

exhibit and, judging from the colour of the ink and the stress used in making the alteration it appears obvious—certainly it is the most reasonable assumption—that it was done with the hand and pen that inscribed the name of Jackson to the document. The fact that this view does not agree with the oral evidence is not material. Details would be readily forgotten during a five-year interval. The suggestion that it was altered after execution, with a guilty mind or otherwise, should not, on a true appreciation of the facts and probabilities, be entertained for a moment. (*London Life Insurance Co.* v. *Trustee of the Property of Lang Shirt Co. Ltd.* (1929), S.C.R. 117 at 126).

It was also submitted under the plea *non est factum* that the agreement was not executed by the two directors referred to with lawful authority. Prior to execution, it is said no meeting of directors authorized its execution or the affixing of the seals. A third director (Wilson) too had no knowledge of its execution. He resided in San Francisco and gave to one Norman authority to act on his behalf and the agreement was executed without notice to Wilson or Norman. Further it was urged that if there is a presumption that the agreement was validly executed it may be rebutted and this was done. If, however, so far as respondent is concerned, the agreement was validly executed Wilson's complaint, if any, must be directed elsewhere. If appellant's memorandum and articles gave two directors authority to sign on its behalf provided certain directions were followed so the respondent might assume that these formalities of a domestic character were duly observed. It is not a question of delegation of authority; or of ostensible authority. It is a valid exercise of a power conferred upon two directors or a power that might have been conferred upon them.

Article 77 provides that "the business of the [appellant] company shall be managed by directors." By article 104,—

> The management of the business of the company shall be vested in the directors who in addition to the powers and authorities by these presents or otherwise expressly conferred upon them may exercise all such powers and do all such acts and things as may be exercised or done by the company and are not hereby or by statute expressly directed or required to be exercised or done by the company in general meeting but subject nevertheless to the provisions of the statutes in that behalf.

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

MACDONALD, J.A.

As a specific power and without prejudice to general powers they might by article 105 (r),—

enter into all such negotiations and contracts and rescind and vary all such contracts and execute and do all such acts deeds and things in the matter and on behalf of the company as they may consider expedient for or in relation to any of the matters aforesaid or otherwise for the purposes of the company.

By appellant's memorandum of association, one of its main objects was 3 (b) "to carry on the business of Brewers and Maltsters" and by 3 (s) it had power,—

To sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures, or other securities of any other company having objects altogether or in part similar to those of this company.

To clothe directors with authority to affix the seal to any instrument article 106 provides that:

The directors shall forthwith procure a common seal to be made for the company and shall provide for the safe custody thereof. The seal shall not be affixed to any instrument except by the express authority of a resolution of the board of directors and in the presence of at least one director and of the secretary or such other person as the directors may appoint for the purpose and that one director and secretary or other person as aforesaid shall sign every instrument to which the seal of the company is so affixed in their presence.

It will be observed that a resolution was necessary. Only a search of the minutes would reveal its existence, if passed.

The foregoing are general powers. But these general powers might be delegated. By article 96,—

The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may from time to time be imposed on it by the directors.

And by article 91 two directors may form a quorum. Without discussing it in detail it is apparent that anyone reading these public documents would find that appellant company had power to authorize these two directors to execute the agreement and to affix the seal. The methods by which that power might be conferred relates solely to internal management.

In *D'Arcy* v. *Tamar, Kit Hill, and Callington Railway Company* (1867), L.R. 2 Ex. 158, it was held that a bond given under the seal of the company, though it must be taken as valid *prima facie* yet this presumption might be rebutted by proof that the necessary authority to affix the seal was not given. But

as pointed out by Bacon, V.C., in *In re Bonelli's Telegraph Company* (1871), L.R. 12 Eq. 246 at 260:

> The seal could not be lawfully affixed but by the direction of the three directors; and it was proved beyond question that . . . only two directors . . . had given any kind of authority for it.

The decision too turned on the provisions of a statute defining the precise manner in which the directors might act. The statute provided that powers

> shall be exercised in accordance with and subject to the provisions of this and the special Act.

The Act was not complied with in affixing the seal. The provisions of a statute must of course be observed as a condition precedent to acts done under it. (*Pacific Coast Coal Mines Lim.* v. *Arbuthnot* (1917), 86 L.J., P.C. 172). It is then solely a question of the proper interpretation of the statute. We are concerned with a memorandum and articles and nowhere is it provided that general powers given shall not be exercised except on the observance of certain formalities or preliminary resolutions. In *In re Bonelli's Telegraph Company, supra,* an agreement to sell the undertaking, while informal according to the indoor regulations of the company, was held binding against them.

In *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327, this principle is stated by Jervis, C.J., at p. 332:

> We may now take for granted that the dealings with these companies are not like dealings with other partnerships and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, we would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.

It was submitted that different principles apply as between normal acts (presumably ministerial acts) and matters of greater moment such as the execution of the agreement in question. But directors can do anything that the company can do—*Herrmann* v. *Canadian Nickel Co. Ltd.* (1929), 64 O.L.R. 190 at 197; and a limited number have equal authority if the right of delegation is given, and in the case at Bar two constituted a quorum. Respondent was bound to read the memorandum and the articles and finding there, not a prohibition against execu-

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

tion and the affixing the seal by two directors, but a permission to do so on certain conditions it might assume that the conditions were complied with.

The decision in *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869, was concerned with the right of bankers to protection in honouring directors' cheques signed in accordance with a formal notice sent to the bank without any enquiry as to whether or not the directors were appointed in compliance with the memorandum and articles. No directors in fact were ever appointed; certain individuals simply *de facto* acting as such. The letter to the bank (thus giving it notice) referred to a resolution that was never passed, *viz.*, that the bank should honour cheques signed by either two of three named directors. It was enough that by the articles authority could be conferred by resolution. Lord Chelmsford at pp. 889-90 said:

> We have a right to assume that the bankers, acting with proper caution, before they commenced transactions with the company, referred, as they were bound to do, to the articles of association, to ascertain in what manner the account which had been opened was to be drawn upon. Beyond the particulars of the objects of the company, and information as to the mode in which the account was to be dealt with, which alone the bank was concerned to know, I do not consider that any more preliminary inquiries were necessary. Upon referring to the articles of association they would have found, by the 58th clause, that every sum paid on behalf of the company amounting to £10 or upwards, was to be paid by cheques to be signed and countersigned as might from time to time be directed by the board.

MACDONALD, J.A.

The observations of Lord Hatherley at pp. 893-4 were referred to in *Pacific Coast Coal Mines* v. *Arbuthnot, supra,* at p. 176 as "the classical exposition of this principle for practitioners in company law." He said:

> . . . Those who deal with joint stock companies are bound to take notice of that which I may call the external position of the company. Every joint stock company has its memorandum and articles of association; every joint stock company, or nearly every one, I imagine (unless it adopts the form provided by the statute, and that comes to the same thing) has its partnership deed under which it acts. Those articles of association and that partnership deed are open to all who are minded to have any dealings whatsoever with the company, and those who so deal with them must be affected with notice of all that is contained in those two documents.
>
> After that, the company entering upon its business and dealing with persons external to it, is supposed on its part to have all those powers and authorities which, by its articles of association and by its deed, it appears

to possess; and all that the directors do with reference to what I may call the indoor management of their own concern, is a thing known to them and known to them only: subject to this observation, that no person dealing with them has a right to suppose that anything has been or can be done that is not permitted by the articles of association or by the deed.

No one would question the decision in *In re County Life Assurance Company* (1870), 5 Chy. App. 288, where on an appeal from a decision in the winding up of the company an insurance policy issued by *de facto* directors acting without authority (though authority might have been given) was held binding on the company. Yet the principles applicable are the same and they are necessary in the conduct of commercial affairs. Sir G. M. Giffard, L.J., at p. 293 said:

I take the law, as deduced from the authorities, to be plainly this: In the first place, a stranger must be taken to have read the General Act under which the company is incorporated, and also to have read the articles of association; but he is not to be taken to have read anything more, and if he knows nothing to the contrary, he has a right to assume as against the company that all matters of internal management have been duly complied with.

Passing resolutions is, of course, a matter of internal concern.

We were referred to *In re Haycraft Gold Reduction and Mining Company* (1900), 2 Ch. 230. But cases of this sort where shareholders only are concerned are of no aid in deciding whether or not strangers may rely on the assumption that all necessary steps within the authority of the Board have been taken. The true principle applicable is found in such cases as *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (1895), 1 Ch. 629, where not a so-called normal or ministerial act in the course of business, but the execution of a mortgage, was held valid as between the company and the mortgagees. Although by resolution a quorum of three was fixed, a meeting of directors at which two only were present authorized the secretary to affix the company's seal to the mortgage. As stated by Lord Halsbury at p. 632:

MACDONALD, J.A.

. . . an outside person, who had no other means of knowledge, was entitled to regard the company as having performed its functions in the making of this mortgage by whatever means it could lawfully do so.

He too distinguishes the *D'Arcy* case, *supra,* because of the special Acts in question. As Lindley, L.J., pointed out at p. 636:

He is not bound to go and look at the directors' minutes; he has no right to look at them except as a matter of bargain.

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

MACDONALD, J.A.

We were referred to *Ruben* v. *Great Fingall Consolidated* (1904), 2 K.B. 712, but it is of no assistance. It turned on the point as to whether or not the company as master was bound by the fraud of its servant, the secretary in forging the name of two directors to a certificate for his own private purposes. *Mahony* v. *East Holyford Mining Co., supra*, was referred to at p. 729 only to point out that its principles were never extended to a forgery. Such an instrument was simply null and void. So also in *Glasgow Lumber Co., Ltd.* v. *Fettes* (1932), 1 W.W.R. 195, a decision of the Saskatchewan Court of Appeal, the instrument executed by the two companies was signed by one director only whereas the articles required signature by more than one. In the case of one of the companies it might be signed by one director and the secretary. Here the limitation of authority was clearly stated in the articles. In the case at Bar two directors either had authority to sign or could procure that authority. No power existed in the case just cited to confer authority by resolution on one director. This principle is repeated in *Biggerstaff* v. *Rowatt's Wharf, Limited* (1896), 2 Ch. 93 at 102 by Lord Justice Lindley in these words:

> It is said that the company are not bound by those orders because Mr. Davy had no authority to give them. Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or indorsing bills of exchange and promissory notes. The person dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him *bona fide*. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power.

Perhaps the latest case is *British Thomson-Houston Co.* v. *Federated European Bank, Ld.* (1932), 2 K.B. 176. In a note at p. 184 it is correctly stated that

> If the articles of association of the company give the officer authority to do the act provided certain directions are observed, and the officer purports to do the act, the plaintiff is entitled to assume that the directions have beeen followed.

These principles have been followed in our own Courts, *e.g.*, *Bank of United States* v. *Ross* (1932), S.C.R. 150; *Herrmann*

v. *Canadian Nickel Co. Ltd.* (1929), 64 O.L.R. 190. Nor are they affected by such cases as *Houghton & Co.* v. *Nothard, Lowe and Wills* (1927), 1 K.B. 246, where the unusual nature of the transaction put a stranger upon enquiry. One cannot, however, base conclusions upon the judgment of the Court of Appeal. Its decision was affirmed in the House of Lords (1928), A.C. 1, but on other grounds. That being so the statement of Jessel, M.R. in *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103 at 112, may be referred to, *viz.*:

> When the House of Lords affirm a decision on different grounds from those of the Court below, it is evidence, in fact proof, to those who know the practice of the House of Lords, that they do not agree with those grounds.

I have no doubt therefore that the agreement under consideration was validly executed with lawful authority by the two directors.

A further complaint is that the contract already set out in full is illegal, contrary to public policy, in restraint of trade and too wide in its scope for the reasonable protection of respondent. It was first submitted that it might be supported under clause (1) as a completed purchase and sale for adequate consideration. Confining attention for the present to this clause it may be noted that it is not a sale of appellant's licence to brew beer. The licence under the Excise Act, R.S.C. 1927, Cap. 69 is granted to appellant as a personal temporary right enabling it to operate in designated premises. It is not assignable and therefore remains with appellant. There is no prohibition against transfer but it is inconsistent with the whole scheme of the Act. It purports to sell, to a limited extent, the goodwill of a business in which a licence is essential. It has, I think, this effect—the appellant cannot in future use the licence so dealt with to brew beer (only sake). When the agreement was executed appellant had no facilities for brewing beer and never in fact manufactured it. The parties were concerned with possible future operations. Can goodwill attach to a non-existent business as a going concern or to the mere right to carry it on? It only arises when a trade is so conducted that it attracts customers; in other words a good business reputation is acquired. Goodwill is the "attractive force which brings in custom." Therefore when the agreement was executed in 1927

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

no goodwill (a property which may be bought and sold) existed in respect to this dormant licence, in so far as it affected beer, ale and porter. (*Inland Revenue Commissioners* v. *Muller & Co.'s Margarine, Limited* (1901), A.C. 217 at pp. 223 and 224.) Appellant, however, agreed not to use the licence to manufacture and sell beer, ale and porter. It is binding, I think, on the conscience of the appellant and while equity would prevent it from manufacturing beer having divested itself, in part, of its personal property rights under the licence or any renewals thereof, still standing alone it is not possible to regard it as an enforceable contract of purchase and sale *a fortiori* when no "goodwill" (the subject-matter of the alleged sale) exists.

We must deal therefore with the remaining restrictive covenant not to manufacture or sell beer or to be interested in its manufacture or sale through others for fifteen years in any part of the world. In deciding whether or not such covenants are in restraint of trade a more liberal construction is applied as between a vendor and a purchaser than in cases where employers and employees are concerned (*Herbert Morris, Lim.* v. *Saxelby* (1916), 85 L.J., Ch. 210). Courts too may look favourably upon restraints imposed by parties contracting upon an equal footing even although the agreement may result in preventing competition in an effort to stabilize prices or even to fix prices, but not upon contracts between masters and servants in unequal positions (*English Hop Growers* v. *Dering* (1928), 2 K.B. 174 at 180-1).

MACDONALD, J.A.

We have in the agreement under consideration in effect a sale with a covenant not to compete; in other words legal principles applicable to a sale and purchase apply. The skill of individuals is not involved. A vendor and purchaser are in essence concerned; they are so described in the agreement. That being so, the first principle is that the sale of a business however extensive is legal. In *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1914), 83 L.J., K.B. 530 at 536, Viscount Haldane said:

> And I agree with what was said by Lord Justice Lindley, one of the most cautious and accurate judges of our time, in *Maxim-Nordenfelt Guns and Ammunition Co.* v. *Nordenfelt* (1892), 62 L.J., Ch. 273; (1893), 1 Ch. 630: "The interest of the public is no doubt adverse to monopolies and

to restrictions on trade; but then its interest is to allow its members to carry on those businesses which they themselves prefer, and to abandon and sell to the best advantage those businesses which for any reason they do not wish to continue."

One ought to be permitted to sell or realize upon any property or property rights acquired and if to protect the purchaser in the full enjoyment of the thing bought restrictive covenants are imposed on the vendor not wider than necessary to afford that protection the bargain will stand. Public policy is concerned with freedom of contract within reasonable limits (and in compelling observance of contracts) as well as with freedom of trade. It must be reasonable having regard to the respective interests of the parties, and not so far reaching as to create what some of the later cases call a "pernicious monopoly" inimical to the interests of the public. Even though some injury may be done to the public it is not always unenforceable. These principles apply to both time and space and as to the latter because of the worldwide ramifications of business in modern days the restrictive covenants may be commensurate with the object aimed at, *viz.*, the reasonable protection of the purchaser. (*Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1894), 63 L.J., Ch. 908 at 915 and 923). At the latter page Lord Macnaghten after stating the general rule that all interference with liberty of action in trading and all restraints of trade, if nothing more, is contrary to public policy states:

MACDONALD, J.A.

> That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public—so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.

It may be enforceable even if it creates a monopoly. I referred to agreements between equals which may for good cause result in fixing prices. It is only when carried to excess that the law intervenes.

On the facts, however, as I view the evidence no monopoly of any sort is or will likely be created. Appellant was not in this branch of the business providing competition. We have other breweries in this Province to protect the consumer with com-

COURT OF APPEAL

1933

Jan. 27.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT & SAKE BREWING CO. LTD.

petitive prices. Limiting the number of breweries should increase the sale volume without necessarily enhancing prices. The Provincial Government through its Liquor Control Board is the only purchaser of beer in British Columbia and it can prevent exploitation if local dealers combine to enhance prices by purchasing elsewhere or by manufacturing on its own account. Figures given relating to production and consumption do not point to the likelihood of a monoply. Any person or company, including Hewer who purchased the shares in appellant company may obtain another licence under the Excise Act, if the department should be disposed to grant it. It is difficult to conceive of a situation where a monopoly dependent upon lack of competition might more easily be prevented.

In any event the onus of shewing that this contract is calculated to create a monopoly or to unreasonably enhance prices lies on the party alleging it (*Attorney-General of Commonwealth of Australia* v. *Adelaide Steamship Co.* (1913), 83 L.J., P.C. 84 at 91) and there is no evidence, not even reasonable assumptions to provide that proof. Appellant and respondent too might effect a combination if only to advance their own interests and not to injure others. If, therefore, the agreement is in the interests of the contracting parties (and they so regarded it when entered into) appellant, a party to it, now for other reasons alleging injury to the public must prove it. It would not be easy in less difficult cases to discharge that onus and I have no doubt that it was not discharged in this case. Injury to the public is the test and in some cases monopolies may serve public purposes. Usually those who oppose the traffic in liquor favour the limitation of brewery licences. One can conceive of conditions, too, where the enhancement of prices may be necessary to preserve an industry and to distribute its benefits over a large area. As stated by Viscount Haldane in *North-Western Salt Co.* v. *Electrolytic Alkali Co.* (1914), *supra,* at p. 534:

MACDONALD, J.A.

> But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbances. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly. In the present case there was no attempt to

establish a real monopoly, for there might have been great competition from abroad or from other parts of these islands than the part which was the field of the agreement.

It cannot be deduced, therefore, either from the terms of the agreement or from the evidence that it is injurious to the public in any respect. True the covenant is worldwide in its application. Appellant may not manufacture brew or sell beer for fifteen years in any place. One might reasonably submit that it should be restricted as to space. I do not think the parties to the agreement had in mind a restriction on brewing anywhere, but even if it must be read literally it is still, in my opinion, valid. The fact that the time is limited bears on this point. It will remain in force for six or seven years. The agreement is not attacked on the ground that appellant desires to operate abroad. If it suggests the remote possibility that it suffers a hardship in being prevented from brewing beer, *e.g.*, in some part of China, respondent may assert with equal force that through the development of commerce in modern days beer is exported to all parts of the world where it may be legally purchased and to protect its foreign trade this restriction is necessary. (*Nordenfelt* case, *supra*, pp. 915-16.) If appellant could profitably brew abroad it could only do so by securing markets and customers otherwise within the reach of the respondent.

Other objections were raised. It was submitted that an agreement by appellant to restrict its operations or to limit its corporate powers is invalid. That would prevent any company from selling its undertaking or business. The powers under its charter were not conferred for the promotion of public purposes as in *Montreal Park and Island Rway. Co.* v. *Chateauguay and Northern Rway. Co.* (1904), 35 S.C.R. 48). Any company having corporate powers unless conferred for public purposes may agree not to exercise them in competition with another (*McCausland* v. *Hill* (1896), 23 A.R. 738). It follows too that there is no breach of any sections of the Criminal Code or of the Combines Act.

I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Lennie & McMaster.*

Solicitors for respondent: *Pattullo & Tobin.*

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION COMPANY LIMITED.*

Constitutional law—Legislative power of the Province—Fuel-oil Tax Act, 1930—Taxation—Ultra vires—Direct or indirect tax—Trade and commerce—B.C. Stats. 1930, Cap. 71, Secs. 2, 5 and 6—B.N.A. Act, Secs. 91 (2) and 92, Nos. (2), (13) and (16).

Crude oil (not produced in commercial quantities in this Province) is permitted by the Dominion Government to be imported from foreign countries into this Province free of customs duties. It is distilled here in refineries, and after the more valuable products (including gasoline) are extracted, fuel-oil is left as a residue in the process of manufacture.

Section 2 of the Fuel-oil Tax Act, B.C. Stats. 1930, provides that "For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay the Minister of Finance a tax in respect to that fuel-oil at the rate of one-half cent a gallon." Section 5 prevents anyone from keeping fuel-oil for sale without a licence for each place of business where so kept. Section 6 (1) gives powers of inspection and interrogation and by 6 (2) failure to produce for inspection or to permit inspection of books and records or receptacles or tanks containing fuel-oil exposes the offender to a penalty. An action to recover the amount of the tax imposed by said Act upon the defendant for fuel-oil consumed by him, was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MCPHILLIPS, J.A. dissenting), that the tax is a duty of excise and is not within the competence of the Province, further it offends against the powers of the Dominion with regard to the regulation of trade and commerce.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. dismissing an action by the Attorney-General, tried by him at Vancouver on the 11th of January, 1933, to recover from the defendant the amount of the tax imposed by the Fuel-oil Tax Act, for fuel-oil consumed by it since the 1st of June, 1932, and for an account of all fuel-oil so consumed. The defendant claims that said Act is *ultra vires* of the Provincial Legislature, in the alternative that section 2 of said Act is *ultra vires* of the Provincial Legislature in that it imposes a tax that is not a direct tax within the meaning of the British North America Act, in that said section imposes an import duty and constitutes a regulation of trade and commerce.

Statement

* Reversed by the Judicial Committee of the Privy Council.

Harold B. Robertson, K.C. and *Bruce Robertson,* for plaintiff.
Mayers, K.C., Macrae, K.C. and *G. S. Clark*, for defendant.

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* KINGCOME NAVIGATION CO.

7th February, 1933.

MORRISON, C.J.S.C.: The question raised in this action is whether what is locally known as the Fuel-oil Tax Act, being Cap. 71, B.C. Stats. 1930 and particularly sections 2, 5 (1) and 6 thereof, is invalid as being an attempt, in the first place, to impose indirect taxation in contravention of head 2 of section 92 of the B.N.A. Act, 1867, which only conferred powers of direct taxation upon the Provinces of Canada and, in the second place, to impose Excise taxation and in the third place as being an interference with trade and commerce allotted exclusively to the Federal Parliament. Fuel-oil, the commercial, consumable commodity dealt with by the Legislature in the Act in question, is manufactured from crude petroleum which is imported free of duty into the Province from foreign ports and is kept for sale and is sold within the Province. By section 5 (1) I take it that the producers of fuel-oil pay the small licence fee which would be added to the price and passed on to the consumer who in turn is taxed upon consumption pursuant to section 2. No crude petroleum is produced in British Columbia except in negligible quantities. Coal is found in large areas in the Province. Coal-mining is and has been one of the most important permanent industries of the Province both in external and internal trade. The consumption of refined oil manufactured from the crude in Vancouver comes into direct and effective competition with the consumption of coal and tends to leave the trade in that commodity in a somewhat mutilated condition. Sections 2, 5 (1) and 6 are as follows:

MORRISON, C.J.S.C.

2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon.

5. (1.) Upon the expiration of thirty days after the commencement of this Act, no person shall keep for sale or sell fuel-oil in the Province unless he is the holder of a licence issued pursuant to this section in respect of each place of business at which fuel-oil is so kept for sale or sold by him.

(2.) The manner of application and the forms of application and of the licence shall be as prescribed in the regulations. A licence fee of $1 shall be payable in respect of each licence.

6. (1.) Every collector, constable, and every person authorized in writing by the Minister of Finance to exercise the powers of inspection

MORRISON, C.J.S.C.

1933

Feb. 7.

under this section may without warrant enter upon any premises on which he has cause to believe that any fuel-oil is kept or had in possession, and may inspect the premises and all fuel-oil found thereon, and may interrogate any person who is found on the premises or who owns, occupies, or has charge of the premises.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

The question as to what taxation it is competent for the Provincial Legislature to impose is a legal one—*Rex* v. *Caledonian Collieries, Ltd.* (1928), 97 L.J., P.C. 94 at p. 95 quoting Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1887), 56 L.J., P.C. 87; 12 App. Cas. 575. At the time of Confederation there was a well-recognized classification. Taxes on property and income were classified as direct while duties of customs and excise were classified as indirect taxes. If a new form of taxation arises a formula of economists may be used but not for the purpose of placing a tax hitherto recognized as belonging to one class into a different class.

MORRISON, C.J.S.C.

Customs and excise are duties imposed on commodities partly for the purpose of raising a revenue, but more truly for the purpose of regulating trade and commerce. The Provincial Legislature has no power to impose them. *The Attorney-General of British Columbia* v. *The Attorney-General for Canada* (1922), 64 S.C.R. 377 at pp. 381, 384 and 387 and in the same case in the Privy Council (1924), 93 L.J., P.C. 132. Reference is also made to the Act of Union passed in 1840 being 3 & 4 Vict., Cap. 35, s. XLIII. I have also been referred to *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (1908), 5 C.L.R. 818. I am not unmindful of The Special War Revenue Act, 1915, Amendment Act (10 & 11 Geo. V.), Cap. 71, in which the tax is called an excise particularly section 2, subsection (2) and subsection (7) of the Customs Tariff, R.S.C. 1927, Cap. 44, Schedule A, item 267. From this it will be gathered that crude oil imported into and refined in Canada shall be free from import or excise duties.

The defendant submits that a Provincial Legislature cannot by the employment of a subterfuge, encroach on the domain reserved to the Dominion by attempting to levy a form of revenue which differs in its real nature from the semblance which the Provincial Legislature has sought to give to it; and that the actual incidence of the tax is of no legal significance once it is possible to assign the legislation in question to a par-

ticular type of revenue which has long been familiar to Legislatures and Courts. *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 362. *Fairbanks* v. *The City of Halifax* (1926), S.C.R. 349 at p. 368. *Attorney-General for British Columbia* v. *Macdonald Murphy Co.* (1930), 99 L.J., P.C. 113 at p. 115. The question of direct and indirect taxation has been dealt with judicially on many occasions, the latest pronouncement on the subject to which I have been referred is *Attorney-General for British Columbia* v. *Macdonald Murphy Co., supra,* which also supports the proposition just mentioned that if the offending provisions are in their true character an Excise Act then the Provincial Legislature may not enact it. Excise is an inland duty or impost levied upon the manufacture, sale or consumption of commodities within the country and has for its essence the intention that ultimately it is to be borne by the consumer and thus that it enters into the price of the commodity and affects its relative use in competition with other commodities, as for instance, coal, which not only is susceptible of but in practical reality is being put to the same use. It is immaterial at what stage between the producer and the consumer the imposition is levied since the line of incidence extends to the consumer.

It has been strongly pressed upon me that what the Legislature has done is to impose a duty of one-half cent per gallon on all fuel-oil consumed in the Province which includes the fuel-oil produced from the crude petroleum imported to be refined as specified in the Customs Tariff Act thus conflicting with the policy of the Dominion in this behalf. *Attorney-General of Canada* v. *Attorney-General of Ontario* (1897), 67 L.J., P.C. 17; *Toronto Electric Commissioners* v. *Snider* (1925), 94 L.J., P.C. 116 at p. 123; *Attorney-General for Quebec* v. *Queen Insurance Company* (1878), 3 App. Cas. 1090. In short the Act strikes at the use, enjoyment or consumption of this commodity, the levying of imposition upon which is the very essence of an excise tax.

For these reasons in my opinion the Province is under a constitutional disability to impose it. The action is dismissed with costs.

MORRISON, C.J.S.C.

1933

Feb. 7.

From this decision the plaintiff appealed. The appeal was argued at Victoria on the 17th to the 21st of February, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

Argument

Harold B. Robertson, K.C. (*Bruce Robertson,* with him), for appellant: The question at issue was decided in *Attorney-General for B.C.* v. *Canadian Pacific Ry. Co.* (1927), S.C.R. 185 at p. 187. The tax is a direct tax because it is demanded from the persons who it is intended or desired should pay it: see *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 582. The test to ascertain whether a tax is direct or indirect is laid down in *Cotton* v. *Regem* (1914), A.C. 176 at p. 190; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561; *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934 at p. 937; *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Limited* (1932), 49 T.L.R. 104 at p. 106. The Privy Council in the *Lower Mainland Dairy* case reaffirmed the rule laid down in the cases set out above and thereby disapproved of the rule in *City of Halifax* v. *Fairbanks' Estate* (1928), A.C. 117. Customs and excise taxes are entirely different, customs being taxes on export and import of commodities and excise inland taxes charged on commodities. Crude oil is brought in free, refined into many products and the residue is sold as fuel-oil: see *Little* v. *Attorney-General for British Columbia* (1922), 31 B.C. 84 at pp. 86, 97 and 98. It is not an excise tax (a) because between 1660 and 1867 there was no statute in England imposing a tax on a consumer. Wherever in any statute there is mention of a tax on consumption, the word consumption is used to distinguish between goods which are going to be used in the country and goods which are going to be exported: see Stephen's Commentaries, 17th Ed., Vol. 1, p. 274. (b) An excise tax prior to 1867 was imposed only on the manufacturer or producer and before their sale to the consumer: see Oxford Dictionary, Vol. 3, p. 379; Encyclopædia Britannica, Vol. 8, 9th Ed., p. 797. (c) An excise tax in England was an actual charge on the goods: see Excise Management Act, 1841, (4 & 5 Vict.), Cap. 20, Sec. 24. (d) There were certain classes

of assessed taxes which imposed directly on the consumer such as house tax or a tax on horses and carriages, etc., but these were not considered excise taxes: see John Stuart Mill's Principles of Political Economy (1869), Book 5, Cap. 4, p. 504. (e) Because the commodity at the time of the imposition of the tax had ceased to exist. (f) The tax is on a person who is personally liable for it, just like an income tax or personal property tax. Neither a customs tax nor an excise tax is a tax upon a person: *Re Yorkshire Guarantee Co.* (1895), 4 B.C. 258 at pp. 273-4; *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184 at p. 190; *Little* v. *Attorney-General for British Columbia* (1922), 31 B.C. 84 at pp. 86 and 98. Excise is not a regulation of trade and commerce but a taxation. Even if it were excise, still the Province would have the power to legislate under its power of direct taxation: see *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at pp. 112-3; *John Deere Plow Company, Limited* v. *Wharton* (1915), A.C. 330 at p. 340; *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 586; *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C. 231; *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333 at pp. 343-4; *Great West Saddlery Co.* v. *The King* (1921), 2 A.C. 91 at p. 118.

Argument

Mayers, K.C., for respondent: This is a question of law. At the time of Confederation there was a well-recognized classification according to which taxes on property and income were considered to be direct taxes, while duties of customs and excise were considered to be indirect taxes. While a formula of the economists may usefully be consulted in the case of a new form of taxation, it is not permissible to use any such formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation: see *Fairbanks* v. *The City of Halifax* (1926), S.C.R. 349 at p. 365; (1927), 97 L.J., P.C. 11 at p. 14; *City of Charlottetown* v. *Foundation Maritime Ltd.* (1932), S.C.R. 589 at p. 594. By imposing a tax on a commodity the Provincial Legislature interferes with the regulation of trade and commerce. Customs and excise are not taxation at all in the sense in which that word is used in section 92 (2) of the B.N.A. Act, but are duties imposed on

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

commodities partly for the purpose of raising a revenue and more particularly for the purpose of regulating trade and commerce. As customs and excise are imposed under powers given by the head of "the regulation of trade and commerce" in section 91 (2) of the B.N.A. Act, they are altogether excluded from the competence of the Provincial Legislature: see *Lawson* v. *Interior Tree Fruit & Vegetable Committee of Direction* (1931), S.C.R. 357 at p. 362; *Fairbanks* v. *The City of Halifax* (1926), S.C.R. 349 at p. 368; *Attorney-General for British Columbia* v. *Macdonald Murphy Co.* (1930), 99 L.J., P.C. 113 at p. 115; *Attorney-General of British Columbia* v. *The Attorney-General for Canada* (1922), 64 S.C.R. 377 at pp. 381, 384 and 387; (1923), 93 L.J., P.C. 129 at p. 132; *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (1908), 5 C.L.R. 818 at pp. 834, 837 and 854; *Attorney-General for Canada* v. *Attorney-General for Ontario, Quebec, and Nova Scotia* (1897), 67 L.J., P.C. 90 at p. 94; *Toronto Electric Commissioners* v. *Snider* (1925), 94 L.J., P.C. 116 at p. 123; *Proprietary Articles Trade Association* v. *Attorney-General of Canada* (1931), 100 L.J., P.C. 84 at p. 91.

Argument

If the revenue sought to be raised by the Fuel-oil Tax Act is in its true nature an import duty or excise, there is an end of the matter: see *Attorney-General for British Columbia* v. *Macdonald Murphy Co.* (1930), 99 L.J., P.C. 113 at p. 115. A Provincial Legislature cannot by the employment of a subterfuge, encroach on the domain reserved to the Dominion by attempting to levy a form of revenue which differs in its real nature from the semblance which the Provincial Legislature has sought to give to it: see *Attorney-General for Quebec* v. *Queen Insurance Company* (1878), 3 App. Cas. 1090 at p. 1097; *Union Colliery Co. of British Columbia* v. *Bryden* (1899), 68 L.J., P.C. 118 at p. 120; *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), 93 L.J., P.C. 137 at p. 141; *Great West Saddlery Co.* v. *Regem* (1921), 90 L.J., P.C. 102 at p. 115; *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), 66 L.J., P.C. 34 at p. 35.

Robertson, replied.

Cur. adv. vult.

7th March, 1933.

MACDONALD, C.J.B.C.: This is an appeal raising a question involving the jurisdiction of the Dominion Parliament and that of the local Legislature. We have been informed by counsel that the Minister of Justice was notified of this appeal who replied that he did not wish to be heard at this stage. A large number of authorities were cited on both sides a few only of which I shall refer to.

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* KINGCOME NAVIGATION CO.

The facts are shortly these. Crude oil is permitted by the Dominion Government to be imported into this Province free of customs duty and to be refined here—one product of which is known as fuel-oil, on which the Dominion has imposed no duties of excise. The Province has passed an Act (1930, Cap. 71) imposing a tax on the ultimate consumer of fuel-oil and it justifies that tax by submitting that it does not invade the jurisdiction of the Dominion Parliament; that it is not an excise tax and that it does not interfere with trade and commerce but that it deals with property and civil rights—a question assigned to the Province by the British North America Act and is direct taxation. It was contended by counsel for the Attorney-General that excise duties have never been imposed except upon the manufacturer or producer of the article; that it has never been imposed upon the consumer and that the tax imposed by the Province is therefore not an excise tax but one imposed upon property which is found within the Province and, therefore, direct taxation. Counsel have very ably presented their arguments *pro* and *con*. The history of excise legislation has been traced from the time of Charles II. down to the present time and the several cases referred to have been shewn to relate to duties of excise on the consumer as well as upon the producer. I think, on the whole case before us, the tax is a duty of excise and is not within the competence of the Province. Apart from that, I think, it also offends against the powers of the Dominion with regard to the regulation of trade and commerce. The Dominion Parliament allows crude oil in free and permits the refiner to sell his fuel-oil free of excise duty. This is done, I take it, to regulate trade and commerce of the country and a tax imposed by the Province is one which shackles it. In view of my opinion that the tax is an excise tax it is hardly necessary

MACDONALD, C.J.B.C.

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

to consider whether it is affected by the practice in the past of recognizing the personal property tax as a direct tax and whether competent of the Provincial Legislature. The question of whether the personal property tax was *intra vires* or *ultra vires* has never been brought before the Courts and that tax is therefore a very frail foundation upon which to found an argument but in addition to that the Privy Council has referred to the distinction between them.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

It was suggested that the case of *Halifax (City)* v. *James P. Fairbanks' Estate* (1927), 97 L.J., P.C. 11 at p. 14, is inconsistent with the decision of the same Court in *Lambe's* case (1887), 56 L.J., P.C. 89, and in the case of *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934. I do not, however, read the *Halifax* case in that way. It seems to me that what the Privy Council meant was that in a case of this kind it is helpful to consider the state of the law at the time of Confederation, but has not intended to exclude the application of *Lambe's* case. This, however, is a matter which the Judicial Committee will doubtless decide for itself should this case reach that tribunal.

MACDONALD, C.J.B.C.

The appeal, I think, must be dismissed.

MARTIN, J.A.: In this appeal, wherein some difficult questions in the very debatable land of Provincial powers of taxation are raised, the solution of which, we were informed by counsel, is of an urgent nature in connexion with the public revenue, I do not think it is necessary or desirable to say more than to adopt the following language of Lord Justice Romer in the very recent taxation case of *Hennell* v. *Inland Revenue Commissioners* (1932), 102 L.J., K.B. 69, wherein he said at p. 73:

MARTIN, J.A.

> During the argument of this case I have felt, and I still feel, considerable doubt, but upon the whole I have come to the conclusion that this appeal should be dismissed.

That language embodies my view of the like disposition of this case.

MCPHILLIPS, J.A.: The constitutionality of the following statute law of the Legislature of British Columbia is called in question in this appeal, being sections 2, 5 (1) and 6, the Act being the Fuel-oil Tax Act, Cap. 71, B.C. Stats. 1930. In the

MCPHILLIPS, J.A.

Supreme Court of British Columbia by a judgment of the Chief Justice of that Court the legislation was held to be *ultra vires* of the constitutional powers conferred upon the Parliament of the Province under the British North America Act, 1867 (30 & 31 Vict.), Cap. 3. The argument addressed to this Court centred around the principal section of the Act, *viz.*: section 2 of Cap. 71, B.C. Stats. 1930, which reads as follows:

2. For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon.

The learned Chief Justice of the Court below concluded his reasons for holding as he did in the following words:

In short the Act strikes at the use, enjoyment or consumption of this commodity, the levying of imposition upon which is the very essence of an excise tax. For these reasons in my opinion the Province is under a constitutional disability to impose it. The action is dismissed with costs.

It may be stated at the outset that the power to pass an Excise Act by the Parliament of Canada is not one of the exclusive legislative powers conferred by the B.N.A. Act but of course section 91 (3) is very broad in its terms:

(3) The raising of money by any mode or system of taxation.

Whilst the Legislature of the Province is in more restricted lines, namely, section 92 (2):

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:—

(2) Direct taxation within the Province in order to the raising of a revenue for Provincial purposes.

Then it must always be borne in mind that as regards the powers of the Parliament of Canada, that the concluding paragraph of section 91 reads as follows:

And any matter coming within any of the classes of subjects enumerated in this section [92] 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 by this Act [B.N.A. Act] assigned exclusively to the Legislatures of the Provinces.

Further under section 92 there is specifically enacted by head (16):

Generally all matters of a merely local or private nature in the Province.

Then there is section 92 (13) "Property and civil rights in the Province." The conception of the framers of the Act was not to give the Parliament of Canada such a controlling power as would paralyze the Legislatures of the Provinces, that is,

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

that the Legislatures of the Provinces would be within the Provinces supreme in respect of "matters of a local or private nature." Therefore the question of "local or private nature" becomes a most important enquiry when considering the impugned legislation and so far held to be *ultra vires*. The fuel-oil of course is property—personal property—and it cannot, with great respect to all contrary opinion, be looked upon as being in any other category. The property is locally held and within the purview of the Act here being considered is personally consumed and the tax is imposed (Sec. 2, Cap. 71, B.C. Stats. 1930) upon "every person who consumes any fuel-oil in the Province." It is not capable of being said that property within the Province is not taxable; in fact, that was not contended for at this Bar but that it was an invasion of the exclusive domain of the Parliament of Canada in the following respects: (1) An indirect tax; (2) an excise tax; (3) affects trade and commerce. However, in the main the attack on the legislation revolved around the submission that it was legislation in the way of an Excise Act. Approaching the matter at

MCPHILLIPS, J.A.

that point of view I fail to see that there is any authority of any authoritative nature which would preclude the Legislature of a Province of Canada imposing taxation which could be termed an Excise Act—which of course I do not view it to be. In England of course the Parliament is supreme and we cannot expect to get any authority in the English Courts that will be of aid or assistance in the matter—as in England there can never be what we have here—conflict between the powers of the Dominion and the Provinces as to the respective powers of the Dominion Parliament and the Parliaments of the Provinces. Turning to Wharton's Law Lexicon, 13th Ed., p. 334, we have this stated:

> Excise [fr. *acciis Dut.; excisum*, Lat.], the name given to the duties or taxes laid on certain articles produced and consumed at home, amongst which spirits have always been the most important; but, exclusive of these, the duties on the licences of auctioneers, brewers, etc., and on the licences to keep dogs, kill game, etc., are included in the excise duties.

Now what is the position of matters in the Province of British Columbia today? It is a very large producer of coal and coal is taxed, a large producer of lumber and lumber is taxed. Then let us come precisely to fuel-oil. This is produced in Canada, it

is true not in as great volume as in the United States of America, but Canada admits of the entry of crude oil into Canada without duty from which fuel-oil is produced. In Ontario there are oil wells in operation for nearly a century and still operating and there are large oil wells in the Province of Alberta—the Turner Valley—and fuel-oil is produced from these wells and there are many other oil fields in various portions of the Dominion of Canada that will in the early future be in operation. Is it to be said that this property when in the Province and consumed in the Province shall be free from taxation in the Province? I cannot follow the reasoning advanced in the matter. It would seem to be the negation of all powers or authority in the Province to tax any personal property. We are of course familiar with all the cases that have gone to the Privy Council and the Supreme Court of Canada upon the question of whether the tax is a direct or indirect tax. Here fuel-oil is no different in my view for taxation purposes than any other personal property of any person resident in the Province such as furniture, motor-cars, etc., all of which property is capable of being sold; for instance, the stock-in-trade of the merchant actually being sold, yet all this property, in truth all personal property, is subject to taxation and has been the subject of taxation by the Provinces. It is true no matter what may be one's individual opinion the Court must bow to the decision of the ultimate Court of Appeal and loyally obey it. In *Attorney-General of British Columbia* v. *Canadian Pacific Ry.* (1927), 96 L.J., P.C. 149 their Lordships of the Privy Council decided, as set forth in the head-note, that:

The British Columbia Fuel-oil Tax Act, 1923, is *ultra vires* the Legislature of the Province, inasmuch as it does not impose direct taxation within the meaning of section 92, subsection 2 of the British North America Act, 1867.

The Act of 1923 provided that every person who should purchase within the Province fuel-oil, sold for the first time after its manufacture in or importation into the Province, should pay a tax thereon, and the vendor was to collect the tax and pay it over to the Government:—*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*, 94 L.J.P.C. 146; (1925), A.C. 561.

Decision of the Supreme Court of Canada (1927), S.C.R. 185 affirmed.

Cases referred to:

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

MCPHILLIPS, J.A.

Attorney-General for Manitoba v. *Attorney-General for Canada*, 94 L.J.P.C. 146; (1925), A.C. 561. *Attorney-General for Quebec* v. *Reed* (1884), 54 L.J.P.C. 12; 10 App. Cas. 141. *Bank of Toronto* v. *Lambe* (1887), 56 L.J.P.C. 87; 12 App. Cas. 575. *Brewers and Malsters' Association of Ontario* v. *Attorney-General for Ontario*, 66 L.J.P.C. 34; (1897), A.C. 231.

It might be said though that the present case has entirely different features. The taxation imposed here is not such as it was there—as against

> every person who should purchase within the Province fuel-oil, sold for the first time after its manufacture in or importation into the Province, should pay a tax thereon, and the vendor was to collect the tax and pay it over to the Government.

Here the tax is only imposed upon the taxpayer "who consumes any fuel-oil in the Province." No question of indirect taxation it would seem to me is open. The only persons who are capable of being taxed are the consumers—they are persons certain, the actual consumers—and what they have consumed is personal property which in its *genus* can be nothing other than personal property. The present case is not one, I submit, which can be definitely stated to be controlled by the decision last referred to. It was laid down by the Board in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1925), A.C. 561 at p. 566 (Viscount Haldane):

> . . . that 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. Of such taxes excise and customs are given as examples.

In *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73, we have the head-note reading:

> The Manitoba Liquor Act of 1900 for the suppression of the liquor traffic in that Province is within the powers of the Provincial Legislature, its subject being and having been dealt with as a matter of a merely local nature in the Province within the meaning of British North America Act, 1867, s. 92, sub-s. 16, notwithstanding that in its practical working it must interfere with Dominion revenue, and indirectly at least with business operations outside the Province.
>
> *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348, followed.

Where the tax is fixed upon the actual consumer of the fuel-oil—and that is the only person capable of being taxed—I fail to see how it is possible of being said that the tax is capable of

being passed on. The taxation can only be imposed when the fuel-oil has been consumed and whoever consumes it is the only person who can be taxed. I can readily understand why possibly the Legislature in its wisdom did not think it fair or just to impose this taxation on this species of property save only after consumption. This will be borne into one's mind the more clearly when large consumers of fuel-oil have to keep very heavy stocks of fuel-oil on hand, such as railway companies, steamship companies, large industrial concerns, etc., and moneys would only come in consequent on consumption in their business operations; therefore, the law-making authority has said by legislation you will only be taxed as you consume the fuel-oil. This is a most considerate action upon the part of the Legislature.

I would again refer to the question so strongly urged at this Bar and was the burden of the argument, that the Act here to be dealt with was an Excise Act, and that, as such, was *ultra vires* of the Provincial Legislature. I do not agree that it is in the nature of an Excise Act nor would I agree that if it could be called an Excise Act that perforce then it was beyond the scope of Provincial legislation. In *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at pp. 581, 582, 583, Lord Hobhouse, who delivered the judgment of their Lordships of the Privy Council, considered the governing principle as to what may be said to be a direct tax, and I think it well to quote what Lord Hobhouse said:

> First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, *viz.*, what the words mean, as used in this statute; whereas the economists 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. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, 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. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. 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.

After some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows: "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons 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 are the excise or customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the Bar. Their Lordships have not thought it necessary to examine Mill's works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the Legislature.

MCPHILLIPS, J.A.

Their Lordships then take Mill's definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant's counsel, nor only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious *indicia* of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the Federation Act.

It will be observed that the contention made that the submission, p. 582, "that to be strictly direct a tax must be general" was rejected and further on, at p. 582, Lord Hobhouse said:

It would deny the character of a direct tax to the income tax . . . generally looked upon as a direct tax of the most obvious kind. . . .

In the result in the *Lambe* case taxes imposed by the Quebec Legislature on certain commercial corporations carrying on business in the Province was held to be legislation *intra vires* of the Provincial Legislature, being direct taxation. What is

the position of matters here? The consumer is the one directly taxed, there is no difficulty in determining who the consumer is and once consumed the article or commodity of course is gone and the consumer is the very person who it is intended or desired should pay it, and once consumed there can be no trafficking with the article or commodity: therefore it is utterly impossible in the construction of the Act before us to bring the language into play defining indirect taxes at p. 582:

> 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 are the excise or customs.

Here we have the consumers of the commodity taxed and not until the commodity is consumed does the tax take effect, *i.e.*, the incidence occurs, the tax attaches upon the person consuming and falls upon no other, no opportunity or possibility for any recoupment by the consumer "at the expense of another." In passing it might be said that the income tax, which is admitted legal taxation on the part of the Provincial Legislatures is, in principle, the same as the present tax under consideration—the taxpayer pays on income which in effect he has consumed, he has destroyed his personal proprietorship of the money, he received the money and paid it away in the expense of living for himself and family. Here we have the fuel-oil and its consumption. Once consumed nothing remains. There can be no possible indemnification. I would refer to what Lord Moulton said in *Cotton* v. *Regem* (1914), A.C. 176 at p. 190:

> The language of this provision of the British North America Act, 1867, marks an important stage in the history of the fiscal legislation of the British Empire. Until that date the division of taxation into direct and indirect belonged solely to the province of political economy so far as the taxation in Great Britain or Ireland or in any of our colonies is concerned; and although all the authors of standard treatises on the subject recognized the existence of the two types of taxation, there cannot be said to have existed any recognized definition of either class which was universally accepted. Each individual writer gave his own description of the characteristics of the two classes, and any difference in the descriptions so given by different writers would necessarily lead to differences in the delimitation of the two classes, so that one authority might hold a tax to be direct which another would class as indirect. But so long as the terms were only used in connection with the theoretical treatment of the subject this state of things gave rise to no serious inconvenience. The British North America Act changed this entirely. "Direct taxation" is employed in that statute

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

as defining the sphere of Provincial legislation, and it became from that moment essential that the Courts should for the purposes of that statute ascertain and define the meaning of the phrase as used in such legislation.

No indefiniteness here exists as to who is to pay—always the consumer. There can be no passing on of a tax upon property which has been consumed. Looked at in its reality no tax is imposed on fuel-oil existent—the tax is upon fuel-oil non-existent consumed by the taxpayer. Once the fuel-oil is within the Province it cannot be said that any magic attaches to it or that it is immune from Provincial taxation. Being property it must be subject to the incidence of taxation and the taxation here imposed under the Act being considered is direct taxation being property consumed. The Legislature so enacts and in *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575 at p. 585, Lord Hobhouse said:

> Their Lordships . . . hold that, as regards direct taxation within the Province to raise revenue for Provincial purposes, that subject falls wholly within the jurisdiction of the Provincial Legislatures.

The imposition in my opinion is in its nature a direct tax upon property and, being that, how can it be said to trench upon the "regulation of trade and commerce"?

MCPHILLIPS, J.A.

In *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 it is shewn that there may be cases where the statute law relates to property and civil rights and it cannot be held to be an attempt on the part of the Legislature of the Province to affect trade and commerce—and I would refer to a decision of this Court of *Little* v. *Attorney-General for British Columbia* (1922), 31 B.C. 84 at pp. 86, 97 and 98. I would refer to what Lord Atkinson said in delivering the judgment of their Lordships of the Privy Council in *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333 at pp. 343-4.

We have Lord Haldane in delivering the judgment of their Lordships of the Privy Council in *Workmen's Compensation Board* v. *Canadian Pacific Railway Company* (1920), A.C. 184 at p. 190:

> It is not in dispute that the persons employed by the respondent company with reference to whose dependents the present question is raised, come within the conditions under which the enactment purported to be applicable to them. 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. In *Bank of Toronto* v. *Lambe* [(1887)], 12 App. Cas. 575 it was decided by the Judicial Committee that a Province could impose direct taxes in aid of its general revenue on a number of banks and insurance companies carrying on business within the Province, and none the less that some of them were, like the respondents, incorporated by Dominion statute. The tax in that case was not a general one, and it was imposed, not on profits nor on particular transactions, but on paid-up capital and places of business. The tax was held to be valid, notwithstanding that the burden might fall in part on persons or property outside the Province.

In *Attorney-General for British Columbia* v. *Macdonald Murphy Lumber Co.* (1930), A.C. 357 at p. 365 Lord Macmillan, in delivering the judgment of their Lordships, said:

> While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax where the taxpayer's personal property is selected as the criterion of his ability to pay, a tax which, like the tax here in question, is levied on a commercial commodity on the occasion of its exportation in pursuance of trading transactions, cannot be described as a tax whose incidence is, by its nature, such that normally it is finally borne by the first payer, and is not susceptible of being passed on. On the contrary, the existence of an export tax is invariably an element in the fixing of prices, and the question whether it is to be borne by seller or purchaser in whole or in part is determined by the bargain made. The present tax thus exhibits the leading characteristic of an indirect tax as defined by authoritative decisions.

There, as stated, it was held to be an "indirect tax" but in the present case in accordance with the language of Lord Macmillan I think it is well indicated, it is a direct tax. Note:

> While it is no doubt true that a tax levied on personal property, no less than a tax levied on real property, may be a direct tax. . . .

Here in effect it is a tax on personal property but it is levied only upon that property consumed, *i.e.*, fuel-oil and being consumed in the language of Lord Macmillan "is not susceptible of being passed on." In my opinion the Act to be considered here is plainly a tax upon personal property and is a direct tax. The manner and form of the imposition of the tax matters not if it be clear, as I think it is upon the frame of the statute. The imposition of a tax upon personal property of the taxpayer—property which he has consumed—the intention of the Legislature is plain that it is a direct tax upon the person having and consuming fuel-oil, the consumption having taken place. All these questions of nicety, as to whether it is direct or indirect taxation, are at an end as in the language of Lord Macmillan, already quoted, the fuel-oil so taxed and consumed "is not

MORRISON, C.J.S.C.

1933

Feb. 7.

susceptible of being passed on." I am of the opinion that the Act is *intra vires* legislation of the Legislature of the Province of British Columbia and being of that opinion I would allow the appeal.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA *v.* KINGCOME NAVIGATION CO.

MACDONALD, J.A.: I have given full consideration to the arguments submitted (and the cases and statutes cited) and have reached a firm conclusion that this is an excise tax. An appeal is about to be taken to the Judicial Committee for the final determination of the questions involved and because of the limited time at my disposal—and to avoid delay—I will briefly outline my views. The submission is that the Fuel Oil Tax Act, B.C. Stats. 1930, Cap. 71, is *ultra vires* of the Provincial Legislature. Section 2 reads as follows:

> For the raising of a revenue for Provincial purposes every person who consumes any fuel-oil in the Province shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon.

One must scrutinize the whole Act to determine its true character. Section 5 prevents any one from keeping fuel-oil for sale without a licence (subject to cancellation for infraction of the Act) for each place of business where so kept. Powers of inspection and interrogation are given by section 6 (1) and by 6 (2) failure to produce for inspection, or to permit inspection, of books and records or of receptacles or tanks containing fuel-oil, exposes the offender to a penalty. By section 7 (1) all who consume fuel-oil, sell it, or keep it for sale must keep books and records and make such returns as may be prescribed by regulations. By subsection (2), making false or deceptive entries is an offence. These sections indicate that while section 2 imposes the tax on the "person who consumes" the dealer and distributor are brought within the purview of the Act. It would be illegal to tax the dealer; he could pass it on to the purchaser. He is however affected by the legislation.

MACDONALD, J.A.

An attempt to tax fuel-oil by former legislation (B.C. Stats. 1923, Cap. 71) was unsuccessful. It is now hoped that pitfalls then encountered may be avoided. The Act is so framed that the wholesaler, retailer or distributor, as the commodity passes on the way to the consumer, pay no tax. When sold by the retailer to the householder or consumer—the submission is—it still remains untaxed. But when burnt the person using it for

heating purposes must pay a tax on every gallon consumed. It is suggested therefore that as the impost cannot be passed on it is a direct tax.

This tax, it is urged, is not imposed on a commercial commodity but, as in the case of income tax, is levied on the person and his liability to pay is measured by the amount he consumes, as income tax is measured by the amount one earns. We must however "ascertain the real nature of the tax" (*Attorney-General for British Columbia* v. *Macdonald Murphy Lumber Co.* (1930), A.C. 357 at 363) and base conclusions, not on form but on substance.

Fuel-oil is a product of crude oil; the latter not produced in commercial quantities in this Province. It is imported from foreign countries (some produced in Alberta and Ontario) free of duty, distilled here in refineries, other more valuable products (including gasoline) extracted leaving fuel-oil as a residue arising in the process of manufacturing. It is therefore a product refined in the Province although at times limited amounts may be imported. Coal, a competitive product, is extensively produced in British Columbia and the free use of oil as a fluid limits the production and use of coal. It was submitted by respondent that the primary purpose of the Act is to protect the coal industry. I would suggest that is an important secondary consideration; the primary purpose being to obtain much-needed revenue.

The Act is defended under section 92 (2) of the B.N.A. Act (direct taxation) subsection (13) (property and civil rights) and subsection (16) (as a matter of a merely local or private nature in the Province) and attacked on the ground that it is an excise tax embodied in a statute framed purposely with a facade to conceal its real character. In *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), S.C.R. 185 at 187 the late Chief Justice of Canada, referring to section 6 of the former Fuel-Oil Tax Act, already referred to (B.C. Stats. 1923, Cap. 71), said:

> Had section 6 been the only provision imposing the tax it would probably be difficult for the respondent to maintain its inapplicability to the fuel-oil in its possession from time to time, or successfully to challenge its validity.

This is not a final opinion; nor was it necessary for the

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

MACDONALD, J.A.

decision of the case. It is only dealt with in the judgment of Viscount Haldane in delivering the judgment of the Judicial Committee on appeal ((1927), A.C. 934 at 937) by saying that section 6 "has to be read with reference to section 3." No opinion therefore was expressed on the effect of section 6 standing alone.

The authority to impose an excise tax is found in sections 122 and 91 (3) of the B.N.A. Act "The raising of money by any mode or system of taxation." Customs duties may be levied with the dual purpose of regulating trade and commerce, by protecting native industries and of raising revenue by indirect taxation; while an excise tax, although affecting trade, is imposed primarily for revenue purposes. It is under the control of the inland revenue department of the Government. There is therefore a distinction between an excise tax and a customs duty. They have this feature in common that both are restrictive of trade but not equally in manner or degree. It is said that an excise tax is "a duty charged on home goods (as distinguished from customs duties on imported or exported goods) either in the process of their manufacture or before their sale to the home consumers" (Oxford Dictionary, Vol. 3, p. 379). This definition is not sufficiently comprehensive for the lawyer. It is a tax on a commodity paid by the consumer and its essential character is not changed by delay in collecting it or by any conditions relating to time or manner of payment. It was submitted that an "excise tax" as used in 1867, did not include a tax on the consumer and that a search of English statutes from 1660 to 1867 supports this view. True it was usually a tax on goods but paid by the consumer or the purchaser of the commodity. In the statutes of Canada 1920, Cap. 71, Sec. 2 (3) it is provided that

> The excise taxes imposed by the preceding subsections shall be paid by the purchaser to the vendor at the time of sale and delivery for consumption or use," etc.

It would make no difference if, as a matter of policy, it was made payable after consumption.

The Dominion Parliament could place an excise tax on this fuel-oil. It chose to exempt from taxation "oil for illuminating or heating purposes" in the Special Tax Revenue Act of 1915 as amended by Cap. 71 in 1920, thus asserting the right to tax.

If the present Act is *intra vires,* as contended, a levy may be made by the Provinces on sugar, boots, beer and countless commodities manufactured in the Province payable after consumption or use and the only difference between this and Dominion excise imposts on the same commodities would be in the method of collection. While usually the result of a judicial decision should not be considered as decisive yet in determining division of authority under the B.N.A. Act this consideration should at least be kept in mind to avoid confusion.

Further, the Provinces in levying taxes on commodities subject to similar imposts (or customs duties) by the Dominion Parliament might seriously interfere, as submitted, with the commercial policy of the Federal Parliament in domestic and foreign affairs (*e.g.,* in framing treaties). It is a principle that when a right is conferred it involves all necessary protection in the exercise of that right. True the same submission might be made in respect to a personal property tax (usually regarded as within local authority) where the taxpayer's personal property is subjected to a tax using it as a criterion of his ability to pay but not in the same way or to the same degree. If, however, it is *intra vires* of the Provincial Legislature by an Act to gauge the ability of a consumer to pay a tax by the amount of fuel-oil he consumes and to apply this method of taxation to all commodities manufactured in the Province where the raw material is imported from abroad it would impair the free exercise of the right of the Dominion Parliament to regulate trade and commerce and to pursue consistent commercial policies.

Our judgment however may rest on the view that this is an "excise tax" none the less so because of the wording of section 2. It is a tax on the person in respect to a commodity as all taxes are. Properties do not pay taxes of any kind; individuals pay the levy. It is an over-refinement therefore to say that where a tax is imposed on the consumer, rather than on the thing consumed, different results follow. When a duty is imposed on goods it means, if fully expressed, that a duty is levied on the person in respect to the importation of goods "just as a property tax is usually, though not necessarily, a tax on persons in respect of their property." (*Attorney-General of*

MORRISON, C.J.S.C.

1933

Feb. 7.

COURT OF APPEAL

March 7.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION CO.

New South Wales v. *Collector of Customs for New South Wales* (1908), 5 C.L.R. 818 at 854; referred to in *Attorney-General for British Columbia* v. *The Attorney-General for Canada* (1924), 93 L.J., P.C. 129 at 132). Indeed it is not at all clear that by section 2 the tax may not be directly imposed on the commodity before consumption having regard to a free translation of the words "who consumes." It was found necessary by sections 3, 6 and 7 to place restrictions on those who sell or keep fuel-oil for sale to the extent that a licence must be obtained and records kept shewing the difficulty, in fact the impossibility, of keeping in separate compartments, so to speak, the person and the commodity. These provisions are characteristic of all Excise Acts.

The case of *Halifax (City)* v. *James P. Fairbanks' Estate* (1927), 97 L.J., P.C. 11 is conclusive. There a business tax payable by every person occupying real property, although the taxpayer might seek to pass it on to others, was held to be a direct tax because before Confederation certain taxes were then universally recognized as falling within one or the other category. A tax on commodities produced and consumed in the country were known as excise taxes long before Confederation and must be assigned to Federal jurisdiction without regard to any theory as to the ultimate incidence of the tax. This is, of course, a tax on a commodity produced and consumed in this country. In Stephen's Commentaries on the Laws of England, 17th Ed., Vol. 1, the author at p. 272 says:

MACDONALD, J.A.

> Excise duties, which are also controlled by the Commissioners of Customs and Excise, are those duties which are imposed by Parliament upon commodities produced and consumed in this country. They are directly opposite in their nature to the customs duties; for they are an inland imposition, paid sometimes on the consumption of the commodity, frequently upon the retail sale. Inasmuch as this duty is peculiarly liable to evasion, the officers of the revenue have a power to enter and search the places of business of such as deal in exciseable commodities, at any hour of the day, and, in the presence of a constable, of the night also.

As stated, they are paid "sometimes on the consumption of the commodity." One may trace legislation since the reign of Charles II. to the present day and find that excise duties were imposed on consumable commodities. As we approach the Confederation period we find an Act of the year 1867 (30 Vict.), Cap. 5, amending a similar Act of an earlier date

imposing a duty on excise on dogs. A licence had to be obtained and an annual duty of five shillings was payable by the owner. Section 4 provides that

> The said duties and licences shall be excise duties.

This tax is not imposed on dealers but on the owners. I refer also to 32 & 33 Vict., Cap. 14, Secs. 16 to 18 under Part V. under the heading "As to assessed taxes and excise licences." Duties, through licences, were imposed on male servants, carriages, horses, mules, armorial bearings, etc., to be paid by the owner, proprietor or employer. Licences had to be procured and by section 18

> Such duties and licences shall be excise duties and licences and shall be under the management of the Commissioner of Inland Revenue.

Regardless of the history or setting of the particular statutes referred to we have before Confederation a long series of Acts shewing that a definite meaning was assigned to the word "excise" and "fuel-oil" if then used could readily be added to the list. Turning to Dominion statutes, we find (Can. Stats. 1867, Cap. 8) an "Inland Revenue Act." Certain individuals were prevented from carrying on any business subject to excise without a licence. An exception was made by section 3, subsections 3 and 4 in respect to utensils used for brewing beer for family use; also as to growers of tobacco on the owner's land and the manufacture of it for private use and not for sale, indicating a liability to such a tax if not exempted. An excise tax, therefore, could be imposed on these utensils and appliances in the hands of the user or consumer. In fact by the Inland Revenue Act, 1868, Can. Stats. 1868, Cap. 50, an excise tax, similar in nature to the tax under review, was imposed on refined petroleum (section 7). It follows that on the principle enunciated in *Halifax (City)* v. *James P. Fairbanks' Estate, supra,* this Act is *ultra vires* and the appeal should be dismissed.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *A. H. Douglas.*
Solicitors for respondent: *Lawson & Clark.*

COURT OF APPEAL

1933

March 7.

THE ROYAL TRUST CO. v. SHIMMIN

THE ROYAL TRUST COMPANY v. SHIMMIN.

Insurance, life—Will—Declarations changing beneficiaries—Subsequent codicil—Effect of—R.S.B.C. 1924, Cap. 274, Secs. 21 and 31—B.C. Stats. 1925, Cap. 20, Secs. 28, 29, 75, 99 and 102.

The Manufacturers Life Insurance Company issued an insurance policy on the life of R. P. Clark for $5,000 on the 29th of April, 1925. By his will of the 11th of September, 1926, he appointed The Royal Trust Company his executor. The beneficiary under the policy was changed by various declarations until finally on the 18th of July, 1930, by declaration of R. P. Clark it was made payable to his wife, who became preferred beneficiary. The defendant Shimmin, authorized trustee of R. P. Clark & Company, Limited, recovered judgment against Mrs. Clark for $5,900 on the 1st of March, 1932. R. P. Clark made a codicil to his will on the 31st of March, 1932, making certain minor bequests and concluding with the words "In all other respects I confirm my said will." R. P. Clark died on the 8th of April, 1932, and on May 12th following all moneys due from the Manufacturers Life Insurance Company to Mrs. Clark under the policy were attached in answer to the Shimmin judgment. On an issue between The Royal Trust Company as plaintiff and R. L. Shimmin as defendant to determine the disposition of the money payable under the insurance policy, judgment was given in favour of the defendant.

Held, on appeal, affirming the decision of MACDONALD, J. that while the will was republished by the codicil and thus for many purposes the date of the original will was shifted to that of the codicil, still the republication did not necessarily make it so operate for all purposes, the rule being subject to the limitation that the intention of the testator is not to be defeated thereby. The intention of the testator is clearly expressed in his declaration of July 18th, 1930, and there is no statement in the codicil that such intention had been changed. Mrs. Clark is the beneficiary by said declaration and the moneys due under the policy were properly attached to answer the Shimmin judgment.

Statement

APPEAL by plaintiff from the decision of MACDONALD, J. of the 25th of October, 1932 (reported, 46 B.C. 273) on an issue directed to determine as to the disposition of moneys payable under two life-insurance policies on the life of the late R. P. Clark who died on the 8th of April, 1932, issued by the Manufacturers Life Insurance Company on the 10th of September, 1923, for $3,000 and the 29th of April, 1925, for $5,000. Before the trial the defendant abandoned any claim to the $3,000 policy. The Westminster Trust Co. was first named as

beneficiary under the $5,000 policy but this was changed by various declarations until finally on the 18th of July, 1930, the policy was made payable to the wife of R. P. Clark as preferred beneficiary. On the 1st of March, 1932, the defendant R. L. Shimmin, authorized trustee of the estate of R. P. Clark & Co. Ltd., recovered judgment against Mrs. Clark for $5,900, and on the 12th of May following all moneys payable to Mrs. Clark under said policies were by garnishee, attached to answer said judgment. R. P. Clark had by his will of the 11th of September, 1926, appointed The Royal Trust Company as his executor, his wife being the main beneficiary, and by a codicil to his will executed on the 31st of March, 1932, in which after making gifts of certain articles to his sons it concluded with the words "In all other respects I confirm my will."

Statement

The appeal was argued at Victoria on the 19th of January, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Harold B. Robertson, K.C., for appellant: The will was executed in 1926 appointing The Royal Trust Company executors, his wife being the main beneficiary. The codicil executed on March 31st, 1932, after giving small gifts to his sons concluded with the words "In all other respects I confirm my will." This is a republication of the will and it operates as of the date of the codicil: see Williams on Executors, 12th Ed., Vol. I., p. 123; *Rogers and Browning* v. *Pittis* (1822), 1 Add. 30 at p. 37; 162 E.R. 12; *Attorney-General* v. *Heartwell* (1764), Amb. 451; 27 E.R. 298; *Doe d. York* v. *Walker* (1844), 12 M. & W. 591 at p. 600; *In re Anderson Estate* (1928), 2 W.W.R. 365 at p. 376; *McLeod* v. *McNab* (1891), A.C. 471. Mrs. Clark has always had a life interest. The cases of *Hopwood* v. *Hopwood* (1859), 7 H.L. Cas. 728 at 737, and *Powys* v. *Mansfield* (1837), 3 Myl. & Cr. 359 at 376, do not apply as there was an ademption in each case, the original gift having been afterwards satisfied by gift before any change by codicil.

Argument

McPhillips, K.C., for respondent: The intention of the testator is shewn in the declaration of July 18th, 1930, and it must be shewn that there was an intention to change this: see *Hopwood* v. *Hopwood* (1859), 7 H.L. Cas. 728 at p. 747; *Sidney*

COURT OF APPEAL

1933

March 7.

THE ROYAL TRUST CO. v. SHIMMIN

Argument

v. *Sidney* (1873), L.R. 17 Eq. 65 at p. 70; *Powys* v. *Mansfield* (1837), 3 Myl. & Cr. 359 at p. 376; *In re Warren. Warren* v. *Warren* (1932), 1 Ch. 42 at p. 50. This could only be shewn by a declaration as set out in the Insurance Act: see *In re Elcom. Layborn* v. *Grover Wright* (1894), 1 Ch. 303 at p. 308; *In re Park. Bott* v. *Chester* (1910), 2 Ch. 322 at p. 327. There was no express declaration: see *Murch* v. *Murch* (1922), 53 O.L.R. 188 at p. 190; *Re Jamieson and Independent Order of Foresters* (1931), 66 O.L.R. 487 at p. 489; *Re Wythe* (1926), 59 O.L.R. 546 at p. 549 and 60 O.L.R. 323; *Portage Avenue Development Co. Ltd.* v. *Diamond* (1932), 3 W.W.R. 81 at p. 98.

Robertson, in reply: *McLeod* v. *McNab* (1891), A.C. 471 at pp. 475-6 is important on the question of intention. It is not necessary to state it in the codicil: see *In re Smith*: *Prada* v. *Vanroy* (1916), 1 Ch. 523 at p. 531; *Lemage* v. *Goodban* (1865), L.R. 1 P. & M. 57 at p. 62.

Cur. adv. vult.

7th March, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: In my opinion the learned judge came to the right conclusion. The testator changed the beneficiary named in the insurance policy from the former beneficiary to his wife Mildred Hope Clark. He had excepted out of that trust any policies made in favour of other parties. He had prior thereto made a will which vested in The Royal Trust Company, as trustee for his wife and family, all policies of insurance then in existence or which he might take out in the future, except as aforesaid. The policy in question was taken out subsequently to the will and the beneficiary was a company mentioned in the exception. He afterwards secured an assignment of that policy to himself and thereupon appointed himself or his estate as the beneficiary. Some months later he changed the beneficiary and made the policy payable to his wife. Subsequent to the last mentioned appointment he made a codicil to the will in which he made gifts of trifling articles to his sons. The codicil contains these words "In all other respects I confirm my will." The contention before us was that the date of the codicil was to be taken as the date of the will and, therefore, brought the policy

in question within the will and gave the money to the original beneficiary The Royal Trust Company in trust for the wife and family, whereas the respondent contended that the prior declaration of the testator in appointing his wife was the fact that ought to govern and that the proceeds of the policy therefore belong to the wife and were subject to the garnishee order that these moneys were the wife's moneys and had been effectively attached by the garnishee proceedings brought by the plaintiff (respondent). There is nothing in the codicil which indicates any change of intention on the part of the deceased as to the beneficiary appointed by him. The codicil merely added two or three trivial bequests to the deceased's sons and had no reference to the original bequest to the trust company for the benefit of his wife and children.

MACDONALD, C.J.B.C.

I think therefore the appeal must be dismissed.

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. would dismiss the appeal.

MACDONALD, J.A.: The contest herein arises out of an issue tried between appellant, as claimant, and respondent a judgment creditor in respect to the proceeds of an insurance policy for $5,000 on the life of the late R. P. Clark issued by the Manufacturers Life Insurance Company. The judgment creditor claims it under an attachment of all moneys payable by the insurance company to Mildred Hope Clark wife of R. P. Clark, deceased. The facts and issues raised are outlined in the judgment under review. After careful consideration of the authorities submitted as applied to the facts I am unable to say that the conclusion reached by the learned trial judge is erroneous.

MACDONALD, J.A.

A codicil in all cases does not operate to make the will read as if made at the date of the codicil. The intention of the testator is an important element. By the codicil only minor bequests of a trifling character are made shewing no serious alteration of prior dispositions and the confirmation of the will "in all other respects" indicates adherence to the original declaration.

If it must be said in all cases that a will on the execution of a codicil must be read as if made at that time it would often revoke bequests intended to be operative (*In re Park. Bott* v.

COURT OF APPEAL

1933

March 7.

THE ROYAL TRUST CO. v. SHIMMIN

Chester (1910), 2 Ch. 322). Also see *Hopwood* v. *Hopwood* (1859), 7 H.L. Cas. 728 at p. 740, where Lord Campbell said:

> Although a codicil confirms a will, and for certain purposes brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if the will had been originally made at the date of the codicil.

See also *Doe d. Biddulph* v. *Hole* (1850), 15 Q.B. 848.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *A. H. Douglas.*

Solicitors for respondent: *McPhillips, Duncan & McPhillips.*

COURT OF APPEAL

1933

March 7.

MCEWAN v. COSENS

MCEWAN v. COSENS AND HEMSWORTH.

Contract—Parties defendants in action—Oral agreement to bear gains or losses in equal proportions—Death of party so agreeing—Action by other defendants against executors of deceased to recover half their losses—Evidence of solicitor—Corroboration — Ratification — R.S.B.C. 1924, Cap. 82, Sec. 11.

H. owned three claims called the Jumbo group in the Portland Mining Division. In May, 1908, he agreed verbally with S. and P. that if they would keep the claims in good standing, obtain Crown grants and dispose of them when opportunity arose they could have two-thirds of the claims and he (H.) would retain the remaining one-third. S. and P. met the L. brothers on the way to the claims with whom they agreed to share equally their interest in the claims. The Jumbo group was allowed to run out, the three claims were relocated and with other adjoining claims acquired (ten in all) they were called the Big Missouri group. Crown grants were obtained and after a number of options given on the group had expired, the property was sold in 1925, about $300,000 having been obtained on all the options. In the meantime S., P. and one of the L. brothers died. H. then brought action to recover one-third of the moneys so obtained. The remaining L. brother, acting for himself and as executor for his deceased brother and the executors of S. and P., the defendants in the action, employed *R. M. Macdonald* of Vancouver as their solicitor. On perusing the statement of claim *Macdonald* called in L. and advised him that he for himself and his deceased brother had a defence that the executors of S. and P. did not have, namely, that they were not parties to the agreement made

by H. with S. and P. and that he (*Macdonald*) could not then act for all the defendants, to which L. replied that *Macdonald* could act for all of them as "We are in this together; we will share the gains and losses equally." *Macdonald* continued to act for all the defendants, and by the judgment of the Supreme Court of Canada ((1931) S.C.R. 235) judgment was given for the plaintiff against the executors of S. and P. for $50,000, and the action was dismissed as against the L. brothers. The remaining L. brother died in January, 1931. On the 5th of August, 1931, the administratrix of the S. estate, suing as such and on behalf of the heirs of P., brought action against the executors of the L. brothers to recover one-half of the amount paid by her on the judgment, with costs, in the former action. It was held on the trial that the administratrix of the S. estate was not entitled to sue on behalf of the heirs of P., but that as administratrix of the S. estate she was entitled to recover $13,862.26.

Held, on appeal, affirming the decision of FISHER, J., that there was a binding, enforceable contract and the appeal should be dismissed.

Per MACDONALD, C.J.B.C.: There was corroboration of Lindeborg agreeing to share the losses by his later conversation with the plaintiff in which he told her of his agreement with *Macdonald*, also by his telegram to the plaintiff advising her of the result of the appeal to the Supreme Court from which it was apparent that he assumed an equal share in the losses.

Per MACDONALD, J.A.: *Macdonald* had no power to accept Lindeborg's offer on behalf of the plaintiff as it was not within the ambit of his authority as her solicitor in the conduct of the action, but he proceeded to act for all parties, assuming to accept the offer as binding on them. This position could be made legally binding only by ratification. By action claiming payment pursuant to the agreement, she ratified her solicitor's acceptance of the offer and his conduct in assuming to act for her in the action. The ratification relates back to the assumed acceptance of the offer by the solicitor, at which time the agreement must be treated as closed.

APPEAL by defendants from the decision of FISHER, J. of the 10th of December, 1932, in an action to recover from the defendants one-half the amount paid by the plaintiff for judgment and costs in the action of *Harris* v. *Lindeborg* (see (1931), S.C.R. 235). Harris acquired three claims in the Stewart District in 1904 which he called the "Jumbo group." He kept the claims in good standing until August, 1909. In May, 1908, he went to Queen Charlotte Island and on the way met two friends, Proudfoot and Stevenson, who agreed to do the assessment work on the Jumbo group and generally look after the claims until disposed of, on the basis of their having two-thirds of the claims and Harris retaining one-third interest. Proud-

Statement

COURT OF APPEAL

1933

March 7.

MCEWAN v. COSENS

foot and Stevenson proceeded to the claims and on the way met the Lindeborg brothers with whom they agreed to share their interest in the claims. They relocated the claims when they ran out, added other claims to the original three and called the group the "Big Missouri." Several options were given on the group but they all ran out until an option was given in 1925 for $275,000. In the meantime Stevenson, Proudfoot and Andrew Lindeborg had died, and the final option was given by Daniel Lindeborg and the representatives of the other original owners. This option was carried through. In July, 1928, Harris brought action for a one-third interest in the moneys obtained under the several options given on the property and it was held by the Supreme Court of Canada (see (1931), S.C.R. 235) that the actions should be dismissed as against the Lindeborgs, as they were not parties to the agreement with Harris, but he was entitled to judgment against the estates of Proudfoot and Stevenson for $50,000. In the present action the plaintiff claims that an agreement was made between Daniel Lindeborg on behalf of himself and the estate of his brother with *R. M. Macdonald*, who was solicitor for all the defendants in the Harris action, to the effect that he and his brother's estate would share equally with the Proudfoot and Stevenson estates as to principal and costs in any judgment which might be given against them jointly or against the said Proudfoot and Stevenson estates. Daniel Lindeborg died before the trial of this action. D. C. Barbrick, who was administrator of the estate of James Proudfoot, deceased, died during the course of this action, and Laura McEwan, who was administratrix of the estate of Hiram Stevenson, deceased, was appointed by the Court to represent the estate of the said Proudfoot for the purposes of this action. It was held on the trial that the plaintiff Laura McEwan, not having been appointed to represent the Proudfoot estate, cannot sue on behalf of the heirs of this estate but that she is, as administratrix of the estate of Hiram Stevenson, entitled to judgment for one-half of the amount claimed in the action.

Statement

The appeal was argued at Victoria on the 2nd, 3rd and 6th of February, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

A. H. MacNeill, K.C., and *Pratt*, for appellants: The learned judge below did not analyze the evidence as he should. Under section 11 of the Evidence Act there must be corroboration of Mr. *Macdonald's* evidence. The learned judge said there was some corroboration but we say there was no contract at all: see *Ledingham* v. *Skinner* (1915), 21 B.C. 41; *Doidge* v. *Mimms* (1900), 13 Man. L.R. 48 at pp. 54-5; *Vavasseur* v. *Vavasseur* (1909), 25 T.L.R. 250 at p. 252; *In re Finch. Finch* v. *Finch* (1883), 23 Ch. D. 267; *In re Garnett*: *Gandy* v. *Macaulay* (1885), 31 Ch. D. 1; *Thompson* v. *Coulter* (1903), 34 S.C.R. 261. *Macdonald* represented all the defendants in the Harris action when the contract was made with Lindeborg in 1928, and after the pleadings were closed: see Anson on Contracts, 17th Ed., p. 98, and on the question of consideration at pp. 88-9; *Wigan* v. *English and Scotch Law Life Assurance Association* (1909), 1 Ch. 291. *Macdonald's* evidence was privileged. A solicitor cannot give information of his client's private affairs: see Cockle's Cases on Statutes and Evidence, 4th Ed., 39; *Swinfen* v. *Lord Chelmsford* (1860), 29 L.J., Ex. 382. A solicitor cannot make a contract on behalf of his client.

Argument

J. W. deB. Farris, K.C., for respondent: Section 11 of the Evidence Act does not apply to *Macdonald*. His evidence does not require corroboration. He was not concerned with the question of costs. Corroboration may be afforded by circumstances: see *Rex* v. *Pailleur* (1909), 20 O.L.R. 207 at p. 214; *Dominion Trust Co.* v. *Inglis* (1921), 29 B.C. 213. That he continued to act for all the defendants is sufficient corroboration. *Macdonald* had power to make the agreement: see Salmond and Winfield on Contracts, pp. 76 and 81. That there was ratification see Bowstead on Agency, 8th Ed., 46 and 53 (5); *The Managers of the Metropolitan Asylums Board* v. *Kingham and Sons* (1890), 6 T.L.R. 217; *Simpson* v. *Eggington* (1885), 10 Ex. 845. *Ralston* who was acting for another company conversed with Lindeborg, and his evidence should have been admitted as the relationship of solicitor and client did not exist: see *Herring* v. *Clobery* (1842), 1 Ph. 91; 41 E.R. 565.

MacNeill, in reply: *Davis & Co.* acted for Lindeborg, and *Ralston* is a member of that firm. His evidence was rightly rejected: see Halsbury's Laws of England, 2nd Ed., Vol. 7, p.

COURT OF APPEAL

1933

March 7.

MCEWAN v. COSENS

86, sec. 119; *Meynell* v. *Surtees* (1855), 25 L.J. Ch. 257 at p. 259; *Thornbury* v. *Bevill* (1843), 6 Jur. 407; *Williams* v. *Williams* (1853), 17 Beav. 213. The contract had no relevancy to *Macdonald's* retainer from Mrs. McEwan or the Proudfoot estate: see *Tucker* v. *McMahon et al.* (1886), 11 Ont. 718 at p. 725. There was no ratification: see Salmond and Winfield on Contracts, 353.

Cur. adv. vult.

7th March, 1933.

MACDONALD, C.J.B.C.: The plaintiff's contention in this case is that in the case of *Harris* v. *Lindeborg* the four parties interested being the two Lindeborgs and Stevenson and Proudfoot, the latter two of whom are represented by the plaintiff, the Lindeborgs agreed with Mr. *R. M. Macdonald,* who was then acting as solicitor for all parties, to bear the gains or losses of all parties in equal proportions. The suit was eventually lost and the plaintiff herein now seeks to recover from the executors of the two Lindeborgs her proportion, namely, one-half of the expenses to which she was put in defending the action. Mr. *Macdonald* who was acting for the defendants as solicitor stated the agreement as follows. But before setting it out I wish to say that upon seeing the pleadings of his clients the Lindeborgs, he discovered that these clients had a defence separate and distinct from that of the others represented by the plaintiff. He called in Mr. D. Lindeborg who in addition to his own interest in the suit was executor for his deceased brother. Mr. *Macdonald* submitted the difficulty as to his acting in the premises for all the parties to him. Lindeborg then said "We are in this together; we will share the gains and losses equally. Further there is no reason why you should not act for us all." I shall now quote the words of Mr. *Macdonald* as to what happened at that time:

MACDONALD, C.J.B.C.

> Mr. Daniel Lindeborg said on this occasion, they agreed with the said Laura McEwan and Duncan C. Barbrick, now represented by her personally, that they would fight the action together and that he on behalf of himself and the estate of Andrew Lindeborg would share equally with her, as to principal and interest, in any judgment which might be given against them, and the said action was continued and fought by the parties in consideration of and on such understanding and the plaintiff herein at all times has relied upon the said agreement.

The principal contest before us, if not in reality the whole

contest, was as to whether there was corroboration of this agreement. The proceedings were carried to a conclusion and the plaintiff now sues for specific performance of it and to recover from the defendant a sum equal to one-half of the share of the judgment recovered against her with interest, and one-half of the costs which Harris secured against her and which she has paid, she having settled also for her own one-half of the costs with Harris. With regard to corroboration Mr. *Farris* contended that no corroboration was necessary; that the corroboration required by our statute is required only when the contract was made between deceased contractors and the one who is claiming against them; and as this contract was made by Mr. *Macdonald* on behalf of Mrs. McEwan and those represented by her the statute has no application, he contended.

It is unnecessary to decide whether or not this is so, and I do not propose to decide it in this case since there is quite sufficient corroboration of the contract by the said Daniel Lindeborg and the plaintiff herself in her conversation with him at Nelson in which he told her what he had agreed to do, and also corroboration from a telegram of his to her on the 25th of December, 1930, in which he said, speaking of the decision of the Supreme Court of Canada:

MACDONALD, C.J.B.C.

> Decision fifty thousand against us. Not many details. More later. (Signed) D. Lindeborg.

There is also some corroboration from witness Sloan, but I do not need to depend upon that. The words in the telegram "against us" shew that he was interested in the judgment against the plaintiff notwithstanding that he and his brother's estate were free from liability. The judgment was against the plaintiff and those whom she represented and not in any respect against the defendants. Daniel Lindeborg further shouldered himself, by that telegram, with the loss sustained by the plaintiff and himself and his brother under the agreement aforesaid.

Another point argued was that the plaintiff was not advised of the agreement by her solicitor until after the judgment was delivered. It is sufficient to say that the agreement was made on her behalf by her solicitor and agent, and has been taken advantage of and ratified by her, which ratification renders the agreement binding from the time it was made. I also think

COURT OF APPEAL

1933

March 7.

there was consideration for the agreement since the parties co-operated, and acquiesced in it throughout the whole legal proceedings.

I would, therefore, dismiss the appeal with costs.

McEWAN v. COSENS

MARTIN, J.A.

MARTIN, J.A.: It had been my intention to hand down reasons herein, as the case is one of much interest, but the long protracted pressure upon my available time, caused by the greatly increased business of this Court during the last two years, has prevented me from doing so, particularly at present in the face of the necessity of preparing reasons in more urgent cases, and therefore I must perforce content myself by saying that on the whole case, I am of opinion, though not without some doubt, that the learned judge below should not be held to have reached a wrong conclusion and therefore this appeal should be dismissed. I shall only add, with respect to the question raised on section 11 of the Evidence Act, that in addition to the cases I cited during the argument, the observations of Lord Atkinson in the House of Lords in *"Hatfield"* (*Owners*) v. *"Glasgow"* (*Owners*) (1914), 84 L.J., P. 161, 166 should be noted, being made in a collision case wherein all the witnesses on one side had gone down with their ship, *viz.*:

> The witnesses for the Glasgow have a free field. They can, if their consciences permit, suppress facts, invent facts, minimize or exaggerate occurrences, without fear of contradiction. One has to decide, in reality, on the story of one side. The story of the other side can never be told; and this demands that the case of the living against the dead should be clearly and satisfactorily established.

This striking illustration supports the eminently reasonable view that though said section 11 only extends, in my opinion, to "an opposite or interested party to the action" personally, yet in all cases claims of the "living against the dead should be clearly and satisfactorily established."

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I concur in the judgment of my learned brother, the Chief Justice, that the judgment of the learned trial judge be affirmed and that the appeal be dismissed.

MACDONALD, J.A.

MACDONALD, J.A.: The facts disclosing the nature of the action and the interests involved are stated in the judgment under review. In this appeal we are only concerned with

respondent as administratrix of the estate of Hiram Stevenson, deceased. The trial judge outlined the evidence supporting the contract sued upon but it may be convenient to refer to it again briefly to make comment intelligible. It is contained in the evidence of Mr. *R. M. Macdonald,* a solicitor, and his testimony was accepted by the trial judge.

The judgment is attacked on three grounds: (1) No contract; (2) if so, no corroboration, the claim being against the estate of a deceased person; and (3) if a contract, so-called, was entered into or if the conversation between the alleged contracting parties took place as testified it cannot be given the legal effect contended for.

Dealing first with the second point, assuming a contract, is corroboration necessary? Section 11 of the Evidence Act, Cap. 82, R.S.B.C. 1924 reads as follows:

> In any action or proceeding by or against the heirs, executors, administrators, or assigns of a deceased person, an opposite or interested party to the action shall not obtain a verdict, judgment, or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

The "opposite or interested party" is the plaintiff (respondent). But the contract, if it may be so called, was made by Mr. *Macdonald* with the deceased Daniel Lindeborg, now represented by his executors (the appellants), not by the "opposite party." We are not concerned therefore with the evidence of the respondent. If we were corroboration would be required. She gave evidence of a conversation with the deceased Lindeborg in which he told her after the first action started "that they all stood together" but it is too vague, standing by itself, to establish a contract and was only treated by the trial judge as corroboration. The point therefore is—must the evidence of *Macdonald* be corroborated? Do the words "on his own evidence" include evidence produced by the "opposite party"? In England where there is no statute it is a rule of prudence, rather than of law, for a judge (at least some judges) to recommend the jury to disregard the unsupported evidence of a claimant against the estate of a deceased person to protect it from unfounded claims (*In re Finch. Finch* v. *Finch* (1883), 23 Ch. D. 267) and judges sitting without a jury, applying the rule to themselves, sought

COURT OF APPEAL

1933

March 7.

MCEWAN v. COSENS

corroboration. But it never appeared to be more than a rule of caution: nor yet an absolute requirement. As IRVING, J.A. stated in *Ledingham* v. *Skinner* (1915), 21 B.C. 41 at p. 45:

> For the protection from unfounded claims it has always been a rule of the Courts that claims against the estate of a deceased person should be examined with jealous suspicion.

The cases he refers to shew that it was not a rule of law; it is now by section 11 of the Evidence Act. It was submitted that in principle corroboration should not be required of the evidence of an independent witness. That does not follow, bearing in mind the object of the rule. My view is that the statute does not apply to the facts before us but the common law rule of prudence should be applied although I know of no case in which the point arose in this way. Any judge would naturally scrutinize with extreme care evidence that might have been controverted if the deceased were living and thoroughly satisfy himself of its reliability. That however is all that is necessary. Brett, M.R. in *In re Garnett. Gandy* v. *Macaulay* (1885), 31 Ch. D. 1 at p. 9, referring to the alleged need of corroboration, said:

MACDONALD, J.A.

> Are we to be told that a person whom everybody on earth would believe, who is produced as a witness before the judge, who gives his evidence in such a way that anybody would be perfectly senseless who did not believe him, whose evidence the judge, in fact, believes to be absolutely true, is, according to a doctrine of the Court of Equity, not to be believed by the judge because he is not corroborated? The proposition seems unreasonable the moment it is stated. There is no such law. The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd.

In the case at Bar I am satisfied that the trial judge exercised due caution and accepted Mr. *Macdonald's* evidence unreservedly. I will not therefore discuss the alleged corroborative evidence as I feel satisfied from the language used, even although supporting evidence is referred to, that without it, the same conclusion would have been reached.

Mr. *MacNeill* raised the point that statements made by the deceased Daniel Lindeborg to Mr. *Macdonald,* his solicitor, were privileged and evidence relating thereto inadmissible. If this is so the case fails for want of evidence. A solicitor may be

compelled to divulge the fact that his client executed a deed though the result of the disclosure is that the document may be impeached (*Crawcour* v. *Salter* (1881), 18 Ch. D. 30). If Lindeborg before his death gave a document to his solicitor executed by all parties interested setting out the manner in which the judgment should be adjusted the solicitor could not be prevented from producing it in an action carried on by representatives. Why otherwise if an oral agreement, or an offer made for later acceptance? The rule is based on the inability to conduct legal business without the attorney's expert assistance and as a *sequitur* the necessity—in order to make such assistance effectual—of securing full and free intercourse between the two. It would be a breach of duty in this case not to convey the offer to the party intended to receive a benefit. Lindeborg was speaking to his associates through their common solicitor. This objection therefore is not tenable (*Perry* v. *Smith* (1842), 9 M. & W. 681; 152 E.R. 288).

What was the contract, if any? On receipt of the statement of claim in the first action, Mr. *Macdonald* noticed that a defence open to the Lindeborgs was not available to the parties represented by the respondent. The Lindeborgs might not be held liable at all. Obviously a conflict of interests arose requiring ordinarily separate solicitors. In this dilemma Mr. *Macdonald* explained the position to Daniel Lindeborg, *viz.*, that

MACDONALD, J.A.

> Harris [the plaintiff] might recover judgment for the amount that he is suing for against Proudfoot and Stevenson estates, and fail to shew any agreement by the Lindeborgs with them.

He asked Lindeborg:

> Whether it might not be necessary in his opinion for other solicitors to be engaged.

Lindeborg said:

> There is no necessity for that at all: all the defendants in this matter stand or fall together: whatever the outcome of it is, we share and share alike: you can go on and act for all.

He also told him to take any defence he could on behalf of the other defendants. That was done. Mr. *Macdonald* filed separate defences. If the plaintiff Harris succeeded in the action it might only be as against this respondent (as the event proved) while the Lindeborgs or their estates would be free from liability. What is the effect of this conversation? It was at this stage simply (speaking also as executor of the estate of Andrew Linde-

COURT OF APPEAL

1933

March 7.

McEWAN v. COSENS

borg) an offer by Lindeborg, to share equally with respondent the burden of any judgment against her whatever the result of the action might be. The words are not as explicit as they might be but that I think is the fair interpretation. I speak of it as an offer because Mr. *Macdonald* had no authority to make a contract of this sort. As to motive Lindeborg may have thought that for some reason it was important to have Mr. *Macdonald* act for all parties. It was possibly a generous gesture on his part; or he may have made the offer simply because they were associates. It is I think characteristic of men, who follow out-of-door occupations, to be generous to a fault and to take a broad view of obligations, erring, if at all, on the side of liberality, particularly where associates are concerned. It was the offer of a promise to assume a possible liability. The occasion to implement it might not arise but in any event he offered the promise for the consideration of an act on the part of the respondent through her solicitor to forbear from withdrawing his services. The solicitor in effect said in answer to the offer "if you promise to do that I promise to act for respondent and for you." The reciprocal promises provide the consideration. The consideration for a contract may be, and often is, beneficial in respect to one party and onerous in respect to the other. It may be good therefore although unilateral, so to speak, in respect to benefits.

MACDONALD, J.A.

> A contract may be binding as based on good consideration although the promise is purely gratuitous in the sense that the promisor obtains in return for it no consideration or profit to himself:
> Salmond and Winfield on Contracts, p. 79.

The foregoing considerations would be conclusive if the solicitor had authority to act for the respondent in respect to this matter. The respondent however never heard of it until over two years later. Mr. *Macdonald* had no authority to accept the offer on her behalf because it was made, not in a matter relating to the usual conduct of an action but in respect to a collateral matter. (*Swinfen* v. *Lord Chelmsford* (1860), 6 Jur. (N.S.) 1035.) It was not part of the solicitor's duty, nor within the ambit of his usual authority as such in the ordinary conduct of an action (unless authorized) to place an onerous liability on one client or to relieve the other from a legal liability. He was not acting as agent for Lindeborg (except to the limited extent, that he was selected by him to communicate the offer) because

Lindeborg was there to speak for himself: neither *qua* this matter was he the agent of respondent, to bind her to any contract however beneficial. Mr. *Macdonald,* as a messenger, might convey the promise to respondent and she in turn might instruct him to proceed with the action in the terms of the promise; if so, the contract would have been complete. The consideration by an act would then move from the promisee. That however was not done. He (Mr. *Macdonald*) assumed to act without communicating with respondent. It follows that we have, as yet, no completed contract simply because, after the solicitor received this communication, he proceeded to act on behalf of all parties. The offer might have been revoked by Lindeborg at any time before his death as it had not been accepted by respondent in express terms or by conduct or by anyone authorized to do so on her behalf.

We have therefore a promise to assume a burden made to the solicitor to convey to the respondent. It is the respondent, who must furnish the consideration. That consideration would be furnished (moving from the promisee) if and when she instructed the solicitor to proceed with the cause in the terms of the offer.

MACDONALD, J.A.

This difficulty therefore arises. The respondent did not hear of the offer during the course of the trial or before final judgment was given in the Supreme Court of Canada. The solicitor proceeded to act for all parties, assuming to accept an offer in respect to a collateral matter without authority from the only one competent to give it, *viz.,* the respondent. It is the case of an unauthorized agent, acting *ultra vires,* presumptively on behalf of principals (the respondent) and Lindeborg as if the contract had been concluded. That position could be made legally binding only by ratification. The offer of a promise must be communicated to the respondent within a reasonable time before performance was possible. Performance could only take place after judgment was given by the Court of Appeal affirmed by the Supreme Court of Canada, relieving the Lindeborgs of liability. The offer was never withdrawn. If, therefore, it came to respondent's notice in a reasonable time she might still accept it. The question might be asked—what consideration for the promise could pass from the promisee at this

COURT OF APPEAL

1933

March 7.

McEWAN v. COSENS

stage? No act could then be performed by her acting alone or through her solicitor. The act of forbearance on the part of her solicitor was spent. The answer is that ratification on her part at this late date would relate back to the receipt of the offer by the unauthorized agent and the consideration then given would enure in her favour. Respondent could before the time for performance arrived (assuming that it is a reasonable time) by letter or by action claiming payment pursuant to the agreement (and she did so) ratify her solicitor's attempt to not only accept the offer but also his conduct in assuming to act on her behalf in accepting it and in furnishing the consideration by proceeding with the action. While Mr. *Macdonald* had no authority to act upon the offer he in fact did so and it is this unauthorized act that may be ratified by the party on whose behalf he professed to proceed. (*Bolton Partners* v. *Lambert* (1889), 41 Ch. D. 295; *Simpson* v. *Eggington* (1855), 10 Ex. 844). The ratification relates back to the assumed acceptance of the offer by the solicitor and we must treat it as if the agreement had been closed at that time. In Salmond and Winfield's Law of Contracts the authors at pp. 349-50 say:

MACDONALD, J.A.

> When any person professing to act as the agent of another makes on his behalf a contract which is *ultra vires*, either because the person who so made it was not an agent at all or because he exceeded the authority committed to him, the contract is wholly invalid as between the principal and the third party, and neither confers rights nor imposes obligations on either of them. Nevertheless, the principal may, if he chooses, subsequently adopt and confirm the unauthorized act of him who purported to act as his agent. In so doing he is said to ratify the contract. The effect of such ratification is to validate it *ab initio*, just as if it had originally been made with due authority. Ratification takes effect, not prospectively from its date, but retrospectively as from the date of the ratified contract. The legal maxim is, *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.*

If ratification did not so relate back the offer of a promise would die with the party making it and a later attempt to accept it would be valueless. It is not material therefore that Lindeborg died before ratification. Ratification must take place within a reasonable time dependent on the circumstances of the case and the nature of the contract. Lapse of time is not material here in view of intervening events delaying the date of performance and the absence of embarrassment to the opposite party. True Lindeborg had he lived might have withdrawn the offer before ratification but that is not material on this point. He

indicated his willingness to be bound by having the solicitor proceed. I think therefore we have a binding enforceable contract and the appeal should be dismissed.

COURT OF APPEAL

1933

March 7.

MCEWAN v. COSENS

Appeal dismissed.

Solicitors for appellants: *MacNeill, Pratt & MacDougall.*
Solicitors for respondent: *Farris, Farris, Stultz & Sloan.*

YOUNG v. UCHIYAMA.

FISHER, J.

1933

March 15.

YOUNG v. UCHIYAMA

Criminal law—Libel—Charge dismissed—Costs against informant—Nolle prosequi—Jurisdiction of trial judge as to costs—Costs of prior abortive trial—Criminal Code, Sec. 1045.

An accused was discharged on a *nolle prosequi* on a charge for criminal libel.

Held, to constitute a "judment for the defendant" within the meaning of section 1045 of the Criminal Code, and the accused is entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information.

A former trial in the criminal prosecution proved abortive as the jury disagreed.

Held, that the costs thereof are legal and proper costs which may be allowed under said section, and the Court in the criminal case has jurisdiction to order them to be paid by the private prosecutor.

The costs properly ordered by the criminal Court to be paid under said section 1045 may be taxed pursuant to said order and then made the subject of a civil action by the accused or his assignee.

ACTION under section 1045 of the Criminal Code to recover $2,417.95, being the costs incurred by one Kanetaro Takagishi by reason of an information preferred against him by the defendant for the publication of a defamatory libel, the said Kanetaro Takagishi having assigned the said sum to the plaintiff. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 8th of March, 1933.

Statement

Craig, K.C., for plaintiff.
Sloan, and *Murdock*, for defendant.

FISHER, J.

1933

March 15.

YOUNG v. UCHIYAMA

15th March, 1933.

FISHER, J.: In this action plaintiff claims that he is entitled to recover from the defendant under section 1045 of the Criminal Code either under an order of the Chief Justice of the Supreme Court, dated May 20, 1932, or, without regard to that order, the sum of $2,417.95 as costs incurred by one Kanetaro Takagishi by reason of an indictment or information preferred against him by the defendant for the publication of a defamatory libel, the said Kanetaro Takagishi having assigned the said sum to the plaintiff by instrument in writing (Exhibit 3). Said section 1045 reads as follows:

> In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel, if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information, either by warrant of distress issued out of the said Court, or by action or suit as for an ordinary debt.

It is first submitted on behalf of the defendant in the action that there was no "judgment for the defendant" in the case intituled *Rex* v. *Kanetaro Takagishi* on the ground that there was no acquittal of the accused but only a discharge upon a *nolle prosequi*. Following *Rex* v. *Blackley* (1904), 8 Can. C.C. 405, however, I would hold that such a discharge pronounced by the Court upon a *nolle prosequi* constituted the "judgment for the defendant" mentioned in section 1045 and rendered the private prosecutor liable for defendant's costs.

Judgment

It is further contended, however, on behalf of the defendant herein that in any event the plaintiff (assignee) cannot in this action recover under said section 1045 either under the said order of the Chief Justice or without regard to that order. I propose to deal first with the position of the matter so far as the plaintiff seeks to rely upon said order. Counsel on behalf of the defendant contends that the plaintiff cannot rely on the order and his contention is based upon the submission that such order was made "without jurisdiction and contrary to law" even on the assumption that there was "judgment for defendant" in the criminal case as I have already found. The order referred to reads as follows:

> UPON application of the above named Kanetaro Takagishi, and it appearing that a *nolle prosequi* has been entered by the Attorney-General:
>
> THIS COURT DOTH ORDER that the informer, George Kenroku Uchiyama

do pay to the said Kanetaro Takagishi his costs incurred by him by reason of the indictment herein, including the costs of the trial at which the jury disagreed and the costs incurred before the police magistrate:

AND THIS COURT DOTH FURTHER ORDER that such costs be taxed by the registrar at Vancouver, B.C.

Counsel for the defendant herein contends that the costs that may be ordered to be paid by the Court are limited to the proper and lawful costs incurred by the defendant in the criminal case and that the test to be applied to determine such is that suggested by DRAKE, J. in *Rex* v. *Nichol* (1901), 8 B.C. 276 at pp. 279-80; 6 Can. C.C. 8, where he says as follows:

Under these authorities I am of opinion that if the costs are to be taxed according to the laws governing the taxation of costs in civil cases that the evidence taken on commission, and not used at the trial on which a verdict was obtained, could not be taxed against the unsuccessful party, neither could the costs of the abortive trials. Each trial would be considered as a *venire de novo*, and the question is, does the language used in section 833, "The costs incurred by him by reason of such indictment," taken in conjunction with section 835, authorize the taxation of any other or different costs than such as would be allowed in a civil case. Section 833 is similar to the language in the English statute, 6 & 7 Vict., Cap. 96, Sec. 8, but that Act does not contain our section 835.

I think that section 835 indicates sufficiently that the costs to be allowed are all such costs as would be allowed in a civil case as far as applicable; and if the costs occasioned by an abortive trial, or by a commission not used, would be disallowed in a civil case, they ought equally to be disallowed in a libel case, and I so order accordingly.

Judgment

If I understand correctly the submission of counsel on behalf of the defendant herein on this phase of the matter it would seem to be submitted that the debt created by said section 1045 is only for legal and proper costs incurred, that an action brought for such a debt can therefore be only for such legal and proper costs according to the test laid down by DRAKE, J. in *Rex* v. *Nichol, supra,* and that the action herein, so far as it is based upon the said order, dated May 20th, 1932, and upon the subsequent taxation ascertaining the amount, is wrongly based and cannot succeed because the order, according to the contention of counsel, allowed other than legal and proper costs to be taxed and was therefore made without jurisdiction. It seems to me this submission on behalf of the defendant herein means that if in the opinion of the Court, before which the civil action is tried, the costs allowed upon the taxation in, or pursuant to, the order of the criminal Court should not have been allowed

FISHER, J.

1933

March 15.

YOUNG v. UCHIYAMA

following the decision of DRAKE, J. in *Rex* v. *Nichol, supra,* then the Court should hold that there was no jurisdiction to award such costs and the amount taxed in the criminal Court should not control as the civil Court has no power to award other than legal and proper costs. With respect to the argument that the Court in the criminal case had no jurisdiction to order the informer George Kenroku Uchiyama to pay Kanetaro Takagishi the costs of the trial at which the jury disagreed because they were not legal and proper costs, I would say in the first place with all respect to the opinion expressed by DRAKE, J. in *Rex* v. *Nichol, supra,* that in my opinion they were legal and proper costs to be allowed. I would further say however that in my opinion, whether they should have been allowed or not, the Chief Justice, as presiding judge on the discharge of the accused, had jurisdiction to deal with the costs. The question of the jurisdiction does not depend upon whether the presiding judge in the criminal Court, having entered upon the hearing of an application with respect to the costs to be allowed, decides in accordance with the test laid down by another judge, but depends upon the nature of the application and is determinable on the commencement, not at the conclusion, of the application. It is quite apparent that in *Rex* v. *Nichol, supra,* DRAKE, J. upon an application by the defendant in that case to him, as the judge who had tried the indictment, assumed to exercise the jurisdiction and to deal with the question of all the costs of the abortive trials as well as of the costs of the commission as aforesaid although counsel for such defendant said his motion asked for the costs of the commission only and he objected to anything else being dealt with. In the present case it is admitted that Kanetaro Takagishi, the defendant in the criminal case, upon his discharge, applied to the Chief Justice for and obtained an order as to the costs, and, as I have already indicated, my view is that the Court had jurisdiction to hear the application and dispose of it as it did.

Judgment

Even on the assumption that there was jurisdiction to make the said order there is still a further question however to be considered. As already pointed out, I am not now dealing with whether or not the present or any similar action lies without regard to such an order either before any application for such

has been made or after such an order and taxation have been obtained. Still dealing solely with the question, as to whether or not the action lies, so far as such order is relied upon, I have to consider the further question whether the obtaining of such an order and the subsequent taxation of the costs in accordance therewith, even if this does not limit the mode of recovery of the costs simply to distress, in any event can only be relied upon as a basis for recovery by distress and not for recovery by an action such as the present one as for an ordinary debt. It is apparently argued on behalf of the defendant in the action before me that the costs cannot be taxed by or pursuant to an order of the criminal Court and then made the subject of a civil action to realize the amount so ascertained by such taxation and duly assigned to the plaintiff. The argument would seem to me to be that if, after such a taxation, a separate civil action can be and is brought, the taxation, though not appealed from, must be treated as a nullity and the action must be brought not for the amount so ascertained but for the costs incurred, the amount to be determined *de novo* by the Court sitting for the trial of civil cases. I do not think that such an argument is well founded and in this connection reference might be made to what is said in Tremeear's Criminal Code, 4th Ed., p. 1423, and cases there referred to:

Judgment

> If the costs are taxed at the criminal trial, they may be included in the judgment of the criminal Court and realized as such: *Rex* v. *Fournier* (1916), 25 Que. K.B. 556, 25 Can. C.C. 430; or may be taxed either at the criminal trial or afterwards and made the subject of a separate civil action to realize the amount. *Mackay* v. *Hughes* [(1901)], 19 Que. S.C. 367; *Nichol* v. *Pooley* [(1902)], 9 B.C. 363, 6 Can. C.C. 269, affirming 9 B.C. 21; 6 Can. C.C. 12; *Rex* v. *Nichol* [(1901)], 8 B.C. 276; 6 Can. C.C. 8.
>
> The amount taxed in the criminal Court will control. *Mackay* v. *Hughes, supra*; and the civil action may be stayed to enable the plaintiff to have the costs taxed in the criminal Court if he prefers to have them taxed there: *Mackay* v. *Hughes, supra.*

It may be suggested that the result would be that the defendant in the criminal case, though not perhaps obliged to obtain such an order or taxation through the criminal Court as a condition precedent to the right of action (see *Nichol* v. *Pooley, supra*) would have the right to adopt such a mode of procedure as would deprive the private prosecutor of an appeal as to the amount of the costs to be allowed and also of the right to ques-

FISHER, J.

1933

March 15.

YOUNG v. UCHIYAMA

tion in the subsequent civil action the order or the taxation in accordance therewith. I think however that a sufficient answer to this is that the private prosecutor is responsible for having put the said defendant in the criminal Court and cannot complain of the result in that forum. See Tremeear's Criminal Code, *supra,* at p. 1423:

> The procedure was instigated at his instance and he must be held responsible for its incidents and its result.

In my opinion the said defendant Takagishi had the right to have the costs taxed in or pursuant to an order of the criminal Court and in my opinion also if he had made no assignment he could have maintained such an action as the present action pursuant to said section 1045 of the Criminal Code, relying, if he wished to do so, upon the said order and taxation in pursuance thereof as definitely settling the amount. I also hold that the plaintiff, as his assignee as aforesaid, can maintain the action in the same way.

Judgment

At the trial it was stated that the parties had agreed that, if I should find that the plaintiff is not entitled to recover under the said order but is entitled to recover without regard to the order, the bill of costs would be referred to the registrar for taxation. The question might still be raised that upon the form of assignment before me and the pleadings as they stand the plaintiff is not entitled to recover without regard to the order but in view of the conclusion I have already indicated that the plaintiff is entitled to recover under the order I do not find it necessary to deal with this further question.

There will be judgment therefore in favour of the plaintiff against the defendant for the sum of $2,417.95 with costs.

Judgment for plaintiff.

BRITISH AMERICAN TIMBER COMPANY LIMITED v. ELK RIVER TIMBER COMPANY LIMITED.

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

Contract—Vendor and purchaser—Agreement—Provision for later formal agreement—Part performance—Essentials of binding contract—Specific performance.

On the 15th of June, 1931, the plaintiff and defendant entered into a written agreement whereby the defendant agreed to purchase all the timber on two portions of lot 120, Sayward District, Vancouver Island, containing approximately 3,159 acres at the price of $2.50 per thousand feet, payable $25,000 in cash on the execution of a formal agreement (hereinafter referred to) and the balance in three annual instalments on the anniversary of said agreement, with interest at 5 per cent. on deferred payments. The amount of the purchase price was to be ascertained by a cruise to be made at the joint expense of the parties and concurrently therewith the area of timber lands purchased was to be surveyed so that the formal agreement "to be made in pursuance hereof" might be registered as a charge against the lands. The defendant was entitled in any year to cut and remove timber based on the rate of $2.50 per thousand and there was further provision for the defendant's right of entry to establish rights of way and build railways to remove timber, also for payment of taxes by the defendant while in possession, and that upon removal of the timber the lands should be returned to the plaintiff. The last clause recited that "So soon as the cruise and survey as hereinbefore provided for shall have been completed, a formal contract shall be executed between the parties hereto according to the usual form adopted in such cases in the Province of British Columbia, and containing, *inter alia*, such of the provisions of this agreement as shall be applicable." A cruise was made and paid for in equal shares by the parties and a survey completed in accordance with the agreement on the 5th of September, 1931. The defendant then refused to execute the formal contract and the plaintiff recovered judgment in an action for specific performance of the original agreement.

Held, on appeal, affirming the decision of MCDONALD, J. (MARTIN, J.A. dissenting), that the original memorandum contains all the essentials of a binding agreement and notwithstanding the provisions of the last clause thereof as to the execution of a formal contract, the plaintiff is entitled to recover in an action for specific performance.

APPEAL by defendant from the decision of MCDONALD, J. in an action tried by him at Vancouver on the 14th, 15th and 16th of December, 1932, for specific performance of an agreement made between the plaintiff and the defendant on the 15th

Statement

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

of June, 1931, in respect of the sale and purchase of timber, both standing and fallen, located on Crown granted lands owned by the plaintiff and situate on Vancouver Island in the Sayward District and more particularly described in said agreement (recited in the judgment of the learned trial judge). For a declaration in respect to the validity of the said agreement and the rights of the plaintiff therein, for a mandatory order compelling the defendant to execute through its proper officers in that behalf a formal agreement in manner and form in accordance with the terms of said agreement of the 15th of June, 1931, and for the sum of $25,000, being the cash payment due and owing by the defendant to the plaintiff under said agreement.

McCrossan, K.C., and *R. W. Kennedy*, for plaintiff.
Mayers, K.C., and *Locke*, for defendant.

20th December, 1932.

MCDONALD, J.: On the 15th of June, 1931, plaintiff, as vendor, entered into a contract (Exhibit 3) with defendant as purchaser, which contract by reason of the questions arising in this litigation, it will be convenient to set out *in extenso*:

1. In consideration of the sum of One dollar ($1) to it in hand paid by the purchaser (the receipt whereof is hereby by it acknowledged) the vendor agrees to sell and the purchaser agrees to purchase all the timber as hereinafter described and defined situate upon those parts of lot One hundred and twenty (120), Sayward District, Vancouver Island, British Columbia, and more particularly defined on a map attached hereto and marked red, and being two parcels containing approximately Two thousand and nine (2009) and Eleven hundred and fifty (1150) acres respectively.

MCDONALD, J.

2. The purchase price of the said timber shall be Two dollars and fifty cents ($2.50) per thousand feet board measure, British Columbia log scale, payable as to Twenty-five thousand dollars ($25,000) in cash upon the execution of an agreement as hereinafter provided, and the balance in three equal annual payments payable on the anniversary of the date of the agreement to be entered into pursuant hereto in the years 1932, 1933 and 1934 together with interest on deferred payments commencing one year after the date of entering into the said agreement at the rate of five per cent. per annum payable with the instalments of principal to become due in the years 1933 and 1934.

3. The amount of the total purchase price shall be ascertained by a cruise to be made at the joint expense of the parties hereto by some cruiser to be mutually agreed upon and such cruise shall be made so soon after the execution hereof as possible.

4. In the event of either party being dissatisfied with the said cruise,

then such dissatisfied party shall be entitled at its own expense to have said cruise checked by some person satisfactory to it in company with the original cruiser, and should the two said cruisers disagree, then a third cruiser shall be appointed by the parties hereto who shall check the original cruise in company with the first two mentioned cruisers and the decision of the third cruiser finally selected shall be final and binding upon the parties hereto. The expense of the last mentioned check cruise to be made in pursuance of this paragraph shall be borne by the party who shall be dissatisfied with the original cruise, unless the result of such check cruise shall be to substantiate the contentions of such party, in which event the additional expense shall be paid share and share alike by the parties hereto.

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. *v.* ELK RIVER TIMBER CO.

5. It is understood and agreed between the parties hereto that in the making of the said cruise the said cruisers shall cruise the said timber on the basis of average, size and cut of timber made by the Comox Logging Company, Bloedel Stewart & Welsh Limited and the purchaser hereunder during the past three years, it being the intention that a commercial cruise of the property shall be made, and that said cedar poles and piles shall be cruised as stumpage on a per thousand basis, board measure, B.C. Log Scale.

6. Concurrently with the making of the said cruise the area of timber so to be purchased as aforesaid shall be surveyed by a Provincial land surveyor who shall prepare proper descriptions of the timber so to be purchased so as to enable the agreement to be made in pursuance hereof to be registered in the Land Registry office as a charge against the said lands.

7. The agreement to be entered into in pursuance hereof shall provide that the purchaser shall be entitled in any year to cut and remove such quantity of timber based on the rate of Two dollars and fifty cents ($2.50) per thousand as will equal the next payment of principal to be made under the terms of the said agreement, but any timber in such year cut in excess thereof shall be paid for by the purchaser to the vendor at the rate of Two dollars and fifty cents ($2.50) per thousand forthwith as cut and shall be applied on the annual payment secondly thereafter to become due under the terms of the said agreement.

MCDONALD, J.

8. The said agreement shall also provide that the purchaser shall be entitled to enter upon the said lands and establish the necessary rights of way and railroads for the purpose of removing the timber from the said lands and for the purpose of removing timber from lands adjacent thereto.

9. The said agreement shall further provide that the purchaser shall be entitled to remove all of the said timber within a reasonable time after the date fixed for the final payment of principal and interest under the terms hereof and so long as any timber shall remain on the said lands the purchaser shall pay all land taxes on the lands described in the said agreement, provided that so soon as the timber shall have been removed from the said lands the purchaser shall be entitled to return the said lands to the vendor free of encumbrances created by the purchaser, and thereupon the liability of the purchaser to pay the said taxes shall cease and determine.

10. So soon as the cruise and survey as hereinbefore provided for shall have been completed, a formal contract shall be executed between the parties hereto according to the usual form adopted in such cases in the Province

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

of British Columbia and containing, *inter alia*, such of the provisions of this agreement as shall be applicable.

11. The benefits and obligations of this agreement shall enure to and be binding upon the successors and assigns of the parties hereto.

IN WITNESS WHEREOF these presents have been executed the day and year first above written.

THE CORPORATE SEAL OF BRITISH AMERICAN TIMBER COMPANY LIMITED was hereto affixed in the presence of:
Witness: V. M. Plumm.

BRITISH AMERICAN TIMBER CO. LTD.
per C. S. Battle,
Director and B. C. Agent.

THE CORPORATE SEAL OF ELK RIVER TIMBER COMPANY LIMITED was hereto affixed in the presence of:
Witness: R. L. Cobb.

ELK RIVER TIMBER COMPANY LTD.
By N. Jamieson,
President.

This document was prepared by the solicitor for both parties.

In pursuance of paragraph 4 of such contract plaintiff and defendant instructed Gardiner & Baxter Limited to cruise the timber and the cost of such cruise, some $1,300, was paid in equal shares by plaintiff and defendant. Further, in pursuance of the contract (paragraph 6) defendant instructed and paid one Fraser, a Provincial land surveyor, to enter upon and survey the lands, which survey was duly made; a plan being prepared in accordance therewith. The cruise was completed in August, 1931, and shewed an estimated quantity of timber amounting to 104,627,000 feet.

Paragraph 4 of the contract was not called into operation for the reason that both parties accepted the cruise as being correct.

It will be noted (paragraph 3) that the purpose of the cruise was to ascertain the total amount of the purchase price, and that (paragraph 6) the purpose of the survey was to obtain a proper description of the lands so that an agreement containing such description might be registered in the Land Registry office as a charge upon the lands. These two matters having been concluded the whole transaction was closed, were it not for the provisions of paragraph 10 of the contract, the existence of which paragraph has served as the reason for this litigation.

Late in August, 1931, Judge Stone, the active director of plaintiff company, had an interview at Everett, Washington, with Mr. Jamieson, defendant company's president, who had negotiated and executed the agreement (Exhibit 3) and Mr. Butler, another director of the defendant company. The cruise had not yet been completed and, after a more or less general

conversation, Mr. Butler withdrew and Judge Stone, not quite understanding the purpose of the interview, asked Mr. Jamieson just what was in the minds of the defendant's directors to which Mr. Jamieson replied: "We must ask you to waive another year's interest." It will be noted that under the agreement interest on the deferred payments was not to run until one year after the execution of the formal contract. Judge Stone replied that, that was not the time to discuss any changes in the agreement but that after the matter was closed, if conditions in the market remained depressed, he would take the matter up later and see what could be done. No suggestion whatever was made at that interview that the parties were not bound by an agreement to sell and purchase nor was it suggested that any outstanding terms remained to be agreed upon.

On September 21st, 1931 (Exhibit 14) Mr. Battle, plaintiff's representative in Vancouver, wrote to Mr. Jamieson suggesting that the solicitor, Mr. *J. H. Lawson,* be instructed to prepare the formal contract. On September 25th, 1931 (Exhibit 17) Mr. Butler wrote in reply that Mr. Jamieson had gone on a big game hunt and would be away for three or four weeks. Mr. Battle then waited for something over a month when on October 30th, 1931 (Exhibit 18), he wrote defendant again asking that the deal be closed and the money paid. This was acknowledged on November 4th, 1931 (Exhibit 19), with the statement that Mr. Jamieson had then returned. On November 17th, 1931 (Exhibit 20), Mr. *Lawson,* on the instruction of plaintiff, wrote Mr. Jamieson saying: "I take it, it would be in order for me to proceed to prepare the formal agreement" and that Judge Stone was anxious to have the matter disposed of at the earliest possible date. On November 19th, 1931 (Exhibit 22), defendant wrote to Judge Stone a long letter setting out various considerations regarding the logging conditions and the market generally and this significant sentence is used:

> Such conditions dominating the industry we feel that our negotiations of last spring should be reopened.

There appears here for the first time a slight glimmering of the light which afterwards broke upon the defendant's directors in its full force, indicating to them that they had not entered into any agreement at all and that the document which both

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

companies had executed in the preceding June under their respective corporate seals was in reality nothing more than a solemn farce. As I say one can at this time but see the faint suggestion of that idea. Judge Stone replied to Exhibit 22 on November 25th, 1931 (Exhibit 23), in which he says:

> On our side, we had long ago supposed that we had passed the negotiation stage in that of contract. Are we now to understand your position to be that you want to be relieved from your present contract? Please let me know frankly, and at once, just what you want.

To that letter no reply was ever made.

On or about December 29th, 1931, Mr. *Lawson*, who was still acting for both parties, was instructed by Mr. Butler to write to Judge Stone. This he did on December 29th, 1931 (Exhibit 24). Mr. *Lawson* had been asked to impress upon Judge Stone the depressed conditions of the logging industry and this he did adding:

> Under these circumstances he [Judge Stone] hopes that your company can see its way clear to remove entirely the interest charge in connection with this proposed purchase. He points out to me that this has been done a good deal recently and contracts have been reformed to meet new conditions.

MCDONALD, J.

He mentions also the question of payment in Canadian funds but I pass this over for it is common ground from the beginning, and both parties were advised, that under the law the contract having been made in British Columbia, payment would necessarily be made in Canadian funds. Judge Stone's reply to that letter on January 15th, 1932 (Exhibit 25), was that their answer to Mr. Butler's proposition was emphatically "No." Then on February 10th, 1932, Mr. Butler writes Mr. *Lawson* mentioning first Canadian funds and then says:

> The only other point at issue is the question of interest on the deferred payments, and I assume that you will be able to secure some reasonable concessions in case the matter could be closed up within a reasonable time. On hearing from you I shall call a meeting of the directors of the company for final action.

Mr. *Lawson* replied on February 11th, 1932 (Exhibit 27), that so far as the question of interest was concerned Judge Stone was adamant on that point and he was afraid no adjustments could be made along those lines. On February 25th, 1932 (Exhibit 30), Mr. *Lawson* wrote Mr. Butler pointing out plaintiff company was pressing him to have the matter closed and were threatening legal proceedings. Mr. Butler replied

February 27th (Exhibit 31) that they had not yet had a meeting of their directors. On March 10th, 1932 (Exhibit 32), Mr. Battle made formal demand upon the defendant "to pay the money and complete the deal."

Matters had now been delayed so long that it became evident that the defendant intended to take the position that it was not bound by the agreement (Exhibit 3). Control of the defendant company had been taken out of the hands of Mr. Jamieson and placed in charge of a committee of directors of whom Mr. Jamieson was not one. Mr. Jamieson appears to be a man of honour and on March 22nd, 1932 (Exhibit 33), he wrote this most significant letter in which he says:

> Because I am unfortunately not in control of Elk Timber Company finances, completion of a contract for the purchase of part of the British-American Timber Company's timber holdings has been unavoidably delayed. Having personally signed an *interim* agreement as president of the Elk Company I am very much embarrassed and exceedingly humiliated at the situation that has developed but am quite helpless under the existing circumstances. I regret my inability to complete this particular transaction and want you to know that I resent having my signature dishonoured.

On April 11th, 1932, Mr. Battle submitted to the defendant a draft formal contract containing, it is true, some terms regarding fire protection, booming grounds and the like which were not mentioned in the original agreement. I am not discussing this further for the reason that the plaintiff's counsel frankly admits that he does not seek to enforce execution of any document which contains anything other than that contained in Exhibit 3. In reply to the submission of the draft agreement the defendant company comes now frankly out into the open and states by a letter of April 18th, 1932 (Exhibit 36):

MCDONALD, J.

> We have always maintained that no agreement has yet been concluded, and your submission of this draft is merely a necessary step in the process, and we shall of course treat it as such.

In my opinion the statement contained in that letter is untrue. The defendant company by its correspondence and its conduct had not I think maintained that position but, on the contrary, had acted upon the assumption that it was bound by its signed agreement.

Throughout the remainder of the correspondence, prior to the issue of the writ, defendant of course does maintain and most ingeniously take and reply upon that position.

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

I of course have nothing to do with the morals of the parties concerned but can only deal with the law as applicable to the facts.

Counsel for the defendant, on opening, referred to my decision in *Isitt* v. *Hammond* (not reported) which I decided in 1925. Unfortunately that case was not appealed and whether or not I was right in my decision the facts are so entirely different from those involved here that it is of no assistance to me in the present case.

The defence is based upon the proposition that the parties had not entered into an agreement but had merely agreed to make an agreement and various decisions were relied upon. In *Coope* v. *Ridout* (1920), 90 L.J., Ch. 61, where all the terms of an agreement for sale had been settled between the parties "subject to title and contract" but no formal contract had been executed, it was held that it was the intention of the parties not

MCDONALD, J.

to enter into a concluded agreement except in the form of a written and signed contract and as there was no such document there was no enforceable agreement. It is clear from the decision that the words "subject to" constituted a condition precedent and that no obligation arose until that condition had been complied with. In *Rossdale* v. *Denny* (1920), 90 L.J., Ch. 204 it was similarly held that an offer and acceptance "subject to the preparation of a formal contract was conditional only and bound neither party." In *Chillingworth* v. *Esche* (1923), 93 L.J., Ch. 129 the purchasers signed a document agreeing to purchase freehold land, "subject to a proper contract being prepared by the vendor's solicitors." Again it was held that there was no binding contract until the formal contract had been prepared and signed and Sir Ernest Pollock, M.R. said (p. 131) quoting Parker, J. (as he then was) as follows:

> It is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract.

In *Lockett* v. *Norman-Wright* (1924), 94 L.J., Ch. 123, certain negotiations took place regarding a lease and an agreement was arrived at "subject to suitable agreements being arranged

between your solicitors and mine." Again it was held that the execution of a suitable agreement was a condition of any concluded bargain.

It will be noted that in each of the above cases the words "subject to" are used and it seems clear, and one would say rather obvious, that if the parties negotiate and say that the execution of a formal document is a condition precedent to the existence of any obligation then of course they are not bound in any way until that condition precedent has been complied with. On the other hand there are almost innumerable cases, of which I shall refer to only a few, where it has been held that if the reference to a formal contract is simply a covenant or an expression of intention or desire, the parties may nevertheless be bound by the contract into which they have entered unfettered by any condition.

So far as this Court is concerned it seems to me the matter is concluded by the decision of our Court of Appeal in *Horsnail* v. *Shute* (1919), 27 B.C. 474, the essential facts of which are not dissimilar to those in the present case. There the Court of Appeal affirmed my brother MURPHY. The learned Chief Justice and Mr. Justice MARTIN adopted the expression of Lord O'Hagan in *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, at p. 1149:

> But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made.

Mr. Justice MCPHILLIPS, agreeing in the decision, adopted the language of Lord Loreburn in *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), 33 T.L.R. 475 at p. 476:

> It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up, with the full expectation that one would by consent insert in it a number of further terms.

His Lordship quotes further:

> It seemed also that they intended to make a firm bargain and not to make it conditional upon the completion of a formal document.

Mr. Justice MCPHILLIPS further pointed out

> After all, what the Court has to determine is the intention of the parties, and that in this case has to be gathered from the correspondence.

MCDONALD, J. 1932 Dec. 20. COURT OF APPEAL 1933 March 7. BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

These expressions are so apt in their application to the present case that I can see no purpose in reviewing the numerous authorities cited by counsel to the same effect. I think that from the year 1865, at least, when Lord Westbury decided *Chinnock* v. *Marchioness of Ely,* 4 De G. J. & S. 638, to the present day, the Courts in England and Canada as well as in the United States of America have laid down a clear line of demarcation between those cases where the execution of a formal contract was a condition precedent to any binding obligation, and those cases where this was not so, and that the present case falls within the latter class.

There will be a declaration that the document in question (Exhibit 3) is a subsisting and binding agreement of purchase and sale of 104,627,000 feet of timber standing on the lands in question, at the price of $2.50 per thousand feet, payable as to $25,000 on 12th September, 1932 (I fix the date 12th September, 1931, as a reasonable time within which the cash payment ought to have been made) and as to the remainder in three equal annual payments payable respectively on 12th September, 1932, 12th September 1933, and 12th September, 1934; and there will be judgment for the plaintiff for $25,000 and interest at five per cent. from 12th September, 1932. The writ was issued 16th May, 1932, and hence judgment was not prayed for as to the payment of $78,855.53 which fell due 12th September, 1932. The plaintiff, I take it, is entitled to payment forthwith of that amount with interest.

MCDONALD, J.

From this decision the defendant appealed. The appeal was argued at Victoria on the 13th, 14th and 15th of February, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Mayers, K.C., for appellant: This case involves the construction of the tenth paragraph of the agreement of the 15th of June, 1931. This paragraph involves three distinct branches: (1) There must be a formal contract. That is a condition precedent to any obligation on the part of the defendant. So far as this contract is concerned we have performed our obligations under it. (2) The last two lines of paragraph 10 of the agreement shew there are other matters upon which the parties

Argument

must agree before there can be a binding contract. (3) The paragraph states a "formal contract shall be executed according to the usual form adopted in such cases in British Columbia" and they must shew there is such a form. That a further agreement is a condition precedent see *Chillingworth* v. *Esche* (1923), 93 L.J., Ch. 129; *Coope* v. *Ridout* (1920), 90 L.J., Ch. 61 at p. 64; *Rossdale* v. *Denny* (1920), *ib.* 204; *Roberts* v. *Brett* (1865), 11 H.L. Cas. 337 at p. 338; *The Thames Haven Dock and Railway Company* v. *Brymer* (1850), 19 L.J., Ex. 321 at p. 328; *McSorley and Prince Edward Hotels Limited* v. *Murphy* (1928), 40 B.C. 403; (1929) S.C.R. 542; *Bocalter* v. *Hazle* (1925), 20 Sask. L.R. 96. A proposed final agreement was submitted by the plaintiff under letter written "without prejudice" to the defendant company. As the document was pleaded it cannot claim privilege: see *In re Daintrey; Ex parte Holt* (1893), 62 L.J., Q.B. 511 at p. 513. No binding agreement was arrived at: see *Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* (1917), 33 T.L.R. 475. This was only a basis for negotiation as the document shews there was a formal contract to be agreed upon with further terms: see *Allis-Chalmers Co.* v. *Fidelity and Deposit Co. of Maryland* (1916), 114 L.T. 433; *Horsnail* v. *Shute* (1919), 27 B.C. 474 at pp. 475 and 477; *McMillan* v. *Cameron* (1917), 24 B.C. 509. The case of *Rossiter* v. *Miller* (1878), 48 L.J., Ch. 10 at p. 21 does not apply as the terms were accepted without qualification. See also *Chinnock* v. *Marchioness of Ely* (1865), 4 De G. J. & S. 638; *Perry* v. *Suffields, Limited* (1916), 2 Ch. 187 at p. 191; *Bellamy* v. *Debenham* (1890), 45 Ch. D. 481 at p. 493. On the construction of the contract see *Directors, &c. of the Midland Great Western Railway of Ireland* v. *Johnson* (1858), 6 H.L. Cas. 798 at p. 811; *Powell* v. *Smith* (1872), 41 L.J., Ch. 734 at p. 735. As the judgment is drafted they get all the money and we get nothing: see *Rossdale* v. *Denny* (1920), 90 L.J., Ch. 204 at p. 205.

Argument

McCrossan, K.C., for respondent: The agreement of June 15th, 1931, is a valid and binding agreement and has been partly performed. They repudiated and were in default. Clause 10 of the agreement is not a condition precedent in any sense of the word, it is merely a term of the bargain. Every

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

material and essential term is in the agreement as signed. The parties were *ad idem* all the way through. As to what are essential terms see Halsbury's Laws of England, Vol. 25, p. 291, sec. 496; *McKenzie* v. *Walsh* (1920), 61 S.C.R. 312. Construction must be according to the general intention: see Leake on Contracts, 8th Ed., pp. 154-5; Fry on Specific Performance, 6th Ed., 130; *Dolan* v. *Baker* (1905), 10 O.L.R. 259; 2 Sm. L.C. 13th Ed., 496; *Sprague* v. *Booth* (1909), A.C. 576 at p. 580; *Beatty* v. *Mathewson* (1908), 40 S.C.R. 557 at p. 564. If there is any vagueness or doubt in construing the contract the surrounding circumstances may be looked to. He is bound by the *quantum* as ascertained by the cruise at $2.50 per thousand feet. This is an approbation from which he cannot retreat: see 2 Sm. L.C., 13th Ed., 146; *Hamilton Gear & Machine Co.* v. *Lewis Bros. Ltd.* (1924), 3 D.L.R. 367 at p. 375. We paid for one-half of the cruise in accordance with one of the terms of the agreement. They asked for the withdrawal of the interest charge. That the surrounding circumstances may be looked to see Dart on Vendors and Purchasers, 8th Ed., 864; Phipson on Evidence, 7th Ed., 582; *Thompson* v. *The King* (1920), 2 I.R. 365 at p. 394; *McMillan* v. *Cameron* (1917), 24 B.C. 509 at p. 510; *Oliver* v. *Hunting* (1890), 44 Ch. D. 205 at p. 209; *Oxford* v. *Provand* (1868), L.R. 2 P.C. 135 at p. 151; *Martin* v. *Jarvis* (1916), 31 D.L.R. 740; *Munroe* v. *Heubach* (1909), 18 Man. L.R. 450; *Conley* v. *Paterson* (1912), 22 Man. L.R. 127. There is a complete contract treating clause 10 as absent. That the formal contract is not a condition precedent see Halsbury's Laws of England, Vol. 25, p. 290, sec. 494; Leake on Contracts, 8th Ed., p. 16; 2 C.E.D., pp. 167-8; Chitty on Contracts, 18th Ed., pp. 13, 14; Williams on Vendors and Purchasers, 3rd Ed., Vol. 1, p. 17; Fry on Specific Performance, 6th Ed., pp. 136 and 245-6; *Chinnock* v. *Marchioness of Ely* (1865), 4 De G. J. & S. 638 at p. 646; *Rossiter* v. *Miller* (1878), 48 L.J., Ch. 10; *Gibbins* v. *The North Eastern Metropolitan Asylum District* (1847), 11 Beav. 1; *Hampshire* v. *Wickens* (1878), 7 Ch. D. 555; *Gray* v. *Smith* (1889), 43 Ch. D. 208; *Chipperfield* v. *Carter* (1895), 72 L.T. 487; *Ozd* v. *Coombes* (1884), 28 Sol. Jo. 378; *Pinsonneault* v. *Lesperance* (1926), 1 D.L.R. 1153; *Hall* v. *Conder*

Argument

(1857), 2 C.B. (N.S.) 22. There was adoption, acquiescence and entry by the defendant: see *Bodwell* v. *McNiven* (1902), 5 O.L.R. 332; Leake on Contracts, 8th Ed., 501-2; *Lodder* v. *Slowey* (1904), A.C. 442 at p. 452.

Mayers, in reply, referred to *Hobbs* v. *The Esquimalt and Nanaimo Railway Company* (1899), 29 S.C.R. 450 at p. 467.

Cur. adv. vult.

7th March, 1933.

MACDONALD, C.J.B.C.: The parties entered into what is contended to be a binding and enforceable contract, as far as it went, to purchase timber limits, dated the 15th of June, 1931. The said contract has been partially performed. Shortly it provides for a survey and cruise of the limits as preliminary, it is contended, to a formal agreement of sale to be drawn up in fulfilment of clause 10 of the agreement. That clause reads as follows: [already set out in the judgment of the learned trial judge].

The formal agreement was not drawn up and the plaintiff sues for specific performance of the executed agreement of the 15th of June, 1931. The appellant submits that the execution of the formal agreement was a condition precedent to the respondent's right to sue. It is necessary to consider the said agreement and particularly the said clause 10. It will be noted that that clause provides that so soon as the cruise and survey have been completed, and this was on the 5th of September, 1931, "a formal contract shall be executed between the parties hereto according to the usual form adopted in such cases in the Province of British Columbia and containing, *inter alia,* such of the provisions of this agreement as shall be applicable." I do not think that there is any such thing as a "usual form" of agreement in cases of this kind in British Columbia. The parties have agreed to the terms of such a form whether it exists or not and have not left any of the terms of the formal agreement for further negotiation. That usual form of agreement may be merely an imaginary one, but whatever it is its terms have been agreed upon by both parties. But in addition to that usual form it is to include "such of the provisions of this agreement [that of the 15th of June] as shall be applicable."

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. *v.* ELK RIVER TIMBER CO.

MACDONALD, C.J.B.C.

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

MACDONALD, C.J.B.C.

The provisions of "this agreement" shew an agreement for sale and purchase describing the timber to be sold; the parties to the agreement; the purchase price; and the time of payment of the purchase price. Leaving clause 10 out of consideration for the moment, I think that agreement would be a complete and enforceable agreement for sale. Clause 10 does not permit of anything being introduced into the formal agreement except what they have assented to, namely, terms usual in formal agreements of that character to which with the added terms of June 15th, the parties are in actual accord. There is to be embodied in that agreement the terms of the agreement of the 15th of June, 1931, which are applicable to the transaction and nothing more. It was contended, however, on the argument by appellant's counsel that the agreement of the 15th of June did not specify a time fixed for payment of the purchase-money. This submission, I think, is not sustainable. By clause 2 of said agreement the purchase-money is "to be payable as to $25,000 in cash so soon" as the survey and cruise have been completed which was on the 5th day of September, 1931; and the balance in annual instalments the times of payment whereof were already agreed upon. I think, therefore, the times of payment are clearly established. Those provisions of clause 2 are clearly applicable to the formal agreement. There being no formal agreement what is left is the agreement of the 15th of June and nothing additional which must be supposed to be included in it. The purchase-money is to be paid in cash upon the execution of the formal agreement and the formal agreement is to be executed so soon as a cruise and survey have been made. This, I think sufficiently fixes the time for payment of the purchase-money. All the other provisions, except those already performed are, I think, applicable to the formal agreement and are to be deemed to be incorporated in it. Therefore, I think, it is clear that the parties have agreed to all the terms of the sale. Nothing has been left for further negotiation and in these circumstances the Courts have had regard to the fact that the parties were *ad idem* with regard to the essentials of their contract. The agreement of the 15th of June is the whole agreement and includes all they agreed upon or intended to agree upon. When an agreement is complete in itself the fact that a formal contract

is to be drawn up embodying its terms does not render it unenforceable.

We have been referred to a very large number of authorities which I do not think it necessary to consider in detail, but I shall refer to one or two as reflecting substantially the others. One of very high authority indeed is that of the House of Lords —*Love and Stewart (Limited)* v. *S. Instone and Co. (Limited)* —reported in (1917), 33 T.L.R. 475. In that case the agreement had been come to by correspondence except in one particular. Lord Loreburn in his opinion said that he had come to the conclusion "that the parties had agreed on price and quantity and period of delivery and time of payment, and he thought also on the port of shipment. It seemed to him also that they intended to make a firm bargain and not to make it conditional upon the completion of the formal document. But he had come to the conclusion that they also intended to have a strike clause in the formal contract. The inclusion of such a term would make no difficulty if it could be said that by usage or by previous dealing or by law these parties, in binding themselves to a strike clause, bound themselves to something certain, because *id certum est quod certum reddi potest.* But no one said, and no proof was given, that it was so. There might be various kinds of strike clauses. No doubt both parties would have agreed as to a strike clause to be inserted in the formal document had the business eventuated, but they had not agreed upon such a clause at the time when the business came to an end. If, therefore, their Lordships were to say these parties had made a binding contract not subject to the completion of the formal document they must hold that a contract could be binding when the parties were not *ad idem* with regard to one of the intended terms of it," and he held that the contract was not complete in the absence of a formal agreement including a strike clause. The same view was taken by the other members of the House.

In *Chinnock* v. *Marchioness of Ely* (1865), 4 De G. J. & S. 638, the Lord Chancellor said at pp. 645-6:

I entirely accept the doctrine contended for by the plaintiff's counsel, and for which they cited the cases of *Fowle* v. *Freemen* [(1804)], 9 Ves. 351, *Kennedy* v. *Lee* [(1817)], 3 Mer. 441, and *Thomas* v. *Dering* [(1837)], 1 Keen 729, which establish, that if there had been a final agreement, and

MCDONALD, J.
1932
Dec. 20.
COURT OF APPEAL
1933
March 7.
BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

the terms of it were evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract.

It was held in that case that the agent who had made the contract had no authority to make it and that therefore it could not be enforced, but that the mutual assent to terms of an informal agreement may be sufficient where a formal agreement is contemplated notwithstanding the failure to execute it.

In this case there is a contract to which all the parties assented and intended to be bound by. It was intended to be put in legal form which was not done but no term in the contract was left as a matter for negotiation and further their informal agreement was complete. The rule of law is also referred to in Chitty on Contracts, 18th Ed., p. 13, in these words:

MACDONALD, C.J.B.C.

> If the terms in which the proposal is accepted shew that the parties intended that a formal instrument should be prepared and agreed upon between them, and that, until that be done, no contract should arise: they will not be bound, until such formal instrument has been agreed upon. But where certain terms have been mutually assented to, the mere fact that the parties have expressly stipulated that a formal instrument shall be prepared, embodying those terms, does not, by itself, shew that they have not come to a final agreement, nor does the fact that the acceptance contains a statement that the acceptor has instructed his solicitor to prepare the necessary documents.

In support of that is cited, *inter alia, Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, and *Chinnock* v. *Marchioness of Ely, supra.* There are cases in our own Courts which shew that a contract which has been duly assented to by the parties but in which they stipulate for a formal agreement has been itself enforceable. In *Horsnail* v. *Shute* (1919), 27 B.C. 474 at p. 478, this is quoted with approval from *Rossiter* v. *Miller, supra:*

> But where an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made.

To the same effect are quotations made by Mr. Justice

McPHILLIPS from *Love and Stewart (Limited)* v. *S. Instone (Limited), supra.* It was argued that where an informal agreement is made subject to a formal contract being drawn up it cannot be enforced unless the condition is performed. I am not sure that that is strictly correct. It is not correct when all the terms have been assented to according to law. But it does not matter in this case since the drawing up of the formal contract was provided for by agreement and not put in the form of a condition.

I therefore think that the appeal must be dismissed since the parties, I am convinced, came to a concluded contract and the respondent's attempt to now recede from it cannot be countenanced.

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. *v.* ELK RIVER TIMBER CO.

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

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: The whole agreement will be found in the reasons for judgment of the learned trial judge. Clause number 10, giving rise to this litigation, reads as follows: [already set out in the judgment of the learned trial judge]. Looking at the whole agreement, including clause 10, we find that appellant agreed to purchase the timber on parts of lot 120, Sayward District, Vancouver Island, containing approximately 3,159 acres, at the price of $2.50 per thousand feet, payable $25,000 in cash on the execution of the agreement referred to in clause 10 (hereinafter called the "formal agreement") and the balance in three equal annual payments on the anniversary of that agreement. Contemplating that the formal agreement would be executed "so soon as the cruise and survey as hereinafter provided for shall have been completed" the agreement provided that the three yearly payments should be made in 1932, 1933 and 1934. Interest on deferred payments was provided at 5 per cent. to be computed from a period commencing one year after the execution of the formal agreement. The total purchase price was to be ascertained by a joint cruise (and it was later found thereby that the lands carried 104,627,000 feet of timber) and concurrently therewith the area of timber lands purchased was to be surveyed so that the formal agree-

MACDONALD, J.A.

MCDONALD, J.
1932
Dec. 20.
COURT OF APPEAL
1933
March 7.
BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

ment "to be made in pursuance hereof" might be registered in the Land Registry office as a charge against the lands. By clause 7 the formal agreement was to provide that appellant should be entitled in any year to cut and remove such quantity of timber, based on the rate of $2.50 per thousand, as would equal the next payment of principal to be made under the terms of the (formal) agreement, and any timber cut in excess thereof should be paid for at the rate of $2.50 per thousand as cut—such payment to be applied on the annual payment "secondly thereafter to be due." Then two clauses follow providing that the formal agreement should contain several covenants, *viz.*, to provide for appellant's right of entry to establish rights of way and to build railways to remove timber; to remove all timber in a reasonable time after the date of final payment; to pay taxes while timber remained unremoved with the proviso that when finally removed the purchaser (appellant) would return the lands to the vendor (respondent) free of encumbrances and the liability of the purchaser to pay taxes should cease.

MACDONALD, J.A.

I have summarized the whole of the agreement to shew how closely each obligatory clause (except as to cruise and survey) is interwoven with, dependent upon, and referable to, the execution of the formal contract. No time for payment of any sum matured until the date of the formal agreement to be later executed. The right of entry also (except to cruise and survey) to remove timber and the adjustment of taxes was postponed until then.

Appellant, rueing its bargain, doubtless because of depressed economic conditions, refused to execute the formal contract and claims that, without it, and a concensus as to its terms, the agreement cannot be enforced. In reality it submits that it may capriciously refuse to agree to terms and resist performance. That is the true deduction notwithstanding any contrary pretentions. I do not overlook the fact that appellant professed willingness to discuss a formal contract on the basis that it was not already bound and that its terms should be mutually agreed to. If it ever had in mind the arrival at a concensus in this regard (and I doubt it) it would be, not by carrying out the terms of the main contract but by materially altering it. That could not be considered by respondent. I make no further

comment; we are concerned with the legal aspect of the case. Appellant first assumed validity and asked for variations but later adopted the position referred to.

The question of law is—can respondent recover the first payment of $25,000 and subsequent payments in the absence of the formal agreement? Appellant rests on three points: (1) That the execution of a formal contract is a condition precedent to any obligation on its part. (2) That an agreement as to the terms to be inserted in that contract must be arrived at and as a *sequitur,* failing to agree the matter ends. (3) That as clause 10 provides for a formal contract "according to the usual form adopted in such cases in the Province of British Columbia" it rests on respondent to shew that there is a "usual form" and what it is. Respondent contends that the covenants in the agreement are enforceable without a formal contract or if one is necessary, and the parties fail to agree on terms, the Court will settle them.

In support of the first two submissions several cases were referred to. In *Chillingworth* v. *Esche* (1923), 93 L.J., Ch. 129 the contract considered is set out in the report of the trial in (1923), 92 L.J., Ch. 461 at 462. The purchaser agreed to buy from the vendor freehold land and a nursery for £4,800 "subject to a proper contract to be prepared by the vendor's solicitors." Two hundred and forty pounds was paid as a deposit "in part payment of the said purchase-money. Solicitors agreed to a "proper contract" but the purchaser declined to execute it and sued for return of the deposit and a declaration that no binding agreement was entered into. In this action he was successful. It appeared to be conceded, in view of other cases (Warrington, L.J. 134) that the agreement was simply a conditional offer and acceptance and reliance was placed on another document signed by the vendor confirming the sale. The decision depended, as in the case at Bar, upon the particular document (*i.e.,* the effect of the agreement) and the circumstances under which it was signed.

MACDONALD, J.A.

Is it, or is it not, a concluded agreement, so that the parties are bound by it, or should it be treated as merely a preliminary document, and full effect given to the words in it, "subject to a proper contract being prepared by the vendor's solicitors," with the result that, until a formal contract is signed, the parties are not bound?:

Sir Ernest Pollock, M.R., p. 131.

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

It is suggested that the agreement in question is merely a preliminary document, binding as far as it goes, forming however only a basis for the formal contract. Sir Ernest Pollock, M.R., at p. 131, quoted with approval the words of Parker, J. in *Von Hatzfeldt-Wildenburg* v. *Alexander* (1912), 1 Ch. 284 at p. 289, *viz.*:

> It is a question of construction whether the execution of the further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract.

When he uses the words "a condition or term of the bargain" he means, of course, a concluded bargain. That is different to a case where a later fromal contract is one of the terms of an offer subsequently accepted. The last phrase in the citation was properly qualified and explained by Sargant, J. at p. 136 as follows:

> The true meaning of the phrase is that the Court will not enforce a contract to make a second contract, part of the terms of which are indeterminate and have yet to be agreed, so that there is not any definite contract at all which can be enforced, but only an agreement for a contract some of the terms of which are not yet agreed.

MACDONALD, J.A.

And on the main principle he says, p. 136:

> Was there a binding and enforceable contract? That has to be determined by seeing which of two alternative constructions is to be adopted. On the one hand, were the whole terms ascertained and agreed, and was all that was contemplated the mere reduction of these terms into a more formal shape? Or, on the other hand, had the mere heads only of the bargain been ascertained, and was it contemplated that a further contract should be executed, which should embody certain further terms?

These principles are sufficiently comprehensive but their application is not free from difficulty. The Master of the Rolls held, looking at the words used, that the intention was that the whole agreement should be conditional on the execution of the formal contract (not merely an expression of desire) and until it was executed it was inchoate and not a binding contract for the purchase of the property. If therefore negotiations were broken off capriciously or because of failure to agree upon terms all rights were gone. We must not overlook the qualifying words employed. The case turns on the form of words used, and, as pointed out by Warrington, J. at p. 134, it had long been recognized that where we find the words "subject to the preparation of a formal contract" specific performance will not be enforced.

That however is not an absolute rule without qualification. Romer, J. held in *Filly* v. *Hounsell* (1896), 2 Ch. D. 737 at 741-2 that the words "subject to contract as agreed" were not conditional because, looking at the offer and acceptance, a completed contract was effected. True it must be noted in that case that nothing was left to be agreed upon in a later contract. However, while on the whole the cases shew that the words in this particular form (*viz.*, subject to the preparation of a formal contract) reveal an intention by both parties to avoid commitment until a "proper" contract is signed the solution of the problem does not depend upon any stereotyped group of words. It is a question of construction in each case.

In *Rossdale* v. *Denny* (1920), 90 L.J., Ch. 204; (1921), 1 Ch. 57 it may be observed that the formal contract (as contended in this case), might contain other terms than those which appeared in correspondence relied upon as of a binding nature. On the other hand in *Chillingworth* v. *Esche, supra,* it would appear that all the terms of the contract were agreed upon, the purchaser simply refusing without giving reasons, to execute the formal contract. The deduction is that we cannot select any one feature of a decided case to reach finality; we must take a comprehensive view of the whole document. This is further shewn in *Coope* v. *Ridout* (1920), 90 L.J., Ch. 61 also where there was agreement as to all the terms. It was an agreement for the sale of a freehold house "subject to title and contract." Eve, J., at p. 64 said:

MACDONALD, J.A.

> That brings me to the question of what is the meaning of the condition. Is it fulfilled as soon as you can assert with confidence that the parties are *ad idem*, and that a consensus on all material points has been reached? I do not think so. I think the condition contemplates and requires a written contract made *inter partes* and formally entered into. In my opinion, that document has never come into existence in this case, and in the absence of it I cannot think I ought to hold that the defendant is bound.

This passage was approved by Lord Sterndale, M.R., in the Court of Appeal (p. 65).

Mr. *McCrossan* submitted that clause 10 was inserted for a very minor purpose, *viz.*, that appellant might have a registrable document and an accurate description for registration purposes would only be available after a survey; also that at best it was to be ancillary to, and supplemental to, a main contract contain-

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

ing all the terms and concerned chiefly, if not solely, with matters of form. The preparation of another agreement would serve the purpose of putting terms already agreed to in more formal shape. He referred to *Chinnock* v. *Marchioness of Ely* (1865), 4 De G. J. & S. 638 at p. 646 relied on by the trial judge where the Lord Chancellor said:

> . . . if there has been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.

This statement must be read in the light of, and qualified by the facts of the case. As a statement of principle, it assumes what with us is a subject of controversy, *viz.*, "if there had been a final agreement" (*i.e.*, on all points). We have to decide if we have a final agreement and not merely one forming a basis for negotiations. Lord Westbury goes on to say on the same page:

> But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.

MACDONALD, J.A.

The proper principle is here disclosed. Here the assent, or acceptance is a qualified assent. It is "subject to a provision as to a contract." Clearly there is no contract "independent of that stipulation." It does not follow that if we have an offer fully disclosing terms, with the addition as part of the offer that these terms will be embodied in a formal contract and an unqualified assent is given to the whole proposal that the parties are not bound. It, of course, follows that the vendor cannot compel the purchaser to permit other terms to be included in the formal agreement. Other terms are not part of the concluded contract unless they are clearly recognized as usual terms that naturally follow.

We were referred to a statement in Halsbury's Laws of England, Vol. 25, p. 289, sec. 493, where the author after stating that there is no completed contract (as indicated, *supra*) if the acceptance is "subject to approval of terms of contract" or where it otherwise appears that all the terms of the contract are not definitely settled or that other terms are to be settled and embodied in a formal contract says:

On the other hand, if it appears that the parties have agreed upon the essential terms of the sale, a mere intimation of a desire that the agreement shall be embodied in another document of a more formal nature, or the expression of what is necessarily a condition, not of the acceptance, but of the contract itself, does not prevent the agreement being enforceable.

The last part of the citation is relied upon in the sense already discussed and may be applied to the case at Bar. It is a condition of the concluded contract (closed by the acceptance of an offer) that a formal contract should be executed (as here, pursuant to clause 10) having no relation to the question of acceptance; in other words it is not a condition of the acceptance that clause 10 should be complied with.

I have looked at all the cases cited and many others for assistance in the difficult task before us. *Fowle* v. *Freeman* (1804), 9 Ves. 351 deals with an agreement based upon a writing signed by the defendant where to quote the Master of the Rolls, at p. 354:

The question is, whether the whole effect of it is suspended by adding to it a letter to his attorney; desiring him to prepare a more formal instrument.

This is simply a case of an agreement intended to be carried into effect by a more formal agreement and there is no doubt that such an agreement is enforceable. It does not differ from an ordinary agreement for sale with proviso that a deed will be given. The mere fact that a formal contract is in contemplation will not justify refusal to complete (*Thomas* v. *Dering* (1837), 1 Jur. 211). The case of *Lewis* v. *Brass* (1877), 3 Q.B.D. 667 holding that the mere intimation in the written acceptance of a tender that a contract will afterwards be prepared does not prevent the parties from being bound to perform if the intention was to enter into an agreement and the preparation of the contract was only contemplated to express the agreement already arrived at, may be useful because of the statement of Bramwell, L.J. at 671, *viz.*:

It is possible that the formal contract would have contained terms not specially mentioned in the tender by the defendant and in the letter from the plaintiff's architect, for instance, as to the payment of the contract price by instalments, or as to what part of the work was to be first commenced; but the defendant might have successfully objected to the introduction of such terms, and the work would have been proceeded with upon the terms contained in the tender and in the letter.

In *Crossley* v. *Maycock* (1874), L.R. 18 Eq. 180 the Master of the Rolls said:

MCDONALD, J.
1932
Dec. 20.
COURT OF APPEAL
1933
March 7.
BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the Court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party making it, or by his solicitor, then, until those conditions are accepted, there is no final agreement such as the Court will enforce.

Applying these principles to the agreement in question can appellant say that its acceptance meant "we agree provided we can agree upon the terms to be inserted in a formal document"? Material terms not part of the contract cannot be postponed for future settlement without the risk of failure to agree or refusal to sign. Do we find, to quote from the judgment of Lord Cairns in *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, at 1139, not

> an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise?

Or might these words of Lord O'Hagan, at p. 1149, be applied?

> It has been said that until the execution of that agreement the transaction was inchoate and incomplete. And, undoubtedly, if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed.

MACDONALD, J.A.

Love and Stewart (*Limited*) v. *S. Instone and Co.* (*Limited*) (1917), 33 T.L.R. 475, a decision of the House of Lords, may be usefully referred to in its application to the claim that the parties were not *ad idem* as to what the formal contract required by clause 10 should contain. They were *ad idem* on the point that there should be such a clause but not, it is said, as to what terms should be inserted in it. Without reciting details the important clause was "all offers are subject to strike and lock-out clauses." This appeared as a printed notice on a letter. Parker, J. said at p. 476:

> Further, it was clear that both parties contemplated the execution of a formal contract, and unless there were some evidences to the contrary, the right inference was that this formal contract was to contain a strike and lock-out clause, the terms of which would be agreed between the parties. That alone would shew that no binding agreement had been arrived at.

When the alleged contract was repudiated there was no agreement as to what terms should be inserted in the formal contract in respect to strike and lock-out clauses.

Lord Loreburn, at p. 476, said:

It was quite lawful to make a bargain containing certain terms which one was content with, dealing with what one regarded as essentials, and at the same time to say that one would have a formal document drawn up with the full expectation that one would by consent insert in it a number of further terms. If that were the intention of the parties, then a bargain had been made none the less that both parties felt quite sure that the formal document could comprise more than was contained in the preliminary bargain. But if the intention were that what was agreed in the first instance should be subject to the completion of the formal document, then there was no bargain while that condition remained unfulfilled.

In the case at Bar, if I am right in my view, what was agreed to in the first instance was not subject to completion of a formal document. The formal contract was to carry out agreed upon terms. In the case cited the inclusion of the term, as to strike and lock-out clauses, without defining it, caused the difficulty. If it could be said that by usage or law strike and lock-out clauses were certain and definite then the offer "subject to strike and lock-out clauses," when accepted, would bind the parties. There can be no contract if it professes to include terms not settled and agreed upon.

I have referred to a number of cases where a variety of facts were treated to find principles applicable to the contract in question. No case, I know of, on the facts, is at all similar. I said at the outset that nearly all the clauses of this agreement are dependent upon and interwoven with the proposed formal contract. It is repeatedly referred to as a necessary adjunct in working out the contract. At first blush one might assume that fact to be favourable to appellant's view. On reflection I do not think it is If not so interwoven as indicated there would be ground for asserting that clause 10 stood aloof as an independent agreement that must be executed before the parties were bound. Because (among other reasons) it is so closely related to the whole agreement it forms part of the offer and is included in the acceptance. The formal contract is identified and associated with the offer. When we dissect this agreement, as we may, into offer and acceptance the offer briefly would be this—to sell the amount of timber disclosed by a cruise at $2.50 per M. payable at times and in a manner to be fixed by a formal agreement (not subject to a formal agreement being signed) and the acceptance of that offer. Once we are clear that the formal contract is part of the offer and not a condition of the concluded bargain

MCDONALD, J.
1932
Dec. 20.
COURT OF APPEAL
1933
March 7.
BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

difficulties disappear. The unqualified acceptance of that offer makes it part of the concluded bargain. It was not accepted subject to a proviso as to a contract. If that is true it cannot now be detached and made to perform another office, *viz.,* the foundation of another contract. The execution of the further contract is not a condition or term of the bargain. It was already agreed to, being regarded, rightly or wrongly, as essential to express the manner in which a concluded transaction should be carried out. I find it impossible, taking a comprehensive view, to treat the document, apart from clause 10, as a preliminary agreement. The parties were *ad idem;* a consensus on all material points, including what should go into the formal document was reached. It is not a contract to enter into a second contract. It is clear why in law such a contract should not be enforceable. Here the so-called contemplated contract is *ex necessitate* part of the main contract. It takes both to make a decipherable document.

It is not reasonable to hold that the agreement was "conditional upon the execution of the formal contract." Appellant, until it finally decided to raise this point did not think so because it treated it as final and conclusive by asking that its terms be varied. Again the word "formal" in clause 10 has some significance when, as here, we must search in all directions to see what was meant. "Formal" denotes—to serve a purpose regarded as a matter of form and such a purpose was contemplated, *viz.,* registration.

MACDONALD, J.A.

The foregoing views are offered without reference to the words *"inter alia"* appearing in clause 10. Were it not for these words and the further fact that respondent in alleged compliance with clause 10 submitted a contract containing many terms incidental to, but not found in the agreement under consideration, I doubt if appellant would have a serious case to present. It is submitted that the words *"inter alia"* contemplate new terms and the draft contract submitted shews that respondent so viewed it. We should not translate these Latin words by substituting the English words "amongst others," *"alia"* in classical Latin is an adjective and a fitting translation would be "among other things." It does not mean nor should we so translate it "amongst other terms." The draftsman did not intend to thrust

upon the opposite party new terms not agreed to. He did expect that it would be necessary to amplify but not to alter. The main phrase in clause 10 is "such provisions of this agreement as shall be applicable," *i.e.*, all its terms except as to making a survey and cruise. That was now completed. That being so "among other things" means, *e.g.*, facts brought out by the cruise—recital that a cruise had been made; that it disclosed a stand of 104,627,000 feet; that at $2.50 per M the total purchase price would be $261,567.50 with its division into yearly payments; also terms as to interest and the description of the property as disclosed by the survey. When we find within the agreement itself scope for the application of the words "among other things" we need not stray beyond it in search of new terms that might have been but were not contemplated. Clause 10 therefore means that the formal agreement should contain (1) under the heading "such of the provisions of this agreement as shall be applicable" those clauses in the agreement that could be recopied almost verbatim and (2) other provisions made necessary by steps taken under the agreement necessitating the recasting of clauses to fit the new facts. These considerations, coupled with the further fact, that terms to amplify and clarify, not beyond but within the ambit of the original agreement, were contemplated and permissible, makes it possible to interpret and apply the words *"inter alia"* without going to the length (which I regard as extreme) of saying that it meant that new terms never considered were to be introduced and that the executed contract was simply intended to bring the parties a certain distance along a road that might or might not lead to a concluded bargain.

MACDONALD, J.A.

I will not take space to analyze the formal contract submitted for execution by appellant. I think it was only intended to amplify but it must be conceded that appellant would be justified in taking the ground that it went further than contemplated by clause 10. Respondent evidently thought so too and did not insist upon it. At the trial and on this appeal its counsel took the ground that it would be satisfied with a formal contract in the same terms as the main contract: in fact that it could enforce the agreement without a formal contract at all. Respondent is within its rights in taking that stand. We are

MCDONALD, J.

1932

Dec. 20.

COURT OF APPEAL

1933

March 7.

BRITISH AMERICAN TIMBER CO. v. ELK RIVER TIMBER CO.

concerned with interpreting clause 10 as it stands. I may add that I do not think anything decisive turns on the use of the words in clause 10 "according to the usual form adopted in such cases in the Province of British Columbia." It follows that in my view we have an enforceable contract. True because of failure to sign a formal contract we have no precise time fixed for payment of instalments. The time when payments should be made is fixed and the trial judge was justified in the view taken in this respect.

I would dismiss the appeal.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Mayers, Locke, Lane & Johannson.*
Solicitors for respondent: *McCrossan, Campbell & Meredith.*

RITHET CONSOLIDATED LIMITED v. WEIGHT.

MARTIN, J.A. (In Chambers)

1933

March 11.

RITHET CONSOLIDATED LTD. v. WEIGHT

Practice—County Court — Two actions involving same issues — Appeal—Security for costs furnished in both at instance of plaintiff—Appeal allowed—Costs of both appeals taxed—Review.

The plaintiff recovered judgment in two actions in the County Court involving the same issues. The defendant appealed and furnished security for costs in both actions on the plaintiff's insistence that he should do so. The defendant succeeded on the appeal on the preliminary objection that there was a division of one cause of action, contrary to section 35 of the County Courts Act, and the defendant's bills of costs of the appeals were taxed by the registrar as those of separate and distinct appeals.

Held, on motion to review affirming the registrar, that at this late stage the intractable language of Appendix N allows the Court no discretion, and these distinct appeals cannot be grouped for the purposes of taxation.

MOTIONS to review the registrar's taxation of the bills of costs of the proceedings in the Court of Appeal in two distinct actions (see 46 B.C. p. 345). Heard by MARTIN, J.A. in Chambers at Victoria on the 23rd of February, 1933. Statement

Lowe, for the motions.
O'Halloran, contra.

11th March, 1933.

MARTIN, J.A.: These are two distinct motions in two distinct actions between the same parties, to review the registrar's taxation of the respective bills of costs of the proceedings in this Court, and for convenience the motions were heard together.

The bills are substantially identical (excepting the smaller size of the appeal book and smaller disbursements in the second action) and during the argument several items were considered and disposed of leaving for present determination only the question of the proper allowance of the bills as those of separate and distinct appeals. Judgment

That difficult question (which I may say has given me much concern) has arisen because of an unfortunate misunderstanding between the solicitors, the plaintiff submitting that though

MARTIN, J.A. (In Chambers)

1933

March 11.

RITHET CONSOLIDATED LTD. v. WEIGHT

the appeals were not consolidated, though they involved the same issues, yet the arrangement between them was that the second appeal should abide the result of the first, and if that were the case then the registrar's taxation could not be sustained. But the defendant's solicitor points to the correspondence on the subject and submits that it shews that his offer that the second appeal should "follow the disposition of the first" was rejected, and that he was compelled to furnish security in answer to the plaintiff's solicitor's insistence "that there are two distinct appeals and we must ask that security for costs be furnished in each case in accordance with the usual practice," and thereafter security in each of the appeals was furnished and they were entered separately on the list.

After considering carefully the correspondence and the papers and the arguments of counsel, and what occurred in the two appeals when counsel were before us, and in the absence of any definite statement to us by counsel on the vexed point, and of any clause in Appendix N indicating that the registrar has taken a wrong view of its application to these particular circumstances, I can only say, in the language of Lord Justice Greer in *Koch* v. *Dicks* (1932), 102 L.J., K.B. 97 at 101, that "I have with great reluctance come to a similar conclusion" to that of the registrar, *viz.*, that these distinct appeals cannot be grouped for the purposes of taxation, being compelled to take that view by the intractable language of Appendix N (which leads to unforeseen results), and at this late stage at least it allows me no discretion which, I may say, I should have felt it my duty to exercise in favour of the respondent had the matter been brought to our attention when our judgment was pronounced, or even at the eleventh hour before it was entered, after being settled by me on application for that specific purpose.

Judgment

The costs of these motions will be in the appeals.

Motions dismissed.

EDGETT v. TAYLOR *ET AL.*

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

Municipal corporation—Chief of police—Board of police commissioners—Powers of dismissal—Action for wrongful dismissal—Injunction—Interim injunction refused—Evidence—Appeal rule 5—Appeal—Costs—B.C. Stats. 1921 (Second Session), Cap. 55, Sec. 253 (2).

The plaintiff having been discharged from office as chief of police for the City of Vancouver by the board of police commissioners, brought action against the board for damages for wrongful dismissal and for an injunction restraining them from treating the plaintiff as discharged, and from appointing anyone else in his place. On the 17th of February, 1933, MORRISON, C.J.S.C. dismissed the plaintiff's application for an *interim* injunction until the trial, and on the following morning he applied *ex parte* and obtained an *interim* injunction from the Court of Appeal until the hearing of the appeal from the order of MORRISON, C.J.S.C. On the next morning (February 19th, 1933) and before they were served with the *interim* injunction, the board of police commissioners met and by resolution ratified all its actions prior to that date, passed a further resolution dismissing the plaintiff as chief constable and appointed one John Cameron, chief constable for the City of Vancouver. On the hearing of the appeal on March 22nd to 24th from the order of MORRISON, C.J.S.C., further affidavits were allowed in of relevant facts after the date of the decision below and judgment was reserved. After the hearing a Bill was passed by the Legislature abolishing the board of police commissioners and appointing a new tribunal consisting of the mayor, a judge of the County Court of Vancouver and the police magistrate of the City as the board of police commissioners.

Held, that in the circumstances the Court should take judicial notice of the Bill passed by the Legislature and in view of what has transpired since the order appealed from, including the action of the Legislature in abolishing the board of police commissioners, it would serve no useful purpose nor would it be appropriate to grant an injunction until the trial, and the appeal was dismissed.

Held, further (MACDONALD, C.J.B.C. dissenting), that in view of the very exceptional circumstances "good cause" exists for dismissing the appeal without costs.

APPEAL by plaintiff from the order of MORRISON, C.J.S.C. of the 17th of February, 1933, setting aside an *interim* injunction granted by FISHER, J. till the trial of an action against the police commissioners of the City of Vancouver for a declaration that the defendant Taylor was not and is not a member of the board of police commissioners for the City of Vancouver, that

Statement

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

Statement

the defendant Taylor is not qualified to sit as a member of said board, that the purported suspension by the defendant Taylor of the plaintiff from his office as chief constable of the City of Vancouver on the 25th of January, 1933, was illegal, that the resolution purporting to have been passed at the meeting of the board of police commissioners for the City of Vancouver on the 6th of February, 1933, dismissing the plaintiff from his office as chief of police for said city was not legally passed and that the plaintiff was not and is not dismissed from the said office, that the defendants Taylor, Charman and Dumaresq as members of said board of police commissioners at all times material to this action were actuated by motives and causes alien and irrelevant to the discharge of their duties as police commissioners and acted corruptly and in bad faith and without any intention to perform the duties cast upon them by law as members of the board of police commissioners. For damages against the defendants Taylor, Charman and Dumaresq and an injunction against said defendants restraining them as members of said board, and the said board, from acting upon the said resolution purporting to dismiss the plaintiff from office as chief constable of said city, by treating the plaintiff as being discharged, and from appointing anyone else as chief constable for said city. The further relevant facts are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 22nd and 23rd of March, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, K.C., for appellant: The board of police commissioners are vested with a public trust and can only exercise the powers given them by the Act. An honest and proper exercise of the powers given them must be adhered to. They were actuated by motives alien to their statutory duties: see *Short* v. *Poole Borough* (1925), 95 L.J., Ch. 110. The reason for dismissal does not come within the statute: see *Sadler* v. *Sheffield Corporation* (1924), 93 L.J., Ch. 209 at p. 224; *Hanson* v. *Radcliffe Urban District Council* (1922), 91 L.J., Ch. 829. Charges were made that were never brought to the attention of the plaintiff and no opportunity was given him to meet these charges: see *The King* v. *Chancellor, &c. of University of Cam-*

bridge (1723), 1 Str. 557; *Doe dem. Davy* v. *Haddon* (1783), 3 Doug. 310; *Dummer* v. *Corporation of Chippenham* (1807), 14 Ves. 245; *Rex* v. *Electricity Commissioners* (1923), 93 L.J., K.B. 390 at p. 400; *Hedley* v. *Bates* (1880), 49 L.J., Ch. 170 at p. 174; *Cooper* v. *Whittingham, ib.* 752 at p. 755; *Richardson* v. *The Methley School Board* (1893), 62 L.J., Ch. 943; *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (1906), A.C. 535; Kerr on Injunctions, 6th Ed., 641. To shew a *prima facie* case is sufficient for the order.

J. W. deB. Farris, K.C. (*D. McKenzie,* with him), for respondent Taylor: There are two branches (a) That the Court has power to deal with the board if they are actuated with wrong motives; (b) if the dismissal is contrary to natural justice. The *Lapointe* case can be distinguished and does not apply. See also *Local Government Board* v. *Arlidge* (1914), 84 L.J., K.B. 72 at p. 83; *Gardner* v. *City of Niagara Falls* (1923), 55 O.L.R. 53; *Davis* v. *The City of Montreal* (1897), 27 S.C.R. 539; *Fisher* v. *Jackson* (1891), 60 L.J., Ch. 482. The allegations made are founded on improper material; the source of information disclosed is not shewn: see *Tate* v. *Hennessey* (1901), 8 B.C. 220 at p. 222; *Breed* v. *Rogers* (1913), 12 D.L.R. 620; 32 C.J. p. 76, par. 63; Halsbury's Laws of England, Vol. 16, p. 141.

Argument

Henderson, K.C., for respondent Dumaresq: I adopt the argument of Mr. *Farris*. The plaintiff should not ask for an injunction when he has a remedy in damages. The proper remedy is specific performance: see *Gaskin* v. *Balls* (1879), 13 Ch. D. 324 at p. 329; *Pickering* v. *The Bishop of Ely* (1843), 12 L.J., Ch. 271 at p. 275; *Johnson* v. *The Shrewsbury and Birmingham Railway Company* (1853), 22 L.J., Ch. 921 at p. 924. There was no mutuality in this case; Edgett could not be compelled to work. There was no corruption or fraud.

McCrossan, K.C., for respondent Board of Police Commissioners: The board need not give the plaintiff a hearing and they can dismiss him without giving reasons: see *Brown* v. *Dagenham Urban District Council* (1929), 140 L.T. 615. His only right of action is for accrued salary. They are a disciplin-

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

ary body for control of the force: *The Queen* v. *Blaney* (1901), 2 I.R. 93; *Hellems* v. *City of St. Catharines* (1894), 25 Ont. 583 at p. 587; *Short* v. *Poole Corporation* (1926), Ch. 66; *Vernon* v. *Corporation of Smith's Falls* (1891), 21 Ont. 331 at p. 334. When a new appointment is made and is valid, it automatically discharges the old appointee: see *Ex parte Richards* (1878), 3 Q.B.D. 368 at p. 370; Kerr on Injunctions, 6th Ed., 25.

[*W. W. B. McInnes,* for respondent Charman, adopted the arguments of his associates.]

J. A. MacInnes, for respondent Rush.

Mayers, in reply, referred to *Frome United Breweries* v. *Bath Justices* (1926), 95 L.J., K.B. 730 at p. 738; *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (1892), 1 Q.B. 431 at p. 448; *Boulter* v. *Kent Justices* (1897), A.C. 556; *Leeds Corporation* v. *Ryder* (1907), A.C. 420 at p. 423; *Board of Education* v. *Rice* (1911), A.C. 179 at p. 182. There is no escape of any public official from the authority of the Court: see *Eshugbayi* v. *Nigeria Government (Officer Administering)* (1931), 100 L.J., P.C. 152 at p. 157; *Davis* v. *The City of Montreal* (1897), 27 S.C.R. 539 at p. 544; *City of Montreal* v. *Layton & Co.* (1913), 47 S.C.R. 514. On the question of a judgment being ineffective see *Avery* v. *Andrews* (1882), 51 L.J., Ch. 414. On the question of irreparable damage see *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. 287 at p. 322; *Litchfield-Speer* v. *Queen Anne's Gate Syndicate (No. 2), Ltd.* (1919), 1 Ch. 407 at p. 411; *Nireaha Tamaki* v. *Baker* (1901), A.C. 561 at p. 576; *Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110 at p. 115.

Argument

Cur. adv. vult.

4th April, 1933.

MACDONALD, C.J.B.C.: This is an appeal from the judgment of Chief Justice MORRISON, setting aside an *interim* injunction granted by Mr. Justice FISHER enjoining the police commission of the City of Vancouver from dismissing the plaintiff from his office of chief constable.

MACDONALD, C.J.B.C.

After the refusal of the order to continue the injunction the

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

commission dismissed plaintiff from his said office. The plaintiff appealed to this Court and obtained an *interim* injunction until the hearing of the appeal but this proved ineffectual since the dismissal was accomplished before the order was served.

Our *interim* injunction having lapsed on the hearing of the appeal I now proceed to dispose of the appeal from Chief Justice MORRISON'S judgment.

Since our order the plaintiff's successor has been appointed, the *interim* injunction being too late to prevent it. The consequence is that there is nothing now to enjoin. Since the appeal has become futile it must be dismissed.

It was argued that the Court might make a declaration of right that the dismissal of the plaintiff was corrupt and therefore null and void but that was not asked for in the notice of appeal and properly so since such a declaration is a matter for the trial judge alone and this Court had no power in any case to pronounce a prophetic judgment though we may have to deal with that question in an appeal if such is brought in the future from the trial judge's judgment but that time has not yet arrived.

MACDONALD, C.J.B.C.

It was contended that we should not give the successful party the costs of this appeal. We can only refuse them for good cause. Under our rules I confess I can find no good cause in this case for disregarding the statutory rule. Good cause must consist of some harsh conduct in the proceedings on the defendant's part which has occasioned the costs or has tended to increase them. There is nothing of this sort here. The plaintiff commenced the proceedings and has dragged the defendants into Court and has signally failed to get the relief he sought. It is all very well to say or suggest that the defendants have not waited for the plaintiff to enjoin them but whatever one's opinion may be about their ethics they have done nothing legally wrong either in the proceedings themselves or without them, nothing to cause or increase the costs. He has suffered by the cleverness of his opponents in avoiding wrong-doing or hardship; in a legal sense they "dug themselves in" to avoid the attack. The appeal should be dismissed with costs.

MARTIN, J.A.

MARTIN, J.A.: This is an interlocutory appeal by the plaint-

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

iff from an order of Chief Justice MORRISON refusing to grant an *interim* injunction till the trial of this action, brought on the 11th day of February last, by the plaintiff against the defendants who are the police commissioners of the City of Vancouver. The statement of claim has not yet been delivered but the endorsement on the writ is as follows, *viz.*:

The plaintiff's claim is against the defendants for—

(a) A declaration that the defendant Taylor was not and is not a member of the board of police commissioners for the City of Vancouver.

(aa) A declaration that the defendant Taylor is not qualified to sit as a member of said board.

(b) A declaration that the purported suspension by the defendant Taylor of the plaintiff from his office as chief constable for the City of Vancouver on the 25th day of January, 1933, was illegal.

(c) A declaration that the resolution purporting to have been passed at the meeting of the board of police commissioners for the City of Vancouver on the 6th day of February, 1933, dismissing the plaintiff from his office as the chief of police for the City of Vancouver was not legally passed, and that the plaintiff was not and is not dismissed from the said office.

(d) A declaration that the defendants Taylor, Charman and Dumaresq, as members of the board of police commissioners for the City of Vancouver, at all times material to this action, were actuated by motives and causes alien and irrelevant to the discharge of their duties as police commissioners and acted corruptly and in bad faith and without any intention to perform the duties cast upon them by law as members of the board of police commissioners for the City of Vancouver.

MARTIN, J.A.

(e) Damages as against the defendants, Taylor, Charman and Dumaresq.

(f) An injunction as against the defendants restraining the defendants, as members of the board of police commissioners for the City of Vancouver, and the said board, from acting upon the said resolution purported to have been passed on the 6th day of February, 1933, purporting to dismiss the plaintiff from his office as chief constable for the City of Vancouver,—

(a) by treating the plaintiff as being discharged, and

(b) from appointing anyone else as chief constable for the City of Vancouver.

(g) Costs of this action.

(h) Such other and further relief as to this Honourable Court doth seem meet.

Ordinarily an appeal of this kind would be determined solely on the material on which the learned judge below made his order, but this being an interlocutory appeal the respondents (defendants) have taken advantage of their right under Appeal Rule 5 to bring before this Court for its consideration further evidence by affidavit of a relevant matter which has "occurred after the date of the decision below" (on the 17th day of Feb-

ruary) *i.e.*, that the said commissioners met on the 18th day of February and passed the following resolution, *viz.*:

WHEREAS doubts have been cast on the validity of the action of this board because its chairman had not taken the special oath of office before February 11th, 1933.

AND WHEREAS, the chairman did on the same date take the said oath, and it is desirable to remove all doubt as to the previous actions of this board, BE IT RESOLVED, that this board does now ratify and confirm all of its actions prior to this date and declare them of the same effect as if made this day.

WHEREAS doubts have been cast on the validity of the action of this board because its chairman has not taken the special oath of office before February 11th, 1933,

AND WHEREAS, the chairman did on the same date take the said oath, and it is desirable to remove all doubt as to the previous actions of this board,

BE IT RESOLVED, that this Board does now ratify and confirm all of its actions prior to this date and declare them of the same effect as if made this day.

WHEREAS doubts have been cast on the validity of the action of this board because its chairman has not taken the special oath of office before February 11th, 1933,

AND WHEREAS the chairman did on the said date take the said oath, and it is desirable to remove all doubt as to the previous actions of this board,

BE IT RESOLVED, that Colonel C. E. Edgett be dismissed as chief constable of the City of Vancouver.

MARTIN, J.A.

RESOLVED that we accept the application of John Cameron, chief constable of the City of New Westminster, B.C., for the position of chief constable of the City of Vancouver, and that he is hereby appointed to the said position, to take over his new duties at as early a date as possible.

And it further appears by said affidavit that the said Cameron forthwith entered upon the discharge of the duties pertaining to said office.

It is submitted by this appellant (plaintiff) that these proceedings, taken since the service of the notice of appeal to this Court on the 18th day of February, are of no more validity than were those to dismiss him thereinbefore taken, and that they are all null and void in law and, consequently, though the plaintiff has been *de facto* ousted from his office yet he is *de jure* the lawful occupant thereof and should now be so declared by this Court and reinstated therein up to the trial of the action when the rights of the parties may be determined after all the evidence on both sides is fully heard and considered, which it is impossible to do at this early stage of the proceedings when not even the pleadings defining the issues have been filed.

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

On behalf of the defendants it is submitted, in substance, and in brief, that a careful scrutiny of the affidavit filed against them discloses no ground for relief at law and at most shews only that they have acted unwisely, but nevertheless within their rights and in the proper discharge of their public duty to remove the plaintiff from his office because of his inefficiency therein.

The case thus stood at the close of the argument before us on the 24th day of March and it raised a question of much public importance which has never before come up for consideration in this Province, within legal memory at least, and if there were nothing more in the case it would be our duty to give judgment upon it, founded on both the new and the old evidence and attempt to solve to the best of our ability the very difficult primary question it raises because of its very unusual circumstances and to make, in the soundest exercise of our discretion, the order that would now be most appropriate to the private rights of the plaintiff and to the public welfare which is concerned to an exceptional degree, in these unprecedented days of depression and unrest, in the firm maintenance of the public peace and good order—*cf. Price's Patent Candle Company, Limited* v. *London County Council* (1908), 2 Ch. 526, 544; *Great Central Railway* v. *Doncaster Rural Council* (1917), 87 L.J., Ch. 80; *Frost* v. *King Edward VII. Welsh, &c. Association* (1918), 2 Ch. 180; and *Breed* v. *Rogers* (1913), 12 D.L.R. 620.

MARTIN, J.A.

But since the argument an event (which under the present circumstances at least we should judicially notice) of overriding importance has "occurred" (in the language of said rule) affecting the disposition of this appeal, in that a Bill has passed its third reading in the Legislature of this Province (which, be it remembered, is a High Court of Parliament), now sitting, which purports to abolish from the time it receives the assent of the Lieutenant-Governor (which may now be expected any day) the present board of police commissioners, composed of the defendants, and to create a new tribunal constituted by three officials, the mayor of Vancouver, a judge of the County Court of Vancouver, and the police magistrate of that city. This radical intervention by Parliament in the affairs and *status* of

the defendants (brought about doubtless by the proceedings now before us) has the most weighty effect upon the application of the leading case of *Lapointe* v. *L'Association de Bienfaisance et de Retraite de la Police de Montreal* (1906), A.C. 535, which was much relied upon by the appellant's counsel, and wherein an ex-policeman brought an action against a benevolent association to have his name placed on its pension roll on the ground that his application for a pension had not been properly "considered by the board of directors . . . and his right (thereto) determined by a majority of the board" pursuant to the Society's rule (45) but had been unfairly and secretly investigated and no opportunity afforded him to be heard in answer to the charges against him, and the Privy Council held (p. 539) that the Society's directors had acted in a manner that was "irregular, contrary to the rules of the Society, and above all contrary to the elementary principles of justice" and that "the so-called determination of the board is void and of no effect" and that (p. 540) the plaintiff had not by such unlawful acts, "forfeited rights acquired by length of service and regular contribution to the fund."

It is to be noted, of course, that the decision was given on a final judgment of the Superior Court of Quebec in the plaintiff's favour after the evidence on both sides had been fully considered, and there are other obvious and substantial differences from the case at Bar, *e.g.*, that the present plaintiff as a public officer of law and order, and therefore, being at the head of a large force of constabulary in a large city equipped to deal with sudden riots, etc., is in a position of semi-military subservience to his superiors, and holding his office at pleasure only, is consequently legally liable to instant dismissal therefrom without cause assigned and without a hearing, if that course were taken in the honest exercise, *i.e.*, free from indirect motives, of his superiors' absolute discretion (*cf. Davis* v. *The City of Montreal* (1897), 27 S.C.R. 539; and *Gardner* v. *City of Niagara Falls* (1923), 55 O.L.R. 53; and *Brown* v. *Dagenham Urban District Council* (1929), 140 L.T. 615) which leaves him in the precarious position pointed out by the Queen's Bench in *Wilson* v. *York* (1881), 46 U.C.Q.B. 289 at p. 299:

> The effect of this is, that all such officers hold their offices during the

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

pleasure of the council, and may be removed by the council at any time without any notice of such intended removal, and without any cause being shewn for such removal, and without the council thereby incurring any liability to such officers for such removal. There is no hardship in this, for such officers accept their offices upon these terms; and were it otherwise, councils might be greatly embarrassed in the transaction of their public duties by the forwardness of an officer whom they would have no means of immediately removing without subjecting themselves to the liability of an action.

For "council" should be read herein "police commissioners." But assuming that *Lapointe's* case applies to the fullest extent to this one we are met with a greater difficulty than the Privy Council experienced therein and thus expressed at p. 541, after saying that it was not "easy" to decide upon the course to be adopted:

> Their Lordships have anxiously considered what order ought to be made now under the circumstances of the case. The action in substance, though not in form, is an action to administer the trusts of the pension fund, and to compel the trustees—that is, the board of directors—to administer those trusts in Lapointe's case in a proper and legal manner. The board before whom Lapointe's case came have acted in a manner so grossly unfair and improper that their Lordships could not allow the case to go again before the same tribunal. Understanding, however, that the members of the tribunal will not be the same, as the board is now composed of new members, their Lordships think that so extreme a measure is not required. At the same time, they think that the action ought to be retained in the Superior Court and that the Court ought to keep its hand over the future proceedings of the board of directors in Lapointe's case.

MARTIN, J.A.

This shews that even if we were dealing with a final judgment as their Lordships were, and viewing the case in its worst aspect, it would still be our duty to give the defendants an opportunity to reconsider the matter "in a proper and legal manner" under the "hand" of the Court below in accord with the further directions given on pp. 541-2 and reserving control over "the composition of the board" which would reconsider the whole proceedings. It was submitted by appellant's counsel on the argument that such an order should not be made herein because while there were nine directors to choose from in *Lapointe's* case and therefore a new "composition" of the board was possible, yet here the composition of the present statutory board could not be altered and so it would be useless to put the plaintiff again at their mercy, and at the time it was made that submission was correct in fact. But by the intervention of the Legislature as aforesaid that objection has been removed and it

could not be seriously suggested that the new tribunal specially created by statute for the express purpose, *inter alia,* of remedying the present situation in Vancouver, which has become inimical to the public welfare, should not be resorted to without delay for a reconsideration of the whole proceedings involved herein, particularly when the majority of its members will be judicial officers. Such being the new situation that has arisen on the appeal it is to my mind clear that this case has now at least become one (however it might have been regarded before) wherein it would not be "just or convenient," as the Judicature Act says, from any point of view, to grant the *interim* injunction as prayed, and in reaching this conclusion I keep in mind the assurance given us by the leading counsel for the defendants that he was desirous of bringing the action to a speedy hearing and was prepared to co-operate with the plaintiff's counsel to that end.

It follows that, in my opinion, the appeal should be dismissed, but, in view of all its very exceptional circumstances, "good cause" abundantly exists for doing so without costs, as was the course adopted even on pronouncing a final judgment in the said case of *Gardner* v. *City of Niagara Falls* wherein the conduct of the defendant corporation had been, as Mr. Justice Lennox described it, "harsh and arbitrary," which aptly describes that followed by the present board; and see also *Brown* v. *Dagenham Urban District Council, supra,* at p. 623.

MARTIN, J.A.

In the preparation of these reasons I have been careful to confine myself strictly to a consideration only of those matters that are necessary for the determination of the present limited question of the advisability and expediency of granting an injunction before trial, because I wish to guard myself from saying anything that may trammel or embarrass the learned judge when the case comes on for hearing for it may then, after all the evidence is brought out, present a different aspect and be open to considerations which cannot now be properly entertained. This unusual case, indeed, is eminently one where "the proper inferences can be drawn only by the eliminative process of a trial" as was aptly said in another case of an interlocutory injunction, *Breed* v. *Rogers, supra,* by Chief Justice Falconbridge.

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

MCPHILLIPS, J.A.

McPHILLIPS, J.A.: I might say that I am of the opinion that the appeal should be dismissed. This case is rather an unusual one in this sense that, according to my recollection of the practice at the Bar for many years, when an application was made for an *interim* injunction and was refused by the learned judge it was quite an unknown practice to appeal from that order. Sometimes an application was made to another judge for an injunction, and telling the judge—of course—saying that the learned judge first applied to had refused the injunction; and it was quite within the powers of any one of the judges of the Supreme Court to have later, upon the same material or supplemental material, to grant an injunction.

The reason that it has appeared to me that the appeal should be dismissed is that I am not satisfied that the discretion exercised by the learned Chief Justice was wrongly exercised—an injunction must be founded upon justice and convenience. Of course, when you attempt to stop the wheels of a municipality it is a very serious matter, and interfering with the elected representatives of the people on the city council. Further it is to be remembered that this City of Vancouver operates under a private Act and it may also be said that the powers given to the mayor and council are rather different and in many ways more extensive than under the general Municipal Act. When the Act was passed by the Legislature of British Columbia, now many years ago, I have no doubt that what was considered justification for passing a private Act to cover the City of Vancouver was that the City of Vancouver, then in its infancy, would become a great city, which has been the case having a population, I think, of approximately one-half of the whole population of the Province, therefore, the Courts must approach interference with the mayor and council and police board, in the discharge of their duties, with great care and circumspection. An appeal was launched from this refusal to grant an injunction by the learned Chief Justice in the Court below, and then an application was made to this Court of Appeal for an injunction, which was *ex parte,* and this Court granted an injunction until the hearing of the appeal. I understand now that the threatened action that was covered by our injunction had occurred before the parties interested knew of our order. I might say

that my learned brother MARTIN raised the point as to whether it was a *fait accompli,* an accomplished fact, and I did as well. Counsel nevertheless pressed for the injunction and no doubt believed that it would be in time to prevent the threatened action. I can only assume that it was not in time because no steps have been taken based on any defiance of the injunction. If the mayor and council and police board had notice of our injunction, I would be surprised to think that they would act; and if they had acted, there are certain pains and penalties which would have followed.

I do not intend to pass upon the merits of the action itself, that would not be proper on my part as it is *sub judice,* but in just one or two words of generalization I wish to say this: That the learned counsel, Mr. *McCrossan,* for the City, made a submission to this Court that the mayor and council and police board had despotic power, as he put it—rather forensically no doubt—and if his statement is correct upon the wording of the statute, why, of course, Parliament is supreme and if Parliament has so said, it would be powerless for the Court to intervene, but I am not passing on that point at all, because that point will have to be later determined. The Courts in the absence of apt language by Parliament have always withstood action which would offend against natural justice, and if there is not this despotic power why, of course, the Court has a wide range, that is to look at the matter from the point of view of natural justice and one of the first principles of natural justice is that no one shall be deprived of his liberty or affected in his office or in any other wise constrained by any body, official or otherwise, without at least being heard. That is one of the first principles of natural justice and will be a matter to receive attention when the action goes to trial.

MCPHILLIPS, J.A.

For the more specific definition of what all this litigation has resolved itself into and the precise points which were argued with ability on both sides, I might say that I have had the advantage of reading the judgment of my learned brother MARTIN with which I entirely agree.

MACDONALD, J.A.: As certain events, outlined in an affidavit filed, transpired since the order of Chief Justice MORRISON

MACDONALD, J.A.

COURT OF APPEAL

1933

April 4.

EDGETT v. TAYLOR

MACDONALD, J.A.

now under review was made, including the action of the Legislature in abolishing this board it would serve no useful purpose, nor would it be appropriate to grant an injunction for the short period that will elapse before the trial of the action. Formally therefore the appeal should be dismissed but without costs. Because the whole matter will be under review at the trial, I will not specify the conduct, or rather the misconduct of certain members of the board that leads me to deprive them of costs. I only mention it because the rule is that costs are withheld for good cause. I may add that I agree with the reasons for judgment of my brother MARTIN about to be filed.

Appeal dismissed.

Solicitors for appellant: *Williams, Manson, Gonzales & Taylor.*

Solicitor for respondents Taylor and Dumaresq: *Alexander Henderson.*

Solicitor for respondent Charman: *W. W. B. McInnes.*

Solicitor for respondent Rush: *C. S. Arnold.*

Solicitor for respondent Board of Police Commissioners: *J. B. Williams.*

REX v. LEE FONG SHEE.

COURT OF APPEAL

1933

April 7.

REX v. LEE FONG SHEE

Criminal law—Possession of opium—Opium on premises—Knowledge of accused—Evidence—Onus—Can. Stats. 1929, Cap. 49, Sec. 17—Criminal Code, Sec. 1014 (a) and Subsec. (3).

Section 17 of The Opium and Narcotic Drug Act, 1929, provides that, "any person who occupies, controls or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug is found, shall, if charged with having such drug in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent."

The accused, an aged Chinese woman, lived in a building facing a street, in the front of which was a store in which her deceased husband had carried on a butcher business five years previous to its being raided by the police. There was a mezzanine floor at the back of the store which was reached by a ladder and on which was a bed. The accused lived behind and above the store. The store had not been used since her husband's death and she never entered it. The police found a small quantity of dross and opium paraphernalia on the mezzanine floor, and some tins of opium in a toilet in a courtyard at the back of the building to which other buildings had access. The step-son of the accused, who was a drug addict, had lived with her. She tried to cure him when he was living with her but having failed in her attempt to do so she sent him from her home. He retained a key of the front door of the shop and continued to use the shop and mezzanine floor for smoking opium. Accused swore she had no knowledge of this whatever. She was convicted on a charge under the above section.

Held, on appeal, reversing the decision of LAMPMAN, Co. J., that the Court being of opinion that upon her trial the accused advanced the "proof" of her defence to such a stage that she created a reasonable doubt as to her guilt or innocence, she was entitled to the benefit of that doubt and to be declared not guilty of the charge preferred against her.

APPEAL by accused from the decision of LAMPMAN, Co. J. of the 10th of February, 1933, convicting her of unlawfully having opium in her possession. The accused, who was 65 years old and a widow, lived in a house facing Fisgard Street in Victoria. The door from the street entered a shop formerly used by her husband as a butcher shop, at the back of which was a mezzanine floor which was fitted up with a bed and other accommodation for sleeping quarters and could only be reached by a ladder through a small hole. The accused lived in the portion of the building behind and above the store, the store being empty and

Statement

COURT OF APPEAL

1933

April 7.

REX v. LEE FONG SHEE

Statement

not in use since her husband's death. On the store being raided by the police they found a small quantity of opium on the mezzanine floor and opium smoker's paraphernalia. At the back of the building was a courtyard which was common to a number of buildings, and contained a number of old toilets. Several decks of opium were found concealed in sawdust on the floor of one of the toilets. The accused had a step-son who was a drug addict. He had lived with the accused who tried to cure him of this habit, but she eventually sent him away. After he left the accused the step-son kept a key to the front door of the butcher shop and would frequent the place from time to time using the mezzanine floor for smoking opium. Accused claimed she never went into the shop part of the building, and knew nothing about her step-son frequenting the place.

The appeal was argued at Vancouver on the 20th and 21st of March, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Nicholson, for appellant: The accused is 65 years old and the learned judge below exonerated her as far as the opium in the toilet in the courtyard is concerned. As to the mezzanine floor in the shop, this is reached by a ladder through a small hole. She claimed she was never there and it was a physical impossibility for her to get up the ladder through this hole. She tried to cure the step-son of the drug habit but was unable to do so and she sent him away. She knew nothing of the step-son using the mezzanine floor in the shop for smoking. The evidence rebuts the statutory *prima facie* case: see *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491. There is no evidence that the accused knew of opium being on the premises and she is entitled to the benefit of the doubt: see *Rex* v. *McKay* (1919), 32 Can. C.C. 9; *Rex* v. *Mooney* (1921), 36 Can. C.C. 165 at p. 168; *Rex* v. *Eastland* (1924), 43 Can. C.C. 17.

Johnson, K.C., and *R. A. Wootton,* for the Crown: The evidence of the accused was unsatisfactory and the learned judge below did not believe her. It is a fair inference from the facts that she knew smoking was going on in the front part of the premises and the learned judge having so decided, this decision should not be disturbed. The question is largely what construc-

tion should be put upon section 17 of The Opium and Narcotic Drug Act.

Nicholson, replied.

Cur. adv. vult.

7th April, 1933.

COURT OF APPEAL

1933

April 7.

REX v. LEE FONG SHEE

MACDONALD, C.J.B.C. (oral): This was an appeal by a Chinese woman who was convicted of having in her house narcotic durgs.

The facts are very simple. Her step-son who had been living with her was an addict, and when she discovered this she turned him out of the house after trying first to break him of the habit. The house was the house of her husband, who is dead, in which there was a butcher shop, and the husband, during his lifetime, had a small room or cubby-hole fitted up for the accommodation of countrymen who had no place to sleep. This place was reached by a ladder, and there was a bed there. It could be entered through the unoccupied butcher shop by a key which the step-son had. The learned judge found that there was evidence of occupation of this bed shortly before the search, and the finding of the small quantity of opium in it. He also found that the accused had not been there recently. She could not get there except by climbing a ladder, which she was not able to do, being a woman of 65 years of age.

MACDONALD, C.J.B.C.

The law is that where a charge of this kind is brought, where opium is found, or a drug is found in the house of a person, there is a presumption of law against the occupant. There is a *prima facie* case made against her, and she must be able to explain that away. It is a very slight presumption, but it is sufficient on which to convict if it is not rebutted. The fact that the step-son occupied this room occasionally, and that she had not been in it for a considerable length of time would indicate that the opium had been taken there and left there by the step-son. Moreover, her reputation was deposed to by her clergyman, and a nurse who had very often gone to see her, and they give her an excellent character. They found no evidence whatever in the house of the use of opium. Now, while there are certain things that are said not to be against her, such as that she had not smelled opium in the house, and did not know the smell of

COURT OF APPEAL

1933

April 7.

REX v. LEE FONG SHEE

MACDONALD, C.J.B.C.

opium, it is of little account against the inference to be drawn from the son's being in this room and her not having been in the room. It raises a very serious doubt in the mind of the person trying the case.

I therefore have a very, very serious doubt as to her guilt, and I think the learned judge ought to have had a serious doubt as to her guilt, and in the case of this kind ought to have given her the benefit of the doubt, which he did not do. I would give her the benfit of the doubt and would set aside the conviction and allow the appeal.

MARTIN, J.A. (oral): This case raises an important question upon the effect of section 17 of The Opium and Narcotic Drug Act, 1929, Cap. 49, which provides, with respect to a charge such as this, *i.e.*, under par. (*d*) of section 4 of having narcotic drugs in possession without a licence or other lawful authority, that:

> . . . any person who occupies, controls or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug is found, shall, if charged with having such drug in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent, or that he was lawfully entitled to the possession thereof.

Counsel for the Crown, Mr. *Johnson*, submitted to us, and rightly, in my opinion, that this section throws a very substantial onus upon the accused in the case specified, and that it shews the deliberate intention of Parliament to impose that very unusual and heavy onus upon such accused persons. The reason (though it is not for us to look for reasons or question the wisdom of Parliament) for that departure from our ordinary jurisprudence is obvious in cases of this description for they are so insidious in their operation, so difficult of detection, and so disastrous in their results, that Parliament has seen the necessity of adopting this unusual, though not unprecedented, course.

MARTIN, J.A.

We have referred to that in other cases which have come before us, but particularly in the case of *Rex* v. *Wah Sing Chow* (1927), 38 B.C. 491 at p. 498, wherein our brother M. A. MACDONALD, in giving the decision of this Court, referred to the fact that "every possible ruse known to human ingenuity is resorted to in this traffic." Therefore, that is the avenue, so to

speak, from which consideration of this difficult section should be approached, and after having given most careful attention to it, my view of it is that it does, as submitted, cast a very substantial burden upon the accused, which it is the duty of the Court to enforce, especially having regard to the object aforesaid, and the only way that the accused can extricate himself from that onus is as the statute provides, to "prove that the drug was there without his authority, knowledge or consent, or that he was lawfully entitled to possession thereof."

It is here that the main difficulty comes in, as to the meaning of "prove," and we are without any decision of any Court in Canada upon the section, though it was incidentally considered in *Morelli* v. *Regem* (1932), 52 Que. K.B. 440; 58 Can. C.C. 120; and the decisions cited upon other statutes with language not identical are unsafe guides. It so happens, because of our geographical situation and the large Oriental element in our population, that most of the reported and unreported cases under The Narcotic Drug Act have come before this Court, but the only one which is close to this is *Wah Sing's* case, *supra,* and I merely again mention it to shew that while the section was cited in the course of our argument it became unnecessary for us to consider it because the case was so strong, as our brother said in the opening paragraph of his judgment that,

MARTIN, J.A.

> apart from any question of doubt, there is enough direct evidence in this case to support the plea of not guilty.

It proceeded, indeed, upon the assumption that its whole circumstances shewed that the conduct of the accused was properly considerable in the one aspect only, *i.e.,* of its being consistent throughout with his innocence, and so it was unnecessary to consider the section, but it is necessary to do so now.

Having as I said, given the most careful consideration to it, I am of the opinion that its practical application to such cases as the present should be that though the onus is thrown upon the accused, and continues all through the trial, of "proving" his innocence, yet at the same time it must be borne in mind that the doctrine of the benefit of the doubt is also incorporated by our general criminal jurisprudence into the construction of that section and it would be no more proper to exclude it from the consideration of this section than from any other section of

COURT OF APPEAL

1933

April 7.

REX v. LEE FONG SHEE

criminal statutes. That element distinguishes the case from any civil view which might be taken of it, which is well illustrated by the recent decision of the Privy Council in the case of *Winnipeg Electric Co.* v. *Geel* (1932), A.C. 690, wherein their Lordships considered the effect of section 62 of the Manitoba Motor Vehicle Act which cast the onus of negativing negligence, in an action for damages for negligence of a certain class, upon the defendant owner or driver of the vehicle, and their Lordships held that the onus "remained on the defendant until the very end of the case" and to such an extent that (pp. 695-6)

> if the issue is left in doubt or the evidence is balanced and even, the defendant will be held liable in virtue of the statutory onus, whereas in that event but for the statute the plaintiff would fail. . . .

That is an instructive illustration of the reversal of the ordinary onus and also a fundamental difference between criminal and civil jurisprudence, because if this section stood alone and we could not incorporate into it the principle of the benefit of the doubt, then this accused would undoubtedly have been properly convicted. But, in my opinion, the section should be viewed and practically applied in this way, *viz.*: That if in his attempt to prove that the drug was there without his authority, knowledge or consent, etc., the accused person advances that defence to the stage that it is established that there is a reasonable doubt upon that crucial fact, then he is entitled to the benefit of that doubt as in any other criminal charge, though he would not be so entitled had it been a civil action, as has been seen by the decision cited.

MARTIN, J.A.

Such being the case, we have to consider upon the whole evidence the question as to whether that stage had been attained or not, and in my opinion, though not without some doubt, I have reached the conclusion that it can fairly be said that such a reasonable doubt has been created by the evidence that the benefit of it should have been given to the accused. It is there that I think the learned judge below erred, if I may say so with respect, in the application of the law to this difficult section. He must, as I gather from his reasons, have proceeded upon the ground that the continuation of the onus to the end of the proceedings excluded the consideration of the benefit of the doubt, though this, unfortunately, is uncertain because this vital sec-

tion is not mentioned in said reasons, and therefore I feel impelled to dispose of this case upon the ground that the learned judge has not given effect to the real intent and effect of the statute.

It is not for us, of course, to retry this case on the evidence (which I may say was very fairly and adequately presented by Mr. *Wootton*) because our appellate duty is not to retry but to review under section 1014 (*a*), which says that if we are of opinion that the verdict "is unreasonable or cannot be supported having regard to the evidence," then it is our duty to allow the appeal and quash the conviction or make "such other order as justice requires" (3). I just mention that view of our duty because upon occasion it has been misapprehended, though from the very first sittings of the Court of Criminal Appeal in England up until now that rule has never been departed from and I may say that our present statute is in this and most other respects (with the exception of one or two great improvements with regard to the granting of a new trial, etc.), identical with the English Act from which it is taken. The case I refer to is *Rex* v. *Martin* (1908), 1 Cr. App. R. 52, wherein the Court said this, in beginning its judgment:

MARTIN, J.A.

> The case had been argued as if this Court was to retry the case, but that is not its function.

That ruling has been persistently adopted by this Court, and by other Courts throughout Canada, of which I cite only one illustration, a unanimous decision of the Appellate Court of Nova Scotia, in *Rex* v. *Cook* (1923), 57 N.S.R. 362, at p. 368, where the Court cited and affirmed that very case, *Martin's,* to which I have referred.

Being therefore of opinion that upon her trial the accused advanced the "proof" of her defence to such a stage that she created a reasonable doubt as to her guilt or innocence, she was entitled to the benefit of that doubt and to be declared not guilty of the charge preferred against her, and so it follows that the appeal should be allowed, the conviction quashed and a judgment and verdict of acquittal entered pursuant to said subsection (3) of the Criminal Code.

MCPHILLIPS, J.A.

McPHILLIPS, J.A. (oral): I am of the opinion that the appeal should succeed. Hearing my learned brother the Chief

COURT OF APPEAL

1933

April 7.

REX v. LEE FONG SHEE

Justice reviewing the facts—if I may say so admirably—I find it unnecessary to make any particular reference to them. I am entirely in accord with the judgment of the learned Chief Justice.

I would refer in connection with this case to *Rex* v. *Wah Sing Chow,* which as my learned brother MARTIN has said was the judgment of the Court delivered by my learned brother M. A. MACDONALD. I think the whole Court was present in that appeal. It is found in 38 B.C. 491. At p. 497 we have this said:

> Apart from any question of doubt, there is enough direct evidence in this case to support the plea of not guilty. Guilt should be brought home by evidence reasonably conclusive.

Now, in this case I am of the opinion that this requirement was not satisfied, it was not brought home by evidence reasonably conclusive and the review of the evidence by my learned brother the Chief Justice, certainly accentuates it. This case was not a case in which this Court could sustain a verdict of guilty. Then at p. 498 the question of the possession of opium was dealt with in the case I have referred to, as follows:

MCPHILLIPS, J.A.

> The evidence of the empty can found in his store is of no importance and as for the can of "dross opium" found the evidence of the two witnesses explaining its presence is more consistent with innocence, in view of the fact that it was found, not concealed, but in open view in the store of the accused.

Now, in this particular case there was nothing to connect the accused with this opium that was found at all, and there was everything to indicate that she was not one who ever really visited the particular premises which were shut off practically from her, she being a lady who was somewhat handicapped physically and unable to make her entrance into that particular part of the premises, in fact unused part of the premises. That was admitted in the Court below.

Therefore, upon the whole case I am of the opinion the conviction must be quashed.

Now, my learned brother MARTIN made reference to the province of this Court in regard to criminal appeals. With great respect to my learned brother I am not prepared to agree with what he said. I think Parliament has given to us, as I conceive it, the very same authority that is so well known that we exercise in respect to civil cases, and the leading case is *Coghlan* v.

Cumberland (1898), 67 L.J., Ch. 402, where Lindley, M.R. (afterwards Lord Lindley), laid down the principle, which was later approved of by the House of Lords and is taken today as being the true enunciation of our duty. I cannot see how it could be that we should arrive at a conclusion as to whether or not there was any miscarriage of justice unless we retried the case. Certainly, we have to read the evidence or how could we say that? In civil cases that is all that is done. We read the evidence and we have the addresses of counsel and I think it would be, with great respect again to what my learned brother has said, a great failure to discharge our duty, if upon an appeal here under the terminology of the Criminal Code having given leave to appeal on the facts, that we are not to analyze the case from page to page. We must do so or how could we arrive at our conclusion? Many times we have to say, upon doing that, and doing it with great care, that nevertheless whilst we see some errors in the case and in the trial, yet taking the whole of the evidence together like we have seen oftentimes learned judges say, "Well, supposing this case were to go to a new trial, there could only be one result," a result similar to that which took place. I do not intend to limit myself in any way. I think that on an appeal to us when leave is given to appeal on facts, that we are just as free and have equal authority and an equal right to retry the case within the principle of *Coghlan* v. *Cumberland*.

MCPHILLIPS, J.A.

I would allow the appeal and quash the conviction.

MACDONALD, J.A. (oral): I think the appellant discharged the heavy onus upon her under section 17 of the Act. That is the reasonable conclusion that ought to be reached. The isolated facts relied upon by the Crown as indicative of guilt are really consistent with innocence. I think appellant in discharging the onus referred to carried the proof as far as my brother MARTIN indicated. I would allow the appeal.

MACDONALD, J.A.

Appeal allowed.

Solicitor for appellant: *J. R. Nicholson.*
Solicitor for the Crown: *Oscar C. Bass.*

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. v. MORRISON

EAST KOOTENAY RUBY COMPANY LIMITED v. MORRISON AND JOHNSON.

Mining law—Placer lease—Forfeiture—Relocation—Case stated—R.S.B.C. 1924, Cap. 169, Secs. 110 and 114.

The plaintiff, lessee of a placer-mining lease which was located in 1922, and expired on the 30th of September, 1930, failed to pay renewal fee or record the certificate of improvements for the year expiring on that date. On October 1st, 1930, the gold commissioner issued a certificate that the lessee was in default, and the mining recorder cancelled the record of lease. On the same day the defendant Morrison, on behalf of the defendants, staked the ground and in April, 1931, the defendant Johnson restaked as an alternative staking, but no lease was granted to the defendants. On October 9th, 1930, the plaintiff mailed cheque for renewal fees to the mining recorder which was received on October 22nd following, but it was refused and returned, the plaintiff receiving it on the 9th of November following. He then forwarded remittance to the minister of mines to cover renewal fees and penalty. The minister advised the gold commissioner of its receipt but the gold commissioner refused to accept it, ruling that the lease had lapsed. The minister never declared the lease forfeited. On a case stated as to whether there was forfeiture, it was held that sections 110 and 114 of the Placer-mining Act, both dealing with forfeiture, cannot be reconciled, and both being general in their application and enacted at the same time the latter prevails, and there being no declaration of forfeiture by the minister, the lease was not forfeited.

Held, on appeal, affirming the decision of MCDONALD, J., on an equal division of the Court, that as the Government retained the right to approve or disapprove of forfeiture, and it was the duty of the gold commissioner to consult the minister and get his approval before sending the matter to the mining recorder for cancellation, the lease was therefore cancelled without the proper steps being taken to effect it.

Statement

APPEAL by defendants from the decision of MCDONALD, J. in an action tried by him at Victoria on the 23rd of February, 1933, for (a) A declaration that the plaintiff holds, as against the defendants, a good and valid placer lease of the "Margaret" Creek Placer Mining Lease Claim No. 603, situate in the Atlin Lake Mining Division; (b) a declaration that the defendants or either of them have no legal right or title to any interest in the said premises; (c) for an injunction to restrain the defendants from carrying on any mining operations on the said premises and from further trespassing upon the same.

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. *v.* MORRISON

Statement

1930, was not received by the plaintiff until the 9th day of November, 1930, up to which date the plaintiff had no notice or knowledge that its remittance of rent had been rejected.

7. It is not possible to telegraph remittances to the town of Atlin, where said recorder and gold commissioners have their offices. On or about the 13th day of November, 1930, the plaintiff paid to the minister of mines at the City of Victoria, British Columbia, the sum of $60 which was tendered to cover said rent and other matters set out in a telegram of the 12th of November, 1930, from the plaintiff's solicitors *Herchmer & Mitchell* to the minister, which is set out in the Schedule hereto. Said minister notified the gold commissioner for the Atlin Lake Mining Division by telegram that he had received said sums subject to said gold commissioner's acceptance.

8. The said gold commissioner refused to accept the said rent and penalty, ruling that the same were not paid in time and said lease had by reason of the plaintiff's said delay lapsed and become void, and the said moneys were thereupon returned to the plaintiff by the minister.

9. The minister of mines has not at any time formally declared the plaintiff's said lease to be forfeited, or approved any forfeiture thereof; but has at all times adopted the attitude that by reason of plaintiff's default as aforesaid the plaintiff's said lease automatically became forfeited and void, and that he the said minister had no power to act in the said matter.

10. On or about the 1st day of October, 1930, after the cancellation by the said mining recorder of the record of the said lease, the defendant Morrison on behalf of the defendants, staked the said claim as a placer claim and on the 13th day of October, 1930, recorded the said staking in the office of the said recorder; and on or about the 30th day of April, 1931, the defendant Johnson on behalf of the defendants restaked as an alternative staking and recorded the same in the office of the said recorder; but no lease of the said claim has been granted to the defendants or either of them by the gold commissioner.

The question for the opinion of the Court is whether the lease referred to in paragraph 1 hereof has been forfeited by reason of the foregoing.

Crease, K.C., for plaintiff.
Beckwith, for defendants.

28th February, 1933.

MCDONALD, J.

MCDONALD, J.: Plaintiff and its predecessor in title, having been since the year 1922 the lessee under a placer-mining lease, which expired 30th September, 1930, failed to pay the renewal fee on that day or to record the necessary certificate of improvements for the year expiring 29th September, 1930. On 1st October, 1930, the gold commissioner issued a certificate that the lessee was in default in the above respects, and thereupon

The parties concurred in stating the questions of law arising in a special case for the opinion of the Court:

1. On the 30th of September, 1922, the gold commissioner for the Atlin Lake Mining Division demised to Margaret M. Miller as lessee for placer mining, the "Margaret" Creek Placer Mining Lease situate on Ruby Creek and lying between the "Ophir" lease and "Basalt" lease, containing 41.4 acres for a term of 20 years, the yearly rent being $37.50, payable yearly in advance to the mining recorder for Atlin Lake Mining Division.

2. The said indenture of lease provided that it was granted upon the express condition that if the lessee should fail to pay the rent therein reserved, on the respective days and in the manner therein provided for the payment of the same respectively, then said lease should be deemed to be forfeited and the premises thereby demised should be deemed to be vacant and abandoned without any re-entry declaration of forfeiture, or other act on the part of the lessor, any rule of law or equity to the contrary notwithstanding, and it should thereupon be lawful for the lessor to re-enter upon the demised premises.

3. The plaintiff is the assignee of the said lease by assignment from the said lessee in the year 1922.

4. The plaintiff did not during the year which ended on the 29th day of September, 1930, expend on the demised premises or in such manner as should conduce to the development of the same a sum of $250 or any sum; nor did the plaintiff satisfy the mining recorder that such development work had been done as required by the said lease; nor did the plaintiff obtain from the mining recorder any certificate of any such work having been done; nor did the plaintiff record the same before the expiration of the said year; nor did the plaintiff pay the mining recorder the sum of $250 in lieu of performance of such development work; and the annual rental payable under the said lease was not paid on the 30th day of September, 1930, being the day on which the same became payable, and the said annual rental remained unpaid after the said 30th day of September, 1930.

Statement

5. On the 1st day of October, 1930, the gold commissioner issued a certificate that the lessee was in default in respect of the doing and recording of development work in respect of the said lease, and that the annual rental in respect of the said lease was in default, and thereupon the mining recorder for the Atlin Lake Mining Division, being the mining recorder in whose office a copy of the lease was filed, did cancel the record of the said lease and noted the cancellation on the copy of the said lease on file.

6. The rent which became due and payable under said lease on the 30th day of September, 1930, was not remitted by the plaintiff until the 9th day of October, 1930, when a letter was written and mailed at Natal, B.C., enclosing a cheque for $40, and was received by the mining recorder for the Atlin Lake Mining Division (hereinafter called "the said mining recorder") on or about the 22nd day of October, 1930. On the said 23rd day of October, 1930, the said mining recorder wrote to the plaintiff refusing to accept the said remittance of rent on the ground that the same had not been paid in time. The said letter of the 23rd of October,

the mining recorder cancelled the record of the lease. On the same day defendant Morrison on behalf of himself and his co-defendant staked the claim and recorded the staking, and later, on 30th April, 1931, defendant Johnson in the same behalf restaked the claim and recorded same. No lease has been as yet granted to defendants. On 9th October, 1930, plaintiff mailed its cheque for the renewal fee to the mining recorder. This was received 22nd October and immediately refused and returned. It was received by plaintiff on 9th November, and thereupon plaintiff forwarded remittance to the minister of mines to cover the renewal fee and penalty. The minister forthwith advised the gold commissioner of its receipt but the gold commissioner refused to accept it, ruling that the lease had lapsed and become void. The minister appears to have taken the same view, but he has not formally declared the lease to be forfeited, or approved any forfeiture thereof.

The plaintiff clearly was in default both in respect of improvements for the year 1929-30 and in respect of payment of rent within a period of 30 days after due date as required by section 110 of the Placer-mining Act, R.S.B.C. 1924, Cap. 169. Nevertheless if the lease stands forfeited it will have lost all that it expended upon the property during the period of eight years, and the Court "leans against a forfeiture."

The difficulty arises—and it is no slight difficulty—upon the construction of sections 110 and 114 of the statute, which appear, upon a first reading at least, to be inconsistent. It is necessary, therefore, to examine, in an endeavour to see whether this is so. If they are inconsistent one must apply the rules of construction, which I understand to be, that the later in position must prevail, unless the earlier in position be later in point of time of coming into effect; but they shall not be held to be inconsistent if they can by any reasonable interpretation be read together. For the sake of convenience only I shall deal first with section 114. Prior to, and in the Revised Statutes of 1911 (section 110 not yet having been passed) section 114, subsection (1), with certain minor exceptions, appears in its present form and reads as follows:

> On the non-performance or non-observance of any covenant or condition in any lease, such lease shall be declared forfeited by the gold commis-

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. v. MORRISON

MCDONALD, J.

sioner, subject to the approval of the minister of mines, unless good cause be shewn to the contrary. After any such declaration of forfeiture, the mining ground shall be open for location by any free miner. No lease, whether made before or after the passing of this Act, shall hereafter be declared forfeited, except in accordance with this section.

Until the year 1920 when the statute was amended there was no other provision relating to forfeiture. In the year 1920 the statute was amended in various particulars. To this section 114 were added subsections (2) and (3), the effect of which may be briefly stated as follows: There being many lessees in default the gold commissioner may, on application, consolidate rentals in arrear and extend the time for payment thereof over a period of ten years, but if the lessee fails to make application before the 1st of January, 1921, or, having so applied, fails to pay the arrears or fails to pay his current annual rental the lease shall be deemed forfeited and the demised premises shall be deemed vacant and abandoned without any re-entry, declaration of forfeiture or other act on the part of the lessor or otherwise. In addition, the words "subject to the provisions of subsections (2) and (3)" were added, at the beginning of subsection (1).

It will be noted that these subsections (2) and (3) deal only with those lessees who were in arrear and who seized the opportunity to put their houses in order. As to such persons, no lease could be forfeited except subject to the approval of the minister of mines. As I read this whole section 114, therefore, as it stood after 1920, I had thought, after some consideration, that it had application only to lessees who might apply, to have consolidated, their rentals in arrear. In the revision of 1924, subsection (3) was omitted and subsection (2) amended to provide that lessees who had applied to have their rents consolidated (*i.e.*, prior to 1st January, 1921) and who later made default in payment of rentals, should have their leases forfeited, without any re-entry, declaration of forfeiture, or other act on the part of the lessor, etc.

In the same year 1920 the present section 110 was passed under the number 111. It applies to all leases issued after 1st July, 1920, and provides for annual rentals, annual improvements and the recording annually of a certificate of improvements. Subsection (5) contains the provisions for forfeiture

and provides that if the development work is not done in any year or if the lessee fails to record a certificate of improvements, or if the annual rental be not paid on its due date "the lease shall be deemed forfeited, and the demised premises shall be deemed vacant and abandoned, without any re-entry, declaration of forfeiture, or other act on the part of the lessor, gold commissioner, or otherwise." Subsection (6) provides that if the work has been done and if the lessee records his certificate and pays his rental and a penalty of $10 within 30 days he shall be relieved against the forfeiture.

Read in this way the sections would not be inconsistent. If section 114 be held to apply only to leases whereunder the lessee has applied to have his rentals consolidated and if section 110 be read as applying to all leases issued after 1st July, 1920, then there is no inconsistency and the lease in question must be held to be forfeited even in the absence of any declaration from the minister of mines. Upon further consideration, however, I am satisfied this is not the correct interpretation, for it leaves out of consideration those leases issued prior to 1st July, 1920, whereunder no default had taken place, but which are obviously intended to be included within the statute.

MCDONALD, J.

Nor do I agree with counsel for the defendants that section 110 is a particular section, and section 114 a general, and that hence the former must prevail. One, I think, is as general as the other.

Upon the best consideration, which I have been able to give the matter, I have concluded that the two sections cannot be reconciled, and that as, in their present respective forms (speaking as nearly accurately as one can, amid such confusion), they are both enacted in 1920, section 114 must prevail over section 110, and that there being no declaration of the minister the lease in question is not forfeited.

The question submitted in the case stated is therefore answered in the negative.

From this decision the defendants appealed. The appeal was argued at Vancouver on the 3rd of April, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. *v.* MORRISON

Beckwith, for appellants: Where there is conflict in two sections of a statute the latter prevails: see Maxwell on Statutes, 7th Ed., 136. A particular enactment wherever found must be construed strictly as against a general provision. Section 110 (5) is a particular enactment and must prevail: see Halsbury's Laws of England, Vol. 27, p. 136, sec. 246; *Churchill* v. *Crease* (1828), 5 Bing. 177 at p. 180; *De Winton* v. *The Mayor, &c. of Brecon* (1858), 26 Beav. 533 at pp. 543 and 545; *Pretty* v. *Solly* (1859), *ib.* 606 at p. 610.

Argument

D. M. Gordon, for respondent: Section 114 applies to all forfeiture and there is no real conflict between it and section 110. Even without section 114 the respondent should succeed. The Act is dealing with a lease and the relation of landlord and tenant. The Crown, not the gold commissioner, is the real lessor. Section 110 (5) ought to be read as if it contained the words "at the option of the Crown." Every provision, however strong, for a forfeiture of a lease because of the lessee's default must be construed as meaning a forfeiture at the option of the lessor: *Quesnel Forks Gold Mining Company* v. *Ward* (1920), A.C. 222. The Crown cannot exercise its option except through its responsible ministers. The Crown might be unwilling to have a lease cancelled.

Beckwith, replied.

Cur. adv. vult.

7th April, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. (oral): I would dismiss the appeal. There is an equal division of the Court, my brothers MARTIN and M. A. MACDONALD dissenting.

I think the true construction of the statute is that before a lease can be cancelled there must be the approval of the minister of mines as to the cancellation. I think it was the duty of the gold commissioner to consult the minister and get his approval before sending the matter on to the recorder to be cancelled. It does not seem to me to be in accordance with right and justice, that from a mere slip in paying fees or recording work, the cancellation of a mining lease might be brought about without even consulting the lessor, the Government. The Government has retained the right to approve or disapprove of

that proceeding. In this case the application was not made to the minister at all and therefore when the lease was cancelled it was cancelled without the proper steps necessary to effect it.

The appeal, therefore, should be dismissed.

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. *v.* MORRISON

MARTIN, J.A.

MARTIN, J.A. (oral): This appeal raises an interesting question under the Placer-mining Act, sections 110 and 114, with respect to the cancellation of a lease. Two subsections are particularly under consideration, *i.e.*, (5) of 110 and (1) of section 114. The question is, have these sections any inter-relation or are they independent dealing with different subject-matters? If the latter, then this appeal should be allowed.

Now a consideration of subsection (5) shews that it deals only with leases of a certain class, and subsection (1) says:

> The provisions of this section shall apply to all leases issued on or after the 1st day of July, 1920 . . .

and after other provisions it (5) proceeds to enact:

> If the development work required by this section is not done in any year, or if the lessee fails to obtain or record the certificate required in any year, or if the annual rental payable under the lease or any part thereof remains unpaid after the day on which it becomes payable, the lease shall be deemed forfeited, and the demised premises shall be deemed vacant and abandoned, without any re-entry, declaration of forfeiture, or other act on the part of the lessor, gold commissioner, or otherwise, any rule of law or equity to the contrary notwithstanding.

That declares the law upon the consequences of default by the lessee in any of the three specified cases. The section then proceeds to cast this administrative duty upon certain officers after such default:

> Upon receipt of a certificate from the gold commissioner that the lessee is in default in respect of the doing or recording of development work in respect of the lease, or that the annual rental in respect of the lease is in default, the mining recorder in whose office a copy of the lease is filed shall cancel the record of the lease and note the cancellation on the copy of the lease on file.

It may be said that is a drastic provision, but that, of course, is not the business of this Court to enquire into, but it is not a drastic one when you look at the next subsection (6) because that provides for "relief against the forfeiture" and "reinstatement" of the lease "within 30 days after the expiration of the year" if the lessee chooses to bestir himself and comply with the conditions imposed; and that is an important consideration in this matter, shewing that this whole legislation on the subject

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. *v.* MORRISON

MARTIN, J.A.

of leases of this kind under section 110 is not of an arbitrary nature, as was suggested to us in the argument, but one in which the remedy is placed in the hands of the defaulting lessee himself and he can proceed to be reinstated on his own volition by performing the specified conditions, and it is not incumbent upon him to make any application to any tribunal for leave or approval for he can cure his own default himself.

It is to be noted the grounds upon which the lease is to be forfeited are three only and they relate to the keeping of the lease alive either by doing the development work, or by recording the certificate of work under (3) or by paying the rent, and they have nothing to do with the other clauses or conditions which are to be found in such leases from the Crown, but are restricted to those three only, and the striking part of it is that the Legislature expressly declares that the forfeiture is automatic "and the demised premises shall be deemed vacant and abandoned" and that it shall not be necessary for any declaration to be made at all, by any person, and that upon default the gold commissioner is to draw up a certificate to that effect and upon that certificate being handed to the mining recorder it becomes his duty to "cancel the record of the lease in his office and note the cancellation on the copy of the lease on file."

These proceedings are taken entirely under this complete code in itself and require the intervention of nobody and the declaration of nobody. Therefore if they are carried out, in this case, it is, to my mind, quite unnecessary to look further to see if there is anything more that is necessary to be done, because the cancellation ends the whole thing (subject to said reinstatement), for if the lease is gone nothing remains for any other person to do under any other section.

But we are asked to invoke the provisions of section 114 (1), *viz.*:

> Subject to the provisions of subsection (2), [which does not affect this matter] on the non-performance or non-observance of any covenant or condition in any lease, the lease shall be declared forfeited by the gold commissioner, subject to the approval of the minister of mines, unless good cause is shewn to the contrary. After any such declaration of forfeiture, the mining ground shall be open for location by any free miner. No lease shall be declared forfeited, except in accordance with this section.

That deals only with declarations of forfeiture which may in

proper circumstances be made by a nominated person, the gold commissioner, "subject to the approval of the minister of mines" and is a general power embracing "any covenant or condition in any lease." But the point is that subsection (5) dealing only with said three special classes of defaults, does not depend upon "declarations" at all, because the statute itself effects a cancellation of the lease "without any declaration of forfeiture" by "the gold commissioner or otherwise," as it expressly provides, thereby excluding the interference of other persons or tribunals by "declaration" or otherwise from the special procedure provided for such cancellation.

It, therefore, becomes, to my mind, impossible, legally, to import into this purely administrative proceeding, which specially excludes any declaration, the provision of another section, dealing at large with ordinary conditions, which requires the exercise of discretion and a declaration thereupon by a *persona designata* subject to review by the minister.

To my mind those two sections, dealing with different conditions in different ways, are so absolutely inconsistent with one another that there is no connexion at all between them, and, therefore this case is solely governed by subsection (5) and if it is, then this appeal ought to prevail.

McPHILLIPS, J.A. (oral): I am of the same opinion as expressed by my learned brother the Chief Justice and my view is that the appeal should be dismissed. In approaching this question we have to remember that relief from forfeiture is really engrafted upon our law. Now, as between subjects of His Majesty and as well with the Crown, the Courts have the right to pass upon the question whether or no there should be relief from forfeiture. It is not to be thought that the Crown is less lenient than an individual would be in respect to leases, or that the Court could not extend relief as against the Crown as well.

Now, in *Quesnel Forks Gold Mining Company* v. *Ward* (1920), A.C. 222, a well-known case that went from this Province to the Privy Council, there was a lease from the Crown and it was validated by statute and the lease had language to this effect: that in certain events the lease should be

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. *v.* MORRISON

ipso facto void. Although the lease did read in that way, the Privy Council applying the principles I have referred to, held that the lease was not void as it was only so at the option of the lessor, the Crown.

Referring to the principle that the lessor could treat it as null and void, in this particular case the Crown has not done so, that is, acting through its minister, has not indicated its intention to look upon this lease as void at all. The Crown has done nothing and the Crown has not acted in the matter; things are in *statuo quo* while this matter is being passed upon by the Court, but this we have clearly before us that section 114 requires the approval of the minister to void the lease; it is an essential requirement, the controlling provision in the statute. The Court must not legislate but carry out the statute. The Legislature must be held to know the law and the decisions of the Court.

Take this particular case. The placer mining property was in the possession of the lessee for a period of some eight years. I do not know the extent of the improvements and betterments and all kinds of things that were done, but I can easily understand that they amount to hundreds of thousands of dollars. At any rate, they have considerable value, and along comes a man and he decides he will take up this property and he is met with this obstacle which after all is an obstacle which I think is a reasonable one, because in most parts of the country where placer mines exist difficulties arise which may render it impossible for the lessee to be as precise as he would in a city or town or neighbourhood close to a Government office. Was it not reasonable to suppose that the Legislature took all that into consideration? Whilst there is this language referred to by my learned brother, and I draw attention to what the language was in the *Ward* case, is it reasonable to suppose that the Crown was intending to act in this very drastic way? No. It is not reasonable, and we are supported in that view by section 114. Why is it there? Is it not reasonably there? As I have said—is not the Crown going to be as lenient as an individual would be, or if unreasonable, the Court may be applied to?

MCPHILLIPS, J.A.

Referring now to the Revised Statutes Act, 1923, we have this, and it shews the care the Legislature took in having these

statutes revised, and we have a declaration providing against any injustice. Section 7, subsection (3) reads:

If upon any point the provisions of the said Revised Statutes are not in effect the same as those of the repealed Acts and parts of Acts for which they are substituted, then as respects all transactions, matters and things subsequent to the time when the said Revised Statutes take effect the provisions contained in them shall prevail; but as respects all transactions, matters, and things anterior to the said time the provisions of the said repealed Acts and parts of Acts shall prevail.

The Court in accordance with the precedents will seize upon the slightest piece of evidence to prevent the infliction of hardship and injustice, a happening which allowing the appeal would mean. For some stranger "a claim jumper" in mining terminology—one who is not looked upon with great favour—to come along and attempt to oust the lessee under the circumstances of this case would be the gravest kind of an injustice. Fortunately the state of the statute law admits of right being done, and the lease is in full force until the minister approves of its forfeiture. That has not taken place, and without that approval the lessee cannot be disturbed in his rights under the lease. In my opinion the learned judge in the Court below arrived at the correct conclusion, and his judgment should be sustained.

I would dismiss the appeal.

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

The Court being equally divided, the appeal was dismissed.

Solicitor for appellants: *H. A. Beckwith.*
Solicitors for respondent: *Crease & Crease.*

MCDONALD, J.

1933

Feb. 28.

COURT OF APPEAL

April 7.

EAST KOOTENAY RUBY CO. LTD. *v.* MORRISON

MCPHILLIPS, J.A.

MACDONALD, J.A.

FISHER, J.

1933

April 17.

WEBSTER *v.* GENERAL ACCIDENT ASSURANCE CO. OF CANADA

WEBSTER *ET AL.* v. GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA.

Insurance—Fidelity bonds—Real-estate Agents' Licensing Act—Successive yearly bonds—Extent of liability—Rateable distribution amongst claimants—Jurisdiction to make—B.C. Stats. 1926-27, Cap. 37, Sec. 3.

Certain fidelity bonds were issued by the defendant company in successive years under the Real-estate Agents' Licensing Act. In an action upon the bonds it was held that they were distinct and independent contracts and the defendant company was liable under each of them to the extent of the amount stated in each bond for the payment of any damages sustained by reason of wrongful or dishonest dealing on the part of the holder of the licence under said Act for whom the bonds were furnished during the term of any licence held by him concurrent with the period for which each bond stood. It was held that there was no liability under the last bond issued, as the bonded agent did not hold a licence after the date the bond was issued, and the expression therein "during the term of any real-estate agent's licence held by him under said Act" could not reasonably be interpreted as referring to any period before said date.

It was held that with respect to moneys payable for any one of said periods, only those plaintiffs should recover who suffered damages by reason of wrongful or dishonest dealing during such period.

Where during any such period the several plaintiffs sustained damages amounting in all to more than the defendant company's liability for that period, it was held that although the Act did not expressly confer such jurisdiction, the Court had jurisdiction to do justice among them by ordering that the amount of the bond should be distributed rateably, instead of giving priority to the first of them to bring action.

Statement

ACTION on certain fidelity bonds issued by the defendant company pursuant to the provisions of the Real-estate Agents' Licensing Act. The facts are set out in the reasons for judgment. Tried by FISHER, J. at Vancouver on the 10th of April, 1933.

McTaggart, I. A. Shaw, J. Wilson, C. L. McAlpine, Bruce Boyd, and *Lawrence,* for plaintiffs.

Bull, K.C., for defendant.

17th April, 1933.

Judgment

FISHER, J.: The admission of facts made by the defendant (see Exhibit 2) shews that certain bonds were delivered by the

defendant pursuant to the provisions of the Real-estate Agents' Licensing Act [then R.S.B.C. 1924, Cap. 143] as it stood from time to time. One bond numbered 25161, dated July 1st, 1927, in the penal sum of $1,000, after reciting, *inter alia,* the requirements of subsection (1) of section 10 of such Act, as it stood at that time, goes on to say as follows:

Now the condition of the above-written obligation is such that if the said Frank Curzon Smith shall conduct and carry on his business as such real estate (agent) (salesman) without wrongful or dishonest dealing causing loss or damages to any person or shall pay all damages or compensation for which he is liable to any person by reason of wrongful or dishonest dealing on his part, then this obligation shall be void, otherwise shall be in full force, virtue and effect:

Provided that the total liability hereunder for all or any wrongful or dishonest dealing as aforesaid shall not exceed the sum of one thousand dollars:

Provided also that if the said General Accident Assurance Co. of Canada shall at any time give three months' calendar notice in writing to the Attorney-General of the Province of British Columbia for the time being of its intention to terminate the obligation hereby undertaken, then this obligation and all liability on its part hereunder shall cease and determine in so far as concerns any wrongful or dishonest dealing on the part of the said Frank Curzon Smith subsequent to the termination of its obligation hereby undertaken, but otherwise shall remain in full force, virtue and effect in respect of all or any wrongful or dishonest dealing on the part of the said Frank Curzon Smith from the date hereof to the date of such termination.

Judgment

On or about June 20th, 1928, the defendant duly executed and delivered a certificate which was later filed with the department of insurance stating that in consideration of the payment of the renewal premium the above-numbered bond 25161 covering the amount mentioned therein was thereby renewed for the term stated, *viz.,* from July 1st, 1928, to July 1st, 1929.

On or about July 1st, 1929, with a change made in the name of the real-estate agent from Frank Curzon Smith to F. Curzon Smith & Company, a bond No. 26491 in the penal sum of $1,000 was delivered and later filed with the department of insurance containing paragraphs similar to those in the said bond No. 25161 as above set out.

In 1930 a new Real-estate Agents' Licensing Act was passed (Cap. 33 of 1930) and in accordance with the provisions thereof a bond No. 40024 was delivered and later filed with the department of insurance stated to be in the penal sum of $2,500 and setting out the condition as follows:

FISHER, J.

1933

April 17.

WEBSTER v. GENERAL ACCIDENT ASSURANCE CO. OF CANADA

Now, the condition of the above-written obligation is such that if the agent shall pay all damages and compensation for which he is liable to any person by reason of wrongful or dishonest dealing on the part of the agent during the term of the licence, which term expires on the thirtieth day of June, 1931, then this obligation shall be void, otherwise shall be and remain in full force, virtue and effect.

The paragraph with regard to notice was not contained in this bond.

I pause here to state that on or about July 2nd, 1931, another bond No. 40258 was entered into but never filed with the department of insurance. I will deal with such bond later but wish in the first place to deal with the other bonds as aforesaid. The first issue that arises between the parties with respect to them is as to the total liability of the defendant thereunder for the wrongful or dishonest dealing on the part of the agent that took place, and resulted in damages to the plaintiffs amounting to approximately $19,000. On behalf of the plaintiffs it is submitted that the bonds are cumulative and render the defendant liable to the extent of at least $4,500 while the submission on behalf of the defendant is that the total liability thereunder does not exceed the sum of $2,500 in any event.

Judgment

On behalf of the defendant it is argued that the matter is in the same position as though the said insured real-estate agent had been obliged by the statute during the period in question herein to furnish security by way of cash deposited in the amount of $2,500 and the defendant company had furnished such deposit. In such case it is contended that the liability would have been limited to such sum and persons suffering loss would have had only the cash deposit of such amount to rely on. Reference is made to section 48 of our Motor-vehicle Act, R.S.B.C. 1924, Cap. 177 (added by 1932, Cap. 37, Sec. 12) reading as follows:

48. (1.) Every person required to give proof of financial responsibility shall give the proof by filing with the commissioner:—

(a.) A certificate of an insured licensed under the Insurance Act to undertake automobile insurance, including insurance against liabilities to third parties, that it has issued to him or for his benefit a motor-vehicle liability policy which at the date of the certificate is in full force and effect; or

(b.) A bond of an insurer licensed under the Insurance Act to undertake guarantee insurance which shall be in the prescribed form and payable to the commissioner and shall be conditioned upon the payment of the

amount prescribed by section 47, if such person becomes liable therefor; or

(c.) A certificate of the minister of finance that there has been deposited with him by or for the benefit of such person a sum of money or security for money in the amount or value of eleven thousand dollars.

Attention is also called by counsel on behalf of the defendant to the fact that section 9 (1) of Cap. 33 of the 1930 statutes before its amendment by section 4 (1) of Cap. 34 of the 1931 statutes reads in part as follows:

Every holder of a licence under this Act carrying on business or employed or acting and every applicant for a licence shall furnish and maintain security . . .;

and that after the said amendment it read:

Every applicant for a licence under this Act shall furnish, and every holder of a licence shall maintain security . . .

It is argued that the section, as it now stands, if not before, indicates that it was intended that the holder of a licence under the Act should maintain security in the amount mentioned in the same way as though he had deposited cash and that the liability at any time would not exceed such amount. It must be noted however that section 9 of the Real-estate Licensing Act provides not only that the applicant or holder shall furnish or maintain security by way of a bond or policy but also (see section 9 (4) as amended by said Cap. 34, 1931) that:

Where the security furnished or maintained pursuant to this section by the holder of a licence under this Act becomes impaired by any payment made by the insurer or ceases to be in effect, the licence shall *ipso facto* be suspended.

Judgment

It may be noted also that the said Motor-vehicle Act is providing security as aforesaid for damages arising from the happening of an accident that would be known immediately and section 48 (4) of such Act contains a special provision to take care of the situation arising after such an accident. After a comparison of the two Acts and consideration of the nature of the damages intended to be taken care of in each case I think it is a fair inference that it was intended that the holder of a licence under the Real-estate Licensing Act expiring on June 30th should not be able to obtain another licence unless he was maintaining the security unimpaired either by any payment made by the insurer or by any damages or compensation for which the holder of the licence was liable by reason of wrongful or dishonest dealing during the term of the expiring licence. As pointed out by counsel for the plaintiffs the insurer might

FISHER, J.

1933

April 17.

WEBSTER v. GENERAL ACCIDENT ASSURANCE CO. OF CANADA

not be the same party but whether the insurer is or is not the same I do not think the holder of a licence could properly be said to be maintaining security pursuant to the section by way of a bond at the beginning of a new licence period if the contention of counsel for the defendant is to prevail, as this might mean that damages by reason of wrongful or dishonest dealing during the term of such new licence, though not exceeding the amount of the security to be maintained during the said term, may not be recovered *in toto* if damages have been sustained during the expiring term. The fact that damages had arisen by reason of wrongful or dishonest dealing might not be known for some time thereafter and the matter of the issuance of a licence might have to be dealt with after the occurrence of such wrong-doing but before any knowledge thereof. Under such circumstances one can well imagine that it would be considered advisable to have a bond for a certain amount that would be security in any event for damages arising during a particular period and it seems to me that this is what is expressly done in one of the later bonds above referred to, *viz.*, that numbered 40024 as aforesaid for $2,500 which, following the wording of section 9 (1) of the later 1930 Act, uses the expression "during the term of the licence." It is clear that it is not so expressly stated in the earlier bonds nor in the Act as it stood before 1930 and this really creates the difficulty in the present case and brings me to one of the main contentions on behalf of the plaintiffs which is that the bonds should be interpreted strictly against the insurer. Counsel on behalf of one of the plaintiffs refers particularly to the last paragraph of bond No. 25161 as set out above apparently providing only for termination of the bond after three months' notice and for its remaining in full force in respect of any wrongful or dishonest dealing on the part of the agent from the date thereof to the date of such termination. It might be that some question of estoppel would have arisen if a new licence had been issued by the department relying on the wording of the security as aforesaid in a case where the renewal premium had not been paid or another bond issued but such is not the present case and I think the case must be decided after looking to all the circumstances including the conduct of the parties to the security. In this connection reference might be

Judgment

made to *Pye* v. *British Automobile Commercial Syndicate Limited* (1906), 1 K.B. 425, at 428-9; 75 L.J., K.B. 270, where Bigham, J. says in part as follows:

> I have to find out from the language there used what was the intention of the parties to the contract . . . But it is said that my finding as to the intention of the parties is to be controlled by the rules which have been laid down in the authorities which have been cited. I think the only rule which applies to all cases is that the judge must look to all the circumstances of each particular contract—to what the parties did as well as to the language used—and must say from them what the intention of the parties was.

In the present case it is quite apparent that before another licence was issued to the agent another bond was issued and filed with the department of insurance in each year except 1928 when apparently only a renewal certificate was filed as aforesaid. Following the rule as stated by Bigham, J. in the *Pye* case, *supra,* and "looking to what the parties did as well as to the language used" and having in mind also the said statute with which the bonds must be read, I hold that the three bonds were distinct and independent contracts and that the defendant is liable under each of the three said bonds, *viz.,* 25161 (renewed as aforesaid) 26491 and 40024 to the extent of the amount stated in each bond for the payment of any damages sustained by reason of wrongful or dishonest dealing on the part of the holder of the licence during the term of any licence held by him concurrent with the period for which each bond stood, such period ending in my opinion on June 30th in each case. This means that there is no liability for any damages sustained by reason of wrongful or dishonest dealing after June 30th, 1931, as the said real-estate agent did not hold a licence after such date, *i.e.,* there is no liability under the last bond issued on or about that date and numbered 40258 as already stated. As to this last bond, it has been pointed out that one paragraph of the bond reads as follows:

Judgment

> Now the condition of the above-written obligation is such that if the agent shall pay all damages and compensation for which he is liable to any person by reason of wrongful or dishonest dealing on the part of the agent during the term of any real estate agent's licence held by him under the said Act, then this obligation shall be void, otherwise shall be and remain in full force, virtue and effect.

It may be also noted that such bond contained the notice clause.

FISHER, J.

1933

April 17.

WEBSTER v. GENERAL ACCIDENT ASSURANCE CO. OF CANADA

As section 9 (1) as it stood after the 1931 amendment contained the same expression as before, *viz.*, "during the term of the licence," I do not understand why the wording of the 1931 bond was different. The form of the bond was to be prescribed by the department and if it had been signed by another insurer it surely could not have been contended that it covered damages arising from previous wrong-doing. I think, as already intimated, that all the circumstances must be looked at and in the light of such my view is that the expression "during the term of any real-estate agent's licence held by him under the said Act" cannot reasonably be interpreted as referring to any period before June 30th, 1931, and therefore, as the agent never held a licence thereafter I hold that there is no liability on the part of the defendant under said bond No. 40258. Under the other bonds and renewal certificate as aforesaid I hold the total liability of the defendant amounts to $3,601.90, being the sum of $101.90 for the term ending June 30th, 1929, according to Exhibit 1, $1,000 for the term ending June 30th, 1930, and $2,500 for the term ending June 30th, 1931.

Judgment

I have now to deal with the question as to the parties to whom such moneys are payable. I think I have already made it clear, but, if not, wish to say now that my opinion is that each bond covers its own period ending June 30th and with respect to moneys payable for each period only those plaintiffs should recover who suffered damages by reason of wrongful or dishonest dealing during such period. The serious question really arises where there are several plaintiffs claiming damages for any one period amounting in all to more than the amount of the defendant's liability as found for such period. It is contended by counsel on behalf of plaintiff Webster who brought the first action that he is entitled to priority to the full extent of his claim and this contention is also supported by counsel on behalf of the defendant company, which, as already indicated, admits liability to the extent of $2,500. Reference is made to the case of *R. B. Anderson & Son* v. *Dawber* (1915), 22 B.C. 218; 9 W.W.R. 511; 32 W.L.R. 841, and especially to what MARTIN, J.A. says at p. 223:

> There is nothing in the Act to justify us in depriving it of the priority that the first attaching creditor has always been held to secure as the

result of his diligence—the maxims *vigilantibus et non dormientibus jura subveniunt* and *prior tempore, potior jure* cover the principle, which has been recently recognized in *Slinger* v. *Davis* (1914), 20 B.C. 447.

I do not think however that the present proceedings are analogous to garnishee proceedings. In the latter case the first attachment proceedings may save for the benefit of a creditor moneys that might otherwise be paid direct to the debtor to whom the debt is owing apart from the statute but here a bond which must be read with the statute creates the liability and then the statute gives the right of action to every person to whom the real-estate agent is liable. The relevant sections of the statute read as follows:

9. (2.) The security shall be in a form prescribed by the superintendent, and shall be taken in the name of the superintendent and his successors in office; and every person to whom the real-estate agent or real-estate salesman is so liable may bring an action on the security in his own name against the insurer to recover the damages or compensation, notwithstanding that the person bringing the action is not a party to the security.

(3.) So long as the security remains undischarged in whole or in part, the person so suing, or any other person, notwithstanding the suit, may bring an action on the security for any other cause of action pursuant to subsection (2), and the action shall not be barred by reason of any prior recovery, or of any judgment for the defendant rendered in a former action, or of any other action pending on the same security for any distinct cause of action.

Judgment

It is submitted however that the statute does not expressly confer any jurisdiction to distribute the amount rateably as is done in the Merchant Shipping Act, 1894, Cap. 60, and the Railway Act, R.S.C. 1927, Cap. 170, as hereinafter mentioned and therefore it is argued the Court has no jurisdiction to do so or to constitute itself a trustee in bankruptcy. In this connection reference is made to Mayers' Admiralty Law and Practice, p. 164, where the writer says as follows:

When the privilege of limiting their liability was conferred upon owners by the Legislature, it became necessary to provide some procedure by which the fund might be distributed rateably, so as to prevent a scramble among the people entitled. By section 514 of the Merchant Shipping Act, 1854 (17 & 18 Vict., cap. 104), where several claims were made or apprehended the owner was empowered to bring an action to determine the amount of his liability and for the distribution of the amount; the 13th section of the Admiralty Court Act, 1861 (24 Vict., cap. 10) conferred jurisdiction on the Admiralty Court to entertain such actions when the ship or proceeds were under arrest; and now it is provided by section 504 of the Merchant Shipping Act, 1894 (57 & 58 Vict., cap. 60): "Where any liability is

FISHER, J.

1933

April 17.

WEBSTER v. GENERAL ACCIDENT ASSURANCE CO. OF CANADA

alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then, the owner may apply . . . in a British possession to any competent Court, and that Court may determine the amount of the owner's liability and may distribute that amount rateably among the several claimants."

Reference is also made to the provisions of the Railway Act, R.S.C. 1927, Cap. 170, Sec. 387, certain subsections reading as follows:

2. If it be shewn that the company has used modern and efficient appliances, and has not otherwise been guilty of any negligence, the total amount of compensation recoverable from the company under this section in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed five thousand dollars.

6. Where the amount recoverable from the company is limited to such five thousand dollars and such sum is not sufficient to pay all the claims in full, it shall be apportioned among the claimants *pro rata* according to the claims established.

The liability of the defendant in the present case however arises, as already pointed out, in a somewhat different way, *viz.*, from a bond duly executed and delivered by the defendant in accordance with the requirements of a statute and the liability is limited by the bond accordingly.

Judgment

If one may say so it seems unfortunate that the Real-estate Agents' Licensing Act does not expressly authorize the Court to settle the rights of the claimants between themselves by distributing the amount rateably but it seems to me that it impliedly leaves the matter to be dealt with by the Court in which the actions are brought. I think therefore the Court has jurisdiction to do justice amongst those entitled to bring and bringing action while the security remains undischarged and the only question is as to the rule to be applied after a consideration of the Act and the circumstances. The Act provides that the security shall be taken in the name of the superintendent of insurance and undoubtedly the security was intended for the benefit of all those who may suffer loss though they are not parties to the security. I cannot see that any of them could bring an action apart from the statute and I do not see that any one person can get any rights of priority not given by the statute or by some rule of equity. I cannot see that there is any prior

equity that would assist the person instituting the first action for, as already pointed out, he has not conserved anything that might otherwise have been lost. So long as the security remains undischarged in whole or in part any other person may bring an action on the security. It seems to me that the security here remains undischarged and so long as it does anybody is entitled to bring an action notwithstanding the suit of another. It would be idle to give him an action while the first suit was pending, if it was intended that he might not be able to recover anything and that the plaintiff in the other action could proceed to judgment and take it all. The amount recoverable for each period ending as aforesaid is limited and under the circumstances I think the proper rule to be applied is that the amount should be distributed rateably among the several plaintiffs suffering loss during each period respectively and the sums of $1,000 and $2,500 will therefore be so distributed. Judgment accordingly. The question of the costs to be spoken to.

Judgment for plaintiffs.

VANCOUVER BREWERIES LIMITED v. VANCOUVER MALT AND SAKE BREWING COMPANY LIMITED.

Practice—Privy Council—Final leave to appeal—"Provide security to the satisfaction of the Court"—Construction—Privy Council Rule 5 (a).

The appellant (defendant) obtained a conditional order for leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Court of Appeal on the 6th of February, 1933, one of the conditions therein contained being that the appellant "within two months from the date hereof provide security to the satisfaction of this Court in the sum of £300 for the due prosecution of this appeal," etc. The appellant provided a bond by an approved surety company for £300 within the two months but no order of the Court was obtained approving of the security. On the 26th of April, 1933, the appellant moved for final order for leave to appeal.

Held, MACDONALD, C.J.B.C. dissenting, that when there is provision elsewhere for a final application involving the approval of the various steps taken in compliance with the conditional order including the furnishing of security, that would appear to be the natural time to express approval of the sufficiency or otherwise of the bond, and final leave should be granted.

COURT OF APPEAL

1933

April 26.

VANCOUVER BREWERIES LTD. *v.* VANCOUVER MALT AND SAKE BREWING CO. LTD.

MOTION to the Court of Appeal for final leave to appeal to the Judicial Committee of the Privy Council. Heard at Victoria on the 26th of April, 1933, by MACDONALD, C.J.B.C., MCPHILLIPS and MACDONALD, JJ.A.

Hossie, K.C., for the motion: The appellant has provided a bond of an approved surety company in the sum of £300 as security for the due prosecution of the appeal and the other conditions of the conditional order have been complied with.

Sloan, for respondent: The terms of the order have not been complied with. A bond has been provided but the security has not been approved. The terms are mandatory and must be strictly complied with. A deposit is not enough, it must be passed on by the Court. There is no power to enlarge or abridge the time. The two months have expired and it is too late to obtain the approval of the Court. Under rule 5 (*a*) the security must be to the satisfaction of the Court: see also *Retemeyer* v. *Obermuller* (1837), 2 Moore, P.C. 93.

Argument

Hossie, in reply: The question of the sufficiency of the security is now before the Court. Asking for final leave involves the approval of the security: see Bentwich's Privy Council Practice, 2nd Ed., 149.

MACDONALD, C.J.B.C.: I think the conditions have not been performed which we set out in our conditional order, that were to be performed within two months, and the two months are past. The conditions are clear as to what were required; leave is to be given only upon their performance. Approval is a condition precedent not subsequent. There are several things set out as conditions that must be performed within the two months; one of them is that good and sufficient security to the satisfaction of the Court shall be given. Now it is admitted that that security has not been given, for whether the security which is alleged to be good security is good security or not has not been decided—it has not received the approval of the Court. That was to be given within the two months fixed by the original order. Now on the construction of that language, which is clear enough, this Court should say that the application for final leave cannot be granted, and that it is too late for us to say that this

MACDONALD, C.J.B.C.

security is to the satisfaction of the Court—since we have no power to extend the time—if we had, the matter would be very simple—we could now consider the security, and give approval of it. Having no power to extend the time, we must decide the case on the language of the rule itself. And on that language I have no doubt that the approval of the Court must be got within the time fixed by the original order, *viz.*, two months.

The appellant is not deprived of an opportunity to put this right, he can apply to the Privy Council for leave.

MCPHILLIPS, J.A.: In my opinion the objections offered to the final order for leave to appeal are devoid of merit; and further, they are contrary to the practice that has existed in this Court for years. It has never been the practice of this Court, as far as I remember, at any rate, to take the security in hand and approve the security; that we have always left to the registrar of the Court; this is the first time I have ever heard that we sitting here are to pass upon the validity of the security. In the first place, Courts have very little opportunity to pass upon any such matter as that. Scanning the rules you see at once that the parties to the action must look into the security when it is deposited, and if there is any question about its validity or its being a proper security, then that can come before this Court and receive attention; and I understand that in the present case there is no question raised as to the sufficiency of the security.

In construing the rule relied upon, Rule 5 (*a*), I am of the opinion that we must look at these rules in just the same way as we do statute law, that is, look upon them in the way of making them workable. I see nothing which inhibits this Court from making the final order granting leave to appeal owing to the fact that there was no motion made to this Court before the last day of the two months fixed for allowance of the security, the security being on file before the expiry of that date. I would construe it that we are not inhibited from concluding that it is not a mandatory provision, but is one that would be capable of being done at a later time, and reasonably when the case was printed and when all was complete for the making of the final order, which is the case here. Is it reasonable for counsel to

COURT OF APPEAL

1933

April 26.

VANCOUVER BREWERIES LTD. v. VANCOUVER MALT AND SAKE BREWING CO. LTD.

come here at this time and be objecting to the security when we must and can only assume that he must have approved this printed appeal book already? That must have been done. In view of these facts, to give effect to this rule in the manner asked would be highly inconvenient, and not in accordance with justice. The language of the rule is:

"Upon condition of the appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500.

Here in truth the rule has been complied with, the security being entered into and no objection taken thereto. The Court could only express its satisfaction when it is giving its final order for leave to appeal; and that is what we are being asked to do today. And we look at the security and we find it is filed within the two months, the time fixed, no exception being taken; the printed book has been prepared, everything is ready, and then at this eleventh hour comes this objection. That this Court should be compelled to sit here at intervals of time, to approve the security first, and then later sit and make the final order, is not in accordance with my recollection of the practice, extending over nearly half a century. I would make the final order granting leave to appeal to their Lordships of the Privy Council.

MCPHILLIPS, J.A.

MACDONALD, J.A.: There is ground for controversy as to the construction of the phrase "to the satisfaction of the Court" in 5 (*a*) Privy Council Rules, in respect to the time when such approval must be obtained—must it be secured within the three months referred to, or the limited time fixed by the first order? It is possible, and consistent with the whole scheme of the rules, to read the clause as meaning that the "satisfaction of the Court" may be expressed after that limited period expires. It is not stated in the section, either explicitly or by natural implication that it must be secured within that time. One must look at all the rules bearing on the question of granting leave to appeal; and when we have provision elsewhere for a final application involving the approval of the various steps taken, including furnishing security, that would appear to be the natural time to express approval of the sufficiency or otherwise of

MACDONALD, J.A.

the bond. It is more workable to read it in that way; and as there is nothing intractable in the language to prevent it I would so interpret it. I would grant leave.

Order granted, Macdonald, C.J.B.C. dissenting.

COURT OF APPEAL

1933

April 26.

VANCOUVER BREWERIES LTD. *v.* VANCOUVER MALT AND SAKE BREWING CO. LTD.

IN RE INSURANCE ACT. *IN RE* MORRIS ESTATE.

FISHER, J. (In Chambers)

1933

April 25.

IN RE INSURANCE ACT.

IN RE MORRIS ESTATE

Executors—Action defended by executrix—Costs of defending—Right of executrix to payment from balance in Court.

The right of an executrix to her costs for defending an action, out of the balance of the moneys standing to the credit of an estate, does not depend upon the merits of the cause as finally decided, but upon whether or not she has reasonably and in good faith resisted the proceedings.

Where the executrix acted on the advice of counsel and the Court was satisfied that the defence to said action was conducted by her reasonably and in good faith, it was held that she was entitled to protection against the costs of such defence as far as possible out of said moneys after said action was finally determined, and the amount payable to said plaintiff out of the moneys were definitely settled and an order was made that when the proceedings in the action were definitely and finally determined after payment of the amount payable to the plaintiff, the balance could be paid out to the executrix and she would be entitled to a prior claim on such balance for her costs.

APPLICATION by the executrix of the estate of Joseph Frank Morris for an order for payment out of the balance of the moneys standing to the credit of the estate after payment of the moneys ordered to be paid pursuant to a former judgment in an action in which one Morrison was plaintiff, and the said executrix was defendant, and for an order that the executrix be entitled to recover her taxed costs out of the said moneys. Heard by FISHER, J. in Chambers at Vancouver on the 25th of April, 1933. Statement

Soskin, for the application.

25th April, 1933.

FISHER, J.: Application for an order for payment out to the Judgment

FISHER, J. (In Chambers)

1933

April 25.

IN RE INSURANCE ACT.

IN RE MORRIS ESTATE

executrix of the estate of Joseph Frank Morris of the balance of the moneys standing to the credit of this matter after payment of the moneys ordered to be paid pursuant to a judgment of my own dated April 11th, 1933, in an action in which one William Morrison was plaintiff and the said executrix was defendant and for an order that the said defendant executrix be entitled to recover her taxed costs out of the said moneys. The executrix is the only beneficiary that would be interested and having heard counsel for the executrix I have come to the conclusion that it is not necessary that the creditors should be heard on the matter as to her costs in the aforesaid action as the authorities seem to be clear that the right of the executrix to such costs does not depend upon the merits of the cause as finally decided but upon whether or not she has reasonably and in good faith resisted the proceedings. The executrix acted on the advice of counsel and I am satisfied that the defence to the said action has been conducted by her reasonably and in good faith. I think therefore that she is entitled to protection against the costs of such defence so far as possible out of said moneys after the said action has been finally determined and the amount payable to the said plaintiff out of the moneys has been definitely settled. I have come to the conclusion, however, that until the said action has been finally disposed of no moneys should be paid out to the executrix. When it is apparent that there will be no further proceedings in such action, and the balance remaining after payment of the amount payable to the said plaintiff, as a result of such action, has been definitely and finally determined, such balance may then be paid out to the executrix and she will be entitled to a prior claim on such balance for her taxed costs. Order accordingly.

Judgment

Order accordingly.

McKAY v. McKAY.

MURPHY, J. (In Chambers)

1933

April 26.

McKAY v. McKAY

Capias ad respondendum—Form of writ—Nature of the action included—Arrest and Imprisonment for Debt Act—Alimony not a debt—R.S.B.C. 1924, Cap. 15, Sec. 3.

Permanent alimony in arrears is not a debt within the meaning of section 3 of the Arrest and Imprisonment for Debt Act.

A writ of *capias ad respondendum* must state the nature of the action upon which it is based.

APPLICATION to set aside a writ of *capias ad respondendum* and discharge of the defendant from custody. Heard by MURPHY, J. in Chambers at Victoria on the 25th of April, 1933. Statement

F. C. Elliott, for plaintiff.
O'Halloran, for defendant.

26th April, 1933.

MURPHY, J.: In *Wehrfritz* v. *Russell* (1902), 9 B.C. 50, HUNTER, C.J. states in his judgment:

Among other objections raised to the regularity of the proceedings is one that the form of the writ prescribed by the Act, R.S.B.C. 1897, Cap. 10, has not been followed because of the omission to state the nature of the action. In my opinion this objection is fatal. The defendant is entitled to learn the nature of the action on account of which he is being arrested from the writ of *capias* itself, and without reference to other documents; . . .

The same objection is taken here. The writ herein reads:

WE COMMAND YOU that you omit not by reason of any liberty in your bailiwick, but that you enter the same and take John George McKay, if he shall be found in your bailiwick and him safely keep until he shall have given you bail, or make deposit, with you according to law, in an action of debt, at the suit of Hannah McKay, . . . Judgment

The action herein is brought for arrears of permanent alimony ordered in a divorce suit brought by the plaintiff against the defendant wherein the plaintiff obtained a decree of absolute divorce and an order for permanent alimony. In my opinion permanent alimony is not a debt, though it may be a money demand, within the meaning of section 3 of Cap. 15, R.S.B.C. 1924.

If it is not then under the authority of the *Wehrfritz* case, *supra,* the writ must be set aside. The nature of alimony is

MURPHY, J. (In Chambers)

1933

April 26.

MCKAY v. MCKAY

discussed in *Re Freedman* (1924), 55 O.L.R. 206. It is true that is a case under the Bankruptcy Act but a perusal of the judgment will shew that the Court set out the nature of alimony apart from the question of the application of the Bankruptcy Act. The judgment also points out that alimony in Ontario is of the same nature as alimony awarded in England. The effect of this judgment, I think, is that alimony is not a debt within the meaning of said chapter 15, section 3, R.S.B.C. 1924. Permanent alimony whether in arrears or prospective is uncertain in amount because it is entirely within the control of the judge acting in divorce and matrimonial causes. It may be reduced or wiped out if inability to pay is proven. Adultery on the part of the recipient may likewise result in the right to collect it being abrogated.

The nature of alimony under English law is further elucidated in *Keys* v. *Keys* (1919), 2 I.R. 160. It would appear from this last case that the whole proceedings herein are a nullity because an action such as this cannot be brought for alimony but I need not express a definite opinion as to whether this is so or not. These two cases with the other authorities referred to therein, as I read them, do establish the proposition hereinbefore set out.

Judgment

Reverting to the necessity of expressing under the writ the real ground upon which the *capias* has been issued it is clear that if the nature of alimony is such as I hold it to be then it is of the greatest importance to the person *capiased* that he should know that the writ is based on an alimony demand. In the case of debt *simpliciter* if the proceedings are regular the defendant must either remain in custody or put in special bail but if the claim is based on alimony the authorities discussed in the cases above cited shew that he would have the right to apply at any rate to the divorce branch of the Court to have the arrears reduced or possibly wiped out if he could establish a proper case.

The order will be to set aside the writ of *capias* and discharge the defendant out of custody with costs, but that no action should be brought against the plaintiff or the sheriff by reason of the *capias* or the arrest.

Application granted.

THE KING v. THE CORPORATION OF THE CITY OF VANCOUVER.

MURPHY, J.

1932

Dec. 9.

COURT OF APPEAL

1933

April 7.

THE KING v. CORPORATION OF CITY OF VANCOUVER

Municipal corporation—Expropriation of lands—Arbitration and award—Misconduct—Refusal to state a case—Immateriality of finding of law—Enhanced value of owners' remaining property—Allowed as set-off—B.C. Stats. 1921, Cap. 55, Sec. 172 (5)—R.S.C. 1927, Cap. 98.

Under the provisions of the Vancouver Incorporation Act the City of Vancouver expropriated three separate portions of land (in all slightly over eight acres) of the Kitsilano Indian Reserve to be included in the southern approaches of the Burrard Street Bridge across False Creek. By an award of arbitrators appointed under the provisions of said Act the land so expropriated was valued at $44,988.58. On motion on behalf of the department of Indian affairs that the award be set aside mainly on the grounds: (a) That the award is in respect of "present value" (13th September, 1933) of the lands expropriated whereas the notices of expropriation were dated 23rd October, 1931, and 16th December, 1931, respectively; (b) That the award improperly allowed $7,000 as the enhanced value of the remaining property of the owner pursuant to subsection (13) of section 172 of the Vancouver Incorporation Act; (c) That the arbitrators erroneously and improperly admitted in evidence the Zoning By-laws of the City of Vancouver as affecting the premises in question. The motion was dismissed.

Held, on appeal, affirming the decision of MURPHY, J., that although the words "present value" appear in the award, reading the award as a whole shews clearly that the arbitrators made their valuation as of the date of the expropriation, that subsection (5) of section 172 of the Incorporation Act authorizes the set-off of $7,000 as the enhanced value of the remaining property of the owner and the arbitrators properly omitted to submit a case stated as to the applicability of the Zoning By-law as the award shews clearly that they made their award on the basis that the by-law did not apply.

APPEAL by the department of Indian affairs from the decision of MURPHY, J. dismissing an application on behalf of the department of Indian affairs, heard by him at Vancouver on the 5th of December, 1932, for an order that the award of the arbitrators herein, namely, *John Walter Weart* and *Andrew Miller Harper* (John J. Banfield dissenting) of the 13th of September, 1932, be set aside. The City of Vancouver in the exercise of its powers under the Vancouver Incorporation Act, 1921, expropriated three separate strips of land in the Kitsilano

Statement

MURPHY, J.

1932

Dec. 9.

COURT OF APPEAL

1933

April 7.

THE KING v. CORPORATION OF CITY OF VANCOUVER

Indian Reserve (situate within the corporate limits of the City of Vancouver) the lands so expropriated containing in all slightly over eight acres to be included in the southern approach to the Burrard Street Bridge across False Creek. The arbitrators allowed $31,350 as the value of the three parcels of land, that the damage injuriously affecting the remaining lands of the reservation was $13,800. In addition, 10 per cent. of the value of the land so taken was allowed, namely, $3,135. The arbitrators further found that the claimant would derive an advantage from the work carried out by the city by enhancing the value of their remaining property in the sum of $7,000. Interest on lands taken and interest on the damages for lands injuriously affected was allowed at $3,703.58. The total amount allowed by the arbitrators was $44,988.58. The department of Indian affairs moved to set aside the award on the following grounds:

1. That the said award is in respect of "the present value" of the lands expropriated whereas the notices of expropriation were dated the 23rd day of October, A.D. 1931, and the 16th day of December, A.D. 1931, respectively.

Statement

2. That the said award improperly allowed the sum of Seven thousand dollars ($7,000) as the enhanced value of the remaining property of the owner pursuant to subsection (13) of section 172 of the said Vancouver Incorporation Act, 1921.

3. That there was no evidence given at the said arbitration that the owner would derive any advantage from the work carried out by the City of Vancouver, to wit, the Burrard Street Bridge.

4. That the arbitrators erroneously and improperly admitted in evidence the Zoning By-laws of the City of Vancouver as affecting the premises in question.

5. The said by-laws have no application to lands reserved for Indians.

6. The said by-laws are *ultra vires* of the city to enact as against the premises in question.

7. The said by-laws were passed for the purpose of limiting the uses to which the premises could be put and thus destroying the value thereof to the owner and in anticipation of the arbitration.

8. The arbitrators did not submit a case stated for the opinion of this Honourable Court as to whether the said by-laws should be admitted in evidence or applied to the premises in question before making their award although requested so to do.

9. The arbitrators received in evidence without objection an offer of the Harbour Board to purchase the Kitsilano Indian Reserve described in the said award and failed to give any effect thereto or to the evidence respecting the same of Samuel McClay, Chairman of the Harbour Board, as an element of value of the premises in question.

10. The arbitrators erred in refusing to consider as an element of value

the rental paid by the Rat Portage Lumber Company for a portion of the said Reserve.

11. The arbitrators failed to consider the evidence concerning the "hotel site" as an element of value by comparison with the said Indian Reserve.

12. The arbitrators proceeded on false bases and assumptions and reached the amount which they so awarded by discarding the evidence of the witnesses for the department, and accepting the evidence of the witnesses for the city and by wrong and incorrect calculations and by error.

MURPHY, J.

1932

Dec. 9.

COURT OF APPEAL

1933

April 7.

THE KING v. CORPORATION OF CITY OF VANCOUVER

Lennie, K.C., and *McMaster*, for the application.

McCrossan, K.C., and *Lord, contra.*

9th December, 1932.

MURPHY, J.: In my opinion the attack on the award fails.

As to the objection that the arbitrators promised to submit a case stated *re* the applicability of the Zoning By-law, if I am to look at the award only, there is no evidence establishing this contention. If I am to read the evidence then my interpretation of what occurred is, that the arbitrators at most intimated that if they felt they ought to hold the by-law applied they would refer the matter to the Court for decision, otherwise not. In either case it is clear from the award, as I read it, that the arbitrators made their award on the basis that the by-law did not apply.

MURPHY, J.

As to the $7,000 set-off allowed, I think the city is quite entitled to rely upon subsection (5) of section 172 which, if applicable, admittedly authorizes such set-off. This subsection expressly states that "such compensation," meaning compensation in computing, in which the element of advantage has been taken into consideration, if applicable, shall be determined by arbitration.

As to the contentions based on the Harbour Board's so-called offer to purchase, the Rat Portage lease and the Calkin promotion scheme, these, in my view, all involve questions of the weight to be attached to the evidence concerning them. The way they are dealt with in the award I think involves no question of principle which could invalidate the award.

The only matter that has caused me some hesitation is the occurrence of the words "present value" on p. 33 of the award. The law seems to be clear that the Court will support the award if possible. *Selby* v. *Whitbread & Co.* (1917), 1 K.B. 736; *Wood* v. *W. H. Malkin Co.* (1928), 40 B.C. 255; 2 W.W.R.

MURPHY, J.

1932

Dec. 9.

COURT OF APPEAL

1933

April 7.

THE KING v. CORPORATION OF CITY OF VANCOUVER

674; *In re Hopper* (1867), 36 L.J., Q.B. 97 are instances of application of this principle. The case of *O. Martineau & Sons, Ltd.* v. *Montreal City* (1932), A.C. 113; 1 D.L.R. 353; 52 Que. K.B. 542; 1 W.W.R. 302 shews to what narrow grounds an attack on the validity of an award is restricted. Approaching the question under discussion from the points of view above set out, in my opinion, a reading of the award as a whole, particularly pp. 32 and 35 thereof will shew clearly that the arbitrators did make their valuation as of the date of notice of expropriation. If the record of proceedings can be looked at the matter is placed beyond discussion. The application is dismissed.

From this decision the department of Indian affairs appealed. The appeal was argued at Vancouver on the 17th of March, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Lennie, K.C., for appellant: There are three grounds of appeal: (1) Misconduct; (2) Award is bad on its face; and (3) The arbitrators exceeded their jurisdiction. Under the first is consideration of the Zoning By-law by which certain areas are zoned for residential purposes. This would include the Reserve if the by-law applied to the Reserve, but we say it does not apply to the Reserve and evidence should have been accepted as to the value of the property for industrial purposes. This is misconduct: see *Williams* v. *Wallis and Cox* (1914), 2 K.B. 478 at pp. 484-5. The Indian Act is a Code in itself: see *Rex* v. *Morley* (1931), 46 B.C. 28; *Rex* v. *Cooper* (1925), 35 B.C. 457; *Rex* v. *Edward Jim* (1915), 22 B.C. 106. The Provincial Legislature cannot interfere and the Zoning By-law cannot apply to the Reserve. The by-law was passed for the express purpose of lowering the price of this property in anticipation of the expropriation. This is contrary to natural justice and is a ground for excluding the by-law. Next, that the award is bad on its face as evidence was given without objection of an offer by the Harbour Board of $750,000 for the Reserve and witnesses say it is still worth that amount. The arbitrators excluded this evidence altogether. It is the value of the land to the owner: see *Re N.B. Power Commission and Inglewood Pulp & Paper*

Co. (1927), 3 D.L.R. 967, and on appeal (1928), A.C. 492; *Cedars Rapids Mfg. and Power Co.* v. *Lacoste* (1914), A.C. 569; 83 L.J., P.C. 339; 16 D.L.R. 168. The Rat Portage Lumber Co. have a lease of a portion of the Reserve. The rental paid is substantial evidence of value and it was not considered: see *Rogers* v. *London and Canadian Loan and Agency Co. Ltd.* (1908), 18 O.L.R. 8; *Re Canada Steamship Lines Limited and The Toronto Terminals Ry. Co.* (1929), 36 C.R.C. 301. They were wrong in deciding value at date of award instead of date of notice of expropriation. They allowed a set-off of $7,000 for increased value to the other lands of the Reserve under section 172 (5) of the Vancouver Incorporation Act. The statute does not give the arbitrators jurisdiction to make allowance for increased valuation to other lands. The arbitrators did not submit a case stated for the opinion of the Court as to whether the by-laws should be admitted in evidence or applied to the property in question, although requested to do so under section 22 of the Arbitration Act: see *In re Palmer & Co. and Hosken & Co.* (1898), 1 Q.B. 131; *In re Fischel & Co. and Mann & Cook* (1919), 2 K.B. 431; Redman on Arbitration and Awards, 5th Ed., 198.

Argument

McCrossan, K.C., for respondent: No advantage was taken of the Zoning By-law: see Russell on Arbitration and Award, 12th Ed., 316; *Buerger & Co.* v. *Barnett* (1919), 89 L.J., K.B. 161. On the question of allowing for the increased value to the remaining portion of the Reserve, we rely on subsection (5) and not on subsection (13) of section 172 of the Vancouver Incorporation Act. The arbitrators must make allowance for the betterment of the remaining lands: see *The Town of Toronto Junction* v. *Christie* (1895), 25 S.C.R. 551 at p. 556; *Re Richardson and City of Toronto* (1889), 17 Ont. 491; *In re Pryce and the City of Toronto* (1892), 20 A.R. 16 at p. 25. The words "present value" were used in the award but the award shews clearly that the values were taken as of the date of the arbitration notice: see *North Cowichan* v. *Gore-Langton* (1921), 29 B.C. 535 at p. 540; *O. Martineau & Sons, Ltd.* v. *Montreal City* (1932), 1 W.W.R. 302 at pp. 305-6.

Lennie, replied.

Cur. adv. vult.

MURPHY, J.

1932

Dec. 9.

COURT OF APPEAL

1933

April 7.

THE KING v. CORPORATION OF CITY OF VANCOUVER

7th April, 1933.

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

I may say that I have read with very much pleasure Mr. Justice MURPHY's reasons for judgment in this case with which I quite agree. If I may say so, I am very glad to see he put the matter in a very concise and illuminating way, and it shews beyond question, I think, that there is no ground for setting aside this arbitration award.

MARTIN, J.A.: I also agree in dismissing the appeal for the reasons given by Mr. Justice MURPHY, and I would not add anything to them.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I am of opinion that Mr. Justice MURPHY was right in sustaining the award.

There are one or two considerations that I would like to make reference to. We had a very important case before this Court, *City of Cumberland* v. *Cumberland Electric Light Co. Ltd.* (1931), 43 B.C. 525. There I took occasion in my judgment to deal with a point which is important in this case, because the same situation has to be viewed. During the progress of the proceedings before the arbitrators a question of law was mooted, that is as to whether or no the Zoning By-law would be effective as against Federal property. Some discussion took place, but the result of it all was that nothing was done and no reference upon the point of law was had to a Supreme Court judge. As far as I can follow the proceedings, there is no indication that the point was afterwards mentioned, or that there was any application made to the arbitrators to state a case, or refer the matter for the opinion of the Court.

Now, in the case that I have just referred to, at p. 534, I said this:

> It was strongly submitted by counsel for the appellant that there was error on the face of the award.

I might deal with that for the moment. I do not see any error on the face of the award here, and that really is the only matter that would entitle an appeal. That is the vital question, to be able to point to an error on the face of the award. I do not see it in this case.

> I fail to see that any such error exists; [that was in the case referred

to] the award is plain in its terms and follows the submission. . . . The award is precise in its terms, the value found is . . . In my opinion no exception is now open to question the award.

And that is my view in this case.

The Lord Chancellor said in *Tabernacle Permanent Building Society* v. *Knight* (1892), A.C. 298 at p. 302:

"I think the objection of section 19 of the Arbitration Act 1889—"

That was in Ontario. It is section 22 of the Arbitration Act of British Columbia, 1924, which is exactly the same.

"though in one sense it may be said to have for its object the same result, was rather to hold a control over the arbitration while it was proceeding by the Courts, and not to allow the parties to be concluded by the award, when, as it is said, parties may be precluded by the arbitrator's bad law once the award is made, althought they might have had a right to repudiate the arbitrator if they had done so before the completion of the award."

The case of *London Dock Company* v. *Shadwell* (1862), 7 L.T. 381 is very much in point in principle. That was before the English Arbitration Act 1889. There the submission contained a clause giving either party power to call upon the umpire to state a case. The parties allowed the umpire to make his award without asking him to state a case and after the award was made the umpire stated the principle upon which he had gone. There, a Court consisting of Cockburn, C.J., Blackburn and Wightman, JJ., discharged the rule. Cockburn, C.J. said (p. 382):

"You allow the opportunity to go by and take your chance, and then come here, putting all the parties to great expense. It can't be permitted."

That is this case.

In the report of the same case (*London Dock Company* v. *Shadwell, supra*) in 32 L.J., Q.B. 30, *Jones* v. *Cory* (1839), 7 Scott 106 was disapproved of and the judgment of Cockburn, C.J. is given as follows (p. 32):

"This is an attempt to get a case stated by the umpire. The appellants had an opportunity of getting this done by making an application to the umpire at the reference. Instead of doing so, they took the chance of having the award made in their favour, and I think they have no right now to come to the Court because they are dissatisfied with the amount fixed by the umpire. If we allowed this to be done, we should be multiplying proceedings improperly and the rule must therefore be discharged."

This case is exactly the same in principle; a chance was taken of obtaining a favourable award and now complaint is made. In my opinion it is now too late to question the award in this case.

In passing, I might also refer to *Hamilton Gas Co.* v. *Hamilton Corporation* (1910), 79 L.J., P.C. 76, Lord Shaw at pp. 79-80, and *Perth Gas Co.* v. *Perth Corporation* (1911), 80 L.J., P.C. 168.

Our judgment in the *Cumberland* case went on appeal to the Supreme Court of Canada. It was affirmed (1931), S.C.R. 717, and therefore we have a determination of our highest

MURPHY, J.

1932

Dec. 9.

COURT OF APPEAL

1933

April 7.

THE KING v. CORPORATION OF CITY OF VANCOUVER

Court of appeal upon the point. I cannot find any misconduct upon the part of the arbitrators and upon the face of the award it is not apparent that the Zoning By-law was at all applied—in fact the contrary. All values were considered industrial and residential. Then as to the time of fixing the value, I am satisfied that that was at the date of the expropriation notice—the award read as a whole well indicates this—it was that date the arbitrators dealt with in fixing the "present value." Upon the whole, in my opinion, the award is incontestable. I would therefore dismiss the appeal.

MACDONALD, J.A.: I would dismiss the appeal for the reasons given by Mr. Justice MURPHY.

Appeal dismissed.

Solicitors for appellant: *Lennie & McMaster.*
Solicitor for respondent: *J. B. Williams.*

WHITWORTH v. DUNLOP *ET AL.*

MACDONALD, J.

1933

May 3.

WHITWORTH v. DUNLOP

Criminal law—Keeping a disorderly house—Arrest without warrant—Police officer—Liability for false arrest—Malicious prosecution—Proof—Damages.

Keeping a disorderly house is not an offence for which an offender may be arrested without a warrant, even by a police officer, unless the offender is found within the house when the police officer has entered it under a search warrant obtained under section 641 of the Criminal Code. A police officer in the course of his duties must act strictly within the law and will be held liable personally for any breach of it.

ACTION for damages for false arrest, false imprisonment and malicious prosecution. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 13th of April, 1933. Statement

D. McKenzie, for plaintiff.
McCrossan, K.C., for defendants.

3rd May, 1933.

MACDONALD, J.: Plaintiff seeks to recover damages from the defendants, for false arrest, false imprisonment and malicious prosecution. He was tried before police magistrate Findlay on June 1st, 1932, on a charge of unlawfully "keeping a disorderly house to wit: a common bawdy house" on Seymour Street, Vancouver, B.C. The charge was dismissed and he now seeks redress.

I think it better to deal with the question of malicious prosecution first. The trial was based upon an information laid by the defendant Black, who has died since the commencement of the action. This defendant undoubtedly acted upon information afforded by his co-defendants, who are responsible for his actions. He was in the habit of thus laying complaints upon which trials ensued and there could be no contention that there was any malice on his part. As to this aspect of the case I do not deem it necessary to discuss the evidence. It was necessary for the plaintiff, in order to succeed, to prove facts which would warrant certain findings. This was referred to by Lord Davey, Judgment

MACDONALD, J.
1933
May 3.
WHITWORTH v. DUNLOP

in delivering the judgment of the Judicial Committee of the Privy Council, in *Cox* v. *English, Scottish and Australian Bank* (1905), A.C. 168 at 170; 74 L.J., P.C. 62, as follows:

> The principles applicable in these cases have been laid down for the English Courts, in the case of *Abrath* v. *North Eastern Ry. Co.* [(1883)], 11 Q.B.D. 440, at p. 455; [52 L.J.Q.B. 620] in which Bowen, L.J. said: " . . . in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, . . . ; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice."

I will assume innocence on the part of the plaintiff, as it was so found by the magistrate. Plaintiff has however failed to satisfy me that there was a want of reasonable and probable cause for laying the information and then continuing his prosecution. On the contrary, in my opinion, it was fully warranted. Then the plaintiff has utterly failed to prove that the proceedings were initiated in a malicious spirit. I find that the defendants had no indirect or improper motive in bringing the plaintiff to trial and that their actions were simply in the furtherance of justice. With these findings it follows that the action for malicious prosecution fails.

Judgment

Then, while the laying of the information and subsequent trial were warranted, did the defendants Dunlop and McGregor improperly arrest the plaintiff? It appears that the arrest took place without a warrant on May 28th, 1932, while the information was not laid until May 30th, 1932. The plaintiff was confined after arrest for a short period at the police station, until he was released on bail. It is contended that, although these defendants had no warrant for the arrest of the plaintiff, still that they were justified in making an arrest, with consequent short imprisonment, under section 30 of the Criminal Code, reading as follows:

> Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not.

It is to be noted that this section, justifying an arrest by a

peace officer, without warrant, only applies in cases where an offender can be arrested without warrant. A schedule of the offences, for which such an arrest is permitted, is covered by sections 646 to 652 inclusive of the Code; but, while a great number of offences are referred to in these sections, still that of keeping a disorderly house is not mentioned. In this connection, Stuart, J.A. in *Rex* v. *Roach* (1922), 19 Alta. L.R. 119; 38 Can. C.C. 294; (1923), 1 W.W.R. 433, at 435, mentioned that keeping a disorderly house was "not one of the offences specified in sections 646 and 647" and thus did not afford justification to a peace officer for arresting without a warrant.

There is authority for the proposition that the absence of a warrant, where it was necessary, does not affect the jurisdiction of the magistrate, once the accused is brought before him for trial, especially if there is no objection taken at the time. The law in this respect is shortly stated by Osler, J.A. in giving the judgment of the Court of Appeal in *McGuiness* v. *Dafoe* (1896), 23 A.R. 704 at 714:

> . . . however illegal may have been his arrest under the warrant, and detention up to that time, the jurisdiction of the defendant attached when the plaintiff was before him charged with the offence, and his subsequent detention and commitment would be justifiable: *The Queen* v. *Hughes* [(1879)], 4 Q.B.D. 614, [48 L.J., M.C. 151]; *In re Maltby* [(1881)], 7 Q.B.D. 18, at p. 28; [50 L.J., Q.B. 413]; *Dixon* v. *Wells* [(1890)], 25 Q.B.D. 249; [59 L.J., M.C. 116].

Judgment

Compare *Rex* v. *Iaci; Rex* v. *Bovero* (1925), 35 B.C. 95, 103; 1 W.W.R. 304; 44 Can. C.C. 275. This does not, however, assist a police officer, whose powers should necessarily be restricted and require that he should act legally, in arresting without a warrant. He should only act as authorized by common law or statute.

The distinction between a magistrate acting judicially and a police officer is quite apparent. This is emphasized in *Rex* v. *Ackerman* (1925), 57 N.S.R. 533; 43 Can. C.C. 251; (1925), 1 D.L.R. 1095 (following *Rex* v. *Flavin* (1921), 54 N.S.R. 188; 35 Can. C.C. 38; 56 D.L.R. 666) where it was decided that, when arrest was illegal upon a charge of keeping a disorderly house, still that after the arrest the magistrate had jurisdiction, through waiver on the part of the accused. It was apparent that there had been no warrant for the arrest and it

MACDONALD, J.

1933

May 3.

WHITWORTH v. DUNLOP

was assumed that so far as an arrest was concerned this was necessary; in fact there was no argument even presented to the contrary.

In *Rex* v. *Young Kee* (1917), 2 W.W.R. 442 at p. 443; 28 Can. C.C. 161, Hyndman, J., in deciding as to the jurisdiction of a magistrate upon a charge of keeping a common bawdy house, referred to the necessity for a warrant, in making an arrest for such an offence, as follows:

> It appears to me that there is no doubt but that this is one of those cases which does not permit of an arrest without a warrant whether the person effecting the arrest is or is not a police officer.

In order to form an opinion as to the conduct of these defendants I enquired as to the practice in "raiding" houses of this alleged character, without a warrant. Defendant McGregor, after admitting that he had no warrant or paper in writing, authorizing him to enter the premises or make an arrest, stated that it was the practice of the police to raid suspected disorderly houses without a warrant. In other words that he and co-defendant Dunlop were following a usual custom of the police. Assuming this statement to be correct then the importance of this action becomes quite apparent. I have already referred to the fact, that the keeping of a disorderly house, does not come within the category of offences, for which an arrest can be made without a warrant. Further, that section 30 is confined in its application and inapt in its terms with reference to such an offence. In this connection Trueman, J.A. in *Rex* v. *Johnson* (1924), 1 W.W.R. 828 at 834; 34 Man.L.R. 100, refers to the power of a constable to arrest without a warrant and the application of section 30 to the following effect. He mentions that a constable has the power of arresting without a warrant any person whom he reasonably suspects of having committed a felony. He then points out at p. 835, the reference I already made, that Mr. Justice Stuart in *Rex* v. *Roach, supra,* said that:

Judgment

> Parliament has specified the cases in which people may be arrested without a warrant.

And later on adds:

> In my opinion the section [30] is a re-enactment or codification of the common law.

Haultain, C.J.S. in *Anderson* v. *Johnston* (1918), 3 W.W.R.

620; 11 Sask. L.R. 478; 30 Can. C.C. 268, made a statement to the same effect, saying:

MACDONALD, J.

1933

May 3.

WHITWORTH v. DUNLOP

> This section [30] is simply declaratory of the common law.

It could thus only afford a limited justification to the defendants herein.

I do not think that it was intended that a police constable, with respect to the offence "of keeping a disorderly house" could decide for himself and act, without making any complaint or laying any information, to the extent of entering the premises and making an arrest. There would in that event be no record of the steps he might have taken before making an arrest. There is a procedure outlined in the Criminal Code for entering disorderly houses which these defendants might have adopted, *viz.*, by section 641 (as amended by 1930, Cap. 11, Sec. 19). They could thereunder have obtained this right to search and upon obtaining entry and searching the house they could then "take into custody all persons who were found therein." It may be that this provision is usually applied in "raiding" gambling joints. They could also have laid an information and obtained a warrant for the arrest of the plaintiff in the ordinary manner.

Judgment

Plaintiff submits that the judgment in *Rex* v. *Roach, supra,* supports the contention that he was falsely arrested. The judgment therein of the Appellate Division of the Supreme Court of Alberta was stated by counsel for the defendants, as being in conflict with the decisions of other Courts of Appeal in Canada. In support of this contention reference was made to *Rex* v. *Flavin* (1921), 54 N.S.R. 188; 35 Can. C.C. 38; *Rex* v. *McLatchy, Ex parte Wong,* 50 N.B.R. 320; 40 Can. C.C. 32; (1923), 3 D.L.R. 291, and *Rex* v. *Iaci, supra.* While so far as the jurisdiction of a magistrate is concerned, where a warrant has not been issued, there may be some conflict as to the decisions, still, upon the question of false arrest, the *Rex* v. *Roach* case is of assistance and I have no hesitation in following it on this point. Stuart, J. A., at pp. 434-5, after referring to the provisions of the Code as to issuance of search warrants and taking into custody persons found in disorderly houses (in that case a common gaming-house), considered it quite evident that "it was not the intention of Parliament that section 648, which follows shortly after section 641," should give the right to a

MACDONALD, J.

1933

May 3.

WHITWORTH v. DUNLOP

police officer to arrest without any warrant at all "when the officer has not got even the search warrant provided for in section 641." He then referred to section 649 with general observations as to powers of arrest as follows:

> It is helpful, I think, to observe that sec. 649 says that any person (not merely a police officer) may arrest without a warrant any person whom he finds committing any offence "by night." This, I think, confirms the view expressed in the cases referred to by my brother Beck that the phrase "finds committing an offence" is intended to apply to offences which consist in specific individual acts, not to those which consist in a general course of conduct.
>
> Parliament has specified the cases in which people may be arrested without a warrant. Obviously it was not thought right to leave it open to police officers to arrest any person whenever they please.

Beck, J.A., p. 437, in referring to the objection, as to illegal arrest without a warrant, said:

> At the opening of the hearing the solicitor for the defendant took the objection that the defendant had not legally been brought before the Court inasmuch as he had been illegally arrested without a warrant and that, therefore, the magistrate was without jurisdiction over the person of the defendant. This objection was persisted in. If the fact is so, the conviction must be quashed.

Judgment

I think in this particular case the defendants relied upon what defendant McGregor says is the usual practice. It is my duty and might I add, I am anxious to uphold the police in the discharge of their arduous duties, but in my opinion the defendants Dunlop and McGregor raided the rooming-house in question and effected the arrest of the plaintiff improperly. It was a false arrest and with consequent false imprisonment. I am expressing myself clearly under the circumstances. So if the police authorities feel satisfied that members of the force, either in uniform or in plain clothes, have the right to thus decide for themselves and "raid" such houses and make arrests without warrant, then the way is open for them to establish such right.

As to damages, the special damages principally arose through the prosecution and not through the arrest and temporary detention. The plaintiff is not in business and was found not guilty of the charge upon which he was arrested, without even reporting to headquarters. His character has not been affected. While I do not think the defendants Dunlop and McGregor had a right to "raid" this licensed rooming-house and arrest the plaintiff, still, as I have mentioned, they acted without malice

and in good faith. They thought they were acting legally and according to McGregor pursuing the practice to which I have referred. I think under the circumstances the damages should be low.

Hyndman, J. in *Pon Yin* v. *Edmonton (City), Hill and Kroning* (1915), 8 W.W.R. 809; 24 Can. C.C. 327, in discussing an action for false arrest against the city, found its chief constable and one of the detectives liable. He however only allowed nominal damages. In so doing he expressed himself at p. 814 as follows:

> By awarding nominal damages I do not wish to be understood as encouraging similar actions by police constables, but the facts of this case appear to me to justify such a verdict. Policemen in carrying on their work may as well understand that they must act strictly within the law and will be held liable personally for any breach of it and cannot fall back on their employers for indemnity in case of a judgment against them for damages.

Judgment

Prendergast, J. (now Chief Justice of Manitoba) in *Mack Sing* v. *Smith* (1908), 1 Sask. L.R. 454; 9 W.L.R. 28, in a similar action also dismissed it, as against the mayor of the city of Regina, but held certain police officers liable. They had detained 67 Chinamen without warrant, in a manner which amounted to a false arrest and imprisonment. He also only allowed nominal damages of $25 with costs on the higher scale. I have decided to follow a like course here and award $25 damages with costs. The plaintiff is entitled to costs in this Court less costs taxable against him upon the unsuccessful issue of malicious prosecution. Judgment accordingly.

Judgment for plaintiff.

COURT OF APPEAL

1933

Feb. 16.

THE TRUSTEE OF BLUE BAND NAVIGATION CO. v. PRICE WATERHOUSE & CO.

THE TRUSTEE OF THE PROPERTY OF BLUE BAND NAVIGATION COMPANY, LIMITED, A BANKRUPT v. PRICE WATERHOUSE & CO.

Practice—Examination for discovery—Scope of—Questions as to custom and usage—Expert evidence.

The Blue Band Navigation Company, incorporated in July, 1920, with one W. as president and director, was adjudged bankrupt in September, 1931, owing largely to defalcations by W. while in office, and C., who was an auditor by profession, was appointed trustee in bankruptcy of the company. From the time of its incorporation the defendants acted as the company's auditors, and C. as trustee in bankruptcy brought action against the defendants for damages for negligence, misfeasance and breach of contract as auditors of the company. On his examination for discovery C. refused to answer when asked "When you conduct an audit yourself . . . do you find it necessary to rely to some extent upon the statements made to you by officers of the company, or information supplied to you by them?" An application that C. attend for examination and answer said question and other questions relating to the practice or custom of an auditor in conducting an audit, was dismissed.

Held, on appeal, affirming the decision of FISHER, J., that a trustee in bankruptcy, discharging his statutory duty of realizing the assets of an estate, cannot be compelled to give evidence as an expert simply because he happens to be a member of a certain calling, a member of which is involved in the action in question.

APPEAL by defendants from the order of FISHER, J. of the 2nd of February, 1933, dismissing an application for an order that W. R. Carmichael, trustee in bankruptcy of the plaintiff, the Blue Band Navigation Company, Limited, do attend for further examination for discovery. The plaintiff company carried on a towing business from its incorporation in July, 1920, until its bankruptcy, one Norman R. Whittall having been president and director of the company from its inception. During this period it is alleged that the said Whittall wrongfully converted to his own use moneys of the company amounting to $41,607.99, and the company was declared bankrupt on the 11th of September, 1931, when W. R. Carmichael (who was an auditor by profession) was appointed trustee. On the incorporation of the company the defendants were appointed its

Statement

auditors and acted in that capacity continuously until the company's bankruptcy. The action was for damages for negligence, misfeasance and breach of contract in the defendants' duties as auditors of the plaintiff company. On the examination for discovery of W. R. Carmichael as trustee in bankruptcy of the plaintiff company, he was asked the following question: "When you conduct an audit yourself, Mr. Carmichael, do you find it necessary to rely to some extent upon the statements made to you by officers of the company on information supplied to you by them?" This question he refused to answer. The application was for an order that the witness do answer the above question and any other questions he may be asked by counsel for the defendants relating to the duty, practice or custom of an auditor in conducting an audit of the books and accounts of a limited company. The application was dismissed.

Statement

The appeal was argued at Victoria on the 15th and 16th of February, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Symes, for appellants: Examination for discovery is in the nature of a cross-examination: see *Bank of B.C.* v. *Trapp* (1900), 7 B.C. 354 at p. 356; *Jones* v. *Pemberton* (1897), 6 B.C. 69; *Beaven* v. *Fell* (1895), 4 B.C. 334 at p. 336; *Hopper* v. *Dunsmuir* (1903), 10 B.C. 23; *McInnes* v. *B.C. Electric Ry. Co.* (1908), 13 B.C. 465; 3 C.E.D. 228; *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445 at pp. 483 and 485. Questions on the custom and practice of auditors are relative to the issue and the test is whether these questions could be asked on the trial.

Argument

Mayers, K.C., for respondent: This examination is a process of discovery. Custom and usage must be specially pleaded: see Odgers on Pleading & Practice, 10th Ed., 95; *Birrell* v. *Dryer* (1884), 9 App. Cas. 345 at p. 352; *Lewis* v. *Marshall* (1844), 13 L.J., C.P. 193 at p. 195; *Tucker* v. *Linger* (1882), 21 Ch. D. 18 at p. 34. He cannot be compelled to state his views as an expert witness: see *Campbell* v. *Rickards* (1833), 5 B. & Ad. 840 at p. 846; *Ramadge* v. *Ryan* (1832), 9 Bing. 333; *Courser* v. *Kirkbride* (1883), 23 N.B.R. 404. The duty of an

COURT OF APPEAL

1933

Feb. 16.

THE TRUSTEE OF BLUE BAND NAVIGATION CO. v. PRICE WATERHOUSE & CO.

auditor is a matter of law: see *In re City Equitable Fire Insurance Co., Lim.* (1924), 94 L.J., Ch. 445 at p. 477.

Symes, replied.

MACDONALD, C.J.B.C.: I think this appeal must be dismissed. The question of course is one of some importance, one that may affect practice in the future. But there can be very little doubt as to what the answer to this motion should be. It has come down now to the consideration of one question, the others having been abandoned by Mr. *Symes;* that question is this—on examination the party being an auditor: "When you conduct an audit yourself, Mr. Carmichael, do you find it necessary to rely to some extent upon the statements made to you by officers of the company, on information supplied to you by them?" That simply means, Do you find it necessary on information supplied by officers of the company, to rely upon it? It is perfectly clear that an auditor is not entitled to rely upon all information and statements made by officers of the company; he may get certain information from the company which enables him to examine the books with intelligence, but he is not entitled to rely upon statements which are made by the officers of the company, to the effect that there is nothing wrong with the books. The question which this section 23 raises might in some cases be a proper question and might in other cases, and most cases, be very improper. And there is nothing here to shew that this is a case where the question could be asked properly and answered. Besides, it would not matter whether this particular auditor would find it necessary to accept such statements or not. That is not a question in issue in this action at all, it is a question as to whether or not the auditor in question was justified in accepting statements. What some auditor would do has nothing to do with it. And therefore the question which is set out here is not a proper question. I am satisfied that you cannot ask an auditor, for instance, his opinion about the integrity of another auditor. These are questions merely of opinion, and his opinion either one way or the other may be entirely wrong; the case does not depend on his opinion, and is not affected by it.

MACDONALD, C.J.B.C.

I think that the order made below is correct, and ought not to be interfered with.

MARTIN, J.A.: This appeal raises an important question which is not covered by the decision of the old Full Court, affirming my previous decision, in *Bank of B.C.* v. *Trapp* (1900), 7 B.C. 354, as given effect to by later decisions in the old Full Court and in the Supreme Court, as recited by me in *McInnes* v. *B.C. Electric Ry. Co.* (1908), 13 B.C. 465; and I do not wish to say anything which would in the slightest degree detract from the effect of those decisions, which have been so long followed. But the ground upon which I base my decision in this case is that each of those decisions has present in it a fundamental fact which distinguishes them all and renders it impossible to give effect to them in the consideration of the sole question that is before us, which is, in effect,—can a trustee in bankruptcy be compelled, while discharging his statutory duty of realizing the assets of an estate, to give evidence as an expert simply because he happens to be a member of a certain calling a member of which is involved in the action in question? To my mind that cannot be done, because that would be to weave together two distinct capacities and interject into the action his evidence derived from his personal calling, which has nothing to do with his knowledge or the discharge of his duties in relation to his office of trustee. In other words, they are two distinct capacities, and advantage cannot be taken of one so as to import it into the other. The consequences of doing such a thing are so serious that we should shrink from adopting for the first time a course of that kind, unless we are quite certain that the Rules of Court empower it. As an illustration of the consequences that might ensue, I would point out that rule 370c (1) does not restrict this right to examine to an officer of a corporation but extends to its servant; the rule saying, "In the case of a corporation, any officer or servant of such corporation may, without any special order," be orally examined. Now to think that a servant of a corporation, under the guise of obtaining from him the ordinary information based upon personal knowledge of a cause of action, could be examined to the extent of taking advantage of his professional capacity *aliunde* (I do not suggest that it was attempted here) is to me something that I feel so extremely doubtful upon, I put it that way, that I cannot accede to that view of the scope of the rule. And

COURT OF APPEAL

1933

Feb. 16.

THE TRUSTEE OF BLUE BAND NAVIGATION CO. v. PRICE WATER-HOUSE & CO.

MCPHILLIPS, J.A.

therefore, upon that ground alone, upon that primary and paramount ground, I think the appeal should be dismissed.

MCPHILLIPS, J.A. (oral): I approach this matter feeling that it is a very important one indeed, especially for the Court of Appeal to be asked now to make a pronouncement which would be binding upon all judges sitting in the trial Courts. For this reason I would like to make my decision as narrow as possible in the interests of justice. A trammelling decision upon the learned judges in the trial Courts would certainly not be in the furtherance of justice. I turn to what is being moved for: "for further examination *viva voce* upon oath touching his knowledge of the matters in question in this action, and for an order that on such examination the plaintiff do answer question 23 put to him upon the examination for discovery held on the 30th day of January, 1933, and adjourned." In my opinion the learned judge in the Court below was right, as the pleadings do not warrant the proposed examination without the question of custom or usage being alleged in the pleadings. Therefore, as far as that is concerned, I have no hesitation. Then, next, "and any other questions he may be asked by counsel for the defendants relating to the duty, practice or custom of an auditor in conducting an audit of the books and accounts of a limited company." Again, I think the pleadings are not wide enough to cover duty and practice; there ought to be an allegation that it was a failure in duty as aduitor—that they did not pursue the practice of auditors—and then these questions might be relevant. Therefore, upon the whole, in regard to this particular motion, and upon the pleadings as they are before me, I think that the questions were improper, and cannot be said to have been questions that should have been answered.

The trustee in bankruptcy has to bear all the responsibilities of bringing an action; he is the plaintiff, really, and therefore if he is acquainted with matters relevant to the issues that are to be enquired into he may be examined as he might be examined in Court. Then if it should turn out that he is an auditor himself, and the question of the duty and practice and custom of auditors is in question, with apt statements in the pleadings he could in my opinion be examined upon all that. In short, what

I mean is this, that whoever comes into Court must either come in in the capacity of plaintiff or defendant. Now the auditor here is the plaintiff, but is not in his capacity as auditor suing but as trustee in bankruptcy. For instance, to illustrate the reasonableness of it, if a trustee in bankruptcy is an auditor, and if the trustee in bankruptcy, advising himself, says the company has a cause of action against the auditors, he must then advise himself upon the facts which he thinks creates a liability upon those auditors; and the discovery may reach that. You are entitled to find out what he is basing his belief upon that he has come into Court with a well founded action; and he can be cross-examined as to that,—Why do you bring this action? Upon what do you base it? All open, to my mind. But the pleadings are not complete enough to admit of that examination. I limit my judgment to the pleadings, as they are, and would like to limit it to that in every respect; because, as I say, it would be an embarrassment, and against the interests of justice if the Court of Appeal should give an omnibus decision to be quoted in the future. Each case will have its differences.

MCPHILLIPS, J.A.

I would dismiss the appeal.

MACDONALD, J.A.: The facts are unusual, because of a coincidence; I doubt if the point on similar facts arose in this Province before and possibly will not again for some time at least. We should apply the Rules, if possible, in such a way that, while reserving full rights of cross-examination within proper limits, to one party, no injustice will be done to the other. In my opinion the trustee may be examined only *qua* the plaintiff company, so to speak; that is, as an officer or servant of the company. He may in his private capacity be a musician, a chemist, an astronomer, or, as here, an auditor, but because it so happens that in an action questions arise where his knowledge in one or other of these collateral pursuits might be of assistance, it would, I think, be manifestly unfair that the plaintiff company should be bound by his admissions in respect thereto. That, it seems to me, is clear. One can conceive of a case, notwithstanding Mr. *Symes's* submission, where the trustee might be suing under the direction of inspectors, against his own personal wishes, and if this sort of examination was allowed he

MACDONALD, J.A.

COURT OF APPEAL

1933

Feb. 16.

THE TRUSTEE OF BLUE BAND NAVIGATION CO. v. PRICE WATER-HOUSE & CO.

might give evidence favourable to his fellow-craftsmen. This possibility does not determine the principle applicable, but it does suggest possible consequences. I have already stated the principle, as I view it.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Robertson, Douglas & Symes.*
Solicitors for respondent: *Burns, Walkem & Thomson.*

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

THE BISHOP OF VICTORIA v. THE CORPORATION OF THE CITY OF VICTORIA.

Municipal law—Assessment and taxes — Improvements — Actual value—Interpretation—Formal order—Not to include reasons or argument—R.S.B.C. 1924, Cap. 179, Secs. 212 (1) and 228 (7).

By section 212 (1) of the Municipal Act "land shall be assessed at its actual value and improvements shall be assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements."

The plaintiff owned two lots in the City of Victoria upon which was erected a well-built parochial school, the cost of construction (built in 1930-31) being $58,425. For the year 1933 the land was assessed at $2,900 and the improvements at $56,000. The Court of Revision reduced the assessment on improvements to $50,000. On appeal to a judge the assessment on the lots was not changed but improvements was reduced to $22,100, the learned judge reciting in the formal order "and the Court being of the opinion contrary to the contention of counsel for the respondent that the words 'actual value' in section 212 of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale."

Held, on appeal, reversing the order of MCDONALD, J., that "actual value" of land for assessment purposes where no present market is in sight, is what a prudent person attempting to measure the forces at work making for a present shrinkage in value for a time and again likely to arise making for an increase of value, would be likely to agree to pay in way of investment for such lands, with the qualification in reference to the building that in determining "what some such man would be likely to pay or agree to pay in way of investment," regard must be had to the likelihood that the "reversible currents" which affect land

causing it at times to depreciate and again to appreciate in value will not, at least to the same degree, affect a building of this character dedicated for all time to academic and moral pursuits, and the matter should be remitted to the judge below to fix the assessment on the improvements on the principles outlined.

Per MARTIN, MCPHILLIPS and MACDONALD, JJ.A.: It is contrary to the established jurisprudence of the Courts of this Province to recite or include arguments or reasons in a formal judgment or order.

APPEAL by the City of Victoria and cross-appeal by The Bishop of Victoria from the decision of MCDONALD, J. of the 15th of November, 1932, on appeal from the decision of the Court of Revision of the City of Victoria of the 11th of October, 1932, on appeal from the assessment for the year 1933 made by the assessor of the City of Victoria in respect to the lands and improvements on lots 1 and 2 of suburban lot 15, City of Victoria (St. Louis College). The land was assessed at $2,900 and the improvements at $56,000. The Court of Revision allowed the assessment on lands to stand and reduced the assessment on improvements to $50,000. The learned judge did not change the assessment on the lots but reduced the assessment on improvements to $22,100, the preamble in the formal judgment below reciting that the Court was of opinion, contrary to the contention of counsel for the respondent, that the words "actual value" in section 212 of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale. This appeal and cross-appeal are in respect of the improvements only, consisting of a college building known as St. Louis College. The building was completed less than a year before the assessment, the cost of construction being $58,425. It was built for permanency, very finely constructed and with a view to its lasting for over one hundred years.

Statement

The appeal was argued at Victoria on the 6th, 7th and 13th of February, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Maclean, K.C., for appellant: The question is the construction of the words "actual value" in section 212 of the Municipal Act. Formerly for the purpose of taxation the value of land and improvements was their actual cost value as appraised in

Argument

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

payment of a just debt from a solvent debtor: see *Re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361; *In re Vancouver Incorporation Act, 1900, and Rogers* (1902), 9 B.C. 373. The situation is altered since 1899 by taking the viewpoint of a solvent owner not anxious to sell but not holding for a fictitious or speculative price. This is a new building and the cost is a fair value: see *Gates' Case* (1918), 2 W.W.R. 930; *In re Charleson Assessment* (1915), 21 B.C. 281; *In re Bell Irving Assessment* (1924), 33 B.C. 496; *Pearce* v. *Calgary* (1915), 9 W.W.R. 668; *Grierson* v. *City of Edmonton* (1917), 58 S.C.R. 13; *Rogers Realty Co.* v. *City of Swift Current* (1918), 57 S.C.R. 534.

Argument

O'Halloran, for respondent: Unless "actual value" means structural value there is no basis for his appeal. We say the value is the price on the open market between a willing vendor and willing purchaser. The words must be taken in their fair meaning. The only evidence the city has is on structural value, and this does not apply: see *Rogers Realty Co.* v. *City of Swift Current* (1918), 57 S.C.R. 534; *Dreifus* v. *Royds* (1920), 61 S.C.R. 326; *In re Charleson Assessment* (1915), 21 B.C. 281 and 372; *In re Bell Irving Assessment* (1924), 33 B.C. 496 at p. 499; *Dodds* v. *Assessment Committee of South Shields Union* (1895), 64 L.J., Q.B. 508 at p. 510.

Maclean, replied.

Cur. adv. vult.

10th March, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The City assessed the property of the respondent consisting, so far as this appeal is concerned, of a college building known as St. Louis College. The building had been completed a short time before the assessment, I think within a year. It was intended as a permanent home for the Christian Brothers (as a college) who for a considerable time past had used the old college building which had become unfit for their use. The contract for the construction of the new building was let to reputable contractors at the sum of $58,425 and the building was constructed in accordance with that contract and there is no suggestion that it was not constructed economically by the contractor. On the contrary it was shewn

to be exceptionally well built. It was built of material and of a structure which was intended to last, it was said, for hundreds of years. It was not built for sale but for use, and for permanent and continuous use. The Court of Revision reduced the assessment of the building alone to $50,000. An appeal was taken to a judge of the Supreme Court who after hearing evidence *de novo* adopted as the standard of value a price which he thought could be got for the building at the present time at a forced sale. McPherson, the principal witness for the respondent, was asked in examination-in-chief:

> If the Bishop, the owner, was compelled by force of circumstances to sell that site and building, what do you consider the most likely business or undertaking that would be apt to be in the market for it? The business that I have just cited, that of an apartment-house.

Similar evidence is given in two other places in the evidence. This may not mean exactly by forced sale but it shews that respondent's counsel was coming very close to it.

In the recital in the final judgment after same had been submitted to him for his approval the learned trial judge used these words after objection to them by respondent's counsel:

> . . . "Actual value" in section 212 of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale.

MACDONALD, C.J.B.C.

I shall deal with this question further when I come to consider the counterclaim. I think the learned judge's valuation of the property was founded on a wrong basis. There is no definition of "actual value" beyond what the words themselves import. The only appeal allowed to this Court is one on the point of law and the point of law which has been raised is that the learned judge was wrong in deciding that the market value at a forced sale was the actual value. Counsel for the appellant contended that the market value at a forced sale was not the actual value; that cost of construction and other surrounding circumstances should have been considered by the learned judge as well as the market value, in arriving at what he considered the actual value to be, and that in excluding the recent cost of construction and the circumstances of time and place, he was guilty of an error in law. I think there is a question of law involved in this case. The selling value is no more the actual value of the property than is the cost of construction and, in my

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

MACDONALD, C.J.B.C.

opinion, the learned judge ought to have taken into consideration, although he might not have founded his judgment upon it, the cost of construction and all other circumstances affecting the actual value of the property, for instance, the depression which now exists, the cost of construction, the deterioration of the building, if any, and any relevant local circumstances were appropriate subjects for consideration. All facts which might affect what the judge might consider the value ought to have been canvassed by him and by excluding these the learned judge was in error in his law. This Court has not power to deal with anything other than the question of law. It may be mentioned, however, that the law respecting valuation of property for assessment purposes has been frequently changed by the Legislature in past years. In 1914 the law gave directions as to how the value for assessment purposes should be found in these words (Cap. 52, Sec. 199):

> For the purpose of taxation, land and improvements shall be estimated at their value, the measure of which as to land shall be the actual cash value, and as to improvements shall be the cost of placing at the time of assessment such improvements on the land, having regard to their then condition, but land and improvements shall be assessed separately.

This may be called the replacement value. Earlier the statute read as follows (1896, Cap. 37, Sec. 112):

> For the purposes of taxation, land and improvements within a municipality shall be estimated at their value. the measure of which value shall be their actual cash value as they would be appraised in payment of a just debt from a solvent debtor; but land and improvements shall be assessed separately.

Finally by section 212 (1), Cap. 179, R.S.B.C. 1924:

> For the purposes of taxation, land, except as hereinafter provided, shall be assessed at its actual value, and improvements shall be assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements: provided, however, that land and improvements shall be assessed separately.

The effect of this statute is to direct the assessment of the building in question at the "actual value."

This Court, while it has no power to deal with anything other than the question of law, must I think look at all the circumstances of the case fairly and I think may also consider the history of the section in order to ascertain what the actual value is. In the quotations which I have just made from previous Acts we have the view which the Legislature took of the different

methods of appraisement. Some cases in the Supreme Court of Canada were cited to us by counsel for the respondent, in which opinions were expressed to the effect that the actual value of land was what it would bring in the market. In those cases the Court was dealing with wild land which had no other ascertainable value. In this case, however, there are other criterions which ought to have been considered, namely, what the property cost those who own it, and who intended to use it and continue to use it for the very purpose for which it was built. One of the witnesses who gave evidence in the Court below for the respondent said it was unsuitable for any other purpose than that of a college or for conversion into an apartment-house for which purpose he would be willing to pay $20,000 for it. One cannot doubt that the assessor, considering the actual value of the property might very well say: "Respondent has built this property for a special purpose; it is a permanent purpose. He has considered the cost before building it and has agreed to pay $58,425 for it. There are no circumstances local or otherwise which would make that property less valuable to the owner than the price paid for it and while no outsider would be willing to pay that cost having no use for the building, except as an apartment-house, the actual value, to the owner who has use for it and who has built it and paid for it the price above mentioned and will continue to use it for an indefinite time, may be exactly what it has cost, less any depreciation since its construction." This, I think, would be something that ought to appeal to the valuator taken in connection with any other circumstances which might affect the value including its market value. He ought not to accept the selling value at a forced sale or the selling value at an open sale as the basis of assessment to the exclusion of all other relevant facts any more than he should accept the cost of construction as the actual value to the exclusion of all other circumstances. The value would depend upon his own judgment after having taken all circumstances into consideration and since the property was not so valued but to the exclusion of some of the most important of them, there must be a new trial by a judge of the Supreme Court.

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

Respondent cross-appealed objecting to the inclusion in the final judgment of the words:

"Actual value" in section 212 of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale.

These words were inserted on the settlement of the formal judgment. The learned judge did not define in his very meagre reasons for judgment the basis of his decision and when he came to settle the formal judgment he was requested to state the basis of his decision and, after arguments *pro* and *con.*, he did so in the words quoted above. The insertion of these words was strongly opposed by respondent's counsel, but was allowed as the judge's settled opinion. It was argued that a statement of this character is never found in formal judgments in our practice. No authority was cited for this except a recent case in this Court. The probable reason for the absence of other authority is that no one in the past presumed to raise the question. There is no set form. It must be conceded that the words aforesaid could properly have been inserted in the reasons for judgment or for that matter orally on the pronouncement of judgment. There is no reason to doubt the truth of the language complained of. We have the authority of the judge himself and no better authority could be got. It is said that the words were inserted in order to permit the appellant to found his appeal on the question of law. If that be so the insertion was all the more justifiable.

MACDONALD, C.J.B.C.

It was also argued that the words "upon a forced sale" were not part of the judge's original judgment, but these words are part of his judgment as corrected which corrections he had a right to make as the judgment had not been entered at the time they were inserted. Therefore they constitute the true opinion of the learned judge after argument of counsel, and I think the counterclaim fails and should be dismissed with costs.

In my opinion the result would be the same in the appeal if the judge had confined his opinion to a sale in the ordinary way, not a forced sale and if it became necessary to discard the words "upon a forced sale" my opinion of the case would not be altered.

I think it is more important to arrive at a true opinion upon

the case than it is to attach importance to matters of mere form assuming that there is nothing wrong with the form. What the Court ought to do is to decide whether actual value means the market value or the market value at a forced sale. That is a matter of substance whereas the form in which we receive the judge's opinion is, in my opinion, not a matter of substance.

It was also objected that the appeal succeeds on a question not raised in the Court below. There is no merit in this contention since it was raised in the Court below and was raised again on the settlement of the judgment. Therefore, our statute which would give to the respondent the costs where a new trial is ordered on a point not raised in the Court below has no application. The fact that appellant's counsel contended that actual value was the cost of construction of the building does not, in my opinion, affect the case one way or the other. The cost of construction was a relevant question in the case in contradistinction to market value.

MACDONALD, C.J.B.C.

A new trial should be ordered before a Supreme Court judge and the costs of the abortive trial should abide the result of the new trial.

MARTIN, J.A.: In this appeal from the judgment of the Honourable Mr. Justice D. A. McDONALD, which set aside the decision of the Court of Revision of the defendant corporation respecting the assessment of the improvements on the plaintiff's property and fixed it at $25,000, I am in complete accord with the principle of assessment of the "actual value" of said improvements, pursuant to section 212 of the Municipal Act, Cap. 179, R.S.B.C. 1924, as lucidly and ably set out, if I may be permitted to say so, in the reasons of my brother M. A. MACDONALD, and so my observations will be confined, as briefly as possible, to other, though involved, aspects of the case.

MARTIN, J.A.

The manner in which the defendant's assessor regarded the matter and the principle or test that he applied are, fortunately, beyond speculation or dispute, and his evidence shews clearly he made the initial and primary error of construing "actual value" as meaning the cost of construction alone in the case of buildings erected for scholastic purposes, as appears by the following questions and answers:

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

You feel, do you, in your view, that a building should be assessed according to its structural cost or cost of replacement? Well, after all, I think that a building must be assessed for—this building was built for a specific use, money was spent for a specific use, and they are using it for the use for which it was intended; we have other schools in the City of Victoria, and I think, from an assessment point of view, that I cannot take any other view with regard to St. Louis College than any other school in the City of Victoria. Mine is a wholesale proposition.

I quite understand that. I cannot consider any one individual any more than another.

And,—

The question I am asking you now is, do you feel, is it your opinion that in assessing that building you must take into consideration as a dominant consideration the structural cost or the cost of replacement? Well, in this instance I think you must take into consideration the structural cost, yes.

As a dominant consideration? I think so, yes.

MARTIN, J.A.

And there was the further error in applying his general rule as "a wholesale proposition," and refusing to consider "individual," *i.e.*, particular cases, though public schools erected and maintained by the defendant pursuant to its statutory obligation and from taxes levied upon its property owners and into which the question of any profit or loss to be derived or suffered therefrom does not enter, differ essentially and obviously from a school founded and maintained by private persons and into which the questions of ways and means and loss or profit must enter as fundamental considerations, be the objects of the foundation never so beneficial and open, as herein, to all scholars irrespective of religion even to the extent of continuing to afford them unusual educational facilities in these times of depression despite the fact that the parents of over one-half of the total number of 175 pupils during last year (of whom 145 are in Victoria) have been unable to pay their fees, with a consequent loss on the operation of the college which during the last three years has increased from $4,934 to $9,652: this property, indeed, is not in a "wholesale" but a particular, and so far as the evidence shews, unique class. Furthermore, it is to be borne in mind that the assessment in question is one for a year only and subject to annual change to meet improved conditions, which we all hope are not far off, and if happily the result of them should be that a revenue is derived from the use and operation of this "improvement" institution, that would be an element in the future consideration of its actual value just as is

the loss suffered today in the severe struggle of carrying out its purpose in the face of unprecedented adverse conditions: in short, as my brother had indicated as aforesaid, due regard must be had to all the "features" of the particular case.

It appears from an unusual recital (to be later considered) in the order appealed from that the learned judge construed the expression "actual value" as meaning "the sum which could be realized for the property in question upon a forced sale," but I am unable, with every respect, to see how that question came into the case because neither counsel made that submission below or here, and no evidence was directed to that point, as appears from the passages which appellant's counsel relied upon, for when carefully examined they are found to relate not to a forced sale but to the plaintiff being ultimately compelled (forced) to close the school because of the increasing burden of continued heavy loss in its operation, and thereafter placing it on the market for sale. But the sale of an unprofitable property by an unquestionably solvent owner (as here) at any price that he may choose, sooner or later, to accept, is in no legal sense a "forced sale" of it, as *e.g.*, by ordinary process of execution, or by tax sale, or power of sale, or under lien enforcement proceedings, or other compulsory process directed against insolvent debtors and their property for immediate realization of assets to satisfy judgments, etc.

The position, however, of the matter before us is that, from some cause not apparent upon the record, the learned judge did in fact, as he says, decide the question on a forced sale value, and so we must deal with it upon that basis. If this were an ordinary appeal we would have jurisdiction over the whole matter both in fact and law and could proceed, should we think it the proper course to adopt, to fix the assessment upon the same evidence that was before the learned judge below, but there is at least some substantial doubt about our general powers extending to this appeal, since it is restricted by section 228 (7) of the statute to points of law only (though our general rules are made to apply thereto) and therefore the best and surest judgment to pronounce is that the matter should be remitted to the same learned judge to fix the assessment of said improvements

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

on the principles hereinbefore mentioned upon the evidence already before him in which there is ample material to enable him to reach a just conclusion, though that task will be far from an easy one under present conditions. In view of the fact that so large and sufficient a body of evidence was given on the question there is, in my opinion, no justification for ordering a new trial at large thereby entailing much unnecessary expense and further undesirable delay. In this connexion I refer to the case of *Dunkirk Colliery Company* v. *Lever* (1878), 9 Ch. D. 20, wherein a judgment of the Master of the Rolls was set aside by the Court of Appeal and the matter of the assessment of damages on a proper principle remitted to the special referee, and Lord Justice Bramwell said at pp. 27-8, in significant and appropriate language:

> If the finding of the referee is not to be adopted, I do not see anything that can be done except to comply with the alternative prayer, that it be remitted to him for reconsideration; and I think it is due to the learned gentleman to say that we do not direct him to find differently to what he has found already. If he in his conscience thinks he can only find the same thing over again, he must do so. He is the judge of the facts and not we.

MARTIN, J.A.

There remains for consideration the cross-appeal of the respondent from the refusal of the learned judge at the time of the settlement of the order appealed from to exclude from it the following recital which has been inserted therein at the instance of the defendant's counsel, *viz.*,

> . . . and the Court being of the opinion contrary to the contention of the counsel for the respondent that the words "actual value" in section 212 of the Municipal Act should be construed to mean the sum which could be realized for the property in question upon a forced sale. . . .

The insertion of this recital was objected to (1) as being contrary to law for including in the formal judgment an argument of counsel and also a reason for judgment; and also (2) as being contrary to fact because

> such construction or interpretation of the words "actual value" was never argued, discussed or mentioned either by the learned judge or by counsel for either party during the hearing on the 15th day of November, 1932, when the judgment was pronounced.

That it is contrary to the established jurisprudence of the Courts of this Province to recite or include arguments or reasons in their judgments is beyond controversy, and only last term, on the 17th of February, we gave effect thereto in the case of

Everett Trust & Savings Bank v. *Foster et al.* by striking out of the order a certain recital, saying *per curiam*:

> The recital in the order that the learned judge in his discretion had decided that the said motion should be adjourned until the 1st day of June, be struck out . . . it being contrary to our jurisprudence to embody in formal orders the reasons for judgment.

Our jurisprudence in this respect differs historically and essentially from that which obtains in countries whose civil laws are not founded upon those of England, *e.g.*, as in Quebec, and hence the judgments there are drawn up in a different form to meet their different system, a recent example of which is to be found in *Webster Motors (Ltd.)* v. *Knutson* (1931), 70 Que. S.C. 38. That it is our duty to preserve the due course of procedure generally is beyond question, but should authority be required to support that statement it is to be found in the highest of our legal tribunals and in one of its greatest cases, *viz., Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520 at 530, where the words just quoted are to be found, and their Lordships also laid it down that

> the due and orderly administration of the law [should not be] interrupted, or diverted into a new course, which might create a precedent for the future.

And the same tribunal later in *Ibrahim* v. *Rex* (1914), A.C. 599 at 615 affirmed the same language and deprecated "new courses which may be drawn into an evil precedent in future."

In a leading constitutional case on the Fourth and Fifth Amendments the Supreme Court of the United States aptly said, in *Boyd* v. *United States* (1886), 116 U.S. 616 at 635:

> Illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.

Finally, Lord Lindley, M.R. in *Stewart* v. *Rhodes* (1900), 1 Ch. 386, pp. 403-4, used language eminently fitted to this case, *viz.*:

> No one ever saw such an order before. It is an experiment, and I hope it will not be repeated.

But though the said recitals (while inserted doubtless with the best intentions) have unfortunately, though unwittingly, brought, to me at least, additional difficulty and, indeed, embarrassment, in the determination of the present important question, yet I feel that we cannot go to the length of disregarding the positive statement by the learned trial judge of his reasons

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

for his decision, even though that reason should have been given in the proper way, *viz.*, either orally at the time judgment was pronounced or later in writing, and the matter is further complicated by the fact that in the oral reasons which were given at the close of the hearing no mention whatever was made of a forced sale, as appears by the official stenographer's report before us; therefore this recital, though subsequent to judgment, necessitates the remission of the matter to the learned judge as aforesaid, which it would not be necessary to do had the matter been confined to the original reasons given when judgment was pronounced because there is no appeal to us on questions of fact and, as a matter of law, there undoubtedly is evidence in the record on which the learned judge could have reached the same conclusion on a proper self-direction of "actual value" as already mentioned, but, unfortunately, we as has been said, feel unable in this restricted appeal to invoke our ordinary appellate powers to dispose of the matter here.

MARTIN, J.A.

The judgment that should be pronounced on this cross-appeal in the present unusual circumstances is, in my opinion, the formal one that it should be dismissed without costs, and it is unnecessary to make the direction that the recital should be struck out of the order because the whole of that part thereof, affecting the assessment of the said improvements (which alone are the subject of this appeal) has gone by the board and so nothing remains that can be varied. I express no definite opinion upon the question as to the necessity of resorting to a cross-appeal to remove recitals from a formal judgment because, though we did not require that course to be taken in the *Everett Savings Bank* case, *supra,* and the point was not debated, there might well be cases wherein it would be the only safe course to adopt since, by omissions or otherwise, recitals might easily misrepresent or prejudice the other party, and objections to the form of judgments have frequently and without exception been raised, to my knowledge, as grounds of appeal in the old Full Court and in this Court, and doubtless the respondent's counsel herein thought it was the better course to adopt *ex abundanti* at least, and he has been successful in principle.

As to the costs of the main appeal, I agree with my brothers

McPHILLIPS and M. A. MACDONALD that, under the very unusual circumstances of this case, they, like those of the cross-appeal, should not be allowed, and I notice that in the Court below the learned judge ordered that "each of the parties hereto shall bear its own costs of this appeal" though there was much more reason why the plaintiff should have got costs below than that the defendant should get them here.

McPHILLIPS, J.A.: I have had the advantage of reading the judgments of my learned brothers MARTIN and M. A. MACDONALD and I may say that they so admirably carry out my own considered opinion upon the appeal and cross-appeal we have before us that I do not consider that I can usefully add anything thereto. The ends of justice will be well conserved by remitting the question of assessment to Mr. Justice D. A. McDONALD in the Court below to determine the actual value of the improvements upon the property. The question of the value of the realty is not under appeal. The considerations which should weigh with the learned judge below have received the careful attention of my learned brothers—considerations in which I entirely agree.

MCPHILLIPS, J.A.

MACDONALD, J.A.: Appeal from an order of Mr. Justice D. A. McDONALD setting aside in part the decision of the Court of Revision of the Corporation of the City of Victoria in placing an assessment of $2,900 on two lots and $50,000 on the improvements thereon, the "improvement" being a well-built parochial school (St. Louis College on Pandora Avenue) maintained for the instruction of children taught by Christian brothers (without remuneration beyond a small allowance). The cost of construction (built 1930-31) was $58,425. It is supported largely by voluntary contributions and carried on at a loss, at present.

MACDONALD, J.A.

The learned judge did not interfere with the valuation on the lots but lowered the assessment on improvements, placing it at $22,100. On appeal from that order we may decide only questions of law (section 228, subsection (7)).

Section 212 (1) of Cap. 179, R.S.B.C. 1924 (Municipal Act), is the governing section and its proper construction is a

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

MACDONALD, J.A.

question of law. We must state the principles which should be followed on a proper interpretation of the section as applied to the special kind of improvement under consideration. It reads as follows:

> For the purposes of taxation, land, except as hereinafter provided, shall be assessed at its actual value, and improvements shall be assessed for the amount of the difference between the actual value of the whole property and the actual value of the land if there were no improvements: Provided, however, that land and improvements shall be assessed separately.

It is recited in the order under review that in the opinion of the judge "actual value" should be construed to mean "the sum which would be realized for the property upon a forced sale." This phrase, shewing the ground of the decision, should not, with deference, be included in the order. It should appear only in reasons for judgment. We need not however ignore it: It shews the basis upon which the learned judge fixed the assessment. It was urged that respondent did not advance this proposition below as a guide to the interpretation of the words "actual value" and offered no evidence to support it. A reference however to the record discloses evidence which, although not precise, might possibly appear to support the view that "actual value" might be found by seeking an answer to the question—what would a hypothetical or actual purchaser pay for the property at a forced sale? At all events, rightly or wrongly, the order is based on that viewpoint. With great respect I do not think that is the proper avenue of approach. Appellant contended (and the Court of Revision acted upon the view) that the dominant consideration was the structural cost of the building; or cost of replacement. Some deduction was made from the actual cost but it was on that basis that the assessment on the improvements, *viz.*, the school building, was actually made. This basis too, in my opinion, is erroneous.

The history of section 212 was referred to. In 1897 the corresponding section was 113 of Cap. 144, R.S.B.C. 1897, and read as follows:

> For the purposes of taxation, land and improvements within a municipality shall be estimated at their value, the measure of which value shall be their actual cash value as they would be appraised in payment of a just debt from a solvent debtor.

In *Re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361 the late Mr. Justice WALKEM reduced the assessment

on a residence costing $185,000 to $45,000. This, he thought, was the amount at which it could properly be appraised in payment of a debt. In *In re Vancouver Incorporation Act, 1900, and Rogers* (1902), 9 B.C. 373 dealing with a similar section in the Vancouver Incorporation Act the judge refused to reduce an assessment fixed at $6,000 less than the actual cost of construction, *viz.*, $50,000.

In 1899 section 113 *ante* was repealed (Cap. 53, Sec. 7) and the following substituted:

> For the purpose of taxation land and improvements shall be estimated at their value, the measure of which as to land shall be the actual cash value, as to improvements shall be the cost of placing at the time of assessment such improvements on the land, having regard to their then condition; the land and improvements shall be assessed separately.

This meant as to improvements reproduction cost (or replacement value) of a structure in the condition of the one assessed and if still in force would justify the method followed by the Court of Revision. This section however was repealed and section 212 (1) virtually as it now reads appeared in B.C. Stats. 1915, Cap. 46, Sec. 30.

MACDONALD, J.A.

All we can say from this history is that in ascertaining "actual value," where we have not the benefit of additional phrases the old aids, *viz.*, "payment of a just debt from a solvent debtor" and "replacement value," while they may possibly be considered as factors in taking a general view of the whole problem no longer form the true basis for assessment purposes.

In *Gates' Case* (1918), 2 W.W.R. 930, THOMPSON, Co. J., dealing with the present section, considered the passing of the British Columbia Prohibition Act as an element affecting the value of a hotel. I think he was right in doing so. So too, although it does not necessarily follow from the case referred to, a school or college engaged, not in commercial pursuits but in academic work, carried on, to some extent at least, on a charitable basis should be viewed from the standpoint of the "use" to which the building is devoted. It does not follow that its assessment should be unreasonably low because it is non-productive in a commercial sense: it does mean that a proper valuation cannot be reached without due regard to that feature.

COURT OF APPEAL

1933

March 10.

THE BISHOP OF VICTORIA v. THE CITY OF VICTORIA

MACDONALD, J.A.

There are two kinds of value known to economists, *viz.*, value in use and value in exchange. An article may have great value in use because of special properties or characteristics not susceptible to measurement by commercial standards and have comparatively little value in exchange. It is the latter measure of valuation, properly understood however, that should be applied. In doing so we have a guide in the judgment of the late Mr. Justice Idington in *Pearce* v. *Calgary* (1915), 9 W.W.R. 668 at 672-3. In interpreting the words "fair actual value" (and the word "fair" adds little to the phrase) as applied to land, at the time unsaleable, and likely to remain so for many years, he said:

> In the course of liquidation which always follows and has to be faced by those concerned in disposing of such properties under such circumstances, there are generally some prudent persons possessed of means or credit who will attempt to measure the forces at work making for a present shrinkage in values for a time and again likely to arise making for an increase of value.
>
> Such men are few in number and of these only a very small percentage perhaps are able to make a rational estimate of these reversible currents, and a still smaller percentage willing to venture the chances of their investment on the strength of their best judgment. They know that the shrewdest and most far seeing may be mistaken.
>
> I take it that the "fair actual value" meant by the statute quoted above is, when no present market is in sight and no such ordinary means available of determining thereby the value, what some such man would be likely to pay or agree to pay in way of investment for such lands.

This test may be applied to lands on which is erected a school, practically unsaleable at present as such, with the qualification that in determining "what some such man would be likely to pay or agree to pay in way of investment" regard must be had to the likelihood that the "reversible currents" which affect land causing it at times to depreciate and again to appreciate in value will not, at least to the same degree, affect a building of this character dedicated for all time to academic and moral pursuits. This latter consideration would induce the mythical investor to reduce his estimate accordingly. That I think is a fair conclusion. I refer only to the building. There is no appeal in regard to the assessment of the lots. Their value will change with changing conditions. The valuation of the "improvement" may remain stationary while that of the land advances.

The building must be treated as an academy as long as it remains as such in making assessments. It is improper, for assessment purposes to mentally convert it, so to speak, into a revenue-producing commercial structure (*e.g.*, an apartment-house) and value it accordingly. That would be placing a value not on this special "improvement" but on something else not in existence. To follow this method one would be taking into account potential values whereas the meaning of "actual" is "as opposed to potential." It must be valued *qua* school and although the task is difficult it cannot be shirked by adopting an easier or unsound method.

MACDONALD, J.A.

As we have no jurisdiction over questions of fact, I would remit the matter to the same learned judge to fix the assessment on the improvements on the principles outlined. He, as a jury, must, as best he can on the evidence already heard, fix the amount following the principles laid down by Idington, J. qualified as herein indicated because of the special nature of the "improvement." The appeal should be allowed but, as appellant sought to invoke a wrong method of assessment, *viz.*, replacement value, it should be without costs. Formally the cross-appeal is dismissed without costs.

Appeal allowed.

Solicitor for appellant: *H. S. Pringle.*
Solicitor for respondent: *C. H. O'Halloran.*

COURT OF APPEAL

1933

Feb. 20.

ANDLER v. DUKE

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

Practice—Action involving title to land—Costs—Appendix N—"Amount involved"—Meaning of.

In an action involving the title to certain property in the City of Victoria, the plaintiff recovered judgment on the trial which was affirmed by the Court of Appeal. On appeal to the Supreme Court of Canada, the appeal was allowed with costs, including the costs of the trial and in the Court of Appeal. On the taxation of the defendants' costs of the action, evidence was submitted that the assessed value for said lands with improvements for the year 1931 was $55,400, and the defendants claimed that this sum should be accepted as the "amount involved" in the action within the meaning of Appendix N of the Supreme Court Rules, and the costs should be taxed under Column 4 in the Tariff of Costs. The costs were taxed by the taxing officer under Column 2 in said Tariff of Costs, and an application to review the taxation on the ground that it should have been under said Column 4 was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J. (MCPHILLIPS, J.A. dissenting), that this case being one of simply a question of title and the subsequent right of registration by order of the Court of one of the parties as owner, it cannot be said to be one which has a pecuniary "amount involved" within the meaning of the Appendix and the appeal should be dismissed.

Per MARTIN and MACDONALD, JJ.A.: Under the final clause of the introductory paragraph in Appendix N it was open to the appellants to have applied before the taxation to a Court or judge to have their costs taxed under Column 4, but this was not done.

APPEAL by defendants from the order of MCDONALD, J. of the 31st of January, 1933, refusing to direct a review of the taxation of the defendants' costs of this action. The action involves the ownership of lots 3, 4, 11 and 12 in block 75 (plan 219) in the City of Victoria, and said lands have at all times since the 1st of March, 1926, been leased to Angus Campbell & Co. Ltd. at a rental of $550 a month. The assessed value of said lands with improvements for the year 1931 was $55,400. The action was brought to enforce a claim that the plaintiffs were entitled to said lands by virtue of a judgment dated the 30th of July, 1928, in the Supreme Court of California. The plaintiffs recovered judgment in the action, which was affirmed by the Court of Appeal. On appeal to the Supreme Court of

Statement

Canada, the appeal was allowed and the respondents were ordered to pay the costs incurred by the appellants in the Court of Appeal and in the Supreme Court of British Columbia. The deputy district registrar at Vancouver taxed the defendants' costs of the action under Column 2 of the Tariff in Appendix N to the Supreme Court Rules, over the objection of counsel for the defendants that said costs were taxable under Column 4 of said Tariff.

Statement

The appeal was argued at Victoria on the 16th of February, 1933, before MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

A. D. Crease, for appellants: The property in dispute was assessed at $55,400. The question is the meaning of the words "amount involved" in Appendix N. The "amount" involved is the "value" involved: see *Davies* v. *Schulli* (1927), 39 B.C. 321; *Burnett* v. *Hutchins Car Roofing Co.* (1917), 54 S.C.R. 610. The registrar should enquire and take evidence as to the Column applicable: see Phipson on Evidence, 7th Ed., 344.

Bull, K.C., for respondents: Everything that does not contain a money claim is put into Column 2: see *Haddock* v. *Russell* (1892), 8 Man. L.R. 25. "Money in question" and "amount involved" mean the same thing. *Burnett* v. *Hutchins Car Roofing Co.* (1917), 54 S.C.R. 610 is in our favour. There was no evidence before the registrar upon which he could tax under Column 4. "Assessed value" is generally an over value and should not be accepted as "actual value."

Argument

Crease, replied.

Cur. adv. vult.

20th February, 1933.

MARTIN, J.A. (oral): In this case the question arises on the taxation of costs under Appendix N of the Tariff, and the case comes before us in an appeal from the decision of Mr. Justice D. A. MCDONALD, wherein he held that the registrar was right in taxing the appellants' costs in the manner he did; namely, that they should be taxed under Column 2 of the said Appendix, and not under Column 4, as the present appellants submit.

MARTIN, J.A.

The question turns on the meaning of the expression "amount involved," as used in the said Appendix, and after a very full and careful consideration of the matter, I have reached the

COURT OF APPEAL

1933

Feb. 20.

ANDLER v. DUKE

opinion that the learned judge took the proper course in confirming the taxation by the registrar.

In order to understand the exact point it is necessary to bear in mind that what we are dealing with is the meaning of the expression "amount involved" as used by the Appendix, and the whole of it has to be read to get at the true meaning.

It begins by saying that:

> In all actions for liquidated amounts of money, damages, and other actions at common law, and for enforcement of all equitable remedies and all proceedings by way of appeal, there shall be taxable the amount set out opposite each respective tariff item in the columns hereinafter set out.

In Column 1 the "amount involved" is $3,000 or under; and Columns 2, 3 and 4 deal with various progressive amounts respectively. And then it proceeds to say:

> In all other actions and proceedings there shall be taxable the amount set out opposite each respective tariff item in Column 2: Provided, however, that for special cause the Court or judge may, at any time at or after trial and before the bill of costs has been taxed, order the costs to be taxed under Column 1, 3, or 4.

MARTIN, J.A.

It is conceded by both counsel, it should be noted, that Rule 983 does not apply to this case, and it is also, in effect, conceded that it was open to the present appellants to have applied to a Court or a judge to have their costs taxed under Column 4, and in view of the importance of this action it is not seriously suggested that it would not have been very proper indeed for a learned judge below to have applied the tariff to its full extent. It is unfortunate, I might say, that Mr. *Crease* did not avail himself of this opportunity to make that application and put the matter beyond peradventure, but we have to deal with it as it stands and to see if even now he can obtain the desired result on the construction that he puts forward, even though it is too late, admittedly, after taxation, to obtain it otherwise.

In order to determine this matter, we have to consider the nature of the action, and it is conceded that this is one which is essentially an equitable remedy, because what is asked for here, as the statement of claim recites and prays, is that a certain instrument held by the defendants, to which they were entitled, should be cancelled as null and void, and that, after that was done, a declaration should be made that the plaintiffs herein are the owners, and "entitled to be registered as the owners in fee

simple of, those certain parcels or tracts of land and premises . . . according to a map or plan deposited in the Land Registry office," and that a vesting order be made by which the title to the property should be vested in the plaintiffs and that they should be recorded as the registered owners thereof.

Such being the case, we are dealing with a thoroughly equitable remedy, as the Appendix says, and it is difficult for me to imagine how, with all respect to contrary opinion, it can be said in such case that there is an "amount involved" within the meaning of the Appendix.

We have been referred to a decision by a very distinguished judge, Mr. Justice Killam, in *Haddock* v. *Russell* (1892), 8 Man. L.R. 25, wherein he decided that in an action of replevin, on appeal under the County Courts Act of Manitoba, 1887, which only allowed an appeal when the "amount in question" was $20 or more (and there can be no doubt that the expressions "amount in question" and "amount involved" are identical), a question of title only was raised, saying "There is no right of appeal, as no money is in question." That is, I think, put briefly, the test of this present appeal, and although it can be said that property is here involved, yet that does not mean that there is an "amount involved," because "amount" as here used means an amount of money.

MARTIN, J.A.

It is true that there might be cases of application of equitable remedies wherein an amount of money would be directly involved. For instance, it strikes one immediately, there might be a special definite sum of money in a bank to the credit of one person and yet it could be declared that such person was the trustee of another therefor and because the property was solely money it would constitute an "amount," because money itself, or its commercial equivalent, in the shape of a fixed fund was the subject-matter of the action, and therefore an "amount" was necessarily involved.

But, to give an illustration on the other hand, it could not be said, viewing the expression properly, to my mind, that if John Doe filed a bill in Chancery to have it declared that a will, under which Richard Roe had acquired the paper title to Blackacre to the detriment of John Doe, had been obtained by Roe's

COURT OF APPEAL

1933

Feb. 20.

ANDLER v. DUKE

undue influence, that there was an "amount involved," though the result of the action if successful would be that the title to Blackacre would pass from Roe to Doe and Roe would have to account for the *mesne* profits: to my mind "amount involved" is not synonymous with "property involved"; and in every case the substance of the action must be considered in its particular circumstances to ascertain its primary nature with regard to the application of said Appendix.

But whatever may be the amount of the property which is directly or indirectly involved, whether it is $10,000 or $100,000, there is the said remedial power given by said Appendix to meet the justice of every meritorious case by declaring that "for special cause" the taxation should be in accordance with what justice requires in the discretion of the "Court or judge" exercised "at any time at or after trial" before the bill has been taxed.

MARTIN, J.A.

I, therefore, can only reach the conclusion that this case being one of simply a question of title, and the subsequent right of registration by order of the Court of one of the parties as the owner in the Land Registry office, pursuant to a vesting order, it cannot be said to be one which has a pecuniary "amount involved" within the meaning of the Appendix, and therefore the appeal should, I think, be dismissed.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A. (oral): The case in which this matter arises is perhaps one of the most imporant cases which has ever arisen, I might say in all Canada, and the first and final decision of the final Court of Appeal in Canada upon the point. The litigation has relation to the Promis Block, on Government Street, in the City of Victoria, a well known building. The litigation ended with the judgment of the Supreme Court of Canada, *Duke* v. *Andler* (1932), S.C.R. 734. I will refer as I proceed to language used by Mr. Justice Smith, who delivered the unanimous judgment of the Supreme Court of Canada. Shortly, an action was brought in the Superior Court of the County of Alameda, State of California, to have it declared that certain property which is the property I have referred to, sold for $55,000, should be retransferred to the vendors, and if default made an officer of the Court should execute the convey-

ance making a declaration of title to the land in the names of the vendors, that is, declaring that the vendors, not the vendees, should have vested in them the title thereto.

The question is this—What item of the tariff should control the taxation of the costs? Now the action that was brought, was brought in the State of California, and the judgment of that Court was sued upon in the Supreme Court of British Columbia and was approved—given effect, and it was so declared by the trial Court in British Columbia without having passed upon the merits, but adopting the adjudication as to title of the California Court, and the Appellate Court in British Columbia on appeal upheld the trial Court. I dissented.

Now the judgment in the Superior Court of California which this Court approved is in these terms (I make it as short as I can):

> 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,—

that would be to convey it to the vendor. The vendors had executed a deed and it was placed in escrow in California following the agreement to purchase at $55,000, providing for payment in a certain way.

Now the allegation in the claim was that title to the land was obtained by fraud, because the deed having been placed in escrow with the bank or trust company, had been taken out by the vendees wrongfully, that is he had not given the certain promissory notes and paid the $10,000 and otherwise complied with the agreement for sale; therefore it was obtained by fraud and the Court so held and so decreed and ordered that the property should be reconveyed; all the parties were under the jurisdiction of the State of California's Court, because they resided there, and the decree was that the property should be reconveyed to the vendors. If they did not do that, then an officer of the California Court should do it, and an officer of the Court did do it, and that deed was produced to the Land Registry office at Victoria, and the land registrar refused to accept it and register it. Then it was that an action was brought, founded on the Californian judgment, in the Supreme Court of British Columbia. The Supreme Court of British

COURT OF APPEAL

1933

Feb. 20.

ANDLER v. DUKE

Columbia did not hear the evidence or go into the merits of the case at all. The Supreme Court of British Columbia approved that judgment without enquiry or trial on the merits. There was an appeal to this Court of Appeal, and the Court of Appeal supported the judgment of the Court below. Then there was an appeal to the Supreme Court of Canada, and the Supreme Court of Canada reversed the judgment of this Court.

The Supreme Court of British Columbia had to apply its mind to this extent, at least, that it was litigation in relation to a sale of land for $55,000 and that there was no payment; if there had been no default and the $55,000 paid there would have been no litigation. The decree is founded, and must be founded upon the fact that $55,000 that had been agreed to be paid was not paid.

Therefore I say that there was involved, in the action the non-payment of the $55,000. How could it be otherwise, because if the $55,000 had been paid, there could have been no such decree, and certainly this Court would have been imposed upon grossly if it approved a judgment of this character, when the vendees had really paid this $55,000. It would mean that the successful party in California had both land and money, an unthinkable thing.

MCPHILLIPS, J.A.

So when I look at these proceedings it is evident that $55,000 was involved in the proceedings in this Court, because the Court, on the face of the statement of the Superior Court of the State of California, chose to believe the Superior Court of the State of California, that the agreement had not been complied with and the deed had been got by fraud, and the property should be reconveyed.

Now let us see what the rule is, page 245, B.C. Supreme Court Rules:

> In all actions for liquidated amounts of money, damages, and other actions at common law, and for enforcement of all equitable remedies and all proceedings by way of appeal, there shall be taxable the amount set out opposite each respective tariff item in the columns hereinafter set out, that is to say:—

In this particular case it had to be determined that the $55,000 was not paid, because if it were paid, why of course no such judgment could be given. The Supreme Court of British Columbia had before it default to the extent of $55,000

being the purchase price of the land when they approved the order and decree of the Superior Court of the State of California. Now Column 1:

> Where the amount involved is $3,000 or under.
>
> Column 2: Where the amount involved exceeds $3,000 but does not exceed $10,000.

It is Column 2, Mr. *Crease,* under which you were allowed costs, was it not?

[*Crease*: Yes, my Lord].

So the amount involved exceeds $3,000, but does not exceed $10,000, according to the taxing officer—what justification can there be for such a holding? Can it be said that this case only involved an enquiry into an amount not exceeding $10,000? I cannot agree with the taxing officer.

And further, let me note this, a further provision of the decree of the California Court:

> It is further ordered, adjudged and decreed that the plaintiffs herein named to have and recover of and from the defendants G. E. Duke and Margaret E. Duke the sum of $16,804.11 together with plaintiffs' costs and disbursements incurred herein. . . .

Now surely at least that was involved; and that would put the costs under Column 3.

Here is the decree, approved by the Supreme Court of British Columbia, approved by the Court of Appeal of British Columbia, and set aside by the Supreme Court of Canada.

I may say that my learned brother MARTIN copies in his judgment the decree of the Superior Court of California, and what I have read is found in that decree.

The Supreme Court Rules, of which this Appendix N and taxation of costs form a part, have the force of statute law. When construing statute law it is always permissible to construe it in favour of that which is apparently intended to be dealt with, and also in accordance, in so far as the Court can say, with the intention of the Legislature, and the Court may go a very long way in interpreting statute law, so long as no violence is done to the language used. Now is there any violence to this language that in a case of this character, involving the determination that $55,000 of the purchase price of the land was not paid, involving also a further $16,804.11? Can it be said, and said with reason, that one does violence to the language of the

COURT OF APPEAL

1933

Feb. 20.

ANDLER v. DUKE

statute, when one would say that it should have been taxed under Column 4?—which reads:

When amount involved exceeds $25,000.

It baffles me to see how it can be contended, and with great respect to what my learned brother who has preceded me has said, it baffles me to see how it is possible on the face of these proceedings to hold that the Court was not seized with a matter, and did not deal with a matter, which involved $55,000, because, as I have said, if the $55,000 had been paid there could have been no such decree in the California Court, nor could it have been approved in the Supreme Court of British Columbia.

Now this rule is supposed to cover all cases. I may say in passing, that even as provided here, I think the practitioners get a very insignificant amount for the services rendered. I would like to know how much the costs taxed at.

[*Crease*: In the appeal book—$403.]

A case of this magnitude in the Superior Court of California is brought here and sued upon and approved by this Court, and the sum of $403 only is allowed for a trial and an appeal to this Court.

MCPHILLIPS, J.A.

[*Crease*: Without the appeal, my Lord. The appeal costs have not been taxed, awaiting the decision of this Court.]

The statute law with respect to the right of appeal to the Supreme Court of Canada was amended by chapter 44 of the Statutes of Canada, 1930, to be found at page 341. The right to appeal to the Supreme Court of Canada is limited as follows:

Where the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars.

Now we have not got this in the taxation rule, but we have, "value of the matter in controversy in the appeal," in these words, but we have the words: "Where the amount involved." What was the amount involved in the determination of this matter? It was the Court bringing its mind to bear on a contract for sale of $55,000.

The Supreme Court of Canada went, as I have mentioned, upon the question of law, which has been determined now for all time in Canada, that no foreign Court can invade our country and pronounce a decree in respect to the title to land in this country and pretend to say that land should be transferred

from A to B. It is, in effect, a judgment of this character which has been reversed.

I may say I took a different view from my learned brothers. It was a very important question, one that involved a great deal of research. I took the view that *British South Africa Company* v. *Companhia de Mocambique* (1893), A.C. 602, had removed all doubts that previously existed in respect of this jurisdiction, *i.e.,* foreign land, when all the parties even were within the jurisdiction of the Court. That was the case here. The view I took was that the Court was limited in such a case to a decree *in personam,* and I considered the decree as being one *in rem.*

The Supreme Court of Canada referred to the case that raised some doubt: *Penn* v. *Lord Baltimore.* Mr. Justice Smith said at p. 739:

MCPHILLIPS, J.A.

> In numerous decisions, however, besides *Penn* v. *Lord Baltimore,* it has been pointed out that, in exercising jurisdiction in such cases, the Courts act *in personam.*

This case was in 1750—a long time ago—to be found in 1 Ves. Sen. 443. Mr. Justice Smith said that *Penn* v. *Lord Baltimore* could no longer be looked upon as good law, and the matter is now finally determined.

It is well to have certainty in this matter. I do not think I am unduly extending the language used in the Rules, when I say that in this case the amount involved was $55,000 and the taxation should have been under Column 4, and I would allow the appeal.

MACDONALD, J.A. (oral): This is a simple question of taxation of costs, and does not involve an examination of the case except to see the nature of the relief claimed. We are only, too, concerned with the action in our own Courts, not in the California Court.

My brother MCPHILLIPS referred to a decree in the California Court where the definite sum of $16,000 was mentioned, but there was no claim made in respect to that amount here. There can be no doubt from the relief sought in the statement of claim, and it is also made clear in the judgment of Mr. Justice Smith in the Supreme Court of Canada, at p. 737, that only a question of title was involved.

MACDONALD, J.A.

COURT OF APPEAL

1933

Feb. 20.

ANDLER v. DUKE

MACDONALD, J.A.

The complaint is that this taxation should be on a higher scale, and that is quite true. There is, however, a part of the rule in the final clause of the introductory paragraph under Appendix N, precisely applying to such a case as this, and it was open to the appellants to go to the judge and obtain an order to have these costs taxed under Column 4. That, however, was not done.

I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellants: *Crease & Crease.*

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

THE KING v. CRABBS.

Revenue—Special War Revenue Act—Sale of stock or bonds—Document evidencing ownership—Affixing revenue stamp thereto—Civil liability of broker—R.S.C. 1927, Cap. 179, Secs. 58, 63, 82 and 108—Can. Stats. 1929, Cap. 57, Sec. 4.

Section 58 of the Special War Revenue Act provides that "No person shall sell or transfer the stock or shares of any association, company or corporation . . . unless in respect of such transfer there is affixed to or impressed upon the document evidencing the ownership of such stock or shares . . . an adhesive stamp or a stamp impressed thereon by means of a die of the value of," etc., and the penalty for violence thereof is provided for by section 63 of said Act. Section 108 of said Act provides that "All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable and all rights of His Majesty thereunder enforced, with full costs of suit as a debt due to or as a right enforceable by His Majesty in the Exchequer Court or in any other Court of competent jurisdiction." In an action under said section 108 to recover $499.48, being the amount of stamps which it is alleged the defendant, a stock-broker, should under said section 58 have affixed to certain shares and stocks at the time he, as agent for the owner, sold on the Vancouver Stock Exchange, it was held that the provisions of section 108 did not apply to an infringement of section 58 of the Act and the action was dismissed.

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

Per MACDONALD, C.J.B.C.: The general law does not render the agent liable for the debt of the principal and the provisions of the Act do not render the broker liable in an action in debt for his failure to affix stamps.

Per MARTIN, J.A.: The appellant invokes the first subsection of section 108 and submits that failure to comply with the said prohibition is covered by the opening words thereof, *viz.*: "All taxes or sums payable under this Act shall be recoverable as a debt due to His Majesty" but I am unable to understand how, in the absence of any direction that a tax shall be paid by a nominated person, anyone can be fastened with the necessary legal liability to pay it to anybody; and still less can I understand how the breach of a duty not to sell or transfer property unless (Sec. 58) in the manner directed, can be converted into "taxes or sums payable" to the Crown, in the absence of express language bringing about such an incongruous result.

APPEAL by the Crown from the decision of ELLIS, Co. J. of Statement

COURT OF APPEAL

1933

June 6.

THE KING v. CRABBS

Statement

the 24th of October, 1932, in an action to recover $499.48 due under the Special War Revenue Act for stamp tax on the sale or transfer of certain stocks and shares of associations, companies and corporations by the defendant in the course of his business as a stock-broker in the City of Vancouver, between the 1st of July and the 11th of November in the year 1929. The action is brought under sections 58 and 108 of said Act, section 58 having been repealed and substituted for by section 4 of Cap. 57, Can. Stats. 1929.

The appeal was argued at Vancouver on the 7th and 8th of March, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

W. H. S. Dixon, for appellant: The Crown claims stamp taxes in the sum of $499.48 under sections 58 and 108 of the Special War Revenue Act. Section 58 was re-enacted in 1929. The learned judge erred in holding that Part VII. of the Act are only penal sections. Construction of the Act must be made by taking all the Parts together: see Maxwell on the Interpretation of Statutes, 7th Ed., 25; *Turquand* v. *Board of Trade* (1886), 55 L.J., Q.B. 417. The object of the Act is to collect taxes and not solely to inflict penalties. Section 58 includes everybody and section 108 applies to all taxes and includes those payable under section 58.

Grossman, for respondent: Section 58 only applies to a penalty and section 108 has no application to that section. There are two types of taxation (a) by stamps to which a penalty is attached for non-compliance and (b) an excise tax for cards, etc., under section 82, and it is to this section that section 108 applies: see *Rex* v. *Walker & King Ltd.* (1921), 3 W.W.R. 191 at p. 193; *Rex* v. *Disappearing Propeller Boat Co. Ltd.* (1924), 55 O.L.R. 545 at p. 546.

Dixon, replied.

Cur. adv. vult.

6th June, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The action is brought to recover the amount of certain revenue stamps which it is claimed the defendant wrongfully omitted to affix to stocks and bonds sold

by him as a broker. Part VII. of the Special War Revenue Act, Cap. 179, R.S.C. 1927, is relied upon to fix liability on the broker for the failure to affix the stamps. Section 58 of said Part VII. reads:

> No person shall sell or transfer stock or shares of any association, company or corporation, or any bond other than a bond of the Dominion of Canada or of any Province of Canada by
>
> (*a*) agreement for sale;
>
> (*b*) entry on the books of the association, company or corporation;
>
> (*c*) delivery of share certificates or share warrants or bond endorsed in blank or payable to bearer; or
>
> (*d*) any other method whatsoever;
>
> unless in respect of such sale or transfer there is affixed to or impressed upon the document evidencing the ownership of such stock or shares or bond, . . . an adhesive stamp, or a stamp impressed thereon by means of a die, . . .

The defendant negotiated the sale of the securities in question as agent or broker only. He had himself no interest in them and resists, *inter alia,* payment on this ground. By section 59 it is provided that "in case where the evidence of sale or transfer is shewn only by the books of the company the stamp shall be placed or impressed upon such books."

Section 63 provides a penalty of $500 for the violation of the provisions of this Part. But this is not a proceeding for penalties, nor for damages for not affixing the stamps. Section 108 makes all taxes or sums payable under this Act recoverable by His Majesty as a debt; also the penalties. By section 108 (3) every penalty imposed by this Act for which no provision for recovery thereof is by the Act provided may be sued for.

Do these provisions of the Act render the broker liable to be sued by His Majesty the King in debt for his failure to affix stamps? It is my opinion that they do not, and this is the only question I need consider in this case.

The opening words of section 58 are wide enough standing alone to include a broker but a broker is not the seller or transferor in the legal sense. He brings about the sale or transfer, but his principal is the seller or transferor. There is nothing in the Act making the broker liable as principal. There are indications to the contrary as where the entry of sale is to be made on the books of a company the stamps are to be affixed to the book. Then again the general law does not render the

COURT OF APPEAL

1933

June 6.

THE KING v. CRABBS

agent liable on a sale of his principal's property. The act of the broker or agent is in law the act of the principal and to render the agent liable for the debt of the principal there must be special warrant for it in the Act which is absent here.

Section 59 (3) is significant. It provides that where the transfer is by delivery of the certificate or bond in blank or payable to bearer "there shall be delivered by the seller to the buyer a memorandum of the sale or transfer to which the stamp shall be affixed or impressed." This to my mind indicates that the broker is not to be considered as the seller but merely the agent for bringing about the sale.

MACDONALD, C.J.B.C.

See Meyer's Law of Stock Brokers and Stock Exchanges, 1932 Supp. at p. 13 where he cites *Connelly* v. *Glenny,* 233 App. Div. 198, at p. 199, 251 N.Y. Supp. 288 at p. 289:

> The relation which existed between plaintiff (customer) and defendants (brokers) was that of principal and agent, and not of buyer and seller. Defendants were not selling their own stock; they were acting as brokers for the plaintiff.

Additional American authorities are cited there but I need not quote them. The law of our own country is plain that an agent acts only for his principal, not for himself.

In my opinion, therefore, the agent is not liable in this action for the failure to affix the stamps and this appeal must be dismissed. It is not necessary to refer to the other questions argued.

MARTIN, J.A.

MARTIN, J.A.: This is an action to recover "as a debt due to His Majesty" under section 108 of the Special War Revenue Act, Cap. 179, R.S.C. the sum of $499.48, being the amount of stamps which it is alleged that the defendant, a stock-broker, should, pursuant to section 58, have affixed to, or had impressed upon, certain shares and stocks at the time he, as agent for the owner thereof, sold them on the floor of the Vancouver Stock Exchange to various purchasers: that section declares, relevantly, that

> No person shall sell or transfer the stock or shares of any association, company or corporation . . . unless in respect of such sale or transfer there is affixed to or impressed upon the document evidencing the ownership of such stock or shares . . . an adhesive stamp, or a stamp impressed thereon by means of a die, of the value of three cents for every

one hundred dollars or fraction thereof the par value of the stock or shares or bond sold or transferred.

This section does not declare that any tax or sum is payable by any person or party to the sale or transfer, whether vendor, or purchaser, or corporation making the transfer in its "books," (*cf.* sections 59, 60), nor does it declare who shall affix or impress the stamps, but simply prohibits the selling or transferring of unstamped stocks and shares, and the penalty for violation of this prohibition is to be found in section 63, *viz.*:

Any person who violates any of the provisions of this Part shall be liable to a penalty not exceeding five hundred dollars.

Then subsections 2 and 3 of section 108 provide for the recovery, by nominated civil process, of "every penalty incurred for any violation of the provisions of this Act," and it was not disputed that said civil proceedings could be brought to recover the amount of any penalty that had been duly inflicted upon any one who had violated said prohibition, and it is beyond question, to my mind, that if there were no more in the Act, said sections would conclude the matter in favour of the defendant-respondent.

MARTIN, J.A.

But the appellant invokes the first subsection of said section 108 and submits that the failure to comply with the said prohibition is covered by the opening words thereof, *viz.*: "All taxes or sums payable under this Act shall be recoverable . . . as a debt due to His Majesty . . .," but, with every respect, I am unable to understand how, in the absence of any direction that a tax shall be paid by a nominated person, any one can be fastened with the necessary legal liability to pay it to anybody; and still less can I understand how the breach of a duty not to sell or transfer property "unless" (section 58) in the manner directed can be converted into "taxes or sums payable" to the Crown, in the absence of express language bringing about such an incongruous result.

Therefore, whatever questions may otherwise be involved, in my view the statute as it originally stood as applicable to this case, and quite apart from any inference to be derived from later amendments, does not authorize the bringing of the present action, and so the judgment below dismissing it should be affirmed and this appeal dismissed.

COURT OF APPEAL

1933

June 6.

THE KING v. CRABBS

I note the cited case of *Rex* v. *Walker & King Ltd.* (1921), 3 W.W.R. 191, only to say that the language of the statute there in question differs substantially from that before us and therefore I do not rely upon it, though in its general reasoning it affords some support to the respondent.

MCPHILLIPS, J.A.: In my opinion the statute law is definite and precise—that the stamp tax is payable on sales or transfers of stock, bonds, etc. (section 58, R.S.C. 1927, Cap. 179, Special War Revenue Act). Here admittedly the respondent did effect sales of stock and failed to affix the stamps thereon as called for by the statute. The contention is that being a broker only he is not answerable therefor. I cannot follow the submission made that the broker is not a "person" within the purview of the Act (section 58). The section reads as follows [already set out in the judgment of MACDONALD, C.J.B.C.].

The broker (the respondent) made the sales and in his examination at the trial the following questions were put and the following answers made: [after setting out the questions and answers the learned judge continued].

MCPHILLIPS, J.A.

In my opinion upon this evidence and the application of section 108 of the Act the money value of the stamps constituted a debt due by the respondent to His Majesty and the action was rightly brought and maintainable against the broker. Section 108 in part reads as follows:

> 108. All taxes or sums payable under this Act shall be recoverable at any time after the same ought to have been accounted for and paid, and all such taxes and sums shall be recoverable, and all rights of His Majesty hereunder enforced, with full costs of suit, as a debt due to or as a right enforceable by His Majesty, in the Exchequer Court or in any other Court of competent jurisdiction. . . .

It is pressed that because the Parliament of Canada substituted by an amendment in 1930—Cap. 43, An Act to Amend the Special War Revenue Act—a new section and repealed section 58 as in the principal Act it demonstrates that section 58 as originally enacted was ineffective. With this view I cannot agree. Judgment must go on the then existent statute law and I consider that it was in its terms effective and covers the present case. No doubt amendments at times are made out of abundance of caution but they cannot be considered by the

Courts—every case must stand or fall upon the existent statute law. There is no merit in this appeal. The broker was aware of the liability and took steps to protect himself—he contravened the law.

I am unable—with great respect to the learned trial judge—to arrive at any other conclusion than that the case of the Crown was fully made out and I would therefore allow the appeal.

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

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *W. H. S. Dixon.*
Solicitors for respondent: *Grossman, Holland & Co.*

HADDON v. FILLMORE.

Official guardian — Infant's estate — Interest on marriage settlement of parents—Interest on legacy administered in England—Paid to official guardian—Right to commission on these sums—Section 18 of Official Guardian Act—Validity—R.S.B.C. 1924, Cap. 186, Sec. 18.

The applicant, on his coming of age, became entitled to (a) The balance of the estate of his father received by the official guardian from the administrator of said estate. (b) The *corpus* and accumulated income of a marriage settlement entered into by his parents in England of which The Royal Trust Company is trustee. (c) The *corpus* and accumulated interest arising out of a devise in the will of an aunt in Wales, Lloyd's Bank, Limited, being trustee. (d) Five hundred pounds being proceeds of a policy of insurance payable on the applicant coming of age. During the course of his guardianship the respondent received $4,255.26 income from The Royal Trust Company as trustee of the marriage settlement and $5,481.32 income from Lloyd's Bank, Limited, as trustee of the aunt's estate. It was held that the two latter sums form part of the gross value of the estate whereof the respondent was guardian, and he is entitled to a commission on said sums under section 18 of the Official Guardian Act.

Held, on appeal, affirming the decision of FISHER, J., that the money was voluntarily paid to the official guardian who had to apply it according to law, however trifling the labour and responsibilities involved. The money became, when received, part of the infant's estate and the Act

COURT OF APPEAL

1933

June 6.

enabled the official guardian to charge a commission on it for the benefit of the Province.

Held, further, that the commission charged under section 18 of the Act is not an indirect tax and said section is *intra vires* of the Provincial Legislature.

HADDON *v.* FILLMORE

APPEAL by applicant from the order of FISHER, J. of the 15th of February, 1933, on an originating summons issued for the determination of certain questions in relation to the applicant's estate. The applicant who was 21 years old on the 23rd of June, 1932, then became entitled to (a) The balance of his deceased father's estate in the hands of the respondent as administrator of said estate, amounting to $14,939.82. (b) The *corpus* and accumulated income arising under a marriage settlement trust deed made between his father and mother in Birmingham, England, on the 11th of July, 1910, whereof The Royal Trust Company is now trustee, amounting to about $20,000. (c) The *corpus* and accumulated income arising out of a devise and trust in the last will of Alice Hadley of Conway in the County of Carnarvon, Wales, duly proved in England, and amounting to about $20,000. (d) Five hundred pounds proceeds of an insurance policy. In addition to the $14,939.82 received by the respondent he has received during the course of his guardianship (a) $5,481.32 income from Lloyd's Bank, Limited, the trustee of the Alice Hadley trust aforesaid; (b) $4,255.26 income from The Royal Trust Company as trustee of the marriage settlement trust deed aforesaid. The questions for determination are: (1) Whether the last two mentioned sums (in all $9,736.58) form part of the gross value of the estate whereof the respondent was guardian within the meaning of section 18 of the Official Guardian Act? (2) If question 1 is answered in the affirmative is the respondent entitled by said section 18 to a commission on said sum? (3) If questions 1 and 2 are answered in the affirmative and a commission on said sum is payable to the Province by virtue of said section 18, is said commission an indirect tax and is said section 18 of the Official Guardian Act *ultra vires* the Legislature of British Columbia?

Statement

The appeal was argued at Vancouver on the 10th of March, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

O'Halloran, for appellant: The $9,736.58 was income from two portions of the deceased father's estate that were not in the hands of the official guardian at all. The Act should be construed strictly in favour of the subject: see *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420 at pp. 424-5; *Hennell* v. *Inland Revenue Commissioners* (1932), 102 L.J., K.B. 69; Halsbury's Laws of England, Vol. 27, p. 180, sec. 345; *In re Finance Act, 1894, and Studdert* (1900), 2 I.R. 400 at p. 410. It is clear that the two outside estates are not included in section 18 of the Official Guardian Act. In any case this would be an indirect tax and *ultra vires* of the Provincial Legislature: see *Cotton* v. *Regem* (1913), 83 L.J., P.C. 105 at p. 115; *Burland and others* v. *Regem* (1921), 91 L.J., P.C. 81; *City of Windsor* v. *McLeod* (1926), 2 D.L.R. 97; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357; *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (1932), 3 W.W.R. 639 at pp. 642-3; *Halifax (City)* v. *James P. Fairbanks' Estate* (1927), 97 L.J., P.C. 11 at p. 15.

Argument

H. J. Davis, for respondent: All moneys received by the official guardian are subject to commission under the Act: see Halsbury's Laws of England, Vol. 27, p. 180, sec. 345, see also sec. 327. The section is mandatory and applies to everything received in his official capacity: see *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575. The official guardian could not demand the money held by trustees in England, but once having received it the Act applies.

O'Halloran, in reply, referred to *Attorney-General of Quebec* v. *Reed* (1884), 54 L.J., P.C. 12.

Cur. adv. vult.

6th June, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: Three questions are submitted for our decision as follows:

1. Does the sum of Nine thousand, seven hundred and thirty-six dollars and fifty-eight cents ($9,736.58) income received by the respondent from the trustees of the marriage settlement trust deed and Alice Hadley trust form part of the gross value of the estate whereof the respondent was guardian within the meaning of section 18 of the Official Guardian Act, Cap. 186, R.S.B.C. 1924 and amending Acts?

2. If Question No. 1 is answered in the affirmative, is the respondent

COURT OF APPEAL

1933

June 6.

HADDON v. FILLMORE

entitled by said section 18 to a commission on the said sum of Nine thousand, seven hundred and thirty-six dollars and fifty-eight cents ($9,736.58)?

3. If Questions No. 1 and No. 2 are answered in the affirmative, and a commission on the said sum of Nine thousand, seven hundred and thirty-six dollars and fifty-eight cents ($9,736.58) is payable to the Province of British Columbia by virtue of section 18 of the Official Guardian Act aforesaid, is the said commission an indirect tax, and is section 18 of the Official Guardian Act aforesaid *ultra vires* the Legislature of British Columbia within the meaning of sections 91 and 92 of the British North America Act, in so far as such section directs payment of such commission to the Consolidated Revenue Fund of the Province of British Columbia?

I infer that both parents of the infant were dead when the official guardian was appointed and that the estates of the deceased had become vested in an administrator and in trustees in England. On the death of the parents or following that event the trustees of the marriage settlement of the parents and Alice Hadley trust and the administrator of his father's estate paid income from the properties held by them as such to the official guardian here who received it and dealt with it as part of the infant's estate, which came to his hands. Whether the English

MACDONALD, C.J.B.C.

trustees were bound to do it or not appears to me to be immaterial to the decision of this case, since the official guardian had to apply it according to law however trifling the labour and responsibilities involved. The money became, when received, part of the infant's estate and the Act enabled the official guardian to charge a commission on it for the benefit of the Province. The fact that it came from England does not affect the case. It is perhaps unnecessary but I will cite Dicey's Conflict of Laws, 5th Ed., p. 552, Rule 144:

> A guardian appointed under the law of a foreign country for a child domiciled in that country can exercise, subject to the discretion of the Court, control over the person of his ward in England, and over movables belonging to his ward situate in England.

The authorities relied on for this rule are there referred to.

Here the moneys were not controlled, they were paid over voluntarily. I take it for granted since there is nothing to the contrary shewn that these moneys were paid during the continuance of the guardianship which ended on the 23rd of June, 1932. I agree with the finding of FISHER, J. that Questions 1 and 2 should be answered in the affirmative.

In answer to Question 3, I may say that it may be considered

to be a tax. I express no opinion on it, but it is not an indirect tax. It is a payment to which the Government alone is entitled. The official guardian is merely the conduit-pipe. The Government is entitled to the commission. It is quite outside the doctrine adopted by the Courts in Customs and Excise cases. The third question should therefore be answered in the negative.

The appeal must be dismissed.

MARTIN, J.A.: There is no doubt, to my mind, that the learned judge below has, on the present facts, rightly answered the three questions submitted to him, having regard to the provisions of our Official Guardian Act, Cap. 186, R.S.B.C. 1924, the revelant sections of which, read together, must in practice include everything received by the official guardian in that capacity, and "gross value" means herein all receipts without deduction, and he was the proper person to receive in this Province the income from all sources which might lawfully come to his hands from within or without the Province.

MARTIN, J.A.

The appeal therefore should be dismissed.

MCPHILLIPS, J.A. would dismiss the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: In my opinion the trial judge reached the right conclusion and the appeal should be dismissed. The points involved call only for brief comment. True, an Act imposing burdens in the nature of taxation should be construed favourably to the subject if reasonably capable of alternative constructions: he must be brought within the letter of the law. The language however is clear and sufficiently comprehensive. All the moneys involved were received by the official guardian "in his official capacity."

As to the submission that section 18, in so far as it refers to commissions, is *ultra vires,* I doubt if the charge imposed for the work of the official guardian, in the control and disposition of moneys passing through his hands is a tax at all; nor is it material that sums so charged for services rendered are paid into the Consolidated Revenue Fund. However, it is not necessary to determine that point: if it is a tax it is procured directly from the estate or taxpayer.

MACDONALD, J.A.

Appeal dismissed.

Solicitor for appellant: *C. H. O'Halloran.*
Solicitors for respondent: *Lawson & Davis.*

COURT OF APPEAL

1933

June 6.

McDANIEL v. THE VANCOUVER GENERAL HOSPITAL.

McDANIEL v. THE VANCOUVER GENERAL HOSPITAL

Negligence—Public hospital—Infectious diseases—Diphtheria and small-pox patients in same ward—Diphtheria patient contracts small-pox—Liability of hospital—Damages.

An infant suffering from diphtheria was admitted to the Vancouver General Hospital and placed in a room on the third floor of the "Infectious Diseases Hospital." On the following day a small-pox patient was put in a room on the same floor. Three days later another small-pox patient was put in a room adjoining the infant's room and seven days later a third small-pox patient was put in the room opposite the infant's room. On the day after the arrival of the third small-pox patient the infant was moved to another floor. Four days later she was taken home and eight days after her arrival home her physician found she had contracted small-pox. The nurses in attendance on the third and fourth floors had common admittance to all the rooms on these floors and there was common use of cooking utensils. After the admission of small-pox patients, eight small-pox infections occurred on the third and fourth floors within a short period after the infant's admission. The plaintiff recovered judgment in an action for damages for negligence.

Held, on appeal, affirming the decision of FISHER, J. (McPHILLIPS, J.A. dissenting), that on the facts disclosed the defendant was negligent and the negligence was the proximate cause of the plaintiff contracting small-pox.

APPEAL by defendant from the decision of FISHER, J. of the 13th of January, 1933, in an action to recover damages for negligence and want of care by the defendant when in the custody and care of the infant plaintiff at the defendant's hospital, in that the lack of care of the defendant resulted in the infant plaintiff contracting the disease of small-pox. On the 17th of January, 1932, the plaintiff, then suffering an attack of diphtheria, was taken to the defendant hospital for isolation, care and treatment. A few days later the child's attendant physician found that there were cases of small-pox on the same floor of the hospital as the room in which the child was placed, and on the 29th of January the child was removed to another floor. The child was taken home on the 3rd of February. On the 11th of February the attendant physician visited the child

Statement

at her home and found that she had contracted small-pox. There were no small-pox patients in the hospital when the plaintiff arrived there. The first of such patients was put in a room on the same floor as the child on the 18th of January, the second was placed in a room adjoining that of the child on the 21st of January, and a third was put in a room on the opposite side of the hall from the child's room on the 28th of January.

The appeal was argued at Vancouver on the 30th and 31st of March, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Reid, K.C. (*Gibson,* with him), for appellant: This girl was nine years old. We submit that we come under the case of *Evans* v. *Liverpool Corporation* (1906), 1 K.B. 160. They must provide reasonably skilled and competent medical attendance and this was done: see *Thompson* v. *Columbia Coast Mission* (1914), 20 B.C. 115; *Moore* v. *Large* (1932), 46 B.C. 179 at p. 182. Negligence is want of care: see *Jones* v. *Sisters of Charity of the Incarnate Word* (1914), 173 S.W. 639; Salmond on Torts, 7th Ed., 28; *Boilard* v. *City of Montreal* (1914), 18 D.L.R. 366; *Hamilton* v. *Phœnix Lumber Co. Ltd. and Bunn* (1931), 1 W.W.R. 43; *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 2 K.B. 820. The cause of the injury to the child was lack of vaccination and the child is bound by the negligence of its parents. The damages are excessive: see *Cossette* v. *Dun* (1890), 18 S.C.R. 222.

Argument

MacInnes (*M. M. Macfarlane,* with him), for respondent: We submit (a) Hospital facility and technique are not in accordance with the best standard. (b) Even if approved there was failure of the operating or working out of same in regard to the technique. (c) The failure of defendant in both respects involved the plaintiff in undue exposure and risk. (d) The practice and technique having failed in their purpose the burden of proof rests on the defendant. As to the first point, the old system was segregation and the up-to-date system started in 1932 but it broke down. The defendant took no means to meet the special danger of small-pox: see Salmond on Torts, 7th Ed., 28 and 66-7. This case comes within the rule in *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330. A duty arises when creat-

COURT OF APPEAL

1933

June 6.

McDANIEL v. THE VANCOUVER GENERAL HOSPITAL

Argument

ing a source of danger: see *Donoghue* v. *Stevenson* (1932), A.C. 562 at p. 580; *Green* v. *Canadian National Railway* (1932), S.C.R. 689. The burden of proof is on the defendant: see Beven on Negligence, 4th Ed., Vol. I., 127; *Chaproniere* v. *Mason* (1905), 21 T.L.R. 633; *Vivian* v. *B.C. Electric Ry. Co.* (1930), 42 B.C. 423 at pp. 425-6; *Pronek* v. *Winnipeg, Selkirk & Lake Winnipeg Ry. Co.* (1929), S.C.R. 314 at 327; (1932), 102 L.J., P.C. 12; 148 L.T. 193; 3 W.W.R. 440 at pp. 445-6; (1933), A.C. 61. Contributory negligence through non-vaccination was never raised before. The damages are not excessive: see Mayne on Damages, 10th Ed., 7; *Chaplin* v. *Hicks* (1911), 2 K.B. 786; *Nicolais* v. *Dominion Express Co.* (1914), 20 B.C. 8; *Beauchamp* v. *Savory* (1921), 30 B.C. 429 at p. 438; *Bradshaw* v. *British Columbia Rapid Transit Co.* (1926), 38 B.C. 56.

Reid, replied.

Cur. adv. vult.

6th June, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: Negligence is a want of care in the circumstances. What are the circumstances here? The infant plaintiff was taken into The General Hospital at Vancouver suffering from diphtheria. She was a pay patient. Neither her parents nor her physician knew that small-pox patients were admitted or were about to be admitted into the hospital. Up to that time none had been admitted. The defendant knew that she had not been vaccinated. She was placed in a room on the third floor known as "The Infectious Diseases Hospital," and was attended by a nurse or nurses of defendant who had common admittance to all the rooms on that and the fourth floor and who associated indiscriminately with the attendants there. On the day following the infant plaintiff's admission, without her knowledge or that of her parents or her physician, a patient was admitted to the hospital suffering from a virulent type of small-pox and placed in an adjacent room to hers. The defendant knew that owing to her unvaccinated condition she was very susceptible to infection and took no other means to protect her from contagion than that furnished under regulations which they did not know to be efficient for the purposes for which they

were being used. The medical witnesses of the defendant deposed that apart from the protection of vaccination and isolation it is not known by the profession at the present time what the causes of infection are; that is to say that apart from these two precautions there was no method of fully protecting persons coming into direct or indirect contact with small-pox patients. Altogether, after the admission of small-pox patients on these floors, eight small-pox infections occurred on the third and fourth floors of this hospital within a very short time after the infant plaintiff's admission. The defendant became alarmed and called the physicians and supervisors together in an effort to ascertain the cause and the only reason they could find for this infection was that the infected victims had not been vaccinated. Thereafter they refused to admit small-pox patients who had not been vaccinated unless they signed a waiver of the hospital's responsibility for infection. This, of course, was a system of protecting themselves not their patients. Their system was disclosed to have been more than 20 per cent. inefficient in its protection from infection. The medical witnesses for the defendant confirmed the views of Milton J. Rosenau expressed in his work on Preventive Medicine and Hygiene, 5th Ed., see particularly pages 31 and 32 and page 854. We were invited by counsel on both sides to read this book if we thought fit. The author asserts that vaccination is the only real protection against small-pox; that it is the only effective guard against infection; and that isolation, a secondary means of avoiding infection, need not necessarily take place in a separate building, but that the nurse as well as the patient should be isolated. I may point out that the physician of the infant plaintiff, Dr. Kennedy, who was a witness for her at the trial strongly disapproved of the means adopted by the hospital for the prevention of infection.

MACDONALD, C.J.B.C.

The eight cases of infection above referred to tempt me to say *res ipsa loquitur,* though some of the factors giving that maxim application to the facts of this case are wanting. A jury might well say that that fact condemns the defendant's system. I have no hesitation in saying that the defendant was negligent and that the negligence was the proximate cause of the plaintiff's injury. I would dismiss the appeal.

COURT OF APPEAL

1933

June 6.

McDANIEL v. THE VANCOUVER GENERAL HOSPITAL

MARTIN, J.A.: Upon the facts as found by the learned judge below, which differ, obviously, in certain essentials from those in, *e.g., Jones* v. *Sisters of Charity of the Incarnate Word* (1914), 173 S.W. 639, much relied upon by the respondent, I am of opinion that the right conclusion has been reached in law and therefore the appeal should be dismissed.

MCPHILLIPS, J.A.: The action was one for negligence and damages resulting to the infant plaintiff and expenses incurred by her father her next friend in this action. The particulars of the negligence were stated to be:

(a) The negligence and want of due care of the defendant and its servants and the undue and improper exposure of the infant plaintiff to the contagion of small-pox consisted of placing the infant plaintiff and causing her to remain in too close proximity to another patient or other patients suffering from small-pox and that the nurses, orderlies and attendants in the employ of the defendant, after waiting upon, attending or serving such small-pox patients or doing work or rendering services to such small-pox patients and in and about such small-pox patients, came into contact with, waited upon and served the infant plaintiff, thereby causing the infant plaintiff to contract the disease of small-pox.

(b) The plaintiffs say that the hands, arms, neck and face of the infant plaintiff were, during the course of the said attack of small-pox, heavily and severely pitted, scarred and marked and that such pitts, scars and marks are and will remain permanently, thereby disfiguring the infant plaintiff, impairing her appearance and interfering with her opportunities for advancement and betterment in the future.

MCPHILLIPS, J.A.

The appellant is a corporation incorporated by private Act of the Legislature of British Columbia (An Act to Incorporate The Vancouver General Hospital, Cap. 69, B.C. Stats. 1902). The appellant carries on and operates a public general hospital not operating for profit. It is sustained by grants from the Government of British Columbia, municipal corporations and private donations and has for years done this work and does a very large amount of charitable work, no patients being refused but all applying being cared for. The infant plaintiff was a paying patient. The illness for treatment in the present case was that of diphtheria from which the infant—of the age of nine years—was suffering.

The infant plaintiff, before entering the hospital and until discharge therefrom, was receiving the attention of the family physician Dr. William Davis Kennedy, that is Dr. Kennedy

was the attending physician throughout, making daily visits upon his patient. The Vancouver General Hospital is a very modern block of buildings and today along with many other hospitals throughout Canada—that is in its principal cities—has the highest position of standardization amongst hospitals in staff and equipment and is approved as such by the American and Canadian Colleges of Physicians and Surgeons. To effectuate continued efficiency there is an organization common to both the United States and Canada which overlooks and inspects the hospitals and one of the witnesses called on the part of the appellant was Dr. Malcolm T. MacEachern who in connection therewith occupies the position of Director of Hospital Activities. It can well be said on the evidence that the hospital in every way is most modern and most complete in its buildings, staff and equipment generally. Now what is alleged and what, in my opinion, was not proved that by some class of negligence which, with great respect to the learned trial judge I cannot perceive, there is legal liability upon the appellant for that which happened to the infant plaintiff after her discharge from the hospital then being cured of diphtheria in that later she contracted small-pox and portions of her body are pitted and scarred by that disease. Whilst the infant plaintiff was in the hospital and being treated for diphtheria, small-pox broke out in the City of Vancouver but was not existent for any long period of time. The hospital work is carried on in several buildings upon the unit principle and the infant plaintiff was in that called the Infectious Diseases Hospital and therein small-pox cases were also treated in separate rooms with glass front through which the patients may be observed. This was known, of course, to Dr. Kennedy the infant plaintiff's physician. It could not be possible that he did not know being the attending physician and making daily visits and taking as he said every precaution expected of physicians and nurses, putting on a gown and everything necessary to obviate infection or carrying infection. It would seem that the infant plaintiff had next to her a small-pox patient in a separate room. The mother of the infant plaintiff complained of this and she was removed to another floor. In moving her it was more a matter of sentiment to satisfy the

MCPHILLIPS, J.A.

COURT OF APPEAL

1933

June 6.

MCDANIEL v. THE VANCOUVER GENERAL HOSPITAL

MCPHILLIPS, J.A.

mother's desire than any admission that there was any danger in the system in vogue. The now recognized mode of arrangement of patients in the most advanced and up-to-date hospitals supported by the highest medical opinion is the separate room or cubicle system with the closest possible attention to sterilization and this medical opinion was given by medical men of eminence, men of great experience whose evidence I have given the closest study and I am satisfied to accept that testimony and, in my opinion, the learned trial judge should have accepted it. In saying this I do so with the greatest respect to the learned trial judge. In my view year by year there has been great advance in medical science and the treatment of diseases. The old-time method of caring for small-pox was inhumane in the extreme. "Pest houses" as they were called were the most usual place to which the patients were removed, giving great mental worry to relatives. Now small-pox as other infectious and contagious diseases may be treated in the same building with all modern safeguards and there is no danger in the system as carried out. There will be unaccountable infection even under the most careful supervision and that careful supervision was given in the present case, the testimony of the medical staff and the trained and experienced nurses shews this. There are so many possible sources from which infection will come that it would indeed be most dangerous to hold or come to the conclusion by mere inference that owing to being in the same building as small-pox patients were, or even have next to her a small-pox patient that because of that the infant plaintiff became infected, I might almost say that infection might have occurred in countless ways; the infant plaintiff's own physician may have been the agency mixing with the populace in daily practice; the mother may have likewise brought it upon her visits to the daughter.

The mere fact that the infant plaintiff contracted small-pox is no determination that the system in vogue in the hospital was defective. Let us visualize things. The medical staff, nurses, and cleaners of the rooms are not shewn to have contracted the disease. Why should this be? The answer must be that the system is as near perfect as human agency fortified by the latest

scientific knowledge can make it. After the most careful study of the voluminous evidence adduced in this case, I fail to find any negligence proved as against the appellant even if I were to admit that negligence in law were capable of being found in the light of the relevant facts of the case which I do not admit. There is no relationship existent between the parties to this action in view of the facts of the case that will permit of it being said that there is any legal responsibility upon the appellant for the damages sustained by the respondents. The authoritative case upon the point of law that must be determined in this case is *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 2 K.B. 820. The hospital must be carried on under some system and that system must be determined by the best medical opinion. The hospital in this case was built, arranged, staffed and equipped under the best medical opinion obtainable—has passed careful inspection—and that being the case can it be said that there was negligence in any particular? Here we have not found it established that the appellant was in any way negligent by itself or its servants. The infant plaintiff was cared for in the hospital and dealt with in the manner that was approved of and laid down by the medical staff and trained nurses. It would indeed be perilous to run counter to professional opinion in the operation of the hospital. Further, the duty is to obtain that opinion and act upon it. Whilst the present case is not in all respects analogous to the *Hillyer* case, *supra,* it is useful to observe what Farwell, L.J. and Kennedy, L.J. said at pp. 825-831. I would particularly refer to what Kennedy, L.J. said at p. 830:

> The plaintiff had produced no evidence that the defendants had been guilty of a breach of their duties towards the plaintiff—the duty of using reasonable care in selecting as members of the staff persons who were competent, either as surgeons or as nurses, properly to perform their respective parts in the surgical examination, and the duty to provide proper apparatus and appliances.

Here we have, in my opinion, no breach of duty whatever established. Can it be that maintaining and operating the hospital as it does in accordance with the best medical opinion with qualified persons acting on the medical staff and qualified nurses, that nevertheless there is liability? That is in effect placing the appellant in the position of an insurer, a liability

COURT OF APPEAL

1933

June 6.

MCDANIEL v. THE VANCOUVER GENERAL HOSPITAL

which in my opinion is not upon the plaintiff. Here we also have the infant plaintiff being attended and under the charge of the family physician. It may be assumed that he did not consider the infant plaintiff in any danger of infection. If he did, why did he not complain to the medical staff of the hospital? It was a duty that rested upon him, not upon the hospital authorities. They were entitled to rely upon their medical staff and trained nurses. The present case is devoid of any evidence that Dr. Kennedy made any complaint or gave any direction that was disobeyed.

The evidence shews that Dr. Kennedy knew there was smallpox in the vicinity of the infant plaintiff's room on the 28th of January, 1932, and on the 29th of January, 1932, she was moved to another room, yet although the infant plaintiff could then be safely vaccinated—there being medical opinion to that effect—the infant plaintiff was not vaccinated although it could have been done safely up to the 3rd of February, 1932. Here there was negligence attributable to the respondents. That responsibility, of course, rested upon Dr. Kennedy, not the hospital authorities. Dr. Kennedy it appears so advised but was overborne by the father of the infant plaintiff (the next friend in this action) who would not have it done and so advised Dr. Kennedy. This course of conduct was in my opinion negligence imputable to the respondents. I would refer to the case of *Thompson* v. *Columbia Coast Mission* (1914), 20 B.C. 115, a decision of this Court, where it was held that the liability upon the hospital authorities extended only to providing reasonably skilled and competent medical attendants for the patient. There the doctor though was held liable upon the particular facts of the case. I would also refer to *Foote* v. *Directors of Greenock Hospital* (1912), S.C. 69. There *Hillyer* v. *Governors of St. Bartholomew's Hospital, supra,* was followed. It was held that apart from special contract the managers of a public hospital are not responsible to the patients whom they receive (whether paying or non-paying) for unskilful or negligent medical treatment provided they have exercised due care in the selection of a competent staff. The learned counsel for the appellant at this Bar in his very able argument laid great stress upon the tech-

MCPHILLIPS, J.A.

nique adopted and carried out in the hospital and its completeness in all its parts supported as it was by the highest medical opinion, now followed in the best equipped and managed hospitals of this continent, and submitted that it was in no way impugned. In this submission I agree and the evidence adduced in this case from competent members of the medical profession well supports the system now universally accepted in the leading hospitals upon this continent, of which The Vancouver General Hospital is one. It is unthinkable that the hospital authorities should not apprise themselves of the latest and most accepted medical opinion as to the manner of carrying on the hospital in all its phases.

MCPHILLIPS, J.A.

If there was a weak spot in the technique here—which upon the evidence I do not admit—it cannot be postulated thereon that by reason thereof it can be said to constitute an actionable wrong. Upon the evidence as I read it no negligence has been established. The infection giving rise to the infant plaintiff being affected with small-pox may have been caused by countless possibilities almost amounting to the inscrutable, but this is clear to my mind that the onus resting upon the respondents to prove negligence, *i.e.*, absence of due care, has not been discharged.

I would allow the appeal and dismiss the action.

MACDONALD, J.A.: This is an appeal from the decision of Mr. Justice FISHER awarding the infant respondent $5,000 and her father $545 damages against appellant, The Vancouver General Hospital. The infant respondent, under the care of the family physician, received treatment for diphtheria as a paying patient in the Infectious Diseases unit of the hospital from January 12th, 1932, to February 3rd, and 12 days after her discharge, on returning to her home, contracted small-pox. The complaint is that inasmuch as several small-pox patients were during the period referred to placed in adjoining rooms on the same floor (the first January 18th in room 308; the second on January 21st in room 316 immediately adjoining 314, where the infant respondent was confined, and the third on January 28th in room 317 on the other side of the corridor) the respondent was improperly and negligently exposed to contagion there-

MACDONALD, J.A.

COURT OF APPEAL

1933

June 6.

MCDANIEL v. THE VANCOUVER GENERAL HOSPITAL

MACDONALD, J.A.

from and in fact contracted the disease in that way. Several other cases of cross-infection developed.

The period for incubation of small-pox is from ten to fourteen days and as it developed within that time it is likely that contact was established while she was a patient in appellant's hospital. The trial judge so found. On January 29th on demand of the child's mother, who learned on the 28th that a small-pox patient was in an adjoining room she was removed to the floor below and on that day four additional small-pox cases were admitted, all placed on floor three, two of them in the room just vacated. Several cases of cross-infection occurred in January and February, 1932, that is to say, carried from another patient, or from someone with whom the other patient was in direct or indirect contact. Infection may occur through doctors and attendants going from one suffering from small-pox to another who is not and in other ways. Dr. Haywood on discovery (appellant's medical superintendent) referred to several cases of cross-infection in January, although Miss Forrest, supervisor of the Infectious Diseases Hospital, stated that cases of cross-infection appeared for the first time in February. It is possible, as Dr. Carder stated, that in view of the epidemic in the City of Vancouver at that time infection might have originated outside the hospital; not from cross-infection within. While however that is possible it is a question of fact and from the evidence, knowing that visitors were not admitted and that the child's physician was not, at least consciously, in contact with small-pox patients, a judge or jury might draw the inference that the infection in this case did not originate from outside sources. When the trial judge finds "that what has been called cross-infection did occur, and it did occur with respect to the infant plaintiff" that finding cannot be disturbed.

The defence is that appellant used reasonable care (1) in the construction of the Infectious Diseases Hospital as a separate unit; (2) in selecting a competent staff of physicians, nurses, orderlies, maids, etc., working under a rigid system of rules designed to prevent contagion and (3) in providing proper apparatus and appliances approved by the best medical knowledge available. No liability, it was submitted, attaches as

appellant is not an insurer against ordinary risks incident to the operation of a hospital conducted with due care and skill according to approved standards of professional and technical practice. If appellant used all reasonable precautions found by experience, as developed in medical research work, to be necessary to protect the infant respondent from the risk of cross-infection while a patient in the hospital it discharged its full duty. The system provided must be reasonably capable of coping with the risk involved. Patients suffering from infectious diseases are invited, for reward, to take advantage of the facilities afforded in this branch of the hospital and the obligation to use care, guided by the best knowledge available, is undertaken. If, for example, experience and scientific research shews that special care is required to prevent infection in small-pox cases, not so imperative where other less virulent infectious diseases are dealt with, appellant impliedly undertook to provide these additional safeguards. The degree of care taken should, I think, be greater, if it is true, as testified, that it is not known with precision all the ways small-pox may be transmitted. Doctors, nurses, or a patient may carry an infectious disease and while not developing it themselves transmit it to others with lowered powers of resistance. In the case of small-pox, however, to quote Dr. McEachern, whose opinion is entitled to great weight, "the cause of the disease and the methods of transmission are not sufficiently well-known to medical science." He does not think "there is very much danger of air-borne contamination" not suggesting that such a possibility is eliminated. A quotation was given in evidence from a standard work in Preventive Medicine and Hygiene (Rosenau, 5th Ed., 854) as follows:

MACDONALD, J.A.

> There are only two diseases of man, namely, small-pox and measles which may possibly be air borne in the sense that this term is generally used. Both these diseases are so readily communicable that the virus seems to be "volatile"; it is assumed that the active principle is contained in the expired breath; however, there is no proof of this assumption and some evidence to the contrary.

And he goes on to say:

> Further, it is noteworthy that we are still ignorant of the causes and the precise mode of entrance of the contagion in both measles and small-pox. Even in these two diseases the radius of danger is much more limited than was once supposed to be the case.

In view of this uncertainty and limited knowledge, while it

COURT OF APPEAL

1933

June 6.

MCDANIEL v. THE VANCOUVER GENERAL HOSPITAL

may be difficult to provide against unknown danger, the fact that it is known that this disease may be transmitted in ways not yet understood suggests the need of rigorous precautions with the view, within reasonable limits, of closing every avenue from which danger might be apprehended. The opinion is general that contact direct or indirect is responsible for the spread of the disease. Indirect contact arises where a person coming into contact with a small-pox patient, through the person, or clothing, conveys it to another; also by the common use of articles, instruments, dishes, etc., not properly sterilized. A system to be adequate ought to reduce to a minimum the possibility of contact in this way.

It is not necessary to review the evidence shewing the elaborate scientific precautions taken to prevent, or at least to reduce to a minimum, the danger of cross-infection. Our task is to ascertain if the system was defective to a degree that justifies the finding of negligence. We are not in the same position as the trial judge. On appeal our inquiry is restricted. Have we reasonable evidence to support the judgment? The following

MACDONALD, J.A.

extract from the reasons for judgment under review presents a case difficult to overcome. He found it negligent to allow

> the nurses, orderlies, and attendants in the employ of the defendant, after waiting upon, attending, or serving such small-pox patients or rendering services to such small-pox patients to come into contact with, wait upon and serve the infant plaintiff, thereby causing her to contract the disease of small-pox.

The last clause is an inference drawn from the facts recited and while the elaborate and approved precautions taken by nurses before entering and upon leaving the sick room, in the absence of evidence shewing failure to observe the technique prescribed, might justify another inference a Court of Appeal cannot say that it is clearly wrong. There is evidence to support it. Dr. Kennedy called by respondent gave this evidence:

> What do you say as to the danger of permitting nurses, cleaners, doctors and others to wait upon, serve and attend small-pox patients and other patients indiscriminately as a part of their daily duty? I don't think it is hardly fair to a patient.
>
> Now, would it be likely in your opinion, that a staff of eighteen or twenty attendants, in daily service could be expected to serve a number of small-pox patients and other patients indiscriminately without inducing cross-infection? It is unlikely.

Dr. Underhill (called by appellant) until 1930 medical health officer for the City of Vancouver, gave this evidence:

Now, if the attendants on small-pox patients were not permitted under any circumstances to wait on other patients, while attending the small-pox patients, would that have any effect in diminishing the risk of cross infection to other patients on that floor? Hypothetically I suppose it might.

In other words it would be a more effective break in the contact, would it not? Yes.

That is, if you had your choice of allowing the same nurses or attendants to go from one room to another, and the choice of confining or segregating the attendants on small-pox to the small-pox alone, and not allowed to go into any others, you would have a more effective break in the contact, would you not? Yes, but such a point would not enter my mind.

I don't care if it enters your mind at all. Would that not be so? Oh, hypothetically, yes.

I do not think the addition of the word "hypothetically" or the phrase that "such a point would not enter my mind" detracts from the view expressed that confining nurses and attendants to small-pox patients alone would diminish the risk of cross-infection. Possibly if all approved precautions are taken the disease would not be transmitted in this way. Where, however, it is known that small-pox is a particularly virulent disease "one of the most contagious of the communicable infections" the trial judge was at liberty to find that a system should have regard to the ever-present possibility of failure on the part of attendants to take all necessary precautions and obviate, or at least minimize, this danger by confinement in the way suggested.

We have this further evidence: The attention of Dr. J. W. McIntosh, medical health officer for the City of Vancouver was called in cross-examination to an extract from a book, already referred to (Rosenau, Professor of Preventive Medicine and Hygiene, Harvard Medical School), and as he regarded this work as an authority it is proper to assume from the evidence that he agreed:

The nurse attending a case of small-pox should also be segregated and all visiting should be strictly interdicted. A separate kitchen should be provided and care taken that the dishes be scalded and remnants of food burned.

This is a special precaution that ought to be taken in treating small-pox patients not necessarily applicable to other infectious

COURT OF APPEAL

1933

June 6.

MCDANIEL v. THE VANCOUVER GENERAL HOSPITAL

MACDONALD, J.A.

diseases. This was not done. The regulations did not provide for it. Miss Forrest gave this evidence:

Now, what were the regulations with regard to segregating small-pox patients from the others? No different regulations.

You treat them all alike? Yes.

Indiscriminately? Yes.

While the regulations did not provide for special precautions in case of small-pox (the system defective to that extent) still because it was recognized as a dangerous disease added safeguards not covered by the regulations were in fact resorted to. For example the cleaners might carry brooms, brushes, and mops from room to room. Miss Forrest gave this evidence:

Now, with regard to this separate cleaning apparatus, you say that until the small-pox cases came in, there was no separation of the cleaning apparatus? No.

But after the small-pox patients did arrive, you did then segregate the cleaning appliances and confined them to small-pox patients alone? Yes.

Is that any part of the regulations in exhibit 3? It is not in our written regulations.

It is not in your written regulations. You did that on your own? Yes.

In other words, you went beyond the regulations, went outside of them? Outside of the written regulations.

There was therefore failure to follow a system approved by medical authority in two important aspects. One the failure to segregate nurses attending small-pox patients, the other, as the evidence shews, the common use of cooking utensils, dishes, etc., by small-pox and other patients. No "separate kitchen," as Rosenau stipulated, existed nor were dishes and cooking utensils provided for the use of small-pox patients alone. My conclusion is that whatever view one might form at the trial of the action when the trial judge found that the failure to segregate nurses was negligence and in addition we find from the evidence failure to maintain a separate kitchen we cannot interfere.

It was submitted that respondent was negligent inasmuch as the infant plaintiff was not vaccinated and because of this omission as alleged the disease was contracted. She was admitted however with knowledge of this oversight. Her physician stated he did not know that there were small-pox cases treated in the hospital at that time. Later while still a patient he thought it might possibly "cause an upset" in her condition to vaccinate while under treatment for diphtheria. He did however suggest it when he found that small-pox cases were being treated. An

intern suggested it to him. Although Dr. Kennedy said "I suppose it should be done" still he did not do so, apparently because the child's father objected. He said: "No; vaccination is a dangerous thing having already contracted the disease" (meaning, I assume, diphtheria). However, as intimated, the hospital authorities did not demand vaccination. It was willing to accept her as a patient without it although small-pox patients were on the same floor. The responsibility of admitting patients, not vaccinated, rested on appellant. It may be true, as testified, that no one vaccinated contracted the disease and that the infant respondent might have been inoculated with safety in time but, in view of all the facts, this oversight has no bearing on the question of liability.

As to the law applicable, we are concerned, not with the obligation on appellant to provide proper facilities and to secure a competent staff in dealing with cases of infectious diseases generally but rather with a special situation in the case of small-pox patients admitted for treatment indiscriminately with other patients. It is a dreaded disease and even to the lay mind special care is regarded as necessary. The evidence shews (appellant's evidence) that medical authorities are of the same opinion. If the directors knew, or should have known of this need for special care, and did not by instructions or otherwise provide for it liability follows.

They knew that in comparatively recent times small-pox patients were isolated and treated in an entirely separate building. They knew, or ought to know that if—as the fact is—that policy was changed, and small-pox patients, as in this case, were admitted to the same building with other patients that regulations should be formulated pertaining to this highly dangerous disease. There were in fact no regulations applicable to it alone.

If appellant was obliged to provide a proper building approved by competent authorities it was equally obligatory that regulations should be framed to cope with an admittedly dangerous situation. It is not a case of regulations framed by skilled professional men where damage results from failure to carry them out; a breakdown in technique or negligence of the staff; it is the entire absence of regulations of any kind, par-

COURT OF APPEAL

1933

June 6.

McDANIEL v. THE VANCOUVER GENERAL HOSPITAL

MACDONALD, J.A.

ticularly on two points already referred to. The fair inference from the evidence is that if appellant had, as it was bound to do, secured competent medical assistance in the framing of regulations these two points would have been covered by appropriate rules. Appellant's directors could not, if laymen, intelligently interfere in framing regulations but reasonably anticipating the need they could and should direct that rules for this special care should be framed. I base liability on this ground. Conduct involving failure to provide by regulations for a special situation involves great risk and in this case resulted in damage. For the general law applicable—although not strictly applicable to the special and essentially different facts in this case—I refer to *Hillyer* v. *Governors of St. Bartholomew's Hospital* (1909), 2 K.B. 820, and to an article in 97 J.P. 296 referred to by my brother MARTIN during the argument.

It was submitted that the damages awarded were excessive. The amount awarded is, it must I think be conceded, liberal. However we cannot say on the evidence that it is so large that it could not reasonably be allowed. A wrong measure of damages was not applied, nor extraneous matters taken into consideration.

I would dismiss the appeal.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitors for appellant: *Reid, Wallbridge, Gibson & Sutton.*
Solicitors for respondents: *MacInnes & Arnold.*

REX v. MINNESS AND MORAN.

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

Criminal law—Trial—Retirement of jury—Sheriff's enquiry as to length of deliberations—Juryman volunteering outside information in jury room —Motion to introduce new evidence on appeal.

As the jury were deliberating near the dinner hour, the trial judge instructed the sheriff to enquire of the jury how long they would be in coming to a verdict. The sheriff entered the jury room and in answer to his question a juryman said "Give us ten minutes longer." In about ten minutes the jury rendered a verdict of guilty against both the accused. On the following morning the foreman of the jury and another juryman appeared before the trial judge in his Chambers and complained that they had been stampeded into agreeing to what they later concluded was a wrong verdict by the sheriff's action, and by the further fact that one of the jurymen announced in the jury room that he had been informed by a Crown witness that one of the accused was "no good" and a "bad character." This latter statement was denied on affidavit by both the juryman alleged to have made the statement and by the Crown witness. On the application of the accused for leave to introduce new evidence on the appeal:—

Held, affirming the decision of FISHER, J., that the application for leave to introduce new evidence should be refused, as the jurymen who complained of having been "stampeded" and who say they did not agree with the verdict, having stood mute when it was pronounced, ought not to be heard later to allege that they did not agree with it, and the appeal should be dismissed.

Per MARTIN, J.A.: The general rule excluding admission of affidavits by jurors respecting their deliberations is not inflexible, and may be relaxed, but only with extreme caution and under very exceptional circumstances.

Observations by MARTIN, J.A., on the proper manner at the trial of investigating in public and not *in camera* complaints of improper conduct of jurors.

APPEAL by the accused from their conviction on a charge of conspiracy. The appellants also moved to introduce new evidence. At about 6.20 p.m., and after the jury had been out for some time, the trial judge instructed the sheriff to ascertain from the jury whether they had agreed on a verdict or whether they were likely to be some time. The sheriff then entered the jury room and asked if they were likely to be some time, to which one of the jurymen replied: "Give us ten minutes longer." In less than ten minutes the jury returned to the

Statement

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

Court room and gave a verdict of "guilty" to which there was no dissent from any member thereof. The following morning the foreman of the jury and another juryman wanted to see the trial judge and they both made statements to him, the foreman saying that he from the start was against conviction, but when the sheriff came into the jury room and asked them how long they were to be it created a disturbed atmosphere, and he agreed to the verdict in order to get through when he should not have done so. The other juryman, in addition to being stampeded into agreeing to the verdict, stated he told the jurymen he would not agree to the verdict unless it included a recommendation for mercy, but the verdict was given without any recommendation. This juryman further stated that while the jurors were deliberating one of the jurymen stated that on the previous evening while in company with one of the witnesses of the Crown, said witness gave certain information as to the accused Minness to the effect that the said Minness was "no good" and a "bad character." This was denied by affidavit by the juryman alleged to have made this statement and by the Crown witness.

Statement

The appeal was argued at Vancouver on the 26th and 27th of October, 1932, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Henderson, K.C., for appellants: There should be no discussion with the jury while they are deliberating: see *Rex* v. *Willmont* (1914), 10 Cr. App. R. 173 at p. 174. A juryman talking to a witness about the case during the trial is ground for a new trial: see *Rex* v. *Twiss* (1918), 13 Cr. App. R. 177; *Rex* v. *Ketteridge* (1914), 24 Cox, C.C. 678 at p. 680.

Argument

A. H. MacNeill, K.C., for the Crown: The juryman alleged to have conversed with a witness denies that he did so. In any case it is not sufficient to quash an indictment: see *The Queen* v. *Lawson* (1881), 2 P.E.I. 398; Phipson on Evidence, 7th Ed., 192.

Henderson, replied.

Cur. adv. vult.

10th January, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: The appellants were convicted by a jury and sentenced to imprisonment. They appeal and also

move for leave to introduce new evidence. The new evidence refers to matters which took place in the jury room. The sheriff entered the room on the instructions of the trial judge to ascertain at what time the jury would be able to announce their verdict. The contention of the appellants is that this interruption "stampeded" the jury and prevented them from apprehending what their verdict was to be. The affidavits asked to be admitted are those of two of the jurymen. They set out the facts above mentioned and also that one of the jurymen Garrett announced to the others that he had been informed by one of the Crown witnesses that the appellant Louise M. Minness was "no good" and was a "bad character" which they think had some influence upon the other members of the jury. Within ten minutes of the sheriff's visit the jury arrived at its verdict and filed into the Court room to announce it, which the foreman did. If the jurymen were unduly hurried into their conclusion and the verdict was not as they intended, those dissatisfied had the opportunity in Court to express their dissent but no dissent was expressed.

MACDONALD, C.J.B.C.

After their discharge two or three of them got together and complained to each other that the verdict was not what they intended it to be. Counsel for the appellants thereupon made the motion for the admission of the new evidence being the evidence just disclosed. The juryman who announced that he had been informed that the appellant Minness was "no good" and a "bad character" denies that the Crown witness told him anything of the kind and says that if he (the witness) made any such statement he made it from the evidence taken at the trial. I see nothing in the evidence to which I have referred to induce me to admit it. The jurymen, who complain of having been "stampeded" and who say that they did not agree with the verdict, having stood mute when it was pronounced, ought not now be heard to allege that they did not understand it. I look upon it as a most dangerous and improper thing to permit what has taken place in the jury room and remarks made by jurymen amongst themselves to be made the basis of an application such as the present one.

I therefore would dismiss the motion and also the appeal.

MARTIN, J.A.

MARTIN, J.A.: I agree that this motion for leave to appeal

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

should be dismissed and I share the view expressed by my brother M. A. MACDONALD that it is "highly improper for a witness or anyone else—apart from fellow-jurors—to discuss with a juryman any matter concerning the trial"; and while I agree that in the present circumstances this is not a case where we should interfere with the verdict of the jury because it appears, from every aspect of it, that no "substantial wrong or miscarriage of justice has actually occurred" (Sec. 1014, Code) yet it approaches dangerously near to the stage where it would be our duty to interfere for the due preservation of public justice, and it is to be borne in mind that we have now, under said section 1014 of 1923, Cap. 41, express power to set aside a verdict if we are "of opinion" that "on any ground there was a miscarriage of justice": *cf. The Queen* v. *Preeper* (1888), 15 S.C.R. 401; *Reg.* v. *Harris* (1898), 7 Que. Q.B. 569; *Reg.* v. *Murphy* (1869), L.R. 2 P.C. 535; 11 Cox, C.C. 372; 21 L.T. 598; *Reg.* v. *O'Neill* (1843), 2 L.T. Jo. 77; *Rex* v. *Syme* (1914), 30 T.L.R. 691; 112 L.T. 136; *Rex* v. *Crippen* (1911), 1 K.B. 149, 155-6; *Rex* v. *Twiss* (1918), 2 K.B. 853; 13 Cr. App. R. 177; *Rex* v. *Ketteridge* (1914), 84 L.J., K.B. 352; *Rex* v. *Corrigan* (1919), 2 W.W.R. 81 (turning on the special discretionary provisions of our Criminal Code); *Fanshaw* v. *Knowles* (1916), 2 K.B. 538; *Raphael* v. *Bank of England* (1855), 17 C.B. 161 at 172; 104 R.R. 638.

MARTIN, J.A.

As to the question of our right in a criminal case to receive the evidence of jurors on what occurred in the jury room during their deliberations, that is a matter of such gravity that it should be reserved for further consideration applicable to such special circumstances as may arise, because there is authority to support that course under the old practice, in exceptional circumstances and with the extremest caution, even long before the passing of our said section 1014, and it would be a most grave step to refuse to listen to, *e.g.*, the sworn statement of a juror that he had seen a bribe given in the jury room to one of his fellows, or that one of them, or himself, had been overawed by threats. In *Rex* v. *Willmont* (1914), 30 T.L.R. 499; 78 J.P. 352; 10 Cr. App. R. 173, the Court received a report from the clerk of assize respecting a discussion he had had with the jury while deliberating on their verdict, and acted on it by quashing

the conviction because of the clerk's wrongful interference with the jury, and though it is true the Court said it would not receive the testimony of three of the jury on the point, yet it went on to say that "it was right to say that the point had not been argued before" it (T.L.R. 500), because of their observations to the prisoner's counsel on the admitted irregularity in the clerk's conduct as disclosed in his report to the Court upon the matter; that ruling, however, left the question in a very unsatisfactory state, and the more so because there are many authorities which would have been of assistance to the Court in reaching a considered conclusion, *e.g.,* the well known *Lord Fitzwater's Case* (1675), Free. K.B. 414; 2 Lev. 139; 83 E.R. 487, wherein the King's Bench *in banco* set aside a verdict in his favour and granted a new trial because the jury being "divided in judgment, and at last being willing to be at liberty, resolved to give a privy verdict and to throw dies for which side they should give a verdict," which they proceeded to do, and all agreed to "stand to the verdict" and did so, finally, when they "came up all to the bar and stood to their privy verdict," but

MARTIN, J.A.

> This matter appearing to the Court, *per totam Cur'* a new trial was granted; for a trial by jury, being the solemn trial of the nation upon which our lives, liberties and estates do depend, it ought to be with all fairness, without any thing to bias them; and here it appearing clearly that the chance of the die did govern them in giving their privy verdict, and they never after had any farther conference all together, the whole Court *seriatim* delivered their opinion for a new trial.

It is not expressly stated how this conduct of the jury was made to "appear" to the Court, but it is a fair and strong inference, under the circumstances, that it was on the testimony of some of its members, because the report goes on to say that:

> Twisden [an eminent judge] cited a case, where the plaintiff slided in evidence to the jury, which was not read in Court, and though the jury all made oath that they never looked upon it, yet they giving a verdict for the plaintiff, it was set aside.

Which shews that it was in accord with precedent to take their own testimony respecting improper occurrences during their deliberation. That course was also adopted in *Parr* v. *Seames* (1734), Barnes 438; *Philips* v. *Fowler* (1735), 2 Com. 525, 527 (n); *Cogan* v. *Ebden* (1757), 1 Burr. 383; 2 Ken. 24 (wherein affidavits from eight of the jury were received by the King's Bench, Lord Mansfield presiding, to explain the "mean-

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

ing and intention" of their verdict); *Milsom* v. *Hayward* (1821), 9 Price 134 (wherein the Court of Exchequer took a like course, refusing to follow three prior decisions of the King's Bench and Common Pleas); *Aylett* v. *Jewel* (1779), 2 W. Bl. 1299; and the Court of Criminal Appeal in *Rex* v. *Newton* (1912), 28 T.L.R. 362; 7 Cr. App. R. 214, went so far as to receive the statement of the foreman, made in open Court, upon announcing the verdict, admitting his improper object in asking during the trial, certain questions respecting the accused's "previous character" so as to influence the jury and get them to agree to a verdict against him as an "old offender," and upon that very grave admission the Court set aside the verdict as being based on a miscarriage of justice.

The principal cases upholding exclusion, in addition to some of those already cited, are *Vaise* v. *Delaval* (1785), 1 Term Rep. 11; *Owen* v. *Warburton* (1805), 4 Bos. & P. 326 (wherein the King's Bench said, *per* Lord Mansfield, "It is singular indeed that almost the only evidence of which the case admits should be shut out"); *Straker* v. *Graham* (1839), 4 M. & W. 721 (C.P.; but it is to be noted that Baron Parke grounded his decision on "hearsay in matters of this kind"); and probably the extreme high-water mark of rejection was reached by the Court of Common Pleas in *Burgess* v. *Langley* (1843), 5 Man. & G. 722; an unsatisfactory decision wherein even a charge made in open Court by one of the jury, immediately after the return of the verdict, that it had been reached by drawing from a hat was refused investigation.

MARTIN, J.A.

The following cases may also be referred to: *Dent* v. *The Hundred of Hertford* (1696), 2 Salk. 645; *Philips* v. *Fowler* (1735), 2 Com. 525, 527 (n); *Rex* v. *Mullen* (1903), 6 Can. C.C. 363; *Rex* v. *Carlin, ib.* 365; *Reg.* v. *Lawson* (1881), 2 P.E.I. 403; *Reg.* v. *O'Neill* (1843), 2 L.T. Jo. 77; and *Reg.* v. *Woodfall* (1770), 5 Burr. 2661 at p. 2667 wherein the King's Bench held, *per* Lord Mansfield, C.J.:

> Where there is a doubt, upon the judge's report, as to what passed at the time of bringing in the verdict; there the affidavit of jurors or by-standers may be received, upon a motion "For a new trial" or "To rectify a mistake in the minutes": but an affidavit of a juror never can be read, as to what he then thought or intended.

There is a marked conflict between the decisions of different

Courts at different times, and also between themselves, *e.g.,* the King's Bench, in *Rex* v. *Wooller* (1817), 2 Stark. 111 at 113, refused affidavits from jurors to shew that they did not hear the verdict pronounced, holding that

> the Court cannot, according to established form and precedent, receive the affidavit of a juryman in any case . . .

But the Common Pleas *in banco* in *Roberts* v. *Hughes* (1841), 56 R.R. 744 received an affidavit from a juror, despite objection, to shew that the verdict, pronounced in open Court, "had been entered for the plaintiff by a mistake of the under-sheriff"; and in *Ellis* v. *Deheer* (1922), 2 K.B. 113, the Court of Appeal overruled, in effect, *Rex* v. *Wooller,* in this respect, though otherwise affirming it, by receiving affidavits from three jurors on the identical ground that they had been rejected in *Ellis'* case, Bankes, L.J. saying, p. 119:

> . . . The affidavits of the three jurors in the case before us are admissible, and, accepting the statement that they did not hear the verdict to be true, I am of opinion that there ought to be a new trial.

In *Palmer* v. *Crowle* (1738), Andrews 382; 95 E.R. 445, though the King's Bench rejected the evidence of two jurors yet not, apparently, on any fixed rule, Probyn, J. saying that

MARTIN, J.A.

> he should be very cautious in collecting a jury, after they are dismissed from their oaths, in order to set aside their verdict, because no one knows whom they meet in the way.

A striking case is *Ex parte Morris* (1907), 72 J.P. 5, a decision of the King's Bench Division *coram* Phillimore and Walton, JJ., wherein a motion for a rule *nisi* for *certiorari,* or alternatively a *venire de novo,* was made to quash the conviction, at Quarter Sessions, of the applicant for common assault on the ground, as set out in his solicitor's affidavit, that a juror was intoxicated and had taken no part in the deliberation of the jury and did not, in fact, join in the verdict, and the Court said:

> The materials in this case are very meagre, and we do not think they are sufficient to enable us to grant a rule. But the application may be renewed at any time, and I think I may add that we are both of opinion that if the application is to succeed there should be an affidavit as to the circumstances from one of the other eleven jurymen. The rule, therefore, is refused, but with leave to renew the application if the materials upon which this rule was moved are supplemented.

This is a most significant judgment because not only did it not reject, but it invited an affidavit from the jury as to their deliberations.

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

Fortunately this Court is not bound by any of the said decisions, which are beyond reconcilement,* but we have an authoritative guide in a decision by which we are, at present, bound, *viz.*, that of the Privy Council in *Reg.* v. *Murphy, supra,* and therein their Lordships said, *per* Chief Justice Erle, p. 549:

> There is also the further objection, that the supposed informant had been one of the jurymen, and the Courts here have at times expressed a reluctance, which we consider salutary, against receiving the separate statements of any of the individuals who had in combination formed a jury, in order to impeach the verdict.

This is very instructive, and shews, as would be expected from the cases hereinbefore cited, that there is no inflexible rule for rejection, but that the Court will exercise its discretion upon the circumstances as they may arise, inspired by a "salutary reluctance" to interfere except where intervention is necessary to avert a miscarriage of justice.

This view is consistent with that taken by the United States Circuit Court of Appeals in *Clark* v. *United States* (1932), 61 F. (2d) 695, wherein the Court said, p. 707:

MARTIN, J.A.

> The special divinity which surrounds the deliberations of a jury is only so far as the protection of the verdict is concerned. If one juror should bribe the balance of the jury to return a verdict, would any Court assert that there was no power to shew this by the statements of another juror as to what the briber had said? If a juror should present to the jury affidavits of alleged facts which should properly have been a matter of testimony, is a Court powerless to rectify the wrong which might thus be perpetrated? Must a Court sit supinely and spinelessly and permit such misconduct in a juror because of the fine distinction to be drawn that while a Court may receive such evidence to shew misconduct of a juror in acts, it has no power to do so as to utterances when the acts can only be shewn by the utterances? It would carry the doctrine of privilege to absurd results to so hold. We think the whole matter as far as this case is concerned is covered in *McDonald and United States Fidelity & Guaranty Co.* v. *Pless* [(1915)], 238 U.S. 264; 35 S. Ct. 783; 59 L. Ed. 1300, where the Court considered the question as to whether the testimony of a juror could be received to prove misconduct of himself or his colleagues in reaching a verdict. The opinion refers to the fact that the rule on the subject has varied and that a juror's testimony in such cases while sometimes received has always been with great caution. The Court says there are only three instances in which the subject has been before it. In *United States* v. *Reid*

*NOTE. The confusion in England is increased by the recent conflicting decisions, subsequent hereto, of the English Court of Appeal in *Rex* v. *Thomas* (1933), 49 T.L.R. 546, and of the Privy Council in *Ras Behari Lal* v. *The King-Emperor* (1933), 50 T.L.R. 1. The jurisdiction of the Privy Council in Canadian criminal appeals was abolished on and from 1st July, 1933, by Cap. 53, Stat. Can. Sec. 17. A.M.

[(1851)], 12 How. 361; 13 L. Ed. 1023, the question was not decided. In *Mattox* v. *United States* [(1892)], 146 U.S. 140; 13 S. Ct. 50; 36 L. Ed. 917, evidence was received to shew that newspaper comments on a pending capital case had been read by the jurors. The Court says in *McDonald* v. *Pless, supra,* at page 268 of 238 U.S., 35 S. Ct. 783, 785: "Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'"

The Supreme Court of the United States affirmed this decision (1933, March 13th), 289 U.S. 1; 77 L. Ed. 993, the judgment being delivered by that very eminent judge, Mr. Justice Cardozo, who learnedly and instructively expounds at some length the elements of public policy and personal privilege involved in the question and thus states the general principle (pp. 13-14):

Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid. But the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a Court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to its aid all the distinctions and analogies that are the tools of the judicial process. The function is the more essential where a privilege has its origin in inveterate but vague tradition and where no attempt has been made either in treatise or in decisions to chart its limits with precision.

Assuming that there is a privilege which protects from impertinent exposure the arguments and ballots of a juror while considering his verdict, we think the privilege does not apply where the relation giving birth to it has been fraudulently begun or fraudulently continued. Other exceptions may have to be made in other situations not brought before us now. It is sufficient to mark the one that is decisive of the case at hand. The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation is merely a sham and a pretense, the juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth. In saying this we do not mean that a mere charge of wrong-doing will avail without more to put the privilege to flight. There must be a shewing of a *prima facie* case sufficient to satisfy the judge that the light should be let in.

And further (p. 16):

No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honour. The chance that now and

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.

Applying, then, the principle in *Murphy's* case to the sole affidavit before us, that of the juror, Smith, it should not, in the present circumstances, be admitted because it does not, in the language of Mr. Justice Cardozo, "shew a *prima facie* case sufficient to satisfy [us] that the light should be let in," and as the irregular statements to the learned judge cannot be considered, and the objection to the sheriff's conduct with the jury was overruled during the argument, it follows that the motion should be dismissed, and also the main appeal, which was not supported by any argument though entered for hearing.

It is desirable, before concluding, to draw attention to the unusual, and unsatisfactory, manner in which this motion for leave to appeal on fact or mixed law and fact comes before us under section 1013 of the Criminal Code, and for a new trial, and its peculiar circumstances, in one aspect of the matter, *viz.*,

MARTIN, J.A.

that it appears from the affidavits filed, and what counsel tell us and the report of the learned judge, that a verdict of guilty had been returned by the jury at the Vancouver Spring Assizes, 1932, *coram* FISHER, J., on the 15th day of May, and after the jury had been discharged, and three days thereafter, on the 18th (according to the official stenographer's report) the foreman of the jury went to the learned judge in his private room and in the presence of the counsel for the Crown made an unsworn statement of considerable length which was taken down by the stenographer to the general effect that the jury were "rushed" into arriving at their verdict, that he wished to "tell you how it happened," and that he supposed he "could talk freely about" their deliberations, and that four of them including himself were for acquittal at first but finally all agreed, after further hurried and inadequate discussion respecting two counts, which he detailed *ipsis verbis*, on a verdict of guilty (that he as foreman announced) which he was not satisfied with though "it did not occur to me to say that I disagreed." After the statement was made the interview thus concluded:

Mr. Justice FISHER: That is all you wish to tell me, is it, Mr. Hood?

Mr. Hood: I thought you should know, and I wondered if you would have any suggestions? I feel that if nothing can be done about it, I am going to have an uneasy time, and I shall never forgive myself for being carried away in a moment from what was really my own conviction.

Mr. Justice FISHER: Well, thank you, Mr. Hood.

Two days later, and while the Assizes were still in session, as they were till the 28th of May, another member of the jury went to the learned judge in the same way and made a statement of a somewhat similar nature, this time in the presence of the convict's counsel, beginning thus:

Mr. Justice FISHER: What is your full name?

Mr. Smith: Robert Anderson Smith.

Mr. Justice FISHER: Mr. Smith, I understand you wish to tell me something.

Mr. Smith: Yes, sir.

Mr. Justice FISHER: Mr. *Henderson* who represents the accused is here and also Mr. *MacNeill* who represents the Crown and you may tell me what you wish to tell me.

Mr. Smith: I don't know really, judge, how to put it. We had quite a stormy session in there to get to any decision at all, . . .

And he proceeded to give particulars of the jury's deliberations with their views expressed in detail on certain aspects, and the interview thus concluded:

Mr. Justice FISHER: Is that all you have to tell me?

Mr. Smith: Yes.

Mr. Justice FISHER: Thank you, Mr. Smith.

It is to be observed that these proceedings ended in nothing and were not taken at the instance of the convicts and no motion of any kind was made by any one, and it is not apparent what jurisdiction the learned judge was purporting to exercise in entertaining them or why the report of them was sent to this Court, because they are entirely foreign to the conviction that was duly recorded later, when the appellants were sentenced on the said 28th of May, and this Court has no jurisdiction to review, or even entertain, proceedings taken *ex cursum curiæ* and wholly *in vacuo* because no ruling was or could be made upon them by the trial judge, and they form no proper part of his report to us under section 1020 of the Code, which restricts it to his "opinion upon the case or upon any point arising in the case," but on this matter he gave no opinion nor did any point arise upon which to give it, nevertheless he sent both statements up to us with his report without giving any authority or reason for taking such a novel course.

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

I have found myself not a little embarrassed by such an interjection of irrelevant and futile proceedings into the record, and the only proper and safe course to adopt is to keep entirely clear of them by respectfully declining to take cognizance thereof, because it is our duty to discountenance "new courses which may be drawn into an evil precedent in future" as was said by the Privy Council in *Ibrahim* v. *Regem* (1914), A.C. 599, 615; and the House of Lords, *per* Lord Chancellor Birkenhead, in the leading case of *Director of Public Prosecutions* v. *Beard* (1920), A.C. 479 at 506, disapproved "an innovation which is not supported by authority and which should not be imitated or repeated": the Privy Council also in the great case of *Reg.* v. *Bertrand* (1867), L.R. 1 P.C. 520, 530, laid it down that

> The due and orderly administration of the law [should not be] interrupted, or diverted into a new course, which might create a precedent for the future.

See also our recent decision in *The Bishop of Victoria* v. *The City of Victoria* (1933) [*ante,* p. 264], 3 W.W.R. 332, and cases cited at p. 341.

MARTIN, J.A.

It is to be borne in mind, however, that the situation below would have been quite different if all the various matters now complained of had come to the attention of the learned judge before the verdict had been returned and the jury discharged, because in such case he has wide original jurisdiction in proper cases to prevent miscarriages of justice, and it is his duty to act remedially in accordance with special circumstances that may arise, and be legally established, and "pursue them to a legitimate conclusion," as *e.g.,* we decided should have been done in *Howard* v. *B.C. Electric Ry. Co.* (1918), 3 W.W.R. 409, 411.

In the case at Bar, however, the proceedings taken after verdict must have been in furtherance of some supposed power of the trial judge to set aside the conviction and have a new trial, otherwise they were merely inquisitorial, if anything, and in any aspect of no legal effect whatever, because the power of reviewing convictions by a jury is, since the amendment of 1923, Cap. 41, possessed by this Court alone, and furthermore, and in any event, we cannot set aside a verdict on unsworn statements made after conviction and discharge as aforesaid, though a Court can act on the report of its own officers, *e.g.,* the clerk of Assize, in *Willmont's* case, *supra.*

It is also to be observed that if such a proper inquiry is entered upon by the trial judge it should be conducted in open Court and not *in camera, e.g.,* the English Court of Appeal said *per* Lord Reading, C.J., in *Rex* v. *Willmont, supra* (78 J.P. 352):

> The trial of a prisoner, more especially on a criminal charge, must take place in public, and everything that appertains to that trial must be in public and must not be in secret.

That language applies strongly to the present case because if it is essential, as it unquestionably is, that no man should be convicted in secret it is equally essential that if any steps to set aside that solemn judgment are taken they should be taken publicly, not only to satisfy the public conscience, but to safeguard justice. Furthermore, in the present case, as an example, the other jurors should, in all fairness, have been given a public opportunity to answer the unsworn reflections, not to say charges, of improper and hasty conduct ("without consideration or any deliberation" on two counts at least, the foreman told the judge) that were made in secret by two of their number, in said unsworn statements, all of which would have been avoided if the matter had been properly heard, if at all, "in the light of full publicity," as the Court further said in *Willmont's* case.

MARTIN, J.A.

A good example of investigation by the trial judge of alleged improper conduct of jurors pending the hearing and the correct decision he came to, is to be found in *Twiss'* case, *supra,* at p. 855; and I conclude by referring to the judgment of Mr. Justice (now Lord Justice) Scrutton in the civil case of *Fanshaw* v. *Knowles, supra,* 549, wherein he draws attention to the greater strictness "with which the jury is dealt with in criminal cases," and this should not be overlooked in considering the narrower course adopted in some civil cases bearing on the very important question which I have felt it my duty to consider most carefully and at a length which, though necessary, in view of the exceptional conflict of authority that was revealed, was not anticipated when its investigation was begun.

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

MCPHILLIPS, J.A.

MACDONALD, J.A.: A new trial was sought on the ground that

MACDONALD, J.A.

COURT OF APPEAL

1933

Jan. 10.

REX v. MINNESS AND MORAN

a witness for the Crown during a recess in the course of the trial told a juryman that one of the accused was "no good" and a "bad character" and that the latter repeated this conversation to his fellow jurors when deliberating on the verdict, mentioning the name of his informant. The witness referred to filed an affidavit in which he swore that he "did not . . inform the said juryman that the accused was 'no good' or a 'bad character' or words to that effect." He might have gone further—if he could—and say that he did not discuss the case in any way with the juror referred to. I infer he could not do so as counsel, when this suggestion was made, did not offer to submit further evidence on the point or combat the suggestion. It is, of course, highly improper for a witness or anyone else—apart from fellow jurors—to discuss with a juryman any matter concerning the trial. I hope it did not occur: if it did it was doubtless a thoughtless act.

MACDONALD, J.A.

This evidence of alleged misconduct, however, is based on the affidavit of a juryman and repeated in a statement to the trial judge in his private chambers. There are cases which shew that on grounds of public policy the testimony of a juror will not be received to prove mistake or misbehaviour by the jury; also that we cannot regard the unsworn statement made to the judge as a ground to impeach the verdict whatever action he might or might not have taken. (Phipson on Evidence, 7th Ed., 192; *Rex* v. *Mullen* (1903), 6 Can. C.C. 363; *Rex* v. *Willmont* (1914), 10 Cr. App. R. 173.)

I guard, however, against saying that no case could possibly arise where a verdict might be impeached through the testimony of jurors.

The appeal should be dismissed.

Note:—Since writing the foregoing I notice an article in the Solicitors' Journal of the 27th of May, 1933, p. 362, where the judgment of Cardozo, J., now of the Supreme Court of the United States, on a somewhat similar point, is discussed.—M. A. M.

Appeal dismissed.

THE CORPORATION OF THE DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LIMITED.

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

Contract — Supply of electric power—"Similar service" — Meaning of— Custom.

A contract whereby the defendant company agreed to supply the inhabitants of the plaintiff municipality with electric energy contained the following clause: "The company covenants and agrees with the corporation that the company will not make any charge for the supplying of electric energy to the corporation or any of the inhabitants of the municipality greater than that paid for similar service by any municipality or the inhabitants thereof other than a city, and will not in any way discriminate against the corporation or residents of the municipality; AND the company will, free of charge to the customer, make the necessary connections and install electric service to anyone requiring service, PROVIDED that such installation be located within one-quarter of a mile of the following roads:" etc. In an action for specific performance of the terms of the agreement the evidence disclosed that one Beharrell, who lived within one-quarter of a mile of one of the roads specified in the agreement was on demand refused the installation of the necessary connections for electric service for his residence; and that the defendant charges consumers of electric energy in the Municipality of Matsqui a rate of six cents per kilowatt hour while consumers in the Municipality of Burnaby are charged a rate of five cents per kilowatt hour. The plaintiff recovered judgment.

Held, on appeal, affirming the decision of MURPHY, J. (MCPHILLIPS, J.A. dissenting), that the meaning of the clause is that the defendant will not make any charge greater than that paid for similar service by any rural municipality or the inhabitants thereof, that it is the municipalities in this Province that are contemplated, and the words "similar service" refer to the use to which plaintiff and its inhabitants put the electric energy supplied, *i.e.*, lighting, power, heating, etc. The plaintiff is entitled to specific performance accordingly.

APPEAL by defendant from the decision of MURPHY, J. in an action tried by him at New Westminster on the 19th and 20th of December, 1932, for specific performance of an agreement made on the 29th of March, 1913, between the plaintiff and Western Canada Power Company (of which the defendant is assignee or successor) and for an order that the defendant, free of charge, make the necessary connections and install electric

Statement

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

Statement

service for the residence and buildings of Lloyd Truman Beharrell, situate on the Sim Road, Matsqui, and other residents of Matsqui entitled to such service under the terms of said agreement, and for an order that the defendant supply electric light, heat and power and install electric service to the residents of Matsqui at the same rate as charged for such service in the Municipality of Burnaby, and in the alternative that they move their equipment from the roads of the Municipality of Matsqui. The said agreement gave the Western Canada Power Company the right to sell electric energy for light, heat, power and industrial purposes within the limits of Matsqui Municipality, and the right to construct and maintain steel towers with standard brackets, cross-arms and attachments and to string wires thereon and to operate lines of wire along certain roads for the purpose of carrying its transmission wires in, through and beyond the municipality on certain terms. A by-law was passed authorizing the execution of the agreement and received the assent of the electors. The company agreed that it would, free of charge, make the necessary connections to anyone requiring service within one-quarter of a mile of certain roads including the Sim Road, and further agreed not to make any charge for supplying electric energy to the corporation or any inhabitant thereof greater than that paid for similar service by any municipality or the inhabitants thereof other than a city, and would not discriminate against the corporation or residents. The defendant company became the successor in title to the Western Canada Power Company and is now affiliated and connected in interest with the British Columbia Electric Railway Company. The plaintiff claims that one L. T. Beharrell, the owner of 90 acres situate on Sim Road within the municipality required the defendant to make the necessary connections and install electric service for his residence and buildings situate less than one-quarter of a mile from the Sim Road, and the defendant refused to comply with such demand and further the defendant has charged and now charges the inhabitants of Matsqui a greater price for the supply of "electric energy" than that paid by the inhabitants of the Municipality of Burnaby for similar service, the charge for consumers in

Matsqui being six cents per kilowatt hour and for consumers in Burnaby five cents per kilowatt hour.

Mayers, K.C., Manson, K.C., and *G. E. Martin,* for plaintiff.
J. W. deB. Farris, K.C., and *W. A. Riddell,* for defendant.

5th January, 1933.

MURPHY, J.: Dealing first with the defence of estoppel it is conceded that Exhibit 16 is inoperative because the requirement of the relevant sections in the Municipal Act necessary for its validity have not been complied with. It is contended however, that defendant with the knowledge of plaintiff changed its position in reliance on said Exhibit 16. Assuming, without deciding, that the evidence led in support would establish the defence of estoppel the law seems to be clear that estoppel cannot be set up where the result of giving effect to such a plea would be in effect to repeal statutory provisions.

Waterman-Waterbury Mfg. Co. v. *Slavanka S. D.* (1929), 1 W.W.R. 598; *Corporation of Canterbury* v. *Cooper* (1908), 99 L.T. 612; *Islington Vestry* v. *Hornsey Urban Council* (1900), 1 Ch. 695. The case then is to be disposed of by construing the contract, Exhibit 1, and particularly paragraph 11 thereof which reads:

MURPHY, J.

11. The company covenants and agrees with the corporation that the company will not make any charge for the supplying of electric energy to the corporation or any of the inhabitants of the municipality greater than that paid for similar service by any municipality or the inhabitants thereof other than a city, and will not in any way discriminate against the corporation or residents of the municipality; AND the company will, free of charge to the customer, make the necessary connections and install electric service to anyone requiring service, PROVIDED that such installation be located within one-quarter of a mile of the following roads:

Glenmore Road between the Township Line Road and the Fraser River.

The Township Line Road between the Glenmore Road and the Canadian Pacific Railway right of way (Mission Branch).

The Matsqui-Mt. Lehman Road from the Glenmore Road eastward for about two miles east of the aforesaid right of way.

The Page Road for about two miles east of the aforesaid right of way.

The Fore Road. The Bell Road. The Sim Road.

ALSO PROVIDED that when fifteen or more proposed customers resident within a radius of one mile of the company's main distribution line petition for service in portions of the municipality not served by the company's main distribution lines, the company shall supply such lighting and power service upon such customers entering into a contract with the company to

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

pay the cost of supplying standard poles and erecting the same for such service PROVIDED that roads are accessible for pole lines to install such service, or right of way will be furnished by such customers to the company, the poles and right of way thus provided to become the property of the company; PROVIDED also that when thirty customers are connected up with such distribution line and are being furnished with light and power service from the company, the initial cost of supplying and erecting the poles will be refunded by the company to the party or parties who paid for the cost of the same.

It is contended first that the true construction is that defendant will not charge plaintiff municipality or inhabitants thereof rates in excess of what it charges other municipalities. To so construe this paragraph would necessitate insertion of qualifying words not found in it. As it stands its meaning is clear, *i.e.*, that the defendant will not make any charge greater than that paid for similar service by any rural municipality or the inhabitants thereof. No evidence was given of the circumstances under which the contract was executed so that if the plain meaning of the language is to be cut down the reason for so doing must be gathered from the contract itself. It is suggested that, taken as it reads, the resultant obligation on defendant company would be so onerous as to make it obvious such could not have been the intention since the limitation as to charges might be worldwide. Apart from the fact that the contract is made in British Columbia to be carried out in British Columbia, the Court, as plaintiff's counsel pointed out, has judicial knowledge through the statutes of the Province that there are district municipalities and city municipalities in British Columbia, whereas it has no knowledge of the existence of such bodies beyond Provincial limits. If the company, as the first recital of the contract shews, was desirous of furnishing the inhabitants with electric energy for the purposes therein expressed, why should it not agree to what the plain language used says it did agree to? There is no inherent difficulty in carrying out the contract according to its terms other than possible financial loss and no one would contend that such a possibility is a reason for a Court to read into a contract that which the contract does not contain. I hold the contract must be given the interpretation contended for by plaintiff. Then it is said that the word "service" in paragraph 11 is a technical word as there used meaning the effort entailed in supplying

MURPHY, J.

electric energy which effort is to be measured by the cost of production and distribution instead of meaning, as plaintiff asserts, the use to which such energy is put by the consumer or the benefit derived by the consumer. Defendant's contention, in my opinion, embodies two mutually exclusive propositions: 1st, that "service," as it appears in said paragraph, is technical; 2nd, that it is ambiguous. If it is technical it cannot of course be ambiguous for *ex hypothesi* it has a defined meaning differing, it is true, from the ordinary accepted meaning but none the less clear and undisputed. Dealing first with the argument that "service" is here used in a technical sense no evidence was led to shew that in British Columbia, in making contracts between municipalities and light and power companies this word has acquired a technical meaning. The authorities seem clear as to what such evidence must be:

> The character and description of the evidence admissible for that purpose, is the fact of general usage and practice prevailing in a particular trade or province, and not the judgment and opinion of witnesses. For the contract may be safely and correctly interpreted by reference to the fact of such usage, as it may be presumed that such fact is known to the contracting parties, and that they contracted in conformity thereto:

Lewis v. *Marshall* (1844), 13 L.J., C.P. 193 at p. 195, and see *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802 at p. 818 and *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292. The only evidence before me is not in connection with the making of such contracts as the one under consideration at any time and certainly not in British Columbia in 1913. This would seem to dispose of the first branch of the argument on this phase of the case.

MURPHY, J.

As to the second, evidence was given that the word "service" in connotation with the use of electricity has a meaning from the standpoint of him who furnishes electric energy which differs from what would be its ordinary meaning from the standpoint of the consumer. Such evidence was I think scarcely necessary as dictionary definitions of the word "service" would shew this to be the case. To decide in which sense it was used in the paragraph under discussion one must study the contract itself, a course which I think clears up all difficulty. The argument made to distinguish effort from the only method of ascertaining what that effort is in connection with this contract, *i.e.*, cost of

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

production and distribution, seems to be more ingenious than convincing. Plaintiff corporation on this contention must embark on an enquiry as to similarity of effort by defendant company in comparison with that of itself or other companies elsewhere than in plaintiff municipality, in order to ascertain whether there has been a breach of contract or not. The only way suggested of measuring effort is by ascertaining the cost of production and distribution. What this involves is shewn by paragraph 7 of the defence. It is argued that no such exhaustive investigation as is there indicated need be carried out because obviously it would cost more to furnish electric energy to a widely scattered population than to a thickly settled community. If that be so, why the pleading? To my mind such increased cost does not necessarily follow from sparsity of population in the district served and if enquiry has to be entered upon it would be difficult to say where it should stop short of what is indicated by the statement of defence as necessary to determine the question of relative cost. It would seem scarcely probable that the parties to this contract could have contemplated an enquiry of this character. But, in my opinion, it is unnecessary to stress this feature because the contract read in its entirety shews clearly I think what the words "similar services" were meant to express. The first recital sets out that it is defendant company which is desirous, *inter alia,* of supplying the inhabitants of plaintiff municipality with electric energy for lighting, heating, power and industrial purposes. These are the various kinds of services which defendant wishes to render to plaintiff. By paragraph 1 plaintiff corporation gives defendant company the right to sell electric energy for lighting, heating, power, industrial and other purposes. Paragraph 4 gives power to defendant company to set up poles, etc., which may be necessary in the supplying of electric energy for lighting, industrial power, heating or other purposes. Then comes paragraph 11 in which again we have the words "the supplying of electric energy." We know from the preceding clauses the purposes for which it is proposed to furnish this energy. It is to be for lighting, industrial, power, heating and other purposes. This energy is not to be charged for at a higher rate than is paid for similar service, etc. The word service here, in my opinion,

MURPHY, J.

refers to what the plaintiff corporation and its inhabitants are to get. The defendant company is, as the agreement shews, the party desirous that the contract be entered into. Defendant company states the uses to which it expects electric energy will be put by the inhabitants and plaintiff. These uses vary in kind but from the standpoint of plaintiff and its inhabitants they are services according to the ordinary meaning of the word. In paragraph 11 defendant is making a term in favour of plaintiff and its inhabitants. To my mind the reasonable interpretation of this paragraph is that the concession therein granted must refer to what persons in the position of plaintiff and its inhabitants would understand to be meant by the word "service." This view is strengthened by referring to the use of the word "service" later on in the same paragraph. "And the company will free of charge to the customer make the necessary connections and install electric service to anyone requiring service." It is true that "service" as first used in this sentence cannot be given the meaning of "use or benefit to the consumer" unless the sentence be regarded as elliptical but the objection is equally strong to making it mean "the effort to produce and distribute electric energy such effort to be measured by the cost of production and distribution." Neither one thing nor the other can be installed. But the use of "service" the second time seems to make plain the sense in which it is being used. Here again a concession is being made. Why should language be strained to make the words "to anyone requiring service" which in their ordinary meaning in the context in which they are used would seem clearly to indicate the use to which the electric energy will be put by such person to some such meaning as "to anyone requiring the effort to produce and distribute such energy such effort to be measured by the cost of production and distribution." This is emphasized I think by the use of the words "lighting and power service" in the provisoes to said paragraph 11.

MURPHY, J.

Why then if the word "service" has been given a definite meaning in one part of the contract should it receive a different interpretation when it occurs elsewhere in the same document unaccompanied by any *indicia* that it is being used in a different sense? I hold that "similar service" refers to the use to which

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

plaintiff and its inhabitants put the electric energy supplied, *i.e.*, lighting, power, heating, etc. The evidence is clear that defendant is charging plaintiff and its inhabitants more than Burnaby and its inhabitants pay and that Burnaby is a municipality other than a city. In my view plaintiff is entitled to succeed.

On the other branch of the case, the breach to make the necessary connections and install electric service to persons within certain prescribed areas, such breach was proven. One defence is that the parties so applying are not shewn to be customers. This contention is I think disposed of by the decision in *Corporation of Maple Ridge* v. *Western Power Company of Canada* (1926), 37 B.C. 252. The other defence is estoppel with which I have already dealt. It follows plaintiff succeeds on this branch also.

From this decision the defendant appealed. The appeal was argued at Vancouver on the 4th, 5th and 6th of April, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: The word "service" as used in the agreement has a distinct technical or trade meaning, it means and includes the effect and expense made and incurred in supplying electric energy. The cost of generation, transmission and distribution and the cost of meter reading, accounting, billing and collecting must be considered in relation to which is the number of customers and average revenue from each, the population to be served, the area served, load factors, including quantity of consumption, density and diversity of load. "Similar service" as used in the agreement also has a distinct and technical or trade meaning which has a substantial similarity to that of "service": see *Myers* v. *Sarl* (1860), 3 El. & El. 306; *Brown* v. *Byrne* (1854), 3 El. & Bl. 703; *Shore* v. *Wilson* (1842), 9 Cl. & F. 355. The cost of supplying electric energy is significant on the question of discrimination: see *Metropolitan Electric Supply Co.* v. *Ginder* (1901), 70 L.J., Ch. 862; *Attorney-General* v. *Hackney Borough Council* (1917), 87 L.J., Ch. 122 at p. 129. Burnaby

is a large and fairly densely populated district and it does not cost nearly so much to supply electricity there. It is not a "similar service": see *Attorney-General* v. *Long Eaton Urban Council* (1914), 2 Ch. 251 at p. 263. Another company supplied Burnaby when the agreement was entered into and paragraph 11 thereof does not apply to Burnaby. In such a case we would be at the mercy of the other companies: see Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., 218; *In re The Alma Spinning Co.* (1880), 50 L.J., Ch. 167 at p. 170.

Mayers, K.C., for respondent: The learned judge properly rejected expert evidence and put a construction on the matter from the document as a whole. Only evidence existing at the time of the contract is relevant. "Service" is not a technical term, it is a common English word: see *Lewis* v. *Marshall* (1844), 13 L.J., C.P. 193; *Robinson* v. *Mollett* (1875), L.R. 7 H.L. 802 at p. 818; *Sea Steamship Co.* v. *Price, Walker & Co.* (1903), 8 Com. Cas. 292 at p. 295; Halsbury's Laws of England, Vol. 10, p. 271, secs. 495-6-7. The parties within the municipality applying for power come within the agreement: see *Corporation of Maple Ridge* v. *Western Power Company of Canada* (1926), 37 B.C. 252 at p. 261. The companies are all merged in the B.C. Electric and the one mind charges both Matsqui and Burnaby. That we are entitled to recover back the additional amount paid for electricity see *Morgan* v. *Palmer* (1824), 2 B. & C. 729; *Pillsworth* v. *Town of Cobourg* (1930), 65 O.L.R. 541 at p. 546; *Brocklebank (T. & J.), Lim.* v. *Regem* (1925), 94 L.J., K.B. 26 at p. 36; *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (1933), A.C. 70 at p. 79; *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290.

Argument

Farris, in reply: The defendant has no charter in Burnaby and never did supply Burnaby: see *Associated Growers of B.C.* v. *Edmunds* (1926), 36 B.C. 413; *Assiniboia* v. *Suburban Rapid Transit Co.* (1931), 2 D.L.R. 862 at p. 864; *Daimler Company Limited* v. *Continental Tyre and Rubber Company (Great Britain), Limited* (1916), 2 A.C. 307. The rate for Matsqui came gradually down from 15 cents to 6 cents. This is not an action in which accounting lies: see Halsbury's Laws of England, Vol. 1, p. 52, sec. 59; *London, Chatham, & Dover Rail. Co.* v. *South Eastern Rail. Co.* (1891), 61 L.J., Ch. 294

MURPHY, J.

1933

Jan. 5.

at p. 300. They cannot get the money back when paid by mistake in law: see *Sharp Brothers & Knight* v. *Chant* (1917), 86 L.J., K.B. 608.

Cur. adv. vult.

6th June, 1933.

COURT OF APPEAL

June 6.

MACDONALD, C.J.B.C.: I entirely agree with the learned trial judge. The appeal should, therefore, be dismissed.

CORPORATION OF DISTRICT OF MATSQUI *v.* WESTERN POWER COMPANY OF CANADA LTD.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: This is an appeal from the decision of MURPHY, J. in respect of the terms of a contract providing for the supply in the Municipality of Matsqui of electric energy for lighting, heating, power, industrial and other purposes incidental thereto within the limits of the municipality and the whole question is the construction of the terms of the contract. The judgment of the learned trial judge is in the following terms [already set out at pp. 337-42].

It will be noted at the outset that the learned judge arrived at this very definite decision: [see *ante*, p. 338 from "as it stands" to "contended for by plaintiff."]

It is a matter for remark though that the evidence does not establish at all that the power company (the appellant) was or is now supplying electric energy in breach of paragraph 11 of the contract which in part reads as follows: [already set out in the judgment of the trial judge.]

This fact in itself, in my opinion, with the greatest respect for all contrary opinion, is sufficient to end the case and admit of the allowance of the appeal. The attempt, though, is to add in some way to the responsibility of the power company *dehors* the precise terms of the company. It is plain that the meaning of the contract is that there will be no discrimination as amongst its customers not that the power company is to be at the mercy of the policy of other power companies as to rates for services. The decision of the learned judge which is here under appeal is devoid of the necessary foundation of fact that it has been proved that the power company is making any charge—as between its customers—greater than that paid for similar service by any rural municipality or the inhabitants thereof.

The attempt to so impose liability was based on arguments at this Bar that the power company was one of several companies which really were under the control of an alleged parent company —the British Columbia Electric Railway Company, Limited— a company incorporated in England under the Companies Act 1862 (25 & 26 Vict.), c. 89 and of the many Acts amending and extending the provisions of that Act—now the Companies Act, 1929 (19 & 20 Geo. 5), c. 23. The British Columbia Electric Railway has undoubtedly many subsidiary companies carrying out, through long years, large operations of a various nature in the form of public utilities and enjoys large statutory powers but outside its traction systems there are other companies and the present power company is one wholly distinct and under separate and distinct corporate powers in the utilization and use of water for power, light and heat, as well as industrial purposes, under the provisions of the Provincial Water Act, Cap. 271, R.S.B.C. 1924. It is futile argument in my opinion to attempt to in any way sweep one company into the affairs and business operations of another company—that could only be done by statute law or the exercise of general statutory powers providing for such being done. Here we have a company contracting within a municipality and the rights and liabilities may only be determined in relation to the respective statutory powers of company and municipality and cannot be otherwise affected (*Salomon* v. *Salomon & Co.* (1897), A.C. 22) and what may be the situation with regard to any other municipality with which there is no contractual relationship cannot have place here. Further the attempt here to bring in the situation of the Municipality of Burnaby lying next the boundaries of the City of Vancouver, if nothing more, is a most inequitable and I would say unconscionable contention that the power company here should be compelled to reduce its rates and charge for services to that obtaining for like services in the Municipality of Burnaby and that, in the result of things, is the effect of the judgment here under appeal. The contract under consideration is not, in my opinion, in its terms nor was it executed with the intention to admit of any such construction as has been given to it. Dealing with the words "discriminate against" in paragraph 11 of the contract that, it would appear to me, is the key

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

MCPHILLIPS, J.A.

to the ambit of the contract, *i.e.*, Oxford Dictionary, Vol. III., p. 4363:

(b) To discriminate against: to make an adverse distinction with regard to; to distinguish unfavourably from others.

Now manifestly to discriminate is to distinguish unfavourably between the power company's customers and, I would think, between its customers in the Municipality of Matsqui—the Corporation of Matsqui—and residents of the municipality. The power company is not shewn to have done this—and in what way can it be conjured up that there has been a breach? I confess it passes my understanding. The installation of electric power systems is a matter of great cost and varies greatly in accordance with the configuration of the country and the territory to be supplied. In the neighbourhood in question the physical condition of the country is rugged and mountainous at the source of the waters impounded and each development varies in cost and charges for services must be based upon initial cost and up-keep, by analogy to the construction of the great lines of railway in Canada. This is well known and accepted in the case of the railways. The Government of Canada has its Railway Board and the public interest is well conserved and I have no doubt that in the Province if in the public interest it becomes necessary there will be a Water Board extended to the examination of charges made consequent upon the establishment of power plants utilizing the water of the country, which is the property of the Crown, but all such Boards will be required to give attention to the initial cost of installation, the configuration of the country and maintenance and cost of up-keep and supply all of which matters enter into the consideration of what the rates should be. At the present time there is no popular complaint. We have here, though, the attempt to expand the words of contract into what appears to me not only in excess of the principles of the true construction of contract in law, but to a degree which in its nature is so expansive that it transcends reasonableness.

If it be necessary to view the contract in the wider sense that is as not confined to discrimination between customers—and that in my opinion of course is not the legal position—then we cannot overlook the words "greater than that paid for similar service by any municipality or the inhabitants thereof other than a city."

Now the onus is to shew and demonstrate this was upon the municipality (the respondent) and it was not shewn. To merely point at the Municipality of Burnaby with its ideal position as against the position of the inhabitants of Matsqui and that it was and its inhabitants were supplied at less cost in my opinion proved nothing. The "similar service" must be read with attention given to the installation and supply available and its nature of supply and the total cost thereof with regard to distance, the contour of the land and the physical difficulties existent.

The question of "similar service" is something that the Court cannot be unmindful of—these words must be given some meaning and the power company (the appellant) led evidence which I consider to be relevant evidence and well supports counsel in relying thereon—and I consider must be given full effect to. (*Brown* v. *Byrne* (1854), 3 El. & Bl. 703; 118 E.R. 1305). In the supply of electric energy—power, light and heat —it is a public utility of recent times and in this connection I would refer to what Lord Shaw said in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 at p. 617:

> The law must adapt itself to the conditions of modern society and trade, . . .

But even as long ago as 1860 Cockburn, C.J. in *Myers* v. *Sarl*, 3 El. & El. 306 at p. 315 said:

> I am of opinion that the course pursued by the arbitrator was both proper and correct in point of law, and that the parol evidence was rightly received. The duty of the Court, or of an arbitrator who is in the place of the Court, is so to construe a contract as to give effect to the intention of the parties. Now, although parol evidence is not admissible to contradict a contract the terms of which have but one ordinary meaning and acceptation, yet if the parties have used terms which bear not only an ordinary meaning, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intention, if the terms were interpreted according to their ordinary and not according to their peculiar signification. Therefore, whenever such a question has come before the Courts, it has always been held that where the terms of the contract under consideration have, besides their ordinary and popular sense, also a peculiar and scientific meaning, the parties who have drawn up the contract with reference to some particular department of trade or business, must have intended to use the words in the peculiar sense. This is but an application of the well-known rule that the interpretation of contracts must be governed by the intention of the parties.

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

MCPHILLIPS, J.A.

(Also see *Metropolitan Electric Supply Co.* v. *Ginder* (1901), 70 L.J., Ch. 862 and *Att.-Gen.* v. *Hackney Borough Council* (1917), 87 L.J. Ch. 122, and at p. 124). I would also refer to pp. 318-19 of Beal's Cardinal Rules of Legal Interpretation, 3rd Ed., reading as follows:

"The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand those words it is material to inquire what is the subject-matter with respect to which they are used, and the object in view." *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394, at p. 412; 46 L.J., P.C. 71, at p. 74, Lord Blackburn, delivering the opinion of the Judicial Committee [cited by Lord Atkinson in *London and India Docks Co.* v. *Thames Steam Tug and Lighterage Co., Ltd.* (1909), A.C. 15, at p. 23; 78 L.J., K.B. 90, at p. 94].

Here we have a contract entered into in regard to the supply of electric energy—it will not do for the municipality (the respondent) to say that we did not know what "similar services" imported and upon this point I would refer to what Bankes, L.J. said in *Laurie & Morewood* v. *John Dudin & Sons* (1925), 95 L.J., K.B. 191, at 193, "so all-pervading, and so reasonable and so well known, that everybody doing business in this way must be assumed to know the custom and be bound by it" that is to contract subject to it. See *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.* (1929), S.C.R. 630, 631. Although I am confident that the facts adduced in this case in no way call upon me to again refer to the relationship of other companies supplying electric energy in the neighbourhood of the territory of the Matsqui Municipality (the respondent) I would draw attention to what Robson, J.A. when delivering the judgment of the Court of Appeal in Manitoba said in *Assiniboia* v. *Suburban Rapid Transit Co.* (1931), 2 D.L.R. 862. There it was held

Even though there is a community of interest between two corporations, by reason of shareholding or other relations, they are nevertheless distinct legal persons. Hence, though one public utility company holds all the shares in another company it cannot be said to own the latter, under a statute providing that "owner" includes every corporation which manages or controls any public utility.

And in the judgment at p. 864 Robson, J.A. said:

In *Daimler Co., Ltd.* v. *Continental Tyre & Rubber Co. Ltd.* (1916), 2 A.C. 307, a war-time case as to who controlled a company, Lord Parker of Waddington was of the opinion that the enemy character of shareholders might be an element in deciding as to the motives of its executives but

reaffirmed the well-known principle which he stated as follows (p. 338):—

"No one can question that a corporation is a legal person distinct from its corporators; that the relation of a shareholder to a company, which is limited by shares, is not in itself the relation of principal and agent or the reverse; that the assets of the company belong to it and the acts of its servants and agents are its acts, while its shareholders, as such, have no property in the assets and no personal responsibility for those acts. The law on the subject is clearly laid down in a passage in Lord Halsbury's judgment in *Salomon* v. *Salomon & Co.* (1897), A.C. 22, 30: 'I am simply here,' he says, 'dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognize only that artificial existence—quite apart from the motives or conduct of individual corporators. . . . Short of such proof'—*i.e.*, proof in appropriate proceedings that the company had no real legal existence—'it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the formation of the company are absolutely irrelevant in discussing what those rights and liabilities are.'"

It would require express statutory language to depart from this rule and such has not been found or adduced in this case. Furthermore, the intent of the Act is against a holding that a public utility company can by indirect means absorb and control the franchises of another.

MCPHILLIPS, J.A.

In the present case the franchise and the contract to build and operate are by statute recognized as those of the Suburban Rapid Transit Co. and there is nothing on which to base a holding that the Winnipeg Electric Co. has at law either rights or obligations in relation to them.

In my opinion and with the greatest respect to the learned trial judge the action should have been dismissed. I would, therefore, and with great respect to my learned brothers who are of a contrary opinion, allow the appeal.

MACDONALD, J.A.: The respondent, district municipality, granted a franchise to appellant's predecessors in title to sell electric energy for lighting, heating, power, industrial and other purposes, including the right to erect and maintain all necessary equipment incidental thereto within the district. A by-law, assented to by the electors, authorized the execution of an agreement between the parties and we are concerned in this appeal principally with the interpretation of clause 11, and particularly the words "similar service" found therein. It reads as follows: [already set out in the judgment of the trial judge.]

MACDONALD, J.A.

I agree with the conclusions arrived at by the trial judge on all points. It may, however, throw some light on the controversy to independently state my views, at least on the main question.

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

It is conceded that appellant charged and still charges the inhabitants of respondent municipality a greater sum for the supply of electric energy than that paid by the inhabitants of another municipality in the Province, *viz.*, Burnaby. The point arises—is this a breach of the agreement? The trial judge so found. Briefly the covenant is not to "charge" more than that paid for "similar service" by, *e.g.*, Burnaby. Conditions in Burnaby are materially different as compared with Matsqui. It is a more densely settled suburban community (although not a city) with more industrial plants; closer also to the centre of operations (thus lowering the unit maintenance cost) and generally without exhausting the distinctions greater cost is incurred in serving a customer in the less densely settled area of Matsqui. Appellant submits that the "service" contemplated means in itself, or at all events, by the usage of trade, the act of providing facilities and supplying energy (with all that implies) and the maintenance and operation thereof. It includes every activity and investment in the business; all the physical factors such as the generation of power, transmission lines, sub-stations for transformers and the whole distribution system, reading of meters, bill collecting, etc., in other words, everything physical or otherwise expended in bringing electric energy to the customer. The word "service" it is submitted must be interpreted from the standpoint of the producer, not the consumer.

MACDONALD, J.A.

If "service," as used in the contract, relates to what the consumer receives it is limited to the energy furnished and he has only an academic interest in the plant producing it. If it means what the company furnishes it may include facilities but it also includes (whether exclusively or not will be discussed) the electric energy flowing from the facilities provided and received by the consumer. The clause however cannot be properly interpreted by confining attention solely to the words "service" or "similar service." We must have regard to the context and particularly the words "will not make any charge . . . greater than that paid for" by others, and, "will not discriminate" (not solely as between residents) but "against the corporation," *i.e.*, I think as compared to other corporations. If to take an example discussed in argument a dairyman agrees not to make a charge greater than that paid for "similar service" by others and not to

discriminate, the customer would feel aggrieved if other dairies were selling milk, equally good in quality for a less amount per quart and the grievance would not be removed by proof that this dairyman's costs of production were unavoidably higher. He would look upon the "service" as supplying the milk; not the furnishing of effort or expense of operation. If the milk was good it would be regarded as good service; not so if bad, all without reference (subject to a limitation later discussed) to whether or not it was delivered in a costly car or a cheap truck. Service is an act—the act of serving another, in this case a commodity to a consumer—and to understand the act *solus* it is not necessary to determine its cost although it may incidentally affect its value. Even if in doubt on this point, having regard to exactitude in defining terms, I would still conclude that fairly and reasonably it should be held that respondent contracted on the basis referred to. There are, of course, as intimated, some qualifications to this view. "Service" in the popular sense may include more than the thing physically delivered. In merchandising it may include conveniences and attractive or serviceable devices in connection with actual sale and delivery but never I think the whole stock-in-trade of the merchant. A service is given to customers in respect to the disposal of stock. It is not strictly accurate to say that it is a "service" to customers to maintain the stock at a certain level or to make large expenditures in connection therewith. That is "self service" on the owner's part. The "service" which the customer receives on entering into business relationship with the merchant is in connection with the process of conversion and delivery by means animate or inanimate. If a customer compares services received in different stores he may regard them as "similar" although the value of the merchandise and overhead may vary greatly.

MACDONALD, J.A.

However, if it be granted that the word "service" may have a different meaning dependent upon whether it is viewed from the standpoint of the one who renders it or the one who receives it the clause in question should be regarded in the latter aspect. It is inserted for the benefit of the recipient. Clause 11 is concerned with what the respondent may or may not be charged for "the act of serving, helping or benefiting" him (Oxford Dictionary) and it must not be more than that charged for the

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

MACDONALD, J.A.

act "of serving, helping and benefiting" residents in other municipalities.

The agreement is that the company will not charge more "for the supplying of electric energy" (it might as indicated be milk) than that paid for similar service elsewhere for the supplying of electric energy. The last mentioned phrase should be inserted after the words "similar service" as an aid in interpretation, without the further additional phrase which must be suggested by appellant, *viz.*, "having regard to the respective costs of production." Clause 11 of the contract, so far as the parties are concerned, is confined to the product, *viz.*, electric energy. Facilities for producing it is the concern only of one of the parties. Other clauses in the agreement relate to erection of poles, steel towers, wires, etc., subject to certain terms. The only concern of respondent in respect to appellant's plant is to receive an annual rental of $400; to give approval to the design and location of steel towers, etc., to see, among other things, that they are properly maintained and kept in repair. Clause 11 stands apart having no reference to these features. Clearly I think the "service" is the supply of electricity and nothing else and it is the same sort of service that is supplied to the residents of Burnaby. This is supplied, not like goods from a store, where other agencies may form part of the service—it is supplied mechanically. The "service" therefore is confined to the actual physical delivery and receipt.

We are obliged too where alternative interpretations are possible, or where the term is susceptible to more than one meaning to ascertain, if we can, what was contemplated by the parties when the agreement was executed. Effect is to be given to the intention of the parties collected, not from conjecture as to what they may have had in mind and would have inserted if better advised but from the expression of it in the agreement itself. The rule as to two alternatives arises only where there is real doubt, and without admitting it doubt may be assumed. Now the appellant was seeking a franchise and to procure it would naturally offer favourable terms. It might well consider that while in Matsqui at present the population was small and industrial activity light yet long before the termination of the franchise (40 years) these conditions might be reversed and

possible early losses recompensed by later gains. The respondent on its part sought to procure electric energy for defined purposes at a reasonable cost having regard to the whole period covered by the franchise. Prices might increase or diminish but it would at least have the safeguard that it would not suffer industrially or otherwise, so far as the cost of electric energy is concerned in comparison with neighbouring municipalities. This at least would give that element of certainty which ought to be found in contracts. We may assume, I think, that they were contracting in reference to these known facts and not entering into a contract obscure in its terms and incapable of working out without an elaborate and costly inquiry. The clause favourable to the respondent in respect to cost was this reference to any municipality, other than a city. Cost of service elsewhere in the sense already suggested could be readily ascertained. I do not think reading the whole contract fairly that it can be said that one of the parties placed "a joker" in the contract if I may use that word. How could respondent, if appellant's contention is correct, ascertain a breach? Only by an intricate and elaborate investigation, costly and of doubtful certainty into what may briefly be termed the total cost of production and all elements entering into it. Granted too that appellant's contention is right we do not know that the charge now made to residents in Matsqui accurately corresponds to charges made to consumers in Burnaby. It may cost more at present to supply John Doe in Matsqui with a certain amount of electric energy than it costs to supply Richard Roe in Burnaby with the same amount, but each is receiving similar service. It is similar in amount and in the means of supply. Cost has relation only to providing or getting ready to perform the service and is expended before the actual service commences or is rendered.

We were referred to *Metropolitan Electric Supply Co.* v. *Ginder* (1901), 70 L.J., Ch. 862 at 867-8. On the facts and the statute referred to it does not assist appellant. Consumers in a certain area were entitled to a supply of electric energy on the same terms on which any other person in that area "is entitled under similar circumstances to a corresponding supply." It is clear why, as pointed out, there was "latitude to the com-

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY OF CANADA LTD.

MACDONALD, J.A.

pany to make bargains with its customers, where circumstances differ or the supply does not correspond for different terms." That right was plainly reserved. Nor can assistance be obtained from the judgments in *Attorney-General* v. *Long Eaton Urban Council* (1914), 2 Ch. 251, where the sections of the same Act were dealt with. The word "similar" of course may properly be regarded as meaning "corresponding" but when "service" is defined, the adjective will not carry all that is involved in the words "under similar circumstances." It means service of a similar nature, *viz.*, the supply of energy.

It was admitted, however, that the term "service" in the electrical industry has a distinct trade and technical meaning and on the principle that although parol evidence may not be adduced to vary the terms of a contract, where the words used have only one ordinary meaning yet if a word is used which has not only an ordinary meaning but also one of a scientific nature peculiar to the trade to which the contract relates it must be interpreted in that sense. Even if this simple word in common use has a technical trade meaning we must be satisfied that it was intended that resort should be had to a mercantile dictionary. Does it appear from the context that the parties used the words except in the ordinary sense? I do not think—aided by reference to other parts of the contract where the word is used —that any such intention appears on the face of the document. Where a word bears a definite known meaning and may reasonably be applied in that sense one must be fully satisfied that the parties intended to use them in a more restricted or as here enlarged sense before admitting extrinsic evidence. Here it is said that it would be manifestly unjust to use the ordinary restrictive interpretation. It is suggested that power would be supplied at a loss. One has to keep in mind the desire to enter the field and the long tenure secured before giving undue weight to this contention. The word is free from ambiguity and these external circumstances do not necessarily raise serious doubts. The fact, too, that clause 11 was deleted in a later contract has some bearing on the point. This so-called scientific or technical meaning must be well known and understood by the parties concerned before extrinsic evidence can be received. It is difficult to say (unlike for example, mercantile documents) that the

parties to this contract, the position of the respondent, corresponding to that of a layman, adopted language of a peculiarly restricted or enlarged character. The admission of external evidence in a proper case is only to assist in arriving at the true intention: hence the need of viewing it from the standpoint and knowledge of both parties. I do not suggest that the fact that one of the parties to the contract has a limited knowledge of a special trade is conclusive, yet weight must be given to the view that the respondent would not be accustomed to using this word in a technical sense.

However, the evidence adduced in any event was insufficient and falls short of the usual requirements. Mr. Gray who does not profess knowledge of the practice in this Province said the word "service" has "in the electrical industry a distinct trade and technical meaning" and in defining it testified that "in public utilities circles service means the act of supplying some general demand" enlarging upon the many factors involved in the act. This evidence does not establish "a general usage and practice prevailing in a particular trade" and "no instance of such construction was stated by any of the witnesses" (*Lewis* v. *Marshall* (1844), 13 L.J., C.P. 193 at 195). Mr. Walker did not appear to have the true import of the inquiry clearly in mind. He simply said (not what the usage is) but "I would define (*i.e.,* in my opinion) the meaning of service as the act of furnishing certain facilities" and "to the best of my knowledge" it always had that meaning. This is equally inconclusive. The evidence too is confined to the "electrical industry" not necessarily extending to the marketing of power. It fails to shew established usage. It is not clear and convincing; nor does it indicate that it is certain and so generally acquiesced in that all in the trade either knew it or should have known of it. No cases were given of this alleged usage being acted upon nor that this special meaning was assigned in the trade when this agreement was entered into twenty years ago. In *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.* (1929), S.C.R. 630 at 633, Duff, J. (now Chief Justice) said:

> Usage, of course, where it is established, may annex an unexpressed incident to a written contract; but it must be reasonably certain and so notorious and so generally acquiesced in that it may be presumed to form

MURPHY, J.

1933

Jan. 5.

COURT OF APPEAL

June 6.

CORPORATION OF DISTRICT OF MATSQUI v. WESTERN POWER COMPANY LTD.

MACDONALD, J.A.

an ingredient of the contract, *Juggomohun Ghose* v. *Manickchund* [(1859),] 7 Moo. Ind. App. 263, at p. 282.

It was further submitted that in any event by the true interpretation of clause 11 it is limited to amounts paid by the inhabitants of any other municipality for similar service to appellant, not to other companies. The appellant company it was alleged does not supply electric energy to Burnaby. As I view this point it is not necessary to discuss the relationship of the different companies concerned. I simply say that I cannot introduce words of limitation into the contract by adding the words "to us" after the phrase "greater than that paid." True the clause providing against discrimination among residents in Matsqui means by the appellant company only but that is an additional covenant. It was said because other companies might supply power cheaply or even at a loss that a hardship might be imposed. True where the language used is fairly open to two constructions the argument that one may lead to inconvenience, hardship or absurdity may be a guide. I think, however, the language is clear. The conclusion of the trial judge is right too, I think that it is municipalities in this Province that was contemplated. It is a British Columbia contract to be performed in this Province. That is the sphere in which it operates.

A further point in reference to making necessary connections and installing electric service free from installation charges while not abandoned was not pressed before us. I would therefore dismiss the appeal.

The respondent claims an accounting for a period of six years prior to the date of the writ of all moneys paid by it and the inhabitants of Matsqui by way of rates in excess of rates paid for similar service in Burnaby. Without expressing any opinion on the right of respondent to sue on behalf of residents I think after perusal of the cases cited that the trial judge was right in treating these as voluntary payments. The fact that the bills rendered contained the notice that "if this bill is not paid on due date service may be discontinued without further notice" does not indicate payment under pressure or compulsion. It is material to observe that the notice relates, not solely to the excess (in which event other considerations might arise) but to the whole sum claimed the greater part of which was rightly

due. It is merely an intimation that one of two remedies may be taken in case of failure to pay; an intimation that certain proceedings might be taken. Similar notices, announcing the possible discontinuance of further supplies for failure to pay accounts monthly, might in the same way appear on the statements of dealers in all kinds of merchandise and if it should transpire that, not by mistake of fact but by mistake of law, excess payments were made without protest such notices would not furnish evidence to destroy the voluntary nature of the payments.

Appeal dismissed, McPhillips, J.A. dissenting.

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

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

CANADIAN CREDIT MEN'S TRUST ASSOCIATION LIMITED AND DINNING v. INGHAM.

Vendor and purchaser—Sale to logging company of lands, timber berths, leases and licences—Installation of logging railway, telephone line and logging equipment by purchasers—Fixtures—Mortgage.

By agreement of the 16th of November, 1926, the defendant sold to the Campbell River Mills Limited certain lands, timber berths, leases and licences to cut timber on certain terms, a term of the agreement providing that in case of default by the purchaser the vendor was at liberty to resell the said lands, timber berths, leases and logging railway, and retain out of the proceeds such part of the purchase price as was not paid. A further term was that the purchaser agreed to acquire by purchase or otherwise in the name of the vendor all necessary rights of way for a logging railway, to supply all necessary rails and other railroad material, and do all work necessary in construction, the title to and ownership of the said railway to be vested and remain in the vendor until such time as all moneys payable under the terms of the agreement are paid, when the title to the railway would be transferred to the purchaser. The company was to supply at least ten miles of rails and all necessary equipment including telephone lines for carrying on logging operations. It was estimated that the logging operations would be completed in about fifteen years. The logging railway was over eighteen miles long, and of this only about three miles was on the properties sold by the defendant, and the company was required to obtain the right of way over the lands of various parties, including the Sumas Dyking Commissioners, the Land Settlement Board, the B.C. Electric Ry. Co., the Crown Dominion and Crown Provincial, also from the Chief of the Soowahlie Indians to lay the road across a portion of the Reserve. Although the purchaser covenanted to acquire the right of way in the name of the vendor, in practice this was not rigidly observed as some of the agreements were made jointly to both vendor and purchaser and some to the purchaser alone. The railway was built by the purchaser at its own expense. By deed of trust of the 24th of April, 1928, the Campbell River Mills Limited assigned to the plaintiff Dinning as trustee for the holders of certain debentures, all the assets of the Campbell River Mills Limited, including the railway, telephone and unloading equipment as security for payment of said debentures by the company. On the 29th of August, 1930, the Campbell River Mills Limited made an authorized assignment of its property pursuant to the Bankruptcy Act, and the plaintiff association was appointed trustee of the property of the company. In an action for a declaration that the agreement of the 16th of November, 1926, so far as any security on the said railway equipment is thereby conferred is void, judgment for possession of the said railway, telephone and unloading equipment and an injunction restraining the defendant from disposing of sail railway, telephone and unloading equipment, it was held that the circumstances indicate

that it was the intention of all parties that the disputed properties were to be removed by the Campbell River Mills Limited when the timber operation was completed, and were not constructed for the purpose of benefiting the fee, and the properties are therefore not fixtures but chattels belonging to the company.

Held, on appeal, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., affirming the decision of MURPHY, J., that the position of the Campbell River Mills Limited should be treated as analogous to that of a tenant, the railway and articles which went into its construction and equipment were chattels and were temporarily affixed to the freehold for the personal convenience of the lumber company in removing the timber from the property acquired, and were never intended to be for the advantage of the freehold.

Per MARTIN and MCPHILLIPS, JJ.A.: As between the parties to the contract upon its reasonable and practical construction the railway must be deemed to be a fixture as it embodies the intention that the railway should be a permanent work.

The Court being equally divided the appeal was dismissed.

APPEAL by defendant from the decision of MURPHY, J. of the 21st of December, 1932 (reported, 46 B.C. 300) in an action by the Canadian Credit Men's Trust Association as trustee in bankruptcy of Campbell River Mills Limited to recover a quantity of steel logging railway rails formerly the property of the Campbell River Mills Limited, and in use in their logging operations along or near the Vedder River and Cultus Lake in British Columbia, for possession of railway telephone and reloading equipment, for an injunction restraining the defendant from disposing or interfering with same and for damages. Prior to the 16th of November, 1926, the defendant was the owner of the timber leases in question herein, and by written agreement of the 16th of November, 1926, between the defendant and the Campbell River Mills Limited the Campbell River Mills Limited agreed to purchase said timber limits for $1,391,070, upon certain terms and agreed to acquire all necessary right of way for logging railway, including at least ten miles of rails. The lands were acquired and the logging railway built and operated for removing timber. On the 24th of April, 1928, the Campbell River Mills Limited assigned and conveyed to the plaintiff Dinning, as trustee for the holders of certain debentures, all the assets of the Campbell River Mills Limited including the railway, telephone and unloading equipment as security for payment of the debentures. On the 27th of August,

Statement

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

1930, the Campbell River Mills Limited made an authorized assignment of its property pursuant to the Bankruptcy Act of Canada, and the plaintiff association was appointed trustee of the property of the company. The main defence relied on is that the disputed properties are fixtures and the plaintiffs have no interest in the fee of the lands upon which the said properties were placed.

The appeal was argued at Vancouver on the 24th, 27th and 28th of March, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

Mayers, K.C. (*G. S. Clark,* with him), for appellant: The whole question is whether the logging railway and equipment on and about the timber berths are fixtures. This is a case between vendor and purchaser. Both the degree and object of annexation must be considered: see *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174 at p. 180; *Crawford* v. *Findlay* (1871), 18 Gr. 51; *Stevens* v. *Barfoot* (1886), 13 A.R. 366 at p. 371; *Stack* v. *T. Eaton Co.* (1902), 4 O.L.R. 335; *Travis-Barker et al.* v. *Reed et al.* (1921), 17 Alta. L.R. 319; *Canadian Pacific Ry. Co.* v. *Prickett and Showalter* (1930), 2 W.W.R. 65 at pp. 67-8; *Peikoff* v. *Brightwell* (1931), 40 Man. L.R. 124; *Royal Bank of Canada* v. *Coughlan* (1920), 28 B.C. 247 at p. 251; *Meux* v. *Jacob* (1875), 44 L.J., Ch. 481 at p. 485; *Southport &c. Banking Co.* v. *Thompson* (1887), 57 L.J., Ch. 114 at p. 116; *Reynolds* v. *Ashby & Son* (1904), 73 L.J., K.B. 946; *Ellis* v. *Glover & Hobson, Lim.* (1907), 77 L.J., K.B. 251. The rails and railway are fixtures: see *Turner* v. *Cameron* (1870), 39 L.J., Q.B. 125 at pp. 126 and 130; *Ex parte Barclay; Re Joyce* (1874), 43 L.J., Bk. 137; *In re Yates. Batcheldor* v. *Yates* (1888), 57 L.J., Ch. 697 at p. 703.

Harold B. Robertson, K.C. (*J. S. Shakespeare,* with him), for respondents: The Ingham interest was never better than that of a lessee in these lands. It is not a case of vendor and purchaser of lands. When counsel on the trial takes a definite course he is bound by it: see *Stone* v. *Rossland Fuel and Ice Co.* (1904), 12 B.C. 66 at pp. 70-1; *The "Tasmania"* (1890), 15 App. Cas. 223 at p. 225; *Official Liquidation of M. E. Moolla Sons, Limited* v. *Burjorjee* (1932), 48 T.L.R. 279. On

the question of election see *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26 at p. 34; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345 at p. 360; *Connecticut Fire Insurance Company* v. *Kavanagh* (1892), A.C. 473 at p. 480. All the cases he cited were with relation to a fee and the chattels were held to be part of the freehold. Parts of the railway were built on the B.C. Electric right of way and part over roads. Over fourteen miles of railway out of eighteen in all was on Crown lands. The intention was that the rails should remain chattels, also the donkey-engine and loading equipment. The intention of the parties when the railway was built is the important factor and the tendency of later decisions is towards holding that what was formerly part of the freehold are now temporary fixtures: see *Leigh* v. *Taylor* (1902), A.C. 157 at p. 162; *Liscombe Falls Gold Mining Co.* v. *Bishop* (1905), 35 S.C.R. 539 at p. 542. Certain land was bought by us and put in Ingham's name: see *Turner* v. *Cameron* (1870), 39 L.J., Q.B. 125; *Climpson* v. *Coles* (1889), 23 Q.B.D. 465 at p. 476; *Small* v. *National Provincial Bank of England* (1894), 1 Ch. 686 at pp. 690-1. This case is within the Bills of Sale Act. The donkey-engine and crane are on a wharf on the Vedder River, for which we have a lease in our own name: *Pronguey* v. *Gurney et al.* (1875), 37 U.C.Q.B. 347 at p. 351. As to the engine see *Lawton* v. *Lawton* (1743), 3 Atk. 14; 26 E.R. 811; *Dudley* v. *Warde* (1751), 1 Amb. 113.

Argument

Mayers, in reply, referred to *Mather* v. *Fraser* (1856), 25 L.J., Ch. 361.

Cur. adv. vult.

6th June, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I agree with the trial judge that the Campbell River Mills Limited must be considered to have been the tenant or in the position of a tenant to the defendant and that on this relationship of the parties the dispute largely turns. The defendant's counsel put their case at this Bar on this—that the disputed property became a permanent fixture and part of the freehold and was not to be removed. Respondents' answer was that the railway or the articles which went into its construction and equipment were chattels and were temporarily affixed to the freehold for the personal convenience of the lumber com-

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

MACDONALD, C.J.B.C.

pany in removing the timber from the property that it acquired, and were never intended to be for the advantage of the freehold. I think the respondents' contention is unanswerable—the object and purpose of constructing the railway is not open to any doubt.

The annexation to the freehold is very slight and the rails and furnishings may be removed without material or perhaps any damage to the soil. The appellant does not claim the ties but if he does then I think when the wild and uncultivated character of the soil is considered it is not hard to say that the soil would not be injured but most probably benefited by the work done on it.

In these circumstances I think the properties in question are tenant's trade fixtures and are removable within the term of the lease—see *Thomas* v. *Jennings* (1896), 66 L.J., Q.B. 5; *Lyde* v. *Russell* (1830), 9 L.J., K.B. (o.s.) 26; Woodfall on Landlord and Tenant, 22nd Ed., pp. 815-6; *Liscombe Falls Gold Mining Co.* v. *Bishop* (1905), 35 S.C.R. 539. That the rails and their fastenings may be removed separately I think is shewn by *Whitehead* v. *Bennett* (1857), 27 L.J., Ch. 474. *Liscombe Falls Gold Mining Co.* v. *Bishop, supra,* is also authority for the plaintiffs' right to remove the fixtures notwithstanding that the owners of the soil are not parties.

That the plaintiffs' right still subsists is shewn by an agreement of 13th February, 1931, Exhibit 9, which is a reassignment of the plaintiffs' rights in the timber leases and licences back to the defendant, save the fixtures. This reserved right in effect extends the term which has never been put an end to. The appellant has never made re-entry and has no other claim at present to the property involved than is shewn by the said Exhibit No. 9.

The bankruptcy of the Campbell River Mills Limited does not change the position of the parties since no action was taken by the defendant thereupon except to procure the said agreement, Exhibit 9.

The respondents are therefore entitled to remove the fixtures, and, if prevented, to damages which in the event of dispute may be settled by the registrar.

The appeal should be dismissed.

MARTIN, J.A.: With all due respect for contrary views I would allow this appeal for the main reason, put briefly, that the judgment in plaintiffs' (respondents) favour is erroneously and primarily based upon decisions on the relationship between landlord and tenant, or some undefined analogous relationship, but they cannot, in my opinion, be invoked to support the plaintiffs' claim that the disputed property is not to be regarded as fixtures as between the parties to this contract for the purpose of carrying out its special objects. The making of the logging railway, with its various essential adjuncts, was not merely a part of the contemplated work to log off the large area, but was the indivisible backbone of the whole enterprise, and not capable of being cut up into bits, so to speak, and I am satisfied that as between the parties to that contract, upon its reasonable and practical construction, the railway must be deemed to be a fixture, however else it might be viewed under other circumstances; and I am unable to perceive that the fact that the ownership of the land upon which the railway is built is in different hands, has any substantial bearing upon the question between the parties to this special contract, which, as I read it (without citing its many lengthy provisions) clearly embodies the intention that the railway should be a permanent work in the business sense that it was to last as long as logging operations could be carried on and then enure to the benefit of the vendor (appellant) whose vendor's lien is the equivalent of the interest of a mortgagee.

I would, therefore, allow the appeal and dismiss the action.

MCPHILLIPS, J.A.: The respondent the Canadian Credit Men's Trust Association Limited is the authorized assignor of the property of the Campbell River Mills Limited (hereinafter called the assignor) under the Bankruptcy Act of Canada and as such brought the action for the recovery from the defendant (appellant) of certain steel rails in fixed position and part of a logging railway built by the Campbell River Mills Limited (hereinafter called the lumber company) the other respondent in the appeal, Dinning, being a trustee under a mortgage made by the lumber company to secure debentures, and the claimed rails form part of the security of the debenture holders and joined

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

MCPHILLIPS, J.A.

in the action to support the claim of the assignor to the rails. The first matter of record to refer to is the agreement in writing and under seal of November 16th, 1926, between the appellant of the first part, the lumber company of the second part and Harold W. Hunter and F. G. Fox of the third part whereby the appellant agreed to sell to the purchaser the lumber company the lands, Dominion timber berths and Provincial lease described in the schedule annexed thereto for the sum of $1,391,072. The agreement is a somewhat long and elaborate document. I will refer later to what I think are the salient and relevant points that call for consideration. The respondents were successful in the Court below. The appeal is from that decision. At the outset and with the greatest respect to the learned trial judge I cannot persuade myself that the state of the law is such that the decision should stand. It becomes necessary to have a proper comprehension of the whole matter to visualize as completely as possible the territory in which the lands and timber are and the lumbering operations that were to follow the acquisition of the timber berths. In many portions of the Province of British Columbia where heavy timber exists suitable for lumbering operations water ways are available for transit of the logs to market. Here that was not so and a logging railway was contemplated being a matter of necessity and the appellant is a large holder of timber lands independent of those disposed of, so that the logging railway really was a part of the general scheme of getting out the timber and it meant the construction of nearly twenty miles of railway consisting of the usual embankments, ditches, rails, ties, bridges, etc., and, as a matter of fact, the appellant advanced to the lumber company all the moneys to construct the logging railway. It is true these moneys he was repaid but it cannot be said that the logging railway was other than—as all the property sold—a security in law to him as vendor—that is, there would always be a vendor's lien in case of default in payment. The amount paid by the lumber company to the appellant would not appear to have been more on account of principal than $12,107 and $338,328 interest—the interest was at 3½ per cent. for one year and 7 per cent. thereafter. The learned trial judge held that the steel rails were chattels and removable from the soil. The submission at this

Bar by learned counsel for the appellant is that in their present position and as placed they constitute fixtures and are not removable. It is true that considerable portions of the railway extend over lands and through timber not sold by the appellant to the lumber company and over lands of the Crown across railway lines along dykes and across public highways, but all these rights of way were acquired for the carrying out of the lumbering operations contemplated and the logging railway being built it is highly inequitable now that because of the financial difficulties the lumber company is in—and in bankruptcy—that the appellant should be superseded in title to the steel rails and the assignor and the debenture holders should be allowed to emasculate the logging railway, tear up the steel rails and carry them away. The manifest intention of the parties to the agreement was that the logging railway should remain intact during the lumbering operations, contemplated to take possibly fifteen years from the date of the agreement, which would be not likely before 1940. This logging railway was not the well known small logging railway, to be moved from place to place on one particular timber berth, but was one of a distinctly more permanent nature to reach scattered timber berths and one that might in the end be permanent as the lands would be opened out to settlement. The evidence is that at the present time following the operations of the timber company there remain upon the lands comprised in the agreement referred to some 500,000,000 feet of timber, yet as matters now stand the logging railway is to be dismantled, in effect, wrecked, being a railway of necessity to get out the timber and it occurs to me that it may be said to be a public convenience as well and there is some evidence that it was used as such to some small extent. Naturally, until the timber is off, there can be little if any settlement. One point of the evidence is important—that even as to three and one half miles of the railway it is over the appellant's own land not covered by the agreement for sale. Then it is clear to me upon the facts that all rights of way and easements acquired in respect to the railway by the lumber company must be held by the lumber company for the vendor the appellant.

MCPHILLIPS, J.A.

Perhaps I have gone a little afield and dealt with features somewhat *extrajudicial,* as all must be determined in accordance

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

with the law as applied to the particular facts of the case. In that the contention of the appellant is that the steel rails are fixtures, in that they are attached to the soil, it is necessary that attention be given to the controlling authorities. Before I refer to them though a statement made by Lord Shaw when delivering the judgment of their Lordships of the Privy Council in *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited* (1915), A.C. 599 at p. 617 occurs to me:

> The law must adapt itself to the conditions of modern society and trade, . . .

Here we have the gravest kind of injury to follow if the judgment of the Court below is to stand and it should, of course, only stand if it is in accordance with incontrovertible law. Then addressing attention to the law. This is clear that respondent the authorized assignor in bankruptcy cannot take any better position than the lumber company and the appellant, the vendor, has an equitable lien on the lands sold for the amount due with interest (*Chapman* v. *Tanner* (1684), 1 Vern. 267; *Pollexfen* v. *Moore* (1745), 3 Atk. 272; *Mackreth* v. *Symmons* (1808), 15 Ves. 329; *Smith* v. *Hibbard* (1789), 2 Dick. 730; *Topham* v. *Constantine* (1829), 1 Tam. 135; *Toft* v. *Stephenson* (1848), 7 Hare 1; (1851), 1 De G. M. & G. 28; (1854), 5 De G. M. & G. 735; *Bowles* v. *Rogers* (1800), cited in *Ex parte Hunter* (1801), 6 Ves. 94 at p. 95; *Grant* v. *Mills* (1813), 2 V. & B. 306 at p. 309; *Ex parte Peake* (1816), 1 Madd. 346 at p. 356). In *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174 at p. 180, King, J. referred to *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328 at p. 334:

MCPHILLIPS, J.A.

> that what is annexed to the land becomes part of the land; . . . It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, *viz.*, the degree of annexation and the object of the annexation. . . .

At p. 182, King, J. said:

> In passing upon the object of the annexation, the purposes to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and shewing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee. See

the cases already referred to, and also *Walmsley* v. *Milne* [(1859)], 7 C.B. (N.S.) 115, and *Wiltshear* v. *Cottrell* [(1853)], 1 El. & Bl. 674.

This important provision of the agreement of the 16th of November, 1926, is not to be overlooked:

30. The purchaser doth covenant and agree that it will acquire, by purchase or otherwise, in the name of the vendor all necessary right of way for a logging railway, from a point on the Chilliwack Branch of the British Columbia Electric Railway Line, or the Wing Dyke, or the Fraser River, to the various parts of the said timber berths and lease, as shall be mutually agreed upon, and supply all necessary rails and other railroad material, and do all the work necessary in constructing grades, and laying ties and steel, and everything necessary for the proper completion of the said logging railway necessary for logging the timber off the said lands, timber berths and lease, all to be done in accordance with plans and details as to location and construction submitted to and approved of by the vendor before any such work shall be proceeded with, the title to and ownership of the said railway to be vested and remain in the vendor until such times as all moneys payable under the terms of this agreement have been fully paid and satisfied, when the title to and ownership in the said railway shall be transferred by the vendor to the purchaser.

In view of the above paragraph I would refer to *Crawford* v. *Findlay* (1871), 18 Gr. 51, where it was held that the covenant against removing the machinery remained in force. There machinery was only held by nails and cleats; there the purchaser as here became insolvent and it was held that the assignee in insolvency was not at liberty to remove the machinery (also see *Stevens* v. *Barfoot* (1886), 13 A.R. 366 at p. 371; *Stack* v. *T. Eaton Co.* (1902), 4 O.L.R. 335). In *Travis-Barker et al.* v. *Reed et al.* (1923), 3 W.W.R. 451, Anglin, J. (afterwards Chief Justice of Canada) said at p. 455:

MCPHILLIPS, J.A.

The material facts and circumstances are fully set out in the judgments delivered by the learned judges of the Provincial Courts (1920), 3 W.W.R. 623; 17 Alta. L.R. 319; (1921), 3 W.W.R. 770, and need not be repeated here. There was in my opinion such an annexation of it to the land as cast upon the respondents the onus of shewing that the building in question was intended to remain a chattel. *Holland* v. *Hodgson* [(1872)], L.R. 7 C.P. 328, at p. 335; 41 L.J.C.P. 146. The circumstances in evidence in this case far from establishing such an intention almost demonstrate, if that be necessary (*Stack* v. *T. Eaton Co.* [(1902)], 4 O.L.R. 335, at p. 338) that the purpose and intention of Punt in placing the building on lot 11, which he had contracted to buy, was that it should remain there permanently as his home, no doubt with the expectation that he would in due course acquire full legal title to the lot. I find nothing in the record which warrants ascribing to him any such conditional or qualified intention in this matter as the learned Appellate Judges made the basis of their holding that the building had remained a chattel removable by him.

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

MCPHILLIPS, J.A.

The strong probability—almost amounting to moral certainty—is that he never contemplated the possibility of his interest in the land being determined as a result of default by his vendor, Sutherland. If so, that contingency would not affect the intent with which he erected his dwelling. He never conceived the idea of placing it on lot 11 as a mere temporary site. He placed it there for a permanency, as the object and the degree of annexation indicate.

There can be no question that the intention was that the logging railway was in its nature "a permanency."

In *Peikoff* v. *Brightwell* (1931), 40 Man. L.R. 124, we find Trueman, J.A. saying at p. 129:

> It is well established that the position of an unpaid vendor is analogous to that of a mortgagee: *Lysaght* v. *Edwards* (1876), 2 Ch. D. 499, at 506; 45 L.J., Ch. 554, cited by Lamont J.A. in *Provincial Securities Co. Ltd.* v. *Gratias* (1919), 2 W.W.R. 83; 12 Sask. L.R. 155.

It was held by this Court in *Royal Bank of Canada* v. *Coughlan* (1920), 28 B.C. 247 that the mortgagee was entitled as against the assignee for the benefit of the creditors of the mortgagor to a stone-cutting plant being an air compressor, travelling gantry, crane, gang-saw, stone-planing machines, electric motors, shafting, pulleys and belting, air-pipes and valves; that the parts were fixtures and part of the realty and were covered by a mortgage on the land. There my learned brother MARTIN at p. 249 said:

> This appeal raises the question of fixtures, always a difficult one, in regard to which it was said in *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, 41 L.J., C.P. 146, approved in the leading case of *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174 at p. 180: "There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land, but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, *viz.*, the degree of annexation, and the object of annexation?" After carefully examining the evidence in the light of the *Haggert* case, *supra*, and particularly that portion of it cited by the learned judge below ((1919), 2 W.W.R. 382), I find so great a difficulty in saying that he has reached a wrong conclusion that I do not feel justified in disturbing his judgment, and, therefore, the appeal should be dismissed.

I would also refer to what I said at pp. 251-2, in the above case:

> It is true that the old rule as defined by the maxim *quicquid plantatur solo solo cedit* has been greatly relaxed, and though fixtures have been held to be removable, such as trade fixtures, ornamental and domestic fixtures, on the other hand, where the fixtures are in their nature of a

special character, being by custom or necessity a part of the freehold in the carrying on of a particular trade, and giving the premises a particular value, and by the owner so intended and mortgaged as such, different considerations arise, and the case is in no way similar to that of tenant and landlord. Here it is as between mortgagor and mortgagee. I had occasion in *Dominion Trust Co.* v. *Mutual Life Assurance Company of Canada* (1918) [26 B.C. 237], 3 W.W.R. 415 at pp. 420 to 434, to refer to many of the authorities bearing upon this point, and the present case may be said to be an analogous one, and in accordance with the *ratio* there defined, the machinery here in question would not be capable of removal as against the mortgagee or the owner of the freehold (see *Elwes* v. *Mew* (1802), 2 Sm. L.C. 189; 3 East 28; *In re Samuel Allen & Sons, Limited* (1907), 1 Ch. 575; 76 L.J., Ch. 362; *Hobson* v. *Gorringe* (1896), 66 L.J., Ch. 114; (1897), 1 Ch. 182; *Reynolds* v. *Ashby & Son, Limited* (1902), 72 L.J., K.B. 51; (1903), 1 K.B. 87; *Lyon & Co.* v. *London City and Midland Bank* (1903), 2 K.B. 135; 72 L.J., K.B. 465; *Kilpatrick* v. *Stone* (1910), 15 B.C. 158; *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174 at p. 182). No question, in my opinion, arises as to the absence of a bill of sale. No necessity for a bill of sale, or registration as a bill of sale could be successfully contended for in the present case. Here the fixtures or trade machinery passed with the mortgage of the freehold as incidental thereto and as incidental to the later conveyance (*In re Yates. Batcheldor* v. *Yates* (1888), 38 Ch. D. 112; 57 L.J., Ch. 697).

It may be well and properly said, upon all the facts of the present case and in the light of the authorities, that the Bank has an unassailable position, and is entitled to the machinery in question and fixtures as being the owner thereof. I would affirm the judgment under appeal. It therefore follows that in my opinion the appeal should be dismissed.

MCPHILLIPS, J.A.

In *Meux* v. *Jacob* (1875), 44 L.J., Ch. 481 at p. 486 Lord Hatherley dealt with the question of law here being considered and dealt specifically with the Bills of Sale Act. The head-note reads as follows:

> Trade fixtures pass by a mortgage of the freehold or of a leaseholder's interest in the property to which they are attached, whether such mortgage be effected by a regularly executed deed, or by deposit with memorandum, and such mortgage will be effectual, though not registered, as against any subsequent unregistered bill of sale. Trade fixtures added subsequently to the mortgage are subject to this rule as much as those attached before the mortgage.

Upon the premise that the appellant is in the same position as a mortgagee, for which view I have cited authority, I would further refer to *Southport &c. Banking Co.* v. *Thompson* (1887), 57 L.J., Ch. 114 and Cotton, L.J. at p. 116 as to there being no distinction between mortgagee and any other realty interest. Then we have the most authoritative case of all in

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

Reynolds v. *Ashby & Son* (1904), 73 L.J., K.B. 946. The head-note to that case puts the decision in concise terms:

Machinery obtained by a trader under a hire-purchase agreement was fastened down to beds of concrete by bolts and nuts in such a way that it could be removed without injury to the building or the concrete. The premises were subject to a mortgage including "fixtures, machinery and fittings"; and the mortgagee entered into possession. Subsequently, on default of payment by the trader under the agreement, the vendor of the machinery gave notice determining the agreement and demanding the return of the machinery: Held, that the mortgagee was entitled to the machinery as fixtures.

Decision of the Court of Appeal [(1902)], 72 L.J., K.B. 51; (1903), 1 K.B. 87) affirmed. *Hobson* v. *Gorringe* ([(1896)], 66 L.J., Ch. 114; (1897), 1 Ch. 182) approved.

As to the question of the steel rails in this particular case not being chattels I would refer to *In re Yates. Batcheldor* v. *Yates* (1888), 57 L.J., Ch. 697. It is very much to the point the head-note reading:

A mortgage of freehold land on which there is trade machinery is not an assurance of personal chattels within section 4 of the Bills of Sale Act, 1878, so as to require to be made in accordance with the statutory form of a bill of sale; the trade machinery passes as part of the freehold to the mortgagee.

MCPHILLIPS, J.A.

(Also see *Mather* v. *Fraser* (1856), 25 L.J., Ch. 361). That the logging railway was distinctly covered in the agreement I think it well to here set it out in full:

26. If default shall be made on the part of the purchaser in any of the covenants, provisions, terms, conditions or stipulations of this agreement, including the provisions hereof relating to the payment of instalments of the purchase price and interest, and if such default, being capable of being remedied, shall continue for Sixty (60) days after notice shall be given to the purchaser by or on behalf of the vendor specifying such default and of his intention to cancel this agreement, then at the expiration of such Sixty (60) days, this agreement shall be void and of no effect, and the vendor shall be at liberty to resell the said lands, timber berths and lease, and premises, and railroads as described below, and out of the proceeds of such sale in the first place to retain such part of the said purchase price of $1,391,072 as shall not at such time have been paid to the vendor and whatever balance due to the vendor in respect of moneys advanced under paragraph 32 hereof and all interest at the rate hereinbefore agreed to be paid, and to reimburse himself for all such costs, charges and expenses as may have been incurred by the vendor in consequence of the action, default, neglect or failure of the purchaser, and any surplus as may remain thereafter to pay unto the purchaser. In the event of such default and the cancellation of the rights of the purchaser under this agreement by notice as herein provided, the purchaser shall deliver up to the vendor possession of the said lands, timber berths and lease and

premises and the said railroad and the purchaser shall have no claim against the vendor whatsoever for or by reason of such cancellation and sale and retainer of said moneys as herein provided for and the vendor shall be deemed to be the owner and entitled to the possession of all timber logs and other products of timber cut from the said lands, timber berths and lease, or premises, or any part thereof, which at the time of such default have not been sold or paid for as aforesaid. The procedure provided in this section for the cancellation of the rights of the purchaser under this agreement shall be concurrent with and in addition and without prejudice to and not in lieu of or substitution for, any other rights or remedy at law or any equity, which the vendor may have for the enforcement of his rights under this agreement, and his remedies for any default of the purchaser in the conditions hereof.

It will be observed that in event of default "the purchaser shall deliver up to the vendor possession of said lands, timber berths and lease and premises and the said railroad."

MCPHILLIPS, J.A.

The law being that the unpaid vendor is in the same position as the mortgagee there is the right to withhold the delivery of the steel rails. They are fixtures upon which the vendor's lien attaches, and as to the rights of way and easements over which the logging railway was built, these also enure to the advantage of the appellant as it can be said, in my opinion, that they were rights acquired by the lumber company as trustee for the vendor, the appellant. Upon the whole case I am of the opinion that the judgment below should be reversed and the action dismissed, that is, the appeal should be allowed.

MACDONALD, J.A.: Appeal by defendant from the judgment of Mr. Justice MURPHY declaring that a logging railway eighteen miles long, spurs, sidings, unloading equipment, etc., also a telephone line seven miles in length along the railway (all purchased and laid by respondent) are the latter's property as chattels. Appellant claims them as fixtures.

MACDONALD, J.A.

A contract was signed November 16th, 1926, between Ingham, the appellant, as vendor, and Campbell River Mills Limited (now represented by the plaintiff respondent as trustee in bankruptcy) as purchaser. It recites that the vendor sold to the purchaser certain lands, timber berths, leases, licences to cut timber on Dominion lands, etc., for $1,391,072 on the terms therein outlined. Clause 26 deals with procedure in case of default and as "railroads" are mentioned I quote it in part as follows: [already set out in the judgment of MCPHILLIPS, J.A.]

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

It should be noted that this agreement was not terminated by a 60-day notice after default. An assignment was made by the company under the Bankruptcy Act, the respondent being made trustee. The agreement contains no term as to rights arising on bankruptcy.

It was necessary at the outset to acquire rights of way for the logging railway over lands owned by third parties. I quote parts of the agreement on this point; also in reference to title to and final disposition of the road:

30. [Already set out in the judgment of MCPHILLIPS, J.A.].

31. IT IS UNDERSTOOD AND AGREED that the purchaser shall provide and bring upon the location of the railroad hereinbefore mentioned, at its own expense, certain material now owned by it, including at least ten (10) miles of 56 and 60 pound rails.

34. IT IS UNDERSTOOD AND AGREED that while it is not in default under any of the terms of this agreement, that the purchaser, subject to its complying with all laws and regulations pertaining thereto, shall have the full use of said logging railway for logging purposes including carrying timber cut on lands not included in this agreement, . . .

35. IT IS FURTHER UNDERSTOOD AND AGREED that until such time as all moneys to be paid under the terms of this agreement have been fully paid and satisfied, all applications to any Dominion, Provincial, Municipal or local authority for any concession or privilege in connection with the said lands and timber, or the said logging railway, or the operation of any of them, shall be made by the purchaser, at its own cost and expense, but in the name of the vendor, and before making any such application, the purchaser must obtain the consent in writing of the vendor to the use of his name for any such purpose, such consent not to be unreasonably withheld.

MACDONALD, J.A.

39. If the purchaser shall pay the sums of money hereinbefore mentioned to be paid by it, and shall perform all the terms and conditions herein contained and on its part to be performed and this contract being in full force and effect, then the vendor will forthwith thereafter execute and deliver such conveyance or conveyances and transfers at the expense of the purchaser of the said lands, timber berths, and lease, premises, rights and privileges as set out in the schedule hereto, together with the railroad herein provided to be constructed.

These clauses shew the relationship between the parties in respect to the road, the purpose and conditions under which it was built and general intentions in reference thereto. No doubt, as part of the scheme for the sale of the timber, a railway was to be built, not only affording the only means of operating but to provide in part at least security for the vendor, thus suggesting a benefit to the freehold. This, however, is not conclusive

on the question of the nature of the property in view of all the facts.

We cannot view it, so far as determining the nature of the property in dispute is concerned, solely as a contest between a vendor and purchaser. Third parties intervene from whom rights were acquired to construct the road over their land. These third parties are the Sumas Dyking Commissioners, the Land Settlement Board, the B. C. Electric Railway Company, the Crown in right of the Dominion, the Crown in right of the Province and one Leonard. Part of the road too crosses appellant's property; also six highways, the fee to which is in the Crown Provincial. In determining therefore the object and purpose and intention of the annexation regard must be had to a variety of facts.

If default has not occurred the railroad was to be transferred to Campbell River Mills Limited (hereinafter called the company) and it could undoubtedly remove as well the telephone line, loading equipment, etc. During its tenure the company could move the rails and ties (at all events, spurs) from place to place as the timber was removed. There was, too, no intention that upon completion of the operation in ten or fifteen years the road should be left in place for common carrier purposes.

MACDONALD, J.A.

What occurred is important on the question of intention. The purchaser covenanted to acquire the right of way for the railway from others where necessary in the name of the appellant and plans had to be submitted for his approval. Undue importance however cannot be given to this method of acquiring title: in practice it was not rigidly observed. Some of the agreements may be referred to to shew the course followed.

Exhibit 7 is an agreement between the Sumas Drainage Dyking and Development District as grantors and (not appellant alone) but appellant and the company as grantees. It recites that the grantees are desirous of obtaining an "easement" over the grantors' lands for a logging railway and the "right and permission" to construct and operate it is secured for 25 years in respect to a strip of land 20 feet in width. The grantees agree to pay "an annual rental" of $1,400 per year for the first ten years and $612 for the balance of the term. The grantees

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

were given the right to terminate the agreement by notice when operations were completed and "shall thereupon be entitled to remove from the premises the said logging railway and all its rolling stock and equipment." Both parties therefore stand in the same relationship to the grantor.

Again, the company, alone, arranged verbally with the Chief of the Indians of the Soowahlie Indian Reserve (with the consent of the Indian Agent) for the "right and permission" (a licence) to lay the road across a part of the reserve. Also approval by the B.C. Electric Railway Company with the consent of the Department of Railways at Victoria was obtained "to permit Campbell River Mills Limited to cross your track at Woodruff if watchman there to protect crossing." This licence appears to have been obtained solely by the company. As to the Leonard land, the agreement is with the appellant, The King, as represented by the Soldiers' Settlement Board of the third part joining, under which Leonard

"doth demise and lease" to appellant a certain area for 20 years at a yearly rental of $10 over which the road might be built.

MACDONALD, J.A.

As stated too the road crossed highways. The right to cross the line of the B.C. Electric Railway—a licence—was acquired by the company without the intervention of appellant. No uniform course therefore in securing rights of way was followed and from what occurred no deductions can be drawn in favour of either party on its possible bearing on the point as to how this property should be treated. It does, however, point to the conclusion that the road was to be regarded as a chattel placed across these areas for a limited time and purpose. That of course is conceded but appellant submits that as between him and these third parties he can remove them as trade fixtures. The company, however, could with equal force make that claim.

We should observe too the nature of the property transferred to the company by the agreement (Exhibit 1). It is set out in the schedule thereto and it consists of a Provincial timber lease, a number of Dominion licences to cut timber, the merchantable timber on lot 500 and on a mill-site and "all the parcel of land with timber therein referred to in paragraph 13 of the schedule." Most of it is property held by appellant under a limited interest, *viz.*, licences, the fee being in the Crown. The

property in question could not be appurtenant to a limited interest as a fixture and where the Crown is concerned it could only be regarded as an obstruction after the removal of the timber.

Further the road was constructed solely by the company at a cost of approximately $437,000. Part of it was made up of ten miles or more formerly owned and used by it in another operation. The rails were taken up, moved and incorporated in this logging railway. That ten miles of railway was composed of rails, in part secured by the company under lease from the Great Northern Railway; in part purchased from Evans, Coleman & Evans and not paid for in full at the time of the assignment in bankruptcy. In connection with the railway, as stated, a telephone line was constructed strung along trees and poles. We are concerned too with some loading equipment. Piling was driven into the bed of the Sumas River to form booming grounds. A siding was constructed to deliver logs from the railway to the booming grounds including a structure to lift the logs off the cars and to dump them into the Vedder River; also an unloading platform. There was too a donkey-engine at this point under a shed and two cranes with all necessary paraphernalia, cables, blocks, etc. The donkey-engine and cranes were fastened to a platform of rough planks with spikes and bolts. All this would be part of the salvage of the logging operation upon completion of the contract.

On the foregoing facts is appellant entitled to the rails, telephone wires, unloading equipment, etc., on the occurrence of an event, *viz.*, bankruptcy, not covered by the agreement (Exhibit 1), the greater part of it on property not his own? It seems to me clear that unless he can establish his right, because of certain terms in the agreement, he must fail. On this point more difficulty arose because of the position taken by appellant's counsel at the trial, *viz.*, that he was not relying upon the terms of the contract (Exhibit 1). However, the contract was before the Court and the question of its applicability is simply a matter of argument. It was not shewn that additional evidence of a material character might have been adduced had this position not been taken. The agreement shews the character of the relationship between the parties and the purposes to which the

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

MACDONALD, J.A.

properties were applied. That is an element in deciding if, as fixtures, they become incorporated in the freehold. It was not the object or intention in constructing the railway and placing equipment on the ground to improve or enhance the value of appellant's land (even in so far as it crossed land owned by him) nor the lands of third parties. It is true that as part of the whole scheme the railway would afford additional security to the vendor. If it should be taken up after part of the timber was removed additional cost would be incurred in providing new railway facilities, to remove the balance of the timber. The agreement however provided for these contingencies. The references in the agreement to the railroad are simply concerned with the working out of the contract as an operating proposition. The property sold was lands, timber berths, leases, rights and privileges, the railway being dealt with in a way really collateral to the main agreement. The construction of the road was a necessary incident to the right to enter to cut and remove the timber affording a better running surface over the soil than would otherwise be obtained. The word "railroad" is first mentioned in clause 26 dealing with default by the purchaser. If default continued after 60 days' notice thereof the agreement "shall be void and of no effect" and the vendor might "resell the lands, timber berths," etc., "and railroads as described below," applying the proceeds as directed. In the event of cancellation by notice "possession" of the lands "and the said railroad" was to be delivered to appellant. But, as pointed out, cancellation did not take place under this clause. A different course was followed. Further by an agreement (Exhibit 9) in which appellant joined with respondent it was agreed that the question of title to the steel rails, etc., shall remain the subject of settlement between the parties hereto. I quoted *supra* clause 30. Under it "the said railroad" was treated as a chattel, its removal or otherwise being dependent upon payment of all moneys due under the contract. In the latter event it was to be transferred by appellant to the company presumably by a bill of sale. If it was to be treated as part of the freehold it would pass by conveyance in so far as it rested on property owned by appellant. If too it was treated as a fixture it was unnecessary to stipulate that the railroad should "be vested and remain in the vendor"

until all payments were made. Leaving aside for the moment the question of physical annexation in principle the agreement might with equal propriety and in the same sense provide for building ordinary highways and placing trucks upon the land for the removal of the timber if such a method was feasible. The question must be determined by the principles applicable, not as between grantor and grantee but as applied to the peculiar situation where we have a variety of interests, all suggesting lack of permanency.

Viewing it therefore as a whole we cannot say that this railroad telephone line and all incidental paraphernalia assumed a freehold character with the soil on which it rested. The fact that the line passed over property vested in different owners with varying interests is material on this point. It was never intended to form part of the different parcels of land in question. The owner of the fee—the Crown Provincial—in one case permitted a temporary interference with the public user of the public highway. It was not of course intended to remain there. This applies also to the part laid over the line of the B.C. Electric Railway and to a lesser degree to timber berths and leases. After removal of the timber, rails as stated would be an obstruction and would not increase the value of the freehold.

MACDONALD, J.A.

The intention may be gathered, not so much from the degree but from the object of the annexation. We need not regard as conclusive the precise manner in which the property was affixed to the soil. If there was such an annexation to the land as to cast upon respondent the onus of shewing that it was intended that these steel rails and logging equipment were intended to remain chattels that onus has been satisfied by all the facts in evidence and necessary inferences.

We were referred to *Turner* v. *Cameron* (1870), 39 L.J., Q.B. 125 as in principle indistinguishable from the present. We have there the incident that the railway was "slewed and shifted about from time to time to meet the convenience of working collieries" but it is added, at p. 127:

> The mode of their construction does not differ from that of the main trunk lines, which are capable of being shifted in like manner, namely by breaking a joint. . . .

Great stress is laid in the narration of the facts on the care bestowed in construction:

COURT OF APPEAL

1933

June 6.

CANADIAN CREDIT MEN'S TRUST ASSOCIATION v. INGHAM

MACDONALD, J.A.

It is expressly found by the arbitrator, that they were so fixed and attached to the freehold as not to be capable of being removed without considerable violence, wrenching by means of picks and iron bars, so that, in their removal, considerable holes were left in the surface by the falling in of the ballast material. It was particularly well ballasted.

It deals too with the right to distrain and does not touch the point of the right of removal by a tenant or one in a relationship somewhat analogous as in this case. The term too, originally 85 years, had about 75 years to run and naturally a road intended to serve the intended purpose for so long a period would be particularly well built. Mellor, J. said at p. 130:

> We think that it must be taken as a fact that the railways in question were constructed for the better enjoyment of the colliery, and were so far permanent that they were intended to remain on the premises as ancillary to the working of the mines, at least, until the expiration of the term . . .

The statement is sometimes made that it is difficult or impossible to reconcile all decisions on the question of fixtures. It is necessary to regard the special facts of the case and impossible to treat decisions on different facts as binding. I think we derive assistance from the judgment in *Liscombe Falls Gold Mining Co.* v. *Bishop* (1905), 35 S.C.R. 539—also a case of sale under an execution—referred to by the trial judge. I only call attention to that part of the judgment of Davies, J (afterwards Chief Justice), where he refers to the relationship "of a tenant towards his landlord or any analogous position" (p. 547). I have treated the position of the company as analogous to that of a tenant and, where the appellant claims that relationship in respect to third parties, pointed out that it was equally open to the company to do so.

I would dismiss the appeal.

The Court being equally divided, the appeal was dismissed.

Solicitors for appellant: *Lawson & Clark.*
Solicitor for respondents: *W. Martin Griffin.*

BLAND v. AGNEW.

COURT OF APPEAL

1933

March 9.

BLAND v. AGNEW

Practice — Appeal — Supreme Court of Canada — Application for leave— Adoption of infant—Religion of parents—R.S.C. 1927, Cap. 35, Sec. 66.

By order of a judge within the Infants Act, Audrey Bland, an infant, was committed to the custody of the Children's Aid Society, of Victoria, as a neglected child. On the petition of the respondents who were Protestants, an order was made granting them leave to adopt the child under the Adoption Act. The appellants, the child's parents, who were Roman Catholics, after obtaining an order to proceed *in forma pauperis*, appealed to the Court of Appeal from the order mainly on the ground that the foster parents were of a different religious persuasion to that of themselves, and the appeal was dismissed.

An application for special leave to appeal to the Supreme Court of Canada was dismissed (McPHILLIPS, J.A. dissenting).

APPLICATION for leave to appeal to the Supreme Court of Canada from the decision of the Court of Appeal of the 10th of January, 1933 (reported, 46 B.C. 493). Heard at Vancouver on the 9th of March, 1933, by MACDONALD, C.J.B.C., MARTIN, McPHILLIPS and MACDONALD, JJ.A. Statement

O'Halloran, for the application: I am also asking for extension of time for leave to appeal: see Cameron's Supreme Court Practice, 3rd Ed., pp. 330-1. This is a question of public importance involving the religion of the child: see *Hand* v. *Hampstead Land & Construction Co.* (1928), S.C.R. 428; *Doane* v. *Thomas* (1922), 31 B.C. 457; *Girard* v. *Corporation of Roberval* (1921), 62 S.C.R. 234 at p. 240. Argument

Beckwith, contra: He cannot proceed to the Supreme Court *in forma pauperis*: see *Fraser* v. *Abbott* (1878), Cassels's Digest, 1893, pp. 695-6. He is not now entitled to an extension of time for leave to appeal: see *The News Printing Company of Toronto* v. *Macrae* (1896), 26 S.C.R. 695.

MACDONALD, C.J.B.C.: I am not disposed to give leave to appeal. The application for special leave to appeal is dismissed, and therefore there is no necessity for dealing with the other question argued; but if there is, then the other is dismissed as well. MACDONALD, C.J.B.C.

COURT OF APPEAL

1933

March 9.

BLAND v. AGNEW

MARTIN, J.A.

MARTIN, J.A.: I express my opinion on one point only, and that is the only necessary point on which to express an opinion, namely, the case is not one, in my opinion, in which special leave to appeal should be given. It therefore becomes quite unnecessary to say anything about any other aspects of the matter.

I might just add that I am the more moved in a case of this kind, and in all its circumstances, to come to that conclusion because it is still open to the Supreme Court of Canada, should it think fit, to grant the leave which we think it is our duty to refuse. The case has also a certain aspect in regard to the continuation of the litigation *in forma pauperis* which places it in an unusual category, and on the whole I think it is one in which it is eminently fit that the Supreme Court should exercise its discretion upon.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would grant special leave and also grant an extension of time. This Court, as a matter of fact, is clothed with Parliamentary authority to grant leave under no curtailment of any nature or kind. It is only in accordance with the justice of the case. The Supreme Court of Canada have surrounded themselves with certain curtailments in the matter. Construction of statute law or conflict in statute law—we are not confined to that; and also granting leave here, there is no review of that by the Supreme Court of Canada. If we refuse leave no appeal can be heard at Ottawa in this class of case.

Now what is the justice of this case? The situation is that the child is of Catholic persuasion. I am speaking within the terminology of the statute, where it speaks of persuasion. It is under three years of age. It was committed to the Children's Aid Society, of Victoria. The Children's Aid Society, of Victoria, held the child under certain statutory inhibitions, if I might say so. They say this, once committed not to be parted with—I am referring to section 93—except to a person or to a society of the same religious persuasion. That was the guarantee these parents had when the custody of the child was taken from them. The guarantee was the child should not be parted

with except to a person of the same religious persuasion, and here we find, in breach of the statute, that has been done.

I know a good deal about this particular statute, now called the Infants Act. I gave notice of the introduction of the Bill in the Legislature in 1901, and upon the notice being given the Government of the day undertook to proceed with the Bill as a Public Bill under the title of the Children's Protection Act. Section 93 is the section that here calls for consideration. Why was section 93 passed? It was passed to preserve for all time in this Province the sanctity and faith of the children, that there never would be interference therewith, and in accordance with the common law and the law of England, absolute protection and preservation of the religion of the child that is to be brought up in the faith of the father. The Province of British Columbia has been very free from religious collisions and controversies, because the Legislature took great care that it should be so free, and that a child taken under the Infants Act would not be subject to any danger of proselytizing. That is what this case comes to. This is a case of proselytizing, and in defiance of section 93 of the Act. The Children's Aid Society, by its board, by its committee, and by the superintendent or deputy superintendent of neglected children, commit breaches of duty under the statute law. Upon an application made under the Adoption Act, they commit a breach of their duty and give a consent for the adoption of a child of the Catholic persuasion to a person who is of the Protestant persuasion, right in the teeth of section 93 of the Infants Act. There was the bounden duty upon that Children's Aid Society to draw to the attention of the learned judge that they were statutorily inhibited from so doing. No doubt counsel raised the point, but the consent was given—a valueless consent, a consent in plain defiance of their statutory duty. This should have been said: "My lord, we hold this child under the provisions of the Infants Act. Section 93 does not admit of our giving consent. We cannot part with the child save to a person or society of the same religious persuasion."

MCPHILLIPS, J.A.

The order, in my opinion, with the greatest respect to the learned judge, is a nullity, but having been made by a Supreme Court judge, it should be set aside. Now, this is a matter of

COURT OF APPEAL

1933

March 9.

BLAND v. AGNEW

first importance; a most extraordinary act has been committed. The learned judge dispensed with the consent of the parents. In this I cannot agree. Both father and mother strenuously objected to the order made. It is not a crime to be paupers, and here the father and mother attend in person before the learned judge and say they want this child handed over to either a person or a children's aid society of the Catholic persuasion. It is true the learned judge under the Adoption Act may dispense with the consent of the parents under certain conditions, but the propriety of so doing upon the facts of this case I, with the greatest respect, disagree, and of course at the threshold the order made was upon a consent void in law and in contravention of statute law.

The religion of the child is the main factor, and the Legislature took care to preserve the faith of the child, and the order made is in denial of the statutory guarantee. The religion of the child is the paramount matter and transcends the material welfare of the child. Authorities have been cited by me in my judgment upholding the view I have here expressed. One of the Lord Chancellors of England, many years ago, pointed out that the faith of the child should not be put in jeopardy because of pecuniary advantage. This child's faith will be irreparably lost, contrary to the law of the land and guaranteed by the statute law of this Province in the Infants Act.

MCPHILLIPS, J.A.

What case could be of higher or of greater importance than this case? I do not think this Court, with great respect to all contrary opinion, should withhold giving leave to appeal to the Supreme Court of Canada, as failure to give leave means a denial of natural justice. I cannot speak of a case arising of greater gravity, affecting as it does the faith of the child—destroying for ever the faith of the child, an irreparable wrong. The child is taken from the parents, and irreparably taken under the Adoption Act. Under the Infants Act the child cannot be irreparably taken from them. The parent, shewing that he has improved his ways and has the means to care for his child, has the right to have his child restored to him. That which has occurred in the present case, in my opinion, with great respect to all contrary opinion, is against natural justice. Further, it is in denial of the plain reading of the statute law, and

the order made should be set aside, and because of that I would grant the leave asked for—that is, leave to appeal to the Supreme Court of Canada.

MACDONALD, J.A.: I deal with the matter purely in its legal aspect—the only way we can deal with it. With deference, it is not necessary to review the case or to reargue it on the merits on this application. That was done some time ago. There is no important question of law involved. It is solely a question of the construction of one Provincial statute—possibly two. It is of great importance to the parties concerned, but the question —who shall be the custodian or guardian of the child—is not one of general public importance within the meaning of our decisions on similar applications. I would, therefore, not grant special leave. I associate myself, however, with the statement of my brother MARTIN, for what it is worth, that it is open to the Supreme Court of Canada to grant leave, if it thinks fit to do so. That, of course, follows in any event.

Application dismissed, McPhillips, J.A. dissenting.

COURT OF APPEAL

1933

July 12.

CROSBIE v. WILSON AND LANGLOIS

CROSBIE v. WILSON AND LANGLOIS.

Negligence—Damages—Collision between automobiles—Disabled car—Duty of owner—Ultimate negligence.

Shortly after 12 o'clock at night on the 15th of December, 1932, the plaintiff drove his truck westerly on Hastings Street, Vancouver, and on passing Windermere Street he went down a hill and parked his truck close to the north curb on Hastings Street just beyond the bottom of the hill. It was raining, and the plaintiff was about to get out of the truck when the defendant Langlois, driving an Essex car in the same direction, skidded at the bottom of the hill and ran into the truck. The Essex bounced back about five feet where it remained, the back of the Essex being about 6 feet out from the curb, the impact putting the lights out on the Essex car. The plaintiff then offered to tow the Essex into the city, and taking a tow-rope from the truck he tied it to the front of the Essex and was in the act of tying the other end to the back of the truck when the defendant Wilson, coming down the hill from the east, struck the back of the Essex and drove it up against the truck, severely injuring the plaintiff who was standing between the truck and the Essex. Another car was coming down the hill just ahead of Wilson. He claimed this car interfered with his vision, and when he saw the Essex it was too late to avoid running into it. In an action for damages it was held on the trial that both defendants were equally liable.

Held, on appeal, reversing the decision of FISHER, J., that Wilson was driving at an excessive speed and was not keeping a proper look-out when coming down the hill, and to him alone must be attributed the cause of the accident.

Statement

APPEAL by defendant Langlois from the decision of FISHER, J. of the 24th of April, 1933, in an action for damages for injury to the plaintiff, owing to negligent driving of automobiles by the defendants. Shortly after twelve o'clock on the night of the 16th of December, 1932, the plaintiff was driving his motor-truck west on Hastings Street, Vancouver, and on reaching the bottom of a hill immediately west of Windermere Street, he parked his car close to the curb on the north side of Hastings Street. The plaintiff was about to get out of his seat when the defendant Langlois, driving an Essex car westerly on Hastings and behind the plaintiff, came down the hill, and on reaching the bottom his car skidded and ran into the back of

the plaintiff's truck. The Essex bounced back, leaving a space of about five feet between the cars, with the rear of the Essex car about six feet out from the curb, the jar from the collision having the effect of putting the lights out on the Essex car, including the tail-light. The Essex being out of commission, the plaintiff offered to tow it to a garage, and getting a rope from the motor-truck, he proceeded to tie it to the rear of the truck, both the plaintiff and Langlois standing in the space between the two cars. At this time and about five minutes after the first collision, the defendant Wilson, driving his car westerly and down the same hill, struck the rear of the Essex car and drove it into the truck, severely injuring the plaintiff. As the defendant Wilson was coming down the hill he was overtaking another car which was nearer the north curb than himself, and on nearing the Essex this car suddenly swerved to the left to avoid the Essex, and on clearing it left Wilson heading for the Essex car and so close to it that when he attempted to swerve quickly to the left to avoid it the side of his car slid into the Essex. The learned trial judge found both defendants equally liable for the accident.

Statement

The appeal was argued at Victoria on the 11th and 12th of July, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Ghent Davis, for appellant: We claim this is a case of ultimate negligence on the part of Wilson. He should have taken more care when coming down a hill behind another car. The fact that there was no tail-light on our car made no difference. He was going down the hill at 20 miles an hour. If Wilson had used ordinary care the accident would have been avoided: see *Davies* v. *Mann* (1842), 10 M. & W. 546; *British Columbia Electric Railway Company, Limited* v. *Loach* (1916), 1 A.C. 719 at p. 728; *Admiralty Commissioners* v. *S.S. Volute* (1922), 1 A.C. 129 at pp. 136 and 139; *Nason* v. *Hodne* (1929), 41 B.C. 398.

Argument

L. H. Jackson, for respondent: The lights on the Essex car went out after it struck the truck. We say the want of a tail-light contributed to the accident and added to this is the fact that the rear end of the Essex car was six feet out from the

COURT OF APPEAL

1933

July 12.

CROSBIE v. WILSON AND LANGLOIS

Argument

curb: see *Petroleum Heat & Power Ltd.* v. *British Columbia Electric Ry. Co.* (1932), 46 B.C. 462. The other car coming down the hill in front of Wilson interfered with his vision and a tail-light on the Essex car would have changed the course of the other car on the way down. Ultimate negligence does not apply here: see *MacDonnell and Jordan* v. *Pech and Lovette* (1930), 3 W.W.R. 455 at p. 456; *Scott* v. *City of Calgary and Riddock* (1926), 22 Alta. L.R. 467 at p. 475. Want of tail-light was the main cause of the accident.

Davis, replied.

MACDONALD, C.J.B.C.: I think this appeal should be allowed. I feel some diffidence in disagreeing with the conclusion at which the learned trial judge arrived, but when we look at the facts in this case it seems to me it is imperative that we allow the appeal. The evidence appears to be that there was sufficient light at the point where the accident occurred to have enabled Wilson to have seen the car distinctly; the mere absence of the red light on the back of the car would not deceive him if he had been looking out; if he had been taking notice of where he was going and kept a proper look-out he would have seen this obstruction, and he had every opportunity to avoid it; he was not in a position in which he was in the agony of collision; all he had to do was to turn out a few feet to the left and he would have avoided it; and he would not have run into the street-car as is suggested. Therefore, on the facts of the case, which have been sufficiently established to leave no doubt in my mind as to what they are, I think that Wilson was the sole cause of this accident. If he was the sole cause of the accident of course the other defendant is not liable at all, even if he were guilty of some negligence as is alleged; because the doctrine of ultimate negligence presupposes original negligence and contributory negligence, and then that doctrine comes in to say that if one of the parties could by reasonable care have avoided the accident, that party is responsible and wholly responsible for the accident, and the other party, who may have been guilty of contributory negligence is therefore relieved. Now that is this case. And therefore I think that I must hold that Wilson did

MACDONALD, C.J.B.C.

not take proper care to avoid an accident which he might have avoided had he kept a proper look-out and been in control of his car.

The appeal should be allowed.

MARTIN, J.A.: I am of the same opinion, and think it only necessary to say, briefly, that upon the allegations of negligence set up in the amended statement of claim against the present appellant, and restricting the evidence, as it should be restricted, to those issues—because there has been no departure therefrom by the course of the trial or otherwise—and without interfering at all with any findings of fact made by the learned judge, but on the contrary accepting them in essentials, the facts being as I regard them uncontradicted, there is no doubt in my mind that the learned judge should have applied the principle of the *Volute* case, which is to be found at page 139 instead of page 144, which he relies upon in his reasons; *i.e.*, that it is quite apparent from his own findings that Wilson was driving at an excessive speed and was not keeping a proper look-out, and that to him alone must be attributed the cause of the collision. The paragraph I refer to, which was adopted by their Lordships in the *Volute* case is this—and it is taken from *Davies* v. *Mann* (1842), 10 M. & W. 546, expressed in terms which are entirely appropriate to the present circumstances—*i.e.*, if the accident might have been avoided by the exercise of ordinary care and skill on the part of the defendant, to his own negligence it is entirely ascribed, and he and he only approximately caused the loss. That principle is the one which should be applied to the somewhat unusual circumstances of this case—I say unusual because there were three motor-cars involved in it, in fact a fourth, but two of them were immobile having been parked by the roadside.

MARTIN, J.A.

MCPHILLIPS, J.A.: I also am of the opinion that the appeal should be allowed. The only matter of doubt that occurred to my mind, was that possibly something might have reasonably been done, that is to post somebody at some distance to the rear

MCPHILLIPS, J.A.

COURT OF APPEAL

1933

July 12.

CROSBIE v. WILSON AND LANGLOIS

MCPHILLIPS, J.A.

of where this car was stalled, to warn on-coming vehicles. But as pointed out by the learned Chief Justice, the evidence supports the view in this case that there was excessive speed on the part of Wilson; and there was also visibility. Therefore it becomes a matter of ultimate negligence. I am further stimulated to take the view that there is no liability here on this question of the tail-light, in this way, the by-law requires one situated as Langlois found himself, to forthwith get his car off the street; so that that might very reasonably do away with the reasonableness as I thought at one time of posting somebody to warn on-coming traffic. Naturally if you have to do something forthwith there must be no delay. And I find that he did do that. He was reasonably and with expedition in accordance with the law doing that which the by-law required him to do; and he might have reasonably thought that that was more important than posting somebody at some distance away, especially as the visibility was good. When matters of this kind occur a man cannot think of everything, and Courts give heed to this—as witness the agony of collision rule. It seems to me that he was about the business that the law required him to do, and that was to get his car away forthwith. The evidence indicates that Wilson came on at an excessive speed, and there being sufficient visibility to have made out the obstacle, all the other questions are removed, and it becomes ultimate negligence, and he alone is answerable for it.

MACDONALD, J.A.

MACDONALD, J.A.: I think the true cause of action was misconceived. Langlois could only be liable to the plaintiff if he failed to remove the derelict car in a reasonable time and failed to guard it in the meantime. He was not liable because of the first collision, as the plaintiff did not own the damaged car. After that a new situation arose, in which we have Langlois' disabled car on the street some distance from the curb imposing upon him a duty to remove and to guard it, and if he failed to do so, and the accident to the plaintiff resulted from want of care in that respect, he would be liable. But there is no evidence

of lack of care. He took steps to remove the obstruction within a reasonable time. It is of no avail to say that the tail-light was out. It was put out of commission by the collision, and being disabled it was the same as any other obstruction on the highway. If it had been alleged and shewn at the trial that he might have taken the precaution of placing a man some distance from the car to warn on-coming cars, a case might have been made out. No such neglect, however, was alleged.

I would allow the appeal.

Appeal allowed.

Solicitor for appellant: *Ghent Davis.*

Solicitor for respondent: *L. H. Jackson.*

FISHER, J.

1933

May 11.

COURT OF APPEAL

July 13.

GODDARD v. BAINBRIDGE LUMBER CO.

GODDARD v. BAINBRIDGE LUMBER COMPANY LIMITED.

Practice—Application for revivor order—Delay in proceedings—Costs only involved—Discretion of Court—B.C. Stats. 1912, Cap. 17, Sec. 32.

In 1919 the defendant company, desiring to expropriate a portion of the plaintiff's lands for right of way, commenced proceedings under the Forest Act for the appointment of an arbitrator to determine the value of the property to be expropriated. The plaintiff then commenced this action for an injunction restraining the defendant from proceeding with the arbitration and for damages. On the application of the plaintiff an *interim* injunction was granted until the trial, and on filing its defence, the defendant paid into Court with denial of liability, $350 as sufficient to satisfy any damages suffered. By judgment of the 6th of December, 1920, the injunction was dissolved and the plaintiff was awarded $25 damages with costs of action up to the time of delivery of the statement of defence, and also costs of the issue in which he was successful (*i.e.*, that of liability). The defendant being given its costs of the action after the delivery of the defence with right of set-off, the defendant was ordered to proceed with the arbitration. The parties then proceeded to arbitration, and the defendant offered $200 in satisfaction of all claims. The arbitrator awarded the plaintiff $200 by way of compensation on the 9th of February, 1921, and the defendant paid this sum with $5 interest into Court. The defendant's costs of the arbitration were taxed at $784.45. The costs of the action were never taxed, but the defendant's costs were substantially in excess of that of the plaintiff's, including the $25 damages awarded. By agreement between the solicitors of March 16th, 1925, $125 of the moneys paid into Court was paid out to the plaintiff's solicitors and the balance (*i.e.*, $430 and interest) was paid out to the defendant's solicitors. The defendant claims that the settlement between solicitors and payment of moneys out of Court was made without authority and without its knowledge. The plaintiff, Gilbert E. Goddard, died on the 5th of April, 1931. An application by the defendant company for an order that the proceedings in this action be continued between Luella Goddard as executrix of the plaintiff, and the defendant, and that said Luella Goddard be added as a plaintiff, was dismissed.

Held, on appeal, affirming the decision of FISHER, J., that there are circumstances in evidence which shew that it would not be in accordance with the principles of equity to open up a matter that has been lying dormant for thirteen years, particularly as one of the parties interested who would be an important witness has since died. This is a matter where the learned judge below has exercised his discretion and there are facts from which inferences can be drawn to support the discretion exercised here, in which case this Court should not interfere.

Statement APPEAL by defendant from the order of FISHER, J. of the

12th of May, 1933, dismissing an application by the defendant for an order that the proceedings in this action be continued between Luella Goddard as executrix of the plaintiff Gilbert E. Goddard and the defendant, and that the said Luella Goddard be added as plaintiff in the action. Heard by him in Chambers at Victoria on the 9th and 10th of May, 1933. In 1919 the defendant company desiring to expropriate as a right of way a portion of lot 129, Alberni District, owned by Gilbert E. Goddard, caused an originating summons to be issued under the Forest Act for the appointment of an arbitrator to determine the value of the property to be expropriated. Before the order was taken out Gilbert E. Goddard commenced action against said company for an injunction restraining the company from proceeding with the arbitration and for $10,000 damages for trespass, and an order was made restraining the company from proceeding with the arbitration until the trial of the action. The defendant company, on filing its defence, paid into Court $350 as sufficient to satisfy the damages. On the 6th of December, 1920, judgment was delivered by GREGORY, J. dissolving the injunction and directing that the arbitration should proceed. He awarded $25 damages to the plaintiff and the costs up to delivery of the statement of defence and the issue on which he succeeded, and awarded the defendant the costs of the action, with the right of set-off. The arbitration then proceeded, the defendant company offering the plaintiff $200 in satisfaction of all claims for compensation. The arbitrator awarded the plaintiff $200 by way of compensation on the 9th of February, 1921, which sum with $5 interest was paid into Court by the defendant company. Pursuant to an order of CLEMENT, J. of the 14th of December, 1921, the registrar taxed and allowed the defendant's costs in connection with the arbitration proceedings in the sum of $784.45. The costs of the plaintiff and the defendant in the action for an injunction and damages have never been taxed, but the defendant's costs would have considerably exceeded the amount awarded the plaintiff as damages (*i.e.*, $25) and his costs. By agreement between the plaintiff's and defendant's solicitors in March, 1925, the sum of $125 was paid out of Court to Messrs. *Taylor & Brethour,* solicitors for the plaintiff, and the balance in Court (*i.e.*, $430 and interest)

Statement

FISHER, J.

1933

May 11.

COURT OF APPEAL

July 13.

GODDARD v. BAINBRIDGE LUMBER CO.

was paid to Messrs. *McIntosh & Finland,* the defendant company's solicitors. Gilbert E. Goddard died on the 5th of April, 1931. The defendant company claimed that Messrs. *McIntosh & Finland* had no authority to settle the action on its behalf and that the company had no knowledge of the moneys in Court being paid out until October, 1932.

R. A. Wootton, for plaintiff.
H. W. Davey, for defendant.

11th May, 1933.

FISHER, J.: This is an application on behalf of the defendant company for an order that the proceedings in this action be continued between Luella Goddard as executrix of the plaintiff and the defendant and that the said Luella Goddard be added as plaintiff in the action.

It would appear that judgment was given in the action on the 6th day of December, 1920, and part of such judgment reads as follows:

That the plaintiff shall be entitled to sign judgment for the sum of $25 and costs up to and inclusive of the 7th day of November, 1919, and of the issue upon which he was successful to be taxed and paid forthwith after taxation by the defendant to the plaintiff and that the defendant shall be entitled to the costs of this action on the Supreme Court scale from and after the 7th day of November, 1919, such costs to be taxed and paid by the plaintiff to the defendant forthwith after taxation, there to be an offset as to costs and as to said sum of $25.

AND THIS COURT DOTH FURTHER ORDER AND DIRECT THAT THERE BE PAID OUT TO THE plaintiff's solicitors the amount, if any, to which the plaintiff may be entitled in respect of the said sum of $25 and the costs hereinbefore awarded to the plaintiff, after setting off against the same the taxed costs to which the defendant is entitled under this judgment, and that the whole of the moneys in Court, or the said sum in Court less the amount payable to the plaintiff's solicitors under and by virtue of this judgment be payable to the defendant's solicitors.

Referring to said judgment, Mr. Clarence Hoard, managing director of the defendant company in his affidavit of 27th April, 1933, says in part as follows:

5. That the costs awarded to said plaintiff and said defendant by said judgment have not been taxed, settled or paid, nor have the damages of $25 awarded to the said plaintiff by said judgment been settled or paid by the said defendant.

10. That the said defendant desires to proceed with said action and work out said judgment by having the said costs allowed to said plaintiff and the said defendant taxed and the amount owing to the said plaintiff

for damages and costs, or to the said defendant for costs under said judgment, ascertained.

The plaintiff Gilbert Edwin Goddard died on the 5th day of April, 1931, and his executrix claims that the action was settled and disposed of long before his death. There is no doubt that on or about the 16th day of March, 1925, the whole of the moneys in Court to the credit of such action were paid out to the solicitors on the record for the respective parties, apparently in pursuance of the terms of the judgment as aforesaid. In his affidavit of May 6th, 1933, filed in reply to the claim of the executrix that the action was settled, Mr. Hoard says that he first learned the moneys had been paid out of Court as aforesaid on or about the 6th day of October, 1932. He states, also, however, that he is and has been at all times material hereto the president and managing director of the defendant company and it is or must be admitted that he knew at the time of the payment of the money into Court and of the terms of the said judgment as to taxation of costs and payment out.

I think the first question to be decided is whether or not the delay on the part of the defendant company disentitles it to the order asked for which has been and may be described as a "revivor" order using the word as a short word to express the effect of the order that might be made.

FISHER, J.

Counsel on behalf of the executrix refers to Daniell's Chancery Practice, 8th Ed., Vol. 1, p. 239, reading in part as follows:

> An order to carry on the proceedings may be made after the lapse of a long period. After judgment the Court exercises a discretion, and will not make an order to carry on the proceedings where there has been gross negligence or *laches* on the part of the applicant, . . .

Higgins v. *Shaw* (1842), 2 Dr. & War. 356, is cited as one of the authorities for this proposition, where at p. 360 the Lord Chancellor says in part as follows:

> The delay, which has taken place in the proceedings in this cause, has not been accounted for, and is certainly much to be condemned. It cannot, however, be argued, that the right of the party to revive is barred either by any Statute of Limitations, or by any rule of this Court. The bar depends altogether on the discretion of the Court, . . .

As counsel for the defendant points out it must be noted that in the *Higgins* case, *supra,* the Lord Chancellor also says that the delay is not a positive bar and that relief cannot be refused

FISHER, J.

1933

May 11.

COURT OF APPEAL

July 13.

GODDARD v. BAINBRIDGE LUMBER CO.

if the plaintiff be within time, and there has not been such a variation of the rights of parties, as to occasion danger of working positive injury and injustice to other parties.

I think the principle is established that, although delay is not a positive bar, the matter is within the discretion of the Court and the order should not be made if there is danger of working injury and injustice to other parties. I think also that though there may be no general rule in this Court barring a revivor order for costs only as contended by counsel for the executrix, citing Daniell's Chancery Practice, *supra,* p. 240, still the fact that there is nothing to be worked out except costs is a factor to be seriously considered in reaching a conclusion as to whether the Court should exercise its discretion in favour of the applicant. Counsel for the applicant strenuously contends that there is something more than costs to be worked out, but I cannot agree with this contention. Mr. Hoard himself says in his said affidavit of the 27th day of April, 1933, that he is informed and believes

FISHER, J.

that in order to proceed with the taxation of the costs awarded to the said plaintiff and the said defendant by said judgment and ascertain the amount payable to the said plaintiff or the said defendant thereunder, it is necessary to have someone appointed to represent the estate of the said Gilbert Edwin Goddard, deceased.

It is quite apparent that the judgment provided that there should be an offset of the said sum of $25 damages and referred to the moneys in Court, but in my opinion this would in no way change the nature of the revivor order asked for which in effect would be nothing more nor less than a revivor for costs. The executrix claims that such costs have been fully settled and as already intimated Mr. Hoard says in one of his said affidavits that the costs awarded to the plaintiff and defendant by said judgment of the 6th day of December, 1920, have not been taxed, settled or paid, but the delay which has taken place in having the costs taxed, settled and paid has not been accounted for by him at all though he was president and managing director of the defendant company throughout the whole proceedings.

My view is that, according to the case as put forward by the defendant company itself, there has been great delay unaccounted for on its part with the result that it is asking at this late date after judgment for a revivor order for costs only. My

view also is that the order is being asked for at a time when there has been such a change of position by the death of the plaintiff that such an order might possibly occasion an injustice to his estate as the executrix would be obliged to support her claim that the costs were settled without the evidence of her husband who as plaintiff would undoubtedly have had an intimate knowledge of the course of the proceedings. Under such circumstances my conclusion on the whole matter is that, the judgment in this action having been rendered as long ago as the 6th day of December, 1920, the long delay on the part of the applicant company on the case as put forward by itself constitutes *laches,* and the application being for a revivor order for costs the Court should exercise the discretion it has on such an application and refuse to assist the applicant by making a revivor order for costs only at this time when as already indicated there is the possibility that such a revivor order might occasion an injustice to the estate of the deceased plaintiff.

Having come to such conclusion I might add that it is not necessary for me to consider the question as to whether or not there was a settlement as contended by the executrix, or to decide whether such question should be determined on the affidavits filed after cross-examination as suggested or upon oral evidence to be taken in an issue to be directed.

The application of the defendant is dismissed with costs.

From this decision the defendant appealed. The appeal was argued at Victoria on the 12th and 13th of July, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Beckwith, for appellant: The plaintiff died in April, 1931, and this is an application that his widow, who is executrix under his will, be added as a plaintiff under rules 178, 179 and 181. The plaintiff did not proceed with the taxation, so we must act under rule 1002 (28). This cannot be done until the action is properly constituted: see *Boynton* v. *Boynton* (1879), 4 App. Cas. 733; *Knight* v. *Gardiner* (1888), 32 Sol. Jo. 166; *Blakeway* v. *Patteshall* (1894), 1 Q.B. 247; Daniell's Chancery Practice, 8th Ed., 239; *Higgins* v. *Shaw* (1842), 2 Dr. & War.

FISHER, J.

1933

May 11.

COURT OF APPEAL

July 13.

GODDARD v. BAINBRIDGE LUMBER CO.

356. Delay in itself is not a ground for refusing this order: see *Hollingshead's Case* (1721), 1 P. Wms. 742; *Micklethwaite* v. *Vavasour* (1893), W.N. 61; *Curtis* v. *Sheffield* (1882), 20 Ch. D. 398. Assuming we have a right to revivor for costs only then we have a right to enforce it: see Daniell's Chancery Practice, 8th Ed., 232.

R. A. Wootton, for respondent: Goddard died in 1931, and he was a material witness in these proceedings. The executrix has no knowledge of this action. Judgment was delivered in this case in 1920, and without any excuse for the delay the defendant attempts to bring the matter up on a question of costs only, thirteen years later and after the death of the plaintiff: see *James* v. *Gwynne* (1856), 2 Jur. (N.S.) 437. The learned judge below rightly decided that the loss of a material witness by death (*i.e.*, Goddard) was sufficient ground for refusing the application: see *Eaton* v. *Dorland* (1893), 15 Pr. 138; Daniell's Chancery Practice, 8th Ed., 242. It is sufficient to shew that there is a liability of injury to others: see *Hollingshead's Case* (1721), 1 P. Wms. 742; *Higgins* v. *Shaw* (1842), 2 Dr. & War. 356; *Curtis* v. *Sheffield* (1883), 21 Ch. D. 1. There can be no revivor after judgment: see *Attorney-General* v. *Corporation of Birmingham* (1880), 15 Ch. D. 423; *Heard* v. *Borgwardt* (1883), W.N. 173. There is an absolute discretion in the trial judge on this application: see *In re Dracup; Field* v. *Dracup* (1892), W.N. 43; *Arnison* v. *Smith* (1889), 40 Ch. D. 567; *Hulbert* v. *Cathcart* (1896), A.C. 470. In any case the delay limits them to the funds in Court.

Argument

Beckwith, in reply: *Finland* was not authorized to act for the defendant: *The Hudson's Bay Co.* v. *Kearns & Rowling* (1896), 4 B.C. 536; *Butler* v. *Knight* (1867), L.R. 2 Ex. 109.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I think the application should be refused. There are circumstances in evidence here which shew that it would not be in accordance with the principles of equity if we should open up a matter that has been lying dormant for thirteen years, or a very long time, and particularly as one of the parties interested has since died. The application now is to revive the action in favour of the other party to the proceedings. I can imagine no more important witness in the proceedings

which would follow if we revived this action than Mr. Goddard himself. If there was a settlement thirteen years ago he would know of it, and would know the authority by which it was made, and would be able in that way to shew exactly if the defendant's claims were invalid. The defendant had the opportunity for twelve years to have taken proceedings—Goddard is only dead about a year—to have this matter disposed of; but it was allowed to lie dormant until now. Having taken no proceedings, what inference are we to draw from that? We may not be able to presume something which may not be legal presumption, but what inference are we to draw from the fact defendant did nothing? Say they were not aware of their rights, that was negligence on their part; if they had been alert in looking after their interests they would have taken these proceedings when the matter was fresh in the minds of the parties, and when Mr. Goddard was alive. They have not done it. The inference we should draw from that is that the settlement did take place thirteen years ago; and if that were so, then there is no necessity for reviving the action at all, because the defendants could not succeed in their contention. In these circumstances I think the learned trial judge, who heard argument on both sides—which I must say has been very well conducted by both counsel on this appeal before us—I am very much pleased with the manner in which both counsel have put forward their contentions—the learned trial judge had the same opportunity, and he came to the conclusion that it would not be equitable to revive this old action. I would not be astute to find that he had come to a wrong conclusion; I should on the contrary come to the conclusion that his discretion ought not to be interfered with. This is a matter of discretion; it may be a matter of judicial discretion, but if there are facts from which inferences can be drawn to support the discretion exercised here, then the judge was entitled to exercise that discretion, and this Court ought not to interfere with it.

MACDONALD, C.J.B.C.

MARTIN, J.A.: It is conceded that this appeal is from an order based upon the discretion of the learned judge below

MARTIN, J.A.

FISHER, J.

1933

May 11.

COURT OF APPEAL

July 13.

GODDARD v. BAINBRIDGE LUMBER CO.

refusing to continue the proceedings in the action and to add as a party defendant the widow of the deceased plaintiff, and there are two cases which I think it necessary to refer to—*Earl Egremont* v. *Hamilton* (1811), 1 Ball & B. 516; and *Higgins* v. *Shaw* (1842), 2 Dr. & War. 356—cited by the learned judge below. Those two cases clearly shew—one by the Lord Chancellor of Ireland, the first one, and the other by the Lord Chancellor of England—that it rests in the discretion of the Court, to be regulated by the circumstances of the case, whether relief shall be given or not, and at p. 533 Lord Chancellor Manners said:

> From the length of time that has elapsed, and the change of circumstances, I think it impracticable, consistent with principles of justice, to pronounce a decree for the plaintiff.

MARTIN, J.A.

That, I think, is language that should be applied to this case because there are here unquestionably three elements of discretion, first, the length of time, second, the question of costs, and third, the danger of working injury and injustice to other parties, and to those three elements the learned judge has applied his mind; it is not necessary for us to go outside or enter into the question as to whether or no a settlement had in fact been arrived at, because that is something the truth of which would appear after further elucidation. It is impossible for us to say, in my opinion, having before us a case which has all the elements of judicial discretion that it is our duty to interfere with the due exercise of that discretion. There are cases, of course, where we would be justified in interfering if we could say that there was some substantial element which the learned judge had either omitted to consider or had gone astray in considering. But applying, as I do, the principles laid down in those two cases, it follows that it is legally impossible for us, in the exercise of true principles of justice, to interfere in this matter.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I would dismiss the appeal. This is essentially a matter of the application of the principles of equity that have obtained for a long time in our law. At one time they

were not applied; but as a matter of fact today we are really exercising equitable principles, rather than common law principles, that is, the principles of equity have become supreme. Today there is very little of what was at one time the strict application of common law principles. Cases are constantly met with which bring in the principles of equity. And here there certainly is a case where those equitable principles should receive careful attention, especially when such a long lapse of time has taken place. The learned judge heard this matter, and we can well assume that he heard it with great patience because his reasons for judgment indicate that in the completest terms. The leading authorities are referred to in his reasons for judgment. And we have had cited from both sides all the relevant authorities, for which counsel are to be commended. The line of demarcation is perfectly clear it seems to me. The principal question in this case is the question of whether or not prejudice would result if revivor was granted. I think that this is a case in which that is eminently the case. Mr. Goddard lived for some time after the alleged transaction took place, that is, the settlement, when there would have been ample opportunity to investigate matters, but at this late date the attempt is made to reagitate that which was settled in his lifetime. Business men must do their business in a businesslike way, and the Courts are well entitled in applying equitable principles when people do not proceed as they should proceed. This long delay is inexplicable to me. People should be vigilant; they should do their business in a businesslike manner. And when it is evident to the Court that it is a case where prejudice would result no indulgence should be granted. The plaintiff was apprised of the settlement, and stated that all matters had been settled—at this late date to have it determined otherwise would certainly offend against principles that have been applied in Courts of equity for long years. I certainly do not think it is a case for the Court to interfere. In any case, it is a matter of discretion; and as I have indicated, the learned trial judge appears to have applied his mind very closely both to the facts and the law; and

MCPHILLIPS, J.A.

FISHER, J.

1933

May 11.

COURT OF APPEAL

July 13.

GODDARD v. BAINBRIDGE LUMBER CO.

the Court of Appeal would not in my opinion be justified in disturbing the discretion exercised below. This is not a case in which the Court of Appeal should extend a helping hand; on the other hand, I think it is a case devoid of merit.

I would dismiss the appeal.

MACDONALD, J.A.: I think the judge below exercised his discretion on proper grounds, and we should not interfere.

Appeal dismissed.

Solicitor for appellant: *H. W. Davey.*

Solicitor for respondent: *R. A. Wootton.*

CAMERON v. ROUNSEFELL *ET AL.*

FISHER, J. (In Chambers)

1933

June 30.

CAMERON v. ROUNSEFELL

Practice—Application to dismiss action—Res judicata—Master and servant —Reduction of salary—Sufficiency of notice.

The plaintiff brought this action on May 6th, 1932, claiming $861.64, being the balance of salary due him from the defendants for the months of March, April, May and June, 1932, on the basis of $325 per month, but the action was not set down for trial until June 29th, 1933. On the 14th of February, 1933, the defendants in this action brought action in which the plaintiff herein was defendant, for an account of the partnership dealings and transactions between themselves and the defendant and a declaration of dissolution, and the defendant, by paragraph 10 of his defence pleaded that "It was a term of the said partnership that it should exist during the joint lives of the partners and that the defendant should be employed in the business of the partnership at a remuneration of $325 per month or alternatively a fair remuneration for services rendered. The plaintiffs conspired together to and did in fact wrongfully and unjustly reduce the defendant's remuneration and dismiss him from the employment of the partnership." He also set up a counterclaim in which he repeated the allegations of fact contained in paragraphs of the defence, including paragraph 10. The second action was tried and judgment was given. On an application by the defendants to dismiss this action on the ground that the plaintiff's claim has been adjudicated upon by this Court:—

Held, that as the issues of fact and the questions of law which the plaintiff seeks to put in controversy in the present action are the very same issues and questions which have already been decided between the same parties by this Court, this action should be dismissed.

APPLICATION to dismiss the action on the ground of *res judicata*. The facts are set out in the reasons for judgment. Heard by FISHER, J. in Chambers at Vancouver on the 23rd of June, 1933. Statement

Christopher Morrison, for the application.
Hossie, K.C., contra.

30th June, 1933.

FISHER, J.: This is an application by defendants to dismiss the action herein on the ground that the claim of the plaintiff herein has been adjudicated upon by this Court. It would appear that the writ was issued on May 6th, 1932, but the action was not set down for trial till June 29th, 1933, *i.e.*, after Judgment

FISHER, J. (In Chambers)

1933

June 30.

CAMERON v. ROUNSEFELL

the present application was launched. In the meantime the defendants in the action had begun on February 14th, 1933, another action in which the plaintiff herein was defendant for an account of the partnership dealings and transactions between themselves and the defendant and a declaration of dissolution and such action was tried before myself and judgment given a short time ago.* In the action begun by the plaintiff herein he claimed, according to the statement of claim, "the sum of $861.64 being the balance of salary due him" by the defendants apparently for the months of March, April, May and June, 1932, on the basis of $325 per month without any deduction for income tax paid by the defendants for the plaintiff. In paragraph 10 of his defence to the second action the defendant therein pleaded in part as follows:

> It was a term of the said partnership that it should exist during the joint lives of the partners and that the defendant should be employed in the business of the partnership at a remuneration of $325 per month, or alternatively a fair remuneration for services rendered. The plaintiffs conspired together to and did in fact wrongfully and unjustly reduce the defendant's remuneration and dismiss him from the employment of the partnership.

Judgment

The defendant in the second action also set up a counterclaim in which he repeated the allegations of fact contained in several paragraphs of the defence including said par. 10 and counterclaimed against the plaintiff damages for wrongful dismissal and such further or other relief as to the Court might seem meet. At the trial evidence was introduced and it seems to me rightly so on the record as it stood with the object of establishing what the terms of the employment of the defendant were and the rights of the parties under the circumstances and it may be noted that the defendant himself put in evidence Exhibits 15, 17 and 18 in support of his contention that one of the terms of his employment was that his income tax should be carried by

* In that action FISHER, J. applying *Austen* v. *Boys* (1857), 24 Beav. 598 at 606, 53 E.R. 488; Lindley on Partnership, 9th Ed., pp. 597, 675; and *Syers* v. *Syers* (1876), 1 App. Cas. 174, at 183-4; 35 L.T. 101, declared that the partnership was dissolved, gave an order for an accounting, and gave leave to either the three plaintiffs together, or one of them, the plaintiff F. W. Rounsefell, as the owner of a very substantial interest in the old-established business of Ceperley, Rounsefell & Co., to lay proposals for the purchase of the defendant's one-tenth interest. His disposition of the counterclaim is referred to fully in the present judgment.

the firm and paid out of profits. Evidence was also given as to the passing of the resolution of February 17th, 1932, abolishing the position of office manager held by Mr. Cameron and reducing his salary from $325 to $150 per month from and after March 31st, 1932. Such resolution was before me as well as the partnership agreement and it must be noted that in the endorsement on the writ in the present action the plaintiff claimed a declaration that such resolution was void and of no effect and the defendants pleaded such resolution as part of their defence. In my reasons for judgment I said in part as follows:

I now come to deal with the counterclaim of the defendant based on the allegations that "the plaintiffs conspired together to, and did in fact wrongfully and unjustly reduce the defendant's remuneration and dismiss him from the employment of the partnership." I find there is no merit in the claim with respect to conspiracy. The terms of the partnership agreement (Exhibit 1) being applicable, as I have already held, it follows that paragraphs numbered 15 and 16 of such agreement apply and, in my opinion, the partners had power to pass the resolution of February 17th, 1932, abolishing the position of office manager and directing that Mr. Cameron perform such duties as might be assigned to him from time to time by Mr. Rounsefell. As to the reduction of salary, however, from $325 per month to $150 I have to say that Mr. Cameron had been holding the important position of office manager and had been retained in that position long after the expiry of the three-year term. Under the circumstances I think he was entitled to reasonable notice of any reduction and that the six weeks' notice was not sufficient. The position is somewhat unusual in that the defendant, having protested against the reduction, continued in the employment of the firm until June 30th, 1932, having been advised on May 31st, 1932, that his services would not be required by the firm after the said June 30th, 1932. Having considered the rights of the parties under the peculiar and unusual circumstances I hold that justice will be done if I direct, as I do, that the counterclaim be dismissed without costs but that in the accounting to be taken the defendant should be allowed credit upon the basis of his monthly salary being the sum of $325 per month until June 30th, 1932. I cannot find that any arrangement was ever made that the income tax of the defendant should be paid by the firm and the defendant is therefore not entitled to claim that the account should be made upon that basis.

Judgment

As already indicated the present application raises the question of *res judicata* and the plaintiff submits that such a plea would not be good in the present action and that in any event the matter should go to trial and that it is not for me to try the action now. My opinion however is that the action should not be allowed to proceed if I am satisfied that there is nothing to

FISHER, J. (In Chambers)

1933

June 30.

CAMERON v. ROUNSEFELL

be tried or, in other words, that the matter had already been tried and determined. In this connection reference might be made to what Lush, J. said in *Ord* v. *Ord* (1923), 2 K.B. 432 at 439; 92 L.J., K.B. 859:

> Now, there is no difficulty in seeing what, in its strict and proper sense, the plea of *res judicata* means. The words "*res judicata*" explain themselves. If the *res*—the thing actually and directly in dispute—has been already adjudicated upon, of course by a competent Court, it cannot be litigated again.

The litigant must admit that which has been judicially declared to be the truth with regard to the dispute that he raised. In order to see what the fact is that he must admit the truth of, "one has always to see what is the precise question, the precise fact that has been disputed and decided." See also Spencer Bower on Res Judicata, at p. 115, where the writer says:

> It follows that, in strictness, the burden is on the party setting up the estoppel of alleging and establishing this identity of subject matter,—that is to say, that his opponent is seeking to put in controversy and re-agitate some question of law, or issue of fact, which is the very same question or issue which has already been finally decided between the same parties by a tribunal of competent jurisdiction.

Judgment

Counsel for plaintiff contends that the claim in the present action being one for balance of salary as a debt "the precise question" was not directly in issue nor decided in the other action. I must say that I disagree with this contention. The allegations of fact on which the present plaintiff's counterclaim in the other action was based included the statements that it was a term of the employment and partnership that he should be employed in the business of the partnership at a remuneration of $325 per month or alternatively as above set out and that the defendants (in the present action) wrongfully and unlawfully reduced his remuneration and dismissed him from the employment of the partnership. As already pointed out the plaintiff also undoubtedly put in controversy and agitated the question as to whether or not it was agreed between the parties that the income tax of the plaintiff should be paid by the firm. My reasons for judgment in the other action, as above set out, shew my findings of fact and conclusions on the rights of the parties and, after carefully considering the arguments of counsel on the present application, I am firmly of the opinion that the question as to the plaintiff's right to claim a balance of salary for the

months in question either as a debt or otherwise has been tried and determined by me in the other action. Counsel for the plaintiff has referred to the case of *Jones* v. *Ryder* (1928), 39 B.C. 547; 2 W.W.R. 302, where it was held that the setting aside of the first writ does not prevent a new action claiming other relief although arising out of the same state of facts. It may be noted however that in such case MACDONALD, C.J.B.C., said at p. 303 that the second writ was not for the same cause of action and MACDONALD, J.A. said at p. 306 that there was no adjudication on the first writ. In the matter now being considered by me I hold that the plaintiff put forward in the case tried a cause of action which was really the same as in the present case and such cause of action having been determined on its merits there has been an adjudication thereon. In the second action which, as already stated, was in the beginning simply for an accounting and a declaration of dissolution of partnership the plaintiff in the present action raised the dispute as to the terms of his employment and the reduction of his salary. I found what the facts were and gave what I considered was the proper relief upon my findings. The issues of fact and the questions of law which the plaintiff seeks to put in controversy in the present action are, in my opinion, the very same issues and questions which have already been decided between the same parties by this Court. I think the principle laid down in the *Ord* case, *supra,* is applicable and that the plaintiff having raised in the other action the dispute as to the precise facts and questions involved in the present action must now "admit that which has been judicially declared to be the truth with regard to the dispute that he raised." I have to add that I have not overlooked the fact that the item of $80 *re* use of motor-car was not brought forward in the other case but it is claimed in the present case as part of a balance due on account of salary and I think the rule laid down in *Henderson* v. *Henderson* (1843), 3 Hare 100 at 114-15; 67 E.R. 313, and approved by the Privy Council in *Hoysted* v. *Taxation Commissioner* (1925), 95 L.J., P.C. 79; (1926), A.C. 155 at p. 170; 1 W.W.R. 286 applies. See also *Green* v. *Weatherill* (1929), 2 Ch. 213, at 221; 98 L.J., Ch. 369.

Judgment

In the *Henderson* case, Wigram, V.-C. said in part as follows:

FISHER, J. (In Chambers)

1933

June 30.

CAMERON v. ROUNSEFELL

I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

My conclusion therefore on the whole matter is that the present action should be dismissed but under the circumstances without costs. This would not necessarily dispose of the counterclaim set up by the defendants but on the hearing of the application the defendants asked that if I held that the plaintiff's action should be dismissed the counterclaim should also be dismissed. The defendants asked that the dismissal should be without costs but as it raised distinct and separate issues I think the costs should follow the event and that the counterclaim of the defendants herein should be dismissed with costs. Order accordingly, the defendants to have the costs of the present application.

Judgment

Application granted.

REX v. LESCHIUTTA.

FISHER, J. (In Chambers)

1933

July 4.

REX v. LESCHIUTTA

Intoxicating liquors—Excise Act—Conviction under section 176 (e)—Fine without imprisonment—Certiorari—Amendment of conviction—R.S.C. 1927, Cap. 60, Sec. 176 (e)—Can. Stats. 1930, Cap. 18, Sec. 7—Can. Stats. 1932-33, Cap. 40, Sec. 10.

After conviction of an accused on a charge under section 176 (*e*) of the Excise Act, the magistrate imposed a fine only, without imprisonment. On an application by the Crown for a writ of *certiorari*, to amend the conviction by adding thereto a term of imprisonment in accordance with the provision of said Act and to direct this amendment without the issue of the writ:—

Held, that the writ should issue and directions were given that it should be served on the magistrate and on the accused together with a notice of application to amend the conviction on a named return day.

On return of the writ the original conviction being then before the Court was, on the application of the Crown, amended by adding the term of imprisonment provided for in the Act.

Rex v. *Campbell and Thomson* (1932), 3 W.W.R. 272 (Saskatchewan) followed as to the amendment but distinguished as to the practice.

APPLICATION by the Crown by way of *certiorari* to amend a conviction by Noble Binns, stipendiary magistrate at Trail, B.C., on November 6th, 1932, under section 176 (*e*) of the Excise Act, by adding thereto a term of imprisonment, in accordance with the provisions of the said Act, in addition to the fine of $200 imposed, and to direct the amendment without the issue of a writ. It was held that the writ should issue and directions were given that it should be served on the magistrate and on the accused together with a notice of application to amend the conviction on a named return day. The writ having been issued accordingly and made returnable on the 4th of July, 1933, was served with notice of return day on the magistrate, who made return to the writ, and the accused was served with notice of the return day and the application that the conviction be so amended. Heard by FISHER, J. in Chambers at Vancouver on the 31st of January, 1933.

Statement

Lucas, K.C., for the Crown.

No one, for accused.

FISHER, J. (In Chambers)

1933

July 4.

REX v. LESCHIUTTA

4th July, 1933.

FISHER, J. (oral): This is an application on behalf of the Crown by way of *certiorari* proceedings to have a certain conviction for a violation of the Excise Act amended so as to conform with the statute as it stood at the time of the offence charged, that is, on the 6th day of November, 1932.

It would appear that after conviction of the accused upon his plea of guilty on a charge under section 176 (*e*) of the Excise Act, R.S.C. 1927, Cap. 60, the magistrate imposed a fine only, without imprisonment.

The Crown submits that under subsection 4 of section 127 of the Excise Act as amended by section 7 of Cap. 18 of the statutes of 1930, the power to impose a fine only without imprisonment was expressly taken away. I notice that his worship, police magistrate Noble Binns, says in the return which he made to the writ of *certiorari* issued herein, that in giving his judgment he was relying on section 1028 of the Criminal Code of Canada, and on a case referred to *Ex parte Kent* (1903), 7 Can. C.C. 447. Perhaps I might be permitted to say that I can well appreciate the difficulty the magistrate might have had in this matter, as there has been what might be called a conflict of authorities with regard to the question raised as to whether or not the magistrate would have the power to impose a fine only without imprisonment.

Judgment

The long line of cases has been reviewed, however, in a judgment of His Honour Judge ELLIS, in the case of *Rex* v. *Hornibrook,* dated November 1st, 1932, which I have had the opportunity of perusing. In his reasons for judgment His Honour discusses a great many recent cases dealing with the point at issue here, and comes to the conclusion, with which I may say I agree, that the weight of authority since the amending Act referred to is unquestionably in support of the Crown's contention that imprisonment as well as a fine must be imposed.

Under the circumstances here, Mr. *Lucas,* of counsel for the Crown, submits that upon this application a proper case has been made out to have the conviction amended by the imposition of a sentence in accordance with the statute, and upon the previous argument before me in this matter reference was made to several recent Saskatchewan cases. These cases apparently

are unreported, but I was furnished by counsel with a memorandum of the judgments obtained from the registrar of the Court at Regina, from which it would appear that in somewhat similar prosecutions for violation of the Excise Act, convictions were amended upon application for *certiorari* so as to conform with the statute.

In one case, *The King* v. *Wasyl Filipchuk,* an application was made to Mr. Justice Taylor of the King's Bench, and the judgment was in part as follows:

> In this matter an order will now go to amend the conviction imposing the minimum fine of $200 and directing imprisonment, with hard labour, at Regina for a period of one month.

In another case of *Rex* v. *Campbell and Thomson,* on September 29th, 1932, in the Court of Appeal of the Province of Saskatchewan, the judgment of the Court was delivered by Haultain, C.J.S. as follows:

> This is an application on behalf of the Attorney-General for a writ of *certiorari.*
>
> After conviction on a charge under sec. 176 (*e*) of the Excise Act, R.S.C. 1927, Cap. 60,—

which I might pause to say is the same section in question in this matter— Judgment

> the sentence of imprisonment was suspended by the police magistrate who tried the case. As the power to impose less than the minimum penalty prescribed by the Act or to suspend sentence in any prosecution, suit, or proceeding under the Excise Act is expressly taken away by sec. 7 of An Act to amend the Excise Act, Cap. 18 of the statutes of 1930, the suspension of sentence was clearly wrong.

Then the judgment goes on:

> The application must therefore be allowed without the issue of the writ and the conviction will be amended by providing for a term of imprisonment for two months with hard labour in the Regina gaol in addition to the pecuniary penalty.

It might be noted in the *Campbell* case the application was made directly to the Court of Appeal, as under the Crown Practice Rules in Saskatchewan the application may be made either to a single judge of the King's Bench or to the Court of Appeal.

In the present case I have not had the benefit of any argument on behalf of the accused, although he was duly served with notice of the hearing of the application herein.

Uniformity in decisions of the Courts in criminal matters,

FISHER, J. (In Chambers)

1933

July 4.

REX v. LESCHIUTTA

however, is most desirable, and I see no good reason for refusing to follow in this case the precedent set by the Court of Appeal in the Province of Saskatchewan in the *Campbell* case.

In the case before me the writ of *certiorari* has been issued and the conviction has been duly returned by the magistrate. An order will now go, therefore, to amend the conviction by providing for a term of imprisonment for one month, with hard labour, in the Nelson gaol, in addition to the pecuniary penalty.

Judgment

Attention has been called by counsel on behalf of the Crown to the fact that there has been a recent amendment passed in May, 1933, to the Excise Act. I have not had an opportunity of perusing it very carefully, but I understand from counsel for the Crown that the effect of it would be now to leave it optional with the magistrate as to whether or not imprisonment should be imposed, and in view of that amendment perhaps I might be permitted to say that, although I am making the order, it may be that the order will not be taken out.

Application granted.

STANDARD SAUSAGE COMPANY LIMITED v. LEE AND PROCTOR v. STANDARD SAUSAGE COMPANY LIMITED.

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

Constitutional law—Legislative power of the Dominion—Food and Drugs Act—Validity—"Peace, order, and good government"—Public health—Criminal law—Regulations of Trade and Commerce—R.S.C. 1927, Cap. 76, Secs. 3, 4 and 23—B.N.A. Act (30 & 31 Vict.), Cap. 3, Secs. 91 and 92.

Section 3 of the Food and Drugs Act, enacted by the Parliament of Canada in 1920, provides that the Governor in Council may make regulations prescribing standard of quality for, and fixing the limits of variabilities permissible in any article of food or drug, etc. Section 4 provides that "Food shall be deemed to be adulterated within the meaning of this Act (*f*) if it contains any added poisonous ingredient, or any ingredient which may render it injurious to the health of the person consuming it," etc., "(*g*) if its strength or purity falls below the standard, or its constituents are present in quantity not within the limits of variability fixed by the Governor in Council," etc., and section 23 under the head of "Penalties," provides that "Every person who by himself or his agent or employee manufactures for sale, sells, offers for sale or exposes for sale, any article of food or any drug which is adulterated or misbranded, shall be guilty of an offence, and (*b*) if such adulteration is not deemed to be injurious to health within the meaning of this Act, or if the article is misbranded, shall for a first offence be liable upon summary conviction to a fine not exceeding one hundred dollars," etc. Regulations passed by order in council contained a list of permissible preservatives which did not include sulphur dioxide.

The Standard Sausage Company used sulphur dioxide as an ingredient in its manufacture of sausages in quantities that were not injurious to health. A director of said company brought action for an injunction to restrain the company from using a sausage adulterant, not injurious to health, contrary to the provisions of the Food and Drugs Act, and regulations made thereunder. The company raised the defence that the provisions of the Food and Drugs Act and regulations, and especially sections 3, 4 and 23 of the Act, were *ultra vires* of the Parliament of Canada. It was held on the trial that said Act was *intra vires* of the Parliament of Canada.

Held, on appeal, affirming the decision of MACDONALD, J., that the primary object of the legislation was the public safety and that it was a proper exercise of Federal powers over "criminal law" under section 91 (27). It is not a *sine qua non* (as many provisions of the Criminal Code shew) that injury to property or to the person must necessarily fol-

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. *v.* LEE.

PROCTOR *v.* STANDARD SAUSAGE CO. LTD.

low the commission of an unlawful act. If the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used, it may do so under said section, which is not in essence an interference with property and civil rights though that may follow as an incident, but the real purpose is to prevent actual or threatened injury or the likelihood of injury of the most serious kind to all the inhabitants of the Dominion.

Per MARTIN, J.A.: The legislation may also be upheld under the "peace, order, and good government" powers in said section 91.

Quære, as to the power under section 91 (2)—"regulation of trade and commerce."

Statement

APPEAL by the Standard Sausage Company Limited from the decision of MACDONALD, J. of the 14th of December, 1932, in two consolidated actions, the first being by said company against one Olive Lee to recover the amount due for ten pounds of sausage-meat delivered to the defendant at her request, the defence being that said sausage-meat contained an adulterant not injurious to health but contrary to the provisions of the Food and Drugs Act, and regulations made thereunder, and that the sale of said sausage-meat was an illegal transaction and null and void. The second action was by one A. F. Proctor as director of the Standard Sausage Company Limited against the said company for an injunction to restrain the company from using a sausage adulterant, not injurious to health, contrary to the provisions of said Act. The defence to this action was that the provisions of the Food and Drugs Act and amendments and regulations made thereunder and specifically sections 3, 4 and 23 of the said Act are *ultra vires* of the Parliament of Canada in so far as the said Act and regulations, and the said specific sections of the said Act assume to legislate with reference to the adulteration of food when such adulteration is not injurious to health. On the trial the said company was enjoined from using sulphur dioxide as a preservative in the manufacture of sausages. The company appealed on the grounds set out above as its defence to the second action.

The appeal was argued at Victoria on the 24th and 25th of January, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Argument

J. W. deB. Farris, K.C., for appellant: This adulteration is

not injurious to the health. The Act is therefore a straight interference with property and civil rights in the Province. The learned judge below followed the Chief Justice of the Supreme Court in *Rex* v. *Goldsmid* (1932), 45 B.C. 435. In fact, according to the evidence, sulphur dioxide is beneficial to the health. Peace, order, and good government cannot be held to invade section 92 of the B.N.A. Act: see *Literary Recreations Ltd.* v. *Sauve* (1932), 46 B.C. 116; *Rex* v. *Garvin* (1909), 14 B.C. 260. The case of *Russell* v. *The Queen* (1882), 7 App. Cas. 829, is brushed aside by recent cases. The manufacture and sale of sausage comes essentially within the enumerated heads of section 92: see *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (1927), A.C. 934; *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396 at p. 406. The question of health comes within section 92: see *Re Geo. Bowack* (1892), 2 B.C. 216 at p. 224. "Property and civil rights" applies to this case: see *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 113. On the question of criminal law the strongest case against us is *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931), A.C. 310, but my submission is he cannot bring this case within the criminal law: see *In re The Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919* (1922), 1 A.C. 191; *Attorney-General for Ontario* v. *Reciprocal Insurers* (1924), A.C. 328. To come within "Criminal Law" it must purport to deal with public safety or morals: see *Russell* v. *The Queen* (1882), 7 App. Cas. 829; *Reference re Validity of the Combines Investigation Act and of s. 498 of the Criminal Code* (1929), S.C.R. 409 at p. 413. On the question of delegating authority to the Governor in Council see *Regina* v. *Wason* (1890), 17 A.R. 221; *The King* v. *Eastern Terminal Elevator Co.* (1925), S.C.R. 434; *Lymburn* v. *Mayland* (1932), A.C. 318; *Quinn* v. *Leathem* (1901), 70 L.J., P.C. 76 at p. 81.

Argument

Maitland, K.C., for Attorney-General of Canada: This case is not confined to public health. If the Dominion consider any matter an "evil" they can deal with it under "Criminal Law" and many statutes have been in force without question on this

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

Argument

basis. The case of *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396 was decided on a point that was purely local. *Regina* v. *Wason* (1890), 17 A.R. 221 is in our favour. This statute has been in force for 40 years: see *Regina* v. *Stone* (1892), 23 Ont. 46; *Rex* v. *Wakabayashi* (1928), 39 B.C. 310. You cannot sell fraudulent substitutes of articles whether it is injurious or not. "Adulteration" means adding something to the article that is not part of the article itself. "Deceit" is always a public evil. The Dominion Parliament can say that any kind of fraud is a crime: see *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524; *In re The Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919* (1921), Cameron's Canadian Constitution, Vol. 2, p. 253 at 360; *Proprietary Articles Trade Association* v. *Attorney-General of Canada* (1931), 100 L.J., P.C. 84 at p. 90.

Farris, replied.

Cur. adv. vult.

7th March, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C. agreed with MACDONALD, J.A. in dismissing the appeal.

MARTIN, J.A.

MARTIN, J.A.: By this appeal it is sought that the National Food and Drugs Act, Cap. 76, R.S.C. 1927, be declared to be *ultra vires* of the National Parliament as an infringement upon the Provincial subject-matter of "Property and civil rights in the Province" (under section 92 (13) B.N.A. Act) in so far as "the said Act and regulations . . . assume to legislate with reference to the adulteration of food where such adulteration is not injurious to health": *vide* notice of appeal herein, par. 5.

At the outset it is to be observed, first, that the question has arisen in an unusual way by means of "a friendly action" (so described by plaintiff's counsel) brought by one of the defendant company's own directors against itself, and while there is no legal objection to such a course yet, under such circumstances, it is not to be expected that the company's evidence against itself will be stronger than it deems necessary to make out its case; and, second, that though both the National and Provin-

cial Governments were duly notified of the proceedings pursuant to the Constitutional Questions Determination Act, R.S.B.C. 1924, Cap. 46, yet neither of them appeared at the trial, and while the National Government is now represented before us and upholds its Act, yet counsel for the Provincial Government who appeared informed us that he was only holding a watching brief, and he did not make any attack upon the validity of said Act, from which the only conclusion to be drawn is that this Province, at least, regards that Act as not infringing its constitutional powers, which is something worthy of regard in determining the question of alleged legislative enactment.

What the appellant did was to put a certain amount of a poisonous drug, sulphur dioxide, into its professedly "fresh" sausages in such proportions as to prolong their edible "life" for from 12 to 18 hours before they became unfit for human food by "going sour," and it is submitted that appellant had the legal right to do so because the amount of the drug so put in is so small that it has no harmful effect upon the human body, and I assume for the purposes of this appeal that such is the case, though I note the meat inspector of the City of Vancouver called by appellant says:

MARTIN, J.A.

My experience with sulphides, if I may be permitted to give it, would indicate that it is not very harmful at all. I don't know what quantity one would have to take in order to be detrimental in any way. . . .

And after a favourable comparison with large doses of common salt he goes on to say, in answer to the learned judge:

THE COURT: It could not be inert, because it accomplishes the purpose? Well, so far as a poison is consumed. That is what we are speaking of, your Lordship.

You say it does benefit the digestion, according to your idea? Yes, but it would be inert so far as poison is concerned.

The certificate of the Dominion Analyst, put in by appellant, sets out:

(4) That I duly analysed the said sample and obtained the following results:

The sample contained 0.46 parts of Sulphur Dioxide (SO^2) per 2,000 parts of meat product.

The sample is a meat product, namely, Fresh Sausage.

(5) That the said sample is adulterated within the meaning of the Food and Drugs Act (section 4 (*g*)), for the following reasons:
in that it contained an added preservative, namely, Sulphur Dioxide, which is not listed in Class I., Section XII., of the regulations made under the

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. *v.* LEE.

PROCTOR *v.* STANDARD SAUSAGE CO. LTD.

MARTIN, J.A.

Food and Drugs Act, made by order in council, dated February 6, 1928, and, therefore, the presence of the said preservative is contrary to section IX. (2) of the said regulations as amended July 3, 1930.

(6) That the adulteration of the said sample is of a nature deemed to be, for the purpose of the Act non-injurious to the health of the person consuming the same.

The relevant ordinary meaning of "adulterate" is thus given in the Oxford Dictionary:

3. Of things: To render spurious or counterfeit; to falsify, corrupt, debase, esp. by the admixture of baser ingredients.

This is in general accord with the *ad hoc* definition given by section 4 of the Act, *viz.*:

4. Food shall be deemed to be adulterated within the meaning of this Act

(*a*) if any substance has been mixed with it so as to reduce or lower or injuriously affect its quality or strength;

(*b*) if any inferior or cheaper substance has been substituted wholly or in part for the article;

(*c*) if any valuable constituent of the article has been wholly or in part abstracted;

(*d*) if it consists wholly or in part of any diseased or putrid or rotten animal or vegetable substance, whether manufactured or not;

(*e*) if it is obtained from a diseased animal, or from an animal fed upon unwholesome food;

(*f*) if it contains any added poisonous ingredient, or any ingredient which may render it injurious to the health of the person consuming it, whether added with intent or otherwise; or

(*g*) if its strength or purity falls below the standard, or its constituents are present in quantity not within the limits of variability fixed by the Governor in Council as hereinafter provided.

And section 5 provides:

5. Any adulteration of milk shall be deemed to be injurious to health.

"Food" and "drug" are thus defined by section 2:

(*c*) "drug" includes all medicine for internal or external use for man or animal, and any substance or mixture of substances intended to be used for the treatment, mitigation or prevention of disease in man or animal;

(*d*) "food" includes every article used for food or drink by man, and every ingredient intended for mixing with the food or drink of man for any purpose whatever.

It is to be noted that the sole present attack upon the validity of the Act, and the regulations thereunder, is confined to non-injurious adulteration, from which it is to be inferred that the Act is admittedly valid as regards injurious adulteration, and it is submitted that if the added ingredient is an adulterant of a non-injurious nature then any legislation by the National Parliament is a colourable invasion of "property and civil rights in the Province" because it is *ex facie* an unnecessary exercise

of any power, primary or incidental, conferred upon the Nation by section 91, either as (1) "peace, order, and good government" of Canada, or (2) "regulation of trade and commerce," or (27) "the criminal law."

Now it is obvious that there can be no matter of more vital concern to a state than the preservation of the health of its citizens, because it is literally one of life and death, and unless they have good food they will have bad health, and hence it is difficult to apprehend how it can discharge its paramount duty "to make laws for the peace, order, and good government of Canada" throughout the whole realm and not merely in parts of it, without "making laws" to secure and protect the public health in its food supply, unless that "class of subject [was] assigned exclusively to the Legislatures of the Provinces" (Sec. 91), yet that most beneficial obligation would be frustrated in our, now, Sovereign State of Canada if general measures for the preservation of the National health by ensuring purity of its food could not be passed by the Nation, with the result that different laws on the same vital National matter would prevail not only in all the Provinces of Canada but in the immense National areas of the Yukon and the North-Western Territories, which areas comprise about two-fifths of our whole State, and the addition of which to the federated Provinces was provided for by said B.N.A. Act in section 146.

From very early times, so far back as 51 Hen. 3, the Statute of the Pillory and Tumbrel and Assize of Bread and Ale, etc., there are to be found penal enactments dealing with "corrupt victuals," and in *Burnby* v. *Rollitt* (1848), 11 Jur. Pt. 1, p. 827, the Court of Exchequer said, pp. 829-30, *per* Baron Parke:

> This position is laid down, apparently in general terms in Keilw. 91, pl. 16, but the case there referred to, which is in the Year Book 9 H. 6, 53. B. pl. 37, together with the 11 Edw. 4, 6. A. pl. 10, and other authorities, when considered lead to this conclusion: that there is no difference, between the sale of victuals for food, and other articles, than this, that victuallers, butchers and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances as they are, so that if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article,—but they are also liable to punishment for selling corrupt victuals, as a common nuisance by virtue of an ancient statute (certainly if they do so knowingly probably if they do not) and are therefore

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

responsible civilly to those customers, to whom they sell such victuals, for any special or particular injury by the breach of the law, which they thereby commit.

That they, the common dealers—not all persons—are liable criminally for selling corrupt victuals, is clear from what Lord Coke says in 4 Inst. 261. "This Court of the Leet may inquire of corrupt victual as a common nuisance, whereof some have doubted, both for that it is omitted in the statute of the leet, and of the weak authority of the book of 9 H. 6, where Martyn saith that it is ordained that none should sell corrupt victuals. And Cottismore held the opinion that it is *actio popularis*, whereupon it is collected that the conusance thereof belongs to the leet. And Martyn and Neale, 11 Hen. 4, agreeing with him, said truly, for by the statute of 51 Hen. 3, stat. *pillor' et tumbrel'*, & *assis' panis et cervis'*, and by the statute made in the reign of Edw. 1, intituled Stat. *de pistoribus et brassiatoribus et aliis vitellariis*, it is ordained that none shall sell corrupt victuals."

And see the decision of the Queen's Bench Division in *Shillito* v. *Thompson* (1875), 1 Q.B.D. 12, that it was a nuisance at common law to expose for sale things unfit for human food.

By the statute 18 Ann. 8 (1709) "An Act to regulate the Price and Assize of Bread," it was provided, section 3, that the Court of Lord Mayor and Aldermen within the City of London and its liberties, and other nominated Magistrates without the same:

MARTIN, J.A.

shall have full Power and Authority, from time to time, to limit, direct and appoint, how and in what Manner each Sort of Bread shall be marked, for knowing the Baker or Maker, Price, Weight and Sort thereof; and to make and set down any other reasonable Rules and Orders for the better regulating the Mystery of baking Bread, and the Sorts, Assize, Price, and Weight thereof, and all things concerning the same, as in their Judgments they shall find necessary and convenient; . . .

And the section went on to impose a penalty of forty shillings upon conviction for breach of "such regulations and orders."

Then by section 7 it was:

Provided also, That if any Baker or Seller of Bread shall put into any Bread by him sold or exposed to Sale, any Mixture of any other Grain than what shall be appointed by the Assize settled in the Place where such Bread shall be so sold or exposed to Sale, every such Person so offending shall, for every such offence, forfeit the Sum of twenty Shillings, to be had and recovered in the Manner and Form herein before-mentioned; . . .

This provision is most significant in relation to the present question because it makes it a criminal offence merely to put into bread "any mixture of any other grain" than that which was "appointed" by the Assize of Bread to be used in the "mystery of baking bread," quite apart from the fact that such

"mixture of any other grain" might not only be non-injurious but even beneficial. The obvious intent of so remarkable a provision is not only to preserve the health of the people but to prevent them from being defrauded by the addition of "adulterants" in one main sense of that term, *i.e.*, the substitution or addition of ingredients not properly to be found in an article of food as authorized, or as settled by common public use.

Then "An Act for the due making of Bread; and to regulate the Price and Assize thereof; and to punish Persons who shall Adulterate Meal, Flour or Bread" was passed in 31 Geo. II., Cap. 29 (1757) consolidating, repealing and amending various preceding Acts on the subject, and dealing with it elaborately and lengthily, and by section 3 it allowed bread to be made by mixing "meal or flour" of other grains "where it hath been usual to make bread with" them, and by sections 20-30 provision is made to secure the "goodness" of "the several sorts of bread" and that "genuine meal or flour" and "pure water," etc., should "be put therein," and for marking (section 25) the bread so as to distinguish between wheaten and household or brown bread, etc.; and section 22 provides:

> That . . . no person shall knowingly put into any Corn, Meal or Flour, which shall be ground, dressed, bolted or manufactured for Sale, either at the Time of grinding, dressing, bolting or in any wise manufacturing the same, or at any other Time or Times, any Ingredient, Mixture or Thing whatsoever; or shall knowingly sell, offer or expose to or for Sale, any Meal or Flour of one Sort of Grain as or for the Meal or Flour of any other Sort of Grain, or any Thing as or for, or mixed with the Meal or Flour of any Grain, which shall not be the real and genuine Meal or Flour of the Grain the same shall import to be and ought to be; upon pain that every Person who shall offend in the Premises, and shall be thereof convicted in Manner hereinafter prescribed, shall forfeit . . .

This extends the protection of the public to include "any ingredient, mixture or thing whatsoever" in addition to mixing grain only, so as to insure that the "real and genuine meal or flour of the grain" shall be what it "imports to be and ought to be" when offered for public consumption.

There is, also, the substantially similar lengthy Act of 6 & 7 Wm. IV. (1836), Cap. 37, which recites one of its aims to be for "the punishment of persons who shall adulterate meal, flour or bread," etc., and section 2 specifies the "ingredients or matters whatsoever" that may alone be used in making and selling

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

bread, "and mixed in such proportions as they [bakers] shall think fit"; and section 9 essentially re-enacts said section 22 of 31 Geo. II.

These statutes are cited to shew that for centuries it has been contrary to the criminal law of England to adulterate the principal food—the "staff of life"—of the people with even non-injurious ingredients, and that Parliament has for the same period conferred upon certain public officials the duty of making and enforcing regulations to carry out the intention of such statutes, just as is done in the statute now before us, and therefore, in view of such a long course of legislation preceding the B.N.A. Act, if can only, I apprehend, be held that the same power is continued in the National Parliament under the head (27) of "The Criminal Law," viewed either as a protection of the public from bad health or from fraud, or "cheats," to use the older term employed, *e.g.*, in 2 East, P.C. 821, Cap. XVIII., sec. 4, on "Cheats in matters of public concern," where it is said:

MARTIN, J.A.

> So all frauds affecting the Crown and the public at large are indictable, though arising out of a particular transaction or contract with the party. This was admitted by the very terms of the objection in the following case.

The case cited is that of *Rex* v. *Treeve* [(1796)], a brewer, who was indicted for "knowingly wilfully deceitfully and maliciously" providing certain French prisoners of war, confined in Cornwall, with unwholesome food, *viz.*, bad bread, whereby the prisoners "became distempered in their bodies and injured and endangered in their healths; to [their] great damage, to the discredit of our said Lord the King, to the evil example, &c. and against the peace, &c.," and upon that indictment Treeve was found guilty, and the report proceeds:

> After conviction, it was objected in arrest of judgment that the offence as laid was not indictable; as it did not appear that what was done was in breach of any contract with the public or of any moral or civil duty; and judgment was respited to take the opinion of the judges. But in Michaelmas term 1796 they all held the conviction right . . . for the giving of any person unwholesome victuals not fit for man to eat, *lucri causa*, or from malice or deceit, is undoubtedly in itself an indictable offence, apart from any other consideration, which entered deeply into the demerits of the defendant's conduct.

This decision was followed in *Rex* v. *Dixon* (1814), 3 M. & S. 11.

Though, to illustrate my view, I have referred mainly to statutes directed to securing good bread for the people, yet that of their drink was not only regarded in the said Bread & Ale statute of Hen. III. (the first statute on general food adulteration) but by several later statutes relating, *e.g.*, to the adulteration of tea, coffee, and chocolate, and though the main object of some of them was to protect the revenue yet the health of the people was also by no means overlooked and that object was so declared therein by recitals and substantive discreet sections, and also the damage done to "fair traders" by the fraudulent practices of dishonest ones, which was treated and penalized as a fraud upon the public as, *e.g.*, in 1718 by Cap. 11 of 5 Geo. I., Sec. 23 (which was by the Short Titles Act of 1896, Cap. 14, given the title of "The Adulteration of Coffee Act, 1718"), *viz.*:

'And whereas divers evil-disposed Persons have at the Time, or soon after the roasting of Coffee, made use of Water, Grease, Butter, or such like Materials, whereby the same is rendered unwholesome, and greatly increased in Weight, to the Prejudice of his Majesty's Revenue, the Health of his Subjects, and to the Loss of all honest and fair Dealers in that Commodity:' For the Prevention whereof, Be it enacted by the Authority aforesaid, That from and after the five and twentieth Day of March one thousand seven hundred and nineteen, if any Person or Persons whatsoever shall at the roasting of any Coffee, or before or at any Time afterwards make use of Water, Grease, Butter, or any other Material whatsoever, which will increase the Weight, or damnify and prejudice the said Coffee in its Goodness, he, she or they shall forfeit the Sum of twenty Pounds for every such offence; and if any Trader or Dealer in Coffee shall knowingly buy or sell any such Coffee, he, she or they shall forfeit the Sum of twenty Pounds for every such Offence, one Moiety whereof to his Majesty, and the other Moiety to him or them who will sue for the same.

MARTIN, J.A.

It is to be observed that there also the addition of normally non-injurious ingredients, such as water and butter, are treated as an adulteration amounting to a crime, because it "increased the weight" or "damnified and prejudiced the said coffee in its goodness"; in other words, changed its ordinary constituents.

Similar provisions are to be found in The Adulteration of Tea and Coffee Act, 1724 (11 Geo. I., c. 30; Short Titles Act, *supra*), section 5 of which imposes a penalty of one hundred pounds, and forfeiture of the adulterated article, upon those persons who "counterfeit or adulterate tea," or who

shall alter, fabricate or manufacture Tea with *Terra Japonica*, or with any Drug or Drugs whatsoever, nor shall mix or cause or procure to be mixed

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

MARTIN, J.A.

with Tea any Leaves other than Leaves of Tea, or other Ingredients whatsoever; on pain," etc.

That prohibition is precisely the same as the one before us because it forbids the "alteration" of tea by mixing with it any "drug or drugs whatsoever," "or other ingredients whatsoever," quite apart from their non-injurious effect. In this section, it is to be noted, the word "adulterate" is used for the first time (I think, after a diligent search) in this class of legislation.

Section 9 of the same Act relates to coffee and denounces and penalizes the practices of "divers evil-disposed persons" who with intent "to defraud and impose upon such as buy the same" mix "butter, lard, grease, water or other materials" with roasted coffee, etc., in order to increase its weight, etc., "to the prejudice of the health of his Majesty's subjects and to the loss and injury of all honest and fair dealers therein."

The Adulteration of Tea Act, 1730 (4 Geo. II., c. 14) relating to Starch, Coffee, Tea and Chocolate, in its recital refers to the "frauds that have been committed and are still carrying on by the makers of starch to the great damage of the fair traders and to the lessening of the revenue . . ." and section 11 penalizes the adulteration of tea by mixing or colouring it (a new provision) with any ingredients or materials whatsoever, and section 12 deals with coffee and chocolate adulteration and "imitation."

It is unnecessary to refer to the modern legislation on the subject, which, in England, is to be found in the Food and Drugs Adulteration Act, 1928, and other statutes of similar import (conveniently set out in Halsbury's Statutes of England, Vol. 8, pp. 841-911); and in Canada, in addition to the present Food and Drugs Act, there are many others, such as the Meat and Canned Foods Act, Cap. 77, R.S.C. 1927; the Fish Inspection Act, Cap. 72; the Fisheries Act, Cap. 73; the Fruit Act, Cap. 80; the Canada Grain Act, Cap. 86; The Opium and Narcotic Drug Act, Cap. 144; the Proprietary or Patent Medicine Act, Cap. 151; the Dairy Industry Act, Cap. 45; and also several sections of the Criminal Code including 224 and 207 (*c*).

It follows clearly, to my mind, from the foregoing brief historical review, that the National Parliament was validly exer-

cising its powers in passing the impugned legislation, the primary objects of which were to create new offences for the general protection of the National health and to prevent dishonesty in dealings in the subject-matter, and there is nothing in its nature nor in its practical operation that invades, or conflicts with Provincial powers under "Property and civil rights in the Province," which may be exercised in the concurrent manner and to the extent pointed out by the Ontario Court of Appeal in *Regina* v. *Wason* (1890), 17 A.R. 221, wherein a Provincial "Act to provide against frauds in the supplying of Milk to Cheese or Butter Manufactories," was held to be valid because, as Burton, J.A., succinctly put it at p. 236:

> The enactment was simply one for the regulation of a particular trade or business, and for the prevention of frauds in the manner in which it is conducted. . . .
>
> How then can the fact that the Legislature has, in exercise of its powers to impose a penalty for enforcing the laws which it has power to make, imposed a penalty, convert that into a crime which was not so otherwise?

And at p. 238:

> This does not at all conflict with the decision arrived at by this Court in *Regina* v. *Eli* [(1886)], 13 A.R. 526, where the offence was one created by an Act of the Parliament of Canada, and by it made a crime, and all the procedure connected with the infliction of punishment for this crime had necessarily to be fixed by the same Parliament, in which case, therefore, we were compelled to hold that the Court had no jurisdiction to entertain the appeal.

MARTIN, J.A.

And in the same case, speaking of the old Dominion Adulteration Act of 1885, R.S.C. 1886, Cap. 107, Maclennan, J.A., p. 248, used language entirely applicable to the present Act, *viz.*:

> [It] is universal in its scope and application, and prohibits the forbidden acts by all persons whomsoever under all circumstances, and in all places throughout the Dominion, while the Provincial Act is confined to the dealings between these two particular kinds of manufacturers and their customers. The one has all the features of a public criminal law passed in the interest of the general public; the other is merely the regulation of the mode of carrying on a particular trade or business within the Province, so as to secure fair and honest dealing between the parties concerned.

This language was unanimously adopted and applied by the Common Pleas Division in *Reg.* v. *Stone* (1892), 23 Ont. 46 at 49; *cf.* also our recent decision in *Rex* v. *Morley* (1931), 46 B.C. 28, on the "lines of demarcation" between Provincial game rights and National Indian Reserves.

It is only necessary to add the decision of the Privy Council

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (1931), A.C. 310, wherein it was said, p. 324:

"Criminal law" means "the criminal law in its widest sense": *Attorney-General for Ontario* v. *Hamilton Street Ry. Co.* (1903), A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? . . . It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

It is beyond question that, in the due exercise of National powers over criminal law, Provincial civil rights may be interfered with and drastically curtailed, and perhaps the most striking historical example of curtailing rights of property and making their abusive exercise a crime is to be found in the great moral reform begun in the passing of legislation making cruelty to animals a crime, though at common law the members of the animal kingdom were at the mercy of the wanton brutality of their owners; the first example in Europe of such legislation was the "Act to Prevent the Cruel and Improper Treatment of Cattle," 3 Geo. IV., Cap. 71 (known as Martin's Act) in regard to the then novel criminal aspect of which, Lord Campbell says in his "Lives of the Lord Chancellors," Cap. 186 (Life of Lord Erskine):

MARTIN, J.A.

Erskine again [1810] introduced his bill, with some amendments, in the next session, and it underwent much discussion, but finding that he was not likely to carry it through the House of Commons, he withdrew it after it had passed the committee. When Windham was gone, and the passion for bull-baiting and boxing had subsided, it was introduced there by [Richard] Martin of Galway, and finally, in Erskine's lifetime, received the sanction of the Legislature. Independently of "the rights of brutes," which it may be difficult to protect by human laws, although the subject of religious and moral obligation, I think there can be no doubt that any malicious and wanton cruelty to animals in public outrages the feelings—has a tendency to injure the moral character of those who witness it—and may therefore be treated as a crime.

See also Lecky's "History of European Morals" (1884), Vol. II., 176-7; Fairholm & Pains' "A Century of Work for Ani-

laws for the peace, order, and good government of Canada" in matters "not assigned exclusively" to the Provinces, both Parliament and Legislatures have passed many statutes affecting the matter of public health, which assumes a great variety of aspects, *e.g.*, as included in England, in the National Health Insurance Act, 1924, and all the long list of matters noticed in the two volumes of Lumley's Public Health, 7th Ed. (*vide* preface), and Halsbury's Statutes of England, Vol. 13, ranging from mortuaries, bath-houses, and sewers, to ships, hop-pickers and shooting-galleries, and not overlooking the Rats and Mice (Destruction) Act, 1919. Some of the principal Acts on the subject passed by the Parliament of Canada, in addition to those already mentioned, are the Department of Health Act, Cap. 90, R.S.C. 1927; Quarantine Act, Cap. 168, R.S.C. 1927; the Leprosy Act, Cap. 119; the Public Works Health Act, Cap. 91, etc., of which in principle the most important, presently, is the first-named because in defining the wide "duties and powers of the Minister of Health" section 4 declares that they shall be carried out in a spirit of

(a) Co-operation with the provincial, territorial, and other health authorities with a view to the co-ordination of the efforts proposed or made for preserving and improving the public health, the conservation of child life and the promotion of child welfare.

MARTIN, J.A.

And section 7 disclaims interference with "any Provincial or Municipal Board of Health or other health authority operating under the laws of any Province."

The international aspect of the matter under the treaty with the United States and the enforcement of the rules or regulations of the International Joint Commission "relating to boundary waters and questions arising . . . so far as the same relate to public health" is recognized by section 4 (*f*); to which may be added, as a final illustration of the National importance of the subject, the fact that Canada is a member of the League of Nations which has an important Health Organization, on the Committee of which Canada is represented.

This Province has, on its part, passed the Health Act, Cap. 102, R.S.B.C. 1924, which deals elaborately with many phases of the matter.

It is to be observed that in 1 Hawk. P.C. (8th Ed.) that

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

learned author includes in Book I. Part II. "Offences against the Commonwealth," p. 353, the "head" of "Offences against the Public Health" and considers them, as of that period, at p. 681, and includes that of "spreading the infection of the plague."

It follows, from all the foregoing, to my mind, that since it is clear that the present impeached Act could not have been passed by a Provincial Legislature and the subject-matter is not within its exclusive assignment, said Act is within the "peace, order, and good government" power of Parliament as well as within that of criminal law, and therefore under both heads, as applied to the facts of this case, Parliament has the power to prohibit the addition of poison to any extent to food prepared for public consumption.

The construction that has been "authoritatively put on sections 91 and 92 by the more recent decisions" of the Privy Council is thus stated in *Toronto Electric Commissioners* v. *Snider* (1925), A.C. 396, at 406:

MARTIN, J.A.

> The Dominion Parliament has, under the initial words of s. 91, a general power to make laws for Canada. But these laws are not to relate to the classes of subjects assigned to the Provinces by s. 92, unless their enactment falls under heads specifically assigned to the Dominion Parliament by the enumeration in s. 91. When there is a question as to which legislative authority has the power to pass an Act, the first question must therefore be whether the subject falls within s. 92. Even if it does, the further question must be answered, whether it falls also under an enumerated head in s. 91. If so, the Dominion has the paramount power of legislating in relation to it. If the subject falls within neither of the sets of enumerated heads, then the Dominion may have power to legislate under the general words at the beginning of s. 91.

And in the later *Proprietary Articles* case (1931), *supra,* at 316, their Lordships stated this "canon of construction":

> . . . The general powers of legislation for the peace, order, and good government of Canada are committed to the Dominion Parliament, though they are subject to the exclusive powers of legislation committed to the Provincial Legislatures and enumerated in s. 92. But the Provincial powers are themselves qualified in respect of the classes of subjects enumerated in s. 91, as particular instances of the general powers assigned to the Dominion. Any matter coming within any of those particular classes of subjects is not to be deemed to come within the classes of matters assigned to the Provincial Legislatures.

In *Great West Saddlery Co.* v. *Regem* (1921), 2 A.C. 91 at 99, their Lordships said:

mals" (1924), Caps. 1-2; Coleman's "Humane Society Leaders in America" (1924), Cap. I.; Wellesley Pain's "Richard Martin" (1925); and *Russell* v. *The Queen* (1882), 7 App. Cas. 829, at 839 expressly recognizes the principle as applied to animals as part of public morals and "wrongs."

Then it was further submitted that Parliament could not delegate its powers to the Governor in Council to make regulations defining what articles of food should not be manufactured or sold (section 23) even though non-injurious to health, but that submission is answered by the decisions of the Privy Council in the *Proprietary Articles* case, *supra,* p. 327, and in *Lymburn* v. *Mayland* (1932), A.C. 318, which hold that the Legislature which has the power may employ its own instruments to exercise it, in the latter case, by the Provincial Attorney-General who was empowered to make wide inquiries, their Lordships saying, p. 326:

The provisions of this part of the Act may appear to be far-reaching; but if they fall, as their Lordships conceive them to fall, within the scope of legislation dealing with property and civil rights the Legislature of the Province, sovereign in this respect, has the sole power and responsibility of determining what degree of protection it will afford to the public. There appears to be no reason for excluding Dominion companies from the inquiries of the Attorney-General under this section; and no inconsistency between this legislation and the powers of inquiry under the Dominion Companies Act made on application of members of a company and for a limited purpose—namely, the investigation of the affairs of the company.

MARTIN, J.A.

The case is also a good illustration of the expansion of the principle enunciated in *Reg.* v. *Wason,* and *Rex* v. *Morley, supra.*

Hitherto I have been considering the matter upon the assumption that the manufacture of food products is, as submitted by appellant's counsel, one of public health and therefore a matter of "Property and Civil Rights" and hence exclusively within Provincial powers, and that though good food admittedly affects public health yet that subject-matter is also within the same jurisdiction as forming part of property and civil rights, and reliance was placed upon the observation of Mr. Justice WALKEM in *Re Geo. Bowack* (1892), 2 B.C. 216 at 224, on certain by-laws passed by the City of Vancouver, *viz.*:

The present case has arisen under the Public Health Act and a set of by-laws passed under its provisions by the Corporation of Vancouver. The

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. *v.* LEE.

PROCTOR *v.* STANDARD SAUSAGE CO. LTD.

MARTIN, J.A.

by-laws are within those provisions, and the Act itself, in so far as it relates to the question I have to decide, is constitutional, as the subject of public health falls within the class of legislative matters assigned to the Province by section 92 of the British North America Act.

On this it is to be observed, first, that the validity of the Provincial Public Health Act was not in question, but only that of the municipal by-law passed by the City in ostensible compliance with the powers locally conferred upon it by its charter, the Vancouver Incorporation Act, 1886, and amending Act of 1889, from the Provincial Legislature; and second, that WALKEM, J. was careful to confine his language to "the question I have to decide," which is not the one before us.

But the general matter of public health does not exclusively fall within the matters assigned to the Provinces and it is not even an "enumerated head" in either section 91 or 92, which is a surprising thing considering its primary importance, but that subject-matter is in fact, in certain aspects, but under other enumerated heads, partly and in effect, though indirectly distributed between the Dominion and the Provinces, *viz.*, to the Dominion by section 91, head 11—"Quarantine and the establishment and maintenance of marine hospitals"; by head (10), "Navigation and shipping," implemented by the Canada Shipping Act, Cap. 186 (containing many provisions relating to sick and distressed seamen and the safety and welfare of passengers), and by section 95 "Immigration," which includes very wide powers for safeguarding the public health as long exercised under the Immigration Act, Cap. 93, R.S.C. 1927, and the Chinese Immigration Act, Cap. 95; while to the Provinces is given by section 92 head (7) "The establishment, maintenance and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals"; and by heads (10) and (16) "Local works and undertakings [save as excepted] and matters of a merely local or private nature in the Province"; and head (13), "Property and civil rights," which undoubtedly includes many aspects of public health; and by section 95 a limited concurrent power over "immigration into the Province."

Under these distributed powers, and also, to the Dominion that primary one in the opening words of section 91, "to make

. . . If it also falls within any of the enumerated heads of s. 91, then it cannot be treated as covered by any of those in s. 92.

The unusual element herein is that the subject-matter of public health is an "unenumerated head" and only indirectly and partly "covered" by both sections, and therefore, in my opinion, the "general powers . . . committed to the Dominion Parliament" may be invoked to fortify its position in the practical working out of the "interlacing" powers in the manner adumbrated by Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [Local Prohibition Case] (1896), A.C. 348, at pp. 360-2, 366-7.

And *cf.* also *In re The Regulation and Control of Radio Communication in Canada* (1932), A.C. 304.

Such being my opinion it is not necessary to pass upon the submission that the legislation in question can also be sustained under section 91 (2), "The regulation of trade and commerce," though I do not wish it to be thought that I am opposed to that submission, on the contrary I recognize, after giving it some, but not final, consideration, that there is much to be said in favour of it herein because the facts and wide circumstances before us, *i.e.*, the general regulation of a National pure food supply "affecting the whole Dominion," in the field of public health already preponderantly open to the authority of the National Parliament, are essentially different from those considered in, *e.g.*, *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96; 51 L.J., P.C. 11, wherein it was held that insurance contracts were civil rights and therefore within Provincial authority, but their Lordships took care to say, p. 19:

MARTIN, J.A.

Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of inter-provincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view, its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance, in a single Province, and therefore its legislative authority does not in the present case conflict or compete with the power

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. *v.* LEE.

PROCTOR *v.* STANDARD SAUSAGE CO. LTD.

MARTIN, J.A.

over property and civil rights assigned to the Legislature of Ontario by No. 13 of section 92.

Having taken this view of the present case, it becomes unnecessary to consider the question how far the general power to make regulations of trade and commerce, when competently exercised by the Dominion Parliament, might legally modify or affect property and civil rights in the Provinces, or the legislative power of the Provincial Legislatures in relation to those subjects; questions of this kind, it may be observed, arose and were treated of by this board in the cases of *L'Union St. Jacques de Montreal* v. *Belisle* [(1874)], L.R. 6 P.C. 31 and *Cushing* v. *Dupuy* [(1880)], 5 App. Cas. 409; 49 L.J., P.C. 63.

This decision was considered in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* [Local Prohibition Case] (1896), A.C. 348, 362; and by Anglin, J., in *In re "Insurance Act, 1910"* (1913), 48 S.C.R. 260 at p. 308, and by Davies, J. at p. 343 in *In re Companies, ib.* 331; and reference should also be made to *City of Montreal* v. *Montreal Street Railway* (1912), A.C. 333, 344; *John Deere Plow Co., Lim.* v. *Wharton* (1914), 84 L.J., P.C. 64, 71; (1915), A.C. 330 (applying *Parsons'* case to matters of "general interest" and restricting the literal interpretation of "civil rights"); *Attorney-General for Ontario* v. *Attorney-General for Canada* (1916), 1 A.C. 598; 114 L.T. 774; *Great West Saddlery Co.* v. *Regem* (1921), *supra; Board of Commerce* case (1921), 91 L.J., P.C. 40, 46-7; (1922), 1 A.C. 191; *Toronto Electric Commissioners* v. *Snider, supra,* 406, 409-10; *Proprietary Articles Trade Association* case, *supra,* 326; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1928), 98 L.J., P.C. 65; (1929), A.C. 260, 268; *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (1931), S.C.R. 357; *Lymburn* v. *Mayland, supra,* 324-6; Lefroy's Canadian Constitutional Law (1918), pp. 102-5, 123-4; and Clement's Canadian Constitution, 3rd Ed., 475-7. In considering these authorities regard would be had to the great change effected by modern methods of transportation, including aerial, by which the food products of the various Provinces may be rapidly distributed to consumers throughout the State.

But at present it is not expedient to pursue this interesting question, and so, in conclusion, I cite, upon the whole subject, from that monumental and admirable work, Holdsworth's History of English Law, Vol. IV., pp. 362, 374 *et seq., sub tit.*

"Agriculture, the Food Supply, and Prices" and "The measures taken by the government to ensure an adequate food supply and due distribution," the instructive passages therein shewing that even in Tudor times the vital National importance of this subject was recognized, and the learned author says, p. 363:

> The measure of the success of the Tudor legislation is the increase in the prosperity of the country, and the firmness with which the authority of the government was established amid changes which might well have endangered its peaceful development.

It follows that, in my opinion, the appeal should be dismissed.

McPHILLIPS, J.A. would dismiss the appeal.

MACDONALD, J.A.: In this appeal the right of the Dominion Parliament to enact the Food and Drugs Act (R.S.C. 1927, Cap. 76) and specifically sections 3, 4 and 23 thereof and regulations thereunder is questioned. Appellant used an adulterant in the manufacture of sausages, *viz.*, sulphur dioxide to the extent of 0.46 parts to every 2,000 parts of meat product. This quantity is not injurious to health. It is submitted that he was unlawfully enjoined from using this drug as a preservative on the ground that the sections of the Act referred to and regulations passed thereunder are *ultra vires* of the Federal Parliament.

The sample sausage, submitted for analysis, found to contain the adulterant, was sold as "fresh sausage." By spreading sulphur dioxide over it, or mixing it with the sausage, it stops fermentation and makes it fit for consumption and therefore saleable for from 12 to 18 hours longer than would otherwise be the case.

MACDONALD, J.A.

Section 3 of the Act provides that the Governor in Council may make regulations

> (*a*) prescribing standards of quality for and fixing the limits of variabilities permissible in any article of food or drug the standard of which is not otherwise prescribed by this Act or the Meat and Canned Foods Act.
>
> (3) Regulations made under any of the provisions of this Act shall have the same force and effect as if embodied in this Act.

Section 4 provides that:

> Food shall be deemed to be adulterated within the meaning of this Act
>
> (*f*) if it contains any added poisonous ingredient, or any ingredient which may render it injurious to the health of the person consuming it, whether added with intent or otherwise; or
>
> (*g*) if its strength or purity falls below the standard, or its constituents

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

are present in quantity not within the limits of variability fixed by the Governor in Council as hereinafter provided.

Section 23 under the heading "Penalties" provides that:

Every person who by himself or his agent or employee manufactures for sale, sells, offers for sale or exposes for sale, any article of food or any drug which is adulterated, or misbranded, shall be guilty of an offence, and

(*a*) if such adulteration is deemed to be injurious to health within the meaning of this Act, shall for a first offence be liable upon summary conviction to a fine not exceeding two hundred dollars, etc.

(*b*) if such adulteration is not deemed to be injurious to health within the meaning of this Act, or if the article is misbranded, shall for a first offence be liable upon summary conviction to a fine not exceeding one hundred dollars, etc.

(2) In all cases where the adulteration is proved to have been wilful the penalties imposed by this section shall be doubled.

It will be observed that it is an offence to use an adulterant even although it may not be injurious to health. The penalty however is greater if it is injurious in that respect. This raises the question in issue—is it within the power of the Dominion Parliament to declare that a harmless act is criminal?

MACDONALD, J.A.

By sections 3 and 4 adulteration (the alleged criminal offence) is defined by regulations passed pursuant thereto. By order in council it is provided (IX. (2)) that

Preservatives other than those mentioned in class 1, section XII., or colouring matter, shall not be used in or upon meat, meat by-products, or any preparation of either of them.

By referring to class 1 of section XII. of the regulations it will be found that sulphur dioxide is not included in the list of permissible preservatives. It follows therefore that unless the sections referred to and regulations are *ultra vires* of the Federal Parliament the appeal must be dismissed.

These sections (and regulations) are valid, if at all, under sections 91 (27) of the British North America Act giving exclusive authority to the National Government to legislate in respect to "The Criminal Law . . . including the procedure in criminal matters."

Acts of a similar nature respecting food adulteration appear in the Dominion statutes, practically since Confederation, standing often side by side with somewhat similar legislation, of a more restricted character, enacted by the Provinces. In *Regina* v. *Wason* (1890), 17 A.R. 221 a Provincial Act to provide

against frauds in supplying milk to cheese or butter manufactories (held *intra vires*) was considered in its relation to the Dominion Adulteration Act of that day and as Rose, J. stated in *Regina* v. *Stone* (1892), 23 Ont. 46 at p. 49 where the Dominion Adulteration Act was held to be *intra vires* of the Dominion Parliament the reported argument of Mr. Edward Blake in the *Wason* case correctly outlined the law where the jurisdiction of the Provincial and Dominion Legislatures appear to overlap.

The cases have been so often reviewed that extended references should not be necessary. The Dominion Parliament cannot acquire jurisdiction by attaching penalties to the commission of acts otherwise within the exclusive legislative control of the Provinces subject to this—that it is not precluded from creating offences merely because the subject-matter, in another aspect, may fall under one of the subheads of section 92. The limitation is that the Dominion Parliament cannot under the guise of criminal law legislate for the purpose of assuming, or with the object of securing, control over activities properly local and Provincial in character. This however is not the avenue of approach in considering the case at Bar. We start with the fact that the selling of food, not only unfit for human consumption, but dangerous was a criminal offence at common law. If death followed, the vendor, if he knew it was unfit or "dangerous," might be indicted for manslaughter. Section 224 of the Code makes it a criminal offence to knowingly sell food unfit for consumption. Food may be rendered unfit or potentially dangerous by adulteration. This case arises only because the mixing of sulphur dioxide with meat to the extent disclosed in evidence is not injurious to health. But the subject of legislation is adulteration of food (properly classified as a crime) and what constitutes adulteration must, at least within reasonable limits, be left to the judgment of Parliament in the light of the best knowledge available at the time. The subject of food purity, free from adulteration by the admixture of baser ingredients, is so important and the need to preserve its purity so great to prevent widespread calamity that precautions of the most detailed character must be taken to ensure it. These

MACDONALD, J.A.

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

MACDONALD, J.A.

restrictions may be unnecessarily wide and open to criticism but that does not affect the principle. By the regulations Parliament entrusted to the Governor in Council the power and duty to make regulations prescribing what preservatives might or might not be used in or upon meat or meat products. Eight are permitted, *viz.*, common salt, sugar, saltpetre, wood smoke, vinegar, spices, alcohol and refined sodium nitrate. Greater scientific knowledge may induce Parliament or the Governor in Council to add sulphur dioxide to the list. In that event it would doubtless be necessary to prescribe the quantities that could safely be used. This might involve the danger that careless manufacturers would use too much or too little and for aught we know excessive quantities might be injurious to health. In the meantime it is reasonable to provide in dealing with a product in which it is so essential to maintain purity, that with other preservatives available, sulphur dioxide may not be used at all. We may assume that the framers of the regulations were aware of the facts disclosed in evidence, *viz.*, that this preservative is used, at least in part, to enable the dealer to offer the product for sale from 12 to 18 hours later than he otherwise could if no preservatives or permissible preservatives, were used. What happens if the dealer should be careless and sell after 20 hours elapse: or if a larger quantity should be used than 0.46 to 2,000 parts? The meat inspector stated that this quantity "so far as a poison is concerned" would be inert but he does not state possible results if by mistake or design a larger proportion should be used. These considerations point to the conclusion that, granted the general subject of the adulteration of food may be the subject of legislation by the Dominion Parliament under the heading "criminal law," it must follow, reasonably and necessarily, that it may define precisely the ingredients that may or may not be used. Nor is it any less a crime because it may be shewn scientifically that some of the ingredients prescribed may not, if used in proper quantities, be deleterious at all. It is not a *sine qua non*, as many provisions of the Criminal Code shew that injury to property or to the person must necessarily follow the commission of an unlawful act. This contingency is recognized inasmuch as the penalty is less severe if injurious results do not follow.

The opinion is often held by many that acts long recognized as criminal are not in fact harmful but as Lord Atkin said in *Proprietary Articles Trade Association* v. *Attorney-General of Canada* (1931), 100 L.J., P.C. 84 at p. 90 referring to the provisions of the Combines Investigation Act making criminal combines which the Legislature in the public interest prohibited if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes.

So too if the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used, it may do so under section 91 (27) of the B.N.A. Act. This is not in essence an interference with property and civil rights. That may follow as an incident but the real purpose (not colourable and not merely to aid what in substance is an encroachment) is to prevent actual, or threatened injury or the likelihood of injury of the most serious kind to all the inhabitants of the Dominion. To quote further from the judgment of Lord Atkin at p. 90:

"Criminal law" means "the criminal law in its widest sense"—*Attorney-General for Ontario* v. *Hamilton Street Railway*. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality—unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

I quote too from the judgment of Duff, J., in the Supreme Court of Canada (1929) at p. 413:

You cannot create a new criminal offence without directly affecting civil rights. The characteristic rules of the Criminal Law, rules designed for the protection of the State and its institutions, for the security of

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. *v.* LEE.

PROCTOR *v.* STANDARD SAUSAGE CO. LTD.

property and the person and public order, rules for the suppression of practices which the Criminal Law notices as deserving chastisement by the State, and so on, all are rules restricting the liberty of action of the subjects of the State, and in that sense affecting civil rights; but such acts and neglects are not, as a rule, viewed by the Criminal Law in their juristic aspect, but in their actual effects, physical or moral, as harmful to some interest which it is the duty of the State to protect. They are concerned primarily not with rights, with their creation, the conditions of their exercise, or their extinction; but with some evil *or some menace,* moral or physical, which the law aims to prevent or suppress *through the control of human conduct.*

The italics are mine.

The primary object of this legislation is the public safety—protecting it from threatened injury. If that is its main purpose—and not a mere pretence for the invasion of civil rights—it is none the less valid because it may be open to a criticism, from which few Acts are free, that its purpose would be served equally well by accepting the opinion of others, *viz.*, that sulphur dioxide might with safety be added to the list of usable preservatives. Tampering with food by the introduction of foreign matter, however good the intentions, should properly be regarded as a public evil and it may properly be regarded as highly dangerous to lower the bars, or to remove restrictions which, rightly or wrongly, Parliament in its wisdom thought fit to prescribe.

MACDONALD, J.A.

I think, too, if further support is required, the Act may be upheld because its purpose is not only to protect the consumer, but also to suppress fraud, in its criminal aspect, in the distribution of food products. The product was "sold as fresh sausage." It is in fact the substitution of an article treated with a preservative for one free from extraneous matter. If a dealer sold sausages as "fresh" and treated them in this way he would obtain money by fraud and false pretences and the customer would not be appeased by the assurance of the meat inspector that this "keep 'em" process, as the butchers call it, is wholly effective. However it is not necessary to rely on this view. This drug in limited quantities may be safe: it is necessary to convince Parliament on that point.

It was also submitted that while Parliament might declare it to be a crime to treat sausages in the way outlined the Governor in Council cannot do so. It will be observed by reference to the

Act that Parliament did not make it a criminal offence to use sulphur dioxide as a preservative. It only declared, for example, that

> food shall be deemed to be adulterated if constituents are present in quantity not within the limits of variability fixed by the Governor in Council as hereinafter provided,

i.e., by the regulations. I cannot conceive of any sound basis for this submission. The Act in general terms makes the adulteration of food a criminal offence and because it was impossible to define the limits of variability without going into endless details, subject no doubt to change from time to time, the Federal Parliament entrusted that duty to the Governor in Council. By section 3, subsection 3 the regulations have the same force and effect as if embodied in the Act. This is not a delegation of a power to the Governor in Council to make the use of sulphur dioxide a crime where Parliament itself did not so provide. Adulteration was made a criminal offence by the parent Act by "a general definition and a general condemnation" and this is one form of adulteration within the general prohibition. As stated in *Proprietary Articles Trade Association* v. *Attorney-General of Canada, supra,* at p. 91:

MACDONALD, J.A.

> If the main object be *intra vires*, the enforcement of orders genuinely authorized and genuinely made to secure that object are not open to attack.

This, it is true, was said in respect to powers given by the Act then in question to the Board of Commerce but may, I think, with propriety, be applied to the point under discussion.

Several provisions of the Act were referred to and many clauses in the regulations to support the submission that property and civil rights are invaded. That is true if the main purpose of the legislation is not kept in view as it must be. We were referred, for example, to section 4 (*c*) of the Act making it a crime to abstract any valuable constituent from an article of food. This, it was said, would make it an offence for a dairyman to abstract cream from milk. These provisions must be read in the light of the context, having in mind the object in view. As Mr. Blake said in argument in *Regina* v. *Wason, supra,* at p. 223:

> "It is necessary . . . to look even more closely than commonly at the whole law, to avoid detached views and the microscopic investigation of isolated words and phrases."

COURT OF APPEAL

1933

March 7.

STANDARD SAUSAGE CO. LTD. v. LEE.

PROCTOR v. STANDARD SAUSAGE CO. LTD.

This principle in reading the Act is equally applicable to the regulations. They must be read in their proper setting and regarded as an aid only in securing observance of necessary requirements for the protection of the public from the menace of adulterated food products.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Farris, Farris, Stultz & Sloan.*
Solicitors for respondents: *Owen & Murphy.*

MCDONALD, J.

1933

Nov. 7.

THE CANADA LIFE ASSURANCE COMPANY v. McCLELLAN.

Foreclosure action—Costs—Taxation—Scale under Appendix N—"Amount involved"—Ruling of taxing officer—Appeal.

THE CANADA LIFE ASSURANCE CO. v. MCCLELLAN

There being no "amount involved" in a foreclosure action, it being brought merely for the purpose of enforcing an equitable remedy, the costs should be taxed under Column 2 of Appendix N.

Andler v. *Duke* (1933) [*ante*, p. 282]; 3 W.W.R. 26 followed.

Statement

APPEAL by plaintiff from the taxing officer on his taxation of the bill of costs in an undefended foreclosure action. Argued before MCDONALD, J. at Vancouver on the 7th of November, 1933. The plaintiff presented his bill drawn up in accordance with the scale set out in Column 2 of Appendix N. The district registrar as taxing officer, taxed the costs upon the scale set out in Column 1 thereof on the ground that the amount ascertained on the taking of accounts did not exceed $3,000.

A. Alexander, for appellant.
No one, *contra.*

Judgment

MCDONALD, J.: There is no "amount involved" in a foreclosure action. It is brought merely for the purpose of enforcing an equitable remedy; the costs should therefore have been taxed and allowed in accordance with Column 2 of Appendix N following the decision of *Andler* v. *Duke* (1933) [*ante*, p. 282]; 3 W.W.R. 26.

Appeal allowed.

IN RE T. D. JONES, DECEASED. RUDD *ET AL.* v. AITKEN.

COURT OF APPEAL

1933

March 10.

IN RE JONES, DECEASED.

RUDD v. AITKEN

Taxes—"Coal land"—Meaning of—Coal excepted from sale of land—R.S.B.C. 1924, Cap. 254, Secs. 2, 41, 118 and 133.

"Coal land" as defined by section 2 of the Taxation Act includes coal reserved to the vendor on a sale of land in fee simple, and the interest so reserved is subject to taxation under said Act irrespective of whether coal has been found on the land or not (MACDONALD, C.J.B.C. dissenting).

APPEAL by the executors of the estate of T. D. Jones, deceased, from the decision of the Court of Revision for Comox District of the 20th of July, 1932, whereby it was decided that the rights of the appellants in the mines and minerals including clay, coal and coal oil lying in or under certain lands in the Comox Assessment District, were assessable as "coal lands" under the Taxation Act, and against the action of the Court of Revision in referring back to the assessor the question of revaluation of the appellants' rights and the omission of the Court of Revision to decide the valuation of the appellants' said rights. The property in question was sold by the executors in 1920, subject to the reservation of all mines and minerals including clay, coal and coal oil. The evidence disclosed that most transfers of property in that vicinity reserved the coal rights. An option was given for the coal rights on the land in question (known as the Jones property) in March, 1930, but after drilling one hole in the centre of the property, no coal being found, the option was abandoned. The assessor assessed the coal rights at $15 per acre, and the Court of Revision referred the question of valuation back to the assessor with instructions to reassess the same, keeping in mind that if $15 per acre is a fair value where there is known coal then $15 is too high where there is no information whether there is coal there or not.

Statement

The appeal was argued at Victoria on the 25th and 26th of January, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

COURT OF APPEAL

1933

March 10.

IN RE JONES, DECEASED.

RUDD v. AITKEN

Argument

Cunliffe, for appellants: We sold the land reserving the minerals in 1920. Nothing was done by the assessor until 1930, when finding we had excepted the minerals in the 1920 conveyance he charged us for ten years' taxes on coal. On revision it was held we were properly charged, but too high. An option was given on the coal in 1930, and after spending $7,500 no coal was found and the option expired. Our holding constitutes minerals and we have no right in the land at all under the Taxation Act. Coal alone, if not being mined, is not assessable and there must be some evidence that coal is there. The meaning of the word "mines" is defined in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1888), 13 App. Cas. 657 at p. 687; *Midland Railway Co. and Kettering Thrapston and Huntingdon Railway Co.* v. *Robinson* (1889), 15 App. Cas. 19 at p. 31. We have discharged the onus of shewing this is not coal land, as a substantial endeavour was made to find coal and it failed. Assessment is made for ten years and we submit there is no such power under the Act: see *Reid* v. *Reid* (1886), 55 L.J., Ch. 294 at p. 298; *Schmidt* v. *Ritz* (1901), 31 S.C.R. 602 at p. 605. The Court of Revision should have made the assessment; there is no power to send it back to the assessor. No value is attached to these rights at all.

Pepler, for respondent: It is not incumbent upon the Crown to shew that there is coal on the lands. The assessor is bound to assess if he finds there are coal lands belonging to the appellants. "Coal land" means land held for the purpose of mining coal. The definition of the word "land" covers coal: see *Dilworth* v. *New Zealand Commissioner of Stamps* (1898), 68 L.J., P.C. 1 at p. 4. The interpretation in the Taxation Act must be taken and they have a registered interest in land: see *Hext* v. *Gill* (1872), 41 L.J., Ch. 761 at p. 764. Under sections 133 and 134 of the Taxation Act the Court of Revision may refer the case back to the assessor to find the "valuation" of the interest assessed and the assessment may be retroactive under section 118 (3) of said Act.

Cunliffe, replied.

Cur. adv. vult.

10th March, 1933.

MACDONALD, C.J.B.C.: The assessor and the Court of Revision thought that "coal land" as defined in section 2 of the Taxation Act, R.S.B.C. 1924, Cap. 254, which reads as follows:

"Coal land" means any land owned, held, or occupied by any person for the special purpose of mining coal therefrom.

is this applicable to coal excepted from land sold to a purchaser and in which the owner of the coal, if any, has no interest?

The land in question was sold to a purchaser in fee simple excepting the coal therein. Two estates were thought by the assessor and Court of Revision to have been created, the surface which belonged wholly to the purchaser, and the coal *simpliciter* contended to be in itself "land," which remained in the vendor with the implied easement of necessity of such part of the surface as is necessary to enable the owner of the coal to take it out.

My reasons for thinking that the coal cannot be assessed apart from the surface land is that "coal land" in its ordinary and sensible meaning is one subject of taxation not two. The surface may be and is assessed separately because it is capable of being so assessed, possibly higher because of the coal supposed to be in it. No coal was actually found in this land. It is a mere presumption that there is coal in this land. The assessor admits that there is no proof of any and that he assessed the coal because of a presumption arising from the reservation of it in the conveyance to the purchaser.

It is well-settled law that in the imposition of a tax the tax must be clearly and certainly stated and imposed. It cannot be levied on a presumption. There cannot be a tax in equity. It is not enough to say that such a tax is just. The tax must be imposed by clear and unambiguous words which must be strictly construed.

The definition of "coal land" can only embrace the coal contained in the land, that is to say, where it is an integral part of the parcel known as land, and it is only by a forced construction that coal contained in or under the land with which it is associated can or was intended to be assessed as coal land. Coal may be land when so reserved but it is not "coal land" within the meaning of the definition. The whole tenor of the Taxation Act is against holding that the coal excepted from land was

COURT OF APPEAL

1933

March 10.

IN RE JONES, DECEASED.

RUDD v. AITKEN

intended to be taxed in the manner in which this coal is assessed. The definitions in section 2 of the Taxation Act aforesaid shew that coal *simpliciter* was not intended to be taxed except on output. Section 73 imposes a tax on the output of coal and it is levied on the quantity taken out and the value of that quantity. The Act requires monthly statements and the amount of the output to be supplied to the Government officials. It is true that that provision is in addition to any other method of taxation on coal but I am satisfied that coal in the present case was not properly assessed as "coal land." Section 114 requires the assessor to put into his assessment roll a description of all taxable property and all output and income.

Here the assessor admitted that he did not know of the existence of coal in the land from which this supposed coal is excepted. He had no evidence that any coal was there. There may be a pound of coal in these lands or none or there may possibly be thousands of tons. In such circumstances how is he to give a description of the coal or fix its value?

MACDONALD, C.J.B.C.

In addition to the necessity that the tax should be imposed in clear and certain terms the construction of the section relating to the assessment of coal lands when ambiguous must not be interpreted in such a way as to lead to absurdity or manifest injustice and I am satisfied that the construction of the term "coal land" by the assessor and the Court of Revision leads to an absurdity; in fact it leads to a practical impossibility. What could be more absurd than to require an assessment of something not known to exist and of an unknown value if any does exist? The existence of coal in the mind of the assessor in these lands is a mere notional one, the result of an inference arising from its reservation in the deed. Therefore it can be assessable under such a section as section 73 of the Act on output and that I think was made plain by the Legislature. I would therefore allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: Appeal allowed in part: assessment of the land as "coal land" within the meaning of the Taxation Act, R.S.B.C. 1924, Cap. 254, affirmed, but reduced from $15 to $3 per acre.

McPhillips and Macdonald, JJ.A. agreed with Martin, J.A.

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

Solicitor for appellants: *F. S. Cunliffe.*
Solicitor for respondent: *E. Pepler.*

COURT OF APPEAL

1933

March 10.

IN RE JONES, DECEASED.

RUDD v. AITKEN

TRUEB v. TRUEB AND BLAKE.

ROBERTSON, J.

1933

Oct. 17.

TRUEB v. TRUEB AND BLAKE

Divorce—Husband's action dismissed—Costs—Solicitor and client scale—Jurisdiction—R.S.B.C. 1924, Cap. 70, Secs. 35 and 37—Divorce rule 87.

There is jurisdiction in the Supreme Court of British Columbia to order that the costs in a divorce action be taxed as between solicitor and client.

Held, that the present case is a proper one in which such order should be made.

Clappier v. *Clappier and Clery* (1923), 32 B.C. 204 followed.

APPLICATION by the successful respondent in a divorce action for an order that her costs be taxed as between solicitor and client. Heard by Robertson, J. at Vancouver on the 13th of October, 1933. Statement

Nicholson, and *L. St. M. Du Moulin,* for plaintiff.
C. L. McAlpine, for respondent and co-respondent.

17th October, 1933.

Robertson, J.: At the conclusion of the trial I dismissed with costs the husband's petition for divorce and now the respondent asks for an order that her costs be taxed as between solicitor and client. Judgment

Counsel for the petitioner submits the Court has no jurisdiction or, alternatively, the Court's discretion should not be exercised in favour of the appellant.

ROBERTSON, J.

1933

Oct. 17.

TRUEB v. TRUEB AND BLAKE

Section 35 of the Act (An Act to amend the Law relating to Divorce and Matrimonial Causes in England) commonly known as the Divorce Act, R.S.B.C. 1924, Cap. 70, provides:

The Court on the hearing of any . . . petition under this Act . . . may make such order as to costs as to such Court . . . may seem just . . .

Section 37 of the same Act provides:

The Court shall make such rules and regulations concerning the practice and procedure under this Act as it may from time to time consider expedient.

Divorce Rules, 1925, were approved by the learned judges of this Court and are statutory. See section 3, Court Rules of Practice Act, R.S.B.C. 1924, Cap. 224.

Rule 87 provides as follows:

The same fees and costs as between solicitor and client, and party and party, and generally, shall be payable and allowable in Divorce and Matrimonial Causes and matters as are payable or allowable in similar analogous proceedings and things in causes or matters in the Supreme Court of British Columbia.

The above sections of the Divorce Act and rule 59 of the then Divorce Rules, which is the same as rule 87, *supra,* were considered by HUNTER, C.J.B.C. in *Clappier* v. *Clappier and Clery* (1923), 32 B.C. 204, wherein he said, at p. 206:

Judgment

This latter rule evidently contemplates that there may be cases where solicitor and client costs might be allowed. Even if it were not so I do not think that any rule or practice could fetter the complete discretion vested in the Court by section 35 of the statute, and therefore, it is clear that there is jurisdiction to make the order in a proper case.

In July, 1925, MARTIN, J.A. delivered the judgment of the Court of Appeal in *In re Estate of Hugh Magee, Deceased* (1925), 36 B.C. 195, wherein the executor, who had been successful on an originating summons for the determination of questions arising out of Magee's will, asked to have his costs "as between solicitor and client" and after pointing out the difference between rule 800, as to costs, in the 1890 Supreme Court Rules and rule 983, as to costs, in the Supreme Court Rules 1906 (hereinafter set forth) the learned judge said, at p. 199:

This rule (which has been carried into the present consolidated rules under the same number) authorized a tariff of costs which was substantially the same as that of 5th April, 1897, under section 83 of the Legal Professions Act, Cap. 25 of 1895, and greatly expanded in number the items in the old tariff of 1890, and added two schedules thereto, and also greatly increased in value many of said former items, the consequence being that

the difference between a taxation on the party and party scale and one on the solicitor and client scale became very slight, and the general opinion prevailed in the profession (which I have shared for nearly 20 years) that taxations upon the solicitor and client scale had in effect been abolished.

In *Payne* v. *Gammon*, 38 B.C. 153; (1927), 1 W.W.R. 506, the Court of Appeal considered rule 60 of the Probate Rules to be found at p. 333 of the Supreme Court Rules, 1925, which provides in part:

> Costs in all probate matters shall be taxed as between solicitor and client unless the Court otherwise directs. . . . .

GALLIHER, J.A., with whose reasons MARTIN, J.A. agreed, held the rule only applied to non-contentious business. While the Chief Justice had doubts about the result arrived at by the majority of the Court he did not dissent but, as I read his judgment, he was of the opinion that if the rule did apply to non-contentious business the Court's decision in *In re Estate of Hugh Magee, Deceased, supra,* would apply.

Now rule 983 as it appeared in the 1906 and 1912 Supreme Court Rules reads as follows:

> In all causes and matters the fees allowed shall be those set forth in Appendix M, and no higher fees shall be allowed in any case, except such as are by these Rules provided for.

Judgment

In 1925 the bloc system of costs was put into force and, as it applied only to actions commenced after September 1st, 1925, it was necessary to amend the above rule by the addition of the word and letter "and N" after the letter "M" which was done.

On October 14th, 1930, the said rule 983 was further amended by the following addition:

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

It seems to me that this amendment restored to the Court the power to order costs as between solicitor and client which had been declared by the Court of Appeal in the *Magee* case, *supra,* to be abolished.

In the Act relating to divorce in England there does not appear to have been any jurisdiction to order costs as between solicitor and client. See *Ottaway* v. *Hamilton* (1878), 3 C.P.D. 393 at 401-2; 47 L.J., C.P. 725. There the wife's solicitor could sue the unsuccessful husband for all the extra

ROBERTSON, J.

1933

Oct. 17.

TRUEB v. TRUEB AND BLAKE

costs reasonably incurred beyond those upon taxation between party and party. The provisions of our statute upon this point are the same as the English provisions. As stated above, our Divorce Rules, 1925, are statutory—so that they do not depend for their validity alone on the provisions of section 37 of the Divorce Act. HUNTER, C.J.B.C., as pointed out above, held that this Court had jurisdiction and I follow his decision.

From the evidence at the trial it was clear the wife has nothing. She was forced to defend these proceedings. If she is not given her solicitor and client costs it will be necessary for her solicitor to take another action for "the extra costs." Why should she not be entitled now to tax these extra costs? I think that she should. I therefore order that her costs as against the petitioner be taxed as between solicitor and client.

Judgment

Application granted.

IN RE TESTATOR'S FAMILY MAINTENANCE ACT. *IN RE* CLEGG ESTATE.

ROBERTSON, J.

1933

Oct. 24.

IN RE CLEGG ESTATE

Testator's Family Maintenance Act—Will—Petition of wife to modify—Adequate provision for maintenance.

The deceased herein was survived by his second wife and five children by his first wife. He left life insurance amounting to $2,600 which was made payable to his wife, the balance of his estate consisting of a house worth $750 with other assets which would realize about $1,500. By his will deceased left one-third of his whole estate (the insurance to be included in computing the total amount) to his wife, the residue to be divided equally among his children. On petition by the wife for relief under the Testator's Family Maintenance Act, the evidence disclosed that one of the children (Hilda) was practically destitute, but the others were in circumstances under which they were able to get along.

Held, that the testator did not make provision that was "adequate, just and equitable" in the circumstances for the petitioner and Hilda and it was ordered (1) that the trustees pay to Hilda $50 per month for six months; (2) permit the petitioner to occupy the house free of rent; (3) pay the petitioner $10 per month and (4) in addition pay the taxes and insurance on her home.

PETITION by the widow of Frank Clegg, deceased, under the Testator's Family Maintenance Act, that the terms of the will of her late husband be modified and that she be granted further moneys from the estate so that she may have adequate provision for maintenance and support. The facts are set out in the reasons for judgment. Heard by ROBERTSON, J. at Vancouver on the 20th of October, 1933. Statement

G. Roy Long, for the petitioner.
Evans, for the administrators and trustees.
A. H. Miller, for certain beneficiaries.

24th October, 1933.

ROBERTSON, J.: This is a petition by Emily Sarah Clegg under the provisions of the Testator's Family Maintenance Act, R.S.B.C. 1924, Cap. 256, that the terms of the will of her late husband, Frank Clegg, be modified and that she be granted an order for further moneys to be paid to her from the proceeds of Judgment

ROBERTSON, J.

1933

Oct. 24.

IN RE CLEGG ESTATE

the said estate so that she may have adequate provision for her proper maintenance and support.

The petitioner was the second wife of Frank Clegg, who died April 15th, 1933, having left a will dated February 15th, 1933, which will has been duly proved. After providing for payment of his debts, the testator directed his trustees to divide the balance of his property as follows:

> To my wife Sarah Frankham Clegg residing with me—in respect that she will receive the proceeds of my policies in the Sun Life Assurance Company which do not form part of my estate—a sum which taken along with the proceeds of the said policies will give her one-third share of the gross amount arrived at by totalling the net value of my estate along with the proceeds of said insurance policies. In respect that most of my estate was saved by me along with my first wife I wish my children by said wife to share the residue among them and the remaining portion of such residue to be distributed equally among my children share and share alike provided that if any of my said children shall predecease me leaving issue such issue shall take *per stirpes* such share as his her or their parent would have taken upon surviving me. the following are my children to share in said distribution—Edith Mary Silva, 739 Georgia Street, Vallejo, California, U.S.A., Dorothy Clegg, 2808 Denbigh Avenue, Burnaby, New Westminster, B.C., Hilda Shields, wife of Al Shields, 1715 Sea Street, Bellingham, U.S.A., Cedric Clegg, my son, residing with me and Beatrice Clegg, 193 Dowling Avenue, Toronto, Canada.

Judgment

The deceased left life insurance amounting to $2,600 which was payable to the petitioner and therefore did not form part of his estate. The petitioner left this money with the insurance company and is now getting $25 a month from them. The balance of the estate consists of a house worth $750 and other assets which would realize about $1,500.

The petitioner is 62 years of age and unable to work.

The testator left five children by his first wife, *viz.*. Edith Mary, 28 years of age; Dorothy, 26 years of age; Hilda, 24 years of age; Cedric, 22 years of age, and Beatrice, 19 years of age. Edith Mary is married, living in California, and her husband has employment but they are entirely dependent on his wages as they have no other means. Dorothy supports herself and assists in supporting Cedric who has been out of steady employment. Hilda is married and has one child, born on March 12th, 1933. She says she is continually under a doctor's care and unable, and will not be able for a year, to fulfil any household duties. Neither she nor her husband has any means.

Her husband is unable to obtain employment and they are in necessitous circumstances. Beatrice, who lives with her aunt and uncle, is employed and making $55.25 per month. Cedric has no regular employment but is assisted by Dorothy.

The position then is that the girls except Hilda, are either supporting themselves or being supported and Cedric, although not able to obtain steady employment, is, however, with the assistance of Dorothy, apparently, able to get along.

Under these circumstances it does not appear to me the testator has made provision which is "adequate, just and equitable" in the circumstances for the petitioner and Hilda. The petitioner cannot live on what she gets from the life insurance. Under the circumstances I order (1) that the trustees pay to Hilda the sum of $50 per month for six months, making $300 in all; and until further order (2) permit the petitioner to occupy the house, free of rent; (3) pay to the petitioner $10 per month and (4), in addition, pay the taxes and insurance upon the house.

Judgment

The costs of all parties will be taxed and paid out of the estate.

Order accordingly.

MACDONALD, J. (In Chambers)

1933

Oct. 27.

ALERT LOGGING Co. LTD. v. STANDARD MARINE INS. Co. LTD.

ALERT LOGGING COMPANY LIMITED *ET AL.* v. STANDARD MARINE INSURANCE COMPANY LIMITED.

Costs—Action dismissed with costs—Counterclaim dismissed with costs—Form of order as to costs—Rule 977.

Where an action is dismissed with costs and the counterclaim is dismissed with costs, the portion of the order for judgment dealing with the costs should read as follows: "That the defendants recover against the plaintiffs their costs of defence to the claim to be taxed, and that the plaintiff recover against the defendants their costs of defence to the counterclaim to be taxed."

Remarks on the difference between the power of a trial judge to deal with costs in non-jury cases in British Columbia as compared with that possessed in Ontario and England.

Statement

APPLICATION to settle the form of the order for judgment as to costs where the action was dismissed with costs and the counterclaim was dismissed with costs. Heard by MACDONALD, J. in Chambers at Vancouver on the 24th of October, 1933.

Wismer, for plaintiffs.
Griffin, K.C., and *Sidney A. Smith,* for defendant.

27th October, 1933.

MACDONALD, J.: Upon the trial herein plaintiffs' action was dismissed with costs and a like result ensued with respect to the defendant's counterclaim.

Judgment

Plaintiffs sought to recover from the defendant upon a policy of marine insurance. The defendant counterclaimed for expenses incurred in salving the insured property. While the action arose out of the plaintiffs having effected such insurance, still the situation at the trial was the same as if two actions were being tried together. The registrar, in settling the order for judgment, endeavoured to follow a portion of my oral reasons for judgment, dealing with the question of plaintiffs' costs of the counterclaim as follows:

The plaintiffs do recover from the defendant such costs as are properly apportionable to the counterclaim, such last mentioned costs to be set off against the costs of the action.

Defendant now applies, summarily, to vary the order so settled and contends that the order it submitted for approval to the registrar is correct. It read in part as follows:

The plaintiffs do recover from the defendant any additional costs incurred by them by reason of the counterclaim over and above the costs of the action, such last mentioned costs (if any) to be set off against the costs of the action.

The case of *Wilson* v. *Walters* (1926), 1 K.B. 511; 95 L.J., K.B. 624, and other cases there referred to, were cited in favour of the defendant's contention. Even although the facts in that case are not the same and the reasons supporting the order are dissimilar, still I might have approved of the order under the circumstances, if I did not feel controlled by our rules relating to costs. I think the proper order should be, as in *Atlas Metal Company* v. *Miller* (1898), 2 Q.B. 500; 67 L.J., Q.B. 815, tried by a jury, and the portion dealing with the costs should read as follows:

That the defendant recover against the plaintiffs their costs of defence to the claim to be taxed and that the plaintiffs recover against the defendant their costs of defence to the counterclaim to be taxed.

It should be borne in mind that costs follow the "event" in this Province in all jury and non-jury actions unless the Court or judge shall have "good cause" to otherwise order. In my opinion this restriction applies to the counterclaim in the action. There is a marked difference between the power of a trial judge to deal with costs in non-jury cases, in our Province, as compared with that possessed in Ontario and England. In Ontario, in a non-jury action "the costs of and incidental to all proceedings shall be in the discretion of the Court or judge" and the Court or judge shall have full power to determine by whom and to what extent the costs shall be paid. Then in England a similar discretion is conferred upon the Court or judge. This distinction was referred to by Lindley, M.R. in *Atlas Metal Company* v. *Miller, supra,* where, at p. 504, in citing *Lowe* v. *Holme* (1883), 10 Q.B.D. 286; 52 L.J., Q.B. 270, and *Lund* v. *Campbell* (1885), 14 Q.B.D. 821; 54 L.J., Q.B. 281, he said it was unnecessary to consider these (non-jury) cases, then adding:

Judgment

In such cases the judge who tries the action without a jury has greater power over the costs than a judge who tries an action with a jury.

Then counsel for the defendant invoked the latter portion of

MACDONALD, J. (In Chambers)

1933

Oct. 27.

ALERT LOGGING CO. LTD. v. STANDARD MARINE INS. CO. LTD.

Judgment

rule 977 as supporting his contention. I deem it unnecessary to consider this point at any length, as such rule is only intended to deal with the costs of different issues in either an action or a counterclaim. It does not purport to affect costs, as between an action and a counterclaim. A similar rule was in force when the *Atlas Metal Company* v. *Miller* case was decided. No reference was made to it and it was not referred to as not being applicable where costs are being considered, in a trial involving both a claim and counterclaim.

I think the order should be in the form I have stated, and the last-mentioned case will doubtless be of assistance to the registrar upon the taxation. I have already referred to the small amount of time consumed at the trial with respect to the counterclaim.

As virtually neither party was successful upon this application, there will be no order for costs.

Order accordingly.

MACDONALD, J.

1933

Nov. 7.

CRAIG v. CANADIAN NORTHERN PACIFIC RY. CO.

CRAIG AND CRAIG v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY *ET AL.*

Railway company—Negligence—Infant playing on right of way—Warnings by railway officials—Death of infant—Liability of railway—Damages —Trespasser—R.S.B.C. 1924, Cap. 85.

A boy six years of age was killed when attempting to board a moving train on the defendant's right of way. School boys in the vicinity of what is known as the "Grandview Railway Cut" near Vancouver on the Great Northern Railway line were in the habit of playing in this ravine. The railway officials of this portion of the right of way made every reasonable effort to prevent such use of their property as they strenuously and persistently objected to its being so utilized, and on request one principal of a neighbouring school notified the pupils that they should not make use of this property as a playground. It was found further that the boys, including deceased, knew this was a place they were forbidden to frequent. In an action by the parents for damages under Lord Campbell's Act:—

Held, on the evidence, that deceased was a "trespasser" and as there was no act done by the defendants or their officials with a deliberate intention of doing harm to deceased, or any act done with reckless disregard of his presence on the railway property, the action was dismissed.

Held, further, that the plaintiffs' inability to shew that they have lost a reasonable probability of pecuniary advantage in the death of their son is a further bar to their claim under Lord Campbell's Act.

ACTION for damages arising out of the death of the plaintiffs' son while playing in the "Grandview Railway Cut" on the Great Northern Railway tracks. The facts are set out in the reasons for judgment. Tried by MACDONALD, J. at Vancouver on the 6th and 7th of November, 1933. Statement

Levin, for plaintiffs.

R. W. Hannington, for defendant Canadian Northern Pacific Railway Company.

A. H. MacNeill, K.C., for defendant Vancouver, Victoria and Eastern Railway and Navigation Co.

Clark, K.C., for defendant Vancouver Harbour Commissioners.

MACDONALD, J.: The plaintiffs seek to recover damages from the defendants arising out of the death of their son, Donald; on the 16th of March, 1932, while he was playing in what is com- Judgment

MACDONALD, J.

1933

Nov. 7.

CRAIG v. CANADIAN NORTHERN PACIFIC RY. CO.

monly known as the "Grandview Railway Cut" on the Great Northern Railway line, he was killed.

The action is based on negligence, and particulars have been given of the alleged negligence. The burden rests upon the plaintiffs of proving acts of negligence causing the accident and subsequent death of their son. It appears that after school, Donald Craig, who was six years of age, went with a number of other boys, all older than himself, according to their habit, to play Indian or cow-boy in this ravine created by the railway company in the construction of its line. It lent itself to their imagination as it was deep, with rocky sides interspersed with brush. It also had a cave in one of the banks which became, no doubt, considering the purpose of their play, an added attraction. I am quite satisfied that the children of the neighbourhood had used this place as a playground for a number of years. Donald Craig, perchance through being younger than the rest of the boys, is not shewn to have been there before the day of the accident. It was a dangerous situation that these boys should thus frequent that locality. This was apparent, no doubt, to the parents, but more particularly to the railway officials, who had charge of that portion of the right of way and who would be bound to take reasonable precautions to prevent such use of their property by the children. The railway officials made every reasonable effort to prevent such use of their property. They strenuously and persistently objected to it being so utilized. The boys were driven away repeatedly, and upon request, one principal, at least, of a neighbouring school, notified the pupils that they should not make use of this property as a playground. Such repeated objections and requests, however, failed, and boy like, these school children persisted in using this property in the manner I have shortly outlined. Some children seem prone to do what is forbidden, and if one leads, others follow. There may be a scarcity of playgrounds in that locality. I think there is, generally speaking, throughout the city; however, from the railway's standpoint they feel that their property should not be used for such a purpose. I am quite satisfied that all the boys, including Donald Craig, who went to this railway cut to play that afternoon, knew they were going to a place which they had been forbidden to frequent. They knew they

Judgment

were doing wrong in playing in that place. They were trespassers. They were proceeding to use private property, reserved for railway purposes, as a playground. They had not only no right to be on the property that day, much less did they have any right to board the train, as apparently some of them did. And it was in the boarding of the train, or "hopping" the train as they called it, that the accident occurred, which resulted in Donald Craig being run over and eventually dying from the injuries he received.

These boys, including Donald Craig, by their actions, come within the definition of "trespassers." Viscount Dunedin in *Robert Addie & Sons (Collieries)* v. *Dumbreck* (1929), A.C. 358 at 371, defines a trespasser as being

> [one] who goes on the land without invitation of any sort and whose presence is either unknown to the proprietor or, if known, is practically objected to.

The case to which I have just referred, *Robert Addie & Sons (Collieries)* v. *Dumbreck,* to my mind limits, if it does not destroy, the effect of what has been commonly called the turntable cases, of which *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229 is typical. They deal with the responsibility towards children frequenting a place which is dangerous. Lord Hailsham, L.C., in the *Addie* case, refers to Lord Macnaghten having treated the *Cooke* v. *Midland Great Western* case as one in which children were resorting to the turntable with the tacit permission of the railway company. They thus became, in a sense, "licensees." Further, Lord Atkinson, in the same connection, said that the plaintiff entered upon the premises and played on the turntable with the leave and licence of the defendants.

Judgment

The situation then is one in which the plaintiffs are seeking redress, just as if Donald Craig had not been killed, but only injured, and he was seeking a remedy for such injury. Lord Campbell's Act was not intended to go further, and if Donald Craig were now seeking to obtain damages he would be in the position of having been a trespasser, upon the occasion when he was injured. I find that he was in no sense a "licensee" or an "invitee," but the evidence, as I have mentioned, is altogether to the contrary. There may be some contention that Donald, as

MACDONALD, J.

1933

Nov. 7.

CRAIG v. CANADIAN NORTHERN PACIFIC RY. CO.

a child of tender years, would be in a stronger position than an adult, but being a trespasser, I do not think that such a position is tenable. It did not have weight in the *Addie* case.

Without referring at any greater length to the *Addie* case, I will simply read an extract from that case which MARTIN, J.A., in *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213 at p. 223, made, as follows:

"The duty which rests upon the occupier of premises towards the persons who come on such premises differs according to the category into which the visitor falls. The highest duty exists towards those persons who fall into the first category, and who are present by the invitation of the occupier. Towards such persons the occupier has the duty of taking reasonable care that the premises are safe. In the case of persons who are not there by invitation, but who are there by leave and licence, express or implied, the duty is much less stringent—the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known—or ought to be known—to the occupier. Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser."

Judgment

Now, having held that Donald Craig was a trespasser, does he come within the last category? The responsibility or liability of the defendants must be brought within its provisions, otherwise in my opinion the plaintiffs cannot succeed. He came to the place at his own risk, and used it as a playground. He was a bright boy and presumably knew what he was doing. He either boarded or attempted to board the train at his own risk. I find that there was no wilful act, committed by the defendants or any of their employees, which would involve the absence of reasonable care. I must for the moment qualify that statement by a reference I intend to make, at somewhat greater length, to the alleged actions of Archie Kelly, a brakeman on the train, which these boys were boarding that afternoon. Then I find, leaving aside the acts of Kelly, that there was no act done with a deliberate intention of doing harm to Donald Craig, or any act done with reckless disregard of his presence on the railway property.

It only remains then to consider whether the defendants have rendered themselves liable through the acts of Archie Kelly.

This could only apply to the defendant Canadian National Railway or as it is more properly termed in this Province the Canadian Northern Pacific Railway Company, as he, Kelly, was an employee of that company and not of the Vancouver, Victoria and Eastern Railway and Navigation Company, or the Vancouver Harbour Commissioners. It may be contended as to the latter defendant he was in a position of an employee at the moment when the accident occurred. However, there is no clear evidence upon that point, so at this stage I had better mention specifically as to both the Vancouver Harbour Commissioners and the Vancouver, Victoria and Eastern Railway and Navigation Company, no liability whatever has been shewn. Then I turn to a consideration as to whether the Canadian Northern Pacific Railway Company has been rendered liable by the acts of Kelly at the time these boys were boarding its train. Plaintiffs gave particulars of negligence at great length, and as I have already stated in the argument no evidence was afforded shewing that any of these alleged acts of negligence either occurred, or, if they had occurred, occasioned the accident complained of. I need not, under such circumstances, refer to the nine different allegations of negligence. It was sought on behalf of the plaintiffs to bring the acts of Archie Kelly within one of the allegations of negligence, but I stated during the argument, and still adhere to the opinion, that not a single one of these different allegations of negligence could be in any way applied to the acts of Archie Kelly, at the time of the accident. Counsel for the plaintiffs then, although there had been some mention of Kelly's acts yesterday, and slightly referred to today, sought to amend the statement of claim by setting up acts of negligence on the part of Kelly, which contributed to and caused the accident. The amendment was stated orally, but as I understood it, such counsel sought to allege that Archie Kelly shewed a disregard for the boys who were then on the train, including Donald Craig, by waving or ordering them to get off the moving train, with an attendant risk. In other words, counsel sought to come within the provisions of the latter portion of the extract I have read from the judgment of the Lord Chancellor in the *Addie* case, that is, that he, Archie Kelly, "had done an act with reckless disregard of the presence" of these trespassers upon the

Judgment

MACDONALD, J.

1933

Nov. 7.

CRAIG v. CANADIAN NORTHERN PACIFIC RY. CO.

Judgment

train, which would include Donald Craig. If I accept the account of what took place, as given by Archie Kelly, then he was in no sense liable, nor did he commit any act of negligence at the time when this swarm of boys, as he expressed it, were boarding the train on which he was brakeman, some of whom succeeded and others failed. According to his statement he recollected what took place with respect to Donald Craig. He seemed to be clear in giving his evidence and it in no way implicated him as being negligent either with respect to Donald Craig or the boys generally, who were there trespassing upon the railway property, and, seeking to board a train, without any right so to do. But there was some evidence yesterday along the lines contended for by counsel for the plaintiffs. I mentioned it at the time and the result was, presumably, that counsel for the defendants had an opportunity of advising with Archie Kelly, and he gave his evidence in the manner I have indicated. I must bear in mind that these boys were at fault, and that they were well aware of that fact. They had endeavoured for years to use this property in the manner I have indicated. They were not perhaps bad boys, but they were mischievous and they had been brought in conflict with the railway employees at various times. Those who gave their evidence tending in the direction of shewing that Archie Kelly had thus endeavoured to put the boys off a train which was moving, would have all their sympathies excited towards the dead boy, which would include his parents. The case is really sought to be reconstructed, so far as negligence is concerned, and such an amendment should not be allowed unless I am perfectly satisfied the defendants would not be prejudiced by the amendment. Counsel for one of the defendants very aptly pointed out to me that had such particulars of negligence been delivered in the first instance, they would have been not only prepared to consider it and advised with their witnesses, but, during the cross-examination of the boys they would have had the opportunity of endeavouring to find out how much truth there was in the statements which sought to render Archie Kelly liable for reckless disregard of the boys on the train. I have, under the circumstances, come to the conclusion not to allow such amendment. I am impelled in that direction in the short time at my disposal to consider the point also

by the fact that Kelly impressed me as a truthful witness. It does not appear to me that he, with his knowledge of railway operations would, with boys in sight, put them to the risk and danger of jumping off a train which is moving at any degree of speed whatever. So this side issue, if I might so term it, which has arisen during the trial, is thus disposed of.

There is another feature, however, which to my mind, is a bar to the recovery by the plaintiffs of any damages and that is their inability to shew that the death of their son comes within the intent and spirit of Lord Campbell's Act. It would serve no good purpose for me to discuss the object of that Act: suffice for me to say that it is based upon the benefit which has been lost through the death of a person, usually through negligence. Here, what benefit has been destroyed, of which the father and mother have cause to complain? It goes without saying that it is not an Act passed to be utilized on sympathetic grounds. This boy was six years of age, bright, healthy, useful around the house. The situation presented is one similar to that which Mr. Justice MURPHY had to deal with in *Sanford* v. *Crossley* (1931), 44 B.C. 481. He there followed the case of *Barnett* v. *Cohen* (1921), 2 K.B. 461. Beven on Negligence, 4th Ed., Vol. I., p. 253, referring to the *Barnett* v. *Cohen* case somewhat at length quotes Mr. Justice McCardie as follows:

Judgment

> I think that the only way to distinguish the cases where the plaintiff has failed from the cases where he has succeeded is to say that in the former there is a mere speculative possibility of benefit, whereas in the latter there is a reasonable probability of pecuniary advantage.

I might say that counsel for the plaintiffs very candidly this morning admitted that this was the ground on which he hoped to succeed, and under which he sought to obtain a favourable verdict. Then a further quotation from McCardie, J., in the *Barnett* v. *Cohen* case appears in Beven on Negligence at pp. 253-4 as follows, dealing with the question of damages:

> The deceased child was a bright and healthy boy. He had gone to school when only two years of age. The plaintiff (his father) had two other children, both boys, aged nine and thirteen. The plaintiff is a wholesale and retail trading engineer. He has a good business. He makes about £1,000 a year. His age is forty. His health is not good; he suffers from nerves and dilated heart. His wife is thirty-three; her health is defective. The plaintiff meant to give the deceased child a good education; to send him to an ordinary school till about fourteen years, then to a secondary school,

MACDONALD, J.

1933

Nov. 7.

CRAIG v. CANADIAN NORTHERN PACIFIC RY. CO.

and then, perhaps, to a university. The plaintiff has not satisfied me that he had a reasonable expectation of pecuniary benefit. His child was under four years old. The boy was subject to all the risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if he had lived. He might, or might not, have turned out a useful young man. He would have earned nothing till about sixteen years of age. He might never have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other.

I find myself in the same position. No doubt the father and mother both hoped that this boy would grow up to be a help to them. They appear to be in rather meagre circumstances, and if he had lived such hopes might have been fulfilled, but that is mere speculation. There is no rule by which I can be guided in coming to a conclusion that there was in the words of Mr. Justice McCardie a reasonable expectation that he would at some later age be a benefit, in a pecuniary way, to his parents. The situation, as I have intimated, is the same as my brother MURPHY was in, when the case of *Barnett* v. *Cohen, supra,* was cited to him. I appropriate his remarks:

Judgment

> It would be a case, to my mind, of a contingency upon a contingency. I do not think it was intended that judgments, no matter how sympathetic one might feel, should be based upon such a situation.

In conclusion, in dismissing this action might I, in this connection, refer to the remarks of the Lord Chancellor in the *Addie* case and take the liberty of quoting them as a portion of my judgment. He, after referring to the question of fencing and the warnings which had been disregarded, as they have been in this case, and there had been no permission given to the child to frequent the field, then added at the conclusion of his judgment as follows (p. 370):

> The sympathy which one cannot help feeling for the unhappy father must not be allowed to alter one's view of the law, and I have no doubt that in law the respondent's son was a mere trespasser, and that as such the appellants owed him no duty to protect him from injury.

On these grounds I am of opinion the action should be dismissed.

Action dismissed.

STANDARD EQUIPMENT LTD. v. PREST-O-LITE BATTERY COMPANY LTD.

FISHER, J. (In Chambers)

1933

Sept. 13.

STANDARD EQUIPMENT LTD. v. PREST-O-LITE BATTERY CO. LTD.

Practice—Close of pleadings—Notice of trial may be given by plaintiff within six weeks—Long vacation intervening—Effect of—Rule 436.

Rule 436 provides that if the plaintiff does not, within six weeks after the close of the pleadings or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may before notice of trial given by the plaintiff, give notice of trial or apply to the Court or a judge to dismiss the action for want of prosecution.

Held, that the time mentioned in said rule does not run during long vacation.

APPLICATION to vacate the defendant's entry of notice of trial. Heard by FISHER, J. in Chambers at Vancouver on the 5th of September, 1933. Statement

Bruce Fraser, for the application.
A. Alexander, contra.

13th September, 1933.

FISHER, J.: In this matter the question has been raised as to whether or not the time mentioned in Order XXXVI., r. 12 (marginal rule 436), runs during long vacation. Said rule reads as follows:

12. If the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as a Court or judge allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or apply to the Court or a judge to dismiss the action for want of prosecution; and on the hearing of such application the judge may order the action to be dismissed accordingly, or may make such other order, and on such terms, as may seem just. Judgment

Counsel on behalf of the defendant has referred to Order LXIV., r. 5 (marginal rule 965), reading as follows:

5. Save as in the last preceding Rule mentioned, the time of the vacations in any year shall not be reckoned in the computation of the times appointed or allowed by these Rules for amending, delivering, or filing any pleading, unless otherwise directed by the Court or a judge.

It is apparently submitted that it is a fair inference from said rule 965 that the time of the vacations in any year should be reckoned in the computation of the six weeks referred to in

FISHER, J. (In Chambers)

1933

Sept. 13.

STANDARD EQUIPMENT LTD. v. PREST-O-LITE BATTERY CO. LTD.

rule 436 as aforesaid. With reference to the said rule 965, however, it might be noted that almost the same expression, *viz.*, "the time appointed by these Rules, . . . , for doing any act or taking any proceeding," is used in Order LXIV., r. 7 (marginal rule 967), and yet in *Saunders* v. *Pawley* (1885), 14 Q.B.D. 234 it was

Held, that the period of six weeks mentioned in Order XXXVI., r. 12, is not a time appointed for doing any act or taking any proceeding within Order LXIV., r. 7, and consequently that the Court could not make an order giving the defendant leave to give notice of trial, if the plaintiff did not give such notice within a shorter period than six weeks from the close of the pleadings.

In the *Saunders* case at pp. 238-9, Lopes, J. says in part as follows:

We are asked to apply the provisions of Order XXXVI., r. 12, although the period of six weeks mentioned by that Order has not expired. It is to be observed with regard to the Order that no time is therein specified within which the plaintiff is bound to give notice of trial; it is left entirely to his option to give it when he thinks fit, subject, however, to this, *viz.*, that on his not giving it within six weeks, or such extended time as the Court or a judge may allow, the defendant may give notice of trial or apply to dismiss the action. The period of six weeks so mentioned not having expired, reliance is placed on Order LXIV., r. 7, as enabling us to abridge that time. I do not think that this case is within that rule. With regard to certain matters provided for by the rules, certain times are specified within which they must be done; for example, times are specified within which an appearance must be entered, a statement of claim or defence must be delivered, and interrogatories must be answered. I think the rule was intended to apply to cases of that kind, and that in such cases there is a time appointed within its meaning. I do not think that it was intended to apply to cases within Order XXXVI., r. 12, or to enable us to accelerate a remedy or an indulgence given to the defendant upon a certain express condition, *viz.*, default made by the plaintiff for a certain period of time.

Judgment

I do not think therefore that the inference suggested by counsel as aforesaid can be drawn from said rule 965 but the said rule 436 must of course be read along with the other rules, including rule 948, which provides for certain vacations to be observed in the Supreme Court and offices thereof. It would appear that said rule 948 has been interpreted in the registry office at Vancouver as preventing the entry of trials during vacation and I must say that this seems to me to be a reasonable interpretation of the rule as it is apparent that entry of trials is not one of the matters mentioned in the subsections of said rule as unaffected by vacations. I have not overlooked the fact

that in the Annual Practice, 1933, at p. 619 there is a note to the effect that notice of trial may be given and actions entered in vacation but no authority is given and in any event it must be noted that our rule 948 is somewhat different from the English rule. It may also be noted that our rule 436 as above set out apparently provides that the time mentioned may be extended and I incline to the view that a summons to extend the time could not be issued during the long vacation unless by special leave—see Annual Practice, 1933, p. 1348. I think the intention of our rule as to vacations is that the progress of the action should be suspended with respect to the notice or entry of trial by reason of the vacations. *Prima facie* it lies with the plaintiff to give notice of trial subject to the said rule 436 by which the defendant is given an exceptional power which depends upon such rule. My conclusion on the whole matter is that the time mentioned in such rule did not run against the plaintiff during vacation and consequently he had not lost his right to give notice of trial. The defendant's entry should therefore be vacated as its right to give notice of trial had not arisen. Order accordingly. No costs.

Order accordingly.

COURT OF APPEAL

1933

Oct. 24.

REX v. MAH QUON NON.

Criminal law—The Opium and Narcotic Drug Act, 1929—Sale of opium—Defence—Agent of purchaser—Receiving no profit—Can. Stats. 1929, Cap. 49.

REX v. MAH QUON NON

On a charge of selling opium the accused raised as a defence that a stool-pigeon ingratiated himself with him and, after obtaining his confidence, introduced him to a police detective, then at the request of the stool-pigeon and later at the request of the detective the accused got in touch with a certain Chinaman named by them as a person from whom opium could be bought, and with money received from the officer paid it over to the real vendor for a tin of opium which he gave the detective without profit to himself, claiming that he merely acted as agent for the detective in the purchase of the drug. The accused was convicted.

Held, on appeal, that the conviction should be sustained.

Rex v. *Berdino* (1924), 34 B.C. 142 followed.

APPEAL by accused from his conviction on a charge of selling opium. One Halliday, a stool-pigeon, ingratiated himself with the accused for three or four weeks. He then brought up the subject of opium and asked accused if he could locate one Wong Loo, from whom he intimated they might buy opium. On the 19th of April, 1933, a police detective with Halliday went into a store on Georgia Street East, where accused worked with his uncle, and Halliday introduced the detective to accused, telling accused this was a friend of his who wanted some opium. On the next night (Thursday the 20th) the detective again went to the store and seeing accused asked him if he could get him a tin of opium. The accused replied "No, but on Saturday maybe." Later the same evening the detective handed accused $100 in bills. On Friday night he saw the accused again who said "Everything all right, come back on Saturday night at nine." The detective went back on Saturday night to the store and accused then took him for a drive in his car. After driving back and forth for some time the accused turned up a lane where he stopped and told the detective to get out. When the detective got out accused started his car and then said "It is on the ground." The detective looked about and picked up a paper parcel containing a tin of opium. As he was picking it up

Statement

another policeman jumped on the running-board of the car and arrested accused. Accused claimed he merely acted as agent for the detective and gave the money to the real seller without profiting on the transaction himself.

The appeal was argued at Vancouver on the 24th of October, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS, MACDONALD and MCQUARRIE, JJ.A.

Nicholson (*D. Murphy,* with him), for appellant: This man did not sell opium, he merely assisted Macfarlane in getting it. He had no interest in the opium whatever. He made nothing on the transaction and the real seller was another Chinaman. The words of the detective were "I asked him if he could get me a tin of opium": see *Rex* v. *Bogeotas* (1912), 18 B.C. 123; *Rex* v. *Burke* (1925), 35 B.C. 453. The case of *Rex* v. *Berdino* (1924), 34 B.C. 142 is distinguished in the *Burke* case. See also *Rex* v. *Donihee* (1921), 36 Can. C.C. 293 at p. 294; *Pasquier* v. *Neale* (1902), 2 K.B. 287. Argument

Maitland, K.C. (*Des Brisay,* with him), for the Crown: *Rex* v. *Berdino* (1924), 34 B.C. 142 should be followed in this case, as it is impossible to say that there is no evidence to support the view which the magistrate took. He is at least a person who aided and abetted, even if he did not actually sell the opium.

Nicholson, replied.

MACDONALD, C.J.B.C.: I think the conviction was well founded. The statute, of course, is broader than mere selling. The offence is committed if the party aids and abets in the transaction. While he did not aid and abet the purchaser he did aid and abet the seller who, for the purpose of this appeal, must be regarded as one Loo. He aided him in the transaction. He aided him in the delivery of the goods to the purchaser.

MACDONALD, C.J.B.C.

It is perfectly clear to me, had it not been for his intervention the transaction would never have taken place at all. It was through his intervention it took place, and therefore he is within the terms of the statute which makes the aider or abettor guilty of the offence charged in the indictment.

I think it is a case where we must sustain the conviction.

I therefore dismiss the appeal.

COURT OF APPEAL

1933

Oct. 24.

REX v. MAH QUON NON

MARTIN, J.A.

MCPHILLIPS, J.A.

MARTIN, J.A.: The case comes within our decision in *Rex* v. *Berdino,* 34 B.C. 142; (1924) 3 W.W.R. 198, which is a case not so strong in favour of conviction as this is, yet wherein the majority of the Court, pursuant to the judgment which I delivered therein had no difficulty in arriving at the conclusion that, as the Lord Chief Justice said in *Pasquier* v. *Neale* (1902), 2 K.B. 287 at 290; 71 L.J., K.B. 835:

> It is impossible to say that there was no evidence to support the view which the magistrate took.

This case, indeed, is singularly clear because counsel for the defendant, now before us on this appeal, himself stated below:

> In this case, your Honour, the defence is short and not at all complicated. Our submission is that the accused, even on the evidence of the Crown, has not been proven to have sold any opium, but rather that he assisted a Mounted Police Constable, Constable Macfarlane, to purchase opium from another party.

That is quite a bold defence. All that was necessary for the learned judge to do was to find, as was found, on the evidence before him, that there was nothing to support that submission made. Had the case ended by no evidence being called for the defence, nobody, I feel sure, would have come before us to suggest that we could have interfered with his judgment. The addition to the evidence before the learned judge, supplied by the testimony of the accused and his witnesses, would serve only to make us believe that the learned judge, in his conclusion, found that the account given by the defendant and his witnesses fortified him in his view that there was more than abundant evidence that the third party, that is to say the vendor, the undisclosed vendor, was nothing but a myth, and the most charitable way to look at it is that the appellant was at least a joint vendor with an undisclosed person, if it is necessary to go that far.

But I have no doubt the learned judge found that he was the vendor himself and therefore must be convicted of the offence charged against him, and so the appeal fails.

MCPHILLIPS, J.A.: In my opinion the appeal must be dismissed. There is no doubt if you are to analyze the matter as a mere buying and selling in the ordinary course of business, the atmosphere would be very different, but we have to consider

this in the light of the policy of the law as being very severe with respect to trading and dealing with these very terrible drugs such as opium, and this runs through the whole matter—could this sale ever have been carried out had not this young man been influenced by—it is true—an officer of the police, so that he was enabled to ingratiate himself with this young man and get his confidence, and there is no doubt about it, lured him into the position in which today he finds himself? I cannot say that I look upon that class of espionage and proving of crime with a great deal of favour, but I suppose, if there ever is a right to do it, it is in this very terrible traffic in these very deleterious drugs. Therefore, I find myself in this position in regard to this case—that it is peculiar to this dealing in opium, and the policy of the law is that it should be destroyed, and this young man was one of the agencies carrying on the traffic. There is great dexterity and ingenuity exercised in the infamous traffic of those who persist and continue to engage in this class of crime. It is a large traffic, a deleterious traffic, and one inimical to the health and mentality of our people, and the policy of the law is that it shall be destroyed, and when we consider this, even if he were not the principal, which I am inclined to believe he was—I am not disagreeing with the learned judge's view—he certainly was the instrument, and made possible the transaction. The truth of the matter is that it was by and through his agency that it was possible to transfer this opium from one to another, and he plainly transgressed the law.

MCPHILLIPS, J.A.

I would not disturb the judgment of the Court below, that is, I would sustain the conviction.

MACDONALD, J.A.: I think there was sufficient evidence to enable the trial judge to find that the accused either solely or jointly was the vendor of the opium sold.

MACDONALD, J.A.

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

MCQUARRIE, J.A.

Appeal dismissed.

FISHER, J.

1933

Oct. 27.

W.—— v. W.—— AND M.——

Divorce—Evidence of Adultery—Inference from facts proven—Connivance —Suspicions aroused—Watching for evidence.

W. v. W. AND M.

It is not necessary to prove the direct act of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion. To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend upon its own particular circumstances.

Where a husband, suspecting that his wife is guilty of adultery, hires a room in the hotel where the co-respondent is staying and employs others to watch co-respondent's room, without interfering, for the purpose of obtaining proof of her guilt, in an action for dissolution of marriage:—

Held, that these facts do not establish connivance.

Davis v. *Davis and Hughes* (1904), 2 C.L.R. 178, applied.

Statement

PETITION for divorce by W. (husband) and for the custody of his children. The facts are set out in the reasons for judgment. Heard by FISHER, J. at Vancouver on the 19th of October, 1933.

Macrae, K.C., and *Clyne*, for petitioner.

A. Alexander, for respondent.

Bray, for co-respondent.

27th October, 1933.

Judgment

FISHER, J.: In this matter the first issue to be decided is, whether or not the respondent committed adultery with the co-respondent on the 29th day of May, 1933, as alleged in the petition herein. Counsel for the petitioner has referred to the case of *Allen* v. *Allen* (1894), P. 248 where, at pp. 251-2, Lopes, L.J., delivering the judgment of the Court, said in part as follows:

It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because, to use the words of Sir William Scott in *Loveden* v. *Loveden* [(1810)], 2 Hagg. Cons. 1, at p. 2—"if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a neces-

sary conclusion; and, unless this were the case, and unless this were so held, no protection whatever could be given to marital rights." To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery, is impossible. Each case must depend on its own particular circumstances.

Upon the evidence before me in the present case I have no hesitation in saying that the circumstances here are not capable of any other reasonable solution than that of the guilt of the parties. As stated in the passage cited, in every case almost the fact of adultery is inferred from circumstances which lead to it by fair inference as a necessary conclusion. In the case before me the circumstances lead to the fact of adultery by fair inference as a necessary conclusion. I find, therefore, that the petitioner has satisfied the burden of proof which is on him to prove adultery as alleged.

Counsel on behalf of the respondent and co-respondent contend, however, that the finding of adultery does not conclude the matter. It is strenuously submitted that in any event the petitioner has connived at the adultery.

In the present case it would appear from the evidence that the petitioner, on the 29th day of May, 1933, had had a certain hotel room, in which the respondent and co-respondent were supposed to be, secretly watched for several hours. During part of the time he himself was present but did not interfere at any time, the room being watched, apparently, for the purpose of obtaining proof of guilt. Under these circumstances it is contended that the petitioner was guilty of connivance.

Judgment

Counsel on behalf of the respondent and the co-respondent rely upon *Gipps* v. *Gipps* (1864), 33 L.J., P. & M. 161 and *Allen* v. *Allen* (1859), 30 L.J., P. & M. 2. On the other hand, counsel on behalf of the petitioner relies especially upon *Davis* v. *Davis and Hughes* (1904), 2 C.L.R. 178, and as the two cases *Gipps* v. *Gipps,* and *Allen* v. *Allen* (1859), 30 L.J., P. & M. 2, are considered in such case, it might be as well to set out here a considerable portion of the judgment of the Court in the *Davis* case reading, in part, as follows (pp. 182-4):

Now in this case the husband suspected the fact of adultery, and watched to obtain evidence for the purpose of proving it. The learned judges of the Supreme Court thought that this amounted to connivance. I will state what we conceive to be the law as to connivance. As far as we know, there is no conflict of opinion on this point to be found in the books. The

FISHER, J.

1933

Oct. 27.

W. v. W. AND M.

matrimonial law is derived from the Canon Law. The first case cited to us was *Phillips* v. *Phillips* [(1844)], 1 Rob. Eccl. 144, in which Dr. Lushington stated the principles of law governing the power of the Divorce Court as to connivance. The same case was relied on by the Supreme Court of New South Wales in the case of *Linscott* v. *Linscott*, 18 N.S.W.L.R. Div. 12. In that case delay in instituting the suit was held not to be evidence of connivance, and the learned Chief Justice in his judgment referred to the case of *Phillips* v. *Phillips*, and quoted some passages, which I will also read as applying to the facts of this case, though the application is not quite the same. Dr. Lushington says (1 Rob. Eccl. at p. 157): "The first case to which I refer is that of *Rogers* v. *Rogers* [(1830)], 3 Hagg. Ecc. 57, in which Sir John Nicholl says: 'Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief, on account of the adultery which he has allowed to take place. *Volenti non fit injuria* is the principle on which the rule has been founded.' I apprehend that the meaning of this maxim is, that there must be *consent*—the party must be acquiescing in (it matters not whether actively or passively), and cognizant of the adulterous intercourse of his wife. That consent must be proved, either by direct evidence or by necessary consequence from his conduct. Sir John Nicholl refers to several cases. 'In these cases,' he says, 'it was held not to be necessary that any active steps should be taken on the part of the husband to corrupt the wife—to induce and encourage her to commit the criminal act. Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention, and in the expectation that she would be guilty of the crime'—(with the intention)—'but, on the other hand, it has always been held that there must be a consent. The injury must be *volenti*'—(nothing can be stronger than these words; and the learned judge having stated what connivance is, proceeds to shew what it is not). 'It must be something more than mere negligence—than mere inattention—than over-confidence—than dullness of apprehension—than mere indifference—it must be intentional connivance, in order to amount to a bar.' . . . 'If the facts are equivocal, the presumption is in favour of the absence of intention.'" Dr. Lushington then referred to the case of *Timmings* v. *Timmings* [(1792)], 3 Hagg. Ecc. 76, which was also referred to by the Supreme Court, as having been disapproved of in *Gipps* v. *Gipps* [(1864)], 33 L.J., P. & M. 161. An examination of the latter case, however, shews that the supposed disapproval was due to a misapprehension of the language of Lord Stowell. In the case of *Timmings* v. *Timmings* [(1792)], 3 Hagg. Ecc. 76, at p. 81, Lord Stowell is reported to have said: True it is, that a husband is not barred by a mere permission of opportunity for adultery; nor is it every degree of inattention on his part which will deprive him of relief; but it is one thing to permit and another to invite; he is perfectly at liberty to let the licentiousness of the wife have its full scope; but that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think amounts to legal prostitution. The analogy, as to theft, in the passage cited from Sanchez shews this doctrine." The words misapprehended are "he is perfectly at liberty to let the licentiousness of his wife take its full scope." Immediately after the passage just quoted Lord Stowell referred

Judgment

to Sanchez. It will be convenient here to read the passage on which he relied. Sanchez was a great writer on the Canon Law, and probably the generally accepted view taken of connivance is derived from his work "De Matrimonio." The passage is in lib. 10 disp. 12, No. 52,—I shall read it in English—"It is lawful for a man who suspects his wife of adultery to watch her with proper witnesses so as to be able to convict her of adultery, first because that is not conniving at the offence but taking advantage of her wickedness for his own advantage; secondly, because it is one thing to invite, advise, or enjoin the commission of a wrong thing, which is never lawful, and another to allow, or abstain from removing the opportunity for wrong-doing, which is sometimes permissible for the sake of some greater good. . . . For instance, parents or masters of a household do no wrong in abstaining from removing some opportunity for theft from their children or dependants, when they know that they are addicted to it, in order that they may by such means be caught in the theft and recalled to rectitude." The analogy put by Sanchez shews that he did not think it connivance to watch for the purpose of discovering the existence of a suspected fact, and it is manifestly in that sense that Lord Stowell used the words that a man may let the licentiousness of his wife take its full scope, that is to say, if he suspects her, for the purpose of convicting her.

In the *Davis* case the head-note reads as follows:

A wife, without just cause, left her husband's house, and refused to return to it, or to allow him to live with her. Having reason to suspect her of adultery with a certain man, the husband, for the purpose of obtaining proof of her guilt, secretly watched the house in which she lived. On one occasion he saw the man whom he suspected enter the house in the evening and leave at an early hour of the following morning, and, on another occasion, saw the pair in the act of adultery. He did not interfere on either occasion.

Held, in a suit by the husband for dissolution of marriage on the ground of adultery, that these facts did not establish connivance.

Judgment

If I understand the submission on behalf of counsel on behalf of the respondent and co-respondent they do not contend that the Court did not state correctly in the *Davis* case the principle to be applied. The submission seems to be that the *Davis* case is distinguishable on the ground that in such case the husband suspected the fact of adultery whereas in the present case it is contended that the husband did not suspect such fact and had no reason to do so. On this phase of the matter I must say that it is quite apparent from the evidence that the suspicions of the petitioner had been aroused some time before the particular incident of the 29th of May, 1933. The petitioner says that his wife, who had been living in Victoria while he was living in Vancouver, had introduced him to the co-respondent in Victoria. He admits that during the time that his wife lived in

FISHER, J.

1933

Oct. 27.

W.
v.
W. AND M.

Victoria "he never heard of anything definite" but says that the second day after his wife came in January, 1933, from Victoria, to live with him in Vancouver, his wife told him, in answer to his questioning, that she had been out with the co-respondent that afternoon. I accept the evidence of the petitioner that from that time he continually objected to her going out with the co-respondent or having him come to the house. The petitioner says that he "had suspicions of her actions," that he had "warned her dozens of times." In another part of his evidence the petitioner says as follows:

> My suspicions generally were aroused and they had been aroused for months and I kept on warning her, but when I found that he was in town on Sunday afternoon I was going to find out what she was going to do the next day. . . .

I think a fair inference from all the evidence is that before the said 29th day of May, 1933, the petitioner suspected the respondent of adultery and that he had reason for his suspicions, though up to that time he certainly did not know and could not prove, that the respondent had been guilty of adultery. Obviously it cannot be reasonably argued that he was guilty of connivance before the said 29th day of May, 1933, or the Sunday before, referred to in his evidence. Undoubtedly up to that time the petitioner had done his utmost to prevent any improper conduct on the part of his wife. I come now therefore to consider the period thereafter. I think the authorities referred to shew that, though passive acquiescence would be sufficient to bar the husband, it must appear to "be done with the intention and in the expectation" that the wife would be guilty of the crime. After careful consideration of the previous conduct of the petitioner in the present case, I cannot come to the conclusion that he suddenly changed from being a husband doing his utmost to prevent adultery on the part of his wife to one intending as well as expecting that she would be guilty of it. His suspicions having been aroused, as he says, I think the said authorities make it clear that he was entitled under all the circumstances to watch or have others watch his wife without interfering for the purpose of obtaining proof of her guilt. I therefore find that the facts here do not establish connivance. I have also to say that, though the conduct on the part of the

Judgment

petitioner, on or about the 27th day of April, 1933, was inexcusable, I cannot find that he has been guilty of such cruelty to the respondent or of any other misconduct as would justify me in refusing a decree.

There will therefore be a decree absolute dissolving the marriage between the petitioner and the respondent by reason of the adultery of the respondent with the co-respondent since the said marriage.

As to the custody of the children, I make no order at present with respect to the eldest child. The petitioner will have the custody of the other two children with reasonable access allowed to the respondent who will also have liberty to apply.

As to costs, I would take the liberty of referring to my own judgment in the case of *Bourgoin* v. *Bourgoin* (1930), 42 B.C. 349 and the order I make here is that the respondent will have her costs as against the petitioner to be taxed as between party and party on the usual scale and that the petitioner will have his costs against the co-respondent including those which he has to pay the respondent.

Petition granted.

REX v. JONES. REX v. ANDERSON.

Criminal law—Conviction for robbery with violence—Appeal—Reasonableness of verdict—Circumstantial evidence—Inferences.

The accused were convicted for robbery with violence. In the afternoon of November 25th, 1932, one Howard of the Ross & Howard Iron Works in Vancouver took $2,288 from a branch of the Royal Bank to the company's office where he handed the money to the book-keeper, who distributed the money for the fortnightly pay-roll in envelopes and put them in a box for payment at 5 o'clock in the afternoon. With the exception of the two and one dollar bills, the money was all in Royal Bank bills, varying from $50 to $5. At about 4.50 p.m., as Howard entered the office, he was followed by a masked man who held up the office staff with a revolver. Howard attempted to grapple with him and he was immediately shot. The masked man then seized the box containing the money and went out the door where another masked man was holding back the workmen with a revolver. They both escaped in an automobile. Both accused were on relief shortly before the hold-up. Anderson was positively identified by Howard and one of the clerks in the office. He had $15 when arrested and he

COURT OF APPEAL

1933

Oct. 3.

REX v. JONES.

REX v. ANDERSON

had purchased a new overcoat for $15 just after the hold-up. Jones was not identified at the hold-up but four days after he purchased a car for $250 which was paid for by Royal Bank bills, and some days later on his house being searched $578 was found in his wife's purse, all the bills of $5 or over being Royal Bank bills, and one $20 bill had the figures "38" in pencil mark on it which was recognized by a clerk in the Royal Bank as written by him, and that bill was included in the pay-roll given to Howard on the afternoon of the 25th of November. There was evidence that Anderson had associated with Jones for over one year prior to the hold-up and neither of them had been in employment for some time.

Held, on appeal, affirming the decision of MCDONALD, J., that the true inferences from these facts and circumstances are to be drawn by the jury. The jury were justified in finding on the evidence that both accused were guilty but the life sentence imposed should be reduced to twelve years for each of them.

APPEAL by defendants from their conviction on the 12th of April, 1933, for robbery with violence. The office of Messrs. Ross & Howard at their foundry at the foot of Woodland Drive in Vancouver was held up by two men at about five o'clock on the afternoon of the 25th of November, 1932. The men took $1,684 of a fortnightly pay-roll, consisting of bills from $50 to $1, all the larger ones being bills of the Royal Bank of Canada. In the course of the hold-up Howard was shot by one of the men. Anderson and Jones were seen together a number of times before the hold-up and both were on relief. Anderson was identified by an employee who was in the office at the time of the hold-up. Shortly after the 25th of November, Anderson had new clothes, including overcoat and $15 in his pocket, and a few days after the hold-up Jones bought a car from one Ellison for $250, paying for it in Royal Bank bills, and in registering the transfer he called himself Burton. At the time he was arrested and on giving his address two officers called at the address with a search warrant and found $578 in Mrs. Jones's purse, all the bills except the one and two dollar bills being Royal Bank of Canada bills, and one of these bills (a $20 bill) had the figures "38" in pencil which a clerk in the bank identified as one of the bills included in the pay-roll that was given to Messrs. Ross & Howard on the morning of the 25th of November. Both men were found guilty by a jury and sentenced to imprisonment for life.

Statement

The appeal was argued at Victoria on the 19th and 20th of June, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Wismer, for appellants: To justify the Crown putting the case to the jury they must prove the money that Jones had was stolen. They only identify one bill and that was in his wife's purse. They must prove the money was stolen: see *Rex* v. *Lewis* (1910), 4 Cr. App. R. 96; *Rex* v. *Pritchard* (1913), 9 Cr. App. R. 210. There was misdirection as the learned judge took away from the jury their function of deciding on the facts as to the money. The evidence was equally consistent with innocence as with guilt and a *prima facie* case is not established: see *Harries* v. *Thomas* (1917), 86 L.J., K.B. 812; *Rex* v. *Swityk* (1925), 43 Can. C.C. 245. The judge must not decide matters that the jury should decide: see *Rex* v. *Collins* (1907), 12 Can. C.C. 402. The statements of accused given in evidence were not "free and voluntary" and should have been rejected: see *Sankey* v. *The King* (1927), S.C.R. 436 at p. 441; *Regina* v. *Bates* (1860), 2 F. & F. 317; Tremeear's Criminal Code, 4th Ed., 1277. The learned trial judge did not put the defence to the jury. There is no evidence upon which a jury could reasonably find Anderson guilty. The man who took the money wore a mask and the only witness who swore to his identity on the trial did not identify him on a previous line-up.

Argument

O'Brian, K.C., for respondent: If the jury could reasonably find as they did on the evidence, the verdict will not be disturbed: see *Rex* v. *Jenkins* (1908), 14 B.C. 61; *Reg.* v. *Langmead* (1864), 9 Cox, C.C. 464; *Rex* v. *Ferrier* (1932), 46 B.C. 136; *Rex* v. *Berger* (1915), 31 T.L.R. 159; Archbold's Criminal Practice, 28th Ed., 556. The statement to the officer was given freely and voluntarily: see *Rex* v. *Bellos* (1927), S.C.R. 258; *Sankey* v. *The King* (1927), S.C.R. 436; *Rex* v. *O'Neil* (1916), 25 Can. C.C. 323 at p. 332. The charge was sufficiently full and given without injustice to the accused: see *Melyniuk & Humeniuk* v. *The King* (1930), 58 Can. C.C. 106; *Rex* v. *McKenzie* (1932), *ib.* 106 at p. 117; *Rex* v. *West*

COURT OF APPEAL

1933

Oct. 3.

REX v. JONES.

REX v. ANDERSON

(1925), 44 Can. C.C. 109 at p. 112; *Rex* v. *Baugh* (1917), 28 Can. C.C. 146.

Wismer, in reply: That the statement by accused is inadmissible see *Rex* v. *De Mesquito* (1915), 21 B.C. 524. The sentence is too severe: see *Rex* v. *Zimmerman* (1925), 37 B.C. 277; *Rex* v. *Lim Gim* (1928), 39 B.C. 457; *Rex* v. *Petch* (1925), 45 Can. C.C. 49; *Rex* v. *Chow Ben* (1925), 36 B.C. 319.

Cur. adv. vult.

3rd October, 1933.

MACDONALD, C.J.B.C.: These appellants appeal from conviction and from sentence. They were tried together though charged separately. Both appellants complain of the improper admission of evidence and the improper exclusion of evidence and that the charge of the judge to the jury was defective and wrong in that the judge did not sufficiently explain the appellants' defence to the jury. These complaints are, in my opinion, not well founded and if well founded to any extent brought about no miscarriage of justice. This leaves the question of proof of the Crown case for consideration. The evidence against Jones to a large extent is circumstantial; that against Anderson is partly direct and partly circumstantial and with regard to the Anderson appeal, I am satisfied that the jury had sufficient evidence before them to support the conviction. The only thing that requires consideration is the evidence against Jones. Perhaps the strongest piece of evidence against him is his own question to the police constables who had prior thereto, namely on the 1st of December, 1932, given him the customary warning as to statements made by him to them. On the 7th of December these constables Petit and Hann visited him at his request in the gaol. Jones wanted his bail reduced. Petit in evidence said:

MACDONALD, C.J.B.C.

> I warned him that he was charged with a very serious offence, attempted murder, and robbery with violence, of James Howard at the Ross & Howard Iron Works. He then said, "How is Mr. Howard?" I said, "He is improving." He said, "Do you think I will get any more than seven years for this?"

The answer was "I don't know." No questions were asked to induce the appellant to ask the question stated above and no

objection was taken to what has just been quoted. In fact, in my opinion, no objection would have been pertinent.

Ross and Howard had procured from the Royal Bank of Canada a list of the denominations required for their pay-roll of $2,288, which was taken to the firm's office by Mr. Howard and handed to his book-keeper who proceeded to apportion it to the men's wages. The robbery was effected on the 25th of November, 1932, in the afternoon and in the firm's office. The bills received from the bank were of these denominations: eight $50 bills; fifty-eight $20 bills; thirty-three $10 bills; fifty-two $5 bills; forty-six $2 bills; twenty $1 bills and a small amount of silver, all the bills being the issue of the said bank including one $20 bill marked by the teller with the figure 38, being the number of bills of that denomination loose in his till when he paid out the money to Howard. The book-keeper had appropriated these moneys to the different amounts due for wages and put each man's wage in a separate envelope and put the whole in a box on her desk. Some of these envelopes had been handed out to workmen before the robbery, amounting, I think, to about $500. Appellant Anderson followed Mr. Howard through the back door of the office into the office, sprang up two or three steps of the stairway and shouted "Stick 'em up," and then shot Howard down, seized the box containing the money and fled. Jones remained outside on guard and waved back with a revolver persons who might interfere. He was not clearly identified by any witness.

On a later day police having observed a man sitting in a motor-car in front of the Court House questioned him. He gave his name as Reginald Burton but was in fact Jones. He had bought on that day an automobile from one Ellison and he and Ellison had gone to the Court House to obtain a transfer of the automobile to Jones. Jones had not gone into the transfer office. He sat in the car and when the police questioned him he gave the false name of Reginald Burton. He had given Ellison a $20 Royal Bank of Canada bill with which to pay for his licence and transfer. He also paid Ellison $250, the price of the car, in Royal Bank of Canada bills. He had on the same date, 29th of November, bought an overcoat for $15, giving the tailor a $20 Royal Bank of Canada bill and representing him-

COURT OF APPEAL

1933

Oct. 3.

REX v. JONES.

REX v. ANDERSON

MACDONALD, C.J.B.C.

self as Bass. With these particulars before them the police obtained a search warrant to search his house which they did that evening. They found there in his wife's hand-bag or purse a large sum of money ($502.68), consisting of the following denominations of the said bank: five $50 bills; eight $20 bills; eleven $10 bills and nine $5 bills, and some small change. Included in these was the bill with the figure 38 upon it. I may here state that the cashier who is supposed to have put these figures on the bill while he would not say positively that they were his figures said they looked like his figures. When an expert in handwriting was called he positively stated that, in his opinion, they were in the handwriting of the said teller. No witness was called in answer. Jones did not go into the transfer office while the transfer was being made by Ellison but the document was brought out by Ellison and signed by Jones in the car. There are some suspicious suggestions concerning the conduct of Jones, which I need not detail. They are of lesser importance but those to which I have referred are more than suspicions. They are, I think, sufficient to enable the jury to draw an inference of fact which they did draw. The circumstances which I have related are not merely consistent with guilt, they are inconsistent with innocence. To be effective as inconsistent with innocence they must be so on the whole evidence. It is not enough to say as counsel said in this case that this bill marked 38 might have been amongst the wages paid out that day or that it might have been marked at some other time by the teller and have been in circulation and obtained by Jones or his wife innocently. That he had bought a car is in the same category; also the overcoat. The question is —looking at these circumstances reasonably can it be said that they are inconsistent with guilt or in other words only consistent with innocence? The true inference to be drawn from these facts and circumstances were to be drawn by the jury and in my opinion the jury have made no mistake.

There is another circumstance which, while by no means conclusive, might be taken into consideration by the jury, namely, that his father-in-law had some time previous to this worked for Ross & Howard and knew their habit of paying their men on certain days, which would enable the appellants

in this case to fix upon the time that the money to meet the pay-roll was in the office.

With regard to Anderson I may say this that in addition to his identification by Howard and by Dunn who each positively identified him as the person who fired the shot, it is true that he had a handkerchief partly over his face leaving only his nose and eyes clearly visible, but identification does not depend entirely upon the recognition of a face. The whole appearance of the accused is as important as the face and when we find two witnesses although perhaps interested, but yet men of standing and position in the community in which they live, saying positively "That is the man," and when we find him paying out Royal Bank of Canada bills for a suit of clothes and that he had associated with Jones for a year or so before the robbery, as more than one witness has sworn, although only casually apparently, I can find no fault with the jury's verdict with regard to him. I think, that neither verdict should be interfered with.

I may further observe that the evidence shews by a statement made by Jones to the police that he was on city relief up to about a month before the robbery and it also appears, although not quite satisfactorily, that Anderson's brother Phillip who with Anderson lived at home with their mother and another brother, obtained relief in the name of the appellant Anderson shortly prior to the robbery. It is therefore most improbable that these men should have had the money which they had in their possession as above set out. Neither of them had been in employment for some time before the robbery. Their appeal from conviction should be dismissed.

They also appeal from their sentences. The learned judge imposed a sentence on each of imprisonment for life. While the robbery was a violent and brutal one yet I think the sentence of imprisonment for life ought to be reduced. The appellants are young men and no opportunity to reform and to become good citizens is possible under such a sentence. Lashes may be imposed for the crime of which they were convicted and, in my opinion, men who commit crimes of this sort dread the lash more than imprisonment. It is a more potent deterrent to those who may feel inclined to commit like crimes than a mere term

COURT OF APPEAL

1933

Oct. 3.

REX v. JONES

REX v. ANDERSON

of imprisonment and in these times of brutal crimes it is necessary that the Court should be firm in meting out punishment. I would, therefore, reduce each sentence to imprisonment for fifteen years and with ten strokes of the lash to each of them in addition.

With this variation the appeal from sentence is dismissed.

MARTIN and MCPHILLIPS, JJ.A. agreed in the conclusion arrived at by MACDONALD, J.A.

MACDONALD, J.A.: I am confirmed in the view I formed at the hearing that these appeals should be dismissed. The discovery in the home of the accused Jones of a Royal Bank bill with the figures "38" upon it placed there by the teller (even although found in his wife's purse) without explanation taken in conjunction with other incriminating evidence justified the jury in convicting. I think also that the evidence of identification of Anderson was sufficient.

Objection was taken on behalf of Jones to the admission of a statement to a police officer. He went with another officer to the gaol as a result of information that Jones wanted to see him. At the opening of the interview, to quote the officer,

> A general conversation started, and then the accused Jones wanted to know about bail being reduced. I warned him that he was charged with a very serious offence, attempted murder, and robbery with violence, of James Howard at the Ross & Howard Iron Works. He then said, "How is Mr. Howard?" I said, "He is improving." He said, "Do you think I will get any more than seven years for this?"

MACDONALD, J.A.

The last sentence inferentially contains an admission of guilt. It was urged that the details of the preliminary conversation referred to ("a general conversation started") should have been elicited to establish that under cover of it threats were not made nor inducements held out. If that occurred it could not properly be described as a "general conversation." This introductory statement was made without objection and was accepted by Court, counsel and jury as a simple reference to observations introductory to the material conversation that followed and should not reasonably be otherwise interpreted. The objection should be overruled.

An appeal was taken against sentence. Life imprisonment was imposed. This sentence, with deference, should be reduced. I would impose 12 years in each case.

Appeal dismissed; sentence reduced.

WILLIS v. THE COCA COLA COMPANY OF CANADA LIMITED.

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

Negligence—Sale by manufacturer to retailer who sells to consumer—Coca cola—Caustic soda in bottle—Injury from drinking—Liability of manufacturer—Right of action—Duty of manufacturer to ultimate purchaser—Jury—Questions should be answered if possible.

The plaintiff drank part of a bottle of coca cola (a soft drink or beverage) manufactured by the defendant which his wife had bought from a retailer and brought to their home. The bottle contained a percentage of caustic soda from which the appellant suffered permanent internal injury. Used bottles were returned periodically by the retailer to the manufacturer, who first cleaned them with a solution of caustic soda and then with pure water before refilling them with coca cola. In an action for damages for negligence a jury found in favour of the defendant and the action was dismissed.

Held, on appeal, affirming the decision of MORRISON, C.J.S.C., on an equal division of the Court, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that the appeal should be dismissed, and *per* MARTIN and MCPHILLIPS, JJ.A. that a new trial should be ordered.

Per MACDONALD, C.J.B.C.: The fact was proved that there had been no tampering with the bottle and no chance of inspection which would disclose this defect from the time it was delivered to the distributor and its consumption by the plaintiff. The unwholesomeness of its contents was satisfactorily proved at the trial, clearly raising the presumption of negligence of the defendant and bringing the case within the maxim *res ipsa loquitur*. The presumption of negligence is rebuttable and applies only to the defendants and those for whose conduct and care they are responsible, they are not required to prove that it was a result of the malicious conduct of others. They have amply proved that they took due care to prevent a deleterious substance from entering or remaining in the bottle and the rebuttal is complete.

Per MACDONALD, J.A.: The plaintiff submitted that upon proof that the bottle contained caustic soda, that it was manufactured and prepared for consumption by defendant and that damage from drinking it ensued, it was incumbent on defendant to disprove negligence. With this I do not agree. The plaintiff, on establishing the relationship from which it follows that legal duty to take care exists must prove that the one so obligated did not take care. I find it impossible to say from the weight of evidence that the verdict of the jury is wrong, and the appeal should be dismissed.

Per MARTIN and MCPHILLIPS, JJ.A.: There should be a new trial because the plaintiff was prejudiced in the fair trial of the action by the charge of the learned trial judge, within the principle of *Lucas* v. *Ministerial*

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

Union (1916), 23 B.C. 257 and *Morton* v. *Vancouver General Hospital* (1923), 31 B.C. 546; and also for misdirection, and non-direction amounting to misdirection, respecting the obligation imposed on defendant by the facts of the case to take special precautions in the use of a poisonous solution to wash the bottles in which its product was put and distributed for public consumption.

Per MCPHILLIPS, J.A.: The maxim *res ipsa loquitur* applied also.

Per curiam (MARTIN, MCPHILLIPS and MACDONALD, JJ.A.): Questions should be put to the jury in negligence cases as a general rule, and though it is within the discretion of the judge to dispense with them in a proper case, yet when they are put it is the duty of the jury to answer them if possible, and they should not be diverted from that duty by being told that they have the right to return a general verdict, which however they may properly do *ex mero motu*.

Per MACDONALD, C.J.B.C.: Questions are proper and of assistance in a certain class of cases, but the course adopted by the trial judge in telling the jury they may return a general verdict is not reviewable or contrary to law.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. and the verdict of a jury in an action for damages for injury and loss to the plaintiff due to the defendant's negligence in supplying a noxious solution in place of a wholesome beverage, and for breach of warranty in respect of same. On the 11th of March, 1933, the plaintiff's wife purchased a sealed bottle of coca cola from a retail grocer on 16th Avenue in Vancouver, said bottle having been supplied with others by the defendant company, duly sealed, from their manufactory of coca cola (a soft drink or beverage) at 898 Richards Street in said city. Upon the plaintiff's wife taking the bottle to her home the plaintiff opened it and drank a portion of the contents which was afterwards found by an analyst to contain among other ingredients a strong caustic and poisonous solution, namely caustic soda. The plaintiff in consequence suffered an acute toxic collapse, and has not recovered sufficiently to carry on his ordinary work. In addition, he suffers from a permanent injury caused by the destruction of the tissues of the alimentary tract by the caustic action of said solution. It was the custom for the retailers to collect used bottles and return them to the manufacturers who had all the bottles rinsed with a solution of caustic soda of a certain strength, after which they were carefully washed before being refilled with coca cola. The jury gave

Statement

a verdict in favour of the defendant and the action was dismissed.

The appeal was argued at Victoria on the 8th to the 13th of June, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: This is a motion for a new trial. We ask that the verdict be set aside on the grounds of misdirection and non-direction. The defence is a high-class system of cleaning bottles with extreme care. The bottle in question was traced back to the defendant. Every 60 hours the company used 175 pounds of caustic solution for cleansing. There is a legal duty to the ultimate purchaser to take reasonable care, and there was non-direction: see *Morton* v. *Vancouver General Hospital* (1923), 31 B.C. 546 at p. 562; *Donoghue* v. *Stevenson* [Snail case] (1932), A.C. 562; 101 L.J., P.C. 119. The learned judge said "If you conclude you cannot find how the caustic soda got in the bottle then you must find for the defendant." This is clearly misdirection. The caustic soda was in the bottle and traced to the defendant and the burden is then on the defendant to shew it was not its fault. The accident itself affords *prima facie* evidence of negligence: see Underhill on Torts, 12th Ed., 201; Taylor on Evidence, 12th Ed., Vol. I., p. 172, sec. 188; *Byrne* v. *Boadle* (1863), 2 H. & C. 722; *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596 at p. 600; *Crawford* v. *Upper* (1889), 16 A.R. 440 at p. 444. The burden is on the company to shew how the caustic soda got there and there was misdirection: see *Chaproniere* v. *Mason* (1905), 21 T.L.R. 633. *"Res ipsa loquitur"* applies: see *Pyne* v. *Canadian Pacific Railway Co.* (1919), 3 W.W.R. 125 at p. 126. The *onus* was shifted to the defendant: see *Vivian* v. *B.C. Electric Ry. Co.* (1930), 42 B.C. 423; *Pronek* v. *Winnipeg, Selkirk and Lake Winnipeg Ry. Co.* (1932), 3 W.W.R. 440 (1933), A.C. 61. The charge of the learned trial judge shuts the door to our contention that it was incumbent on the defendant to prove that it was not at fault. The poison in the bottle is sufficient to establish the applicability of the doctrine of *res ipsa loquitur.*

Argument

Locke, for respondent: On the evidence this man did not drink coca cola with caustic soda in it. Fraud is so easy to

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

carry through in such a case that the evidence must be scrutinized with the greatest care. He was examined for war allowance when it was found he had burning pains and he had to lay off work on account of his unhealthy condition before he drank from the coca cola bottle. As to the *onus* of proof, the case of *Chaproniere* v. *Mason* (1905), 21 T.L.R. 633 was never followed in England: see Beven on Negligence, 4th Ed., Vol. I., p. 43, foot-note (*f*); *Donoghue* v. *Stevenson* (1932), A.C. 562; 101 L.J., P.C. 119. The case of *Mullen* v. *Barr & Co.* (1929), S.C. 461 was overruled by the *Donoghue* case, *supra*. The maxim *res ipsa loquitur* does not apply: see *Gordon* v. *The Canadian Bank of Commerce* (1931), 44 B.C. 213; *McTaggart* v. *Powers* (1926), 36 Man. L.R. 73; Clerk & Lindsell on Torts, 8th Ed., 427. Even if the maxim does apply the plaintiff has waived this by giving particulars of negligence and tendering evidence seeking to shew how caustic soda got into the bottle.

Argument

There must be proof of facts that raises a legal presumption of negligence: Salmond on Torts, 7th Ed., 34; *Ballard* v. *North British Railway Co.* (1923), S.C. (H.L.) 43 at p. 54; *Shawinigan Carbide Co.* v. *Doucet* (1909), 42 S.C.R. 281. On the charge as a whole there was no misdirection: see *Cowans* v. *Marshall* (1897), 28 S.C.R. 161. As to the learned judge's directions in asking the jury to answer questions see *Howard* v. *B.C. Electric Ry. Co.* (1918), 3 W.W.R. 409; *Curry* v. *Sandwich, Etc., R.W. Co.* (1914), 7 O.W.N. 140; *McAuliffe* v. *Hubbell* (1930), 66 O.L.R. 349. The judgment of Lord Buckmaster in *Donoghue* v. *Stevenson* (1932), A.C. 562; 101 L.J., P.C. 119 is unanswerable and should be followed.

MacInnes, in reply: In *Chaproniere* v. *Mason* (1905), 21 T.L.R. 633, the presence of the stone in the bun was held to be *prima facie* evidence of negligence. Under section 60 of the Supreme Court Act we are entitled to have the case properly put to the jury.

Cur. adv. vult.

5th October, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: *Donoghue* v. *Stevenson* (1932), A.C. 562; 101 L.J., P.C. 119 as applicable to the duty of a manufacturer to his customer admirably states the view of the

majority of the House of Lords. The head-note reads as follows:

Under English and Scots law alike a manufacturer of products which he sells in such a form as to shew that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation and putting up of the products will result in injury to the consumer's life or property owes a duty to the consumer to take that reasonable care, and an action by the ultimate consumer will lie against the manufacturer.

And at p. 129 Lord Atkin said:

The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where everyone, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser, namely, by members of his family and his servants and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

MACDONALD, C.J.B.C.

In the case at Bar a bottle of coca cola was sent out by the manufacturer in a form which indicated it was to be opened only by the consumer and which contained caustic soda in quantities injurious to his health and from which he suffered by drinking from the bottle. The fact was proved that there had been no tampering with it and no chance of inspection which would disclose this defect, from the time it was delivered to the distributor and its consumption by the plaintiff. The unwholesomeness of its contents were satisfactorily proved at the trial, clearly raising the presumption of negligence of the defendant and bringing the case within the maxim *res ipsa loquitur* as defined in *Byrne* v. *Boadle* (1863), 2 H. & C. 722, followed in 1865 by *Scott* v. *London Dock Co.*, 34 L.J., Ex. 220 at p. 222, where the classic statement of the rule by Erle, C.J. is to be found. These cases have been followed ever since. The most recent examination of the doctrine is to be found in *Ellor* v. *Selfridge and Co., Ltd.* (1930), W.N. 45, where the rule was rather extended than contracted by Scrutton, L.J. and Romer, L.J.

In *Donoghue* v. *Stevenson, supra,* Lord Macmillan said that

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

the plaintiff must prove negligence which is quite true but the plaintiff did this *prima facie* when he proved facts which raised the presumption of negligence and cast upon the defendant the *onus* to rebut this presumption. Lord Macmillan also said that the maxim *res ipsa loquitur* had no application to the facts of that case which is also quite true for it must be noted that in that case it had no application because the question of negligence and the proof of damages were not an issue before their Lordships having been reserved for proof in the Courts below. Therefore, those issues were remitted in that case for trial as stated by Lord Thankerton at pp. 139-40 in these words:

> I am therefore of opinion that the appeal should be allowed and the case should be remitted for proof, as the pursuer did not ask for an issue.

See also Lord Macmillan at p. 148. The House of Lords were concerned only with the purely legal question of the manufacturer's duty to the consumer in a case of alleged tort. The implication of negligence in this case raised a rebuttable presumption and defendant sought to rebut it by shewing the conditions under which the bottle was filled and sent out. The question of negligence was fully tried in the present case and the evidence discloses, in my opinion, a complete rebuttal of the presumption. The presumption applies only to the defendant and those for whose conduct and care it is responsible. It was not required to prove that it was a result of malicious conduct of others. When it proved that it took due care to prevent a deleterious substance from entering or remaining in the bottle the rebuttal was complete if believed by the jury, and this, I think, it amply proved. Its machinery and mode of operations were of the most modern and best type generally in use and its servants and other operators skilful and efficient and no attempt was made by plaintiff to name any deficiency in the preparation of defendant's product or any act of negligence or want of care in the preparation and bottling and delivery to the distributor of the product of its well-equipped factory. The rebuttal was therefore complete and that is the effect of the verdict.

MACDONALD, C.J.B.C.

Some faults are alleged in the charge to the jury but the only branch of the case in which prejudice could be caused to the plaintiff would be in relation to the rebuttal. I find against him

only on the rebuttal and there is no fault in the charge in this respect. The appeal should therefore be dismissed.

I think I ought to say a word or two concerning a complaint made against this Court by the trial judge in his charge. He was, with deference, under an entire misapprehension in his criticism. Some *dicta* has fallen in the past from the lips of judges to the effect that in a certain class of cases answers to questions would assist the Court and that the absence of them made the decision more embarrassing than it would have been had there been answers to questions. These opinions were, I think, quite proper and inoffensive. They were *obiter* and there was no need of the trial judge taking any notice of them except through a courtesy. What has given offence, however, though only inferentially referred to by the learned judge, were statements that trial judges who had submitted questions should not instruct the jury on the admitted law of this Province that instead of answering questions the jury might return a general verdict. I have often expressed a contrary view and this is certain that no solicitor has been bold enough to make that question a ground of appeal in any case which has come before us or so far as I am aware before any other Court governed by similar law. It is a startling suggestion to me that a judge who is charged with the duty of instructing a jury on the law applicable to such an important subject as their verdict should be criticized for doing so. I have referred to the learned judge's remarks reluctantly and only for the purpose of removing any impression that anything said *obiter* by judges of this Court is authority for the distasteful imputations on the Court made by the learned trial judge.

MACDONALD, C.J.B.C.

MARTIN, J.A.: This is an appeal from a judgment of Chief Justice MORRISON dismissing the plaintiff's action after the jury had returned a general verdict in favour of the defendant company, thereby rejecting the plaintiff's claim for damages alleged to have been sustained by him from drinking part of the contents of a bottle of coca cola manufactured by the defendant and supplied by it in a capped bottle direct to a retail vendor from whom the plaintiff purchased it; and it is admitted that it was intended by the defendant that the bottle and its contents

MARTIN, J.A.

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

should reach the customers of retail vendors in their original state and that said contents should be consumed by them direct from the bottle if they chose to do so, as the plaintiff alleges he did in this case. There was no indication of the presence of any deleterious substance in the coloured liquid contained in the bottle in question, which liquid consisted of a syrup of certain materials diluted with carbonated water, but it is alleged that said bottle did in fact contain a certain amount of poison, caustic soda, which poison was admittedly used by defendant in the form of flakes which were put into a washing machine and dissolved, and then the solution was used in washing the bottles into which the liquid was put, and thereafter the bottles were capped and distributed for sale as aforesaid.

MARTIN, J.A.

Apart from a preliminary question of fact to be noticed later, the law on the matter was recently considered by the House of Lords in *Donoghue* v. *Stevenson* (1932), A.C. 562 (*cf.* 49 L.Q.R. 1, 22) and developed a striking conflict of opinion in that House, and below, and that decision has been very informingly considered and defined by the Court of Appeal in *Farr* v. *Butters Bros. & Co.* (1932), 2 K.B. 606; 101 L.J., K.B. 760; 147 L.T. 427 (and *cf.* 49 L.Q.R. 26) and distinguished on the facts, Scrutton, L.J., after pointing out (pp. 612, 614) that "the general proposition stated by Lord Atkin is wider than necessary," goes on to say, p. 614, that the House based its judgment on the "proximate relationship" between the manufacturer and the consumer, and that such relationship

> rested on the fact that the manufacturer sent out his goods in such a container that no one could discover the defect until the consumer had begun to consume the ginger-beer, for the snail did not necessarily come out when the ginger-beer was poured out. There was thus no opportunity of independent examination between the manufacturer and the consumer. That proximate relationship, according to the three law lords who constituted the majority, created the liability of the manufacturer.

And he concludes, p. 617:

> Here there was ample opportunity for intermediate examination before the deceased met with his accident. . . . McCardie, J. was right in deciding as he did, and in those circumstances the appeal must be dismissed in spite of the new view involved in the recent decision of the House of Lords.

And Greer, L.J. at p. 620 quotes from Lord Atkin's judgment* thus:

"By Scots and English law alike a manufacturer of products which he sells in such a form as to shew that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products is likely to result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

And then says, "That is the principle on which he based his judgment."

I agree with my learned brother M. A. MACDONALD that the duty arose in this case for the defendant to take reasonable care to protect the consumer from injury from its product, and also that the failure to discharge that duty "must be both averred and proved" by the plaintiff and that the maxim *res ipsa loquitur* does not apply, as Lord Macmillan sets out very clearly in his concluding passage, wherein he said: "The appellant accepts this burden of proof, and . . . is entitled to have an opportunity of discharging it if she can." This refers to the fact that the proceedings had been up to that stage in the nature of a demurrer, decided against the plaintiff, on averments in the pleadings, as summarized by Lord Macmillan at p. 606, taken *pro veritate.*

MARTIN, J.A.

Much reliance was placed by appellant's counsel on the decision of the Court of Appeal in *Chaproniere* v. *Mason* (1905), 21 T.L.R. 633, which, strangely, was not cited in *Donoghue's* case, and wherein the plaintiff suffered a broken tooth and an abscess from eating a bun which he had bought from the defendant, the maker thereof, and in which there was concealed a stone of considerable size, but on the point of *res ipsa loquitur* there was no dispute that it applied to the particular facts, as appears from the judgment, delivered by Collins, M.R. who said (p. 634):

With regard to the second part of the case, the question of negligence, it was admitted that the principle of *res ipsa loquitur* applied. In the bun sold to the plaintiff was found a considerable stone, which was certainly not an article of food and was not adapted for mastication. The unexplained presence of the stone in the bun was *prima facie* evidence of negligence on the part of the person who made the bun. That was admitted,

* (NOTE.—*Vide* also the late decision (6th October, 1933) of Horridge, J. in *Pattendon* v. *Reney*, 50 T.L.R. 10.—A. M.)

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

and the defendant produced evidence to rebut this *prima facie* presumption of negligence. He called witnesses who gave evidence to the effect that in the manufacture of his buns he made use of a system which rendered it impossible that a stone should be present in the dough.

In view of that admission the decision on that point is not of present assistance since there was no admission herein. The Court proceeded to say, however, that the fact that the visible and considerable stone did get into the dough was evidence going to shew that the system "was not carried out, with proper care and skill" and the judgment is of value in this relation (as shall appear) and in regard to the new trial that was ordered because of the unsatisfactory summing up which "involved the possibility of two misapprehensions on the part of the jury."

Several grounds were raised in support of the appeal and those that should be first considered relate to the sufficiency of the charge to the jury, as to which a difference of opinion arose and therefore I have given the matter special attention and have most carefully reconsidered the charge as a whole, with the result that I find myself driven to the same conclusion as that firmly reached by my learned brother MCPHILLIPS, which is that it was not an adequate and fair presentation of the plaintiff's case: indeed I do not understand that the other members of the Court are satisfied with the charge in all respects, and the learned Chief Justice condones it on the ground that its faults relate to rebuttal only, with which I am, respectfully, unable to agree. It, to my mind, presents so many serious objections that it cannot be upheld and comes within our decisions in *Lucas* v. *Ministerial Union* (1916), 23 B.C. 257; and *Morton* v. *Vancouver General Hospital* (1923), 31 B.C. 546; which I refer to without citation other than the opening words of our Chief Justice in *Lucas's* case, p. 261, *viz.*:

MARTIN, J.A.

> I think there has been a mistrial. Some remarks of the learned trial judge during the progress of the trial and in his charge to the jury were, in my opinion, calculated to prejudice a fair trial of the action.

Apart from this element, the jury was not properly directed on the law, and the unusual course adopted of reading several pages of extracts from two judgments in *Donoghue's* case, involving highly technical legal consideration, instead of giving a clear summary of the practical effect of that decision (as in *Farr's* case, *supra*) as applicable to the evidence tended inevitably to

confuse the jury, and the more so when the reading was followed by "a few admonitory remarks" containing this statement:

> I must tell you this also, that there is sufficient *onus* upon the plaintiff in a case of this kind that he must not leave the case in such a condition so that you are puzzled by such [a] scholastic question as to where a horse's tail begins and where it ceases, because you must decide it is a horse's tail some time. That is a sort of request for you to try to come to a verdict one way or the other and not leave it in the air by a disagreement. I must also tell you that it is the maxim of our law that a plaintiff must shew that he stands on fair ground when he calls on a Court of justice and a jury to administer relief to him. It is for you to say whether the plaintiff can be put in that category.

And the matter was twice referred to as "a problem play that you are not called upon to solve," and there is a very serious misstatement that

> if that caustic soda got into that bottle in that machine the whole output would be poisoned and you would have a community here suing instead of one man. . . .

There is, moreover, no reference to the very important distinction between the case and *Donoghue's, viz.,* that here the defendant did knowingly employ a poisonous agency to clean its bottles and that having put that material specially dangerous in itself into its bottles it must take consummate care to see that it was all taken out and the more so because the defendant used the poison in a liquid form which made it impossible to detect its presence by even defendant's own vision and therefore called for exceptional vigilance in its use and removal otherwise the bottle became "a loaded gun" as Lord Atkin says, p. 597, of *Donoghue's* case. All that the jury were instructed was that negligence consists in "taking due care under the circumstances" but the peculiarly dangerous circumstances and the obligation to take commensurate precautions were ignored though that element is repeatedly referred to in *Donoghue's* case, at pp. 595-6-7, 602, 611-2, 618, 620-1: Lord Atkin said, p. 596:

MARTIN, J.A.

> The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle.

And he proceeds to quote the decision of the Privy Council in *Dominion Natural Gas Company, Limited* v. *Collins and Perkins* (1909), A.C. 640, 646, as follows:

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

"It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity."

And proceeds:

This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved; but clearly in the class of things enumerated there is a special duty to take precautions.

Lord Thankerton at p. 602 says:

We are not dealing here with a case of what is called an article *per se* dangerous, or one which was known by the defender to be dangerous, in which cases a special duty of protection or adequate warning is placed upon the person who uses or distributes it.

And Lord Macmillan likewise says, pp. 611-12:

The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

MARTIN, J.A.

The decision of this Court in *Gordon* v. *Canadian Bank of Commerce* (1931), 44 B.C. 213, at 227, 230, holding (on authorities cited) that the operation of a passenger elevator requires "anxious care" is in entire accord with these citations.

In *Donoghue's* case the defendant had not put the snail into the opaque bottle, the specific acts of negligence charged being that his system of conducting his business was wrong in that he "kept his bottles in premises to which snails had access and failed to have his bottles properly inspected for the presence of foreign matter before he filled them," *per* Lord Macmillan, *supra,* p. 606.

This fundamental distinction between the two cases and its legal implications were completely overlooked by the learned judge and the jury attempted to deal with the "problem play" under more serious "misapprehensions" than were present in *Chaproniere's* case, *supra,* and it is at least a ponderable submission within that case that when the plaintiff had proved that the defendant had put poison into the bottle and had sworn that he had been injured by drinking liquid therefrom (though only

two or three teaspoonfuls) that he had then established "a *prima facie* case" [which] threw on the defendant the *onus* of "giving evidence to rebut it," but this important aspect of the case was also overlooked and the matter treated as though the *onus* remained upon the plaintiff to the end of the trial.

It follows, therefore, that upon the whole charge for the several reasons set forth, the interests of justice require that there should be a new trial to remedy the miscarriage that has taken place.

In coming to this conclusion I have not overlooked the preliminary question of fact alluded to, which is that the defendant makes the serious charge that the plaintiff's action is a fraudulent scheme to extort damages from the defendant, in that he did not in fact drink any poisonous or noxious liquid from the bottle as alleged and that his evidence to that effect is a false and concocted story, and evidence *pro* and *con.* on that initial fact was given and it is conceded that if the matter had been properly presented to the jury and passed upon by them adversely to the plaintiff the case would have been at an end and it would not be necessary to consider the difficult legal questions that have arisen.

MARTIN, J.A.

This preliminary question formed the first of four questions submitted by plaintiff's counsel and put to the jury as a fair one with the concurrence of defendant's counsel, but most regrettably the questions were not answered but a general verdict returned, with the result that plaintiff's counsel submits that this primary question is left so much in doubt, having regard to the prejudicial occurrences during the trial and the misdirection, and non-direction amounting to misdirection, already alluded to, that it would be unsafe and unfair to make the usual assumption that by their general verdict the jury intended to find all relevant facts in favour of the party for whom their verdict was given, and that by the time the case was left to them they had become so confused and prejudiced by the prejudicial "atmosphere" against the plaintiff that they simply adopted the expedient of returning a general verdict to avoid giving any indication of the basis of their findings; and in further and final support of this submission of "harmful effect," and that though the learned judge went through the form of submitting questions

COURT OF APPEAL

1933

Oct. 5.

yet at the same time in fact withdrew them, counsel referred to the ridicule that had been cast upon him when the jury were recalled for final instruction, and to the following strictures upon this Court when the questions were put to them:

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

> Gentlemen, I am drawing your attention to the fact that you need not answer these questions, because the Court of Appeal to my surprise, continuously, as if they forgot the law on the matter, scold and deprecate the fact that questions are not answered by juries or are not put to the jury. I am not concealing from you the law, because both litigants and jurors would certainly lose all confidence in a judge if they found him tricking them out of their undobuted rights by concealing the law in the way suggested time and again by the Court of Appeal; so I am telling you, you need not answer the questions, but they are there and you can answer them if you want to. You may retire.

Non-judicial language of that description carries its own condemnation so completely that it would be superfluous to add to it.

As could only have been expected in view of such an invitation the jury ignored the questions and returned a general verdict with a result similar to that described by Mr. Justice Anglin in *Linnell* v. *Reid* (1923), 3 D.L.R. 966; 3 W.W.R. 422, at p. 434, *viz.*:

MARTIN, J.A.

> While the verdict imports such findings as are necessary to support a judgment based on negligence, it leaves us in the highly unsatisfactory position of not knowing what views the jury took on several questions of fact which were distinctly in issue.

My learned brother M. A. MACDONALD has dealt with the matter of putting questions properly to the jury in negligence cases in a way with which I am in entire accord. That long-established course is a matter of curial practice of the first importance because if the best means are not employed to secure a just verdict from the jury a miscarriage of justice has occurred, and therefore our highest tribunals have repeatedly dealt with it. For example, in *Pritchard* v. *Lang* (1889), 5 T.L.R. 639, Lord Coleridge, C.J. said (p. 640):

> The judge put no ground specifically to the jury; he left it all vaguely to them. It was an imperfect and improper way of putting the case to them. It came to this in effect:—"Can you find out any ground for giving a verdict for the plaintiff?" No course could be conceived more calculated fatally to mislead them and defeat justice. . . . It was extremely important that the Courts should hold a strong hand over juries in this class of cases.

In the Supreme Court of Canada*, in the leading case of *Spencer* v. *Alaska Packers' Association* (1904), 35 S.C.R. 362 (cited by my brother MCPHILLIPS in *Morton's* case, *supra*, p. 554), wherein a new trial was ordered because of the confused charge, two of their Lordships, Nesbitt and Girouard, JJ., said, p. 373, approving Lord Coleridge's views:

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.

How is it possible "to get from a jury," be it noted, "by questions to be answered," the specific grounds for their finding of negligence if they are told not only that they need not answer the questions but that the Court of Appeal has been trying to "trick" them by "concealing the law"?

MARTIN, J.A.

I may interject here that it fell to my lot to hold the new trial directed in *Spencer's* case and that I followed the said direction and submitted questions, in accordance with the long established and proper practice in England and in this Province, *i.e.*, without any reference at all to a general verdict, with the result that the case was determined by the answer to the first question submitted which was, coincidently, like the present a preliminary one of fact.

Then the House of Lords in *Woods* v. *Davison* (1930), N.I. 161 recited in their judgment at pp. 162-3, the action of the Lord Chief Justice of Northern Ireland, who, after the jury had answered certain questions in a negligence case but not others took this course, as set out by Lord Hailsham (pp. 162-3):

The jury returned into Court and answered the first, second and fourth questions in the affirmative, but returned no answers to questions 3 and 5. The learned Lord Chief Justice directed the jury to retire again and to answer these two questions and thereupon they answered the third question in the affirmative and assessed the damages, if any, at £400.

*[NOTE.—*Cf.* also the recent decision of that Court in *McLean* v. *The King* (1933, November 15th), S.C.R. 688 at 693, deprecating "suggestions which may mislead the jury into a misconstruction of their duty."—A. M.]

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

That such was the proper course to adopt appears also from the decision of the Privy Council in the late important negligence case of *Pronek* v. *Winnipeg, Selkirk, Etc., Railway* (1932), 102 L.J., P.C. 13; 148 L.T. 193; (1933), A.C. 61 at 66:

> Their Lordships are of opinion that on any view the Supreme Court ought to have ordered a new trial, so as to put to the jury the question whether the accident was not due to the negligence of the respondents by their motorman in driving at an excessive speed having regard to his knowledge that the head-light was inadequate—that is, at an excessive speed in view of all the circumstances; but this need not be further considered, for reasons which will appear hereinafter.
>
> It is in the discretion of a trial judge to ask a jury to give a general verdict, or require them to answer specific questions.

This last paragraph exactly confirms the said view taken by my brother M. A. MACDONALD, *viz.*: that the discretion of the judge when properly exercised should not be interfered with, but once he has decided that the case is one for questions then it becomes the duty of the jury to answer them according to the judge's "requirement," and without any suggestion from any quarter that they should evade that duty. It is true that the jury have the right to return a general verdict, just as they have the right to return a special one in all cases, as is well put in that legal classic, Stephen on Pleading (1866), pp. 85, 87:

MARTIN, J.A.

> It is to be observed that it is a matter entirely in the option of the jury whether their verdict shall be general or special.

And it is well said in Dean Roscoe Pound's Criminal Justice in America, p. 115, that:

> Throughout the seventeenth century the power of juries to render general verdicts was a chief obstacle to the attempts of the Crown to use criminal justice for political purposes. When *Bushell's Case* (1670), Vaugh. 135; 124 E.R. 1006 established that jurors could not be punished for contempt in using this power as their own reasons and consciences dictated, the trial jury seemed to stand first among the common-law bulwarks of individual freedom.

In that celebrated case there is much interesting learning on the relation between Court and jury and, *e.g.*, it says, p. 149:

> In special verdicts the jury inform the naked fact, and the Court deliver the law.

And p. 150:

> The legal verdict of the jury to be recorded, is finding for the plaintiff or defendant, what they answer, if asked, to questions concerning some particular fact, is not of their verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their issue for the plaintiff or

defendant, they may differ in the motives wherefore, as well as judges, in giving judgment for the plaintiff or defendant, may differ in the reasons wherefore they give that judgment, which is very ordinary.

Also, p. 144:

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or *e contrario*, and thereupon they rectifie their verdict. . . . Therefore alwaies in discreet and lawful assistance of the jury, the judge his direction is hypothetical, and upon supposition, and not positive, and upon coercion, *viz.* If you find the fact thus (leaving it to them what to find) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.

There is not to be found in that case, nor in any other, any suggestion that where the jury has been definitely "asked, to questions concerning some particular fact," that they should at the same time be told they need not answer the questions: such an inconsistent position creates in law an absurdity. But the right of the jury to decline *ex mero motu,* to answer questions has since *Bushell's Case* never been seriously questioned, and that is well exemplified in *Mayor and Burgesses of Devizes* v. *Clark* (1835), 3 A. & E. 306, where, after returning a general verdict, Williams, J. questioned them respecting the particulars of their finding on an immemorial usage, but after some conversation between the Court and the foreman the latter said that "the jury had been guided by the remarks of his Lordship, but they desired to add nothing to their verdict," and the King's Bench refused to set aside the verdict, Lord Denman, C.J., explains the situation, saying, p. 510:

MARTIN, J.A.

Then they retire, and afterwards bring in a verdict for the plaintiffs. The only issue which they could so find, consistently with abstaining from any decision on the legal question, was the issue as to the fact of the custom. Then the judge, with the purpose of making further discussion unnecessary, told them that, if they found the fact more distinctly, it might prevent further litigation. A conversation takes place, in the course of which the jury say, "Of course our verdict is to say that the defendant had not a right to do what he is charged with doing." Now, whether the defendant had the right, depended, at that stage of the proceedings, on the question as to the fact of the custom: finding the one was finding the other. It is true that the jury were called on to speak expressly as to the fact; but they had a right to refuse. It seems to me that they have merely exercised a right belonging to them, and that we should not be justified in disturbing their verdict.

This right, *ex mero motu,* has always been recognized in this

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

Province and was stated, *e.g.*, by the old Full Court in *Steves* v. *South Vancouver* (1897), 6 B.C. 17, Mr. Justice MCCREIGHT saying, shrewdly, at p. 40:

> I will only add that cross-examining questions to be left to a jury, like these two proposed by the defence, are not to be encouraged, for they are calculated to induce a jury to stand on their undoubted right to return a general verdict, where answers to proper questions may be very useful in avoiding the expense of a new trial.

An instructive example of the exercise of the right in a proper way, *ex mero,* and after an honest attempt to answer questions is to be found in a case before this Court, *Ellis* v. *B.C. Electric Ry. Co.* (1914), 20 B.C. 43. In that case our Chief Justice said, our brother MCPHILLIPS concurring, in speaking of the course adopted by the trial judge in dealing with the jury, pp. 46-7:

> Instead of criticizing the course adopted in sending the jury back to reconsider their verdict, I would commend that course. In negligence cases it is very desirable, in the interests of both parties, that the issues of fact should be found in the form of answers to questions. That practice is to be encouraged, and the jury assisted by the judge and counsel as far as possible to that end, as was done in this case. To declare a jury at fault because they had failed to make their meaning clear in their answers, and when sent back had brought in a general verdict, unless the general verdict was not an honest one, would be to discourage juries from attempting to answer questions.

MARTIN, J.A.

No attempt to depart from this salutary and proper practice was made till 1907 in *MacLeod* v. *McLaughlin,* 13 B.C. 16, when plaintiff's counsel asked the judge to direct the jury as to their right to return a general verdict, which application was objected to by defendant's counsel (of eminence and great experience, Mr. *E. P. Davis, K.C.*) who "urged that the jury had the right to return a general verdict if they chose, but that they should not be directed to do so." This was, of my own long judicial experience, considerably now the longest in this Province, a correct statement of the practice, but nevertheless the learned judge, HUNTER, C.J.B.C., after saying correctly that

> the custom has been established for a long time for the Court to submit special questions to the jury in the majority of cases,

went on incorrectly, with respect, to say

> But while . . . if either of the parties asks that the jury return a general verdict, that is to say, a verdict generally, for either one party or the other, then the jury must do so under the existing state of the law, unless of course they are unable to agree.

No authority was cited to warrant such an innovation and it was rejected at the first appellate opportunity by myself in *Guthrie* v. *W. F. Huntting Lumber Co.* (1910), 15 B.C. 471, wherein I considered at some length the established practice and pointed out certain misconceptions and errors which had arisen; and our late brother IRVING likewise did so in *McElmon* v. *B.C. Electric Ry. Co.* (1913), 18 B.C. 522, at 527, saying:

> This Court, or at any rate, a majority of the judges of this Court, having expressed the opinion that questions should be left to the jury where practicable, I venture to say, with every deference to the learned Chief Justice, that if questions are put, it is unnecessary for the trial judge to invite the jurors to decline to answer the questions he is about to submit. I have already expressed the opinion that counsel would not be justified in interfering to suggest to jurors that they are at liberty to act as they please. Jurors are a part of the Court, and we should assume that they desire to do their duty and assist the Courts in rightly deciding the case.

In the prior case of *Andrews* v. *B.C. Electric Ry. Co.* (1913) in the same volume, 25 at 26, our learned Chief Justice thus spoke of the duty of trial judges to "impress upon the jury" their duty:

> This appears to be a case where the questions put to the jury would have been of great assistance if they had been answered. I think it should be impressed upon a jury that it is their duty to assist the judge by answering questions. Of course it will ultimately lead to legislation, whereby questions will have to be answered.

MARTIN, J.A.

And I said:

> Unfortunately, it is often impressed unduly upon the jury that they need not answer questions, but it should be shewn [to them] that the questions not only are of assistance in deciding a case, but that they tend to prevent useless and expensive litigation.

Then a few months later, in *Armishaw* v. *B.C. Electric Ry. Co.* (1913), same volume, 152, at 155, our brother IRVING said, on the duty of trial judges:

> I would like to state, in addition to what I have already said in the course of argument, this Court has laid it down it is the duty of the trial judges, in negligence cases particularly, to submit questions to be answered by the jury, where they (the judges) can properly do so. That having been said by this Court, I think it is the duty of counsel engaged in such a case to allow questions to be put and answers to be made. Counsel ought not to interfere with the judge in the exercise of that duty by pointing out or suggesting to the judge that the jury are not called upon to answer the questions. The privilege of not being cross-examined on their verdict is a privilege belonging to the jury, which privilege is not to be seized upon by counsel for the plaintiff or counsel for the defendant and employed as a device in order that the judge may be hampered in his charge.

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

The Chief Justice then said: "I concur with what Mr. Justice IRVING has said about questions to the jury," and as I also concurred, that was a decision of this Court upon this very important point of practice on "the duty of the trial judge . . . " in submitting questions to the jury.

Then the matter was further considered by this Court in *Howard* v. *B.C. Electric Ry. Co.* (1918), 3 W.W.R. 409, and after considering all the cases therein collected, we applied our decision in *Armishaw's* case and held, p. 413, that it was not the duty of the trial judge to tell the jury that they need not answer questions, saying, pp. 413-4:

> There never has been such a manifestly objectionable practice in this Province and the attempt to introduce it has been very properly resisted. The learned judge below will I feel sure be glad to know that he was not "bound by law" to make any statement of the kind to the jury, which he evidently was, very properly, reluctant to make, unless they had questioned him upon the subject of their own motion. It does not at all follow that because certain things are the law that the jury must be reminded of them. How objectionable it would be in a criminal trial, for example, if the counsel for the defence should repeatedly ask the judge to instruct the jury that if one of their members disagreed there could be no conviction, and if the judge should accede to that request? That is the law, and the jury is supposed to, and does in fact know it, even in capital cases: (*cf. Rex* v. *Spintlum* (1913), 18 B.C. 606, at p. 616; 5 W.W.R. 977, 1199; 26 W.L.R. 849; 22 Can. C.C. 483) but to force it upon the jury in that way would be a forensic indecency as inevitably tending to invite disagreement with all its consequences of delay and expense.

MARTIN, J.A.

And further, p. 414:

> These suggestions of doubt and disagreement and of a means to avoid responsibility or assistance to the Court are very harmful and insidious in the case of a jury and tend to obstruct justice by preventing those harmonious relations between Court and jury which are essential to the attainment of justice. The only proper course to follow is the practice laid down by this Court to which we ought to give adherence, as should judges and counsel below, and I have no doubt that the action taken by plaintiff's counsel in this case which this Court has declared over five years ago in *Armishaw's* case, *supra*, to be contrary to the duty of counsel, did tend to interfere with the course of justice, and there should on that ground also be a new trial.

No one will, I think, venture to suggest that, after the judge decides that the case is simple enough to go to the jury for a general verdict, it is, nevertheless, his legal duty to tell them that they have the right to return a special verdict, though the law unquestionably gives them that right; and if that be so, then why should they be told that they have the right to return

a general verdict when he decides that questions should be put to them?

I only add, *ex abundanti cautela,* that while it is true, as pointed out by my brother M. A. MACDONALD, that if the judge insists upon telling the jury that they may bring in a general verdict, or indeed refuses to put questions at all, that is not of itself misdirection (*cf. Guthrie's* case, *supra,* p. 472), but nevertheless the adoption of either of those grave courses might well become, under appropriate circumstances, the "last straw" which would turn the scale in favour of a new trial, as being "calculated fatally to mislead them and defeat justice," to adopt Lord Coleridge's opinion hereinbefore cited.

In leaving this subject, the practical importance of which supplies the reason for the full consideration it has received, it is with the hope, indeed expectation, that now the proper practice has been upheld and expounded by this Court attempts will no longer be made to depart therefrom to the great detriment of litigants, whereof this misfortunate case is an instructive example.

MARTIN, J.A.

It follows that, upon the whole case, a new trial should, in my opinion, be directed; the costs of the former trial to abide the result thereof.

MCPHILLIPS, J.A.: In approaching the consideration of this case, it would seem to me that it is fitting to quote the classic language of Lord Atkin in *Donoghue* v. *Stevenson* (1932), A.C. 562 at pp. 582-4:

> There will no doubt arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises. But in the class of case now before the Court I cannot conceive any difficulty to arise. A manufacturer puts up an article of food in a container which he knows will be opened by the actual consumer. There can be no inspection by any purchaser and no reasonable preliminary inspection by the consumer. Negligently, in the course of preparation, he allows the contents to be mixed with poison. It is said that the law of England and Scotland is that the poisoned consumer has no remedy against the negligent manufacturer. If this were the result of the authorities, I should consider the result a grave defect in the law, and so contrary to principle that I should hesitate long before following any decision to that effect which had not the authority of this House. I would point out that, in the assumed state of the authorities, not only would the consumer have no remedy against the manufacturer, he would have none against anyone else, for in the circum-

MCPHILLIPS, J.A.

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

stances alleged there would be no evidence of negligence against anyone other than the manufacturer; and, except in the case of a consumer who was also a purchaser, no contract and no warranty of fitness, and in the case of the purchase of a specific article under its patent or trade name, which might well be the case in the purchase of some articles of food or drink, no warranty protecting even the purchaser-consumer. There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes, where the same liability must exist. The doctrine supported by the decision below would not only deny a remedy to the consumer who was injured by consuming bottled beer or chocolates poisoned by the negligence of the manufacturer, but also to the user of what should be a harmless proprietary medicine, an ointment, a soap, a cleaning fluid or cleaning powder. I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family, and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong.

It will be found, I think, on examination that there is no case in which the circumstances have been such as I have just suggested where the liability has been negatived. There are numerous cases, where the relations were much more remote, where the duty has been held not to exist. There are also *dicta* in such cases which go further than was necessary for the determination of the particular issues, which have caused the difficulty experienced by the Courts below. I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the *dicta* of the judges.

MCPHILLIPS, J.A.

Here we have a bottle of coca cola put up by the respondent, securely or mechanically corked not intended to be opened until about to be consumed. And as a matter of business routine the great majority of the bottles when they become emptied find their way back to the manufacturer and are supposedly cleansed and refilled finding their way again to the consuming public. The facts disclosed in the case shew that the method of cleansing the bottles carried out by the respondent—the manufacturer—was by the utilization of a poison known as caustic soda, deleterious and dangerous to health. In my view the use of poison

in the cleansing process was *per se* dangerous, and upon the facts of this case the maxim of *res ipsa loquitur* applies to the case. It is true that Lord Macmillan at p. 622 in the *Donoghue* case, *supra,* considered upon the facts of that case that the maxim did not apply, but the facts there were radically different; the decomposed remains of a snail could not be in the same category as poison, not only dangerous to health but capable of destroying life. *Jackson* v. *Watson & Sons* (1909), 78 L.J., K.B. 587, was a case of the sale of tinned salmon, unfit for food when sold. Evidence was led at the trial that the coca cola was unfit to drink when sold in that the manufacturer negligently permitted or allowed this foreign matter, that is to say, a poison (caustic soda), to be in the bottle from which the appellant suffered serious injury to his health. In the *Jackson* case just referred to it was held by the Court of Appeal, consisting of Vaughan Williams, L.J., Farwell, L.J., and Kennedy, L.J., that there was liability. There the wife of the plaintiff died and damages were allowed to the husband for the loss of his wife's services.

Of course if the maxim *res ipsa loquitur* applies to the present case then unquestionably the *onus* was upon the respondent to rebut in the most complete way the negligence which will otherwise be assumed, that is there is the presumption of negligence and that in my opinion is this case. MCPHILLIPS, J.A.

With great respect, the learned Chief Justice of the Supreme Court—the Court below—failed, in my opinion, to so charge the jury but throughout threw the responsibility upon the appellant to establish negligence. There is no question that evidence was led upon the part of the appellant which brought about the shifting of the *onus* of proof—in truth the initial proof that the coca cola was the manufacture of the respondent in a sealed or tightly fastened bottle issued to the trade for sale to consumers and contained poison the maxim of *res ipsa loquitur* applied and it was for the respondent to excuse itself or demonstrate it was in no way responsible for that which happened, that is, serious injury to the appellant consequent upon his drinking coca cola from a bottle the manufacture of the respondent and put upon the market for human consumption. I would refer to what Lord Atkin said at pp. 595-6 of

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

MCPHILLIPS, J.A.

the *Donoghue* case, and, in my opinion, the reasoning of the learned Lord is peculiarly forceful in this present case:

The last case I need refer to is *Bates* v. *Batey & Co., Limited* (1913), 3 K.B. 351, where manufacturers of ginger-beer were sued by a plaintiff who had been injured by the bursting of a bottle of ginger-beer bought from a shopkeeper who had obtained it from the manufacturers. The manufacturers had bought the actual bottle from its maker, but were found by the jury to have been negligent in not taking proper means to discover whether the bottle was defective or not. Horridge, J. found that a bottle of ginger-beer was not dangerous in itself, but this defective bottle was in fact dangerous; but, as the defendants did not know that it was dangerous, they were not liable, though by the exercise of reasonable care they could have discovered the defect. This case differs from the present only by reason of the fact that it was not the manufacturers of the ginger-beer who caused the defect in the bottle; but, on the assumption that the jury were right in finding a lack of reasonable care in not examining the bottle, I should have come to the conclusion that, as the manufacturers must have contemplated the bottle being handled immediately by the consumer, they owed a duty to him to take care that he should not be injured externally by explosion, just as I think they owed a duty to him to take care that he should not be injured internally by poison or other noxious thing. I do not find it necessary to discuss at length the cases dealing with duties where the thing is dangerous, or, in the narrower category, belongs to a class of things which are dangerous in themselves. I regard the distinction as an unnatural one so far as it is used to serve as a logical differentiation by which to distinguish the existence or non-existence of a legal right. In this respect I agree with what was said by Scrutton, L.J. in *Hodge & Sons* v. *Anglo-American Oil Co.* (1922), 12 Ll.L. Rep. 183, 187, a case which was ultimately decided on a question of fact. "Personally, I do not understand the difference between a thing dangerous in itself, as poison, and a thing not dangerous as a class, but by negligent construction dangerous as a particular thing. The latter, if anything, seems the more dangerous of the two; it is a wolf in sheep's clothing instead of an obvious wolf." The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended. But they all illustrate the general principle. In the *Dominion Natural Gas Co. Ld.* v. *Collins and Perkins* (1909), A.C. 640, 646, the appellants had installed a gas apparatus and were supplying natural gas on the premises of a railway company. They had installed a regulator to control the pressure and their men negligently made an escape-valve discharge into the building instead of into the open air. The railway workmen—the plaintiffs—were injured by an explosion in the premises. The defendants were held liable. Lord Dunedin, in giving the judgment of the Judicial Committee (consisting of himself, Lord Macnaghten, Lord Collins, and Sir Arthur Wilson), after stating that there was no relation of contract between the plaintiffs and the defendants, proceeded: "There may be, however, in the

case of anyone performing an operation, or setting up and installing a machine, a relationship of duty. What that duty is will vary according to the subject-matter of the things involved. It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity." This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved; but clearly in the class of things enumerated there is a special duty to take precautions.

Also we have Lord Atkin saying at pp. 598-9 in concluding his judgment in the *Donoghue* case, the following, which I consider cogent reasoning and a determination of the law particularly applicable to the present case:

In the most recent case (*Bottomley* v. *Bannister* (1931), 101 L.J., K.B. 46, 54; (1932), 1 K.B. 458), an action under Lord Campbell's Act, the deceased man, the father of the plaintiff, had taken an unfurnished house from the defendants, who had installed a gas boiler with a special gas-burner which if properly regulated required no flue. The deceased and his wife were killed by fumes from the apparatus. The case was determined on the ground that the apparatus was part of the realty and that the landlord did not know of the danger; but there is a discussion of the case on the supposition that it was a chattel. Greer, L.J. states with truth that it is not easy to reconcile all the authorities, and that there is no authority binding on the Court of Appeal that a person selling an article which he did not know to be dangerous can be held liable to a person with whom he has made no contract by reason of the fact that reasonable inquiries might have enabled him to discover that the article was in fact dangerous. When the danger is in fact occasioned by his own lack of care, then in cases of approximate relationship the present case will, I trust, supply the deficiency.

It is always a satisfaction to an English lawyer to be able to test his application of fundamental principles of the common law by the development of the same doctrines by the lawyers of the Courts of the United States. In that country I find that the law appears to be well established in the sense in which I have indicated. The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland, but there it brought a liability upon the manufacturer. I must not in this long judgment do more than refer to the illuminating judgment of Cardozo, J. in *MacPherson* v. *Buick Motor Co.* in the New York Court of Appeals, 217 N.Y. 382, in which he states the principles of the law as I should desire to state them, and reviews the authorities in other States than his own. Whether the principle he affirms would apply to the particular facts of that case in this country would be a question for consideration if the case arose. It might be that the course of business, by giving opportunities of examination to the immediate purchaser or otherwise, prevented the rela-

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

tion between manufacturer and the user of the car being so close as to create a duty. But the American decision would undoubtedly lead to a decision in favour of the pursuer in the present case.

My Lords, if your Lordships accept the view that this pleading discloses a relevant cause of action you will be affirming the proposition that by Scots and English law alike a manufacturer of products, which he sells in such a form as to shew that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense. I think that this appeal should be allowed.

MCPHILLIPS, J.A.

The present case has this feature—that the manufacturer using poison in the cleansing of the bottles must be held at all times to be aware of the danger; in truth using a poison in this way it was known to the manufacturer at all times that if any of the poison should perchance remain in the bottle there would be danger to life. This called for the highest form of protection and that *onus* rested on the respondent. I would refer to what Lord Thankerton said in the *Donoghue* case, at p. 603, and that is the present case, in my opinion:

> The special circumstances from which the appellant claims that such a relationship of duty should be inferred may, I think, be stated thus—namely, that the respondent, in placing his manufactured article of drink upon the market, has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer, with the result that the consumer is entitled to rely upon the exercise of diligence by the manufacturer to secure that the article shall not be harmful to the consumer. If that contention be sound, the consumer, on her shewing that the article has reached her intact and that she has been injured by the harmful nature of the article, owing to the failure of the manufacturer to take reasonable care in its preparation prior to its enclosure in the sealed vessel, will be entitled to reparation from the manufacturer.

We have Lord Macmillan at pp. 611-12 saying in the *Donoghue* case (the Snail case):

> The appellant in the present instance asks that her case be approached as a case of delict, not as a case of breach of contract. She does not require to invoke the exceptional cases in which a person not a party to a contract has been held to be entitled to complain of some defect in the subject-

matter of the contract which has caused him harm. The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. I may observe that it seems to me inaccurate to describe the case of dangerous things as an exception to the principle that no one but a party to a contract can sue on that contract. I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety.

I would also refer to what Lord Macmillan said at p. 614 of the *Donoghue* case:

Heaven v. *Pender* [(1883)], 11 Q.B.D. 503, has probably been more quoted and discussed in this branch of the law than any other authority, because of the *dicta* of Brett, M.R., as he then was, on the general principles regulating liability to third parties. In his opinion "it may, therefore, safely be affirmed to be a true proposition" that "whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." The passage specially applicable to the present case is as follows: Whenever one person supplies goods . . . for the purpose of their being used by another person under such circumstances that everyone of ordinary sense would, if he thought, recognize at once that, unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence." Cotton, L.J., with whom Bowen, L.J. agreed, expressed himself as "unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived," but the decision of the Court of Appeal was unanimously in the plaintiff's favour. The passages I have quoted, like all attempts to formulate principles of law compendiously and exhaustively, may be open to some criticism, and their universality may require some qualification, but as enunciations of general legal doctrine I am prepared, like Lord Hunter, to accept them as sound guides.

MCPHILLIPS, J.A.

I would call attention to what Lord Macmillan said at pp. 616-18 in the *Donoghue* case, particularly applicable to the present case:

I would observe that, in a true case of negligence, knowledge of the existence of the defect causing damage is not an essential element at all.

This summary survey is sufficient to shew, what more detailed study confirms, that the current of authority has by no means always set in the same

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

MCPHILLIPS, J.A.

direction. In addition to *George* v. *Skivington* [(1869)], L.R. 5 Ex. 1, there is the American case of *Thomas* v. *Winchester* [(1852)], 6 N.Y. 397, which has met with considerable acceptance in this country and which is distinctly on the side of the appellant. There a chemist carelessly issued, in response to an order for extract of dandelion, a bottle containing belladonna which he labelled extract of dandelion, with the consequence that a third party who took a dose from the bottle suffered severely. The chemist was held responsible. This case is quoted by Lord Dunedin, in giving the judgment of the Privy Council in *Dominion Natural Gas Co.* v. *Collins and Perkins* (1909), A.C. 640, as an instance of liability to third parties, and I think it was a sound decision.

In the American Courts the law has advanced considerably in the development of the principle exemplified in *Thomas* v. *Winchester*. In one of the latest cases in the United States, *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, the plaintiff, who had purchased from a retailer a motor-car manufactured by the defendant company, was injured in consequence of a defect in the construction of the car, and was held entitled to recover damages from the manufacturer. Cardozo, J., the very eminent Chief Judge of the New York Court of Appeals and now an Associate Justice of the United States Supreme Court, thus stated the law: "There is no claim that the defendant knew of the defect and wilfully concealed it. . . . The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to anyone but the immediate purchaser. . . . The principle of *Thomas* v. *Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. . . . There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. . . . The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it [the defendant company] was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion."

Then at pp. 620-21, Lord Macmillan says:

Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he

intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities, and that relationship which he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the respondent, when he manufactured his ginger-beer, had directly in contemplation that it would be consumed by members of the public. Can it be said that he could not be expected as a reasonable man to foresee that if he conducted his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger-beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker, through carelessness, allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as he did not know that any poison had got into it, his only liability was for breach of warranty under his contract of sale to those who actually bought the poisoned bread from him? Observe that I have said "through carelessness," and thus excluded the case of a pure accident such as may happen where every care is taken. I cannot believe, and I do not believe, that neither in the law of England nor in the law of Scotland is there redress for such a case. The state of facts I have figured might well give rise to a criminal charge, and the civil consequences of such carelessness can scarcely be less wide than its criminal consequences. Yet the principle of the decision appealed from is that the manufacturer of food products intended by him for human consumption does not owe to the consumers whom he has in view any duty of care, not even the duty to take care that he does not poison them.

MCPHILLIPS, J.A.

Quite apart from the question whether the maxim *res ipsa loquitur* applies—and that the learned Chief Justice should have so advised the jury—there was with great respect error in the charge in that the learned Chief Justice having had a view of the process of cleansing the bottles in the factory of respondent (a view was had by judge and jury) dealt with what took place, that is, the method of cleansing the bottles—took such a strong view of what he saw and the effectiveness as he thought of the cleansing process—that there was not, nor could there be said to have been, any negligence. It would seem to me that the charge in this respect was in conflict with *Bridges* v. *The North London Railway Company* (1874), 43 L.J., Q.B. 151, referred to by Nesbitt, J. in *Spencer* v. *Alaska Packers' Association*

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

(1904), 35 S.C.R. 362 at pp. 370-1, where the language of Mr. Justice Brett is quoted (p. 160):

> When the judge has so directed the jury as to the law he has finished all which it is legal for him exclusively to determine in the case. He ought then, though I do not think there is any legal absolute obligation on him to do so, to point out to the jury the bearing of the facts in evidence, upon each of the questions which they must determine, and which of the facts are in his judgment in dispute, and that there are not only the facts directly deposed to which are to be considered but facts or propositions of fact which are to be inferred by them from the facts directly deposed to, and finally that it is for them to say whether the facts directly in evidence and adopted by them, and the facts and propositions of fact inferred by them, do or do not amount in their judgment to proof of the propositions which the plaintiff is bound to maintain. But the judge has no legal right, either directly or indirectly, to force upon the jury his view of any fact or inference of fact.

The error as it occurs to me is the very emphatic view of the efficacy of the process, amounting to a direction to the jury that there was not or could not be any negligence upon the part of the respondent. It is to be noted in the above quotation we have this language "But the judge has no legal right either directly or indirectly to force upon the jury his view of any fact or inference of fact."

MCPHILLIPS, J.A.

Now the machinery used to cleanse the bottles was put in operation and viewed by the trial judge and jury. Following this, with great respect, the learned trial judge in his charge so emphasized its operation and the sufficiency of the apparatus to the jury that, in my opinion, he in effect took the question from the jury, as to whether there was the likelihood that a bottle or bottles would pass inspection and mayhap have therein some of the poison used in the process. That was a vital question to be found by the jury and the jury should not have forced upon them the view of the learned trial judge, which was undoubtedly that there was no possibility of any such happening. It is only to be remembered that the evidence in the case shews that in many other cases foreign matter was found in the bottles and as a matter of fact the respondent was well aware of that and had a fine imposed against employees in such cases and employees had beeen fined for passing bottles with foreign matter therein.

With respect to the practice and history of submitting questions to the jury in this Province, I might usefully refer to at least two cases, the first case being tried as long ago as 1892—

Foley v. *Webster et al.*, 2 B.C. 137—a negligence action. The trial took place before MCCREIGHT, J., a most learned and distinguished judge of this Province, being the first Prime Minister of the first Government of British Columbia after Confederation. There we find the learned judge submitting no less than fifteen questions to the jury, and upon the answers thereto the learned judge entered judgment for the plaintiff. The case went on appeal to the then Full Court and I would particularly call attention to what WALKEM, J. said at p. 149, sitting in the Full Court (and I was one of the counsel in the case in the Full Court):

> The questions are so numerous and searching, and the replies so explicit, and above all, consistent, that we are fortunately relieved of the not infrequent difficulty that arises on special verdicts of deciding what the jury meant. It is also to be observed that the unusual number of the questions is a circumstance that was highly favourable to the defendants, for had any two or more conflicting replies been given they might have disentitled the plaintiff to recover.

Then we find DRAKE, J. saying at p. 152:

> This appeal is, in fact, limited to the question whether or not the judgment of the learned judge on the findings of the jury is right.

and the judgment of the learned judge for the plaintiff in conformity with the findings of the jury was sustained. The case then went on appeal to the Supreme Court of Canada and the appeal was dismissed (*Webster* v. *Foley* (1892), 21 S.C.R. 580).

MCPHILLIPS, J.A.

It is apparent how valuable it is to have questions submitted to the jury and duly answered and how helpful it is in the proper administration of justice and in a proper case questions should be submitted and should be answered. That a jury may refrain from answering questions is no doubt true, but to refrain from doing so in a proper case would be to assume something highly improbable. Juries in my long experience have been always ready and willing to assist in every reasonable way in the furtherance of the ends of justice.

Then in 1897 there was the case of *Macdonald* v. *Methodist Church* (1897), 5 B.C. 521 (I was one of the counsel in this case at the trial and before the Full Court). In that case a claim for extras and additional work in connection with a building contract, WALKEM, J., the trial judge, according to my recollection submitted no less than seventeen questions written with

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

his own hand for the jury to answer. They were answered, and upon those answers judgment was entered by WALKEM, J. for the defendant. An appeal was taken to the then Full Court upon the ground that the judgment by the learned trial judge was at variance with the findings of the jury. The Court consisted of DAVIE, C.J., MCCREIGHT and DRAKE, JJ. DRAKE, J. delivered the judgment of the Court and at p. 524 we find this language:

> We are of opinion that as long as the findings of the jury are standing unreversed the only judgment that can be entered is one in accordance with the findings. We, therefore, allow the appeal with costs. . . .

MCPHILLIPS, J.A.

I referred to these earlier cases to shew that for a long period of time the practice has been to submit questions to juries in all proper cases, and speaking generally in negligence cases—especially where there is personal injury—the disputed facts can be most effectually arrived at by the submission of questions to the jury and the jury should answer the questions and I think in the great majority of cases the questions are answered. Upon the point of submitting questions to juries in proper cases, I have had the privilege of considering the authorities that my learned brother MARTIN has so industriously collected and referred to in his judgment and his conclusions thereon are so complete and convincing and with which I so entirely agree that I feel I cannot usefully add anything thereto.

I therefore, upon the whole case, am of the opinion that a new trial should be had, the costs of the former trial to abide the result thereof.

MACDONALD, J.A.

MACDONALD, J.A.: Appeal from a verdict of a jury dismissing a claim for damages sustained by appellant upon drinking a beverage known as "coca cola" containing a foreign substance, *viz.*, caustic soda. It was purchased from a retailer and obtained in the first instance from the manufacturer, the respondent. The bottle was capped in a way that shewed respondent intended it to reach the consumer unaltered. There was no reasonable probability that it would be opened and tampered with before consumption (unless maliciously); nor were means of inspection afforded in its passage through the retailer from the manufacturers to the consumer. Caustic soda in solution was used by respondent in cleaning bottles before being filled with coca cola,

and the allegation is that because of neglect to take adequate precautions it was intermingled with the product either in solution or in crystals thus rendering it poisonous and unfit for consumption.

Appellant submitted that upon proof that the bottle contained caustic soda; that it was manufactured and prepared for consumption by respondent and that damage from drinking ensued it was incumbent on respondent to disprove negligence. I do not agree. The burden of proving negligence was on the appellant. The point is disposed of by a decision in the House of Lords, *Donoghue* v. *Stevenson* (1932), A.C. 562; 101 L.J., P.C. 119. There appellant drank ginger-beer, manufactured by respondent and purchased through a retailer, containing "the decomposed remains of a snail which were not and could not be detected until the greater part of the contents of the bottle had been consumed" (p. 120). The caustic soda could not be detected in the liquid (dark opaque glass) by observation and so the question of visibility therefore does not arise to distinguish it on the facts. Marked differences of opinion prevailed in the Scottish and English Courts on the question of liability to a third party (or the existence of a duty) apart entirely from contract in respect to an article supplied for consumption, not in itself dangerous or known to be likely to cause harm. No useful purpose would be served by a detailed examination of the illuminating judgments of the law Lords in support of the rival views advanced. I will only state briefly, after careful study of the cases relied upon, why I think the views of the majority should be accepted.

MACDONALD, J.A.

Two points must be established by appellant, *viz.*, the existence of a duty to take care on the part of the manufacturer *qua* the consumer and breach of that duty or negligence. The skill of the manufacturer is wholly directed in a very special sense to producing and marketing a product that will appeal to the palate of the consumer (a relationship therefore exists between them) and granted that none but malicious hands (in which case it would not be liable) can interfere with the product *in transitu* it is rational to conclude and not in conflict with underlying principles in cases referred to by Lord Atkin and Lord Macmillan that the manufacturer owes a duty to take care

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

towards the person (or persons) he has in contemplation in preparing the product, knowing that lack of care may have serious results. Knowledge of dangerous possibilities creates a duty to avoid it. To quote Lord Atkin at p. 136:

> . . . a manufacturer of products which he sells in such a form as to shew that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.

I have no doubt that a duty arises in this case but it would not be safe to generalize too freely as "there will, no doubt, arise cases where it will be difficult to determine whether the contemplated relationship is so close that the duty arises" (p. 128). Lord Macmillan at pp. 146-7 refers to this aspect in these words:

> What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view is in determining what circumstances will establish such a relationship between the parties as to give rise on the one side to a duty to take care and on the other side to a right to have care taken.

MACDONALD, J.A.

In modern days, food and drink products in manufactured form are generally used and may as Lord Macmillan states (using the reference for illustrative purposes only) (p. 143) "by careless preparation be as dangerous to life as any loaded firearm." For a more detailed statement of principles I refer to the judgment of Lord Macmillan, particularly at pp. 147 and 148, and Lord Atkin at p. 128 where necessary limitations are referred to:

> It must always be a question of circumstances whether the carelessness amounts to negligence, and whether the injury is not too remote from the carelessness:

p. 148. These views, however, do not lead to a reversal of the jury's verdict. The appellant, plaintiff in the action, is not relieved of the task of proving negligence. Appellant on establishing the relationship from which it follows that a legal duty to take care exists must prove that the one so obligated did not take care. At p. 148 Lord Macmillan says:

> The burden of proof must always be upon the injured party to establish that the defect which caused the injury was present in the article when it left the hands of the party whom he sues, that the defect was occasioned by the carelessness of that party, and that the circumstances are such as to cast upon the defender a duty to take care not to injure the pursuer. There is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim *res ipsa loquitur*. Negligence must be both averred and proved.

In the *Donoghue* case it was intimated that the manufacturer stored his empty bottles in a place where snails could get access to them and filled the bottles without taking adequate precautions by inspection to see that deleterious foreign matter was excluded. In this way negligence might be established.

I have read the record in the case at Bar with care, and find it impossible to say from the weight of evidence that the verdict of the jury is wrong. I so find notwithstanding the fact that in part of the charge to the jury the issues—I say so with respect—were not in my opinion properly placed before them. References were made (*e.g.*, to problem plays) calculated to lead the jury to abandon the true line of inquiry. The charge in part, however, correctly states the law applicable and viewing it as a whole a new trial should not be directed on the ground of misdirection.

MACDONALD, J.A.

The jury possibly found that appellant did not in fact drink from the bottle containing caustic soda and that the claim therefore was dishonest. They may on the other hand have found that respondent established by proof of the elaborate care taken and the thorough cleansing methods employed that this deleterious substance was not introduced into the bottle in question in the respondent's plant. The cap might be removed and replaced without detection. No duty is so onerous that it is impossible to fulfil it and it was shewn that the obligation to take care was fully discharged. No act of negligence was established. The appellant could not on the facts succeed, if at all, without the aid of a maxim that has no application, *viz.*, *res ipsa loquitur*.

COURT OF APPEAL

1933

Oct. 5.

WILLIS v. THE COCA COLA COMPANY OF CANADA LTD.

MACDONALD, J.A.

The case would be free from difficulty had the jury answered questions submitted. If the claim was fraudulent, as suggested, it was important that the jury should say so. In that event no further inquiry would be necessary. It illustrates the importance of securing answers to appropriate questions. The learned trial judge thought it necessary to tell the jury that they might disregard the questions submitted and return a general verdict. With great respect, I do not agree. Two verdicts are possible, *viz.*, a general verdict and a special verdict—both perfectly legal. It is for the trial judge, responsible for, and in full control of, the conduct of the trial to decide which verdict on all the facts will best serve the interests of justice. In many cases a general verdict is satisfactory: in others it is desirable that questions should be submitted and answered. When the trial judge in his discretion decides that a special verdict is desirable the need for any reference to a general verdict is past. In requesting a special verdict clearly he is not asking the jury to do an unlawful act. Having decided therefore that questions should be submitted it is not necessary, nor yet desirable to tell them that they may ignore his considered judgment, flout his decision and bring in a different verdict not appropriate to the case. The minds of the jury should not be thus diverted from their duty nor should an invitation be extended to shirk it. Cases, as intimated, will arise where a general verdict is satisfactory. It is time enough to refer to it when it does arise.

It is conceivable too that where matters in issue are intricate a jury might report inability to answer questions and a desire to exercise the undoubted right it possesses of returning a general verdict. Such a case should not be anticipated but rather dealt with when it arises. It should seldom arise where full directions are given but if it did the trial judge dealing with it at that stage might in his discretion either direct that a further effort should be made to answer the questions or that under the special circumstances a general verdict should be returned. It does not follow because of exceptional cases that the trial judge must in all cases tell the jury that it may return a general verdict.

It is necessary to add that, as a general verdict in any case tried by a jury, is lawful, if the trial judge insists on telling

them that they may return a verdict of that character it would in law be impossible to regard it as misdirection. It is equally true that if, when a special verdict is appropriate, he adheres to his own decision and refrains to say that they may bring in a general verdict it would not be misdirection. This is a question of practice affecting the decision of the case and with the greatest respect for contrary views unless or until a higher Court otherwise directs the practice referred to should be discontinued although adherence to it will not necessarily avoid the trial.

I would dismiss the appeal.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *Geo. L. MacInnes.*

Solicitors for respondents: *Mayers, Locke, Lane & Johannson.*

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

FERGUSON v. WALLBRIDGE *ET AL.*

Company—Mines—Syndicate with majority of stock—Take over management—Mine worked at loss—Loans from members of syndicate—Working bond and option by way of sale—Declaration of trust by purchaser in favour of members of syndicate—Validity—Action by minority shareholders.

The defendants as a syndicate, purchased 51 per cent. of the stock of Pioneer Gold Mines Limited from the former shareholders, and took over the management thereof on the 6th of January, 1921. The property was worked at a loss while the syndicate was in control and money was borrowed from time to time from members of the syndicate to keep the mine in operation. On the 16th of July, 1924, when the debts amounted to $45,000, most of which was owing to members of the syndicate, a working bond was given to one Sloan containing an option to purchase the mine for $100,000. This bond and option was granted by a board of four directors, three of whom were members of the syndicate. Sloan's estimate was that the sum of $16,000 would be required by him to bring the mine to a state of production which would enable him to pay the purchase price from the proceeds of ore mined and milled on the property. Contemporaneously with the execution of this bond a declaration of trust was executed by Sloan reciting that the members of the syndicate had agreed to advance one-half of the $16,000 referred to above in consideration for which Sloan agreed to hold the land and all benefits to be derived thereunder in trust as to one-half for himself and the remainder for the members of the syndicate. On the 22nd of August, 1924, an extraordinary general meeting of the shareholders was held, at which a resolution was passed to wind up the company, and a liquidator was appointed. This was confirmed at a meeting held on the 9th of September following. On the 26th of September, at a meeting of the creditors, the liquidator was directed to advertise the assets of the company for sale. The only offer was that of Dr. Boucher on behalf of the syndicate, being $45,000, and as this was objected to by one of the directors the offer was increased to $65,000. At a meeting of the shareholders on the 5th of December, 1924, at which six out of twenty-three members (four of whom were members of the syndicate and purporting to represent over 95 per cent. of the stock), were present, resolutions were passed approving the bond to Sloan, representing himself for a one-half interest, and the syndicate for the other half, and the offer of the purchase of Boucher on behalf of the syndicate of the assets of the company subject to the bond and option to Sloan, and at a meeting of the creditors on the 21st of January, 1925, a resolution was passed confirming the sale, the bond to Sloan and the declaration of trust. Shortly after the Pioneer Gold Mines of B.C. Limited was incorporated and the syndicate conveyed

their interest to the new company in consideration of an allotment of a large block of shares to each of them, and Sloan for a like consideration transferred to the new company his interest in the bond and option. An action by the minority shareholders of Pioneer Gold Mines Limited that the majority shareholders by conspiracy and fraud wrongfully acquired the assets of said company and for damages was dismissed.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

Held, on appeal, affirming the decision of MORRISON, C.J.S.C. (MCPHILLIPS, J.A. dissenting), that the appeal should be dismissed.

Per MACDONALD, C.J.B.C.: I am satisfied there was here a breach of trust in which all the defendants and Sloan were equally involved, but reading the history of the case I am of opinion there was no conscious fraud. The option and the declaration of trust of Sloan must be regarded as one transaction, but plaintiff's counsel asks the Court to affirm the agreement as far as Sloan is concerned and set aside only his declaration of trust in favour of the defendants. When the plaintiff acquiesced in and relied upon the option he confirmed and ratified the whole agreement and therefore it cannot be rescinded. Nor can the defendants be declared trustees for the plaintiff's alleged interest.

Per MARTIN, J.A.: The bond to Sloan and his declaration of trust of even date can be upheld under the provisions of article 102 of the company's articles as full disclosure of the nature of the interest of the three directors concerned was in fact made at the meeting of directors of July 16th, 1924. At this meeting the directors interested improperly voted with the result that the contract became "voidable," but what was done at that meeting was duly ratified and confirmed by the general meeting of the company held on the 5th of December following.

Per MCPHILLIPS, J.A.: What was done constituted breach of duty, the benefit of the contract belonged in equity to the company and the directors could not validly use their voting power to vest it in themselves. Further, shareholders—not directors—parties to the fraud and breach of duty, and members of the syndicate carrying out the sale and profiting by the secret agreement also must account for all profits received. There was defective notice of meetings and no proper disclosure of facts to minority shareholders. *Cook* v. *Deeks* (1916), 1 A.C. 554 applied.

Per MACDONALD, J.A.: The truth is that the minority shareholders, if the company could not effect a sale to third parties—and its efforts in that direction failed—were willing to retire and to permit the respondents to join them in a deal with Sloan, acquire the property, pay the debts of the old company and $20,000 additional. It seemed to them desirable to affirm at that stage; they cannot now repudiate because future events disclosed that it would have been more profitable to dissent.

APPEAL by plaintiff from the decision of MORRISON, C.J.S.C. in an action tried by him at Vancouver on the 10th to the 13th of April, 1933, for a declaration that the plaintiff, for himself and his deceased brother, is owner of 214,593 shares in Pioneer

Statement

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

Statement

Gold Mines Limited (in liquidation) subject to certain encumbrances. A declaration that the defendants *Bull,* Duff-Stuart and Wallbridge, as directors of said company acquired 118,300 shares in said company in trust for the plaintiff, and for an order for reconveyance thereof. A declaration that the defendants *Bull,* Duff-Stuart, Boucher, Nicholson and Wallbridge (deceased) acquired 275,397 shares in said company for the plaintiff, and that they hold said shares in trust for the plaintiff, and for an accounting and reconveyance thereof or for damages with respect to the loss thereof. A declaration that the defendants acquired, held and hold all their shares in Pioneer Gold Mines of B.C. Limited in trust for Pioneer Gold Mines Limited (in liquidation), or alternatively for the plaintiff, and a declaration that the defendants as majority shareholders of Pioneer Gold Mines Limited (in liquidation) by conspiracy and fraud wrongfully acquired their interest in said company, and for damages suffered by the plaintiff and other shareholders other than the defendants, and for an injunction restraining the defendants from disposing of their shares in Pioneer Gold Mines of B.C. Limited. The property in question is located in the Lillooet District of British Columbia and was acquired by Andrew Ferguson and his brother Peter in 1911. Shortly after they sold a one-quarter interest to one Williams, when the Pioneer Gold Mines Limited was incorporated, the issued capital being 750,000 shares. The Fergusons worked the property until 1919, and during this period about $135,000 was taken out in gold, the larger part of which was expended on the property. In 1919 the company was in debt, and the Fergusons gave an option on the property to a Canadian corporation which made an examination but threw up the option in February, 1920. Shortly after, one Copp, who had worked for the Fergusons induced the defendant Wallbridge to form a syndicate to buy a controlling interest in the company, and on the 6th of January, 1921, an agreement was entered into whereby the Fergusons and *Williams* sold to the defendant Wallbridge, on behalf of the syndicate consisting of himself and the defendants *Bull,* Duff-Stuart, Boucher, Nicholson and *McKim* (now deceased), 382,500 shares (being 51 per cent. of the whole issue) of the capital stock of Pioneer Gold Mines Limited for $50,000, payable in instal-

ments. The first payment of $15,000 was made, $5,000 being paid to the members and $10,000 in payment for a cyanide plant. The syndicate then appointed their own directors and took charge. Prior to this sale Wallbridge had been notified by the vendors that there was from 10,000 to 12,000 tons of tailings running from $5 to $6 a ton that could be treated by the cyanide process upon the installation of a cyanide plant, and that the machinery on the property was adequate and in good condition. The syndicate installed a cyanide plant and worked the property. *Williams* died in 1921. It was found in 1922 that the representations as to tailings and the condition of the machinery were not true, as it was less than 4,000 tons of tailings that contained only $4 per ton, and the machinery and equipment was worn out and was from time to time breaking down. Then correspondence ensued between the parties, but the defendants continued to work the property at a loss, and by the end of 1923 the defendants, with *McKim* and Wallbridge, had advanced about $40,000 to the company and were responsible for debts up to $20,000. In the spring of 1924 an option on the mine was offered to one Sloan, a mining engineer, who agreed to take it if the defendants with *McKim* and Wallbridge would take a half interest in the adventure. After negotiations and a meeting of the directors approving, on the 16th of July, 1924, an option to purchase the mine for $100,000 was given to Sloan, Sloan to supply $16,000 of working capital and pay the company 15 per cent. of all ore taken out, and *McKim* and Wallbridge agreed to find one-half the sum required to carry out Sloan's obligation. At this time the company owed the defendants, *McKim* and Wallbridge, over $45,000. The company was wound up voluntarily by resolutions passed and confirmed on the 22nd of August and the 9th of September, 1924. The property subject to Sloan's option was duly advertised for sale for fourteen days in a daily newspaper, but no tenders were received. The defendants, with *McKim* and Wallbridge, offered to buy the property subject to the Sloan option for $45,000, through Dr. Boucher acting in their behalf, and this offer was approved by a meeting of the creditors on the 22nd of October, 1924, but *Walsh*, acting for the *Williams* interests, objected to the offer and the syndicate then raised the offer to $65,000 and

Statement

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

Statement

this was agreed to by *Walsh*. The liquidator called a meeting of the shareholders by notice of the 13th of November, 1924, for the 5th of December, 1924, for confirmation of the working bond given Sloan, notwithstanding the participation therein by the syndicate, also for confirming the action of the creditors in accepting an offer of $65,000 for the mine. At the meeting of the shareholders on the 5th of December, 1924, 97 per cent. of the shareholders were present, and the meeting unanimously ratified and confirmed the option to Sloan, and further confirmed the sale of the company's assets to the defendants with *McKim* and Wallbridge as creditors of the company, subject to the option to Sloan. Accordingly by indenture of the 21st of January, 1925, between the liquidator of the company as vendor and the defendants with *McKim* and Wallbridge as purchasers, the mine was sold to the said purchasers subject to the Sloan option, and the company was wound up on July 27th, 1928. In 1928 the Pioneer Gold Mines of B.C. Limited was incorporated, and the mine was transferred to this company by the purchasers from the old company. Under Sloan's management there was a loss in operations in 1924, but by the end of 1925 there was a profit of $9,000 in the two years' operations.

J. A. MacInnes, and *Ian A. Shaw*, for plaintiff.

Mayers, K.C., for defendants *Bull*, Duff-Stuart, Boucher and Nicholson.

J. W. deB. Farris, K.C., for Wallbridge Estate.

St. John, for defendant Salter.

MORRISON, C.J.S.C.: Somewhere by somebody it has been said that great is the wilderness where the wild mare maketh her nest and many there be that findeth it.

The plaintiff's solicitor must be included in the throng that found the wild mare's nest.

MORRISON, C.J.S.C.

With the utmost deference to counsel, I shall not pay the plaintiff the tribute of withholding the conclusion to which I have come in this case. The statement of claim is voluminous. It really is a farrago of reiterated allegations of fraud, conspiracy, negligence and breach of trust, supported by evidence which I cannot accept. The pleadings have been released with-

out, in my opinion, any justification, and I hope with no expectation of being received with credulity, to which, after all, there is a limit. It is launched some ten years after the events alleged, and after several of the parties concerned died, and the *status* of all the parties had changed.

Fraud is the gist of the action. The plaintiff must prove the fraudulent mind and intent to deceive on the part of the defendants. It is a term that should be reserved for something dishonest and morally wrong. These ingredients are, of course, in my opinion, wholly absent in this case, and much mischief was done as well as much unnecessary pain inflicted by its use, where such words as illegality and illegally might be appropriately employed.

The *onus,* of course, is on the plaintiff, which he has failed to discharge. Lord Watson, in a case which I cannot just recall, said, "I know of no case where by implication of law the duty of clearing himself from an imputed fraud rests on the defendant." That is only in cases where there is danger of referring knowledge of the facts now known to a time anterior to their discovery—danger of falling into error attributable to those who are wise after the event. That would be a case, assuming one is *bona fide,* which, in my opinion, the plaintiff is not. The two main witnesses on whose evidence I take it counsel rely are Ferguson and Copp. They impressed me in the course of their evidence as having a desire to refrain from committing themselves when faced with the necessity of answering a direct question. They were both most disingenuous; their evidence was halting and dubious. The plaintiff Ferguson failed signally to prove even the semblance of fraud.

As to the evidence material to the issue, I accept unreservedly the evidence of the defendants and that adduced on their behalf. I shall not dilate upon or deal in detail with the evidence. I simply now disclose the conclusion to which I have come, and if counsel desire, I shall, of course, deal in a more lengthy judgment with my reasons for coming to those conclusions.

There is one element in this which would differentiate the facts from many of those cases to which Mr. *MacInnes* referred, and that is that those parties were not on the equal footing that

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLERIDGE

is looked for. Take the case of the contractor dealing with other contracting parties, *Cook* v. *Deeks* (1916), 1 A.C. 554, and those people dealing with the C.P.R. and other railway contracts. They are all on an equal footing, all of equal experience and knowledge, dealing with work with which they are thoroughly familiar. In this case it is practically the other way. Mr. Ferguson is an experienced miner, and had this property, the character of which exclusively might be said to be known to him. The defendants, who are of different professions and callings, and were the source to which Mr. Ferguson, in his apparent financial distress, came seeking means whereby he might either dispose of this so-called mine, or get them to associate themselves with him, and in the whole matter I think Mr. Ferguson knew what he was doing and was in no way deceived, if he were susceptible of being deceived. I am sure that this group of defendants are the last people who could impose upon him. He withdrew from the jurisdiction when he thought, in my opinion, he had disposed of this property very satisfactorily, to a group, and he left them there to deal with it as best they might. They started in, and all the incidents connected with it turned upon how they would ultimately, and without loss, dispose of this property or retain it, and not lose by retaining it. Mr. Ferguson was indifferent to all that, and after the matter turned out successfully, and perhaps he himself not meeting with success in his new home, turns up after this long period of time and, instead of attacking the problem, the method by which these properties changed and were acquired, and attacking the legality of the proceedings, he launches the action, the statement of claim in which from almost the first paragraph to the end is a reiteration and repetition of expressions of fraud and conspiracy and breach of trust connected with it.

MORRISON, C.J.S.C.

May I express a pious hope that our Courts in the future will not be made the medium of putting on record aspersions on the character of reputable citizens on occasions that may be appropriately termed privileged. This pleading seems to be nothing more than that.

The action is dismissed, with costs to be paid forthwith after taxation.

1st May, 1933.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MORRISON, C.J.S.C.: This is an action in which damages are claimed for the alleged loss of mining shares and for a declaration that the defendants and A. H. Wallbridge, deceased, acquired an interest in the assets of Pioneer Gold Mines Limited (in liquidation) by fraud and oppression and further for a declaration that the defendants acquired and held certain shares in Pioneer Gold Mines of B.C. Limited (being the proceeds of sale of the aforesaid assets) in trust for the plaintiff and all other shareholders of Pioneer Gold Mines Limited (in liquidation); and, for an order that the defendants do transfer and convey such shares or pay the value thereof to the defendant Salter as liquidator of Pioneer Gold Mines Limited (in liquidation) for distribution among the contributories of the said company; and, for a declaration that the defendants and A. H. Wallbridge, deceased, as directors and majority shareholders of Pioneer Gold Mines Limited (in liquidation) by conspiracy and fraud wrongfully acquired assets of the company and for damages suffered by the plaintiff and all other shareholders of the company other than the defendants by reason thereof.

In compliance with counsel's request to extend my reasons given at the conclusion of the trial and which may be taken as being incorporated herein I now find as follows:

In the year 1919 Andrew Ferguson, the plaintiff, and his brother, Peter, deceased, both miners, had a controlling interest along with Mr. *Adolphus Williams,* a solicitor in the Pioneer Gold Mines Limited—the predecessor of the Pioneer Gold Mines of B.C. Limited. The property is located in the Lillooet District not known hitherto as being of much interest to the mining world. The mine, up to events disclosed in this action, was unsuccessful, being really an undeveloped property disclosing no ore body, that would appeal to investors more than many such burrowings throughout the Province. There was no money available to the company to carry on development work and the Fergusons then began to give options. The first was to the Mining Corporation of Canada who made sufficient exploratory tests which seemed to satisfy them it was not prudent to negotiate further respecting the property so they abandoned the option in February, 1920. Mr. C. L. Copp, who appears prominently in the narrative, as disclosed at the trial, had formerly worked for the Fergusons at the property in question. Copp, acting for the Fergusons, and *Williams* approached Wallbridge to form a syndicate to buy a controlling interest in their company. Acting together Copp and Wallbridge were authorized by the Fergusons

MORRISON, C.J.S.C.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

and *Williams* to inform prospective buyers that there was on the property obtained from previous operations some 10,000 or 12,000 tons of tailings assaying up to $6 per ton, that the property had been properly developed, machinery being adequate and in good condition. As to this it may be fair to infer that *Williams* would rely upon the Fergusons. I find that these representations, unknown to Wallbridge, who was not a miner, were untrue and misleading. With a view the more readily and speedily to acquire the property the other defendants, none of whom are miners, were approached and were induced by these representations to enter into formal negotiations. The first agreement with a view to acquire a controlling interest from the Fergusons is dated 29th December, 1920. On the 6th of January, 1921, the Fergusons and *Williams* gave Wallbridge, representing also his associates, the other defendants, an option to buy a block of the capital stock in the company. On 10th February, 1921, the Fergusons transferred to *Williams* their interest in this contract of 6th January, 1921. With money raised by the new people thus brought in a cyanide plant was installed. Meetings of directors including the defendants were held authorizing the borrowing of various sums for the necessary development and carrying on of the operations, at which the plaintiff, Andrew Ferguson, as director, was present and took part. Along in 1922 the defendants, including the late Wallbridge, ascertained that the representations upon which they had relied were not true. *Williams* had in the meantime died and Mr. *Walter Walsh*, a solicitor, his law partner, was appointed his executor along with Mr. Godfrey, a banker. The true condition of affairs at the mine was disclosed to Mr. *Walsh* and correspondence followed. Up to this time the defendants had contributed $22,500 which was spent on the property; but the operations were not a success. They had also guaranteed loans to the extent of some $11,000. The shares standing in the name of the Fergusons were on the 6th of June, 1922, transferred to and registered in the name of *Williams's* executors. Then followed more correspondence between the *Williams* executors and Ferguson's solicitors—Ferguson having by now gone to the United States. After various interviews and correspondence between *Walsh*, Ferguson and Ferguson's solicitor and the

MORRISON, C.J.S.C.

defendants the new agreement of February, 1923, was arrived at understandingly and without oppression or over-reaching. By the end of 1923 the state of affairs was not encouraging to the defendants. The amount advanced had increased to a substantial sum with outstanding guarantees of $5,000. On December 6th, 1923, an option to purchase the property was given Copp which he abandoned. In April, 1924, a Mr. Land of the State of New York took an option. After inspection by himself and his engineers this option also was thrown up. By this time the defendants' investment amounted to $60,000. The minority shareholders had declined to give any assistance. It was at this juncture and under these circumstances that in their extremity the defendants prevailed upon Sloan, an experienced miner, to operate the mine under a working bond with an option to buy which he agreed to do only on condition that the defendants would take a half interest with him and put up half the necessary money. At a directors' meeting, held on July 16th, 1924, the defendant *Bull* made a full disclosure of the state of affairs and of their proposed association with Sloan. On the 16th of July, 1924, the Sloan option was given. At that date one share each out of the 750,000 shares stood in the name of the Fergusons. The debts of the company then amounted to $45,257.05. The banks were pressing the defendants, and fearing that the Sloan option might also be abandoned they considered it advisable to place the company in such a position that the property might the more readily be disposed of to a purchaser who would take over the company's interest on the off chance of securing the purchase-money, $100,000, under Sloan's option. It was therefore considered advisable that the company be wound up. The company was wound up voluntarily by resolution confirmed on 9th September, 1924. The property was duly advertised for sale by the liquidator. No outside tenders were received. But the defendants did bid the amount which would be sufficient to pay the then liabilities, some $45,000. *Walsh*, who held Ferguson's and *Williams's* estate shares, voted against this offer and the offer was dropped. Then began negotiations with *Walsh*, who knew as much about the matters as the defendants did, culminating in an offer by the defendants to pay all the liabilities, cost of winding up and $20,000 to the shareholders, amount-

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

ing in all to $70,000, to be paid out of the purchase-money as it came in, on condition that this offer and the Sloan option be confirmed by 95 per cent. of the shareholders of the company. A meeting of the shareholders was called for the 5th of December, 1924. The notice calling this meeting and the letter of Wallbridge, dated 13th November, 1924, and the verbal statements made at the said meeting, disclosed fully the true situation. There was no concealment by the defendants of any knowledge they had as to the developments or as to any results accomplished by Sloan during the autumn of 1924. I accept the evidence of Sloan and Yuill that there was nothing to conceal. The meeting at which 97 per cent. of the stock was represented duly confirmed all this. On March 28th, 1929, the Pioneer Gold Mines of B.C. Limited was incorporated by the defendants, to which they transferred their right in the property for shares in the new company which sale included other properties in the purlieus of the old property and not included in the property, the subject-matter of this action. The whole design in these transactions was to develop the mine and to have the vein explored, a vein which after all might turn out to be a pocket and broken. That chance the defendants took. After steady, orderly work and efficient management with better equipment by an experienced and conscientious miner results appeared. Wallbridge died in September, 1927, in consequence of which the plaintiff doubtless felt the more secure at the trial in his evidence relating to the events, particularly with which he and Wallbridge and Copp had to do. Parenthetically I am satisfied that the way the plaintiff and Copp answered questions they are not reliable witnesses. At no period throughout the events sketchily referred to above were the Fergusons unaware of what the defendants and Mr. Wallbridge were doing. The Fergusons were in no way deceived or kept in ignorance of the true situation at any time.

MORRISON, C.J.S.C.

The exigencies with which the defendants were confronted from time to time justified the various *bona fide* steps taken in acquiring the interests now held by them. The meetings necessary during all these periods were properly convened. The meeting held to ratify and confirm the option and sale to Sloan

was properly convened, notice of which I am satisfied was duly served or conveyed to the plaintiff and to his brother.

I am satisfied by the evidence and find as a fact that the defendants and the late Mr. Wallbridge were never actuated by any fraudulent design or dishonest intent nor sought to gain or abuse any advantage in connection with the matters set out in this claim and were not guilty of conspiracy or oppression in any way.

The action is dismissed with costs to be paid forthwith after taxation in Column 4 of Appendix N of the Rules.

From this decision the plaintiff appealed. The appeal was argued at Victoria from the 27th of June to the 5th of July, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

J. A. MacInnes, for appellant: We are not appealing against the judgment in respect to the plaintiff's claim as to the defendants' acquisition of 51 per cent. of the stock of Pioneer Gold Mines Limited. We are appealing in respect to the transactions of the majority shareholders in July, 1924, and following months, whereby the minority shareholders were deprived of their interests in the company. The question is "Can a majority in control of a company appropriate to their own benefit the property and assets of the company to the exclusion of the company and the minority shareholders?" They were a syndicate acting together, and they actually gave Sloan the interest of the minority shareholders for his co-operation when the new company was formed. We allege actual fraud. They propose to benefit themselves at the expense of the minority: see *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350 at p. 353; *Alexander* v. *Automatic Telephone Company* (1900), 2 Ch. 56; *In re Consolidated South Rand Mines Deep, Limited* (1909), 1 Ch. 491; *Daniel* v. *Gold Hill Mining Company* (1899), 6 B.C. 495; *Lasell* v. *Thistle* (1905), 11 B.C. 466, and on appeal (1906), 37 S.C.R. 324; *Re Postlethwaite; Postlethwaite* v. *Rickman* (1888), 60 L.T. 514. Admissions of counsel shew that notice of the meeting of December 5th, 1924, was not sent to Andrew Ferguson at Seattle, and the

Argument

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

declaration of the liquidator that he did send notice to him in Seattle should not be allowed in later. Ferguson received no notice: see *Madden* v. *Dimond* (1906), 12 B.C. 80; *Kendall* v. *Webster* (1910), 15 B.C. 268. The important case on the question of depriving the minority of its interest is *Cook* v. *Deeks* (1916), 1 A.C. 554; see also *Jacobus Marler Estates Lim.* v. *Marler* (1913), 85 L.J., P.C. 167; *British America Nickel Corporation* v. *M. J. O'Brien* (1927), A.C. 369. They filled a position of a fiduciary character and their action in depriving the plaintiff of his shares was fraudulent: see Kerr on Fraud & Mistake, 6th Ed., pp. 158-160; Snell's Principles of Equity, 20th Ed., 443; Smith's Equity, 5th Ed., 176; Wegenast on Company Law, pp. 318-20.

Argument

Ian A. Shaw, on the same side: As to the meeting of shareholders on the 5th of December, 1924, ratifying the sale to Sloan, there were (1) Those who received no notice. (2) Those in England who received constructive notice. (3) Those who received constructive notice and did not attend. The notices were sent out on the 14th of November. About 10,000 shares were held in England and there was not sufficient time for these shareholders to attend the meeting: see *Cannon* v. *Trask* (1875), L.R. 20 Eq. 669; *Madden* v. *Dimond* (1906), 12 B.C. 80 at p. 89. The new vein was struck in the mine about the middle of November and this was a deliberate short notice. In the next place the notice does not disclose clearly the scheme proposed, and in case of an extraordinary resolution, the proposal must be set out in full in the notice: see Wegenast on Company Law, p. 237; *MacConnell* v. *E. Prill & Co., Limited* (1916), 2 Ch. 57 at p. 61. Andrew Ferguson was not notified at his proper address and Lloyd Owen, a shareholder whose registered address is Vancouver was notified at Birken, B.C. If it is found they were not properly notified all proceedings at the meeting are irregular and cannot stand: see Palmer's Company Law, 13th Ed., 165; Wagenast on Company Law, 202. Each shareholder is entitled to notice, and if one does not get it the meeting is invalid: see *In re Pacific Coast Coal Mines and Hodges* (1926), 37 B.C. 550; *Smyth* v. *Darley* (1849), 2 H.L. Cas. 789; *Young* v. *Ladies' Imperial Club* (1920), 2 K.B. 523 at p. 527. The next question is whether the notice and

circular sent to the shareholders gave a fair, frank, and full disclosure so as to allow the shareholders to understand what was happening. From September to December, 1924, over $15,500 in gold was taken out of the mine. That there must be a full disclosure of all material facts see *Pacific Coast Coal Mines, Limited* v. *Arbuthnot* (1917), A.C. 607; *Kaye* v. *Croydon Tramways Company* (1898), 1 Ch. 358 at p. 369; *Tiessen* v. *Henderson* (1899), 1 Ch. 861; *Baillie* v. *Oriental Telephone and Electric Company, Limited* (1915), 1 Ch. 503 at pp. 514-5; *Lumbers* v. *Fretz* (1928), 62 O.L.R. 635 at pp. 648 and 652, and on appeal, 63 O.L.R. 190.

J. W. deB. Farris, K.C., for respondents: The written reasons of the learned trial judge were handed down before notice of appeal was given. When the sale was made to the syndicate in 1921 the plaintiffs were guilty of fraudulent misrepresentation as to the tailings on the property. They represented there were 12,000 tons of tailings averaging $5 a ton, and on the strength of this the defendants erected a cyanide plant to work the tailings. They found there were only 3,600 tons averaging about $4 a ton. The Fergusons gutted the mine before handing it over to the syndicate. They charged the syndicate with conspiracy that commenced in 1921, but now they have dropped that and start from 1924. There was complete failure of the original charge, and if we can break down his charge of fraudulent conspiracy that ends the case. The minority shareholders would never put up anything to help develop the property, and members of the syndicate were creditors to the extent of over $40,000 for money loaned the company. The whole trend of events up to the time of the sale to Sloan was to get out of an enterprise that was of no value. There was no unfairness or underhand dealing as regards the sale to Sloan. This was a binding contract: see *North-West Transportation Company* v. *Beatty* (1887), 12 App. Cas. 589; *Camsusa* v. *Coigdarripe* (1904), 11 B.C. 177. They say there was constructive fraud arising out of the fiduciary relationship between the parties, but this is not a case of moral turpitude. The company ratified the directors' action on the 5th of December, 1924, and the notice of that meeting gave full disclosure of the whole transaction. The company waived the benefit of

Argument

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON
v.
WALLBRIDGE

the rule that a director cannot contract with the company: see Palmer's Company Precedents, 14th Ed., pp. 678-9; *Grant* v. *United Kingdom Switchback Railways Company* (1888), 40 Ch. D. 135; *Burland* v. *Earle* (1902), A.C. 83. The company has power to ratify such a contract. Ninety-seven per cent. of the shares of the company voted in favour of the resolution which included all Ferguson's shares except three that were in his name: see *Cook* v. *Deeks* (1916), 1 A.C. 554 at p. 563. The liquidator's affidavit shews all shareholders were sent notices of the meeting at their registered addresses, including Ferguson who had changed his address a number of times. As to service on the English shareholders see *Georgia Construction Co.* v. *Pacific Great Eastern Ry. Co.* (1929), S.C.R. 630 at pp. 644-5; *Re The Union Hill Silver Company (Limited)* (1870), 22 L.T. 400 at p. 402; *In re Newcastle United Football Co., Ltd.* (1932), W.N. 109. The notice given the English shareholders exceeded the statutory time. Assuming we are technically wrong as to the notice, no person was misled and 97 per cent. of the shares were represented at the meeting. The facts in *Cook* v. *Deeks* (1916), 1 A.C. 554 do not apply here as that was a cut and dried attempt to steal a partner's interest in the profits. When the meeting of the 5th of December, 1924, was held they knew nothing of the new wealth in the mine. The gold given to the assay office from September to December, 1924, all came from the old workings. The directors ceased to be directors when the liquidator was appointed on the 9th of September, 1924. The meeting of December 5th, 1924, was called under pressure from the creditors, there was full disclosure including delivery of the gold bricks to the assay office and the resolution passed was an ordinary resolution and not an extraordinary resolution. That the sale by the liquidator to Sloan and his associates was valid see *The Chatham National Bank* v. *McKeen* (1895), 24 S.C.R. 348; *Holmested* v. *Annable* (1914), 18 D.L.R. 3. Assuming the sale to Sloan is invalid and the ratification of December 5th, 1924, is of no effect, the liquidator has the power to turn the property over to Sloan, and the directors, as directors then had no power as such and were no longer directors or in a fiduciary relationship in the company.

Argument

St. John, for liquidator: Salter was improperly made a

party. The company should have been made a defendant. They try to bring the liquidator in as a conspirator in the notice of appeal but not in the pleadings. Salter had been an auditor of the company but he was never a servant. There is no case made out against the liquidator.

MacInnes, in reply: The cases referred to differ as in all of them nothing was done at the expense of the company: see *Fullerton* v. *Crawford* (1919), 59 S.C.R. 314 at pp. 325 and 329; *Liquidators of Imperial Mercantile Credit Association* v. *Coleman* (1873), L.R. 6 H.L. 189; *Mackereth* v. *Wigan Coal and Iron Company, Limited* (1916), 2 Ch. 293; *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350; *Canada Furniture Company* v. *Banning* (1918), 1 W.W.R. 31; *Giles* v. *Dyson* (1815), 1 Stark. 32.

Cur. adv. vult.

3rd October, 1933.

MACDONALD, C.J.B.C.: The burden of the plaintiff's complaint is that an option was given by the board of directors to one David Sloan to purchase the mine for $100,000, on the terms set out in the written agreement which was entered into. The said option was accepted by Sloan on a definite understanding that the defendants, with whom the said three directors were associated, should agree to take a half interest in the said option and supply one-half of the money required to carry on Sloan's operations. The said option and declaration of trust by Sloan in favour of the defendants were executed on the 16th of July, 1924. I think it clearly appears from the evidence that the taking of the half interest by the said defendants was a condition precedent to Sloan's acceptance of the option and that the option and declaration of trust were one transaction. The defendants were to contribute towards the cost of developing the mine and did contribute. The work of development was proceeded with by Sloan and the defendants and eventually the option was exercised on the completion of the terms on which it was given. The mine has turned out to be a very valuable one and now the plaintiff who was one of the original owners of the prospect comes forward to claim the advantages attained by Sloan and his *cestui que trustent.* On the 8th of August of the

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

Argument

MACDONALD, C.J.B.C.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MACDONALD, C.J.B.C.

said year the board determined upon winding up the company under the British Columbia Companies Act and sent out notices to shareholders calling an extraordinary general meeting for the 22nd of August, 1924, for the purpose of passing a resolution to wind up as aforesaid. The resolution was duly passed. A meeting of creditors was then called for the purpose of obtaining bids for the mine. The creditors were virtually the defendants who had before the option was given advanced or become responsible for, from time to time, about $45,000. It may be stated here that before the said option was given the defendants were in control of the mine and were operating it for the company and advancing money for that purpose but had not made a success of it. The company therefore owed them this sum of $45,000. The creditors met pursuant to the liquidator's notice when an offer of the syndicate to buy the company's interest in the mine for $45,000, plus $20,000 for distribution to the shareholders, was considered. This was agreed to on the condition that the Sloan offer and the defendants' interest in it should be not affected by the sale. The option and trust deed from Sloan to defendants were therefore both recognized and assented to by the liquidator.

The plaintiff sues on behalf of himself and the shareholders other than the defendants who held 51 per cent. of the shares. Three of the four vendor directors are concerned in the option to Sloan and his declaration of trust which has now by performance of the conditions of the option become an actual sale of the company's mine and other assets to Sloan and the syndicate.

The plaintiff until defendants purchased their 51 per cent. of the shares had been the manager in control of the mine. Defendants then took over the control and elected three of their number to the board who with the fourth member constituted the board and gave the option. The company at the date of the option were in debt in the sum of said $45,000, principally advanced as loans by the syndicate and the bank. The affairs of the company having fallen into grave difficulties efforts were made by the board and the other defendants to raise sufficient money to continue the company's operations but without avail. Efforts were made to sell the mine and options were given

ranging from $125,000 to $90,000, to several parties including Copp the mine superintendent, at the former figure, and to an American company at the latter; both failed to exercise the option, the latter after an examination of the property by their experts and after spending $1,000 in making the examination. The defendants then proposed to contribute a proportion of their shares to the company for operating purposes if the minority would do likewise but this was not accepted. They then proposed to contribute two cents a share if the minority would do the same; but this was also refused. The minority would do nothing to help the enterprise along, not apparently because they had any objection to the directors but because they would not obligate themselves to enable the company to carry on their operations. The plaintiff himself suggested—some time prior to this—that the only thing to be done was to sell the mine at the suggested price $125,000. In fact some time before the option was given he offered to sell his shares at 15 cents per share, which would put a value on the mine of $112,500, there being but 750,000 issued shares.

The defendants finding that they could get no assistance from the minority and no doubt thinking of no other way of saving their investments decided to give the option to Sloan, a noted mining engineer and to agree to take a half interest in same and supply one-half of the capital $16,000, estimated to be required to carry on operations.

This was, I think, a deliberate breach of trust on the part of the three directors, concurred in by the other defendants and by Sloan. The transaction was, in my opinion, a transaction founded upon one consideration, and must be so dealt with. The option and the declaration of trust of Sloan to the defendants cannot be separated from one another so as to sustain the one and not the other.

Looking at the frame of the action one sees that Sloan is not a defendant. In fact counsel for the plaintiff stated in argument that the most sensible act of the board was the giving of the option to Sloan. They did not therefore contend that that should be interfered with. They must then be regarded as contending that the declaration of trust is a separable part of the whole agreement and may be dealt with without disturbing

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

the other part relating to Sloan. In other words they ask us to affirm the agreement so far as Sloan, a party to the breach of trust, is concerned and to set aside only his declaration of trust in favour of the defendants. They ask the Court for a declaration not that the trust is voidable but that it should stand good with a declaration that the defendants are trustees for the company for the benefits accruing therefrom. It is my opinion that when the plaintiff acquiesced in and relied upon the option he confirmed and ratified the whole agreement and therefore it cannot be rescinded. Nor can the defendants be declared trustees of this interest for him.

Many other questions were raised, in very exhaustive and prolonged arguments of counsel; one being advanced by defendants' counsel that the fraud alleged was merely constructive and therefore not ground either for recission or damages for deceit. Sir Frederick Pollock in his Law of Tort, 13th Ed. at p. 306, quoting very high authority said the material question is "Was there or was there not misrepresentation in point of fact?" and added in the text:

MACDONALD, C.J.B.C.

> Innocent or benevolent motives do not justify an unlawful intention in law, though they are too often allowed to do so in popular morality.

I am satisfied that there was here a breach of trust in which all the defendants and Sloan were equally involved but after reading the history of the case as disclosed in the evidence, I am of opinion that there was no conscious fraud, notwithstanding that they must be taken to have known the law and intended what they did. I do not think the winding up affects the conclusion at which I have arrived or that the alternative claim for damages can succeed. Moreover the plaintiff cannot restore the defendants to their original position. The company is dissolved and a new company has taken over the premises and issued shares to the defendants; whether these would be adversely affected by rescission of the original transaction is left in doubt. Some of these new shares may have changed hands but apart from this circumstances have so completely changed that it would be impossible to replace the defendants in their original position. This question only becomes of importance if I am wrong in my main opinion expressed above.

I would dismiss the appeal.

MARTIN, J.A.: This is an appeal in part from the judgment of MORRISON, C.J.S.C., dismissing the plaintiff's action, and in the main it is now sought to have it declared that by the transactions of July, 1924, and thereafter, the minority shareholders of the Pioneer Gold Mines Limited were wrongfully deprived of their interests in that company, and that the defendant directors fraudulently benefited themselves at the expense of their co-shareholders, and should because of their fiduciary relationship be compelled to account for the very large profits that have been derived from the operation of the Pioneer group of mineral claims since the giving of the working bond (*vide* 1 M.M.C. pp. 858, 874) to Sloan on the 16th of July, 1924, by the said company.

We had the pleasure and benefit of a very full argument lasting almost a week, during the course of which the matter was much clarified and the principal question arises out of the relation of three of the directors, Stuart, *Bull* and Wallbridge, with the bond-holder but not appearing on the face of the bond, and without needlessly going into the evidence the appellant's counsel, Mr. *MacInnes,* in his careful and commendable argument has satisfied me that unless the transaction can be upheld by certain provisions of the company's articles a case of constructive fraud had been established which would entitle appellant to the relief prayed, as being within the scope of several decisions in this Province, *e.g., Daniel* v. *Gold Hill Mining Company* (1899), 6 B.C. 495; *Lasell* v. *Thistle* (1905), 11 B.C. 466; (1906) 37 S.C.R. 324; *Madden* v. *Dimond* (1906), 12 B.C. 80; and *Kendall* v. *Webster* (1910), 15 B.C. 268; and also *Cook* v. *Deeks* (1916), 1 A.C. 554; 85 L.J., P.C. 161, and *Jacobus Marler Estates, Lim.* v. *Marler* (1913) reported at pp. 167-8.

But in the present case article 102 provides that:

> No director shall be disqualified by his office from contracting with the company either as vendor, purchaser, or otherwise, nor shall any such contract, or contract or arrangement entered into by or on behalf of the company in which any director shall be in any way interested, be avoided, nor shall any director so contracting or being so interested, be liable to account to the company for any profit realized by any such contract or arrangement by reason of such director holding that office, or of the fiduciary relation thereby established, but it is declared that the nature of his interest must

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

be disclosed by him at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists or in any other case at the first meeting of the directors after the acquisition of his interest, and that no director shall as a director, vote in respect of any contract or arrangement in which he is so interested as aforesaid; and if he do so vote, his vote shall not be counted, but this prohibition shall not apply to any contract by or on behalf of the company to give to the directors or any of them any security by way of indemnity, and it may at any time or times be suspended or relaxed to any extent by a general meeting.

This special language goes very far and is more than sufficient to bring the case within the decisions on the change in the law effected by articles of this nature, which are sufficiently collected in *Transvaal Lands Company* v. *New Belgium (Transvaal) Land and Development Company* (1914), 2 Ch. 488, because here it has been shewn, by uncontradicted evidence, that a full disclosure of the nature of their interest was in fact made by the three directors concerned, at the meeting of directors on the 16th of July which accepted Sloan's offer and authorized the giving of the bond with the full knowledge that said directors were members of the "Syndicate" of five shareholders formed to act with Sloan "to work and develop the mining property" in consideration of a half interest therein as set out in his declaration of trust of even date with his bond; in short it was a special "partnership" which is what a syndicate is—*per* Lord Chancellor Cairns in *Erlanger* v. *New Sombrero Phosphate Company* (1878), 3 App. Cas. 1218, 1234. If, then, there had been no irregularity in said directors' meeting there was no legal objection to its action and it stood unassailable, but unfortunately the directors interested improperly voted with the result that the contract became "voidable" only (*Transvaal* case, *supra,* p. 505), but it was, in my opinion, duly ratified and confirmed by the general meeting of the company held on the 5th of December following and the circumstances before us, differing widely from those in *Cook* v. *Deeks, supra,* do not warrant our interference with that domestic decision.

MARTIN, J.A.

Such being the case, this whole appeal must be viewed in the light that the defendants are relying on their rights under a contract which is a legal one under the changed state of the law and have done no legal wrong though they have derived great benefit from the hazard they undoubtedly took at that time.

Several other grounds of appeal were raised questioning various subsequent proceedings of winding up and reconstructing, and the non-observance of formalities respecting the calling of meetings, and otherwise, but I do not think it necessary to say more than that they are not, in my opinion, sustainable, being either covered by the articles or lacking real substance.

I would therefore dismiss the appeal, but in so doing I feel impelled, in justice to the complaint of appellant's counsel, to disclaim, with all due respect, the oral reasons for judgment given by the learned judge below and "incorporated" (as he puts it) in the written reasons which he later handed down.

McPHILLIPS, J.A.: This appeal has relation to what now would appear to be a regularly producing gold mine. The property for years had very indifferent success. A family of the name of Ferguson, of whom the appellant Andrew Ferguson is one, long stood by (with others) to open up and develop the mine; and throughout some years a sum approximating $100,000 or more was used in so doing and a company was formed under the name of the Pioneer Gold Mines Limited, a company now in liquidation. This suit is brought by Andrew Ferguson, personally and as administrator of the estate of Peter Ferguson, deceased, suing on behalf of himself and the estate and on behalf of all other shareholders of Pioneer Gold Mines Limited (in liquidation) except the defendants, against Helen A. Wallbridge and *David Stevenson Wallbridge,* as executors and trustees of the estate of Adam H. Wallbridge, deceased, *Alfred E. Bull,* J. Duff-Stuart, R. B. Boucher, Francis J. Nicholson and John S. Salter, as liquidator of Pioneer Gold Mines Limited (in liquidation). The matter of inquiry and adjudication in the Court below had relation to the question of liability of the respondents to the appellant, the issues having reference to alleged fraud and misfeasance upon the part of the directors of the company and a certain syndicate inclusive of the directors whereby the company was defrauded, the mining property being sold to one Sloan with an agreement back by way of secret agreement that the directors and syndicate should be entitled to a half interest in the mining property so sold, the company thereby losing its whole property. In truth

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MCPHILLIPS, J.A.

the directors, unmindful of the law, undertook to treat the property of the company as their property, considering that, as they had 51 per cent. of the stock, they owned the property of the company to the denial of any right in the minority shareholders to participate in the profits of the sale; and the effort was made throughout a long course of procedure—which in my opinion was fraud by way of a breach of duty—and they endeavoured to bring about the unassailability of what was done, all profitless in my opinion, as the initial fraud and breach of duty permeates the whole and renders all these proceedings—by way of putting up fences—absolutely nugatory. Why were these proceedings adopted and in what way is it attempted to be justified? It is forsooth on this plea of the majority of the shareholders—really the directors—they were tired, as they said, of putting up money to carry on and preserve the property so that this scheme was hatched to recoup themselves and gain great profits and advantages to the injury of the minority shareholders. This supposed justification was quite unmindful of the fact that the minority shareholders had stood by the mining property for years and disbursed their moneys so that at the time of sale, speaking generally, it may be said that they had provided—situate upon the mining property—machinery and mine equipment generally of the value of at least $80,000. The evidence in the case is most voluminous and it is really not possible or perhaps useful to particularize all the features of the case. It is in my opinion a proper conclusion upon the evidence that what was done constituted fraud and breach of duty. It is well though to see what was the provoking cause for this breach of duty. We have seen that the majority shareholders—really the directors—were dissatisfied that the minority shareholders —many of them largely dispersed as to residence, some in England—would not continue making advances of money. Then it was apparently decided that a course would be adopted to exclude the company from any participation in profits arising out of the mining property and to take the profits to themselves, *i.e.*, the directors and certain other shareholders. There is evidence which, in my opinion, entitles the conclusion being drawn that anterior to the time of the sale of the mining property to Sloan that the majority shareholders, *i.e.*, the direc-

tors had become aware from Sloan's investigation on the ground — Sloan being an experienced mining engineer — that the property was a most valuable one. That is punctuated by the fact that Sloan became the purchaser of the mining property upon the terms that the directors and certain other shareholders should upon their part be vested with a one-half share or interest therein. I do not enter into the method adopted or the individuals whose names were used but what I do decide is this —that in law, no matter what was done, the profits that accrued from this half interest in the mining property got back from Sloan were profits for which the directors and all others concerned must account to the Pioneer Gold Mines Limited. Here we have a patent and glaring case of directors using their position as directors to obtain for themselves and certain other shareholders the mining property of the company or at least one-half thereof—a beneficial contract—which must in my opinion in conformity with the law go to the company and to no one else. The directors cannot by using their voting power as shareholders with the aid of these certain other shareholders in general meeting prevent the company claiming the benefit of it. I do not propose to follow out the long and complicated procedure that was adopted by the directors to (as they thought) put up the fences and shut out the company: all profitless, as it was all conceived and based on the initial fraud and breach of duty and all this procedure is as of naught and is without force or virtue. There never was that disclosure to the minority shareholders or even in general meeting that the law requires. Further there was defective notice of meetings and no proper notification of the business to be transacted thereat. I cannot say that I was at all impressed with the case as presented on behalf of the directors and the majority shareholders notwithstanding the very able and persuasive argument of Mr. *Farris,* the learned counsel for the respondents. That which was here attempted has often been attempted but invariably to the credit of our jurisprudence it has been found that there is the power and authority in the Courts of the land to declare, as was done in *Cook* v. *Deeks* (1916), 1 A.C. 554, that the company is entitled to claim the benefit of the contract. That is, there was fraudulent concealment

MCPHILLIPS, J.A.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

here and the appellant is entitled to have it declared that a decree go for an account as against the respondents for all the profits derivable by the directors and these certain other shareholders for and in respect of the half interest in the mining property sold to Sloan—being an executed contract—and whatever form of consideration therefor was received by the directors and members of the syndicate all being aware of what was being done constituted a fraud upon the company and must be accounted for to the company. In passing I might remark that the learned counsel for the respondents at this Bar said that there were some five to six millions of dollars involved in this appeal from which I gather that the account will develop into extended research and have many ramifications. It is perhaps hardly necessary to point out that the directors are trustees of the property of the company and it follows that they must account to the company for all such property. (*Flitcroft's Case* (1882), 21 Ch. D. 519; *In re Sharpe* (1892), 1 Ch. 154; *In re Forest of Dean Coal Mining Company* (1878), 10 Ch. D. 450; *In re Lands Allotment Company* (1894), 1 Ch. 616, 631).

MCPHILLIPS, J.A.

That the directors here are not entitled to take profits to themselves arises because they exercised a fiduciary position and it need not be said to be based necessarily on actual fraud, but on motives of public policy. I would refer to what Lord Herschell said at p. 51 in *Bray* v. *Ford* (1896), A.C. 44:

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position, such as the respondent's, is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict. It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect.

The argument at this Bar was able, long and elaborate and a great many authorities were cited. I do not find it really necessary to particularly refer to many of them—it would seem to me that upon the special facts of the present case the principles enunciated by Lord Buckmaster, who delivered the judgment of their Lordships of the Privy Council in *Cook* v. *Deeks, supra,* really cover the case. There it was held that the benefit of the contract belonged in equity to the company and the

directors could not validly use their voting power to vest it in themselves. Lord Buckmaster said at pp. 561-2:

Now it appears plain that the entire management of the company, so far as obtaining and executing contracts in the east was concerned, was in their hands, and, indeed, it was in part this fact which was one of the causes of their disagreement with the plaintiff. The way they used this position is perfectly plain. They accelerated the work on the expiring contract of the company in order to stand well with the Canadian Pacific Railway when the next contract should be offered, and although Mr. McLean was told that the acceleration was to enable the company to get the new contract, yet they never allowed the company to have any chances whatever of acquiring the benefit, and avoided letting their co-director have any knowledge of the matter. Their Lordships think that the statement of the trial judge upon this point is well founded when he said that "it is hard to resist the inference that Mr. Hinds was careful to avoid anything which would waken Mr. Cook from his fancied security," and again, that "the sole and only object on the part of the defendants was to get rid of a business associate whom they deemed, and I think rightly deemed, unsatisfactory from a business standpoint." In other words, they intentionally concealed all circumstances relating to their negotiations until a point had been reached when the whole arrangement had been concluded in their own favour and there was no longer any real chance that there could be any interference with their plans. This means that while entrusted with the conduct of the affairs of the company they deliberately designed to exclude, and used their influence and position to exclude, the company whose interest it was their first duty to protect.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MCPHILLIPS, J.A.

Then at p. 563 we find him saying:

It is quite right to point out the importance of avoiding the establishment of rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept the office. But, on the other hand, men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.

Their Lordships think, that, in the circumstances, the defendants T. R. Hinds and G. S. and G. M. Deeks were guilty of a distinct breach of duty in the course they took to secure the contract, and that they cannot retain the benefit of such contract for themselves, but must be regarded as holding it on behalf of the company.

There remains the more difficult consideration of whether this position can be made regular by resolutions of the company controlled by the votes of these three defendants. The Supreme Court have given this matter the most careful consideration, but their Lordships are unable to agree with the conclusion which they reached.

In their Lordships' opinion the Supreme Court has insufficiently recognized the distinction between two classes of case and has applied the principles applicable to the case of a director selling to his company property which was in equity as well as at law his own, and which he could dispose

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

of as he thought fit, to the case of a director dealing with property which, though his own at law, in equity belong to his company. The cases of *North-West Transportation Co.* v. *Beatty* [(1887)], 12 App. Cas. 589 and *Burland* v. *Earle* (1902), A.C. 83 both belonged to the former class. In each, directors had sold to the company property in which the company had no interest at law or in equity. If the company claimed any interest by reason of the transaction, it could only be by affirming the sale, in which case such sale, though initially voidable, would be validated by subsequent ratification. If the company refused to affirm the sale the transaction would be set aside and the parties restored to their former position, the directors getting the property and the company receiving back the purchase price. There would be no middle course. The company could not insist on retaining the property while paying less than the price agreed. This would be for the Court to make a new contract between the parties. It would be quite another thing if the director had originally acquired the property which he sold to his company under circumstances which made it in equity the property of the company. The distinction to which their Lordships have drawn attention is expressly recognized by Lord Davey in *Burland* v. *Earle* (1902), A.C. 83 and is the foundation of the judgment in *North-West Transportation Co.* v. *Beatty* [(1887)], 12 App. Cas. 589, and is clearly explained in the case of *Jacobus Marler Estates, Lim.* v. *Marler* [85 L.J., P.C. 167], House of Lords, April 14, 1913, a case which has not hitherto appeared in any of the well-known reports.

MCPHILLIPS, J.A.

If, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not *ultra vires* of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-West Transportation Co.* v. *Beatty* [(1887)], 12 App. Cas. 589 and *Burland* v. *Earle* (1902), A.C. 83 have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350.

This language of Lord Buckmaster is equally decisive of the present case and it is idle to say that there has been ratification of the action of the directors here admitting of them taking the profits to themselves. The general meetings and votes thereat are of no force or effect. I would expressly on this point again call up the language of Lord Buckmaster at p. 564:

Even supposing it be not *ultra vires* of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority.

In the result therefore upon the facts and the law the contention made upon this appeal and so ably presented by the learned counsel for the appellant, Mr. *MacInnes* and Mr. *Shaw*, that the profits obtained by the directors in relation to the sale of the mining property of the company to Sloan and the half interest vested in the directors must be accounted for by the directors, in the language of Lord Buckmaster, already quoted, "that the directors could not retain the benefit of it for themselves . . . it belonged in equity to the company and ought to have been dealt with as an asset of the company." Further shareholders —not directors—parties to the fraud and breach of duty and members of the syndicate carrying out the sale and profiting by the secret agreement also must account for all profits received. I would refer to *Fullerton* v. *Crawford* (1919), 59 S.C.R. 314 at pp. 325, 329; *Alexander* v. *Automatic Telephone Company* (1900), 2 Ch. 56; *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350; *Gray* v. *Lewis* (1873), 8 Chy. App. 1049. It follows that, in my opinion, the directors must account to the company for the profits achieved in respect to the sale to Sloan of the mining property of the company and so must the shareholders who along with the directors obtained an advantage to themselves not shared by the other shareholders—the profits derived were really assets of the company. I would allow the appeal.

MCPHILLIPS, J.A.

MACDONALD, J.A.: The allegation is that respondents, after acquiring control of Pioneer Gold Mines Limited (in liquidation) through the purchase of controlling shares, by a series of acts fraudulently conceived, appropriated to themselves property assets and benefits belonging to the company to the exclusion of the minority shareholders. Appellants (two brothers, one since deceased) acquired mining claims in the Bridge River District, British Columbia, in 1911, for approximately $26,000 and after operating two years incorporated the company referred to. In the early years, although $135,000 in gold was extracted from 8 or 9000 tons of ore milled, it was not

MACDONALD, J.A.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MACDONALD, J.A.

a successful venture. Debts accumulated and were finally assumed by the late Mr. *Adolphus Williams*. The shares held by the Fergusons were later hypothecated to the *Williams* estate as security and were registered in the names of the executors, the Fergusons retaining one share each unencumbered. Shares were also held by others, some of the holders residing in England.

The difficulties referred to led to the transfer by agreement dated January 6th, 1921, of 51 per cent. of the issued capital stock of the company to A. H. Wallbridge, since deceased, and represented in this action by his executor. He purchased this controlling interest on behalf of a syndicate consisting of himself and the other respondents. They had a syndicate agreement. Its only importance is that—as the facts develop—the inference might be drawn that the directors were acting in the interests of the syndicate rather than the shareholders generally on the occasions later alluded to. The consideration for the transfer of shares was $50,000, payable in instalments, part to be expended in the installation of a cyanide plant and in developing and operating the mine. Respondents, members of the syndicate, as purchasers, thus became shareholders and, being in control, selected from among their number a majority of the board of directors. Development work was carried on and in doing so respondents assumed financial obligations amounting collectively to about $40,000. They were therefore anxious, by further development work, to secure, if possible, a paying mine, not only as a promising speculation but to relieve them from an onerous liability.

For some time repeated efforts were made to sell the property. Several options were given but they failed to mature. Further development work was necessary if the project was not to be abandoned. Respondents, already creditors, and interested in protecting their investment, suggested an assessment of .02 a share to raise additional capital and, as testified, were anxious that all shareholders should agree to contribute in this manner. This assessment plan however was not properly placed before all the members of the company. Some of the minority shareholders (not appellants—unless *Walsh* must be treated as their agent) were asked to contribute to this way to raise $16,000

later referred to but declined. Other shareholders, particularly those in England, were not given this opportunity. True very little would be secured from English shareholders under this plan in any event but they should not have been ignored. The only importance attaching to the incident is that respondents cannot successfully claim that they gave all shareholders a chance to participate with them on equal terms in later developments.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

Failing in efforts to secure funds, it is charged that respondents conceived and executed a plan not only to protect their own interests as creditors but to drop the minority shareholders and secure the property for themselves and did so as follows: On the 16th of July, 1924, the company, so controlled as aforesaid, executed a working and development bond of its entire assets to one David Sloan, a mining engineer. It contained an option to purchase for $100,000 to be paid (except as to $16,000) from the proceeds of ore milled and sold as work was carried on. The hope was entertained that after an initial expenditure of $16,000 the purchase could be completed by returns received from mining operations. Contemporaneously with the execution of this bond a declaration of trust was executed by Sloan reciting that the respondents had agreed with him to contribute one-half of the $16,000 referred to in equal shares and that in consideration thereof Sloan on his part agreed to hold the bond and option and all benefits to be derived thereunder in trust as to one-half for himself and as to the remainder for the respondents. Viewing, as we should, the two documents as one transaction, the company controlled by respondents as vendors in effect transferred to Sloan, and to themselves the right to acquire the property and to pay for it from returns received as mining operations were carried on. Respondents therefore in effecting the sale through the company also participated as purchasers to the extent of a half interest.

MACDONALD, J.A.

The surviving appellant, Andrew Ferguson, did not know that respondents participated in this way until several years later unless the knowledge of Mr. *Walsh,* executor of the estate of *Adolphus Williams,* deceased, to whom, as stated, his shares were hypothecated, can be imputed to him. His solicitor, Mr. *Noble,* was advised of the Sloan option by letter but no mention

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MACDONALD, J.A.

was made—not necessarily purposely—of the declaration of trust. As it transpired respondents were only called upon to advance $4,000—Sloan advancing an equal amount—after which returns from the mine provided for all obligations under the option. It proved to be a profitable deal. By the 5th of December, 1924, the date of a meeting later referred to, in a three months' period shipments of gold were made to the value of $15,532.21. Later it proved to be an exceptionally valuable property.

In the following month, indicating I think that all successive steps leading to the extinction of the old company and the formation of a new one were planned, *viz.*, 8th August, 1924, notices were posted for an extraordinary general meeting to be held on the 22nd of August to wind up the company, make an assignment in bankruptcy and to appoint the respondent Salter, the company's auditor, as liquidator; also, in case such a resolution carried for a second extraordinary general meeting to be held on September 9th to confirm this special resolution. A resolution to wind up the company carried and Salter was appointed liquidator. No action was taken to place the company in bankruptcy. At a shareholders' meeting of the 9th of September the resolution to wind up the company was confirmed.

The next step taken was to convene a meeting of creditors on September 26th, 1924. The principal creditors were the respondents for, as stated, about $40,000 and the Union Bank of Canada for $5,000. Respondents were in a precarious position financially, and apparently, felt justified in following a predetermined course. Relief from their indebtedness could only be obtained by securing a paying mine and further development work in the attempt to secure it required the expenditure, as viewed at that time, of $16,000. While Sloan's report, after investigating was optimistic, still, it was not a certainty that values would be revealed to ensure repayment of moneys advanced.

I think it is accurate to say that only the respondents among the creditors were actively pressing for payment of their debts and that they were not altogether single-minded in doing so; it was part of the plan to wind up the company and effect a sale. The liquidator was directed to advertise its assets for sale and

to call for tenders. Asked if he had anything to do personally with the decision "or was that arranged by Mr. Wallbridge" he replied:

I can't remember really; the chances are it was arranged by Mr. Wallbridge.

Tenders were called for and a further meeting of creditors held on the 22nd of October, 1929, to consider them. The liquidator reported receipt of one tender only for $45,000, the amount of the company's debts. It was tendered by the respondent Boucher, acting on behalf of himself and co-respondents (the syndicate) who held the half interest with Sloan under the bond and declaration of trust. It was accepted by resolution, Mr. *Walsh,* the executor of the *Williams* estate, objecting. His objection led to further consultation among respondents and later one of their number wrote to Mr. *Walsh* (November 20th, 1924) stating that "the offer made by Mr. Boucher on behalf of the syndicate" to purchase the assets from the liquidator would be increased by $20,000, but only on the condition that

if at the meeting of the shareholders called for the 5th December next, 95 per cent. of the shareholders confirm the working bond already given to Mr. Sloan and approve of and support the proposal now being made.

The $20,000 additional and the $45,000 for creditors was to be paid out of purchase-moneys received under the bond to Sloan and in the final analysis from the net proceeds of ore milled and sold. This amended offer was placed before the liquidator in a letter dated December 5th, 1924, signed by the respondents, again stipulating that the amount was to be paid, if at all, out of moneys received under the bond and also conditional upon its approval by a majority as aforesaid. At a meeting of the shareholders held on that date, *viz.,* December 5th, 1924, the following resolution was passed on—it is significant to notice—the motion of two minority shareholders (not respondents):

That the action of the board of directors of the company in granting a working bond containing an option to purchase all the mineral claims, building, plant, . . . dated July 16th, 1924, to one David Sloan, representing himself for one-half interest and the following shareholders of the company for one-half interest, R. B. Boucher, F. J. Nicholson, *H. C. McKim, A. E. Bull,* A. H. Wallbridge and J. Duff-Stuart, of whom the last three mentioned are directors of the company, be and is hereby ratified and confirmed, and the said bond declared to be valid and binding upon the company and the liquidator is hereby authorized to carry out the terms thereof.

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MACDONALD, J.A.

Also the following resolution:

That the offer of [respondents] . . . for the purchase of all the assets of the company subject to but with the benefit of the working bond and option given to David Sloan and the royalties and purchase-moneys payable thereunder for the price and on the terms set forth . . . be and is hereby accepted . . . and the liquidator is hereby authorized to sign, seal and deliver on behalf of the company, all necessary documents for the purpose of accepting and carrying the said offer into effect.

On the 21st of January, 1925, a meeting of creditors (respondents the major creditors) also passed a resolution confirming the sale, the bond to Sloan and the declaration of trust. Later, *viz.*, 21st of January, 1925, an agreement was executed between the company as vendor and respondents as purchasers. It recites that on December 5th, 1924, a meeting of shareholders representing 729,996 shares (over 95 per cent.) of the issued capital stock of the company approved of the sale and that,

2. The consideration for the said sale shall be the payment to the vendor by the purchasers out of the royalties and purchase-money received by them under the said bond as and when the same shall have been so received of a sum sufficient to pay the liabilities of the vendor as now proved with the said liquidator, together with interest thereon. . . . As further consideration the purchasers agree to pay over to the vendor the next $20,000 received by them from said royalties or purchase-money under said bond after satisfaction of above-mentioned liabilities . . . for distribution *pro rata* among the shareholders of the vendor.

Also that:

3. On payment to the vendor of the said sums of money punctually at the times aforesaid the vendor agrees with the purchasers to immediately thereupon convey to the purchasers the said mineral claims, assets and property of the vendor free from all encumbrances, save and except the said bond in favour of David Sloan.

Shortly thereafter another company—Pioneer Gold Mines of B.C. Limited—was incorporated and the purchasers (respondents) conveyed their interest to the new company in consideration of the allotment of a large block of shares to each of them and Sloan for a like consideration transferred to the new company his interest under the bond. Thus appellant and minority shareholders of the original company ceased to have any further interest in the property; all they received, by way of distribution, was 49 per cent. of the $20,000 paid in addition to payment of the debts of the old company.

I have outlined, as I view it, all the material facts. The first question is—were all steps taken *intra vires* of the company's

powers; authorized by properly convened meetings of shareholders to whom full disclosure was made and by a quorum of directors qualified (having regard to personal interest) where the latter had power to act all free from irregularities of a nature incurable by ratification of the shareholders. Where, as here, three of the respondents, who were directors, occupying a dual position and a fiduciary relationship to shareholders, take part in a transaction of this nature we should carefully scrutinize each step to see if their tackle was in order.

The contract with Sloan was *intra vires* of the company's powers. Under article 102, reading as follows: [already set out in the judgment of MARTIN, J.A., *ante*, pp. 537-8.]

It was a voidable contract "or arrangement" and might readily have been set aside unless ratified by shareholders and even after ratification might be avoided if fraud, active or constructive is established or harsh, oppressive or unconscionable conduct revealed. This latter consideration is the only point in the case. If the whole transaction was not of a fraudulent character the appellant fails. That of course assumes the observance of formalities. I will not outline lengthy details but simply say that a careful study of all the evidence discloses that shareholders received proper notices of all meetings convened in the manner specified by the company's articles and that notice of the general nature of the proposed business was given in such a form as to enable them to determine whether they ought to attend in person or by proxy to approve or reject. The appellant Ferguson, holder of one share unencumbered, in addition to an equity in hypothecated shares, was entitled to demand that the company should strictly adhere to the provisions of the articles in respect to mailing, posting and addressing notices. This was done. The non-receipt of notice did not, by the articles, invalidate proceedings. Evidence of mailing notices to shareholders given at the trial in the form of a statutory declaration by the liquidator and filed as an exhibit was not a satisfactory method of proof but the declaration was accepted without objection. If objected to, direct evidence might have been given and it is now too late to complain. Each successive step taken therefore was legal and in law expressed the will of a majority of shareholders in respect to internal matters within the corporate powers of the

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

company and what was done cannot be undone merely because some of the respondents, who were shareholders, served their own personal interests. As stated by Jessel, M.R. in *Pender* v. *Lushington* (1877), 6 Ch. D. 70 at pp. 75-6:

> There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest.

True, three of the respondents were directors and stood in a fiduciary relationship to the company. Their duty was to serve the interests of the general body of shareholders, not of any particular class. *Cook* v. *Deeks* (1916), 1 A.C. 554 on its special facts is of little assistance but the following statement by Lord Buckmaster, at p. 563, may well be heeded by directors:

> Men who assume the complete control of a company's business must remember that they are not at liberty to sacrifice the interests which they are bound to protect, and, while ostensibly acting for the company, divert in their own favour business which should properly belong to the company they represent.

MACDONALD, J.A.

The case at Bar is not on the facts at all similar but the underlying principle applies. In *In re Cameron's Coalbrook, &c., Railway Company, Ex parte Bennett* (1854), 18 Beav. 339, at 355, the Master of the Rolls states it in these terms:

> I believe it to be of essential importance that all persons, who accept the office of directors, should be made to understand what their duties and liabilities are; and especially that it is their bounden duty to do the best they can for the company, totally regardless of their own private and individual interests and benefit.

We must not however forget that in securing for the old company payment of its debts and $20,000 additional instead of committing it to further expenditures of a speculative nature the directors might possibly believe at that stage that they were, in this dilemma acting in the best interests of the company.

It is of course not enough that directors should not exceed their powers; they must not abuse

> the powers vested in them for the management of the company's business:

Burland v. *Earle* (1902), A.C. 83 at p. 97.

But the difficult question in each case is, what constitutes an abuse of powers or its equivalent—fraudulent conduct? Failing to discharge obligations of trusteeship they would be guilty of misfeasance but one cannot decide this point without taking into

account the fact that the shareholders ratified each step taken. The obvious inference from ratification, if the facts are fully disclosed, is that in the circumstances (perhaps embarrassing) existing at the time the plan proposed offered the best solution to their difficulties. The Courts will not set aside an *intra vires* transaction executed and ratified (after disclosure) by a majority of the shareholders, as a matter of internal policy at the suit of minority shareholders solely on the ground that, as it later transpired, it advanced the interests of the majority. It would be otherwise, if ratification was secured by improper means, such as deceit, indirect methods or failure to properly disclose. It is difficult after ratification to assert that the thing approved and, at the time regarded as fair by the minority, was in fact fraudulent. The truth is that the minority shareholders, if the company could not effect a sale to third parties—and its efforts in that direction failed—were willing to retire and to permit the respondents to join in a deal with Sloan, acquire the property, pay the debts of the old company and $20,000 additional. It seemed to them desirable to affirm at that stage; they cannot now repudiate because future events disclosed that it would have been more profitable to dissent. It would be regarded as a fair arrangement had not later developments revealed values rich enough to excite cupidity. The viewpoint, as entertained by all shareholders when the bond was given and continuing up to the time it was known that a rich mine had been developed, is important in deciding whether or not the steps taken by respondents were fraudulent, unjust or oppressive. It may be observed too that the resolution of December 5th, 1924, ratifying the bond and declaration of trust was moved and seconded by minority shareholders and supported by 95 per cent. of the shares represented. Mr. Twiss and other minority shareholders present were capable of appreciating the situation.

MACDONALD, J.A.

What constitutes fraud or oppressive conduct or at what point self-serving conduct injurious to others, where, for example, "a majority shareholder pushes his own interests, so far as to vote a part of the company's assets into his own pocket to the exclusion of the minority" (Wegenast, 319) may properly be regarded as fraudulent will depend largely, as stated, in this work on Company Law, at p. 317, on the opinion of judges,

MORRISON, C.J.S.C.

1933

April 13.
May 1.

COURT OF APPEAL

Oct. 3.

FERGUSON v. WALLBRIDGE

MACDONALD, J.A.

commenting on cases relating to the duty of the majority to deal fairly with the minority he says:

> It may be pointed out that the question resolves itself in most cases into a question of the view which a particular Court will take as to the facts: whether on the facts the conduct of the majority is to be regarded as fraudulent or unfair or oppressive—terms which in the nature of things lend themselves to differences of opinion.

In the case at Bar the trial judge finds a complete absence of any fraudulent design. He does so in emphatic language. Although I have already indicated my views, still I confess that if I were the trial judge I would not be free from concern. That there was animus against appellant, possibly justified, seems clear. Former difficulties created an unfriendly atmosphere and explains possibly in part the course pursued. It may be true that the end was planned from the beginning. Respondents wanted to get rid of appellant. Ill-feeling often provokes retaliation. The refusal of some of the shareholders to submit to an assessment was assigned for the position taken by respondents not "to carry the rest of the stockholders any longer" and "to have a show-down right away." There is some ground too for inferring that it was the interests of the syndicate, that the directors always had in mind, rather than the interests of the company. There is support for this view in the evidence. However, these facts, while causing concern, do not out-weigh the broader aspects I have referred to. They indicate that respondents might have protected their own interests in a manner less objectionable. The trial judge found in the acts complained of no conduct of a fraudulent character and he was in the best position to decide the point. He had the respondents, whose actions were attacked before him, as witnesses and we should accept his conclusion unless satisfied that it is clearly erroneous. I would therefore not disturb the judgment.

Appeal dismissed, McPhillips, J.A. dissenting.

Solicitor for appellant: *Ian A. Shaw.*
Solicitor for respondents *Bull et al.*: *T. Edgar Wilson.*
Solicitor for respondents Wallbridge executors: *A. H. Miller.*
Solicitor for respondent Salter: *C. W. St. John.*

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA v. BANK OF MONTREAL.

COURT OF APPEAL

1933

Oct. 3.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. BANK OF MONTREAL

Forest Act—Timber licence—Cutting of timber—Royalties—Liability of owner of licence—Appeal—R.S.B.C. 1924, Cap. 93, Sec. 127 (1).

Section 127 (1) of the Forest Act provides, *inter alia*, that "Every . . . holder of a timber licence on lands whereon any timber or wood is cut in respect of which any . . . , royalty, . . . is . . . payable under this Act . . . , and every person dealing in any timber . . . and every person operating a mill or other industry which cuts or uses timber . . . shall keep correct books of account of all timber and wood cut for and received by him, and shall render monthly statements thereof . . . and the . . . licensee, or person dealing . . . or operating . . . , shall pay monthly all such sums of money, as are shewn to be due, to the minister." The defendant bank became owner of timber licence No. 7994 by assignment and subsequently entered into a contract with the Redonda Logging Company whereby it granted said company the right to cut and remove the timber covered by the licence. The company cut and removed timber for a certain time and then became bankrupt and $774.20 was due in royalties in respect of the timber cut. An action against the bank for the royalties was dismissed.

Held, on appeal, affirming the decision of MCDONALD, J., on an equal division of the Court, that the appeal should be dismissed.

Per MACDONALD, C.J.B.C. and MCPHILLIPS, J.A.: That the timber was not "cut for or received by the bank" but for the Redonda Logging Company and the bank was not liable for the tax.

Per MARTIN and MACDONALD, JJ.A.: Under said section all classes without discrimination including licensees are subject to the same obligations, namely to keep books of account and to pay royalties in respect to timber cut and removed. It is immaterial whether he cuts and removes the timber himself or contracts with another to do it for him. The section permits the minister to demand payment from the licensee, and the appeal should be allowed.

APPEAL by plaintiff from the decision of MCDONALD, J. of the 2nd of March, 1933 (reported 46 B.C. 453), in an action to recover $941.64 for royalty in respect of timber cut upon Crown lands under Timber Licence No. 7994. By assignment of the 23rd of January, 1923, the defendant became the owner of said timber licence and on October 22nd, 1924, entered into a contract with the Redonda Logging Company Limited, whereby the defendant granted to the company the right to cut and remove the timber referred to in the licence. The purchase price was $9,000 payable by instalments and the company's rights under the contract ceased on April 22nd, 1926. The company cut timber and made certain payments until it became bankrupt in September, 1925. Royalties amounting to $774.20

Statement

COURT OF APPEAL

1933

Oct. 3.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. BANK OF MONTREAL

in respect of timber cut by the company and still lying upon the lands have not been paid and it appears that at present prices such timber would not realize upon seizure and sale a sufficient price to pay these royalties. The action was dismissed.

The appeal was argued at Victoria on the 26th of June, 1933, before MACDONALD, C.J.B.C., MARTIN, MCPHILLIPS and MACDONALD, JJ.A.

Pepler, for appellant: This licence was assigned to the bank. The claim comes within section 127 of the Forest Act. One of the statutory conditions is that the licensee shall be liable for royalties and the holder of a licence is liable by the terms of the licence itself.

Argument

Lawson, K.C., for respondent: The timber was never cut for or received by the bank. It was cut for and received by the Redonda Logging Company Limited. This was really a sale of the licence to that company. No action lies for the recovery of royalties, they are only recoverable by seizure as provided by the Act: see *Pasmore* v. *Oswaldtwistle Urban Council* (1898), A.C. 387 at p. 394. Where the Act provides a remedy no other course can be taken.

Pepler, in reply, referred to *Phillips* v. *Britannia Hygienic Laundry Co.* (1923), 93 L.J., K.B. 5 at p. 7, and *Board* v. *Board* (1919), A.C. 956.

Cur. adv. vult.

3rd October, 1933.

MACDONALD, C.J.B.C.

MACDONALD, C.J.B.C.: I agree with the trial judge, and would therefore dismiss the appeal. Clearly the timber was not "cut for or received by the defendant," but for the Redonda Logging Company Limited and therefore the defendant was not liable for the tax. See section 127 of the Forest Act, Cap. 93.

MARTIN, J.A.

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

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: In my opinion the learned trial judge, Mr. Justice D. A. MCDONALD, arrived at the proper conclusion in dismissing the action. In short, upon the true construction of the Forest Act (R.S.B.C. 1924, Cap. 93, Part XII., Secs. 124 to 127 inclusive) it is apparent that the Crown has a lien on the timber for rental stumpage and also a lien on the premises in which timber is manufactured and a lien as well on lands upon which the timber is cut and the person cutting the timber

must render accounts and returns of the timber cut (section 127 (1) (2)). Now it is evident that it is only the person who cuts the timber who can

> keep correct books of account of all timber and wood cut for or received by him, and shall render monthly statements . . . ; and the owner, lessee, or licensee, or person dealing in the timber or operating the mill . . . . shall pay monthly all such sums of money, as are shewn to be due, to the minister:

section 127 (1). With as careful an analysis of the language of the statute as can be given as to the person who may be said to be statutorily liable—apart from the lien of the Crown always existing—it would seem to me that that person is the person who cuts the timber, as the person who cuts the timber is the person who has to render the account. The owner in this case—the Bank of Montreal—did not cut the timber, but gave authority to the Redonda Logging Company Limited to do so for itself and that company which cut the timber—not for the bank—is plainly liable to render the accounts called for by the statute and that company cutting the timber is liable to "pay monthly all such sums of money as are shewn to be due to the minister" (section 127 (1)). The bank is not shewn to be in default to the Crown at all for the timber-licence fees. These are fully paid, the Crown having received them and the licences are in good standing. The claim now made by the Crown is something above and beyond the licence fees and an additional remedy, as it would appear to me, to the lien which always exists in the Crown and does now exist as against the timber cut upon the ground and the cut timber is now thereon. It is the person who has cut the timber and rendered the accounts as required by the statute who becomes liable, quite apart from the owner. As against the owner and all others the Crown can impose its lien, but where is given the right to sue the owner—the bank—for moneys due and payable for timber not cut by the bank but by the company? In all fiscal and revenue legislation there must be clear words imposing legal liability and there must be strict construction. Here we have the learned trial judge applying his mind to the statute law necessary to be considered and whilst I cannot say that it may not be possible to come to a contrary conclusion to that come to by the learned trial judge yet I do not feel able to come to the conclusion that the learned judge is wholly wrong and that I must do before I am entitled to disagree with his conclusion and that I do not do. That which is being attempted here is an extraordinary remedy—I suppose consequent upon the depressed conditions

MCPHILLIPS, J.A.

COURT OF APPEAL

1933

Oct. 3.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. BANK OF MONTREAL

—as the Crown is always amply secured by its lien given by statute. To insist upon this extraordinary remedy means that the lumber industry will suffer to the degree that the timber licences will lose value as collateral security with the banks as the banks cannot afford to have a personal liability imposed upon them, they not cutting the timber. The Crown is at all times secure with its lien. It is true I may here have given an extrajudicial view but that is not to be lost sight of, perhaps, when one has to consider the intention of the Legislature and determining whether or not that was the intention of the Legislature—that is, have we here clear words which impose this liability upon the bank? It is well to turn to the authorities for aidance in coming to a conclusion in the matter. I might well refer to what Viscount Dunedin said in *Rex* v. *Commissioners of Customs and Excise* (1928), A.C. 402 at p. 409. That was a case in which there was great divergence of opinion in the Court of Appeal and it was the construction of statute law:

> My Lords, in the judgments in this case, and still more in those of *Watney, Combe's* case (1915), A.C. 885, there were stern warnings to those who in order to read in words into a statute which are not there, or to divert words used from their ordinary and natural meaning, permitted themselves to speculate as to what the aim and attainment of the Act was likely to be. Your Lordships will have noticed that I have based my opinion on the words of the statute and on them alone, but with all deference to those opinions, with which indeed I cordially agree, I think it is quite legitimate when it comes to a question of construction without addition or diversion of words to see what the aim of the statute would turn out according to the one interpretation or the other.
>
> Now in the view I have taken of the words the aim of the statute is simplicity itself.

MCPHILLIPS, J.A.

And here what I think the Legislature intended to do was to give to the Crown this additional remedy as against the person cutting the timber not as against the owner as attempted here. What is contended for here is a charge on the owner of the timber licences, the bank. Now in principle the intention to impose a charge upon the subject must be shewn by clear and unambiguous language. That principle was well brought out in *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842 and a bank was held not to be liable as contended for under certain legislation of Cape Colony. Lord Blackburn, who delivered the judgment of their Lordships of the Privy Council, at p. 856, said:

> Their Lordships, therefore, having regard to the rule that the intention to impose a charge on the subject must be shewn by clear and unambiguous language, are unable to say that the obligation of the bank to make the

return applied for, and its consequent liability to pay duty on the notes put into circulation by its Kimberley Branch, are so clearly and explicitly imposed by the present Act as to satisfy this rule. This view of the Act appears to have been for a long time entertained and acted upon by the officers of the Government of the Province, for having made a claim for duty they expressly withdrew it, renewing it only after an interval of two years.

Here we have, as I before intimated, depressed times which possibly accounts for this claim on the bank.

I am not able upon the whole case to take a different view to that taken by the learned trial judge. I would dismiss the appeal.

MACDONALD, J.A.: Appellant contends that respondent owes the Crown $941,64 for timber royalties in respect to timber cut upon Crown lands held under timber licences. Respondent as licensee, by agreement with the Redonda Logging Company Limited, granted the latter the right to enter upon the lands to cut, remove and carry away therefrom "for the company's own use and benefit" all the timber and trees situate and growing thereon for certain considerations therein outlined. Respondent submits that because by this agreement the timber is cut by and for the Redonda Logging Company Limited, the tax is payable by the company. This contention is based upon what is submitted is the true interpretation of the words "cut for or received by him" in section 127 (1) of the Forest Act, Cap. 93, R.S.B.C. 1924. It reads as follows:

MACDONALD, J.A.

127. (1) Every owner of granted lands and every holder of a timber lease or timber licence on lands whereon any timber or wood is cut in respect of which any stumpage, royalty, or tax is reserved or payable under this Act or the Timber Royalty Act or any contract, and every person dealing in any timber or wood cut from any such lands, and every person operating a mill or other industry which cuts or uses timber or wood upon or in respect of which any royalty or tax is by this Act or the Timber Royalty Act or any contract reserved or payable, shall keep correct books of account of all timber and wood cut for or received by him, and shall render monthly statements thereof to the District Forester, and shall within five days after every transfer of ownership of any boom or timber which has been scaled prior to the transfer notify the District Registrar of the transfer or, if demanded, shall furnish a true copy of the tallyman or scaler's daily work, duly sworn to, which shall contain all such particulars as the minister may require; and such books of account shall be open at all reasonable hours for the inspection of any officer of the Forest Branch; and the owner, lessee, or licensee, or person dealing in the timber or operating the mill or other industry as aforesaid, shall pay monthly all such sums of money, as are shewn to be due, to the minister.

It will be observed that five classes of owners including holders of timber lands, dealers and mill operators are required to keep books of accounts and render monthly statements, etc., to the

COURT OF APPEAL

1933

Oct. 3.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. BANK OF MONTREAL

MACDONALD, J.A.

district forester and each of them "shall pay monthly all such sums of money as are shewn to be due to the minister," meaning the minister of lands (section 2). One of the parties who must pay is the "licensee." It is immaterial whether he cuts and removes the timber himself or contracts with another (to his advantage) to do it for him. The section permits the minister to demand payment from the licensee. Reliance is placed on the words "cut for or received by him." Respondent reads it as if the word "by" was used instead of "for." The phrase is equally applicable to the five groups referred to. The word "for" means "to the advantage of" and it is to the advantage of the contractor and contractee alike that the timber should be cut. The sense therefore in which the words "cut for" are used, being equally applicable to both, must be gathered from the context and other relevant sections. All classes without discrimination including licensees, are subject to the same obligations, *viz.*, to keep books of account, etc., and to pay royalties in respect to timber cut and removed. By section 53 timber royalties are reserved for the use of His Majesty "upon and in respect of timber cut upon Crown lands" regardless of who may physically cut and remove it. It was not contemplated that the minister should pursue, perhaps elaborate inquiries, into the disposition by contract or otherwise of the right to cut with a view to collecting royalties from third parties. Certainty is obtained by imposing liability on the licensee. His name is of record in the department. If he wishes to recoup himself he may do so by contract but with that the minister is not concerned.

The point was raised that a right of action will not lie because by other sections the Crown has by way of additional remedy a lien on timber for stumpage and royalties. There is, in my opinion, no merit in this contention. The amount due monthly, if not paid, is a debt due to the minister. He is nominated as the agent of the Crown to receive it and may enforce payment by suit. The action was brought by the Attorney-General, not the minister of lands. By consent, however, the minister of lands is, if necessary, added as a party.

I would allow the appeal.

The Court being equally divided the appeal was dismissed.

Solicitor for appellant: *Eric Pepler.*
Solicitor for respondent: *H. J. Davis.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council:

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. KINGCOME NAVIGATION COMPANY LIMITED (p. 114).—Reversed by the Judicial Committee of the Privy Council, 12th October, 1933. See 103 L.J., P.C. 1; 150 L.T. 81; 50 T.L.R. 83; (1933), 3 W.W.R. 353; (1934), A.C. 45; 1 D.L.R. 31.

CAMERON LUMBER COMPANY LIMITED v. MOUNT ROYAL ASSURANCE COMPANY *et al.* (p. 52).—Affirmed by the Judicial Committee of the Privy Council, 30th November, 1933. See (1933), 103 L.J., P.C. 34; (1934), 1 D.L.R. 785; 1 W.W.R. 193.

CORPORATION OF THE DISTRICT OF MATSQUI, THE v. WESTERN POWER COMPANY OF CANADA LIMITED (p. 335).—Affirmed by the Judicial Committee of the Privy Council, 24th January, 1934. See (1934), 2 D.L.R. 81; 1 W.W.R. 483.

EAST KOOTENAY RUBY COMPANY LIMITED v. MORRISON AND JOHNSON (p. 214).—Reversed by Supreme Court of Canada, 22nd December, 1933. See (1934), S.C.R. 5; 1 D.L.R. 468.

KAPOOR LUMBER COMPANY, LIMITED, THE v. THE CANADIAN NORTHERN PACIFIC RAILWAY COMPANY (p. 19).—Reversed by the Judicial Committee of the Privy Council, 9th October, 1933. See 41 C.R.C. 277; (1933), 3 W.W.R. 513.

VANCOUVER BREWERIES LIMITED v. VANCOUVER MALT & SAKE BREWING COMPANY LIMITED (p. 89).—Reversed by the Judicial Committee of the Privy Council, 2nd February, 1934. See (1934), 50 T.L.R. 253; 1 W.W.R. 471.

Cases reported in 46 B.C. and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

DONALD (M. D.) LIMITED, *In re* (p. 406).—Affirmed by the Supreme Court of Canada, 26th April, 1933. See (1933), S.C.R. 411; 4 D.L.R. 145.

JOHNSON v. SOLLOWAY, MILLS & COMPANY LIMITED (p. 260).—Reversed by the Judicial Committee of the Privy Council, 15th January, 1934. See (1934), 50 T.L.R. 268; 1 W.W.R. 516.

MCTAVISH BROTHERS LIMITED v. LANGER (p. 310).—Reversed by Supreme Court of Canada, 25th April, 1933. See (1933), 4 D.L.R. 609.

INDEX.

COMPANY—*Continued.*

—*Working bond and option by way of sale —Declaration of trust by purchaser in favour of members of syndicate—Validity—Action by minority shareholders.*] The defendants as a syndicate, purchased 51 per cent. of the stock of Pioneer Gold Mines Limited from the former shareholders, and took over the management thereof on the 6th of January, 1921. The property was worked at a loss while the syndicate was in control and money was borrowed from time to time from members of the syndicate to keep the mine in operation. On the 16th of July, 1924, when the debts amounted to $45,000, most of which was owing to members of the syndicate, a working bond was given to one Sloan containing an option to purchase the mine for $100,000. This bond and option was granted by a board of four directors, three of whom were members of the syndicate. Sloan's estimate was that the sum of $16,000 would be required by him to bring the mine to a state of production which would enable him to pay the purchase price from the proceeds of ore mined and milled on the property. Contemporaneously with the execution of this bond a declaration of trust was executed by Sloan reciting that the members of the syndicate had agreed to advance one-half of the $16,000 referred to above in consideration for which Sloan agreed to hold the land and all benefits to be derived thereunder in trust as to one-half for himself and the remainder for the members of the syndicate. On the 22nd of August, 1924, an extraordinary general meeting of the shareholders was held, at which a resolution was passed to wind up the company, and a liquidator was appointed. This was confirmed at a meeting held on the 9th of September following. On the 26th of September, at a meeting of the creditors, the liquidator was directed to advertise the assets of the company for sale. The only offer was that of Dr. Boucher on behalf of the syndicate, being $45,000, and as this was objected to by one of the directors the offer was increased to $65,000. At a meeting of the shareholders on the 5th of December, 1924, at which six out of twenty-three members (four of whom were members of the syndicate and purporting to represent over 95 per cent. of the stock), were present, resolutions were passed approving the bond to Sloan, representing himself for a one-half interest, and the syndicate for the other half, and the offer of the purchase of Boucher on behalf of the syndicate of the assets of the company subject to the bond and option to Sloan, and at a meeting of the creditors on the 21st of January, 1925, a resolution was passed confirming the sale, the bond to Sloan and the declaration of trust. Shortly after the Pioneer Gold Mines of B.C. Limited was incorporated and the syndicate conveyed their interest to the new company in consideration of an allotment of a large block of shares to each of them, and Sloan for a like consideration transferred to the new company his interest in the bond and option. An action by the minority shareholders of Pioneer Gold Mines Limited that the majority shareholders by conspiracy and fraud wrongfully acquired the assets of said company and for damages was dismissed. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C. (MCPHILLIPS, J.A. dissenting), that the appeal should be dismissed. *Per* MACDONALD, C.J.B.C.: I am satisfied there was here a breach of trust in which all the defendants and Sloan were equally involved, but reading the history of the case I am of opinion there was no conscious fraud. The option and the declaration of trust of Sloan must be regarded as one transaction, but plaintiff's counsel asks the Court to affirm the agreement as far as Sloan is concerned and set aside only his declaration of trust in favour of the defendants. When the plaintiff acquiesced in and relied upon the option he confirmed and ratified the whole agreement and therefore it cannot be rescinded. Nor can the defendants be declared trustees for the plaintiff's alleged interest. *Per* MARTIN, J.A.: The bond to Sloan and his declaration of trust of even date can be upheld under the provisions of article 102 of the company's articles as full disclosure of the nature of the interest of the three directors concerned was in fact made at the meeting of directors of July 16th, 1924. At this meeting the directors interested improperly voted with the result that the contract became "voidable," but what was done at that meeting was duly ratified and confirmed by the general meeting of the company held on the 5th of December following. *Per* MCPHILLIPS, J.A.: What was done constituted breach of duty, the benefit of the contract belonged in equity to the company and the directors could not validly use their voting power to vest it in themselves. Further, shareholders—not directors—parties to the fraud and breach of duty, and members of the syndicate carrying out the sale and profiting by the secret agreement also must account for all profits received. There was defective notice of meetings and no proper disclosure of facts to minority shareholders. *Cook* v. *Deeks*

CONSTITUTIONAL LAW—*Continued.*

ada. It was held on the trial that said Act was *intra vires* of the Parliament of Canada. *Held*, on appeal, affirming the decision of MACDONALD, J., that the primary object of the legislation was the public safety and that it was a proper exercise of Federal powers over "criminal law" under section 91 (27). It is not a *sine qua non* (as many provisions of the Criminal Code shew) that injury to property or to the person must necessarily follow the commission of an unlawful act. If the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used, it may do so under said section, which is not in essence an interference with property and civil rights though that may follow as an incident, but the real purpose is to prevent actual or threatened injury or the likelihood of injury of the most serious kind to all the inhabitants of the Dominion. *Per* MARTIN, J.A.: The legislation may also be upheld under the "peace, order, and good government" powers in said section 91. *Quære*, as to the power under section 91 (2)—"regulation of trade and commerce." STANDARD SAUSAGE COMPANY LIMITED v. LEE AND PROCTOR v. STANDARD SAUSAGE COMPANY LIMITED. - - **411**

CONTEMPT — Order for payment into Court—Sheriff's fees—Delay. **38**
See ATTACHMENT.

CONTRACT—*Parties defendants in action —Oral agreement to bear gains or losses in equal proportions—Death of party so agreeing—Action by other defendants against executors of deceased to recover half their losses—Evidence of solicitor—Corroboration —Ratification—R.S.B.C. 1924, Cap. 82, Sec. 11.*] H. owned three claims called the Jumbo group in the Portland Mining Division. In May, 1908, he agreed verbally with S. and P. that if they would keep the claims in good standing, obtain Crown grants and dispose of them when opportunity arose they could have two-thirds of the claims and he (H.) would retain the remaining one-third. S. and P. met the L. brothers on the way to the claims with whom they agreed to share equally their interest in the claims. The Jumbo group was allowed to run out, the three claims were relocated and with other adjoining claims acquired (ten in all) they were called the Big Missouri group. Crown grants were obtained and after a number of options given on the group had expired, the property was sold in 1925, about $300,000 having been obtained

CONTRACT—*Continued.*

on all the options. In the meantime S., P. and one of the L. brothers died. H. then brought action to recover one-third of the moneys so obtained. The remaining L. brother, acting for himself and as executor for his deceased brother and the executors of S. and P., the defendants in the action, employed *R. M. Macdonald* of Vancouver as their solicitor. On perusing the statement of claim *Macdonald* called in L. and advised him that he for himself and his deceased brother had a defence that the executors of S. and P. did not have, namely, that they were not parties to the agreement made by H. with S. and P. and that he (*Macdonald*) could not then act for all the defendants, to which L. replied that *Macdonald* could act for all of them as "We are in this together; we will share the gains and losses equally." *Macdonald* continued to act for all the defendants, and by the judgment of the Supreme Court of Canada ((1931), S.C.R. 235) judgment was given for the plaintiff against the executors of S. and P. for $50,000, and the action was dismissed as against the L. brothers. The remaining L. brother died in January, 1931. On the 5th of August, 1931, the administratrix of the S. estate, suing as such and on behalf of the heirs of P., brought action against the executors of the L. brothers to recover one-half of the amount paid by her on the judgment, with costs, in the former action. It was held on the trial that the administratrix of the S. estate was not entitled to sue on behalf of the heirs of P., but that as administratrix of the S. estate she was entitled to recover $13,862.26. *Held*, on appeal, affirming the decision of FISHER, J., that there was a binding, enforceable contract and the appeal should be dismissed. *Per* MACDONALD, C.J.B.C.: There was corroboration of Lindeborg agreeing to share the losses by his later conversation with the plaintiff in which he told her of his agreement with *Macdonald*, also by his telegram to the plaintiff advising her of the result of the appeal to the Supreme Court from which it was apparent that he assumed an equal share in the losses. *Per* MACDONALD, J.A.: *Macdonald* had no power to accept Lindeborg's offer on behalf of the plaintiff as it was not within the ambit of his authority as her solicitor in the conduct of the action, but he proceeded to act for all parties, assuming to accept the offer as binding on them. This position could be made legally binding only by ratification. By action claiming payment pursuant to the agreement, she ratified her solicitor's acceptance of the offer and his conduct in assuming to act for her in the action. The ratification

3.——*Keeping a disorderly house—Arrest without warrant—Police officer — Liability for false arrest — Malicious prosecution—Proof—Damages.*] Keeping a disorderly house is not an offence for which an offender may be arrested without a warrant, even by a police officer, unless the offender is found within the house when the police officer has entered it under a search warrant obtained under section 641 of the Criminal Code. A police officer in the course of his duties must act strictly within the law and will be held liable personally for any breach of it. WHITWORTH v. DUNLOP *et al.* - **251**

4.——*Libel — Charge dismissed — Costs against informant—Nolle prosequi—Jurisdiction of trial judge as to costs—Costs of prior abortive trial—Criminal Code, Sec. 1045.*] An accused was discharged on a *nolle prosequi* on a charge for criminal libel. *Held*, to constitute a "judgment for the defendant" within the meaning of section 1045 of the Criminal Code, and the accused is entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information. A former trial in the criminal prosecution proved abortive as the jury disagreed. *Held*, that the costs thereof are legal and proper costs which may be allowed under said section, and the Court in the criminal case has jurisdiction to order them to be paid by the private prosecutor. The costs properly ordered by the criminal Court to be paid under said section 1045 may be taxed pursuant to said order and then made the subject of a civil action by the accused or his assignee. YOUNG v. UCHIYAMA. - - - **155**

5.——*Possession of opium — Opium on premises—Knowledge of accused—Evidence—Onus—Can. Stats. 1929, Cap. 49, Sec. 17—Criminal Code, Sec. 1014 (a) and Subsec. (3).*] Section 17 of The Opium and Narcotic Drug Act, 1929, provides that, "any person who occupies, controls or is in possession of any building, room, vessel, vehicle, enclosure or place, in or upon which any drug is found, shall, if charged with having such drug in possession without lawful authority, be deemed to have been so in possession unless he prove that the drug was there without his authority, knowledge or consent." The accused, an aged Chinese woman, lived in a building facing a street, in the front of which was a store in which her deceased husband had carried on a butcher business five years previous to its

being raided by the police. There was a mezzanine floor at the back of the store which was reached by a ladder and on which was a bed. The accused lived behind and above the store. The store had not been used since her husband's death and she never entered it. The police found a small quantity of dross and opium paraphernalia on the mezzanine floor, and some tins of opium in a toilet in a courtyard at the back of the building to which other buildings had access. The step-son of the accused, who was a drug addict, had lived with her. She tried to cure him when he was living with her but having failed in her attempt to do so she sent him from her home. He retained a key of the front door of the shop and continued to use the shop and mezzanine floor for smoking opium. Accused swore she had no knowledge of this whatever. She was convicted on a charge under the above section. *Held*, on appeal, reversing the decision of LAMPMAN, Co. J., that the Court being of opinion that upon her trial the accused advanced the "proof" of her defence to such a stage that she created a reasonable doubt as to her guilt or innocence, she was entitled to the benefit of that doubt and to be declared not guilty of the charge preferred against her. REX v. LEE FONG SHEE. **205**

6.——*The Opium and Narcotic Drug Act, 1929—Sale of opium—Defence—Agent of purchaser—Receiving no profit—Can. Stats. 1929, Cap. 49.*] On a charge of selling opium the accused raised as a defence that a stool-pigeon ingratiated himself with him and, after obtaining his confidence, introduced him to a police detective, then at the request of the stool-pigeon and later at the request of the detective the accused got in touch with a certain Chinaman named by them as a person from whom opium could be bought, and with money received from the officer paid it over to the real vendor for a tin of opium which he gave the detective without profit to himself, claiming that he merely acted as agent for the detective in the purchase of the drug. The accused was convicted. *Held*, on appeal, that the conviction should be sustained. *Rex* v. *Berdino* (1924), 34 B.C. 142 followed. REX v. MAH QUON NON. - - - **464**

7.——*Trial—Retirement of jury—Sheriff's enquiry as to length of deliberations—Juryman volunteering outside information in jury room—Motion to introduce new evidence on appeal.*] As the jury were deliberating near the dinner hour, the trial judge instructed the sheriff to enquire of the jury how long they would be in coming to a ver-

2.——*Default—Appointment of receiver—Powers of—Liability of mortgagee for acts of receiver—Foreclosure—Counterclaim for damages.*] The defendants having previously mortgaged their farm to the plaintiff, gave a lease to A. for one year at $100 a month, with option for renewal, and at the same time sold him their herd of cattle to be paid for in instalments at $60 per month. A. sold his milk and cream to the Fraser Valley Milk Producers Association, and as security for payment of the rent and the instalments for the cattle he gave an irrevocable order to the defendants on the Dairy Association for $160 a month. Owing to low prices for milk the rent was reduced to $50 per month on the 1st of June, 1930. Payments were made under said order until September 12th, 1931, when the mortgagor being in default the plaintiff appointed B. as receiver under powers contained in the mortgage deed. B. notified A. to pay the rent to him, and after discussion between A., B. and the plaintiff, A. cancelled the order on the Dairy and paid $50 a month to B. for the months of October, November and December, 1931. A. did not renew the lease but remained on until the middle of the following March, when he moved to another farm with his cattle. From the 12th of September, 1931, until the following March, A. collected $714 from the Dairy Association but made no payments other than the $150 to the receiver. In June, 1932, the plaintiff brought action for foreclosure claiming only interest, taxes and insurance. The defendant counterclaimed for an accounting, alleging that the plaintiff and the receiver had interfered in an illegal manner in having the order on the Dairy Association cancelled. *Held*, that the re-

NEGLIGENCE—*Continued.*

Essex car in the same direction, skidded at the bottom of the hill and ran into the truck. The Essex bounced back about five feet where it remained, the back of the Essex being about 6 feet out from the curb, the impact putting the lights out on the Essex car. The plaintiff then offered to tow the Essex into the city, and taking a tow-rope from the truck he tied it to the front of the Essex and was in the act of tying the other end to the back of the truck when the defendant Wilson, coming down the hill from the east, struck the back of the Essex and drove it up against the truck, severely injuring the plaintiff who was standing between the truck and the Essex. Another car was coming down the hill just ahead of Wilson. He claimed this car interfered with his vision, and when he saw the Essex it was too late to avoid running into it. In an action for damages it was held on the trial that both defendants were equally liable. *Held*, on appeal, reversing the decision of FISHER, J., that Wilson was driving at an excessive speed and was not keeping a proper look-out when coming down the hill, and to him alone must be attributed the cause of the accident. CROSBIE v. WILSON AND LANGLOIS. - - - - **384**

3.——*Damages — Motor-vehicles — Collision—Intersection — Right of way — Stop sign—Apportionment of fault—Liability of owner—Families' Compensation Act—Husband suing for death of wife—Adult son—Rights of—Contributory Negligence Act—B.C. Stats. 1925, Cap. 8—R.S.B.C. 1924, Cap. 85.*] H., when driving his car stopped at the "stop sign" before entering an intersection, and saw W. approaching in his car about 200 feet to the right. He then proceeded to cross the intersection, going at about 5 to 6 miles an hour. W., who was travelling at from 25 to 30 miles an hour, ran into H. slightly back of the centre of his car. *Held*, that the collision occurred in consequence of the combined negligence of the two drivers, the driver at the left in not keeping a proper look-out while crossing the intersection, and the driver at the right in not respecting the right of way which the other had established, and in not keeping a proper look-out. In view of the finding that the driver at the left had established the right to cross the intersection ahead of the other car, the degree of fault should be apportioned as two-thirds on the part of the driver at the right and one-third on the part of the driver at the left. A husband suing under the Families' Compensation Act for the death of his wife shews some pecuniary loss in consequence by shewing loss of services rendered gratuitously by the deceased, there being reasonable prospect of their being rendered freely for a time at least, had not her death been caused by the accident. A claim under said Act on behalf of an adult son working at home without wages was disallowed. A plaintiff who has been held responsible for the contributory negligence of another (*i.e.*, the driver of a car owned by the plaintiff) cannot recover on behalf of himself under the Families' Compensation Act without being subject to an apportionment of liability for damages under the Contributory Negligence Act. HAINES AND HAINES v. WILLIAMS. WILLIAMS AND WILLIAMS v. HAINES AND HAINES. - - - - **69**

4.——*Damages—Railway—Fire on right of way—Origin—Condition of right of way—Spreading of fire—Damage to adjoining property — Evidence — Jury — Answers to questions—R.S.B.C. 1924, Cap. 93, Sec. 114; B.C. Stats. 1925, Cap. 8.*] A fire started on the morning of Monday, August 18th, 1930, on the defendant's right of way, about one-third of a mile from the plaintiff's saw-mill and lumber yards. A gas-propelled car operated by the defendant passed the fire at about 10.25 a.m. on Monday, when the conductor and engineer saw the smoke but made no report. At about 12.05 the same day a way-freight passed, when the conductor saw the fire, and on the train reaching Kapoor there was a derailment of the engine. At about 1 o'clock the conductor telephoned to one Fraser, the assistant general agent of the defendant company at Victoria, and after advising him of the derailment informed him of the fire on the right of way. The superintendent of the plaintiff, learning of the fire at about 12.30, a foreman with 24 men from the saw-mill were sent to the fire, where they arrived about 1 o'clock and remained until 6 p.m. One Dunn, assistant forest ranger, arrived at the fire about 4 p.m., and at his suggestion six men remained on fire patrol duty all night with fire equipment. Fraser arrived at Kapoor at about 4 p.m. on Monday with a gang of men, and after repairing the track where the derailment took place proceeded to the fire with Dunn, when he was advised by Dunn that his men would not be required and he could take them away. Twenty-five men remained in the fire area on Tuesday, but the mill was kept running all morning and until 2 o'clock in the afternoon, the superintendent thinking the fire was safely under control. At 4 p.m. the wind freshened and the fire starting afresh, it jumped the track, soon reaching

NEGLIGENCE—*Continued.*

the lumber yard where a large portion of the plaintiff's lumber was burnt. The plaintiff had a water-tank car which was available for use on Monday afternoon and Tuesday, but it was not put into operation. The jury in answering questions found that the origin of the fire was unknown, that it started on the defendant's right of way, that the right of way was clean, that the fire spread to the plaintiff's land, that the defendant was guilty of negligence in that the crew of the gas-car did not report as to the fire on Monday morning, and the crew of the way-freight did not report as to the fire promptly. They further found that the plaintiff was guilty of negligence in not using its water-tank car when it was possible to do so. The questions put to the jury included the following: "If there was any fault on the part of both parties which was a real and substantial cause of the ultimate damage, in what degree was each party at fault?" The learned judge in his charge told the jury that they need not answer it, and the question was left unanswered. Judgment was entered in favour of the plaintiff for $117,830. *Held*, on appeal, setting aside the decision of MACDONALD, J. (MCPHILLIPS, J.A. dissenting), that there should be a new trial. *Per* MACDONALD, C.J.B.C.: The Contributory Negligence Act applies in this case and it was the duty of the learned judge to instruct them so that they could dispose of this question, further the jury was not instructed upon the doctrine of ultimate negligence. This Court cannot rectify errors that were made at the trial, and the only course is to send the case back for a new trial. *Per* MACDONALD, J.A.: The true issues were not determined by the jury's answers to questions, and a new trial is necessary. KAPOOR LUMBER COMPANY v. CANADIAN NORTHERN PACIFIC RAILWAY COMPANY. - - - - - - - - - - **19**

5.——*Infant playing on right of way—Warnings by railway officials—Death of infant—Liability of railway—Damages—Trespasser.* - - - - - **453**

See RAILWAY COMPANY.

6.——*Public hospital—Infectious diseases—Diphtheria and small-pox patients in same ward—Diphtheria patient contracts small-pox—Liability of hospital—Damages.*] An infant suffering from diphtheria was admitted to the Vancouver General Hospital and placed in a room on the third floor of the "Infectious Diseases Hospital." On the following day a small-pox patient was put in a room on the same floor. Three days later another small-pox patient was put in a room adjoining the infant's room and seven days later a third small-pox patient was put in the room opposite the infant's room. On the day after the arrival of the third small-pox patient the infant was moved to another floor. Four days later she was taken home and eight days after her arrival home her physician found she had contracted small-pox. The nurses in attendance on the third and fourth floors had common admittance to all the rooms on these floors and there was common use of cooking utensils. After the admission of small-pox patients, eight small-pox infections occurred on the third and fourth floors within a short period after the infant's admission. The plaintiff recovered judgment in an action for damages for negligence. *Held*, on appeal, affirming the decision of FISHER, J. (MCPHILLIPS, J.A. dissenting), that on the facts disclosed the defendant was negligent and the negligence was the proximate cause of the plaintiff contracting small-pox. MCDANIEL v. THE VANCOUVER GENERAL HOSPITAL. - **304**

7.——*Sale by manufacturer to retailer who sells to consumer—Coca cola—Caustic soda in bottle—Injury from drinking—Liability of manufacturer—Right of action—Duty of manufacturer to ultimate purchaser—Jury—Questions should be answered if possible.*] The plaintiff drank part of a bottle of coca cola (a soft drink or beverage) manufactured by the defendant which his wife had bought from a retailer and brought to their home. The bottle contained a percentage of caustic soda from which the appellant suffered permanent internal injury. Used bottles were returned periodically by the retailer to the manufacturer, who first cleaned them with a solution of caustic soda and then with pure water before refilling them with coca cola. In an action for damages for negligence a jury found in favour of the defendant and the action was dismissed. *Held*, on appeal, affirming the decision of MORRISON, C.J.S.C. on an equal division of the Court, *per* MACDONALD, C.J.B.C. and MACDONALD, J.A., that the appeal should be dismissed, and *per* MARTIN and MCPHILLIPS, JJ.A. that a new trial should be ordered. *Per* MACDONALD, C.J.B.C.: The fact was proved that there had been no tampering with the bottle and no chance of inspection which would disclose this defect from the time it was delivered to the distributor and its consumption by the plaintiff. The unwholesomeness of its contents was satisfactorily proved at the trial, clearly raising the pre-

PRACTICE—*Continued.*

the $25 damages awarded. By agreement between the solicitors of March 16th, 1925, $125 of the moneys paid into Court was paid out to the plaintiff's solicitors and the balance (*i.e.*, $430 and interest) was paid out to the defendant's solicitors. The defendant claims that the settlement between solicitors and payment of moneys out of Court was made without authority and without its knowledge. The plaintiff, Gilbert E. Goddard, died on the 5th of April, 1931. An application by the defendant company for an order that the proceedings in this action be continued between Luella Goddard as executrix of the plaintiff, and the defendant, and that said Luella Goddard be added as a plaintiff, was dismissed. *Held*, on appeal, affirming the decision of FISHER, J., that there are circumstances in evidence which shew that it would not be in accordance with the principles of equity to open up a matter that has been lying dormant for thirteen years, particularly as one of the parties interested who would be an important witness has since died. This is a matter where the learned judge below has exercised his discretion and there are facts from which inferences can be drawn to support the discretion exercised here, in which case this Court should not interfere. GODDARD v. BAINBRIDGE LUMBER COMPANY LIMITED. - - - - - - **390**

4.——*Application to dismiss action—Res judicata—Master and servant—Reduction of salary — Sufficiency of notice.*] The plaintiff brought this action on May 6th, 1932, claiming $861.64, being the balance of salary due him from the defendants for the months of March, April, May and June, 1932, on the basis of $325 per month, but the action was not set down for trial until June 29th, 1933. On the 14th of February, 1933, the defendants in this action brought action in which the plaintiff herein was defendant, for an account of the partnership dealings and transactions between themselves and the defendant and a declaration of dissolution, and the defendant, by paragraph 10 of his defence pleaded that "It was a term of the said partnership that it should exist during the joint lives of the partners and that the defendant should be employed in the business of the partnership at a remuneration of $325 per month or alternatively a fair remuneration for services rendered. The plaintiffs conspired together to and did in fact wrongfully and unjustly reduce the defendant's remuneration and dismiss him from the employment of the partnership. He also set up a counterclaim in which he repeated the allega-

PRACTICE—*Continued.*

tions of fact contained in paragraphs of the defence, including paragraph 10. The second action was tried and judgment was given. On an application by the defendants to dismiss this action on the ground that the plaintiff's claim has been adjudicated upon by this Court:—*Held*, that as the issues of fact and the questions of law which the plaintiff seeks to put in controversy in the present action are the very same issues and questions which have already been decided between the same parties by this Court, this action should be dismissed. CAMERON v. ROUNSEFELL *et al.* - - - - **401**

5.——*Close of pleadings—Notice of trial may be given by plaintiff within six weeks—Long vacation intervening—Effect of—Rule 436.*] Rule 436 provides that if the plaintiff does not, within six weeks after the close of the pleadings or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may before notice of trial given by the plaintiff, give notice of trial or apply to the Court or a judge to dismiss the action for want of prosecution. *Held*, that the time mentioned in said rule does not run during long vacation. STANDARD EQUIPMENT LTD. v. PREST-O-LITE BATTERY COMPANY LTD. **461**

6.——*County Court—Two actions involving same issues—Appeal—Security for costs furnished in both at instance of plaintiff—Appeal allowed—Costs of both appeals taxed—Review.*] The plaintiff recovered judgment in two actions in the County Court involving the same issues. The defendant appealed and furnished security for costs in both actions on the plaintiff's insistence that he should do so. The defendant succeeded on the appeal on the preliminary objection that there was a division of one cause of action, contrary to section 35 of the County Courts Act, and the defendant's bills of costs of the appeals were taxed by the registrar as those of separate and distinct appeals. *Held*, on motion to review affirming the registrar, that at this late stage the intractable language of Appendix N allows the Court no discretion, and these distinct appeals cannot be grouped for the purposes of taxation. RITHET CONSOLIDATED LIMITED v. WEIGHT. - - - **189**

7.——*Court of Appeal—Application for leave to appeal in forma pauperis—11 Hen. VII., Cap. 12—R.S.B.C. 1924, Cap. 8; Cap. 52, Sec. 29.*] Chapter 12 of the statutes of 11 Hen. VII. (1494) entitled "A means to help and speed poor persons in their suits" was introduced into British Columbia on